

RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ORIGINAL
FILE COPY

STEPHEN A. ECENIA
KENNETH A. HOFFMAN
THOMAS W. KONRAD
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE
R. MICHAEL UNDERWOOD
WILLIAM B. WILLINGHAM

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

TELEPHONE (904) 681-6788
TELECOPIER (904) 681-6515

September 13, 1995

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. are the following documents:

1. Original and fifteen copies of SSU's Response to Office of Public Counsel's Second Motion to Compel, First Motion to Conduct In Camera Inspection and Second Motion to Postpone Date for Filing Intervenor Testimony; and

2. A disk in Word Perfect 6.0 containing a copy of the document entitled "Rate.Camera".

ACK Please acknowledge receipt of these documents by stamping the
AFA 3 extra copy of this letter "filed" and returning the same to me.

APP _____ Thank you for your assistance with this filing.

CAF _____

CMU _____

CTR _____

EAG _____

LEG 1

LIN 5 KAH/rl

OPC cc: All Parties of Record

RON _____

SEP RECEIVED & FILED

WAS Scw

OTH _____

Sincerely,


Kenneth A. Hoffman

DOCUMENT NUMBER-DATE

09080 SEP 14 88

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Orange-)
Osceola Utilities, Inc. in)
Osceola County, and in Bradford,)
Brevard, Charlotte, Citrus, Clay,)
Collier, Duval, Hernando, High-)
lands, Hillsborough, Lake, Lee,)
Marion, Martin, Nassau, Orange,)
Osceola, Pasco, Polk, Putnam,)
Seminole, St. Johns, St. Lucie)
Volusia and Washington Counties.)
)
)
)

Docket No. 950495-WS

Filed: September 13, 1995

**SSU'S RESPONSE TO OFFICE OF PUBLIC COUNSEL'S
SECOND MOTION TO COMPEL, FIRST MOTION TO CONDUCT IN CAMERA
INSPECTION AND SECOND MOTION TO POSTPONE DATE FOR
FILING INTERVENOR TESTIMONY**

SOUTHERN STATES UTILITIES, INC. ("SSU"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, hereby files its Response to the Office of Public Counsel's ("OPC") Second Motion to Compel, First Motion to Conduct In Camera Inspection of Documents, and Second Motion to Postpone Date for Filing Intervenor Testimony filed by OPC on September 6, 1995 (hereinafter referred to collectively as OPC's "September 6 Response and Motion"). In support of its Response, SSU states as follows:

INTRODUCTION

1. OPC mischaracterizes SSU witness Sandbulte's testimony in an obvious effort to justify its discovery. Mr. Sandbulte in no way places Minnesota Power's ("MP") financial position at issue. Mr. Sandbulte's testimony is restricted to MP's investment in SSU and the dismal returns of less than 3% on the approximately \$80

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

million invested in 1994 and negative returns which MP can expect under present rates in 1995 and 1996. The dismal character of these returns is magnified when SSU continues to place approximately \$20 million of plant into service each year to provide service to **SSU's** customers.

2. SSU reiterates its position that the financial status, performance or well-being of MP's other investments, or any returns, are not relevant to the proceeding as such information is not likely to lead to any relevant evidence in this proceeding.

3. OPC also objects to the legal position SSU takes concerning when it is required to produce a document in the possession of its parent company, MP, for purposes of discovery. OPC's tactic is to ignore the law and impugn SSU's credibility as justification for its discovery requests. Under Florida law, since SSU did not act "as one" with either MP or Topeka Group, Incorporated ("TGI") in the filing of SSU's Amended Application for Increased Water and Wastewater Rates, SSU is deemed not to be in control of documents in the possession of MP or TGI for the purposes of discovery. OPC cites no law to the contrary. Instead, OPC essentially argues that if Mr. Sandbulte can be produced by SSU as a witness, then any document in the possession of MP must be deemed to be "controlled" by SSU for purposes of discovery. OPC's theory has no legal basis and should be rejected.

4. In order to be as brief and efficient in this Response as possible, SSU has attached a copy of its Objections to OPC's First Set of Interrogatories and First Set of Requests for Production of

Document and Motion for Protective Order filed August 29, 1995 as Exhibit "A" hereto and incorporates herein the objections set forth in that document as part of this Response to OPC's September 6th Response and Motion.

SSU'S RESPONSES TO OPC'S MOTION TO COMPEL AND MOTION FOR IN CAMERA EXAMINATION DIRECTED TO SPECIFIC DISCOVERY REQUESTS

5. Interrogatory No. 4 states as follows:

Please indicate the dates and the nature of all communications with the staff of the Florida Public Service Commission (staff) other than those that relate in any way to this docket.

With respect to Interrogatory No. 4 (see Exhibit "A", at 5-6), OPC concedes that the Interrogatory is "suspect." Nonetheless, OPC justifies its attempt to venture into any communications between SSU and the Commission staff in other dockets by arguing that "dealing with SSU" requires OPC to propound these types of interrogatories.¹ OPC's willingness to lower the level of the debate in this rate case is not substitute for factual and legal support for its discovery requests. The Commission has determined that a staff member's participation in a past docket is not relevant to a more current proceeding.² OPC's Motion to Compel a response to this Interrogatory should be rejected.

