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November 15, 1995

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Re: Application of Southern States Utilities, Inc., et al.
Docket No. 920199-WS

Gentlemen:

Enclosed please find the following for proper filing in the above-captioned case:

RESPONSE TO MOTION OF SOUTHERN STATES UTILITIES, INC. FOR CONSIDERATION
(Original plus 15 copies)
and
MOTION TO STRIKE AFFIDAVITS OF FORREST L. LUDSEN AND SCOTT VIERMA AND PORTIONS OF MOTION FOR RECONSIDERATION
(Original plus 15 copies)

Would you please be so kind as to stamp the enclosed copy of this transmittal letter when received and return same to this office in the enclosed stamped self-addressed envelope. Thank you.

Very truly yours,

Susan W. Fox

Susan W. Fox
(Signed for attorney to avoid delay)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION



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| In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties. | Docket No. 920199-WS<br><br>Filed: November 15, 1995 |

**RESPONSE TO**
**MOTION OF SOUTHERN STATES UTILITIES, INC.**
**FOR RECONSIDERATION**

Sugarmill Woods Civic Association, Inc., f/k/a Cypress and Oaks Villages Association, Inc., hereby responds to SSU's Motion For Reconsideration and requests the Commission to deny the motion.

SSU correctly points out that the purpose of a Motion For Reconsideration is to bring to the attention of the agency some point which it overlooked or failed to consider. Unfortunately, SSU proceeds to raise matters that were already argued in the parties' pleadings and at the extensive Oral Argument conducted in this case. Thus, the motion constitutes impermissible reargument and not a discussion of matters overlooked by the Commission.

The specific grounds for rehearing are addressed as follows:

1. SSU claims that the Commission disregarded the findings concerning revenue requirements in the prior Order. This was

obviously not the case, since the Commission discussed the revenue requirements issue both at the hearing on remand and in the Order. Moreover, the revenue consequences of the company's request to lift the automatic stay of the uniform rate structure were also discussed at the hearing on the motion to lift the stay, and the Commission found that the risk of being unable to meet its revenue requirements in the event of reversal was a risk assumed by the company at the time it sought to lift the automatic stay. There were other options available to SSU that would have allowed them to implement the revenue requirements and all portions of the Final Order except the disputed rate structure that was subject to the stay, but SSU did not avail itself of this opportunity.

2. SSU claims that the Commission abused its discretion in disregarding the "devastating financial impact" of its refund order on SSU. As stated in the accompanying Motion to Strike, the assertions concerning financial impact are improper and should be stricken. This decision is not to be made on sympathy or other improper considerations, but on the law. SSU also complains that the Commission refused to reaffirm its original decision by adopting findings and conclusions in a July 1995 order involving other parties. The appellants in this case were not even parties to that case, commonly known as the "jurisdictional docket", and therefore are not bound by any findings or conclusions contained in it.

3. SSU argues that the Commission should allow it to back bill the customers who underpaid pending the appeal. However,

Appellants submit that the Commission correctly concluded that SSU's voluntary reduction of the rates pending appeal for those customers who receive subsidies under uniform rate may not be back-charged to those customers.

4. SSU suggests that the Commission ruling holds that SSU assumed financial risks "by filing a bond", however, this is clearly not the Commission's ruling.

5. Sugarmill Woods takes no position on the adjustments for one inch meters, and

6. Sugarmill Woods submits that the refund order is reasonable and consistent with the Commissions' duties on remand.

## ARGUMENT

### THE COMMISSION HAS NOT ABUSED ITS DISCRETION OR MADE ANY ERROR OF LAW IN ITS ORDER.

SSU's basic argument is that the Commission coerced SSU into implementing uniform rates, and now must return SSU to the status it would have had if that rate structure decision had not been made. Once again, SSU distorts the facts. The Commission did not coerce SSU. Indeed, SSU was under no compulsion to implement uniform rates, and implementation of the uniform rate structure was stayed by the Citrus County appeal. Moreover, the consequences of lifting the stay, i.e., refunds to the customers who paid too much, were placed in the order lifting the stay. SSU accepted the benefits of this order, which it had sought.

