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November 16, 1995

**ORIGINAL
FILE COPY**

HAND DELIVERY

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

Re: Docket No. **950495-WS**

Dear Ms. Bayo:

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

1. Original and fifteen copies of SSU's Response to OPC's Objection to Certain Discovery, Motion for Protective Order; and
2. A disk containing a copy of the document in Word Perfect 6.0 entitled "OPC.PRO1.001."

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 1
 QAF _____
 CMU _____
 CTR _____
 EAG _____
 LEG 1
 LIN 5
 OPC _____
 RCH _____
 SEC 1
 WAS Willis
 OTH _____

cc: All Parties of Record
Trib.3

RECEIVED & FILED
Willis
EPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

11450 NOV 16 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 Osceola)
Utilities, Inc., in Osceola)
County, and in Bradford, Brevard,)
Charlotte, Citrus, Clay, Collier,)
Duval, Highlands, Lake, Lee,)
Marion Martin, Nassau, Orange,)
Osceola, Pasco, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

Docket No. 950495-WS

Filed: November 16, 1995

SSU'S RESPONSE TO OPC'S OBJECTION TO CERTAIN
DISCOVERY, MOTION FOR PROTECTIVE ORDER

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 this Response to the Objection to Certain Discovery, Motion For Protective Order ("Motion for Protective Order") filed by the Office of Public Counsel ("OPC") on November 9, 1995. In support of this Response, SSU states as follows:

1. OPC's Motion for Protective Order should be stricken as untimely, and its objections to SSU's discovery deemed waived for the reasons explained below.¹

a. SSU served its First Set of Interrogatories to the Office of Public Counsel by hand delivery on October 20, 1995.

SSU served its First Set of Requests for Production of

¹ The only objection which OPC may not have waived is attorney work product; however, it is not SSU's position to argue OPC's case for it. As explained below, OPC cannot make a claim to the attorney-client communication privilege.

DOCUMENT NUMBER-DATE

11450 NOV 16 1995 3598

FPSC-RECORDS/REPORTING

Documents to the Office of Public Counsel by hand delivery on October 25, 1995.

b. On October 30, 1995, OPC served a Petition for Special Appearance and Motion to Strike SSU's First Set of Interrogatories, and on November 1, OPC served a similar petition and motion as to SSU's First Set of Requests for Production of Documents (collectively these OPC pleadings are referred to as "Motions to Strike"). In said Motions to Strike, OPC argues that it is not a party to this proceeding and therefore not subject to discovery.

c. On November 6, 1995, SSU served its Response to said Motions to Strike wherein SSU asserts that OPC is a party by virtue of: (1) its own past practice and tacit consent, (2) Sections 350.0611 and 350.0613, Florida Statutes, which both state OPC intervenes in Commission proceedings "as a party," and (3) Sections 120.52(12)(b) and 120.57(13), Florida Statutes, which define "party" and "person," respectively, such that a governmental entity (a "person") entitled to participate in an agency proceeding as a matter of statutory right -- which OPC does here pursuant to Section 350.0611 -- is a "party." The aforesaid OPC Motions to Strike are pending.

d. Without conceding its position disputing OPC's claim that it is not a party, SSU re-served its First Set of Interrogatories and First Set of Requests for Production of Documents on OPC by hand delivery on October 30, this time

directing the discovery to "the Citizens of the State of Florida." The instant Objection and Motion followed on November 9.

e. Pursuant to Order No. PSC-95-0943-PCO-WS, issued August 4, 1994, objections to a discovery request "shall be made within ten days of service of the discovery request." Order No. PSC-95-0943-PCO-WS at p.2. OPC's Motion for Protective Order, served November 9, is not timely in accordance with said Order and therefore OPC's objections should be deemed waived. As explained in SSU's November 6 Response to OPC's Motions to Strike, OPC is a party. Therefore, SSU's discovery was properly served on October 20 and 24. This point notwithstanding, OPC should not be allowed to evade the Commission's time requirements by reliance on semantic differences. The import of SSU's discovery was clear when served on OPC on October 20 and 24, so clear that OPC responded with one very limited objection and a footnote alluding to other possible objections which OPC consciously chose not to make. OPC now seeks to expand the time to file objections and assert objections it knew of and chose not to make. In consideration of the foregoing, the Commission should deny OPC's Motion for Protective Order and objections as untimely.