6. Document Request No. 29 states as follows:

For each affiliated company participating in the consolidated tax return with MPL, state the amount of book net income or loss, for

¹OPC's September 6 Response and Motion, at 6.

²In Order No. PSC-95-0137-PCO-SU issued January 27, 1995.

each of the past five years.

As previously discussed, Mr. Sandbulte's prefiled direct testimony provides no justification for this discovery request. OPC argues that it needs the requested documents in order to evaluate the impact of profits and losses of other MP subsidiaries on SSU's share of MP's consolidated tax liability. The documents OPC seeks are onerous and burdensome to produce, outside the control and possession of SSU, and are not reasonably calculated to lead to admissible evidence. SSU submits that in balancing the discovery desires of OPC and discovery burdens placed on SSU in this proceeding, OPC's Motion to Compel these documents should be denied.

7. Document Request No. 51 states as follows:

Provide a copy of all of the minutes of the Topeka Group Inc.'s Board of Directors meetings for the years 1992 to date.

Document Request No. 52 states as follows:

Provide a copy of all of the minutes of the Minnesota Power and Light's Board of Directors meetings for the years 1992 to date.

OPC wants copies of the minutes of the Board of Directors meetings of MP and TGI based on OPC's speculation that statements may have been made during such meetings concerning the sales of Lehigh Acquisition Corporation or Lehigh Corporation property. OPC essentially attempts to extend the scope of discovery under the Florida Rules of Civil Procedure to any document that OPC speculates may exist or any statement that OPC speculates may have been said. OPC's Motion to Compel these documents should be

denied.

8. Document Request No. 63 states as follows:

Provide copies of the outside independent auditors's work papers for each of the past three years for the company, Topeka Group, Inc., MPL, Buenaventura Lakes, East L.A. Services Corporation, and Lehigh Acquisition Corporation.

SSU relies on its objections set forth in Exhibit "A", at 9-10.

9. Document Request No. 64 states as follows:

Make available for review the books and records of Lehigh Acquisition Corporation.

Document Request No. 65 states as follows:

Please provide a copy of the audited, if available, or unaudited if audited is not available, financial statements (balance sheet, income statement, cash flow statement, and any notes attached thereto) of Lehigh Acquisition Corporation.

SSU relies on its objections set forth in Exhibit "A", at 9-10. Further, OPC fails to articulate how the level of profit allegedly realized by Lehigh Acquisition Corporation is relevant to the recovery of investment and expenses requested by SSU in this proceeding.

10. Document Request No. 72 states as follows:

Provide a copy of all state income tax returns for the company, MPL, Tokepa Group, Inc., and Lehigh Acquisition Corporation for the years 1992, 1993, and 1994 including a complete copy of any and all schedules and work papers.

SSU relies on its objections to this discovery request set forth in Exhibit "A", at 10-11.

11. Document Request No. 82 states as follows

Provide the 1994 consolidated financial

statements of the following entities: BNI Coal; Lake Superior Paper Industries; Topeka Group, Inc.; Heater Utilities; Lehigh Acquisition Corporation; East L.A. Service; SSU; and Minnesota Power and Light.

SSU relies on its objections to this document request set forth in Exhibit "A", at 11-12. Further, OPC has failed to justify its desire to launch into broad based discovery of other MP affiliates based on an alleged need to analyze MP's allocation of shareholder services expense to SSU. Again, and particularly in light of the already huge volume of discovery requested and produced in this proceeding, the burdens imposed on SSU to produce these documents (which it does not possess or control) outweighs OPC's speculation that such documents may prove relevant to this case.

12. Document Request No. 83 states as follows:

Provide the non-consolidated financial statements of Minnesota Power & Light for each year since 1980.

SSU relies on its objections set forth in Exhibit "A", at page 12.

13. Document Request No. 86 states as follows:

Provide copies of all travel entertainment expense vouchers of MPL's senior management and executives for the year 1994.

In its September 6 Response and Motion, OPC chooses to limit its request as follows:

The Citizens seek only travel and entertainment expense vouchers of MPL's senior management to the extent that such expenses are charged to SSU. In addition, to the extent that any senior management's time, expenses, or salaries are in any way allocated to SSU, OPC seeks all of the travel vouchers

for these individuals.³

SSU emphasizes that OPC's above-quoted recognition that it is entitled only to documents reflecting charges from MP to SSU is a clear admission that many of its other discovery requests, previously discussed herein, are overbroad and burdensome. Having appropriately limited the above discovery request, SSU agrees to produce the documents pursuant to OPC's revised request.

14. OPC's Document Request No. 91 states as follows:

Provide all invoices received from any law firm by Topeka Group, Southern States Utilities, and MPL (to the extent such costs were charged to the company) for the years 1992, 1993, 1995, and 1995 to date, and furnish the associated voucher, (Exclude law firms hired in connection with the instant rate case).

Document Request No. 93 states as follows:

Provide all invoices received from any consultant by Topeka Group, Southern States Utilities, and MPL (to the extent such costs were charged to the company) for the years 1992, 1993, 1994, and 1995 to date, and furnish the associated voucher. (Exclude consultants hired in connection with the instant rate case).

