BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET No. 920199-WS

Filed April 1, 1996

IN RE: APPLICATION OF
SOUTHERN STATES UTILITIES, INC.
and
DELTONA UTILITIES, INC.
FOR INCREASED WATER 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

SOUTHERN STATES UTILITIES, INC.'s BRIEF ON RECONSIDERATION OF ORDER NO. PSC-95-1292-FOF-WS

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On October 19, 1995, the Commission entered an order on remand from the First District Court of Appeal that replaced "uniform" rates established by the Commission for Southern States Utilities, Inc. (Southern) in 1993 and in effect during the pendency of appeals, substituting "modified stand alone" rates. The Commission's order also directed a refund of charges paid by some of Southern's customers. (For convenience, the Commission's order will be referenced in this memorandum as "the Refund Order".)

On March 21, the Commission entered Order No. PSC-96-0406-F0F-WS, memorializing its decision to reconsider the Refund Order and authorizing the parties to file briefs "to address the generic issue of what is the appropriate action the Commission should take upon the remand of the SSU decision in light of [*GTE Florida, Inc. v. Clark*, 21 Fla. L. Weekly S101 (Fla. Feb. 29, 1996)]" (referenced here as "*GTE Florida*" and attached as Appendix 1). This brief is filed by Southern in response to the March 21 order.

SUMMARY OF THE REFUND ORDER

Insofar as is relevant to reconsideration, the Refund Order has two features: a directive for customer refunds from Southern's general revenues, and a levy of interest on those refunds.[1] The Refund Order provides refunds to customers who paid more under the uniform rate structure than they would pay under a new rate structure adopted in the Refund Order. Despite the fact that Southern was merely a stakeholder as to the rate structure issue and had obtained no funds in excess of its Commission-prescribed and judicially-affirmed revenue requirements, the Commission made no offsetting provision to compensate Southern for the

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[1] The Refund Order addresses the "rate structure" directive of the First District by replacing the uniform rates that had been established as interim (then final) rates for ratepayers with modified stand alone rates. The Refund Order also ordered the 1-inch meter BFC rates for certain customers reduced to the 5/8-inch x 3/4-inch BFC rates. Neither issue is now before the Commission on reconsideration. The establishment of modified stand-alone rates is not in dispute, and the 1-inch BFC meter order was reconsidered and vacated at the February 28 hearing. Accordingly, Southern does not discuss either issue in this brief.

refund expense. The Commission's rationale for refunds from Southern's general revenues was that the change in rate structure resulted in a rate decrease for some customers and a rate increase for others, and while the Commission believed "the utility cannot collect from the customers who have paid less" it found it "appropriate to order the utility to refund the difference to those customers" who overpaid. (Refund Order at pp. 6-7). This brief addresses that aspect of the Refund Order. It also addresses the additional directive in the Refund Order that Southern pay interest on those refunds.

OVERVIEW OF *GTE FLORIDA, INC. v. CLARK*

GTE initiated a rate case with the Commission to secure a rate increase. The Commission denied a rate increase, and on May 27, 1993 ordered a rate reduction. GTE appealed the Commission's order, but chose not to seek a stay of the effectiveness of the rate reductions.

In due course, the Supreme Court reversed the Commission in part, and held it was error not to allow GTE to recover in its rates certain costs incurred in transactions with affiliates.[2] On remand, the Commission allowed a recovery of those costs but did so only prospectively, dating from the entry of its order on remand in May of 1995. This denied GTE a recovery of allowable costs during the appeal, and during the subsequent remand proceeding before the Commission.

A second appeal by GTE resulted in the *GTE Florida* decision. There the Court reversed the Commission's remand order and held that GTE was entitled to recover affiliate transaction costs dating from May 27, 1993 — the date of the initial rate case order which erroneously denied GTE those costs. In that second appeal, the Court was presented with the issue of "equity and fairness" to customers by the Commission's determination that a rate

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[2] *GTE Florida, Inc. v. Deason*, 642 So. 2d 545 (Fla. 1994).

recovery pending the appeal was precluded by GTE's failure to ask for a stay pending its appeal. The Court rejected the contention that only customer interests be accommodated in fashioning a proper remand remedy.

> 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.

(App. 1 at p. 2).[3]

The Court's decision in *GTE Florida* contained other features that bear directly on the issues before the Commission.

1. **Retroactive ratemaking**. In briefs filed with the Court, counsel for the Commission and Public Counsel had argued that any recovery of revenues previously denied to the utility under an erroneous rate order would require a surcharge to customers who underpaid pending the appeal, and that any such surcharge would constitute "retroactive rate making." (App. 4 at pp. 10-14 and App. 5 at p. 1). The court rejected that contention, stating:

> 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.

(App. 1 at p. 2).

