

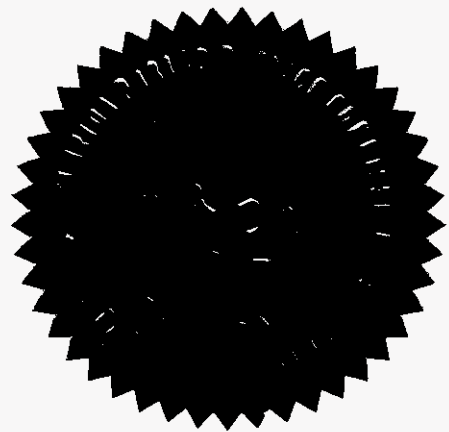
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of

Application for rate increase
in Brevard, Charlotte/Lee,
Citrus, Clay, Duval, Highlands,
Lake, Marion, Martin, Nassau,
Orange, Osceola, Pasco, Putnam,
Seminole, Volusia and Washington
Counties by SOUTHERN STATES
UTILITIES, Inc.; Collier County
by MARCO SHORES UTILITIES
(Deltona); Hernando County by
SPRING HILL UTILITIES (Deltona);
and Volusia County by DELTONA
LAKES UTILITIES (Deltona).

DOCKET NO. 920199-WS



PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 11
 ORAL ARGUMENT

BEFORE: CHAIRMAN SUSAN F. CLARK
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER JULIA L. JOHNSON
 COMMISSIONER DIANE K. KIESLING
 COMMISSIONER JOE GARCIA

DATE: February 20, 1996

TIME: Commenced at 1:00 a.m.
 Concluded at 2:00 p.m.

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: ROWENA NASH HACKNEY
 Official Commission Reporter
 (904) 413-6736

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24

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I N D E X

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P R O C E E D I N G S

(Hearing convened at 11:08 a m.)

CHAIRMAN CLARK: We are ready to reconvene the agenda conference, and we are scheduled to take up Item 11 at this point. Ms. Jaber.

MS. JABER: Commissioners, Item 11 addresses the Staff's recommendation on SSU's motion for reconsideration of what we will call the remand order. To introduce the issues for you, in Issue 1 we are recommending that the parties be allowed 15 minutes for each side of oral argument.

In Issues 2 and 3, we are recommending that the City of Keystone Heights and Putnam County's Petitions to Intervene be denied.

In Issue 4 we are recommending that Sugarmill Woods' Motion to Strike Affidavits be granted, but the Motion to Strike Portions of the Motion for Reconsideration should be denied.

In Issue 5, that is the main issue on reconsideration. We are recommending that it be granted in part and denied in part. Specifically, granted with respect to the portion that deals with the one-inch meters.

In Issue 6 -- Issue 6, Staff has included two recommendations, and they are to address the

1 interest on the refund issue that was raised by SSU in
2 its motion.

3 Issue 7, Staff is recommending that SSU's
4 Motion for Leave to File Reply be denied.

5 And in Issue 8, we are recommending that the
6 docket be closed.

7 CHAIRMAN CLARK: Ms. Jaber, just so I'm
8 clear, on Issue 1, what is the oral argument intended
9 to address? Every issue listed?

10 MS. JABER: SSU specifically filed a Request
11 for Oral Argument, and it's generically addressed to
12 every issue. They didn't specifically leave anything
13 out.

14 CHAIRMAN CLARK: Okay. Is there a motion on
15 Issue 1?

16 COMMISSIONER JOHNSON: Move it to allow the
17 oral argument and that it be limited.

18 MR. HOFFMAN: Madam Chairman, if I may
19 before you vote on this, I wanted to make sure the
20 Commissioners understood that we filed a Request for
21 Oral Argument directed only to our motion for
22 reconsideration of the orders. So we would ask that
23 our 15 minutes be preserved to address that order, of
24 motion for reconsideration of that order.

25 CHAIRMAN CLARK: But just so I'm clear,

1 Mr. Hoffman, that would mean Issue 5 --

2 MR. HOFFMAN: Yes.

3 CHAIRMAN CLARK: -- 6, 7? 5, 6, and 7?

4 MR. HOFFMAN: Yes.

5 CHAIRMAN CLARK: Okay.

6 COMMISSIONER DEASON: Let me ask a question.

7 I'm sorry, there was a motion made to grant oral
8 arguments?

9 COMMISSIONER JOHNSON: Uh-huh.

10 COMMISSIONER DEASON: I have a question. Is
11 15 minutes per side, does that mean per side or per
12 party? We need to get that clarified before we begin.

13 COMMISSIONER JOHNSON: Well, actually, I was
14 going to kind of try to walk through with Staff
15 anyway. Because on the Petition for Leave to
16 Intervene, do they have to request oral argument, or
17 do they automatically get it anyway?

18 MS. JABER: Well, this is a unique
19 situation. Traditionally with cases that have gone to
20 the appellate court and come back, oral argument is
21 not granted. But last time we recognized the unique
22 situation with this docket and, also, I think, in the
23 GTE case. In both cases you allowed oral argument.

24 COMMISSIONER JOHNSON: As I thought.

25 MS. JABER: I tried to be consistent in

1 recommending oral argument here. The petitions to
2 intervene, it's within your discretion. I treated
3 every issue the same.

4 COMMISSIONER JOHNSON: So with respect to
5 oral argument, you were recommending that we allow
6 oral argument on all of the issues?

7 MS. JABER: On all of the issues.

8 COMMISSIONER JOHNSON: And with respect to
9 the parties, how did we split it up? Because we had
10 that issue on another case. And how did we resolve
11 that?

12 MS. JABER: In this case.

13 COMMISSIONER JOHNSON: Oh, was it this case?

14 MS. JABER: Traditionally -- in every single
15 situation that is involved in this docket, you have
16 allowed oral argument per side. So, for example, on
17 SSU's motion for reconsideration, you've treated
18 Citrus County, Sugarmill Woods, and OPC, one side; and
19 you've allowed them 15 minutes. If you gave them more
20 time, then you gave SSU the same amount of time.