Again, OPC has now appropriately limited its request to "... invoices from law firms and consultants to Topeka Group, Southern States, and MP to the extent that such costs were charged (sic) to the (sic) SSU." Having properly limited this request, SSU agrees to provide the documents pursuant to the revised request of OPC.

15. Document Request No. 116 has been withdrawn by OPC.

16. Document Request No. 112 states as follows:

³OPC's September 6th Response and Motion, at 16-17.

Please provide a copy of any orders from the Minnesota Public Service Commission issued within the last 3 years concerning Minnesota Power & Light Company.

Document Request No. 113 states as follows:

Please provide a copy of any orders from any state public service commission which regulates Heater Utilities Inc. issued within the last five years.

SSU relies on its objections set forth in Exhibit "A", at 14-15. Further, to the extent OPC is not satisfied with documents responsive to this request previously provided by SSU, the public records of the state regulatory commission regulating MP and Heater Utilities, Inc. are equally available to OPC. SSU should not be required to do OPC's research.

17. Document Request No. 127 states as follows:

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 any properties owned by SSU or Lehigh Acquisition Corporation.

SSU' objects to this document request to the extent it solicits information pertaining to LAC properties sold to SSU where such property is not included in the revenue requirements requested by SSU in this rate case. Such information is not reasonably calculated to lead to the discovery of admissible evidence in accordance with the authorities cited in Exhibit "A", and SSU does not have control over such documents.

18. Document Request No. 108 states as follows:

Please provide a copy of all correspondence, memorandum, letters, reports, etc. between the

company and the consultants that it retained for purposes of assisting with the instant rate proceeding.

Document Request No. 111 states as follows:

Please provide a copy of all internal memorandum (including electronic mail), letters, studies and reports in the company's possession, custody or control which address the substance of the instant rate proceeding.

SSU relies on its objections set forth in Exhibit "A", at 15-16. Further, in its September 6 Response and Motion, OPC claims that SSU makes no objection based on privilege with respect to Document Request Nos. 108 or 111. OPC is incorrect. SSU asserted its attorney-client and work product privileges with respect to these document requests. See Exhibit "A", at 15-16.

19. OPC's blanket assertion that the test for application of the attorney-client privilege articulated in Southern Bell Telephone and Telegraph Company v. Deason 632 So.2d 1377 (Fla. 1994) supports production of Document Request Nos. 108 and 111 is misplaced. First, the Deason decision concerned the application of the privileges to communications between corporate counsel and a corporate employee, a matter clearly beyond the scope of Document Request No. 108. Second, with respect to Document Request No. 111, OPC's articulation of the five criteria in Deason for application of the corporate attorney-client privilege does nothing to undermine SSU's assertion of the work product privilege. Finally, OPC's claim that it is well-settled Commission policy to conduct an in camera inspection of documents upon a claim of privilege⁴ is

⁴OPC's September 6 Response and Motion, at 20.

inconsistent with SSU's experience. See, e.g., Order No. PSC-92-0819-PCO-WS issued August 14, 1992, at 6-7, in Docket No. 920199-WS.

20. Document Request No. 121 states as follows:

Please provide any reports, studies, or other documents in the company's custody or control which address the subject of economies of scale of the company's storage, treatment, collection, and distribution systems or the storage, treatment, collection, and distribution systems water and sewer companies in general.

SSU relies on its objections set forth in Exhibit "A", at 17-18. SSU did not "hint" at a privilege claim as argued by OPC. SSU objected based on the fact that Document Request No. 121 solicits fact work product. See Exhibit "A", at 17-18, which speaks for itself. Finally, SSU is in the process of preparing such study which SSU considers to be subsumed within the work product privilege.

21. Document Request No. 5 states as follows:

Provide a diskette version of the [Exhibit (JFG-1)] and indicate the program used to create the exhibit.

Document Request No. 7 states as follows:

Provide a diskette version of [Exhibit (JFG-2)] and indicate the program used to create the exhibit.

Document Request No. 45 states as follows:

Provide a copy of the company's standard general ledger system.

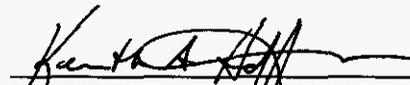
SSU relies on its objections set forth in Exhibit "A", at 18-19.

OPC's Second Motion to Postpone Date for
Filing Intervenor Testimony

22. With respect to OPC's Second Motion to Postpone Date for Filing Intervenor Testimony, SSU incorporates by reference herein its response set forth in its Response to Office of Public Counsel's First Motion to Compel and First Motion to Postpone Date for Filing Intervenor Testimony filed by SSU on September 7, 1995.