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[3] Southern has previously called to the Commission's attention the well-established ratemaking principle that equitable principles must govern remand remedies in the event of appellate reversal of the decision of a lower tribunal. (*See* Southern's Motion for Reconsideration dated November 3, 1995, at pp. 8-9, 11; and Southern's Motion for Leave to Reply and Proposed Reply dated November 27, 1995, at p. 15). These pleadings, which provide a thorough discussion of the established legal principles and the facts pertinent to a proper remand remedy in this case, are attached as Appendices 2 and 3. The legal principles there discussed are in complete harmony with the *GTE Florida* decision.

2. **Waiver of refunds by "stay" considerations**. In a brief filed by counsel for the Commission, the argument was made that GTE was itself responsible for its dilemma because it had made a "choice" not to obtain a stay of the Commission's original order. (App. 4 at p. 6). The Commission's brief to the court characterized that action by GTE as a "waiver" of its rights to a rate recovery. (*Id.*). The Florida Supreme Court squarely addressed and rejected that blame-laying characterization:

> 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 . . . .

(App. 1 at p. 2).

3. **Customer notice as to rates being changed**. The brief filed by counsel for the Commission also urged a "notice to customers" theory, to the effect that utility customers are entitled to know what charges are being made pending appellate review of a rate order so they can adjust their consumption accordingly. (App. 4 at pp. 14-15). This contention, put forward as a reason not to allow a surcharge to customers, was met by GTE's response that all of the ratepayers of the utility *had* notice that rates might change since all of them were fully represented throughout the proceeding by Public Counsel. (App. 6). The court addressed and rejected any "notice to customers" theory, as well.

> 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.

(App. 1 at p. 2).[4]

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[4] There is no valid "customer notice" concern here in any event, because any surcharge to offset a refund expense would be prospective. (App. 2 at p. 21-24).

BACKGROUND OF THE REMAND IN THIS PROCEEDING

This ratemaking proceeding was initiated by Southern in 1992 to secure a rate increase. The Commission ordered a rate increase in September of 1993, following which three of the participants in the proceeding filed an appeal to the First District Court of Appeal. Due to the happenstance of one of the appellants being Citrus County, an automatic stay went into effect which, unless vacated, would have prevented Southern's collection of the increased revenue requirements that the Commission had ordered. Consequently, Southern moved to vacate the stay and the Commission obliged, subject to bond being posted.

Two basic issues were presented to the First District. Some appellants challenged only the uniform rate structure established by the Commission. Public Counsel, however, representing **all** of Southern's customers, challenged the revenue requirement itself.

The First District reversed the Commission's imposition of a uniform rate structure, but it **affirmed** the Commission's rate increase order.[5] On remand, Sugarmill Woods, Citrus County and Public Counsel nonetheless argued for a one-sided result — that those customers who had overpaid utility bills under the rate structure erroneously prescribed should be given a refund out of Southern's revenues, without any offsetting surcharge from customers who underpaid in order to keep Southern whole. Staff, however, urged the Commission **not** to order refunds. (App. 7 at p. 3). Accepting the arguments for a one-sided remedy, and without regard for the impact of that remedy as Southern's financial integrity, the Commission entered the Refund Order that has now been reconsidered.

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[5] *Citrus County v. Southern States Utilities, Inc.*, 656 So. 2d 1307, 1311 (Fla. 1st DCA), *review denied*, 663 So. 2d 631 (Fla. 1995) ("Lastly, we address the Office of Public Counsel's contention [regarding revenue requirements]. . . . We are not persuaded . . . ."). In subsequently denying rehearing, the court dismissed attempts by appellants to have the court prescribe a specific remand remedy (whether by way of refunds or otherwise), and left to the Commission ample discretion on remand to apply equitable principles to fashion a fair and sound remand remedy.

ARGUMENT

1. The *GTE Florida* decision governs this proceeding

The posture of this proceeding is identical to the posture of the *GTE Florida* proceeding. In both cases:

a. a utility company had initiated a rate proceeding which culminated in the entry of a final rate order that was appealed;[6]

b. no stay of the rate order was in effect pending appeal, with the consequence in both cases that the Commission's order remained operative during appellate court review;[7]

c. the appellate court reversed some portion of the Commission's order and remanded for proceedings consistent with its decision;[8] and

d. on remand the Commission adopted the view that ratepayers were entitled to have the utility company bear the entire financial burden which resulted from the company's collection of erroneously prescribed rates (here

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[6] In *GTE Florida*, the order decreased revenues whereas in this case the Commission increased revenues. These are opposite sides of the same coin, *United Telephone Co. v. Mann*, 403 So. 2d 962 (Fla. 1981), and are of no decisional consequence here.

[7] In *GTE Florida*, the utility company collected the revenues that the Commission had ordered by declining to seek a stay. In this proceeding, Southern collected the revenue requirements ordered by the Commission by obtaining an order vacating the automatic stay resulting from an appeal by a governmental body.