21 COMMISSIONER JOHNSON: I'd like to have it
22 per side the way we have traditionally been handling
23 these, but I would allow oral argument on all issues.

24 CHAIRMAN CLARK: That's your motion, that we
25 allow oral argument on all issues and that it be

1 limited to 15 minutes per side?

2 COMMISSIONER JOHNSON: Uh-huh.

3 CHAIRMAN CLARK: Is there a second?

4 COMMISSIONER DEASON: Second.

5 CHAIRMAN CLARK: All those in favor say aye.

6 COMMISSIONER JOHNSON: Aye.

7 COMMISSIONER DEASON: Aye.

8 COMMISSIONER KIESLING: Aye.

9 COMMISSIONER GARCIA: Aye.

10 CHAIRMAN CLARK: Aye. Opposed nay.

11 All right, 15 minutes per side.

12 Mr. England, it is Southern States' motion,

13 so you will go first. Do you wish to reserve any

14 time?

15 MR. ENGLAND: Madam Chairman, I do, five

16 minutes. I'm going to be addressing, as you said,

17 Issues No. 5, 6, and 7. I'm not going to make any

18 comments of Issues 2, 3, and 4.

19 CHAIRMAN CLARK: That's up to you.

20 Mr. Howe, Mr. Twomey, and Ms. Fox, when I

21 get to you, please let me know how you want your time

22 divided.

23 Mr. England go ahead.

24 MR. ENGLAND: Thank you, Madam Chairman.

25 I really believe that the Commission and

1 each of you is fully familiar with the background for
2 this hearing. I want to set the stage, however, with
3 just a few highlights of the events that brought us to
4 this juncture.

5 In March of 1993, the Commission ordered a
6 revenue increase for Southern States of \$6.7 million
7 based on uniform rate design in order to produce a
8 revenue requirement of \$26 million, roughly, in the
9 combined systems. Now, Citrus County and a few of the
10 homeowners associations appealed uniform rate design,
11 and Public Counsel appealed the revenue requirement to
12 the First District Court of Appeal. 16 months later,
13 the district court invalidated the rate design for
14 finding an absence of functional relationship; and
15 most importantly to today's hearing, the district
16 court rejected the challenge of Public Counsel and
17 affirmed your order setting a revenue requirement of
18 \$26 million in the aggregate.

19 And it's important to make that observation
20 at this stage because it appears that the Commission
21 in the order that you entered in on October 19th, and
22 the Staff recommendation that preceded it in January,
23 mistakenly believed that the gross revenue
24 requirements established in 1993 were not challenged
25 in the district court, they were. You'll find

1 statements to the contrary in your order on Page 5,
2 and in the Staff's January 30 memorandum on Pages 13
3 and 16. But it's important to the legal principles we
4 have today that you know that they were challenged.

5 The Commission considered the district
6 court's remand order at a conference in September, and
7 then entered an Order on October -- the October 19th
8 Order that I'm referring to -- setting the modified
9 stand-alone rates.

10 The main problem that brings us here today,
11 ladies and gentlemen, is the Commission's decision
12 to -- at least I'll call it a tentative decision -- to
13 order a refund of \$8.2 million for those customers who
14 overpaid during the pendency of the appeal based on
15 the new modified stand-alone rates, with interest on
16 top of that, but not to order a catch-up payment,
17 either by way of a back payment or a prospective one.
18 No relief at all for the commensurate sum of money for
19 the people who underpaid during that same period of
20 time in relation to the new rates that have been
21 established.

22 That decision that you made tentatively
23 results in Southern receiving from its 1993 rate case,
24 where \$26 million was awarded to make the Company
25 whole, if you will, \$8.2 million less than you

1 determined in 1993 constituted just, reasonable, and
2 compensatory rates. And that brings us to today's
3 hearing. I'm going to rely on our written motion
4 regarding the one-inch meter charges which Staff has
5 indicated they support. I really want to limit my
6 time, at least to 10 minutes, to the issue of this
7 refund.

8 In passing, though, I have to point out and
9 I want to note, if at the end of the day you determine
10 that refunds are to be ordered, let me suggest that
11 there certainly should be no interest paid on those
12 refunds for all of the reasons we're expressed in our
13 Motion for Reconsideration, and you'll find that on
14 Page 38 to 40 of our memorandum.

15 The statute which is referenced in your
16 order doesn't deal with this situation, a
17 reconfiguration of rate design at the end of the case
18 but with no change in revenue requirements. Southern
19 never had any excess revenue. In 1993 you said we
20 were entitled to 26 million, including that \$6.7
21 million increase, and that's where you are today.
22 Nothing has changed in that regard.

23 No one has suggested a rationale for
24 imposing interest. And the consequence of it is a
25 further impairment of the revenue, \$8.2 million with

1 the interest on top of that stream impairing the
2 revenue stream that you said was necessary for this
3 Company's financial health. So this is in the nature,
4 if you will, of a penalty, not a reward. It's a
5 penalty against us for a problem which stems from
6 nothing that we did. A problem which stems from your
7 decision to move to uniform rates which, regrettably,
8 the district court has disagreed with.

9 It's our position then, as a matter of law,
10 as a starting point, you really cannot order refunds
11 to customers who will overpay under the uniform rate
12 design, unless you are also prepared to award Southern
13 the equivalent sum in some fashion from those who
14 underpaid under the uniform rate design. The
15 principle of law is standard that where an appellate
16 court has ruled on a question presented -- and revenue
17 requirements were presented -- the lower tribunal must
18 follow the court's directive and has no discretion,
19 and we cited the authorities in our memorandum. There
20 is no law to the contrary. That is the doctrine of
21 law of the case.

22 And the maintenance of Southern's revenue
23 stream at \$26 million, as you ordered in 1993 and
24 which was affirmed specifically by the district court,
25 is the law of this proceeding.

