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March 4, 1996

Ms. Blanca S. Bayo, Director
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2540 Shumard Oak Boulevard
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HAND DELIVERY

ORIGINAL
FILE COPY

Re: Docket No. 920199-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of the Southern States Utilities, Inc. ("SSU"), are the following documents:

1. Original and fifteen copies of SSU's Notice of Filing and Motion to Vacate Non-Final Order; and

2. A disk in Word Perfect 6.0 containing a copy of the Notice and Motion entitled "Giga.Vacate."

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

KAH/rl

cc: All Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	)	Docket No. 920199-WS Filed: March 4, 1996

NOTICE OF FILING AND
MOTION TO VACATE NON-FINAL ORDER

Southern States Utilities, Inc. ("SSU"), files this Notice to call the Commission's attention to the decision of the Florida Supreme Court rendered on February 29 decision in *GTE Florida, Inc. v. Clark*, Case No. 85.776, a copy of which is attached. SSU files this Motion to request that the Commission withhold entering a final order denying reconsideration of the Refund Order entered in this proceeding on October 19, 1995 (the "Refund Order"), and in light of the *GTE Florida* decision simultaneously vacate the Refund Order.

NOTICE OF FILING

On February 29, the Florida Supreme Court rendered its decision in the *GTE Florida* case, which bears directly on the Refund Order. Inasmuch as no final order has yet been entered in this proceeding, it behooves the Commission to reconsider its Refund Order in light of the directives expressed by the high court in its *GTE Florida* decision.

MOTION TO VACATE REFUND ORDER

The Commission's Refund Order required SSU to refund $8.2 million to select customers of the company who had overpaid on their utility bills during the time the Commission's uniform rate structure was in effect, notwithstanding (i) that customers who had underpaid were not surcharged in the same amount and (ii) that the revenue requirements for SSU were not reduced over the same span of time. The Commission's Refund Order was predicated on a concern for "retroactive ratemaking," with no concern whatsoever given to the equities favoring SSU and its financial integrity, as distinct from considerations favoring a select group of SSU's customers. The justification used by the Commission to erode SSU's unaltered revenue requirement was that SSU had "waived" any objection to refunds by requesting that the Commission vacate the automatic stay of Citrus County's appeal of the Refund Order, and by posting bond.

Prior to the oral vote taken on February 20 on reconsideration of the Refund Order, SSU pointed out to the Commission that equity between utility customers and SSU was being completely disregarded by the Commission's Refund Order, that "stay" considerations were unrelated to revenue requirements and improperly being used by the Commission, and that considerations of "retroactive ratemaking" did not apply at all but, if they did, they would not distinguish between refunds and surcharges to customers in any event.

GTE Florida was decided in the context of a remand proceeding following appellate reversal of a Commission order in ratemaking -- precisely the same circumstances that exist in this pending

proceeding. The Court there reversed a Commission order which had deprived the utility of revenue requirements and had declined to implement customer surcharges, as here. In *GTE Florida*, the Court rejected each of the four justifications used by the Commission in this proceeding to require SSU to refund $8.2 million to some of its customers.

As regards the consideration that utility companies must be accorded when a refund or surcharge is being considered on remand from the reversal of an erroneous Commission order, the Court stated:

> We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner.... It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order.

(Slip Opin. at 3-4). As regards "stay" considerations when the Commission is addressing revenue requirements on remand, and the notion of waiver, the Court stated:

> The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about a waiver ....

(Slip Opin. at 4). As regards retroactive ratemaking, the Court stated:

> We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended that should have been lawfully recoverable in the PSC's first

> order.... If the customers can benefit in a refund situation, fairness dictates that a surcharge is proper in this situation.

(Slip Opin. at 4, 5).

As regards the Commission's acknowledged willingness to order refunds but unstated reluctance to order surcharges for customers, the Court resolved that concern totally.

> The Office of Public Counsel has represented the citizen ratepayers at every step of this procedure.

(Slip Opin. at p. 5).

The relevant factual situation which prompted the *GTE Florida* decision is four-square with the relevant factual situation in this proceeding. This proceeding must be governed by that decision.

Fortunately, there is time to correct the Commission's Refund Order without further cost or delay. That order has not yet been finally entered. It would certainly constitute a waste of Commission resources, and cause the parties unnecessary delay and expense, for the Commission to enter a final order in this proceeding which refuses reconsideration of the Refund Order, and thereby precipitates an appeal of that order for appellate application of *GTE Florida* principles.[1]

Accordingly, SSU requests that the Commission:

(a) withhold entry of its non-final order denying

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[1]Similarly, bifurcation of the refund issue and the prospective surcharge issue, as suggested by Staff in Staff's March 4, 1996 Recommendation, will cause the parties, Commission and Court unnecessary expense as SSU will be required to secure a stay and prosecute an appeal of any "final" refund order, both of which are now unnecessary under the *GTE Florida* decision.

reconsideration;

(b) enter an order approving reconsideration in light of *GTE Florida*;

(c) vacate its Refund Order; and

(d) enter an order approving SSU's retention of all revenue received from customers since September 8, 1992, the date of Commission approval of interim rates, whether the Commission chooses to deny all refunds or order equivalent surcharges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Filing and Motion to Vacate Non-Final Order was furnished by facsimile transmission, hand delivery and/or U. S. Mail to the following this 4th day of March, 1996:

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By: William B. Wright
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Giga.vacate

Supreme Court of Florida

No. 85,776

GTE FLORIDA INCORPORATED,
Appellant,

vs.

SUSAN F. CLARK, etc., et al.,
Appellees.

