BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC. for all regulated systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS ORDER NO. PSC-94-0425-PCO-WS ISSUED: April 11, 1994

ORDER GRANTING MOTIONS TO QUASH SUBPOENAS DUCES TECUM AND FOR PROTECTIVE ORDERS

On September 7, 1993, the Commission, upon its own motion, opened an investigation into the appropriate rate structure for Southern States Utilities, Inc. The investigation was assigned Docket No. 930880-WS. A final hearing in this investigation is scheduled for April 14 - 15, 1994.

I. BACKGROUND

On March 30, 1994, the Office of the Attorney General, on behalf of Citrus and Hernando Counties (the Counties), served a Notice of Depositions Duces Tecum for the purpose of deposing Florida Public Service Commission Staff (Staff) members Jerry Chapdelaine, Troy Rendell, Joanne Chase, Billy Messer, Marshall Willis, Bill Lowe, and Chuck Hill. On March 31, 1994, the Attorney General served Subpoenas Duces Tecum on each of these Commission Staff members.

The Counties' Notice of Depositions Duces Tecum instructs Staff members Joanne Chase, Billy Messer, and Marshall Willis to produce, at their depositions, the following documents:

> 1. Copies of worksheets, notes, minutes of meetings, internal or external memoranda, letters, documents or correspondence of any kind, in the possession of the deponent or the Florida Public Service Commission discussing the implementation of uniform rates or a similar rate structure for Southern States Utilities,

Inc. or any other Florida-regulated water or wastewater company;

2. Copy of Staff Recommendation and Final Order in Docket No. 920199-WS;

3. Dates of all meetings with Southern States Utilities, Inc. personnel, its agents or attorneys for calendar years 1991, 1992, 1993, and 1994 to date;

4. Dates of all meetings with Commissioners to discuss Southern States Utilities, Inc. for calendar years 1991, 1992, 1993, and 1994 to date;

5. Copies of worksheets, notes, minutes of meetings, internal or external memoranda, letters, documents or correspondence of any kind, in the possession of the deponent or the Florida Public Service Commission discussing the strategy of limiting the ability of Florida Counties to rescind Commission jurisdiction over the rates and charges of Jacksonville Suburban Utilities Company, Southern States Utilities, Inc., or any other Florida-regulated water or wastewater company within the bounds of those counties, or of the strategy of taking away the regulatory jurisdiction of non-jurisdictional Florida Counties over water and wastewater systems owned or operated by Jacksonville Suburban Utilities Company, Southern States Utilities, Inc., or any other Florida-regulated water or wastewater company within the bounds of those counties;

6. Copies of all documents in the possession of either the deponent or the Commission describing the theory and methods for designing water and wastewater rates that encourage conservation.

In addition to the above documents, the Counties' Notice of Depositions Duces Tecum instructs Staff members Bill Lowe and Chuck Hill to produce, at their depositions, the following documents:

7. Copies of all orders in which the Commission has approved "uniform" rates for any water and wastewater systems and backup data showing the relative cost to serve each system within a given uniform rate structure;

8. Copies of all Commission documents describing how uniform rates are to be calculated;

9. Copies of all Commission rules and regulations dealing with the calculation of, and implementation of uniform rates.

The Counties also served, on SSU, Notice of Depositions Duces Tecum directed to Matthew Feil, attorney for SSU, and Ida Roberts, an SSU employee. The Counties' Notice of Depositions Duces Tecum instructs SSU Attorney Matthew Feil to produce, at his deposition, the same documents enumerated in numbered paragraphs 1 through 6, above, except that the Counties have substituted "in the possession of the deponent or Southern States" for "in the possession of the deponent or the Florida Public Service Commission."

On April 1, 1994, SSU filed a Motion for Protective Order Regarding Counties' Revised Notice of Deposition Duces Tecum. On April 4, 1994, the Staff of this Commission filed a Motion to Quash Subpoenas and for a Protective Order. On April 5, 1994, the Office of the Attorney General, again on behalf of Citrus and Hernando Counties, filed a response to both SSU's and Staff's motions.

II. STANDARD TO APPLY IN DISCOVERY DISPUTES

When presented with a motion to quash a subpoena for a deposition duces tecum or a motion for a protective order, the Commission, and this Prehearing Officer, must look to the Florida Rules of Civil Procedure. Under those Rules, that have been adopted by the Commission, the scope of discovery is extremely broad. This is clearly indicated by Rule 1.280(b)(1), Florida Rules of Civil Procedure, which provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, Rule 1.280(c), Florida Rules of Civil Procedure, states:

> Upon motion by a party or by the person from whom the discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires. . . .