1 Now, your order of October 19 offers two
2 reasons, if you will, for ordering refunds, but not
3 equalizing that deficiency from revenue from other
4 customers. One are considerations of retroactive
5 ratemaking. The other is a notion the Southern
6 somehow assumed the risk of refunds when it posted
7 bond to vacate the automatic stay which kicked in
8 because Citrus County appealed the rate design.

9 I want to address both of those. The
10 Commission said that Southern can't collect from
11 customers who paid less during that pendency of the
12 appeal because that would be retroactive ratemaking.
13 And you cited for that the proposition that Citizens
14 versus Public Service Commission which described the
15 test, in general terms, as applying new rates to prior
16 consumption.

17 Commissioners, I ask you to consider this.
18 If persons who paid less for their prior consumption
19 under the uniform rate structure, which has now been
20 changed, cannot be equalized by the application of new
21 rates, by what rationale can persons who paid more for
22 their prior consumption be equalized with refunds
23 attributable to that same application of the same new
24 rates?

25 If overpaid customers get a refund, wouldn't

1 that also be applying the new rates to the prior
2 consumption? Of course, it would. This notion of
3 retroactive ratemaking has to be evenhanded. If
4 nothing in the case law, either conceptually or
5 verbally which says it applies to a particular class
6 of customers who happen to have paid more, it's
7 evenhanded.

8 So retroactive ratemaking really has no
9 application in this instance; or it has equal
10 application, as you will, which brings me to the
11 second basis for the Commission's refund order,
12 whether Southern assumed the risk of refunds to
13 individual customers. And I use that word cautiously,
14 as to individual customers, as opposed to an aggregate
15 revenue requirement when it posted bond.

16 I suggest to you, ladies and gentlemen, that
17 Southern never assumed the risk of refunds to
18 individual customers. When it posted bond as a
19 condition to vacate the automatic stay, Public Counsel
20 had lodged an appeal challenging the revenue
21 requirements. That revenue case, you'll recall,
22 involved over 120 separate challenges to Southern's
23 requested rate increase.

24 A Notice of Appeal does nothing but say the
25 case is being appealed. It does not describe issues.

1 There was no way to know how much, if any or all of
2 the \$6.7 million increase that you awarded would be on
3 the line in the District Court of Appeal. The only
4 risk that Southern assumed was a rejection of that
5 gross revenue requirement, or part of it, by the
6 district court. The rejection of rates that you had
7 found were the just, reasonable, and compensatory
8 rates under the applicable statute.

9 Southern had no choice when the automatic
10 stay went into effect. If it did nothing, it would
11 not have been able to collect that \$6.6 million during
12 the pendency of the appeal, the sum that you found was
13 necessary to maintain the financial integrity of the
14 Company. And only by exceeding to the bond
15 requirement could it assure that it would be made
16 consistently financially sound by protecting itself
17 against the possibility that some portion of that 6.7,
18 or the gross requirement of 26 million would somehow
19 be altered by the District Court of Appeal. That
20 would be a finding by the district court that what you
21 had found to be reasonable rates were unreasonable
22 rates. That's always the risk for which bond is
23 posted. It has not a thing in the world to do with
24 any individual customer who might by rate design pay a
25 different amount before and after a district court

1 decision.

2 So Southern had no choice, I suggest to you,
3 ladies and gentlemen. It would have contradicted its
4 own rate case filing, seeking revenues of \$26 million
5 to be sound, if it had turned its back on your
6 determination that the full amount of that revenue was
7 indeed required to maintain the Company's financial
8 integrity.

9 I suggest to you there is nothing in the
10 record of this proceeding that suggests that Southern
11 at any time offered to provide refund insurance to any
12 particular group of customers aggrieved by the rate
13 design that you imposed on Southern when you moved to
14 uniform rates and changed what had been proposed by
15 the Company. The fact that there is nothing in the
16 record --

17 CHAIRMAN CLARK: Mr. England, you have five
18 minutes left.

19 MR. ENGLAND: Thank you very much. I'll
20 have to talk faster or use some of my time.

21 It's clear from the comments of Commissioner
22 Deason at the transcript of the hearing that there was
23 no suggestion that we were taking individual risk.
24 Certainly, the Staff did not think it was an
25 individual risk that we had assumed, because Staff's

1 primary recommendation to you was no refund, which can
2 only be consistent with an absence of our having
3 volunteered, stipulated, agreed, or come in and said
4 we're happy to do that of our individual customers, a
5 refund. And there is lots of position on the record
6 on that.

7 Oddly, the one citation you have in your
8 Order on that is the United Telephone versus Mann, a
9 Supreme Court decision which, if it holds anything,
10 hold that rate decreases and rate increases are the
11 flip side of each other in a rate proceeding,
12 indistinguishable opposites in the ratemaking process.

13 Finally, I suggest that your order, I hope
14 tentative order, no where has addressed -- but you
15 have to take into account the condition of the utility
16 company itself, not just the interest of some
17 customers who have come before you. There's extensive
18 case law about your responsibility to make sure that
19 the Company is able to raise capital to maintain its
20 financial integrity, to do less is to act
21 unconstitutionally, as we pointed out and as you know.

22 The increased revenue requirement you
23 ordered in 1993 and which was collected before there
24 was any notion of a rate design being discharged were
25 necessarily set under your conditions that you were

1 taking into account the responsibility you have to
2 maintain that Company's integrity.

3 I know you are familiar with the end result
4 test. Here it is in simplest form. In 1993 you
5 allowed Southern a rate increase of \$6.7 million. The
6 proposed order now suggests that it refund 8.2 million
7 of those dollars. I suggest to you under the end
8 result test, that is not a reward of just, reasonable,
9 or compensatory rates.

10 Madam Chairman, thank you. I would like to
11 reserve the rest of my time.

12 CHAIRMAN CLARK: You'll have two minutes.

13 Mr. Twomey, Mr. Howe, Ms. Fox, how do we
14 divide this up?

15 MR. HOWE: Chairman Clark, we'll divide the
16 time up. I will take eight minutes of the time, five
17 minutes from Ms. Fox, and two minutes for Mr. Twomey.

