

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

February 13, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING *[Handwritten initials]*

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *[Handwritten initials]*
DIVISION OF WATER AND WASTEWATER (WILLIS) *[Handwritten initials]*

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 20, 1996 - REGULAR AGENDA - MOTION FOR RECONSIDERATION -- INTERESTED PERSONS MAY PARTICIPATE IF ISSUE NO. 1 IS APPROVED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-S.RCM

CASE BACKGROUND

On June 28, 1995, Southern States Utilities, Inc. (SSU or utility) filed an application with the Commission 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

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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. The Commission acknowledged the intervention of the Office of the Public Counsel (OPC) by Order No. PSC-95-0901-PCO-WS, issued July 26, 1995.

On September 22, 1995, OPC filed two separate motions: Citizens' Fifth Motion to Compel and Fifth Motion to Postpone Date for Filing Intervenor Testimony, and Citizen's Sixth Motion to Compel, Sixth Motion to Postpone Date for Filing Intervenor Testimony, and Motion to Impose Sanctions. On September 29, 1995, SSU filed a separate response to each of OPC's motions and a Second Motion for Protective Order. In its Fifth Motion to Compel, OPC stated that its Request for Production of Document No. 71 required SSU to provide a copy of all federal income tax returns and all schedules, workpapers, and consolidating schedules for Minnesota Power and Light (MP&L) for the years 1992 through 1994. OPC alleged that while SSU produced those documents for inspection at the utility's office on September 19 and 20, 1995, the utility refused to allow OPC to copy the documents. OPC contended that Rule 1.350, Florida Rules of Civil Procedure, which the Commission has adopted, allows parties to inspect and copy documents. OPC further contended that SSU's refusal to permit duplication of the documents impeded OPC's preparation in this docket.

In its response, SSU contended that OPC consented to SSU's manner of producing the documents, and had therefore essentially waived any objection. SSU stated that it notified OPC in its September 7, 1995, response that "since these items are confidential, they will be available for review but may not be copied," and that OPC made arrangements to view the documents without objecting to this method of production. SSU argued that this method of production is an accepted practice, one that OPC and SSU have employed in past rate case filings. SSU stated that it was not until OPC representatives were inspecting the documents on September 19, 1995, that OPC first demanded copies of the documents. OPC representatives compiled a list of documents which they wished to copy. SSU attached that list to its response as Exhibit C. SSU also stated that arrangements must be made for an MP&L employee to travel with the documents to Apopka.

In its Second Request for Protective Order, SSU raised

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arguments regarding the confidentiality of the documents, the relevance of the request, the burden of the request, and that some of the information sought has already been provided in other reports. SSU also contended that standard practice in the industry is to allow inspection but not the copying of tax returns, and that OPC is singling out SSU and MP&L for disparate treatment.

By Order No. PSC-95-1504-PCO-WS, (Order) issued December 5, 1995, the Prehearing Officer, inter alia, granted OPC's Fifth Motion to Compel and denied SSU's Second Motion for Protective Order. The Order held that neither merely informing a party of the intent to produce, but to deny copying, nor prior practice in that regard, will provide protection from copying of material produced under the discovery rules.

The Prehearing Officer also found that SSU's Second Motion for Protective Order failed to allege any compelling reason to deny OPC the opportunity to obtain copies of the consolidated tax returns related to Document Request No. 71. Finding that the confidentiality of the tax returns had been protected by Order No. PSC-95-1286-CFO-WS, issued October 17, 1995, the Order directed SSU to produce the consolidated tax returns for copying or provide copies of the documents listed in Exhibit C of SSU's response filed September 29, 1995, within ten days of Order No. PSC-95-1504-PCO-WS.

On December 15, 1995, SSU timely filed a Motion for Reconsideration of Order No. PSC-95-1504-PCO-WS. SSU also filed a Request for Oral Argument on that date. On December 18, 1995 OPC filed Citizens' Opposition to Southern States' Motion for Reconsideration of Order No. PSC-95-1504-PCO-WS.

This recommendation addresses SSU's motion for reconsideration and request for oral argument.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission allow oral argument on SSU's Motion for Reconsideration of Order No. PSC-95-1504-PCO-WS?

RECOMMENDATION: Yes. While the pleadings contain adequate information, because the matter has not gone to formal hearing yet, oral argument should be permitted, with each side allocated five minutes. (O'SULLIVAN)

STAFF ANALYSIS: SSU's November 2, 1995, motion for reconsideration was accompanied by a request for oral argument. Pursuant to Rule 25-22.0376(5), Florida Administrative Code, oral argument in this instance is granted at the Commission's discretion. Rule 25.22-058(1), Florida Administrative Code, requires a party requesting oral argument to "...state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it."

SSU's request reiterates the points of its underlying motion, and states that oral argument would aid the Commission, "in light of the critical nature of the facts, the important questions of law and the adverse precedential impact of the order." OPC did not indicate any opposition to oral argument.

Staff believes that the Commission has more than adequate information from the pleadings in order to make its decision. However, because this matter has not yet gone to formal hearing, parties should be given the opportunity to address the Commission on this matter. Therefore, Staff recommends that the Commission grant SSU's request for oral argument. Each side should be given five minutes for oral argument.

