FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

November 16, 1993

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BEDELL)
DIVISION OF WATER AND WASTEWATER (WILLIS)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (NEIL)

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 920199
COUNTY: BREVARD, CHARLOTTE/LEE, CITRUS, CLAY, DUVAL, HIGHLANDS, LAKE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, VOLUSIA, WASHINGTON, COLLIER AND HERNANDO

CASE: 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 UTLITIES (DELTONA); AND VOLUSIA COUNTY BY DELTONA LAKES UTILITIES (DELTONA).

AGENDA: NOVEMBER 23, 1993 - REGULAR - POST HEARING DECISION- INTERESTED PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\920199C.RCM

CASE BACKGROUND

Southern States Utilities, Inc., and Deltona Utilities, Inc. (hereinafter referred to as the utility or SSU) are collectively a class A water and wastewater utility operating in various counties in the State of Florida. By Order No. PSC-93-0423-FOF-WS (also referred to as the Final Order), issued on March 22, 1993, the

Commission approved an increase in the utility's rates and charges which set rates based on a uniform statewide rate structure. Numerous motions for reconsideration were decided by the Commission. On November 2, 1993, the Order on Reconsideration was issued.

On September 15, 1993, pursuant to the provisions of the Final Order, Commission staff approved the revised tariffs and the utility proceeded to implement the final rates. On October 8, 1993, Citrus County and Cypress and Oak Villages (COVA) filed a Notice of Appeal of the Final Order at the First District Court of Appeal. That Notice was amended to include the Commission as a party on October 12, 1993. On October 18, 1993, the utility filed a Motion to Vacate Automatic Stay which is the primary subject of this recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should Citrus County's Request for Oral Argument be granted?

RECOMMENDATION: Yes. (Bedell)

STAFF ANALYSIS: On October 26, 1993, Citrus County filed a Request for Oral Argument on the pending motions. On November 8, 1993, the utility filed its response to the request for oral argument asserting that the motion filed by the County was deficient. On November 10, 1993, the County filed an amended request for Oral Argument. On November 17th, the utility filed its response to the amended request.

Staff believes that notwithstanding any legal insufficiency in the request for oral argument, the parties should be allowed to make oral presentations in this matter because, unlike other requests related to a stay on appeal of a rate case decision, there are unique circumstances to be considered. Those circumstances are discussed in detail in Issue 2 below. Staff is unaware of any matters which are not addressed below and believes that the recommendation on the motion to vacate the stay is complete. However, with the myriad of policy decisions and departures from the "ordinary" rate case involved in this docket, staff recommends that the parties be given an opportunity to be heard. In addition,

staff believes that the utility should be given an opportunity to respond to staff's recommendation with regards to the potential loss of income and revenues.

ISSUE 2: Should the Motion to Vacate Automatic Stay be granted?

RECOMMENDATION: Yes. The stay should be vacated and the utility should post a bond in the amount of at least $3,000,000. (Bedell, Willis, Neil)

STAFF ANALYSIS: As discussed in the Case Background, the Commission issued Order No. PSC-93-0423-FOF-WS setting final rates for Southern States using a uniform, statewide rate structure. This rate structure was an issue on reconsideration and is now raised on appeal. On November 2, 1993, the Commission issued the Order on Reconsideration which rendered the Final Order final for purposes of appeal pursuant to Section 367.084, Florida Statutes, and Rule 25-22.060, Florida Administrative Code. However, before the Order on Reconsideration was issued, the utility implemented the final, uniform, statewide rates pursuant to Sections 367.081(6) and .084, Florida Statutes, the provisions of the Final Order, and the approved revised tariffs, effective September 15, 1993. Based on the utility's implementing the final rates, Citrus County filed an appeal in the First District Court of Appeal on October 8, 1993. Citrus County filed an amended notice of appeal to add the Commission as a named appellee on October 12, 1993. It is Citrus County's position that this filing of an appeal before the written Order on Reconsideration was issued operated as an automatic stay.

On October 19, 1993, the utility filed its Motion to Vacate Automatic Stay. As grounds for its motion, the utility avers the following: the likelihood of Citrus County's prevailing on appeal is remote; the uniform rates benefit a majority of customers located in Citrus County; the implementation of uniform rates is in the public interest; and, no refund liability would exist if the Final Order is affirmed on appeal. Based on the argument that no refund liability would exist if the Final Order is affirmed, the utility argues that no bond should be required.

On October 26, 1993, Citrus County filed its Response in opposition to the utility's Motion to Vacate. The County's

responsive pleading also contained a Motion For Reduced Interim Rates, Recalculated Bills, Refunds and Penalties. Citrus County's motion is discussed below in Issue 3. The basis for the County's opposition to the Motion to Vacate is that the customers will be irreparably harmed.

Rule 25-22.061 (3)(a), Florida Administrative Code, provides that when a public body, such as Citrus County, appeals an order of the Commission increasing a utility's rates which appeal operates as an automatic stay, "the Commission shall vacate the stay upon motion by the utility ...and the posting of good and sufficient bond or corporate undertaking." The language of the rule is straightforward and unambiguous. Citrus County has raised the argument that there are special circumstances to be considered in this case which mitigate against vacating the stay. Staff agrees that there are special circumstances. However, it appears to staff that the special circumstances are such that the utility will be taking a far greater risk than contemplated by the rule while the customers will be protected from any losses.