18 CHAIRMAN CLARK: Give me that again.

19 MR. HOWE: Eight for myself, five for
20 Ms. Fox, and two for Mr. Twomey.

21 CHAIRMAN CLARK: Okay. Go ahead.

22 MR. HOWE: Chairman Clark, Commissioners, on
23 the substantive issue, I will focus on the issue of
24 whether other customers can be surcharged to reimburse
25 the Company. But, first, I would like to address the

1 issue of what we're here for. This is a
2 reconsideration.

3 I would suggest to you that you have not
4 heard from the Company either in its written filing or
5 in the argument of SSU's attorney, a basis for
6 reconsideration, a mistake or misapprehension of fact
7 or law which it failed to consider or necessarily
8 could not have considered in reaching your decision,
9 which had you considered, you would have reached a
10 contrary decision. It just is not being presented to
11 you. You have not heard anything on that vein.

12 On the substantive issues, I would suggest
13 to you that when Southern States Utilities filed their
14 rate case, they put all issues relative to their
15 rates, revenues, rate of return at issue. They
16 assumed the risk of that entire process. They assumed
17 the risk that when they filed for a rate increase,
18 they might be faced with a rate decrease. I'm sure
19 you are all familiar with circumstances in which that
20 has happened.

21 What Southern States did was they instigated
22 a process, and that process is not over until the
23 Commission issues an Order that is truly final, an
24 Order that either is not challenged on appeal; or that
25 if it was appealed, it comes back to the Commission

1 and the Commission issues a final order.

2 During that process, nothing can be taken
3 from the Company. That is the process that is
4 recognized in statutory and constitutional law through
5 which this Commission and other regulatory bodies see
6 to it that the constitutional standards are met. So
7 Southern States had no entitlement to anything until
8 the process was over. In the sense that they charged
9 some customers higher rates and then were ordered to
10 refund them, nothing was given in a final sense and
11 nothing was taken away. As long as the end result of
12 this Commission's action is to set just and reasonable
13 rates for the future, all statutory and constitutional
14 principles have been fully met.

15 On the issue of the surcharge, I would
16 suggest to you that that is clearly a violation of the
17 prohibition against retroactive ratemaking. Southern
18 States cannot charge the customers for what they think
19 the customers should have paid in the past. It
20 doesn't make any difference that we engage in some
21 semantic games where we say, No, it's a prospective
22 charge for a current expense. There is no current
23 expense.

24 All this Commission has done is told
25 Southern States to give back to the customers who paid

1 higher rates the money they collected. Southern
2 States would instead try to retain that money, keep it
3 in its corporate coffers, and force other customers to
4 pay -- basically force those customers who, to use the
5 word "underpaid," reimburse those who overpaid. This
6 Commission has no jurisdiction to order one customer
7 to pay another.

8 I'd like you to focus on the purpose of
9 rates. Rates are intended to allow a utility to
10 recover its prudent expenses and earn a fair return on
11 investment. Charges, a surcharge in the future is not
12 an expense. If those customers who theoretically
13 underpaid were surcharged, they would not be
14 reimbursing the utility for any expense, any payment
15 to an outside supplier for goods or services, no
16 payment to reimburse the utility for its recovery of
17 initial investment such as depreciation, no return on
18 investment.

19 There simply is no mechanism by which you
20 can impose a charge upon some customers to reimburse
21 others. The reason it violates the prohibition
22 against retroactive ratemaking is the intent, is to
23 recover what the Company considers to be past
24 undercharges. It cannot do that. You cannot go back
25 to customers and tell them the service they received

1 in the past cost them more than they thought it did
2 and more than the utility was authorized to charge at
3 the time. That is the essence of the prohibition
4 against retroactive ratemaking.

5 I would suggest also that the Company's
6 ability to protect itself was all within its own
7 hands. The Company was free to ask for a stay of its
8 own under reasonable conditions. The Commission's
9 rules specifically provide for this. It chose not to
10 ask that the Commission impose whatever conditions the
11 Company thought would have been reasonable to protect
12 it during the pendency of the appeal in the event
13 that, basically, the decision came down the way it
14 did.

15 The Company cites to the case of City of
16 Plant City versus Mann, and I think that's very
17 illustrative for a different reason than the Company
18 cites it for. In that case the Commission went from
19 the spread method to the direct method of collecting
20 franchise fees. Some of you might be familiar with
21 this. The essence of the case was that where the
22 Company used to spread the cost over all of its
23 customers, now it was going to be forced to impose the
24 cost of franchise fees on just the residents of the
25 municipalities that charged the franchise fee.

1 On appeal, Tampa Electric Company, the
2 utility at issue, asked for and was allowed to collect
3 from its full customer body and also to collect a
4 higher amount from the municipality in the event that
5 when it came down from the appellate court they were,
6 in fact, forced to do one thing or the other, impose
7 it, the direct method or the spread method.

8 As it turned out, the court upheld the
9 Commission, and the Company was ordered to refund the
10 money it had collected from customers outside the
11 municipality, and it still had in its coffers the
12 monies necessary to cover the franchise fee. I would
13 suggest that Southern States could have asked for
14 similar conditions to be imposed and chose not to.
15 They chose not to avail themselves of the provisions
16 of your rule governing a stay.

17 And so when we talk about the assumption of
18 risk, I would say they assumed the risk twice. They
19 assumed the risk once when they filed their case and
20 accepted the risk that they were not going to have
21 binding final rates until the process was completely
22 over, and they accepted the risk a second time when
23 they opposed the automatic stay and when they refused
24 or chose not to ask for a stay of their own.

25 Thank you very much.

1 CHAIRMAN CLARK: Ms. Fox.

2 MS. FOX: I'd like to join Mr. Howe in
3 reiterating that this is not a proper motion for
4 rehearing. You have been presented with nothing new,
5 knowing that was overlooked in the prior order.

6 Briefly on the affidavits, we filed a motion
7 to strike those. It's our position that they are
8 irrelevant. If they, by any stretch of the
9 imagination, could be deemed relevant, then they
10 should have been presented before the August hearing.
11 Because certainly refunds were known to be an issue at
12 that time, and the Company could have presented them.
13 More, with a financial impact of a potential refund is
14 something that certainly was considered at the time of
15 the prior hearings.