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ISSUE 2: Should SSU's Motion for Reconsideration of Order No. PSC-95-1504-PCO-WS, be granted?

RECOMMENDATION: No. SSU's motion for reconsideration should be denied. SSU should be ordered to produce the requested tax returns of MP&L to OPC at SSU's Apopka offices for inspection and copying without condition within five days of the Commission's vote on this issue. (O'SULLIVAN, WILLIS)

STAFF ANALYSIS: Rule 25-22.038(2), Florida Administrative Code, permits a party who is adversely affected by an order of the Prehearing Officer to seek reconsideration by the prehearing officer or review by the Commission, by filing a motion in support thereof within ten days of service of the order. The judicial standard for reconsideration is 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. Staff has applied these standards in this recommendation.

In its motion, SSU seeks the review of the full Commission of that portion of Order No. PSC-1504-PCO-WS granting OPC's Fifth Motion to Compel. SSU asserts that:

- (1) the Order is premised on a mistake of law as to a utility's ability to request and the Commission's authority to grant relief other than a temporary exemption from Section 119.07(1), Florida Statutes, through a motion for temporary protective order filed pursuant to Rule 25-22.006(5)(c), Florida Administrative Code;
- (2) the Order contains a mistake of law and fact as to the question of OPC's waiver of its right to copy the tax return documents; and

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- (3) the Order contains a mistake of law and fact insofar as it ignores the relevancy arguments SSU made in its Motion for Protective Order. SSU asserts that the majority of MP&L's tax returns which are sought by OPC are not related to this docket and are not reasonably calculated to lead to admissible evidence.

SSU's motion concludes by stating that the utility's counsel contacted OPC counsel in this matter, and that SSU would attempt to resolve the dispute and advise the Commission of the results.

In its response, OPC simply states that it served a request for production of documents on SSU seeking to inspect and copy the income tax returns of MP&L on July 18, 1995, and that, five months later, it still does not have copies of these documents, which it asserts it has a right to obtain under applicable discovery rules.

The essence of SSU's first assertion appears to be that the Prehearing Officer ruled that the utility erred when it failed to request protection from OPC's copying of the documents in question at the time that it requested a temporary protective order on September 21, 1995, a time when it knew copying was at issue. SSU appears to argue that at that time it was merely responding to OPC's First Set of Requests for Production of Documents, and that it was then only permitted to seek a temporary protective order pursuant to the confidentiality provisions of Rule 25-22.006(5)(c), Florida Administrative Code. Accordingly, SSU asserts that the Prehearing Officer premised the denial of protection on a mistaken reading of Rule 25-22.006(5)(c), Florida Administrative Code.

Staff does not believe that SSU has correctly interpreted the Prehearing Officer's ruling. A party may at any time move for a protective order during the course of discovery, and may request that the method of discovery be limited to certain proscribed terms. Rule 1.280(c), Florida Rules of Civil Procedure. The Order may not be completely clear on this point, but Staff believes that the cited portion of the Order refers to the timing of the request, and not that the request be made pursuant to the confidentiality rules. Moreover, the Prehearing Officer expressly considered SSU's subsequent Motion for Protective Order, filed appropriately in response to OPC's Motion to Compel, and found that there was no compelling reason to deny OPC the opportunity to obtain copies of

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MP&L's tax returns. In other words, the Order did not deny SSU the protection because SSU did not file for protection at the time confidentiality was sought.

In support of its second assertion, SSU states that OPC waived its right under Rule 1.350, Florida Rules of Civil Procedure, by three times consenting to SSU's condition that OPC would be permitted to inspect, but not copy, the documents in question. SSU further states that in its Second Motion for Protective Order it presented in detail the factual basis for OPC's waiver. Staff believes that the Order does not contain a mistake of fact or law in its finding. The Order found that under the discovery rules, neither informing a party of the conditions of production nor prior practice will provide protection. Waiver was not a consideration because waiver is not an element of production in discovery. The Order indicates that the facts regarding OPC's conduct which were alleged by SSU were known, but were apparently unpersuasive. Staff also notes that SSU's detailed legal arguments regarding waiver in its motion for reconsideration were not contained in its initial response to OPC's motion to compel. Reconsideration is not an opportunity to raise new arguments.

In support of its third assertion, SSU states that much of the information in MP&L's consolidated tax return is irrelevant to these proceedings. SSU also reiterates its request for protective order to limit OPC's discovery to those portions of MP&L's tax returns that are relevant to the issues in the present docket or reasonably calculated to lead to the discovery of admissible evidence in the present docket. Once again, it is apparent to Staff that the Prehearing Officer properly considered SSU's relevancy argument and was not persuaded by it.

Staff recognizes that, according to SSU's motion, an effort was made by the parties to resolve the dispute. Apparently, no resolution was reached. Staff recommends that there was no mistake of law or fact, nor anything overlooked or not considered, in Order No. PSC-95-1504-PCO-WS, staff recommends that the Commission deny SSU's Motion for Reconsideration of the Order. Furthermore, staff recommends that the Commission order the utility to make available without condition the consolidated tax returns of MP&L which OPC has requested for inspection and copying at SSU's offices in Apopka within five days of the Commission's vote.