WHEREFORE, for the foregoing reasons, SSU respectfully requests that OPC's September 6 Response and Motion be denied.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing SSU's Response to Office of Public Counsel's Second Motion to Conduct In Camera Inspection and Second Motion to Postpone Date for Filing Intervenor Testimony was furnished by U. S. Mail to the following 13th day of September, 1995:

Lila Jaber, Esq.
Division of Legal Services
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

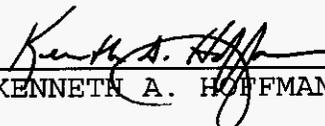
Mr. W. Allen Case
President
Sugarmill Woods Civic Asso.
91 Cypress Blvd., West
Homosassa, FL 34446

Charles J. Beck, Esq.
Office of Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Michael B. Twomey, Esq.
P. O. Box 5256
Tallahassee, FL 32314-5256

Joseph Coriaci, Pres.
Marco Island Civic Asso.
413 S. Barfield Drive
Marco Island, FL 33937

Mr. Morty Miller
President
Spring Hill Civic Asso., Inc.
P. O. Box 3092
Spring Hill, FL 34606



KENNETH A. HOFFMAN, ESQ.

1995\rate.camera

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Orange-)
Osceola Utilities, Inc. in)
Osceola County, and in Bradford,)
Brevard, Charlotte, Citrus, Clay,)
Collier, Duval, Hernando, High-)
lands, Hillsborough, Lake, Lee,)
Marion, Martin, Nassau, Orange,)
Osceola, Pasco, Polk, Putnam,)
Seminole, St. Johns, St. Lucie)
Volusia and Washington Counties.)
)
)

Docket No. 950495-WS

Filed: August 29, 1995

**SOUTHERN STATES UTILITIES, INC.'S OBJECTIONS TO
THE OFFICE OF PUBLIC COUNSEL'S
FIRST SET OF INTERROGATORIES AND
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS
AND MOTION FOR PROTECTIVE ORDER**

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, and pursuant to Rules 25-22.034 and 25-22.037(2), Florida Administrative Code, and Rule 1.280, Florida Rules of Civil Procedure, hereby requests the Prehearing Officer to enter a protective order relieving SSU from any requirement to respond to the interrogatories and document requests set forth in the Office of Public Counsel's First Set of Interrogatories and First Set of Request for Production of Documents which are identified in the body of this motion. In support of this motion, SSU states as follows:

A. BACKGROUND

1. On July 18, 1995, the Office of Public Counsel ("OPC") served SSU by mail with OPC's First Set of Interrogatories and First Set of Request for Production of Documents.

EXHIBIT "A"

2. Since receipt of these discovery requests by SSU, OPC and SSU have been communicating regarding certain objections, confidentiality concerns and issues of privilege. In an effort to provide the most clear and comprehensive explanation of the issues under consideration, SSU and OPC agreed that this motion should be filed as the basis for further discussion. By agreement with OPC, this motion is timely filed.

3. The majority of SSU's objections fall into three general categories: (1) interrogatories and/or document requests which exceed the permissible scope of discovery, (2) interrogatories and/or document requests which solicit matter subject to the attorney-client and work product privileges and (3) other.

B. OBJECTIONS BASED ON SCOPE OF DISCOVERY

Scope of Discovery Generally

1. Rule 25-22.034, Florida Administrative Code, provides, "Parties may obtain discovery through the means and the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure."

2. Rule 1.280(b) of the Florida Rules of Civil Procedure prescribes the scope of discovery as follows:

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.

3. In Calderbank vs. Cazares, 435 So.2d 377 (Fla. 5th DCA 1983), the court explained the latter part of Rule 1.280(b) as

follows:

A reasonably "calculated" causal connection between the information sought and the possible evidence relevant to the issues in the pending action must "appear" from the nature of both or it must be demonstrated by the person seeking the discovery. If a logical connection is not readily apparent, the questioner should make it apparent by pointing out to the court his reasoning . . . demonstrating how he calculates the sought information will "reasonably" lead to admissible evidence. The mere fact that an inquiry that appears to be relevant "might" lead to evidence that is relevant and admissible to the issues in the pending suit is not sufficient.

435 So.2d at 379. See also Krypton Broadcasting vs. MGM-Pathe Communications Co., 629 So.2d 852 (Fla. 1st DCA 1994).

4. In whole or in part, the information sought in the following enumerated interrogatories and document requests from OPC's First Set of Interrogatories and First Set of Requests for Production of Documents do not meet the criteria of Rule 1.280(b) or Calderbank: Interrogatory 4, Document Request 51, Document Request 52, Document Request 63, Document Request 64, Document Request 65, Document Request 72, Document Request 82, Document Request 83, Document Request 86, Document Request 91, Document Request 93, Document Request 112, Document Request 113, Document Request 116, and Document Request 127. In whole or in part, the information sought in these discovery requests do not appear to have a reasonably calculated causal connection to possible evidence relevant to issues in this proceeding. Therefore, as explained in greater detail below, these discovery requests exceed the permissible scope of discovery.¹

¹The instructions to OPC's First Set of Interrogatories and First Set of Requests for Production of Documents define

5. A number of document requests posed by OPC exceed the permissible scope of discovery not only in terms of relevance but also with regard to SSU's control or access to the materials requested. According to Rule 1.350(a), Florida Rules of Civil Procedure, a party upon whom requests for production are served must have "possession, custody or control" of the materials sought. OPC seeks production of documents in the "possession" and "custody" of companies in which SSU's parent companies, not SSU, hold an interest. SSU does not believe it has "control" over many of these records. SSU is wholly-owned by Topeka Group, Inc. ("TGI"). TGI is wholly-owned by Minnesota Power & Light ("MPL"). SSU acknowledges that in the past, despite OPC's having served only SSU with discovery, TGI and MPL have given OPC access to records relevant to the following parent-subsidary issues material to a rate case: (1) charges made directly or indirectly from TGI and MPL to SSU or "allocations" from TGI and MPL to SSU (interaffiliate transactions), (2) MPL and TGI's debt and equity investment in SSU and returns or interest thereon, and (3) income tax matters including treatment of investment tax credits, treatment of

