

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

December 20, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MS*
DIVISION OF WATER AND WASTEWATER (WILLIS) *W*

RE: UTILITY: SOUTHERN STATES UTILITIES, INC. (ORANGE-OSCEOLA UTILITIES, INC.)
DOCKET NO. 950495-WS
COUNTY: 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

CASE: APPLICATION FOR RATE INCREASE 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 BY SOUTHERN STATES UTILITIES, INC.

AGENDA: JANUARY 3, 1996 - REGULAR AGENDA - MOTION FOR RECONSIDERATION -- PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\SSURECO2.RCM

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida

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Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. The utility also requested that the Commission approve an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

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

On September 18, 1995, OPC filed a Motion for Appointment of Counsel. SSU filed a response in opposition to that request. By Order No. PSC-95-1387-PCO-WS, issued November 8, 1995, the Prehearing Officer denied OPC's motion. On November 15, 1995, OPC filed a Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS, wherein it requests that the full Commission consider the Prehearing Officer's order. OPC has not requested oral argument on its motion.

This recommendation addresses OPC's Motion for Reconsideration.

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DISCUSSION OF ISSUES

ISSUE 1: Should OPC's Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS, be granted?

RECOMMENDATION: No, OPC's motion for reconsideration should be denied because OPC has failed to meet the standard for reconsideration. Order No. PSC-95-1387-PCO-WS does not contain a mistake of fact or law. The Commission should not consider the matter on a de novo basis. Oral argument should not be heard on this motion as it was not requested and is not necessary. (O'SULLIVAN)

STAFF ANALYSIS: Rule 25-22.0376(1) Florida Administrative Code, permits a party who is adversely affected by an order of a prehearing officer to file a motion for reconsideration of that order. The standard for reconsideration is as set out in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). In that case, the Florida Supreme Court stated that the purpose of a petition for rehearing is merely to bring to the attention of the trial court or the administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment. Id. at 891. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based on specific factual matters set forth in the record and susceptible to review. We have applied these standards in our review of OPC's motion.

On September 18, 1995, OPC filed a Motion for Appointment of Counsel, requesting that the Commission require SSU to provide funding for representation for legal representation of what OPC perceived as two separate groups of customers created by SSU's petition for uniform rates. SSU filed a response in opposition to that request.

By Order No. PSC-95-1387-PCO-WS, issued November 8, 1995, the Prehearing Officer denied OPC's motion. The order stated that the Commission has no authority to appoint additional counsel as OPC requested. The statutory provisions related to Public Counsel, Sections 350.061 and .0611, Florida Statutes, authorize Public counsel to represent the public, but are silent as to Public Counsel's authority to seek other counsel where a conflict of interest is present. The order further noted that even if the

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Commission had the authority to grant OPC's request, OPC incorrectly and prematurely categorizes the customers into two separate groups, before the record has been developed in this proceeding.

On November 15, 1995, OPC filed its Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS. OPC restates the grounds upon which it sought the appointment of counsel. OPC contends that the issue has never before been considered by the Commission, and that it is a unique and important matter. Therefore, OPC requests that the Commission waive the typical standard for reconsideration, and consider its motion de novo.

According to Rule 25-22.0376(5), Florida Administrative Code, oral argument on a motion for reconsideration may be granted at the Commission's discretion. Because OPC did not request oral argument, and because Staff believes that oral argument is not necessary in order for the Commission to fully review OPC's motion, Staff recommends that oral argument not be heard on this motion.

The utility opposes OPC's motion for reconsideration. In its November 22, 1995, response, SSU asserts that OPC has made no effort to show that Order No. PSC-95-1387-PCO-WS contains a mistake of fact or law. SSU contends that OPC's request for a de novo review by the Commission is inappropriate, and conflicts with a motion for reconsideration filed by OPC in Docket No. 920199-WS. In that motion, OPC employed the "traditional" standard for reconsideration.

OPC has not demonstrated that the Prehearing Officer made a mistake of fact or law in her ruling, as required by Diamond Cab. OPC has not demonstrated, or even alleged, that the order contains error. Therefore, Staff recommends that the Commission deny OPC's motion for reconsideration because it fails to meet the required standard.

Staff also recommends that the Commission deny OPC's request that the Commission consider its motion on a de novo standard. De novo literally means "anew" or "afresh". When a matter is considered de novo, the underlying decision is suspended, and the reviewing court retries the merits of the case. OPC based its request on the grounds that its request for appointment of counsel is unique and important. OPC did not demonstrate the claim of uniqueness and importance in its motion. Even if it had, the importance of an issue is not a factor in granting reconsideration or hearing a matter de novo. OPC has cited no authority or case

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law to support its request that the Commission apply a de novo standard of review on a motion for reconsideration. The very name "reconsideration" implies a examination of a previously-made decision for error, not another hearing of the matter. OPC's request for a de novo review asks that the Commission change its mind, not correct error. The cases cited above demonstrate that a motion for reconsideration is not intended to allow the Commission to change its mind, unless there is a showing that a mistake was made in the earlier decision.

The same standard of review is applicable, whether the order is the result of a prehearing officer's decision, or the decision of the full Commission. The recently adopted Rule 25-22.0376, Florida Administrative Code, makes clear that a party may seek reconsideration of a prehearing officer's order, not de novo review. In Order No. PSC-95-0818-NOR-PU, issued July 6, 1995¹, the Commission stated in the "Purpose and Effect" portion of the notice that the rule was intended to clarify that the review standard is reconsideration, not de novo. Moreover, prior to the adoption of Rule 25-22.0376, the Commission determined in several cases that a de novo review of an order was inappropriate.

For instance, in Order No. PSC-93-0812-FOF-TL, issued May 26, 1993², the Commission held that:

the standard applied by the Commission when reviewing a Prehearing Officer's order is the same as that applied for any other matter on reconsideration: has the Prehearing Officer failed to consider some matter or made any mistake of law.

OPC's motion for reconsideration offers no grounds upon which the Commission could base a departure from case law, Commission rules, and Commission decisions. A de novo review would indeed be a "second bite of the apple." Although OPC has not demonstrated

¹In re: Adoption of Proposed Rule 25-22.0376, F.A.C., Reconsideration of Prehearing Officer Orders; and 25-22.038, F.A.C., Prehearing Officer, Prehearing Statement; Prehearing Conferences; and Prehearing Order. 95 F.P.S.C. 7:58 (1995).

²In re: Comprehensive review of revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company, et al., Docket No. 920260-TL, 93 F.P.S.C. 5:611 (1993).

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any error in Order No. PSC-95-1387-PCO-WS, it requests that the full Commission consider the arguments of OPC's original motion. Staff recommends that the Commission deny OPC's motion for reconsideration because it falls to meet the standard for reconsideration and because de novo review is inappropriate.