REBUTTAL TESTIMONY OF G. ROBERTSON DILG

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ON BEHALF OF

SOUTHERN STATES UTILITIES, INC.

DOCKET NO. 950495-WS

Q. WHAT IS YOUR NAME AND BUSINESS ADDRESS?

A. My name is G. Robertson Dilg and my business address is 201 E. Pine Street, P.O. Box 3068, Orlando, Florida 32802-3068.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE?

A. My degrees include the following: B.A. Dartmouth College - 1965; M.A. University of California - 1966; Ph.D. Indiana University - 1975; and J.D. Stetson University - 1982.

Q. WHAT ARE YOUR PROFESSIONAL AFFILIATIONS?

A. I am a member of the following associations: American Bar Association; Florida Bar Association; and Orange County Bar Association.

Q. HAVE YOU EVER TESTIFIED BEFORE A REGULATORY AGENCY?

A. No.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. Exception No. 2 of the staff audit report suggests that approximately 85 acres of the total 212 acres condemned by SSU from the Baron Collier Group should be treated as non-utility property -- capable of future development -- and, thus, the associated costs should not be included in rate base in this proceeding. This proposal should be rejected by the Commission. There is no basis for

the assertion that the property can, much less ever will, be used for commercial or residential development by SSU or any other party. The 212 acres condemned by SSU was the minimum acreage that SSU could condemn in order to protect the water source for Marco Island. It is inconceivable that any permitting authority would permit residential or commercial development in proximity to the Collier Lakes, and, I am informed, if attempted, such an action would be opposed by SSU using all of its resources.

Q. ARE YOU SUGGESTING THAT THERE ARE RULES AND REGULATIONS WHICH REQUIRED SSU TO CONDEMN THE ENTIRE 212 ACRES?

A. No, there are no specific laws or regulations which require that size parcel to be condemned. However, SSU's engineers and consultants determined that this was the minimum acreage necessary to protect the water source. In addition, SSU's valuation experts, John Calhoun and Woody Hanson, informed SSU that there would have been no appreciable savings to SSU, even had it attempted to condemn less of the property.

Q. COULD YOU PLEASE EXPLAIN WHY THE CONDEMNATION OF A SMALLER PARCEL WOULD NOT HAVE APPRECIABLY DECREASED

THE COST OF THE COLLIER LAKES TO SSU?

A. Yes. To protect the quality of water being withdrawn by SSU from the lakes, development of adjoining property will have to be prohibited. When that occurs, the adjoining land, which is zoned for commercial or high density residential use, will be reduced to a nominal value. Under Florida's condemnation laws, the property owners are entitled to recover all losses occasioned by the diminution in value of the adjoining land. As a result, if SSU did not take the adjoining land, it would, nevertheless, effectively be required to pay for it but would not own it. To make matters worse, the property owners, after the taking, could then have sought to develop the land, which would probably have forced SSU to incur the cost of contesting any proposed development in both administrative and, perhaps, judicial proceedings. Thus, failing to take the entire 212 acres would not have saved money and ultimately could have cost far more than the actual amount SSU paid.

Q. IT HAS BEEN SUGGESTED DURING CUSTOMER SERVICE HEARINGS THAT THE APPRAISAL PERFORMED IN NOVEMBER 1992 WHICH VALUES THE CONDEMNED PROPERTY AT APPROXIMATELY $4 MILLION REPRESENTS THE TRUE VALUE

OF THE PROPERTY. DO YOU AGREE WITH THIS ASSERTION?

A. No. That appraisal, which was prepared by Calhoun, was nothing more than his original good faith estimate of the value of the property. There are several facts which must be understood to appreciate the basis for the original appraisal. First, the total property consists of approximately 1914 acres. Calhoun's appraisal does not include any severance damages to the almost 1700 acre remainder parcel east of the area taken. At the time Calhoun prepared his appraisal, he had very little knowledge of the eastern property and did not include it in his appraisal. Instead, he valued just the triangular portion of property west of Henderson Creek Canal as what is termed by appraisers "a larger parcel."