"company" as SSU, Orange/Osceola Utilities, Inc. ("OOU") and all SSU "affiliates." "Affiliates" is not defined in the instructions. Despite the definition, OPC uses both "company" and "affiliates" or "company" and a specifically named related company in several discovery requests. This redundancy, then, creates the impression that "company" may not include "affiliates." Because of the somewhat confusing use of "company," SSU reserves objections to a more expansive definition of "company" until such time as OPC may file a motion to compel discovery, and the meaning of "company" is called into question. SSU intends to provide OPC information pertinent to SSU and OOU in the meantime.

deferred taxes, treatment of CIAC, and information relevant to the parent-debt adjustment. This prior practice has occurred solely with the consent of SSU's parents in a manner limited to the permissible scope of discovery. SSU never has had possession or control over information or documents which are not associated directly with transactions between SSU and MPL or TGI. SSU, MPL and/or TGI have not acted "as one" in the filing of the Amended Application for Increased Water and Wastewater Rates in this docket. Thus, as a matter of law, SSU does not control and is not required to produce MPL or TGI documents in this proceeding.² The only MPL or TGI documents which are required to be produced through SSU are documents concerning the three parent-subsubsidiary issues described above. In this case, OPC asks SSU (not MPL or TGI) to produce documents far in excess of what it has sought from SSU in the past. Where specified hereinbelow, the Commission should either require OPC to make a predicate showing that SSU does, as a matter of fact and law, have control over these documents or require OPC to serve the appropriate entity with its discovery. The remainder of this motion will disclose SSU's objections with specificity.

Specific Objections

6. Interrogatory 4 states as follows:

Please indicate the dates and the nature of all communications with the staff of the Florida Public

²See Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services, 488 So.2d 886 (Fla. 1st DCA 1986); Michelin Tire Corp. v. Roose, 531 So.2d 361 (Fla. 4th DCA 1988).

Service Commission (staff) other than those that relate in any way to this docket.

On its face, this interrogatory is objectionable and overbroad since it requests communications "other than those that relate in any way to this docket." If the communications do not relate to this docket, then they are not relevant to any material issue in this docket. See Krypton Broadcasting, supra, at 855 (request for documents "evincing any communication between Krypton and any other person or entity concerning the subject matter of this lawsuit" relate to instant proceeding).

7. Document Request 29 states as follows:

For each affiliated company participating in the consolidated tax return with MPL, state the amount of book net income or loss, for each of the past five years.

SSU objects to the production of the requested information to the extent the information solicited is unrelated to SSU or this rate case. SSU's relationship to MPL and TGI and the fact that SSU has filed a rate case do not and cannot serve as sufficient basis for OPC to delve into the profitability of the myriad business interests of SSU's parent companies where such interests have nothing to do with SSU. This request is not reasonably calculated to lead to the discovery of admissible evidence in accordance with the authority cited herein.

8. Document Request 51 states as follows:

Provide a copy of all of the minutes of the Topeka Group, Inc.'s Board of Directors Meetings for the years 1992 to date.

Document Request 52 is worded identically to Document Request 51,

except MPL is substituted for TGI. SSU objects to these document requests to the extent they solicit information unrelated to SSU or this rate case. OPC is aware that MPL and TGI are diversified conglomerates. SSU's relationship with TGI and MPL and the fact that SSU has filed a rate case do not and cannot serve as sufficient base for OPC to delve into the myriad business interests of SSU's parent companies as revealed by their board's minutes when such interests have nothing to do with SSU. A reasonably calculated causal connection between the information sought and possible evidence relevant to material issues in the instant SSU rate proceeding is not readily apparent and, therefore, the discovery should not be allowed. See Cooper v. Fulton, 117 So.2d 33 (Fla. 3rd DCA 1960) (where plaintiff sought defendant corporation's books and records, including those pertaining to divisions engaged in businesses unrelated to business at issue in the case, plaintiff only entitled to (1) books and records which related exclusively to business at issue and (2) those books and records which related to both business at issue and other businesses). Further, the Commission should balance a party's need for discovery and the possible probative value of that discovery against the privacy interest of the person from whom that discovery is sought. See e.g. Pyszka, Kessler et al. v. Mullin, 602 So.2d 955 (Fla. 3rd DCA 1991) and cases cited therein. When weighed against OPC's interest in discovering information which "might" be relevant in this proceeding, TGI's and MPL's interests in maintaining the privacy of its non-SSU business endeavors should be protected and

the discovery should not be allowed. Ernst & Ernst v. Reedus, 260 So. 2d 258 (Fla. 3rd DCA 1972) (accounting firm defendant entitled to order protecting against discovery of distributions to partners where net worth of firm was the issue for damages claim and discovery of distributions would cause undue embarrassment to partners).