16 On to the merits. There's no retroactive
17 ratemaking involved here. In fact, there are never
18 any rates that are going to go into effect as a result
19 of this case because they've already been superseded
20 by the new interim rates, as I understand, in the new
21 rate case. What we are talking about is restitution
22 to the customers who overpaid above the highest
23 possible rate that they could have been lawfully
24 charged under the Order that was entered by the
25 Commission.

1 As others have noted, the automatic stay
2 protected SSU from the current problem, and certainly
3 they could have come in and sought other protections
4 as, I'm sure you'll recall, Mr. Twomey and I suggested
5 at the time. But they implemented the rates even
6 before the stay was lifted and then asked the court to
7 formalize the lifting of the stay, and in so doing,
8 they forfeited whatever protection was available to
9 them.

10 One key point I think which seems to have
11 been lost in this is what the First District's Order
12 said is that you can't combine these systems for
13 ratemaking purposes without first making the
14 functionally related finding and that there was no
15 evidence presented in this case to support that
16 finding. Therefore, these systems are not combined
17 for ratemaking purposes. There's not a \$26 million
18 combined revenue requirement. There is a revenue
19 requirement, say, for Sugarmill Woods, for other
20 systems; but focusing simply on Sugarmill Woods, what
21 their revenue requirement was under the original order
22 is what those customers could lawfully be required to
23 pay.

24 And I don't have much time, but I just want
25 to touch briefly on a few other points. The uniform

1 rate decision then placed an inordinate burden of that
2 overall revenue requirement on the Sugarmill Woods
3 system. Now, the First District says you can't do
4 that; you can't combine these systems. SSU never had
5 authority to impose those higher rates on Sugarmill
6 Woods and similarly situated customers, so the only
7 thing to do now is to make them whole. You have to
8 look at them separately under the court's order. If
9 those customers paid in excess of lawful rates, they
10 are entitled to have their money back. That's
11 restitution.

12 On the question of interest, the law in
13 Florida is very clear. If there's liability between
14 two parties from a date that can be determined, then
15 Florida law requires interest from the date that
16 liability was created. This is the law that applies
17 to prejudgment interest under the Argnot versus May
18 Plumbing landmark case; this is the law as to
19 post-judgment interest; this is the law as to utility
20 refunds.

21 There are cases cited in our response which
22 talk about a successful party on appeal getting their
23 property back with all the fruits and rents and
24 profits thereof, and interest is the fruit of money;
25 that's what those cases say. The customers are

1 entitled to have that back. Your rules also confirm
2 that right. There is not even an arguable position
3 that the customers should not receive interest on
4 their overpayments.

5 And we've also cited to a Pinellas County
6 case, Bloomberg versus Pinellas County, a federal
7 case, which held that a utility policy not to pay
8 interest on customer deposits was unconstitutional.

9 I think -- I want to reserve a couple of
10 minutes for Mr. Twomey.

11 CHAIRMAN CLARK: Go ahead, Mr. Twomey.

12 MR. TWOMEY: Thank you, Madam Chairman and
13 Commissioners. I'll be brief and mostly just
14 reiterate what the other two attorneys said. Again,
15 keep in mind that this is not here before you for the
16 first time. The standard is reconsideration,
17 Mr. Howe stated it correctly. No mistake, no error,
18 reconsideration is the standard. Please keep that in
19 mind.

20 Revenue requirement to the -- Arthur England
21 dwelled on the revenue requirement. You have to give
22 them a certain revenue requirement at the conclusion
23 of a rate case. It's true that you are supposed to
24 give them sufficient revenues to allow them to attract
25 capital, that's true. But nothing says that you have

1 to ensure, especially at the expense of the utility's
2 customers, that they get all that money
3 notwithstanding their own mistakes.

4 Notwithstanding their own mistakes; mistakes
5 were made here. They have talked about it earlier.
6 The Utility could have had all of its money pursuant
7 to the stand-alone rates that were also calculated in
8 addition to the uniform rates in that case. We asked
9 that it do so. It ignored our pleas to stop the
10 lifting of the stay. The stay was lifted. It gambled
11 and it lost. And it's with this gamble they should be
12 held responsible for it, not our clients, not any of
13 the customers of SSU.

14 You held them, the Commission held them, at
15 that time to a revenue refund requirement. That is to
16 a rate refund requirement. It does not matter whether
17 or not the Company chose through its attorneys or
18 otherwise to acquiesce to that requirement. You held
19 them to it. You were in the driver's seat. They went
20 ahead and got the stay anyways. Again, they had the
21 responsibility to carry it out.

22 So SSU assumed the risk and insisted upon
23 doing so. Refunds are permissible, retroactive
24 ratemaking is illegal, the two are not the same. The
25 refunds are restitution. It is clear as Ms. Fox said,

1 that if the Company wrongfully held our clients' money
2 they have to have interest paid for; they have to.
3 It's not debatable.

4 Commissioners, this has been a long, long
5 case. You made the correct decision, I think, months
6 ago when you entered your final order. We would
7 respectfully request that you uphold that order, order
8 the utility to make the refunds with interest and put
9 our clients in a position of being made whole. Thank
10 you very much.

11 CHAIRMAN CLARK: Thank you, Mr. Twomey.

12 Mr. England, two minutes.

13 MR. ENGLAND: Thank you, Madam Chairman.

14 Just to touch on four points quickly.

15 Mr. Howe says how can customers, other customers, be
16 surcharged? We never proposed that. We're talking
17 about prospective recoupment of the amounts that they
18 want by way of refund.

