

FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

January 25, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

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

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: FEBRUARY 6, 1996 - REGULAR AGENDA -- INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-C.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 acknowledging the intervention of the Office of the Public Counsel (OPC). The Sugarmill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc., 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., by Order No. PSC-95-1143-WS, issued September 14, 1995. More recently, On January 17, 1996, the Commission granted intervention to Concerned Citizens of Lehigh Acres and Harbor Woods Civic Association, Inc. by Orders Nos. 96-PSC-0089-PCO-WS and 96-PSC-0090-WS, respectively.

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. The order stated that the Commission had no authority to appoint additional counsel as OPC requested, that the law does not provide for OPC's retention of alternate counsel in the event of a conflict, and that OPC incorrectly and prematurely categorized the customers into two separate groups. On November 15, 1995, OPC filed a Motion for Reconsideration of Order No. PSC-95-1387-PCO-WS, wherein it requested that the full Commission consider the Prehearing Officer's order. OPC did request oral argument on its motion. SSU filed a response opposing OPC's motion on November 22, 1995.

At its January 16, 1996, Agenda Conference, the Commission determined that, on its own motion, it would hear OPC's motion for counsel on a de novo basis, based upon the original pleadings that were filed on the issue. This recommendation addresses OPC's motion for counsel on those grounds.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission allow oral argument on OPC's Motion for Appointment of Counsel?

RECOMMENDATION: Yes. Oral argument should be limited to five minutes for each side. (O'SULLIVAN)

STAFF ANALYSIS: At the January 16, 1996, Agenda Conference, the Commission decided to hear OPC's motion on a de novo basis, and indicated that oral argument would be appropriate because of the uniqueness of the motion. Because the Commission has indicated a willingness to hear oral argument, and the fact that this case has not yet proceeded to hearing, Staff recommends that the Commission permit oral argument on OPC's motion. Staff further recommends that the Commission grant each side five minutes for argument, and that the argument be based upon the original pleadings filed by the parties regarding this issue.

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ISSUE 2: Should the Commission grant OPC's Motion for Appointment of Counsel?

RECOMMENDATION: No. The Commission does not have the authority to require the utility to provide alternate counsel for different groups of SSU's customers. While Public Counsel is vested with the responsibility to provide legal representation by statute, Florida law does not provide for the appointment of alternate counsel. (O'SULLIVAN)

STAFF ANALYSIS: 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. OPC asserted that the uniform rate structure requested by SSU creates two distinct customer groups whose interests are adverse, and that Public Counsel's representation of either group would be harmful to the other group's interests. OPC cited Rule 4-1.7 of the Rules of Professional Conduct, which prohibits a lawyer from representing a client if that representation will be directly adverse to the interests of another client.

Staff notes initially that OPC's motion refers to prior cases involving SSU. However, Staff construes this motion as only referring to the current rate proceeding. Furthermore, Paragraph 2 of the motion states that "OPC has extensively participated in the instant case through hearing before the Commission and subsequent appeal." This docket, 950495-WS, is in the initial stages of proceeding and a formal hearing has not yet taken place. OPC also contends that the Commission's resolution of this case provides for a state wide uniform rate which has generated controversy." While the Commission approved a uniform rate structure in Docket No. 920199-WS and addressed a uniform rate structure on a going-forward basis in Docket No. 930880-WS, the Commission has not established a final rate structure in this docket, and will not do so until the conclusion of the proceedings.

SSU filed a response on October 2, 1995. SSU contended that the Commission lacks the statutory authority to grant OPC's request. OPC has deferred from advocating rate design positions in past cases without filing a similar motion. SSU argued that the customers have received notice of the uniform rate structure and may participate in the hearings. SSU contended that OPC incorrectly assumed that all customers in each group would have the

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same position regarding uniform rates, and further pointed out that there may be more than two groups of customers. SSU claimed that the granting of OPC's request would result in bad public policy and an escalation of rate case expense.

Duties of Public Counsel

The Public Counsel is authorized to represent the general public and to file actions and appear in the name of the State or its citizens, pursuant to Sections 350.061 and .0611, Florida Statutes. Section 350.0614(1), Florida Statutes, specifically provides for the compensation and payment of expenses of the Office Public Counsel:

The salaries and expenses of the Public Counsel shall be allocated by the [Joint Legislative Auditing] committee only from moneys appropriated to the Public Counsel by the Legislature.

Florida law permits the Public Counsel to retain the services of additional attorneys or experts, "to the extent that the best interests of the people of the state will be better served thereby," provided such expenses are authorized by the Joint Legislative Auditing Committee. Section 350.0613, Florida Statutes.