[February 29, 1996]

OVERTON, J.

GTE Florida Incorporated (GTE) appeals a Public Service Commission (PSC) order that implements a remand from this Court. In that remand, we affirmed in part and reversed in part a prior PSC order disposing of a requested rate increase by GTE. The PSC, in its initial proceeding, denied GTE's proposed rate increase and, instead, ordered that GTE revenues be reduced by $13,641,000. We reversed the PSC order insofar as it denied GTE recovery of certain costs simply because those expenditures

involved purchases from GTE's affiliates. We found that those costs were clearly recoverable and that it was an abuse of discretion for the PSC to deny recovery. GTE Florida Inc. v. Deason, 642 So. 2d 545 (Fla. 1994). Accordingly, we issued our mandate on July 7, 1994, and remanded for further action. The PSC, in implementing our decision, entered an order that only allowed recovery of the disputed expenses on a prospective basis from May 3, 1995. This effective date was over nine months after our mandate issued. As noted, our decision was final on July 7, 1994, and the initial erroneous order was entered by the PSC on May 27, 1993. The issue in this cause is whether GTE should be able to recover its expenses, erroneously denied in the first instance, for the period between May 27, 1993, and May 3, 1995. We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.

We reverse the PSC's order implementing our remand. We mandate that GTE be allowed to recover its erroneously disallowed expenses through the use of a surcharge. However, no customer should be subjected to a surcharge unless that customer received GTE services during the disputed period of time.

In our decision reversing the PSC's original order insofar as it denied GTE recovery of certain expenses, we stated:

> We do find, however, that the PSC abused its discretion in its decision to reduce in whole or in part certain costs arising from transactions between GTE and its affiliates, GTE Data Services and GTE Supply. The evidence indicates that GTE's costs were no greater than they would have been had GTE purchased the services and supplies elsewhere. The mere fact

> that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more. Charles F. Phillips, Jr., The Regulation of Public Utilities 244-55 (1988). We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. See id. If the answer is "no," then the PSC may not reject the utility's position. The PSC obviously applied a different standard, and we thus must reverse the PSC's determination of this question.

Deason at 547-48.

On remand, GTE proposed a surcharge as the appropriate mechanism by which to recover its expenses incurred during the appeal and remand. The PSC denied GTE's proposal. The PSC ruled that GTE's failure to request a stay during the pendency of the appellate and remand processes precluded it from recovering expenses incurred during that time period. In this review, the PSC also argues that the imposition of a surcharge would constitute retroactive ratemaking. We reject both contentions.

Both the Florida Statutes and the Florida Administrative Code have provisions by which GTE could have obtained a stay.[1] However, neither of those mechanisms is mandatory. We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner. While the facts of Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966), were different from those we now

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[1] See § 120.68(3)(a), Florida Statutes (1995); Fla. Admin. Code R. 25-22.061.

encounter, we find that Justice O'Connell's reasoning is appropriate in this case. He stated:

> It would be inequitable to defer the utility's right to the increased rates for approximately two years because of what we found to be a defect in the order entered by the commission. The soundness of what we do here is demonstrated by the fact that if the instant case had involved an order decreasing rates it would be equally inequitable to allow the utility to continue to collect the old and greater rates for the period between the entry of the first and second orders.

Id. at 781.

Justice O'Connell was stating that equity applies to both utilities and ratepayers when an erroneous rate order is entered. It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about a waiver, and the failure to request a stay is not, under these circumstances, dispositive.

We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended that should have been lawfully recoverable in the PSC's first order. In this respect, this case is analogous to Mason. Additional support for our position is found by examining the method by which the PSC addresses the reciprocal

situation. The PSC has taken a position contrary to its current stance when a utility has overcharged its ratepayers. In the order implementing the remand in Citizens v. Hawkins, 364 So. 2d 723 (Fla. 1978), the PSC ordered that a refund be paid by the utility. In re Application of Holiday Lake Water System for Authority to Increase its Rates in Pasco County, 5 F.P.S.C. 630 (1979). If the customers can benefit in a refund situation, fairness dictates that a surcharge is proper in this situation. We cannot accept the contention that customers will now be subjected to unexpected charges. The Office of Public Counsel has represented the citizen ratepayers at every step of this procedure. We find that the surcharge for recovery of costs expended is not retroactive ratemaking any more so than an order directing a refund would be. We note that the PSC was advised by its staff that GTE's recovery of expenses and costs would not constitute retroactive ratemaking. Fla. Pub. Serv. Comm'n, Staff Memorandum at 4 (Docket No. 920188-TL, March 23, 1995).

Finally, we address the structure of the current surcharge. The PSC has acknowledged it has the ability to closely tailor the implementation of refunds and to accurately monitor refund payments to ensure that the recipients of such refunds truly are those who were overcharged. While no procedure can perfectly account for the transient nature of utility customers, we envision that the surcharge in this case can be administered with

the same standard of care afforded to refunds, and we conclude that no new customers should be required to pay a surcharge.

Accordingly, for the reasons expressed, the order below is reversed and the cause is remanded for further action consistent with this opinion.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Public Service Commission

Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tallahassee, Florida; and Marceil Morrell and Kimberly Caswell of GTE Florida Incorporated, Tampa, Florida,

for Appellant

Robert D. Vandiver, General Counsel and David E. Smith, Director of Appeals, Florida Public Service Commission, Tallahassee, Florida; and Jack Shreve, Public Counsel and Charles J. Beck, Deputy Public Counsel, on behalf of the Citizens of the State of Florida, Tallahassee, Florida,

for Appellees