The property owners responded by presenting appraisals of two valuation experts, both of whom included very substantial claims for severance damages, which are damages to any portion of the property remaining after the taking. The condemnation values of the Collier's appraisers were approximately $12.5 million and $13.5 million, respectively. Exhibit _____ (GRD-1) provides a copy of the letter from my firm analyzing the

potential evidence to be introduced at trial by the parties' witnesses and recommending that SSU settle the case for a "wrap around" price of $8 million. The exhibit also provides a breakdown of the experts' respective valuations. SSU, for its part, retained Hanson as a second appraiser. Please note that although SSU's appraisers Calhoun and Hanson ultimately considered the property as a single large tract, neither treated severance damages to the eastern property. Also, please note that the severance damages claimed by the Colliers' experts represents the vast majority of the difference between the valuations presented by the two sides.

Q. WHAT IS THE STANDARD APPLIED BY A JURY IN DETERMINING THE CONDEMNATION VALUE OF PROPERTY?

A. It is critical for the Commission to understand that the standard for establishing value in a condemnation proceeding is the price at which a willing seller would be able to sell the property to a willing buyer, both knowing all relevant factors. In this case, there were many factors that might have affected value. For instance, as the Staff Audit Exception No. 2 points out, the condemned parcel was zoned for commercial and residential development. Therefore, the value of

the property for commercial and residential use is the beginning point of valuation. In addition, it should be noted that the property was one of the last remaining undeveloped properties of its size in the Collier County area. Also, the property is contiguous to State Road 951 and Highway 41, both of which are undergoing increasing levels of development along their paths. When SSU's water lease expired on December 31, 1994, the property would have been well suited for rapid development. Development for commercial or residential purposes could not take place, however, if the Collier Lakes were to continue to be used as a source for a public water supply.

Q. WERE THERE DIFFERENCES OF OPINION AS TO THE VALUE OF THE PROPERTY TAKEN EXCLUSIVE OF SEVERANCE DAMAGES AND OTHER CONSIDERATIONS?

A. Yes. One of the property owners' appraisers valued the property taken at $6,400,000, while the other valued it at $4,800,000. Both of the property owners' appraisers contended that there would be an interim period during which the property would be held before development was initiated. During this time, according to those appraisers, water could be sold to a potential purchaser, such as the City of

Naples, or even SSU. By condemning the property rather than continuing the lease, SSU was taking not only the land but also the additional revenue that could be derived from the sale of water. The property owners' appraisers valued that lost revenue at between $1,500,000 and $2,400,000.

Q. ARE SEVERANCE DAMAGES ROUTINELY AWARDED BY JURIES IN CONDEMNATION PROCEEDINGS?

A. Yes. Severance damages are routinely sought and recovered by landowners in condemnation actions any time that less than the landowner's entire property is taken and the remaining property is affected by the taking.

Q. COULD YOU PLEASE DESCRIBE THE SEVERANCE DAMAGES IDENTIFIED BY THE COLLIERS' EXPERTS?

A. Whereas SSU's appraisers focused their attention on the 223 acres to the west of Henderson Creek canal, the landowners' appraisers, Richard Klusza and J. E. Carroll, both looked at the property as an integrated 1900 acre tract. They argued that because this was the last large tract suitable for golf course development in the area, it would not suffer a diminution in per acre value, despite its size. Since the land was worth so much in their opinion, even small reductions in the use of that

land would result in substantial severance damages. Both of the Colliers' appraisers believed that taking water from the lakes would adversely impact a large portion of the property to the east of the canal. They argued that: (1) extracting water from the lakes would reduce the supply of water available for a golf course and would make it more difficult to obtain a water permit for that purpose; (2) using the lakes as a water source would inhibit development of portions of the eastern property that drained into the canal, since the canal, which replenishes water in the lakes, would itself be regarded as a water source; (3) taking highlands near the lakes would eliminate lands whose high densities could otherwise have been available for transfer to the eastern property; (4) the taking would eliminate a "front door" to the eastern property that could have been developed in such a way as to promote more rapid development of the remaining property; and (5) the location of the taking combined with existing wetlands would make it more difficult to develop the remaining property in a logical and efficient pattern. Based on those arguments, the property owners' appraisers estimated that the density of

development in the east would be reduced by between 15 and 23 percent. According to their estimates, this would result in damages of from $4,450,000 to $4,600,00.