19 Mr. Howe said that we assume the risk of a
20 rate case decrease. Of course, when we open up a
21 proceeding, there is the possibility of decrease. Is
22 the Commission prepared to say that having looked over
23 in this docket all of Southern States Utilities'
24 records and resources it is ordering a rate decrease
25 as a reasonable rate equal to \$1.5 million? Because

1 that's what Mr. Howe is suggesting, that at the end of
2 the case you can take away \$1.5 million based on
3 everything you know, which is a subtraction of 8.2 in
4 refunds, from what you gave, 6.7, and somehow that's
5 compensatory for the 1993 rate case. That is an
6 absurdity.

7 Number three, Mr. Howe talks about
8 retroactive ratemaking. You can't go back to the
9 customers and pay more. Nowhere does he explain or
10 have you heard today anyone explain how do you go back
11 to some other customers and say, "Here's a windfall,
12 you overpaid." How can you treat them differently?
13 By what authority? I haven't found any, and they
14 haven't suggested any.

15 It's suggested that we assumed the risk by
16 not seeking a stay. That begs the question. What
17 does a stay have to do with the lawful rates which you
18 directed? What we were doing was following your order
19 to collect \$6.7 million to make us whole, based on
20 your determination that that was the just and
21 compensatory rates for this Company. How can we turn
22 our back on your determination of reasonableness and
23 do something else and say, "Well, don't need to
24 collect that 6.7. We didn't really come here
25 seriously asking for it. We'll just let it go until

1 the appeal is over." That's ridiculous. It's not
2 consistent with anything you know about ratemaking.

3 Finally, what you have heard today from
4 Ms. Fox and Mr. Twomey is a mixing of concepts. And I
5 have to assume inadvertent. A mixing of the concept
6 of revenue requirement, how much money the Company
7 ultimately gets at the end of the day and rate design.
8 You heard Ms. Fox say you set a revenue requirement
9 for Sugarmill Woods. You did no such thing. You set
10 a revenue requirement for the Company. And then you,
11 as in every rate case, determined how to spread that
12 among the customers. In this case you made the
13 decision on how to. It wasn't even our proposal. You
14 made the decision on how to spread it. That's the
15 only thing that is at stake today, not the revenue
16 requirement which the district court has affirmed.

17 I urge you to not award a refund without a
18 recoupment of an equivalent amount. We are the
19 utility company, and they are the customers. There
20 are two sides and they to be balanced. They are not
21 some of the customers; they are all the customers on
22 the other side. And in order to maintain the
23 Company's side of the equation, you have to. I don't
24 see any other way than to come out with an affirmance
25 by the district court and your subsequent

1 reconfirmation that you were right in the first place,
2 and we should have had a \$6.7 million increase. We
3 collected it, and we are entitled to keep it. It's
4 just that easy.

5 Thank you, Madam Chairman, very much.

6 CHAIRMAN CLARK: Thank you, Mr. England.

7 Staff.

8 MS. JABER: Madam Chairman, just to tell you
9 what Staff's recommendation is with regard to some of
10 the things that were raised here. First, Staff would
11 agree with everything that Mr. Howe has said today;
12 but I do want to clarify the surcharge notion. I do
13 think that there is another way of looking at the
14 surcharge. I think that what the utility is trying to
15 say -- not that Staff agrees with it, but just to
16 explain it so that we make sure everyone
17 understands -- I think what they're saying is there is
18 a current cost that is related to making the refund,
19 and that is what they would like to implement the
20 surcharge for. Regardless of whether you think that
21 is retroactive ratemaking or not, I do want you to
22 know that it's been long-standing Commission policy to
23 not have the customers bear the administrative cost of
24 making the refund.

25 Again, though, I would like to emphasize

1 that we are here for reconsideration. I agree with
2 the parties in that regard. As related to the
3 surcharge, it is a new argument and that isn't
4 inappropriate for reconsideration, in our opinion.

5 CHAIRMAN CLARK: That it is inappropriate or
6 appropriate?

7 MS. JABER: Inappropriate. Staff does
8 recommend that it is inappropriate, but I did want you
9 to understand what the proposal was.

10 Quite frankly, there was nothing that
11 Mr. England said, with all due respect to him, that I
12 didn't believe was rearguing. I think that the
13 utility is rearguing your decision.

14 The only other issue that SSU raised that
15 arguably you didn't consider was the interest on the
16 refund notion. We do have a primary and an
17 alternative on that issue. Quite frankly, I think
18 that the primary is the strongest of the two. But the
19 alternative is there because the Staff does believe
20 that the rule sounds discretionary.

21 There is a case, though, that we've cited in
22 our -- actually, it's a Commission order that we've
23 cited in the primary recommendation that says that it
24 is Commission practice to recognize the time value of
25 money in making refunds. And traditionally, you have

1 required that interest be made when refunds are
2 required. Let me make sure I haven't forgotten
3 anything here.

4 Again, you did fully consider, in our
5 opinion, the loss of revenue. We did even discuss the
6 mixing of the terms "revenue requirement" versus "the
7 change in the rate structure and what constituted a
8 refund." There was a primary and an alternative on
9 that in the previous recommendation, as I recall. So
10 it's Staff's position that you have fully considered
11 all of these things.

12 CHAIRMAN CLARK: Questions, Commissioners?

13 COMMISSIONER DEASON: I have question on
14 Issue 5. Staff's recommendation to grant the motion
15 in part concerning the one-inch meters, what type of
16 rate change does that necessitate, if any?

17 MR. RENDELL: That would not affect rates
18 whatsoever. When we went back and looked at the
19 record, we used the appropriate billing determinants.
20 This was discussed in the recommendation, but it was
21 never voted on by the Commission, so there would be no
22 changes in rates.

23 CHAIRMAN CLARK: Let me ask a question about
24 the remand from the court. I noted in your
25 recommendation that you indicated as a matter of

1 policy -- our decision was based on a matter of
2 policy, we wouldn't go back. Refresh my memory
3 though. What was the discussion about what discretion
4 we had from the court from that?

5 MS. JABER: I was hoping you wouldn't ask me
6 that. On the matter of policy, we were talking about
7 reopening the record.

