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**ORIGINAL
FILE COPY**

September 21, 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 Southern States Utilities, Inc.'s Response to the Office of Public Counsel's Third Motion to Dismiss; and
2. A diskette in Word Perfect 6.0 containing a copy of the document entitled "Rate.3Dismiss."

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

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman
Kenneth A. Hoffman

ACK _____
 AFA 3 _____
 APP _____
 CAF _____
 CMJ _____
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cc: All Parties of Record

RECEIVED & FILED

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

09386 SEP 21 95

FPSC-RECORDS/REPORTING

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: September 21, 1995

**SOUTHERN STATES UTILITIES, INC.'S RESPONSE
TO THE OFFICE OF PUBLIC COUNSEL'S
THIRD MOTION TO DISMISS**

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") Third Motion to Dismiss. In support of its Response, SSU states as follows:

1. OPC's Third Motion to Dismiss is but the latest of OPC's misapplication and misunderstanding of the purpose of a Motion to Dismiss. OPC's Third Motion to Dismiss alleges that SSU's customers "... have no notice of and have no means to discovery whether and/or to what extent their interests are affected" by SSU's filing. While SSU disagrees with OPC's assertions, it must first be emphasized that OPC's concerns do not form the basis for a Motion to Dismiss.

2. In Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993), the court restated established law concerning the function of a Motion to Dismiss:

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FPSC-RECORDS/REPORTING

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action... In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side... Significantly, all material factual allegations of the complaint must be taken as true. (Citations omitted).

3. OPC's Third Motion to Dismiss does not even address the legal sufficiency of SSU's Amended and Restated Application for Increased Water and Wastewater Rates, Allowance for Funds Prudently Invested and Service Availability Charges ("Amended Application") nor the supporting minimum filing requirements ("MFRs") from the standpoint of whether the Amended Application and supporting MFRs comply with Commission rules (*i.e.*, state a cause of action). Thus, OPC's Third Motion to Dismiss must be denied.

4. OPC's complaints concerning the issue of notice in this case are akin to an affirmative defense to SSU's Amended Application but do not form the basis for dismissal of the case. As OPC knows, or should know, Rule 25-22.0407, Florida Administrative Code, requires multiple notices including multiple notices to customers and a rate case synopsis. **OPC's Third Motion to Dismiss fails to specifically articulate which notice and/or what part of such notice causes them concern.** OPC's lack of specificity in its Third Motion to Dismiss renders the Motion inherently deficient. In any event, one thing is certain. OPC's Third Motion to Dismiss does not allege that SSU has violated any Commission statutes, rules or orders with respect to the notices

that SSU has provided to date.

5. OPC's Third Motion to Dismiss should be seen for what it is. OPC is simply reacting to the recent decision in Docket No. 920199-WS to not reopen the record on the remand from the First District Court of Appeal. The Commission is scheduled to make a decision on a revised rate structure for SSU on September 26, 1995, a decision which will likely have some level of impact on SSU's existing rates. Without expressly stating so, OPC is essentially relying on the aforesaid Docket No. 920199-WS events to leap to the following conclusions:

There is no customer of this utility who can know what his or her present rate is; there is no customer who can know what his or her rate might become. Consequently, there is no customer who can know or ascertain to what extent SSU's filing affects his or her interest, if at all.¹

6. OPC's contentions are incorrect. **SSU's notices to its customers are not misleading.**

a. An SSU customer may ascertain what his or her present rate is by looking at his or her bill from SSU as well as the Rate Case Synopsis and Notice to Customers of Application, both approved by Staff, provided by SSU in conformance with Rule 25-22.0407(4) and (5), Florida Administrative Code, in this docket.

b. Secondly, an SSU customer can ascertain SSU's proposed rates by reference to the Rate Case Synopsis and Notice to Customers of Application. These documents reflect SSU's request for uniform rates. Recently, the First District Court of Appeal

¹See OPC's Third Motion to Dismiss, at paragraph 6.

held that the Commission first must find that SSU operates as one functionally related utility system before SSU's customers can be charged uniform rates.² On July 21, 1995, the Commission issued Order No. PSC-95-0894-FOF-WS in Docket No. 930945-WS determining that SSU does operate as one functionally related utility system. SSU has presented evidence in this rate case which is substantially similar to the evidence presented by SSU in Docket No. 930945-WS so that the Commission may find that uniform rates are appropriate in this docket.

c. Third, the City of Plant City v. Mayo³ decision of the Supreme Court of Florida cited in SSU's Response to OPC's Second Motion to Dismiss makes it clear that utilities cannot and, therefore, are not required to provide notice to customers of the precise potential impact on customers as a result of the filing.

7. All information provided by SSU to its customers to date concerning SSU's present and proposed rates has been completely accurate. It appears certain as of this date that as a result of the proceeding in Docket No. 920199-WS, that some change in SSU's existing (as opposed to proposed) rate structure and rates will result. If required by the Commission to send additional notices as a result of said anticipated changes in rate structure and rates, SSU, of course, will do so. If so required, there is no authority to restart the eight month clock under Section

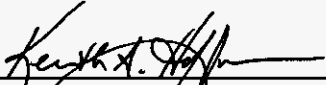
²Citrus County v. Southern States Utilities, Inc., 20 Fla. L. Weekly D838 (Fla. 1st DCA April 6, 1995), as amended on rehearing, 20 Fla. L. Weekly D1518 (June 27, 1995).

³City of Plant City v. Mayo, 337 So.2d 966, 970-971 (Fla. 1976).

367.081(6), Florida Statutes, as suggested by the Marco Island Fair Rate Defense Fund Authority ("Marco Island Committee").⁴ The Marco Island Committee cites no authority in support of their proposition and, indeed, such a decision would be outside the Commission's statutory authority which provides that the Commission may not withhold consent of a rate request "... for a period longer than eight months following the date of filing." (Emphasis supplied.) Since the official date of filing pursuant to Section 367.083, Florida Statutes, already has been established by the Commission as August 2, 1995, there is no statutory authority for modification of said official date of filing based on the possible or actual provision of additional notices to customers.

WHEREFORE, for the foregoing reasons, SSU respectfully requests that OPC's Third Motion to Dismiss be denied.

Respectfully submitted,



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⁴The Marco Island Committee filed a Notice of Joinder with an Adoption of OPC's First, Second and Third Motions to Dismiss on September 19, 1995.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Southern States Utilities, Inc.'s Response to the Office of Public Counsel's Third Motion to Dismiss was furnished by U. S. Mail to the following 21st day of September, 1995:

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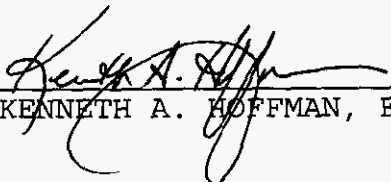
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