2. To SSU's knowledge, counsel for OPC did not communicate with counsel for SSU prior to OPC's filing the instant Motion for Protective Order. Counsel for SSU did contact counsel for OPC by

letter and telephone prior to filing this Response. Pertinent discourse or agreements between counsel are noted hereinbelow. Counsel for SSU and OPC have agreed to continue to negotiate to resolve this discovery dispute subsequent to the filing of this Response. Pending any agreement, however, this matters is ripe for decision.

3. In the event the Commission considers the substantive objections OPC has made in its Motion for Protective Order, the Commission should reject OPC's arguments and compel OPC to immediately respond to SSU's requests.

4. OPC objects to Interrogatories Nos. 15, 43, 44, instructions of SSU's First Set of Interrogatories, to Document Requests No. 6, 7, 8, and the instructions of SSU's First Set of Requests for Production of Documents on the basis of "attorney-client privilege." However, as an identified "agency" in Section 119.011(2), Florida Statutes, OPC must disclose all documents which are non-exempt public records.² This includes attorney-client communications which would be privileged and exempt from disclosure if OPC was not an agency as defined by Section

² A number of cases interpreting Chapter 119, Florida Statutes, "The Public Records Law," were decided in the context of discovery disputes where the objecting governmental entities were parties to the underlying litigation. E.g. Brevard County v. Nash, 468 So.2d 240 (Fla. 5th DCA 1985), State v. Coca-Cola Bottling Co., 582 So.2d 1 (Fla. 4th DCA 1990). Thus, the Public Records Law is a consideration in the law of discovery as much as an interpretation of any rule of discovery and may be considered by the Commission. SSU notes that independent of SSU's invocation of the discovery procedures of the Commission, SSU is entitled to inspect all non-exempt public records made or received by OPC which is in the custody of any person. §119.07 (1), Florida Statutes.

119.011(2). E.g. City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 220 (Fla. 1985); Seminole County v. Wood, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987). The only exemption from public record status relevant here is created by Section 119.07(3)(n), which states in pertinent part as follows:

A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings is exempt from the provision of subsection (1) until the conclusion of the litigation or the adversarial administrative proceedings.

(Emphasis added.) This exemption is not only temporary, valid until the conclusion of a case, but is also very limited in scope. As stated above, attorney-client communications are not exempt, e.g. City of North Miami v. Miami Herald Publishing Co. and Seminole County v. Wood, *supra*, and would only be exempt to the extent such communications contain matter which is exempt. Accordingly, OPC's objection to producing documents on the basis of attorney-client privilege is invalid on its face and must be rejected. OPC should be ordered to immediately produce all documents and portions of documents within the scope of the pertinent discovery requests which are not specifically exempted by Section 119.07(3)(n).

5. One specific objection OPC makes on the basis of privilege is worthy of note. Specifically with respect to Interrogatories Nos. 43 and 44, OPC asserts that such interrogatories solicit the "legal theories" of attorneys. Interrogatories Nos. 43 and 44 state as follows:

(43) What are OPC's criteria for judging the materiality of expenses and capital items on a utility's books and records? Are the criteria different for expense items than they are for capital items? Are the criteria different from case to case or utility to utility? If so, why? If not, why not?

(44) What are OPC's criteria for judging the materiality of expense and capital items for the purpose of advocating adjustments to the Commission? Are the criteria for expense and capital items different? Are those criteria different from cases to case? If so, why?

SSU simply fails to see how the information requested concerning OPC's criteria for judging the materiality of capital and expense items falls within the scope of "legal theories," and in its Motion for Protective Order, OPC offers no explanation. An item is either material or it is not. Even if one accepts the argument that whether OPC actually advocates an adjustment (Interrogatory No. 44) is a matter of litigation strategy, as opposed to the legal theory OPC argues, OPC should at least be required to answer Interrogatory No. 43.

6. OPC objects to Interrogatories Nos. 8, 10, and 13 and Document Request Nos. 11, 12, 13, 14, and 22 on the basis of relevance. All of these requests pertain to OPC's involvement in this and other rate cases. SSU asserts that the information sought