8 CHAIRMAN CLARK: That's right.

9 MS. JABER: And there was a primary and an
10 alternative recommendation. The primary suggested
11 that you could not reopen the record, and the
12 alternative --

13 CHAIRMAN CLARK: Because it wasn't a general
14 remand?

15 MS. JABER: Right, versus a specific remand.
16 And the recommendation that we supported, the
17 alternative, said it was within your discretion to
18 reopen the record, and legally you could have reopened
19 the record.

20 And, I believe, my interpretation of what
21 you did at that agenda was you did not say that you
22 didn't have the legal authority to reopen the record,
23 but you didn't even have to reach that step because as
24 a matter of policy you should not reopen the record.

25 CHAIRMAN CLARK: But the primary

1 recommendation indicated that we may not have even had
2 that opportunity to do it based on the remand.

3 MS. JABER: That's correct.

4 CHAIRMAN CLARK: And now would we have
5 carried out a remand? Assume for a minuted that it
6 was -- didn't allow us to reopen the record, how do
7 you carry out a remand?

8 MS. JABER: You go back to the record as you
9 did, you go back to the evidence presented in the
10 original record, and you find a different rate
11 structure, as we did here.

12 CHAIRMAN CLARK: Do you think it would have
13 complied with that order if we didn't do the refund?

14 MS. JABER: My original recommendation was
15 that you would have complied with the mandate if you
16 didn't order them to refund. I think that you fully
17 considered that, though.

18 CHAIRMAN CLARK: I mean, they told us that
19 we were wrong, and they reversed our decision. I
20 mean, how do you implement that unless you recognize
21 the need for refund?

22 MS. JABER: I think that they told you you
23 were wrong in not making a finding before you
24 implemented a uniform rate. I think that when you go
25 back to the order of vacating the stay and the

1 transcripts, that the refund that Staff believed would
2 have resulted would have been the difference in the
3 revenue requirement and not a difference in a change
4 in the rate structure. But, again, I think that you
5 fully considered that.

6 COMMISSIONER JOHNSON: Say that again, Lila.

7 MS. JABER: Staff's original recommendation,
8 our recommendation, recommended to you that you not
9 order the utility to refund. And the basis for that
10 was that the court opinion and my opinion didn't order
11 you to do that. The court opinion only said that you
12 haven't made a finding, and before you make that
13 finding on functional relatedness, you can't implement
14 a uniform rate structure.

15 When we went back to the order vacating the
16 stay and the transcript from the agenda that resulted
17 in the order vacating the stay, it was our opinion
18 that a refund that should have resulted would have
19 resulted from a difference in the revenue requirement
20 and not a difference in rate structure.

21 It was our opinion that the Utility could
22 not have known that the court would have rejected the
23 rate structure and that the utility did not assume the
24 risk.

25 You did not agree with our recommendation.

1 COMMISSIONER JOHNSON: Let me ask Lila along
2 that line of questioning, because that was one of the
3 issues that Mr. England raised with respect to --
4 let's try take ourselves back to that particular
5 proceeding and the order that was issued vacating
6 that.

7 Assuming that we did decide, as I think that
8 we did, that we would in terms of the refund look to
9 the rate structure issue and require them to do
10 exactly what we required them to do, and I thought
11 that the order was clear in that regard and that the
12 transcript was clear. Because I remember the three of
13 us kept going back and forth saying how are we going
14 to make these customers whole, how do we do that?

15 What kind of a predicament doing that did we
16 put the Company in? What could the Company have done?
17 They're stating that they didn't think that risk was
18 on them, but if we said this is the risk that you must
19 bear, what could they have done at that point in time
20 if they thought that we were in error in that
21 particular order?

22 MS. JABER: Well, they would tell you -- and
23 I don't want to speak for them -- but they would tell
24 you that there was nothing they could do, that if they
25 had not implemented the rates there would be a loss

1 revenue pending the appeal. And implementing the
2 rates and getting the decision from the court has put
3 them in the position of loss of revenue. So their
4 answer would be that they couldn't have done anything.

5 From Staff's point, I would tell you that
6 they take a risk. They take a risk. I think that
7 anything goes with the appellate practice. I think
8 that every issue could have been taken to appeal, and
9 you don't know what's going to happen. So, as I
10 recall -- and I have to be corrected if I'm wrong. As
11 I recall, our advise was that they not implement the
12 rate pending appeal.

13 COMMISSIONER JOHNSON: Mr. England, do you
14 have anything else you want to add on that point?

15 MR. ENGLAND: No. I appreciate -- her
16 answer was correct. We had no choice not to implement
17 the rates, however, because you had determined that
18 the only way to make us compensatory was a \$6.7
19 million increase. We could have walked away from that
20 and disregarded our rate case and your order. That
21 isn't a viable option. That's not real. That's not
22 in the real world. There's no risk in that.

23 The risk we were willing to assume was that
24 the district court would disagree with your \$6.7
25 million revenue requirement. That's all. Thank you.

1 MS. FOX: Are we going to be allowed to
2 respond to that?

3 CHAIRMAN CLARK: Go ahead, Ms. Fox.

4 MS. FOX: Since this is something that is
5 just being raised, you know, I may not have all the
6 answers, but Mr. Howe mentioned one which was to
7 essentially cover both eventualities. And he cited a
8 case in which that was successfully done and upheld on
9 appeal. And I don't recall at this moment the
10 specifics of the interim rate that was in effect, but
11 there was an interim rate tariff that was filed which,
12 as I recall, there was --

13 CHAIRMAN CLARK: It was a uniform increase
14 on every rate, but the rates started out different.

15 MS. FOX: Right. They started out from a
16 stand-alone basis within a uniform level of increase.
17 And the difference between that and the final rates, I
18 think -- don't hold me to this, but it seems to me
19 there might have been a refund on the interim. In
20 other words, those were pretty close to the final
21 rates and a lot closer to what we're coming back to
22 now, as opposed to --

23 CHAIRMAN CLARK: Let me ask Staff. Was
24 there a refund on the interim?

25 MS. JABER: Yes, and it's been made. Long

1 since made.