The change in the rate structure in this docket creates a unique situation, particularly in light of Citrus County's statement that the amount of the revenue requirement will not be at issue (although there is nothing prohibiting other issues from being raised by Citrus County or other parties which may not be revenue neutral). In a typical rate case appeal, any issue raised would have an effect on the final revenue requirement, and the security for the possible change in rates would be a straightforward calculation. The primary issue on appeal is revenue neutral. Therefore, the focus of this analysis must be whether lifting the stay will cause irreparable harm and whether some form of security will adequately protect customers adversely affected. Staff believes that the purpose of the security has always been to insure that if the utility has overcollected revenues by implementing final rates, the customers who have overpaid will have the overpayments refunded with interest. In this case, if the rate structure approved by the Commission is overturned on appeal, the utility will not have overcollected, but certain customers will have overpaid. It is also true that if the stay is not lifted and the existing interim rates are continued and the rate structure is affirmed on appeal, there will also be customers who will have overpaid and the utility would not have

overcollected. In neither of the two situations will the utility be able to backbill those customers from whom they undercollected.

Staff is concerned that the utility will lose income and will not be afforded the opportunity to earn a fair rate of return whether it implements the final rates and loses the appeal or does not implement final rates and prevails on appeal. Since the utility has asked to have the stay lifted, staff believes the utility has made the choice to bear the particular loss that may be associated with implementing the final rates pending the resolution of the appeal. In its motion the utility asserts that it does not believe that it will suffer any losses based on its position that it will prevail on appeal. Staff estimates that the amount to be refunded where the stay is vacated and then the final decision is reversed may be as much as $3,000,000 per year over the course of the appeal. Citrus County argues that it would be impossible to get a bond or corporate undertaking for this amount.

The utility currently has a $5,800,000 bond which has been renewed through September 4, 1994. Staff believes the bond, which was originally the security for the interim rate increase, would be sufficient for the purposes of appeal if the bond issuer is willing to accept the change in the nature of the purpose of the bond. Staff would recommend that the bond remain in effect and be renewed in September of 1994 if the appeal is still pending at that time.

Citrus County argues that the stay should not be lifted and that interim rates should remain in effect with the revenue requirement reduced to the level of the Final Order. Staff believes this argument should be rejected for several reasons. First, the Commission determined that the uniform rate structure is appropriate and that the rates based on that rate structure are fair, just and reasonable for this utility and its customers. If the utility provides security for those customers who may be found to have overpaid in the event the Final Order is overturned, the customers of this utility are not irreparably harmed. The County argues that these particular customers will be irreparably harmed because of their age and income status. Based on this argument, staff believes that few stays, if any, would be vacated. Staff recommends that by requiring security from the utility, the customers of SSU who may possibly be affected are adequately protected. In fact, once the security is in place, the unique circumstance of this case is reduced to the simple distinction that

in the event the Final Order is not affirmed, the utility will lose a significant amount of revenues that the Commission determined the utility to be entitled to have the opportunity to earn.

As further support for recommending that the automatic stay be vacated, staff notes that Rule 25-22.061(3), Florida Administrative Code, does not indicate that the decision to vacate an automatic stay is discretionary. It implies by its use of the mandatory word "shall," that an automatic stay will be lifted when a utility so requests and posts good and sufficient bond or corporate undertaking. This section of the rule does not refer to the things which the Commission is to take into consideration in determining whether to grant a stay. Nor does it anywhere suggest that evaluating the age of the customers or even the relative amount of the increase should be considered in reaching a decision to vacate an automatic stay.

Citrus County also suggests that the utility is not entitled to the relief sought because Rule 25-22.061(1), Florida Administrative Code, only refers to cases where there is a refund or a rate decrease. While Citrus County is correct in its interpretation of what Subsection 1 of the Rule states, the County has neglected to see that Subsection 3, which deals specifically with instances such as these in which the county, a governmental entity, has filed a notice of appeal of "an order involving an increase in a utility's ...rates"(emphasis added). These two subsections have completely different purposes which should not be muddled.

In summary, staff recommends that the stay be vacated and that the utility provide security in the form of a bond, either the bond which the utility has in effect until September, 1994, or a similar one for $3,000,000. In the event the appeal should take longer than two years, the Commission should evaluate the sufficiency of the bond at that time.

ISSUE 3: Should Citrus County's Motion For Reduced Interim Rates, Recalculated Bills, Refunds and Penalties be granted?