9. Document Request 63 states as follows:

Provide copies of the outside independent auditors' work papers for each of the past three years for the company, Topeka Group, Inc., MPL, Buenaventura Lakes, East L.A. Services Corporation, and Lehigh Acquisition Corporation.

SSU objects to this document request to the extent it requests information regarding East L.A. Services Corporation ("ELASCO"), a wholly-owned subsidiary of TGI, and Lehigh Acquisition Corporation ("LAC"), a corporation 80% owned by TGI. None of the materials in the independent auditors' work papers for ELASCO or LAC is reasonably calculated to lead to the discovery of admissible evidence. Any evidence relevant to SSU's relationship and transactions with ELASCO and LAC can be discovered through more direct, less intrusive means whereby ELASCO and LAC are not subject to audit-level scrutiny based on nothing other than their relationship with SSU. The only relevant information material to this case involving ELASCO is the allocation of SSU and TGI officer's time to ELASCO. OPC's request goes unreasonably beyond this issue. LAC is the holding company for Lehigh Corporation. SSU and Lehigh Corporation have an executory developer's agreement and SSU has acquired land from Lehigh Corporation. These are the only facts remotely involving LAC in this case. These facts have no

reasonably calculated connection with the broad scale of information sought in Document Request 63 by OPC. SSU also notes that while an audited entity may consent to another person examining the independent auditors' workpapers,³ such workpapers are within the possession, custody, and control of the auditors and remain the auditors' own workproduct. For the foregoing reasons, SSU objects to Document Request 63 as it pertains to ELASCO and LAC.

10. Document Request 64 states as follows:

Make available for review the books and records of Lehigh Acquisition Corporation.

Similarly, Document Request 65 states:

Please provide a copy of the audited, if available, or unaudited if audited is not available, the [sic] financial statements (balance sheet, income statement, cash flow statement, and any notes attached thereto) of Lehigh Acquisition Corporation.

These document requests clearly demonstrate the over-reaching discussed above. The complete books and records of LAC are not reasonably calculated to lead to the discovery of admissible evidence as defined in Rule 1.280(b) and the case decided thereunder. See City of Miami v. Florida Public Service Commission, 226 So.2d 217 (Fla. 1969) (the City's discovery improper when the request was for all utility books and records supporting figures in the utility's net operating income schedule). The only issues possibly involving LAC in this case are identified in the previous paragraph. OPC may readily obtain information

³SSU, MP&L, TGI, and OOU will consent to OPC's reviewing their independent auditors' workpapers.

reasonably calculated to lead to the discovery of evidence relevant to these issues without audit-level access to all of the books and records of LAC.⁴ Furthermore, the Commission should reject any argument from OPC that in order to verify one relevant fact within a larger set of facts, it is entitled to review the larger set of facts. Acceptance of such an argument will only serve to supplant the criteria of Rule 1.280(b) and open the door for the proverbial discovery fishing expeditions disfavored in the law. Taken to its logical extreme, the same argument can be used to justify a complete audit of all of MPL's subsidiaries. To avoid such unwarranted results, all OPC need do here is refine its request. Furthermore, SSU asserts that the books and records of LAC are not within the possession, custody, or control of SSU.

11. Document Request 72 states as follows:

Provide a copy of all state income tax returns for the company, MPL, Topeka Group, Inc., and Lehigh Acquisition Corporation for the years 1992, 1993, and 1994 including a complete copy of any and all schedules and work papers.

The state income tax returns for the referenced entities are not reasonably calculated to lead to the discovery of admissible

⁴Any reliance on Southern Bell Telephone & Telegraph Company v. Deason, 632 So.2d 1377 (Fla. 1994), for the proposition that financial statements, general ledgers, and other books and records of a regulated utility's affiliated companies are within the permissible scope of discovery in a rate case is misplaced. In affirming the Commission's access to affiliates' accounting and financial records, the Southern Bell Court specifically held that a statute, not the rules of discovery, controlled since access to the records at issue was sought pursuant to the Commission's regulatory powers and not pursuant to a legal discovery effort. OPC's request for information in this case is made pursuant to the rules of discovery, and OPC cannot vicariously invoke the regulatory powers of the Commission.

evidence. The "company" presumably SSU and OOU, does not file state income tax returns. MPL and TGI's state income tax returns will not reflect any information relevant to this case not shown in those entities federal income tax returns. So the request is needlessly intrusive as well. Further, as explained in greater detail above, the issues in this case involving LAC are tangential at best and do not warrant discovery of LAC's tax returns.

12. Document Request 82 states as follows:

Provide the 1994 consolidated financial statements of the following entities: BNI Coal; Lake Superior Paper Industries; Topeka Group, Inc.; Heater Utilities; Lehigh Acquisition Corporation; East L.A. Service; SSU; and Minnesota Power & Light.

All of the named companies with the exception of MPL are either direct or indirect subsidiaries of MPL. SSU objects to the extent these requests solicit financial statements other than those of SSU and TGI. As explained earlier, SSU's relationship with ELASCO and LAC is tangential at best. SSU's president serves as an officer of TGI and as a corporate officer of Heater. Therefore, the only information relevant to a material issue in the case involving Heater would be the charges and/or allocations made by SSU to Heater. SSU has no dealings whatsoever with BNI Coal or Lake Superior Paper -- all these two companies have in common with SSU is the fact that MPL is their ultimate parent company. This request is clearly not within the permissible scope of discovery. OPC should not be allowed to verify one or more relevant facts by examining a much larger and expansive set of irrelevant facts. Further, SSU does not have possession, custody, or control over the

documents requested for BNI Coal, Lake Superior Paper Industries, Heater, LAC and ELASCO.