Q. COULD YOU EXPLAIN SSU'S RATIONALE FOR SETTLING THE CONDEMNATION ACTION AT A COST OF $8 MILLION?

A. Yes. As I previously mentioned, my Exhibit _____ (GRD-1) contains a copy of my firm's opinion to SSU recommending the settlement to SSU at a price of $8 million. I am informed that the engineering expert and land appraiser similarly recommended settlement to SSU at this price and that copies of their recommendations also are being provided as exhibits. These letters provide a detailed explanation of SSU's rationale for settling the litigation at a "wrap around" cost of $8 million. Summarized, that rationale is as follows:

SSU made every effort to purchase this and other properties capable of satisfying the water needs of its Marco Island facilities. Unfortunately, those efforts did not prove successful and it was necessary to condemn the property. In a condemnation proceeding, the condemnor must pay not only full compensation for the land taken and any severance damages, but it

must also pay all reasonable legal fees, expert fees and costs incurred by the landowner. The condemnor must also pay interest on any difference between the amount it estimates as the value of the property when it acquires the property under a quick take proceeding and the final value determined by settlement or a jury. The only way to cut short interest, expert costs and legal fees is to agree on a settlement.

It is also true that a jury tends to value property somewhere midway between the opinions given by the parties' experts. In the instant case, the values for the property taken range from $3,606,500 to $6,400,000. Given that range, a jury verdict of $5 million dollars would have been likely. If the jury accepted the concept of interim sales of the water, it could have awarded an additional $1.5 to $2.4 million for that loss. On the question of severance damages, estimates ranged from $117,000 to $4,600,000. If the jury felt that even less than 10% of the remainder property had been damaged, such an apparently inconsequential reduction would have translated into an additional award of as much as $2 million which SSU would have had to pay.

Given the above considerations, a jury could easily, and I mean "easily", have entered a verdict of $7 million. If such an award were entered, SSU would also be required to pay, at a minimum, interest of $300,000, as well as expert and legal fees and costs well in excess of $1,000,000 thus far exceeding the $8 million paid, without even including the fees SSU would have to pay for its own experts and attorneys to continue the case through trial.

Should the jury have awarded $8.5 million, which we as SSU's counsel believed possible, costs would have exceeded $11 million exclusive of the Company's overhead or other costs associated with continuing the action. By settling the case at $8 million, SSU eliminated the risk of so excessive a jury verdict, resolved all questions of fees and costs without the need for further litigation, and provided a basis for future cooperation with the property owners. SSU thus acted prudently and in the best interest of its customers.

Q. TO CONCLUDE, IN YOUR EXPERT OPINION, WAS THE PRICE PAID BY SSU FOR THE COLLIER LAKES PROPERTY REASONABLE AND PRUDENT?

A. Yes, it was.

Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes, it does.

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May 3, 1995

Brian Armstrong, Esquire
General Counsel
Southern States Utilities, Inc.
1000 Color Place
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RE: Southern States Utilities, Inc. v.
Harold S. Lynton, et al.
Case No. 94-0793-CA-01-CTC

Dear Brian:

You have requested our settlement evaluation of this case. In order to set the stage for this evaluation, it is appropriate to outline the developments both before and after the mediation held all day on Saturday, April 22, 1995.

After we obtained the initial appraisal of John Calhoun in November, 1992, for $4,070,000 and before we had an appraisal from the other side, we predicted that the case was not likely to settle for less than $6 to $6.5 million, and that we felt that it might go as high as $8 million. We also pointed out that the trial of such a large case would be expensive. We did not predict that we would be given Collier appraisals for $11,650,000 and $12,500,000.

At the mediation, SSU offered to settle for $7 million plus attorney fees and costs. Collier made what we were told was a "take it or leave it" offer of $8 million plus fees and costs. We "left it" and told them "no thank you".

After the mediation, Bill Earle indicated that $8 million was not a "take it or leave it" number and talked about $7,750,000 with some "extras" which we had discussed at mediation. On Sunday he called me at home and "floated" $7,750,000 plus attorney fees and costs, or an $8,750,000 wrap plus the "extras". On Tuesday he made this a firm offer.