It is apparent that the Florida Rules of Civil Procedure contemplate that the court, or the Commission in this instance, will be required to rule on the appropriateness of discovery efforts by parties when disputes arise. It is also apparent that the Commission has broad discretion in resolving discovery disputes. Decisional law indicates that the Commission must use a balancing test in certain instances. For example, in Dade County Medical Association v. Hlis, 372 So.2d 117, 121 (Fla. 3d DCA 1979), the court said:

> Many, probably most, discovery questions may be decided by a proper balancing of the competing interests to be served by granting discovery or by denying it. See, e.g., Argonaut Ins. Co. v. Peralta, supra; American Health Plan v. Kostner, 367 So.2d 276 (Fla. 3d DCA 1979); Travelers Indemnity Co. v. Salido, 354 So.2d 963 (Fla. 3d DCA 1978); Begel v. Hirsch, 350 So.2d 514 (Fla. 4th DCA 1977), cert. denied, 361 So.2d 830 (Fla. 1978); Reeg v. Fetzer, 78 F.R.D. 34 (W.D.Okl. 1976); Payne v. Howard, 85 F.R.D. 465 (D.D.C. 1977). In this case, the interest of the public, of the DCMA, and of those the association represents in the non-production of the records in question, far outweighs the almost chimerical grounds for their discovery asserted by the respondents.

Also, in Eyster v. Eyster, 503 So.2d 340, 343 (Fla. 1st DCA 1987), rev. den. 513 So.2d 1061 (Fla. 1987), the court stated:

> [T]he trial court possesses broad discretion in granting or refusing discovery motions and also in protecting the parties against possible abuse of discovery procedures, and only an abuse of this discretion will constitute fatal error. Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967).

In the discussion below, the framework delineated by the Rules of Civil Procedure and the case law will be applied to the two disputes that have been presented to the Prehearing Officer.

III. SSU'S MOTION FOR PROTECTIVE ORDER GRANTED

In its motion, SSU argues that, based upon discussions with Counsel for the Counties, it appears that the Counties intend to question Mr. Feil regarding the impact of uniform rates upon Staff workload. SSU recounts that Mr. Feil is an attorney employed by SSU and, before that, by this Commission. SSU argues that, although Mr. Feil appeared on behalf of Staff in Docket No. 920199-

WS, he had minimal, if any, participation as an advocate regarding the rate issues involved in that case.

According to SSU, deposing Mr. Feil would "serve no purpose other than to burden and harass Mr. Feil and unnecessarily expend the time and resources of Southern States." In support of this contention, SSU points out that issues proposed by the Counties regarding Staff workload have been specifically rejected, as irrelevant to this proceeding, by the Prehearing Officer, by Order No. PSC-93-1795-PCO-WS, issued December 16, 1993, and by the full Commission on reconsideration, by Order No. PSC-94-0176-FOF-WS, issued February 11, 1994. SSU also argues that, since Mr. Feil left the employ of this Commission prior to the implementation by SSU of uniform rates, even if that issue was relevant, Mr. Feil could not possibly provide any information regarding the impact of uniform rates upon Staff workload.

Finally, SSU argues that, in light of the documents listed in the Counties' Notice of Depositions Duces Tecum, it appears that the Counties' concerns go well beyond the boundaries of the impact of uniform rates upon Staff workload. In that regard, SSU also claims that any testimony by Mr. Feil concerning the requested documents is protected and privileged under the attorney-client and/or work product privileges.

The Counties argue that SSU's objections based upon relevance are premature, given that no questions have yet been asked. The Counties further argue that there is no way that SSU, or for that matter, the Prehearing Officer, could divine the nature of the Counties' intended lines of questioning through the documents requested. As for SSU's arguments regarding attorney-client privilege and the work product doctrine, the Counties argue that the privilege must be asserted by this Commission, not by Mr. Feil or SSU. Finally, the Counties suggest that, since they have agreed to depose Mr. Feil by telephone, SSU's arguments regarding undue burden and harassment are "disingenuous".

Upon review of the arguments asserted by both SSU and the Counties, the Prehearing Officer finds that SSU's Request for a Protective Order as to the Notice of Depositions Duces Tecum for Matthew Feil should be granted. While it is true that the Florida Rules of Civil Procedure and the Commission's adoption of those Rules indicates that the scope of discovery in a proceeding before this Commission is very broad, it is not limitless and it must not be allowed to be used for purposes other than bona fide discovery related to the proceeding at hand. In a discovery dispute such as this, the Prehearing Officer must take the broadest view as to the

potential for eliciting information that will lead to the discovery of admissible evidence.