13. Document Request 83 states as follows:

Provide the non-consolidated financial statements of Minnesota Power & Light for each year since 1980.

Fifteen year old, ten year old, or even three year old non-consolidated financial statements of SSU's ultimate parent are not reasonably calculated to lead to the discovery of evidence relevant to the parent-subsidary issues identified herein above. OPC should only be allowed to verify defined, relevant facts and should not be allowed to review anything it inexplicably wishes to review just because something relevant might be discovered herein. This request is also clearly overbroad when weighed against the limited probative value of the vast information sought.

14. Document Request 86 states as follows:

Provide copies of all travel entertainment expense vouchers of MPL's senior management and executives for the year 1994.

This request is not reasonably calculated to lead to the discovery of admissible evidence because the information solicited is not limited to expense vouchers charged directly or indirectly to SSU. Any argument by OPC that it should be allowed to test the reasonableness of amounts charged or allocated to SSU by comparing them with amounts not so charged should be rejected. Accepting this argument would only serve to supplant the test set forth in Rule 1.280(b) and the cases decided thereunder. Taken to its logical conclusion, such an argument would also sanction OPC's obtaining discovery of comparison data of whatever kind and from

whatever source it chooses. Therefore, the Commission should restrict OPC's query so as to allow discovery only of items charged either directly or indirectly to SSU.

15. Document Request 91 states as follows:

Provide all invoices received from any law firm by Topeka Group, Southern States Utilities, and MPL (to the extent such costs were charged to the company) for the years 1992, 1993, 1994, and 1995 to date, and furnish the associated voucher. (Exclude law firms hired in connection with the instant rate case.)

SSU objects to this interrogatory to the extent that the qualification for costs charged to SSU applies only to costs incurred by MPL (as this appears to be OPC's intent). To be reasonably calculated to lead to the discovery of admissible evidence, the information sought regarding TGI must have the same qualification or limitation as does the information for MPL. As was the case with Document Request 86, the TGI invoices requested here are not all charged to SSU directly or indirectly and, therefore, have nothing to do with this case. In addition, discovery of information for comparative purposes is inappropriate as explained in the preceding paragraph. SSU objects to Document Request 93, which uses the same language as Document Request 91 except "law firm" is replaced with "any consultant," for the same reasons.

16. Document Request 116 states as follows:

Provide documents showing the derivation of Minnesota Power & Light Company's and the Topeka Group's consolidated financial statements for the years 1993 and 1994. These documents should include, but are not limited to, the work papers showing the trial balance or balance sheet and income statements of each subsidiary and the applicable consolidating adjusting entries and

all related notes, adjustments, and eliminations used to calculate MPL's consolidated financial statements.

The requested information is not reasonably calculated to lead to the discovery of admissible evidence. SSU's relationship with MPL and TGI is not a valid basis for subjecting MPL and TGI to audit-level scrutiny from OPC in this proceeding. OPC can obtain the information it seeks regarding the parent-subsidary issues identified hereinabove through more refined, less imposing discovery requests. City of Miami v. FPSC, supra; Cooper v. Fulton, supra; Fysyka, Kessler et al. v. Mullin, supra.

17. Document Request 112 states as follows:

Please provide a copy of any orders from the Minnesota Public Service Commission issued within the last 3 years concerning Minnesota Power & Light Company.

Similarly, Document Request 113 states:

Please provide a copy of any orders from any state public service commission which regulates Heater Utilities, Inc. issued within the last 5 years.

These requests are not reasonably calculated to lead to discovery of admissible evidence. SSU objects to these two requests to the extent the orders sought deal with subject areas other than affiliate transactions involving SSU, cost allocations, or other information which would or could impact SSU's costs or investments. SSU has been informed by MPL that the Minnesota Commission has issued approximately 150 orders in the time frame indicated dealing with subjects ranging from rate cases to fuel purchase and bulk supply agreements. SSU has provided OPC with orders pertaining to the subject matters identified above as relevant but objects to

this request to the extent further orders are desired in an apparent fishing expedition.

18. Document Request 127 states as follows:

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 any properties owned by SSU or Lehigh Acquisition Corporation.

SSU objects to this document request to the extent it solicits information pertaining to LAC properties sold to SSU and property is included in the revenue requirements requested by SSU in this proceeding. Such information is not reasonably calculated to lead to the discovery of admissible evidence in accordance with the authorities cited herein, and SSU does not have control over such documents.

C. OBJECTIONS BASED ON PRIVILEGE

19. Document Request 108 states as follows:

Please provide a copy of all correspondence, memorandum, letters, reports, etc. between the company and the consultants that it retained for purposes of assisting with the instant rate proceeding.