is clearly relevant and bears a reasonably calculated causal connection with possible evidence relevant to issues in the pending action. See Calderbank v. Cazares, 435 So.2d 377 (Fla. 5th DCA 1983), and Krypton Broadcasting v. MGM-Pathe Communications Co., 629 So.2d 852 (Fla. 1st DCA 1994). Rate case expense will be an issue in this proceeding. SSU maintains that it has an interest in keeping rate case expense at reasonable levels, as OPC would claim it also does. Rate case expense is undeniably impacted by OPC's activities and expenditures involving a case. Therefore, SSU is entitled to know OPC's actions, procedures, and activities regarding and expenditures and projections for its involvement in this case. SSU also submits that the information sought relative to OPC's involvement in other rate proceedings is likewise relevant. OPC attorneys, Mr. Shreve himself in particular, has on a number of occasions publicly asserted that this SSU case is simply too large and cumbersome for OPC, or anyone, to handle. Further, OPC has in past cases drawn comparisons of rate case expense levels in one case to levels in others. SSU believes that its present filing is no more cumbersome than any electric, gas, or telecommunication utility rate case in which OPC has capably represented the consumers in the past and in which significantly larger sums of money were involved. SSU will support its position that all of its rate case expense in this proceeding is prudent by showing OPC's interest in this proceeding has been disproportionate to its interest in other proceedings, thereby driving rate case expense up. Moreover, SSU reasonably anticipates OPC's comparing

rate case expense in this proceeding with rate case expense in others -- whether electric, gas, telecommunication, water or wastewater -- and SSU therefore is entitled to explore how OPC's expenditures and projections from other cases compare with this proceeding so as to rebut such assertions.

7. OPC has objected to Interrogatory No. 12 on the basis that it constitutes harassment. Interrogatory No. 12 states as follows:

12(a) Please list all SSU journals, registers, and ledgers which were reviewed by OPC in connection with this rate proceeding.

12(b) Please provide the date each document was reviewed, and the name of all OPC employee(s) and consultant(s) who reviewed each document.

OPC fails, however, to support this assertion with specifics. This notwithstanding, it is clearly relevant to know which of OPC's consultants and witnesses looked at what SSU documents and when. To illustrate, if an OPC witness advocates an adjustment based on her review of requested document "x," but she failed to review document "y," despite the opportunity, that failure would be admissible for the purpose of attacking the basis for her opinion. The response to Interrogatory No. 12 also will serve to illustrate the amount of discovery OPC has requested in this case, which bears a direct relationship with rate case expense. SSU also reminds the Commission of the discovery violations which OPC has in the past alleged at final evidentiary hearings. If there is some item OPC has requested and not received, this interrogatory response will so reveal to some degree. SSU is entitled to know what evidence OPC

intends to produce at the final hearing, or before, regarding alleged discovery violations.

8. OPC has objected to a number of other SSU discovery requests on the basis of relevance. SSU responds to those objections as follows:

a. Interrogatory No. 17 asks for a list of reports OPC provides the Legislature. SSU requests this list so it can compare the list to the recommendations and plans regarding the water and wastewater industry which OPC is asked to provide in response to Document Requests Nos. 15 and 16. OPC has requested lists of this type from SSU on a number of occasions and has asserted its relevance on the very basis put forth here. SSU solicits copies of OPC's recommendations and plans to the Legislature regarding the water and wastewater industry to discover OPC's prior statements and positions regarding the very issues involved in this case, i.e. used and useful, conservation, rate structure, reuse, acquisition adjustments, etc. Such documents are relevant.

b. Interrogatory No. 51 requests a description of OPC's efforts on the subject of water conservation. Water conservation is an issue in this case, and SSU is therefore entitled to know what action or inaction OPC has taken regarding conservation in the past.

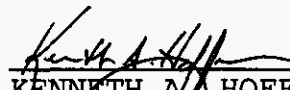
c. Document Request No. 20 requests materials OPC has reviewed or relied on regarding capitalizing versus expensing expenditures. Unless OPC is prepared to stipulate that it

will not advocate or oppose any proposed reclassifications in this case, SSU believes such documents are relevant as they may formulate the bases for opinions held by OPC's testifying experts.

9. Although SSU believes the information sought by Interrogatories Nos. 7, 9, and 29 and Document Request Nos. 19 and 21 is relevant, SSU hereby withdraws those requests at this time in response to SSU's counsel's conversation with counsel for OPC and as an accommodation to OPC.

WHEREFORE, in consideration of the foregoing, Southern States Utilities, Inc. requests that the Commission deny the Office of Public Counsel's Motion for Protective Order and compel the Office of Public Counsel to immediately respond to the discovery served by Southern States Utilities, Inc. as set forth hereinabove.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of SSU's Response to OPC's Objection to Certain Discovery, Motion for Protective Order was furnished by U.S. Mail to the following this 16th day of November, 1995:

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