RECOMMENDATION: No. (Bedell)

STAFF ANALYSIS: On October 26, 1993, Citrus County filed its Motion For Reduced Interim Rates, Recalculated Bills, Refunds and Penalties. As grounds for this motion, the County alleges that by implementing the final rates, effective September 15, 1993, the utility violated the automatic stay resulting from the County's filing an appeal on October 8, 1993. The County further argues that by filing its Notice of Appeal prior to the issuance of a written order on reconsideration that for purposes of the issues between Citrus County, COVA and SSU, the Order was final and all issues raised for reconsideration by Citrus County and COVA were deemed abandoned pursuant to Rule 9.020 (g), Florida Rules of Appellate Procedure. The County argues that because the order was final as of October 8, 1993, the utility should have filed a motion to vacate the stay prior to implementing the rates. The County's motion reargues the fairness issue concerning the rate structure approved in the Final Order. Based on these arguments, the County asks the Commission to refund any monies overcollected due to the implementation of the uniform rates and to penalize the utility for the implementation while the automatic stay was in effect.

On November 8, 1993, the utility filed its response arguing that Citrus County lacks standing to argue its motion on behalf of customers of the Spring Hill system when that system serves residents outside of Citrus County. The utility also argues that the "status quo" on October 8, 1993, that Citrus County argues for was properly implemented uniform rates pursuant to the Final Order, not the interim rates. The utility states that even the interim rates were not strictly stand-alone rates and that to the extent the County argues the uniform rates are unfair because of subsidies, continuing interim rates at a reduced revenue level would have the same result as that which the County seeks to prohibit. In addition, the utility supports its position for having implemented the final rates by asserting that the County failed to ask for a stay pending reconsideration.

Staff recommends denying the county's motion for several reasons. First, staff believes the utility was entitled to

implement the uniform rates pursuant to the Final Order when the tariffs were approved. Rule 25-22.060(c), Florida Administrative Code, provides in pertinent part:

> A final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve to automatically stay the effectiveness of any such final order....

Also, Section 367.084, Florida Statutes, states that a rate adjustment order is considered rendered on the date of the official vote of the Commission for the purposes of Section 367.081 (6), Florida Statutes. Section 367.081 (6), F.S., establishes the time frames within which the Commission must make decisions on requests for rate relief. Based on these provisions of rule and statute, staff believes that the utility had the authority to charge the rates set forth in the Final Order, pursuant to the provisions of the Final Order and the tariffs which were approved on September 15, 1993.

The County has not specified the day on which the customers of the utility on whose behalf the County is arguing were: a) being charged the new rates; b) being charged other new or modified charges; c) billed on these new rates and/or charges; and d) payment was due on these. Nor for that matter has the County alleged or estimated for the Commission the extent of the irreparable harm that has been caused by the implementation of the uniform rates. Staff believes that at least for the period of time from October 8 to the date of this decision, at most two months, no customer is going to be irreparably harmed or come to financial disaster. The period of time involved and the amount of money involved, should one argue that there was any violation of an automatic stay, is de minimis.

Staff believes that it is the County which has placed the utility in an impossible and untenable position by waiting months to invoke the automatic stay through the filing of the appeal without seeking any kind of stay pending reconsideration. The County knew through discussions at Agenda that the utility would have the authority, pursuant to the Final Order and applicable rules and statutes, to implement the final rates prior to the

conclusion of reconsideration. The Commission's oral decision to deny the County's and COVA's motions for reconsideration was made on July 20, 1993. Yet, the County waited until October 8, 1993, to abandon its request for reconsideration and file its appeal which initiated the automatic stay. Of course, in the time between the Commission decision and the filing of the appeal the utility implemented final rates. The utility was thus in the position of having implemented rates with no avenue for seeking relief from an automatic stay prior to that implementation.

Staff is also troubled that the purpose of the automatic stay that the County seeks to have enforced is not the purpose of the County's appeal. The purpose of the rule is to accord deference to a governmental entity's decision which is deemed to have been made in the public interest. St. Lucie County v. North Palm Development Corporation, 444 So. 2d 1133 (Fla. 4th DCA 1984); City of Lauderdale Lakes v. Corn, 415 So. 2d 1270 (Fla. 1982). In this instance, the role of the County is as a customer of the utility appealing a decision of the Public Service Commission which the Commission has determined is in the public interest. The County has made no decisions herein, and has no governmental function in this proceeding. Staff believes that the protection the County seeks is not the protection the automatic stay was intended to provide.

Staff believes that the utility acted with reasonable speed in bringing this motion to the Commission. In addition, the County has not alleged any violation of any Commission rule, statute or order. Therefore, staff cannot recommend that any penalty would be appropriate.

Once again, as in all pleadings, the County raises the issue that the uniform rates are unfair. This issue has been ruled upon innumerable times in this docket and others and need not be addressed here. This Commission made a determination in the Final Order that the rates approved in the Order were fair, just and reasonable. It is the County's prerogative to raise the issue of fairness in the appellate court but its argument is inappropriate in this forum.

Staff believes that to the extent that the County is a customer of the utility, it has standing to file this motion. Therefore, lack of standing is not the basis of staff's recommendation.

In conclusion, staff recommends that the County's motion should be denied. If the Commission agrees with staff's recommendation that the stay should be vacated, there is no need to require a refund for any period of time that the rates may have been in effect during the time that an automatic stay was in effect. The refund, of any such monies if ultimately determined appropriate, will be secured by the bond recommended to be required herein. Even if the record established a violation of the stay, the County has shown no basis for any penalty to be assessed.