Appellants pleaded vigorously with the Commission and SSU to maintain the parties' pre-appeal status quo, but these pleas fell on deaf ears. As a result, SSU collected funds it was not entitled

to from Appellants while the appeal was pending. Restitution of the amount SSU collected in violation of the pre-appeal status quo must be made. Sheriff of Alachua County v. Hardie, 433 So.2d 15 (Fla. 1st DCA 1983), Mann v. Thompson, 118 So.2d 112 (Fla. 1st DCA 1960).

The comments concerning the "devastating financial impact" on SSU should be disregarded as improper, and stricken from the record.

SSU also complains that the SSU abused its discretion in failing to reopen the record. This issue was argued at considerable length at the hearing on remand. The Commission did not overlook this possibility. It simply determined that reopening the record would be inappropriate in this case. Thus, this is not a proper issue for rehearing.

There were several important reasons why the Commission should not reopen the record. First, there were six issues on appeal, five of which the court found that it unnecessary to dispose of, since the entire case was being decided on the dispositive issue of functional relatedness. The five issues not disposed of would have been relevant, and therefore would have been addressed by the court, if they were sending the case back for another evidentiary hearing. These issues were, for example, notice and a point of entry to the proceedings, as well as similar points which would have had to be dealt with if the court anticipated a further hearing. Moreover, the court did say that the evidence did not and would not support findings that the systems were functionally

related in this case. This statement forestalls the necessity of a further evidentiary hearing.

The staff recommendation cites cases holding that a further hearing on remand in inappropriate. Also relevant is Vistaco, Inc. v. Prestige Property, 597 So.2d 356 (Fla. 1st DCA 1992), which holds that when a judgment is overturned for a lack of competent substantial evidence, a further hearing to receive additional evidence is inappropriate.

SSU also faults the Commission for failing to incorporate the findings of fact and conclusions contained in the order issued in the jurisdictional docket. The reasons why the Commission should not adopt those findings are obvious: the parties to this proceeding, other than SSU, were not parties to the jurisdictional case. Moreover, the issue as to who has jurisdiction is an entirely different issue from rate structure. Basic due process precludes the Commission from applying that decision to parties who were not heard or given an opportunity to be heard.

SSU argues that it should not be required to pay interest on the refund amount. However, the case law holds that interest on funds paid under an erroneous judgment is an essential aspect of restitution. Mann v. Thompson, supra. Moreover, Section 367.081(6), Florida Statutes, and Rule 25-30.360(4)(a) also require interest.

This court should disregard SSU's statement that it was a mere "stakeholder" in the uniform rate issue. Clearly, that should have been SSU's posture, but that was not the case, and as a result, SSU

has clouded the entire disposition of this issue for reasons which remain mysterious, known only to its corporate officers and attorneys. We can only speculate that SSU foresaw some corporate benefit that justified risking shareholder funds. This fact should give the Commission pause to question the hidden "benefits" of uniform rates to the company.

The Commission should reject the efforts to extend the period of repayment of the refund amount. Many of the Appellants' constituency are senior citizens who would not even be alive to enjoy the return of their funds if delayed as SSU requests. Furthermore, this issue was argued at length, and SSU's motion is pure reargument. The Commission's rule requiring refund within 90 days should be followed. See Silverman v. Lichtman, 296 So.2d 495 (Fla. 1974). (Trial court acted unreasonably in allowing unsuccessful appellee 180 days to repay funds garnished pending appeal; appellee should have been ordered to restore funds within 10 days.)

The Commission should also disregard SSU's taking, equal protection and penalty arguments. SSU got only the relief it requested from the Commission. If it had been unhappy with the Commission's initial uniform rate order, it could have appealed that order, or if it took the position that it was disinterested in the rate structure issue, then it could have protected itself in various ways, including by simply allowing the automatic stay to remain in effect. SSU's conduct created the refund liability that SSU faces today, and the Commission correctly determined that SSU

took the risk of refunding excessive rates as well as not collecting its full revenue requirements.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail, postage prepaid, this 15th day of November, 1995 to the following persons:

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