In response to SSU's attorney-client and work product privilege objection to the identical document request (Document Request 84) in Docket No. 920199-WS, the prehearing officer ruled as follows:

[G]iven 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. [I]f a

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

Order No. PSC-92-0819-PCO-WS, issued August 14, 1992, pp. 6-7. SSU's objection here is identical to that which it made in Docket No. 920199-WS. OPC's request by its breadth solicits attorney-client communications and fact and opinion work product which are exempt from discovery. See also Krypton Broadcasting, supra (trial court's order to compel quashed where document request solicited all documents concerning the lawsuit and such a request would include privileged matter), and Order No. PSC-94-1218-CFO-WU, issued October 5, 1994, in Docket No. 931122-WU (Lakeside Golf, Inc. transfer to SSU) (motion for protective order granted as to privileged matter where broad discovery request encompassed privileged and non-privileged matter). As it did pursuant to the above order in Docket No. 920199-WS, SSU will provide on-site to OPC the documentation it requests which does not fall within one of the applicable privileges.

20. Document Request 111 states as follows:

Please provide a copy of all internal memorandum (including electronic mail), letters, studies and reports in the company's possession, custody, or control which address the substance of the instant rate proceeding.

As with Document Request 108, OPC posed the identical document request to SSU in Docket No. 920199-WS (Document Request 85). SSU objected on the grounds of attorney-client and work product privileges, and the prehearing officer ruled that SSU had to provide OPC only that information which did not fall within either of the privileges. Order No. PSC-92-0819-PCO-WS, at p. 7. By its

terms, the request in this case solicits information which would include attorney-client and work product privilege matters. SSU will provide on-site to OPC the documents it requests which do not fall within either of the privileges.

21. Document Request 114 states as follows:

Please provide a copy of all drafts of the company's testimony in the instant rate proceeding.

In response to an identical document request posed by OPC in Docket No. 920199-WS, SSU objected on work product and attorney-client privilege grounds. The Prehearing Officer in that case rejected OPC's argument that such documents would be admissible as prior inconsistent statements affecting the credibility of the witnesses and ruled that SSU did not have to produce the requested drafts. Order No. PSC-92-0819-PCO-WS, at p.7. SSU's argument here is the same as in the prior case. It is a commonly known fact that counsel play an integral role in preparing prefiled testimony. Hence, any retained drafts of prefiled testimony are inextricably mixed with attorney-client and work product matter and therefore must be exempt from discovery.

22. Document Request 121 states as follows:

Please provide any reports, studies, or other documents in the company's custody or control which address the subject of economies of scale of the company's storage, treatment, collection, and distribution systems or the storage, treatment, collection, and distribution systems [sic] water and sewer companies in general.

This document request solicits fact work product prepared in anticipation of litigation and is therefore exempt from discovery pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure,

until OPC makes the requisite showing of need or until the requested materials form the basis for the testimony of an expert testifying at the hearing.

D. OTHER OBJECTIONS

23. Document Request 5 states, in pertinent part, as follows:

Provide a diskette version of [Exhibit (JFG-1)] and indicate the program used to create the exhibit.

Document Request 7 states, in pertinent part, as follows:

Provide a diskette version of [Exhibit (JFG-2)] and indicate the program used to create the exhibit.

SSU witness Guastella has informed SSU that he objects to document requests 5 and 7 to the extent that they request proprietary software developed by Mr. Guastella which is used exclusively by him and other members of his firm to prepare studies of the type performed for SSU in this proceeding in anticipation of the instant litigation. SSU will provide the workpapers Mr. Guastella prepared to develop Exhibits JFG-1 and JFG-2 in response to document requests 3 and 6, respectively. However, Mr. Guastella's providing expert testimony in this proceeding does not entitle OPC to proprietary software created by Mr. Guastella for purposes other than his participation in this case. 24.

24. Document Request 45 states as follows:

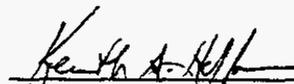
Provide a copy of the company's standard general ledger system.

SSU objects to or seeks clarification of this request. SSU considers its "general ledger system" to be a computer based software program. Pursuant to the software licensing agreement,

SSU cannot provide OPC a copy of the software program. If OPC only seeks access to the data on SSU's computerized general ledger, SSU will provide OPC with that access on-site.

WHEREFORE, for the reasons stated herein, Southern States Utilities, Inc. requests that the Prehearing Officer enter a protective order relieving Southern States Utilities, Inc. of responsibility from answering the interrogatories and document requests from OPC's First Set of Interrogatories and First Set of Requests for Production of Documents identified herein.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 29th day of August, 1995:

Lila Jaber, Esq.
Division of Legal Services
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

Charles J. Beck, Esq. (via telecopier and U. S. Mail)
Office of Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Michael B. Twomey, Esq.
P. O. Box 5256
Tallahassee, FL 32314-5256

Joseph Coriacci, Pres.
Marco Island Civic Asso.
413 S. Barfield Drive
Marco Island, FL 33937

Mr. Morty Miller
President
Spring Hill Civic Asso., Inc.
P. O. Box 3092
Spring Hill, FL 34606

Mr. W. Allen Case
President
Sugarmill Woods Civic Asso., Inc.
91 Cypress Blvd., West
Homosassa, FL 34446


KENNETH A. HOFFMAN, ESQ.

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