All this was much discussed between you and I and our team. We held a conference in our office on Monday, May 1, 1995 to consider our response to this offer. Our response was to offer an $8 million wrap plus the "extras" which was transmitted immediately. (I was recommending $7,500,000 plus fees and costs plus the "extras" or an $8,250,000 wrap plus the "extras"). In response Bill Earle "floated" $7,250,000 plus attorney fees and costs, or an $8 million wrap, both without any of the "extras". His client had no interest in the "extras" because of our reluctance to provide a long term commitment for raw water service and because it was so complicated and appeared to be somewhat "one-sided" in our favor. The "extras" (which included mutual non-intervention on permit applications and additional easements, among other things) were clearly to our benefit when we would not include the new water.

Both of the Collier family's appraisers, Richard Klusza and J. E. Carroll, argue that the Collier property represents one of the last large tracts available for a golf course/resort community. Both argue that the property enjoyed a particularly advantageous location proximate to the interchange of C.R. 951 and the Tamiami Trail. This is an interchange where shopping centers and the Barefoot Bay, Eagle Creek, Lely Resort, River Bend and Woodfield Lakes developments are now being constructed or planned.

Klusza relies primarily on five comparable sales. Two of those are on the west side of C.R. 951, north of the subject property. The other three, the Livingston property, the Westinghouse Communities property and the NJ Development property are located north of Naples between the Tamiami Trail and I-75. In analyzing the prices of those sales, Klusza finds a range of from $6,722 per dwelling unit to $14,677. These prices were for gross densities ranging from 1.05 to 2.8 dwelling units per acre. From those figures he concludes that the subject property, which was estimated to have 1.6 dwelling units per acre, would have a value of $8,000 per dwelling unit. Klusza then applies that figure to a development plan prepared by Tony Wiles, which indicates that the property being taken could support from 800 to 1100 dwelling units. Using the 800 figure, Klusza reaches a value of $6,400,00 for the property taken. The weakness in Klusza's approach is his assumption that there could, in fact, be 800 units on the property taken and that units at that density would actually sell for $8,000 per unit. In cross examination we will raise serious questions about these assumptions, though we probably will not persuade the court to strike Klusza's testimony. As a result, the jury will probably be given a value of $6,400,000 for the property taken.

Carroll adopts a methodology almost identical to that employed by John Calhoun. As comparables, Carroll uses six sales, two

Westinghouse Communities properties, Quail West, and the Livingston property, all of which are north of Naples, as well as an Elba Development property to the west of the Naples airport and the Arete Golf Club property on C.R. 951. Those sales range in price from $15,656 to $54,952 per acre. They range in size from 216 to 780 acres. From those figures, Carroll reaches a value of $24,000 per gross acre. For the property taken, he adds a premium of $2,500 per acre, presumably for the existence of the lakes and the commercial potential of a part of the property, to reach a value of $26,500 That gives the property taken a value of approximately $4.8 million dollars. Because his comparables and methodology is so close to John Calhoun's, Carroll will be difficult to impeach, though we can raise questions about some of the conclusions drawn from his comparables and his failure to credit the Colliers with the value of the easement. Carroll, however, could respond by adding additional value for the commercial property taken (which he did not value separately) and perhaps by increasing his wetland values from $1,000 to $2,500, the figure used by our appraiser, Woody Hanson.

The real difficulty of this case is not in the comparable sales used by Klusza and Carroll. Even if Klusza's figures are entirely disregarded, the jury can still find a value of the taking somewhere between Calhoun's figure of $4,241,000 and Carroll's figure of $4,800,000, or approximately $4,500,000. If Klusza's figures are not disregarded, the likely value will be between Hanson's figure of $3,600,000 and Kluzsa's of $6,400.000, or approximately $5,000,000.

Both Klusza and Carroll give a value to the interim use of the property for supplying water. Klusza places that value at $1,500,000, while Carroll placed it at $2,400,000, based on the retail rates in the market, including those proposed by the City of Naples to provide water to Marco Island. This is the most difficult portion of their appraisals to assess. We are prepared to make legal arguments that it was inappropriate to ascribe any value to such interim use. You should understand, however, that the Appraisal of Real Estate prepared by the Appraisal Institute, which is akin to the Bible for appraisers, recognizes interim uses and specifically discusses such interim uses as farming operations, parking lots and golf courses. Such uses give the properties on which they are located higher values than would be indicated by otherwise comparable properties lacking such interim uses. If Klusza and Carroll are able to introduce evidence of an interim water use, even after extensive attack on our part, it is likely a jury will find damages of $750,000 to compensate for the loss of up to three years of water.