Florida law places the authority and duty to provide counsel to the general public in utility matters upon the Public Counsel. The law permits Public Counsel to utilize additional attorneys in order to serve the best interest of the citizens. One could argue that the procedures are already in place for OPC to obtain the services of alternate counsel by virtue of Section 350.0613, although that statute does not specifically mention conflict.

Commission's Authority

OPC has not cited any statutory language to support its request, nor has it indicated any case law or other authority which might support its contention that the Commission can require a utility to provide counsel for divergent customer groups. While OPC has not addressed the Commission's authority, Staff believes that the Commission's authority is the most important consideration when reviewing OPC's motion.

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Section 350.011 sets forth the Commission's general jurisdiction over utility matters, and Section 367.011(2), Florida Statutes, grants the Commission exclusive jurisdiction over the authority, service, and rates of water and wastewater utilities. While these sections are construed broadly, OPC's request does not fall within the Commission's general authority. Moreover, the appointment of counsel for utility customers is not one of the enumerated powers of the Commission listed in Section 367.121, Florida Statutes. Any reasonable doubt as to the existence of a particular power being exercised by the Commission must be resolved against its exercise. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493, 496 (Fla. 1973).

This determination is further supported upon examination of statutory provisions which address representational conflicts in other legal arenas. In a case of a conflict between the representation of two clients, Section 27.53(3), Florida Statutes, authorizes the public defender in a judicial circuit to petition the trial court to appoint other counsel. The compensation for the alternate counsel is paid by the local county. Section 925.036, Florida Statutes. In the case of a conflict in the Office of Capital Collateral Representative (CCR), CCR is authorized to petition the sentencing court for alternate counsel. CCR must also pay for appointed counsel. Section 27.703, Florida Statutes. The Department of Legal Affairs, which is responsible for providing legal services to any department in the state, is authorized to utilize public counsel when a professional conflict of interests exists. Section 16.015, Florida Statutes.

There is no statutory directive regarding the appointment of counsel when a conflict exists in the Public Counsel's office. The principle of statutory construction of inclusio unis est exclusio alterius applies in this situation. The fact that the appointment of counsel is addressed in other statutes, but not in Chapter 350, leads to the conclusion that Florida law does not provide for alternate counsel in this situation. In addition, none of the above cited statutes require the opposing party to provide additional counsel in the event of a perceived conflict.

Chapters 350 and 367, Florida Statutes, are silent on the provision for appointment of counsel in the event of a perceived conflict. We cannot construe legislative intent where none appears to exist. If the Legislature had intended to provide a mechanism for conflict counsel in utility matters, it would have expressly provided so. Therefore, Staff recommends that the Commission does

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not have the authority to appoint other counsel, nor does it have the authority to require the utility to pay for counsel.

Rate Structure and Conflict of Interest

Staff believes that even if the Commission had the authority to appoint counsel and require the utility to pay for the counsel, OPC has not demonstrated that a professional conflict exists among the classes of customers which would be "winners" or "losers" under the single tariff rate structure. The interests of customers cannot always be quantified merely by the rates which will be set, although rates are obviously a major factor. Moreover, customers groups could not likely be quantified into two categories, as there are many possible variations on rate structure which may result in this hearing.

Other Considerations

As to the issue of requiring SSU to provide funds for counsel, OPC states that the expense would be prudently incurred and could be considered rate case expense. However, this contention assumes that the Commission has the authority to order the utility to incur such expenses. Section 367.0816, Florida Statutes, permits the amount of rate case expense determined by the Commission pursuant to the provisions of Chapter 367 to be recovered in rates. However, as stated above, the Commission has no authority pursuant to Chapter 367 or Chapter 350 to require the utility to incur this expense. Essentially, the Commission would be requiring SSU to pay at least in part for an attorney to advocate against its own interests, which may cause constitutional due process or takings concerns.

Staff is also notes that the schedule of this case has already been extended once to permit additional noticing and customer service hearings. OPC has not indicated in its motion whether or not it believes that the Commission should restart the clock in this case if alternate counsel is granted. An appointment of counsel would likely cause a request to reschedule customer service hearings and extend the time for filing testimony and other key dates.

Finally, Staff has recommended that the Legislature has not provided for alternative counsel because the statutes do not expressly set forth those provisions. OPC's more appropriate remedy may be to seek an amendment of Chapter 350 in order to

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accomplish what it has requested in its motion.

Conclusion

Staff agrees that this is an important issue which affects countless utility customers throughout the state. However, absent a statutory provision which permits the Commission to appoint counsel in the manner suggested by OPC, or a statutory provision which permits OPC to obtain counsel similar to those provisions for public defenders and CCR, Staff recommends that the Commission does not have the authority to grant OPC's request.