Applying this broad view to gauge the possibility that a deposition of Matthew Feil, and his production of the documents requested by the Counties, will lead to information relevant to this proceeding, the Prehearing Officer can only conclude that the Counties' requests are far afield of any information relevant to this proceeding. The issues in this proceeding go to the appropriate rate structure for SSU. SSU has presented the testimony of numerous witnesses that address these issues and has made them available for deposition by the Counties. For the Counties to seek to depose one of SSU's attorneys presumably, based on the documents requested, because he was once an attorney at the Commission, for information apparently related to a prior proceeding is simply not appropriate under the Florida Rules of Civil Procedure.

IV. STAFF'S MOTION TO QUASH GRANTED

Staff presented two arguments in support of its Motion to Quash Subpoenas Duces Tecum and for a Protective Order. First, Staff argues that the information sought by the Counties is not relevant to the instant proceeding. Second, Staff argues that it should be protected from the Counties' subpoenas under a "deliberative process privilege". Each of these arguments is discussed separately, along with the Counties' responses thereto, below.

A. Relevance

Staff contends that, under Rule 25-22.026(3), Florida Administrative Code, it is not a party, but is allowed to act as a party in proceedings before the Commission. See also South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988), for the proposition that Staff is not a real party in interest. According to Staff, "[its] primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration." Rule 25-22.026(3), Florida Administrative Code.

According to Staff, considering the Staff members targeted for deposition, along with the list of documents requested, it appears that the Counties intend to question Staff members regarding their mental impressions or thought processes related to Docket No. 920199-WS, the rate case which is pending in the First District

Court of Appeals, and Docket No. 930945-WS, which involves the issue of the Commission's jurisdiction over SSU systems in several non-jurisdictional counties. Staff argues that, since the mental impressions or thought processes of Staff are not a part of the record, and since this Commission's decisions in those cases will be upheld or overturned on their own merits, the information sought by the Counties is not even relevant to those cases, much less to any of the issues identified in this proceeding. In support of its position, Staff cites Manatee County v. Estech Gen. Chemicals Corp., 402 So.2d 75, (Fla. 2d DCA 1981).

Manatee v. Estech involved an inverse condemnation suit arising out of the disapproval of an application for a development of regional impact (DRI) in which a Manatee County Commissioner was deposed concerning the reasons behind her vote to disapprove the DRI application. She refused to answer, Estech moved to compel, and the trial court granted Estech's motion. Upon review, the appellate court stated that "discovery is usually permitted only on matters reasonably calculated to lead to admissible evidence" and that "[t]he right to discovery thus does not extend to matters which are not directly relevant and which cannot reasonably lead to relevant matters." (Citations omitted.) Id., at 76. Since the only issue involved the effect of governmental action on the use of Estech's land, the Court went on to state that:

> The motive of the governmental entity in taking the action [denying Estech's application for a DRI], much less the motive of an individual commissioner in voting, has no relevance to this action, and, moreover, we do not see any path from the questions leading to relevant matter. Id., at 76

Since the issues involved in this proceeding are clearly defined and specific, Staff argues that the relevance of the information sought by the Counties is even more attenuated than in Estech. Staff further argues that any testimony that the Counties might elicit regarding the instant proceeding would only be cumulative to information that will be part of the record.

The Counties argue that Staff's objections based upon relevance are premature, given that no questions have yet been asked. The Counties further argue that there is no way that Staff, or for that matter, the Prehearing Officer, could divine the nature of the Counties' intended lines of questioning through the documents requested. The Counties also point out that, in Estech, the Commissioner sat for the deposition and only objected after questioned about her reasons for voting to disapprove the DRI.

Accordingly, the Counties argue that they should be allowed to depose Staff and that Staff should only be heard to object to questions actually posed.

B. Deliberative Process Privilege and Public Policy

Staff also argues that, even if the Counties' could make some showing of relevance, the subpoenas should still be quashed based upon a "deliberative process privilege". The Counties argue that there is no deliberative process privilege afforded in Florida and that Staff's assertion of the privilege must, therefore, be rejected. Since the Prehearing Officer finds no reason to address the deliberative process privilege, Staff's arguments for the privilege are not delineated herein in toto. However, the Prehearing Officer finds the public policy reasons behind the asserted privilege to be quite compelling and has, therefore, summarized these considerations, below.