The most difficult area for us to attack is Klusza and Carroll's severance damages. SSU's appraisers recognize only between $117,000 and $157,400 in severance damages, which was due to the impact of the taking on a triangular piece of property just north of the taking (this area was not specifically dealt with by Klusza and Carroll). Klusza and Carroll are prepared to argue that the taking and its use as a source of fresh water for SSU will make it more difficult to develop the remaining property. According to Klusza and Carroll, the Colliers might have restrictions imposed on the kind of development that could take place within the entire area that provides water for the pits. They are also prepared to contend that there might be less water available for the remaining property to use, particularly for golf courses.

Once again, we will be able to attack the assumptions made by Klusza and Carroll. It is likely, however, that they will be able to point to other situations in which the existence of a fresh water source impeded the development of surrounding properties. They might even be been able to find instances in which Southern States opposed the development of property adjoining some of its water supplies. Klusza indicates in his appraisal that such difficulties might result in a reduction of as much as 38% of the number of units that could be constructed on the remainder property. Rather than use that high figure, he uses a figure of approximately 23% ($4,600,000). Carroll uses a figure of 15% ($4,450,000). I do not believe there is any way to strike such testimony. Accordingly, I think it is likely that the jury, even if it disbelieves much of what Klusza and Carroll say, will still find some severance damage, perhaps in the range of from 5 to 7 1/2 percent of the value of the entire remainder property. If this is true, it will result in a severance damage award of from $1.5 million to in excess of $2 million dollars.

In view of the above, we recommend that you now respond and offer to settle for $8,000,000, inclusive of seller's legal and expert costs. The reasons are as follows:

1. The certainty of a resolution is preferable to the significant exposure to trial awards and costs in excess of $8,000,000.

2. The likely verdict on the value component of the case is $5,000,000

Hanson	$3,606,500	
Calhoun	$4,241,000	
Carroll	$4,800,000	(They may not call)
Klusza	$6,400,000	

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The jury will see them at $6.4 million and us at $4.3 million and probably will find $5 million.

3. The likely verdict on the interim use component is $750,000. We are at zero and they are at $1.5 million and $2.4 million. The jury will likely find $750,000. We have a twenty percent chance of knocking out the interim use entirely but the Court is likely to rule that testimony on the interim use goes to the weight of the evidence and not exclude it.

4. A severance award in the magnitude given above ($1.5 million to in excess of $2 million) is likely given the possibility of development restrictions which would be placed on the remainder property due to proximity to a public water supply source. The values of the respective appraisers are as follows:

Hanson	$ 117,000
Calhoun	$ 157,100
Carroll	$4,450,000
Klusza	$4,600,000

The jury will probably not give them all they want but the jury will likely feel that the property is somewhat harder to develop in the after condition than in the before. (I think this is a fact).

5. I believe that the most probable jury award, before fees and assuming a "best case" trial, will be in excess of $7,000,000, with a chance that the award could be significantly higher.

6. Their eight experts' bills total $424,000 at present. If we cut out the fluff we might get it down to $350,000. This will increase by <u>at least</u> $250,000 for trial.

7. The Collier's legal fees (Earle and Patchen) will be reasonable hours at the rate of $350 per hour plus 15% to 20% of the benefit. The time component will be at least $200,000 more for trial. For pre-trial settlement, 20% of betterment is a good figure and a likely one.

8. Let's assume we get a best case verdict of $7,000,000. Interest will be about $300,000 (say 10% of betterment). Their costs will be $600,000

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plus their legal fees of $750,000. Our fees and costs will be a minimum of $500,000 and could be more. This equals a sum of $9,150,000.

9. Seller's "best case" verdict of $8,500,000 would result in at least $11 million total cost. An excessive award could, of course, be appealed, but at significant further cost without any assurance of success.

10. By floating the $8 million wrap figure they are in effect accepting our $7 million mediation offer plus $350,000 for experts and $650,000 for Earle and Patchen's fee. These are fair figures and likely to be awarded by the court.

11. It is my belief that SSU, on balance, would be exposing its customers to significant risk of increased costs and awards by proceeding to trial given the merits of all evidence provided to date.

I look forward to your call.

With kind regards, I am

Cordially,

Gordon H. Harris

GHH:cm