

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-95-1568-FOF-WS
availability charges by Southern) ISSUED: December 18, 1995
States Utilities, Inc. for)
Orange-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.)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING OFFICE OF PUBLIC COUNSEL'S
FIFTH MOTION TO DISMISS

BY THE COMMISSION:

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to areas in 25 counties. On June 28, 1995, SSU filed an application requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes, an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

By Order No. PSC-95-0901-PCO-WS, issued July 26, 1995, we acknowledged the intervention of the Office of the Public Counsel (OPC). We granted the Sugarmill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc. intervenor status by Order No. PSC-95-1034-PCO-WS, issued August 21, 1995. We granted the Marco Island Civic Association, Inc., intervenor status by Order No. PSC-95-1143-PCO-WS, issued September 14, 1995.

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By Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, we denied SSU's request for interim rates in this docket, but acknowledged that the utility may file another petition for interim relief. On November 13, 1995, SSU filed a second request for interim rates.

On October 17, 1995, OPC filed its Fifth Motion to Dismiss. OPC contended the matters raised in its first, seventh and eighth motions demonstrated SSU's flagrant disregard of our discovery rules. OPC stated that SSU ignored its obligation to respond to discovery in a timely manner, which in turn impeded OPC's preparation and ability to file testimony. OPC contended that this rate proceeding should be dismissed as a result of SSU's failure to respond to discovery in a timely manner. In support of its contention, OPC cited Watson v. Peskoe, 407 So.2d 954 (Fla 3d DCA 1981), which holds that "a deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions [dismissal]." Watson at 954.

In its October 24, 1995, response SSU contended that it worked diligently to respond to the hundreds of discovery requests served by OPC and had not willfully or flagrantly disregarded OPC's discovery requests. The utility listed the dates to which it responded to OPC's discovery to support its argument that most of its responses were served on time, and that it made efforts to ensure that the late responses were made as soon as possible. SSU cited Neal v. Neal, 636 So.2d 810 (Fla. 1st DCA 1994) and the cases cited therein, for the proposition that dismissal of a rate case is "the ultimate sanction" that should only be utilized in extreme cases. The utility stated that it had not been sanctioned by the Prehearing Officer and had complied with our rules and orders regarding discovery. It further argued that OPC was not prejudiced in the discovery process.

OPC's Fifth Motion to Dismiss cites the matters raised in its First, Seventh and Eighth Motions to Compel as grounds for dismissal. In its First Motion to Compel, filed August 31, 1995, OPC listed approximately 110 interrogatories and requests for production which had not been served within the 35 day period allotted for discovery responses. Order No. PSC-95-1258-PCO-WS, issued October 13, 1995, noted that the significant portion of those responses were served after OPC's first motion to compel was filed. In fact, only one interrogatory from that first motion to compel had to be addressed in that order: SSU was ordered to respond to Interrogatory No. 87. Similarly, when OPC filed its seventh and eighth motion to compel, several responses to its interrogatories and requests for production remained outstanding. However, as stated in Order No. PSC-95-1394-PCO-WS, issued November

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9, 1995, following the filing of the motions to compel, SSU responded to all of the outstanding discovery requests.

Motions to dismiss are typically addressed by considering whether the facts set forth in the initial pleadings, viewed in the most favorable light, demonstrate a claim for which we can grant relief under the provisions of Section 367.081, Florida Statutes. This standard is not applicable to OPC's motion. OPC did not allege that SSU did not state a cause of action, but rather that SSU's petition should be dismissed because of SSU's failure to respond to discovery requests in a timely manner.

OPC's motion sought dismissal as a punitive sanction, rather than for failure to state a cause of action. We have the authority to dismiss a matter for failure to comply with discovery procedures. Rule 25-30.034, Florida Administrative Code, permits sanctions against a party that does not comply with discovery procedures or an order requiring discovery. Dismissal is permissible under Rule 1.380, Florida Rules of Civil Procedure. See also Rule 25-30.042, Florida Administrative Code.

The dismissal of a proceeding, even a dismissal without prejudice, is a severe penalty to impose upon a party. It is "the most severe of all sanctions, and should be employed only in extreme circumstances." Neal v. Neal, 636 So.2d 810, 812 (Fla. 1st DCA 1994). It requires an express finding of a willful or deliberate refusal to obey an order regarding discovery. Commonwealth Federal Savings & Loan v. Tubero, 569 So.2d 1271, 1273 (Fla. 1990). The party moving for sanctions must demonstrate meaningful prejudice as a result of the failure to comply. In re Estate of Brandt, 613 So.2d 1365, 1367 (Fla. 1st DCA 1993).

Pursuant to Rule 25-22.034, Florida Administrative Code, and Order No. PSC-95-0943-PCO-WS, issued August 4, 1995, the discovery procedures in this docket are governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The volume and complexity of the utility's filing is unique. The nature of this docket requires cooperation and consideration by all parties. Even given the volume of discovery, parties in this docket are expected to comply with discovery requests in a timely manner.

SSU's untimely responses did not comply with Rules 1.340 and 1.350, Florida Rules of Civil Procedure, or our rules and orders cited above. Moreover, when the utility recognized that certain responses would be late, it could have notified OPC of the delay, and the anticipated response time. This may have alleviated the need for OPC to file its motions to compel. Nonetheless, while SSU has not responded to every request within the appropriate time

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period, the vast majority of the discovery has been responded to within the appropriate time limits. We therefore find that SSU's untimely responses to discovery do not rise to the level for which sanctions should be imposed, let alone the dismissal of the entire proceeding. SSU has not wilfully or deliberately refused to comply with the Commission's rules or orders, as required by Neal v. Neal. Furthermore, we find that OPC has not demonstrated a meaningful prejudice which would justify the dismissal of the case, as required by In re Estate of Brandt.

We further note that Order No. PSC-95-1394-PCO-WS requires the utility to notify the party propounding the discovery request, if that request cannot be responded to within the 30 day timeframe. This requirement gives parties notice as to untimely discovery, and may rectify potential disputes before they are brought before the Commission.

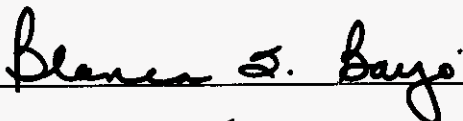
For the reasons set forth above, we deny OPC's Fifth Motion to Dismiss. This docket shall remain open for further proceedings.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that OPC's Fifth Motion to Dismiss is hereby denied. It is further

ORDERED that this docket shall remain open for further proceedings.

By ORDER of the Florida Public Service Commission, this 18th day of December, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.