According to Staff, its

> [P]articipation in a proceeding from the initial discovery stages through its final recommendation is an integral part of the full deliberative process through which all cases proceed and, as such, is entitled to the full decisional process privilege. The [Counties'] subpoenas of Staff appear to be nothing more than an attempt to annoy, harass, or somehow discredit Staff for taking preliminary positions that are different than those espoused by the [Counties]. This is an impermissible and inappropriate intrusion into the deliberative process. Further, as noted above, allowing the [Counties] to compel Staff testimony would most likely result in a chilling effect on the effective functioning of Staff's advisory role. Staff members would be hesitant to take any preliminary positions for fear that such a statement of their professional judgement in their advisory role, however unpopular, would subject them to an adversarial inquisition. (Staff's Motion, paragraph 35)

In addition, Staff notes that Staff members who testify at the hearing are prevented, under Section 120.66, Florida Statutes, from any further participation in the proceeding. According to Staff, if parties are allowed to subpoena non-testifying Staff members, any party could effectively cripple Staff's ability to perform its advisory role by excluding those Staff members from further

participation in the deliberative process. In fact, Staff argues that "the circumstances attending the instant subpoenas, particularly with regard to the Staff members to whom they were directed, suggests that the sole purpose behind the subpoenas is to exclude supervisory level Staff from its advisory role in the decision-making process."

C. Conclusion

When, in its Motion to Quash, Staff raised its arguments regarding the lack of relevance of the information sought by the Counties and the harm that would result from subjecting non-testifying staff to deposition, the Counties chose not to respond in any meaningful fashion. The Counties simply argue that the Staff members should be produced for deposition and any concerns regarding relevance must be raised when an inappropriate question is posed. This view of the law is nonsensical in that it ignores the Commission's authority, indeed obligation, to evaluate the appropriateness of discovery efforts when a dispute arises. Based on the Counties' view, the Commission must permit their subpoena of President Bill Clinton on their facial argument that his deposition would involve information relevant to this proceeding, and that the Commission could only act after an inappropriate question was posed of President Clinton. Clearly, this is not the law.

The Commission must make its evaluation of the appropriateness of the subpoenas duces tecum on the information known, including the documents requested and the number and nature of the Staff members subpoenaed. Certainly the documents requested suggest a free-ranging inquiry into Docket No. 920199-WS, SSU's previous rate case, and issues related to the Commission's jurisdiction over SSU's systems. These issues are clearly irrelevant to this proceeding.

The Counties noticed virtually the entire supervisory structure of the Division of Water and Wastewater, without regard to their specific expertise, knowledge, or involvement in this proceeding. The Prehearing Officer finds most persuasive the Staff's arguments regarding the crippling effect on Staff's advisory role of subjecting non-testifying Staff to compelled testimony. Pursuant to Section 120.66, Florida Statutes, Staff members that testify at hearing are prohibited from further participation in the proceeding. Although the Counties have subpoenaed the Staff for deposition at this time and not for the hearing, it has been indicated that the Counties may subpoena the same Staff for hearing. If parties are allowed to subpoena non-testifying Staff members, any party could eviscerate Staff's

ability to execute its advisory function by excluding those Staff members from further participation in the analysis and preparation of the Staff recommendation. Such a result is contrary to all common sense and reason.

As noted above, when the interest in full disclosure to a discovery request conflicts with a competing interest in non-disclosure, the decision-maker must balance the competing interests. When the public policy considerations of allowing non-testifying Staff members' depositions to go forward are weighed against the lack of relevance of any information that might be elicited thereby, the lack of necessity for such information to the Counties' case, and the Counties' ability to obtain the information through less burdensome means[1], the balance clearly falls toward protecting the integrity of the governmental process.

Finally, the Prehearing Officer notes that the Counties requested an expedited ruling on these matters due to the time constraints of the case schedule for this proceeding. However, considering that the Counties served their Notice of Depositions Duces Tecum via facsimile transmission on March 30, 1994, only eight days prior to the discovery cutoff date, that SSU filed its motion two days later on April 1, 1994, and that Staff filed its motion three business days later on April 4, 1994, any suggestion that there has been any delay or that the Counties have in some way been denied due process by any such delay is rejected.

It is, therefore,

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that Staff's Motion to Quash Subpoenas Duces Tecum and for Protective Order is granted. It is further

ORDERED that Southern States Utilities, Inc.'s Motion for Protective Order Regarding Counties' Revised Notice of Depositions Duces Tecum is granted.

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[1]The Prehearing Officer notes that Staff has sponsored several witnesses, each of whom has been submitted to examination by the Counties. Moreover, when approached by the Counties, Staff agreed to sponsor an additional witness, who has also been deposed, to address a Staff memorandum that the Counties consider of interest.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 11th day of April, 1994.

JULIA L. JOHNSON, Commissioner
and Prehearing Officer

(S E A L)

SFS/RJP

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.