2 MS. FOX: So it seems to me keeping the
3 interim in effect pending appeal might have been
4 another possibility that could have been pursued at
5 that time. But we are purely speculating as to what
6 could have been done, because all SSU did was come in
7 here and ask you to lift the stay. You weren't given
8 any other options. And things could not have gotten
9 any worse for our clients. There is nothing that
10 could have been put into effect by SSU at that time
11 that could have harmed us any greater than the uniform
12 rate order. There are ways that SSU could have
13 protected themselves, but you weren't given those
14 options.

15 MR. ENGLAND: Madam Chairman, may I make
16 one more comment?

17 CHAIRMAN CLARK: Well, we have to end it
18 somewhere, Mr. England.

19 MR. ENGLAND: Okay.

20 CHAIRMAN CLARK: Let's go -- some of these
21 things we need to go issue by issue anyway.

22 So clarify for me who -- I believe the
23 Commissioners on it are just -- who is on?

24 MS. JABER: This item?

25 CHAIRMAN CLARK: Yes.

1 MS. JABER: Full Commission.

2 CHAIRMAN CLARK: Full Commission. I'm
3 sorry. Issue No. 2, is there a motion?

4 COMMISSIONER KIESLING: I move 2 and 3.

5 COMMISSIONER DEASON: Second.

6 CHAIRMAN CLARK: Without objection Issues 2
7 and 3 are approved.

8 Issue 4.

9 COMMISSIONER DEASON: Move Staff.

10 CHAIRMAN CLARK: Is there a second?

11 COMMISSIONER JOHNSON: Second.

12 CHAIRMAN CLARK: All those in favor say aye.

13 COMMISSIONER JOHNSON: Aye.

14 COMMISSIONER KIESLING: Aye.

15 COMMISSIONER DEASON: Aye.

16 COMMISSIONER GARCIA: Aye.

17 CHAIRMAN CLARK: Aye. Opposed, nay.

18 Issue 5.

19 COMMISSIONER DEASON: I move Staff on

20 Issue 5.

21 CHAIRMAN CLARK: Is there a second?

22 COMMISSIONER JOHNSON: Second.

23 CHAIRMAN CLARK: All those in favor say aye.

24 COMMISSIONER JOHNSON: Aye.

25 COMMISSIONER KIESLING: Aye.

1 COMMISSIONER DEASON: Aye.

2 COMMISSIONER GARCIA: Aye.

3 CHAIRMAN CLARK: Aye. Opposed, nay.

4 Issue No. 6.

5 COMMISSIONER DEASON: I move Staff on the
6 primary on Issue 6.

7 COMMISSIONER JOHNSON: Second.

8 CHAIRMAN CLARK: All those in --

9 COMMISSIONER GARCIA: Let me --

10 CHAIRMAN CLARK: Go ahead.

11 COMMISSIONER GARCIA: I just want to get it
12 from Staff. Is this discretionary? This is just so
13 that I know.

14 MS. JABER: The way the rule is worded makes
15 it sound like it's discretionary. It says, "All
16 refunds ordered by the Commission shall be made in
17 accordance with the provisions of this rule, unless
18 otherwise ordered by the Commission." Arguably, it
19 could be viewed as discretionary. When you go back to
20 the statute --

21 COMMISSIONER GARCIA: Are we implemented?

22 MS. JABER: Not that I could find.

23 CHAIRMAN CLARK: Any other questions?

24 There has been a motion and a second on
25 Issue 6 on the primary recommendation. All those in

1 favor say aye.

2 COMMISSIONER DEASON: Aye.

3 COMMISSIONER JOHNSON: Aye.

4 COMMISSIONER KIESLING: Aye.

5 COMMISSIONER GARCIA: Aye.

6 CHAIRMAN CLARK: Opposed, nay.

7 Issue 7.

8 COMMISSIONER JOHNSON: Move it. Move Staff.

9 COMMISSIONER DEASON: Second.

10 CHAIRMAN CLARK: All those in favor say aye.

11 COMMISSIONER KIESLING: Aye.

12 CHAIRMAN CLARK: Aye.

13 COMMISSIONER DEASON: Aye.

14 COMMISSIONER JOHNSON: Aye.

15 COMMISSIONER GARCIA: Aye.

16 CHAIRMAN CLARK: Opposed, no.

17 Issue 8.

18 COMMISSIONER JOHNSON: Move it.

19 COMMISSIONER DEASON: Second.

20 CHAIRMAN CLARK: Without objection Issue 8

21 is approved.

22 MR. ENGLAND: Thank you.

23 CHAIRMAN CLARK: Thank you very much.

24 MR. ENGLAND: Thank you, Madam Chairman,

25 Commissioners. Thank you for the scheduling of this

1 so that I could get to a plane. I appreciate that.

2 CHAIRMAN CLARK: Thank you.

3 (Thereupon, Agenda Item No. 11 concluded at
4 2:00 p.m.)

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1 STATE OF FLORIDA)
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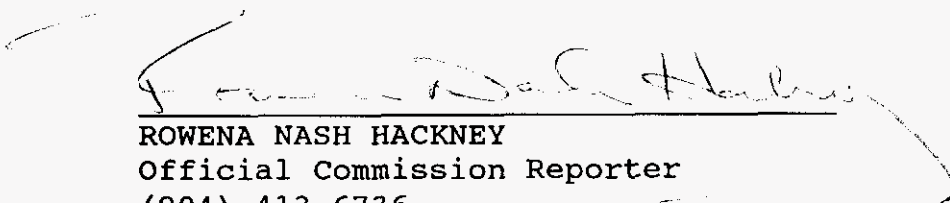
CERTIFICATE OF REPORTER

3 I, ROWENA NASH HACKNEY, Official Commission
4 Reporter,

5 DO HEREBY CERTIFY that **FPSC Agenda Item No.**
6 **11, Docket No. 920199-WS**, was heard by the Florida
7 Public Service Commission at the time and place herein
8 stated; it is further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 46 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 DATED this February 22, 1996.

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ROWENA NASH HACKNEY
Official Commission Reporter
(904) 413-6736