[8] In the predecessor decision to *GTE Florida*, the Court had sustained the Commission's rejection of many of GTE's rate increase components but reversed as to that component which denied its recovery of certain costs incurred through affiliate transactions. *GTE Florida, Inc. v. Deason, supra*, n. 2. In this case, the First District affirmed the revenue requirements that the Commission had approved but rejected the uniform rate structure for failure of the Commission to find explicitly a functional relationship among Southern's systems.

only erroneously *designed* rates) during the pendency of the appeal, and during the remand consideration process.[9]

The outcome of the two cases should be identical. In *GTE Florida*, the Court made the company whole, as if the correct level of revenue had been ordered by the Commission in the first instance. The Commission can do no less in this proceeding. There is no principled distinction between the "make whole" result in *GTE Florida* and in this case, and there is *no* authority or equitable justification for a remand impairment of lawfully-authorized revenue requirements.[10]

There are, of course, obvious *fact* differences between the two cases: *GTE Florida* involved a rate decrease and no request for stay requested pending appeal; this case involves a rate increase and the vacation of an automatic stay pending appeal. These differences provide no basis to distinguish the **principles** iterated in *GTE Florida*, though, which are:

> (i) that a rate making proceeding is a continuum, from the Commission's initial decision to allow or disallow a rate increase until the conclusion of appellate and any resulting remand proceedings. *GTE Florida* stands four-square for the proposition that a utility company's decision to take advantage of procedures for a stay, or not, has nothing whatever to do with the utility company's entitlement to be made whole as if the proper rates had been established by the Commission in the first instance, even if surcharges are required to accomplish that result;

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[9] In *GTE Florida*, the Commission declined to provide a recovery of uncollected costs, while here the Commission required Southern to pay a sum it had never collected from underpaying customers.

[10] *See* App. 2 at pp. 17-21, 32-34, 43-47.

(ii) that there is **no** requirement of special notification to utility ratepayers as to the amounts they will pay during the course of appellate review from a rate order. *GTE Florida* stands for the sound principle that notification of the **commencement** of a rate proceeding (and indisputably one in which Public Counsel has chosen to participate) is adequate and sufficient advice that no particular level of rates is guaranteed during the ratemaking processing *from its start until the conclusion of appellate review*;

(iii) that a surcharge imposed after appellate review, to recoup under-collection during the pendency of review by virtue of an erroneous order, does **not** constitute retroactive ratemaking;

(iv) that the Commission **must** be fair to the utility company. This is not a new principle, of course, as Southern has earlier noted. (App. 2 at pp. 8-9, 11, 16-24; App. 3 at p. 15); and *Tamaron Homeowners Ass'n, Inc. v. Tamaron Utilities, Inc.*, 460 So. 2d 347 (Fla. 1984).

In sum, the *GTE Florida* decision governs this proceeding fully with respect to the Commission's responsibility to maintain the integrity of its 1993 revenue requirements decision, and with respect to Southern's collection of revenue at the approved $26 million level pending appellate review and remand. There is no equitable or legal reason to conclude otherwise. Any impairment of the revenue requirements awarded by the Commission in 1993 will do violence to the principles of ratemaking so plainly re-affirmed in *GTE Florida*. Any doubt on the point was laid to rest in *GTE Florida*:

> 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.

(App. 1 at p. 2).

GTE Florida establishes that any refund remedy adopted on remand here *must* include an offsetting surcharge or comparable rate adjustment, so that Southern will be kept whole in connection with any rate adjustment among customers. Such a balanced remand remedy will not constitute retroactive ratemaking, but would meet the *GTE Florida* requirement that the Commission accommodate the legitimate interests of Southern as well as ratepayers. (App. 2 at pp. 21-24).

2. **No interest on refunds from Southern is permissible**

A denial of refunds to any of Southern's customers would eliminate altogether the issue of paying interest on refunds. The Commission certainly has the authority and discretion to provide refunds without interest. Under the circumstances of this case, and in light of *GTE Florida*, equitable and legal considerations justify a denial of any interest on refunds. (App. 2 at pp. 38-40, 43-47).

Alternatively, the Commission could allow refunds with interest to some customers and add an offsetting surcharge in the amount of that interest to others. Thus, any interest on refunds would be paid by the customers who had underpaid.

It is not an alternative for the Commission that interest on refunds come from Southern itself, as both *GTE Florida* and other applicable precedents establish. An interest-on-refund award without recoupment would impair Southern's revenue requirements as determined in September of 1993, and as confirmed in the Refund Order. (See Refund Order at 5). Such an erosion of revenues would simply be a penalty against Southern — in effect a confiscation of the company's property stemming from its *compliance* with the Commission's September 1993 rate order. Southern had no "excess" revenue from its collections during appellate review; it collected only what had lawfully been ordered.

3. Southern takes no position on refunds for customers who appealed the rate design order

The question undoubtedly on the minds of Commissioners is whether those parties who prosecuted the rate structure appeal should be afforded a refund as part of a remand remedy. Southern takes no position on that question.

The Commission, Southern believes, is free to provide refunds to those who overpaid pending appeal, and whose efforts secured prospective benefits through implementation of modified stand-alone rates, *so long as the Commission draws the revenue for any refunds from those who underpaid during the period of time for which refunds are calculated.*[11] Southern has placed before the commission a refund/recoupment plan that would fairly accomplish this result. (App. 2 at 21-24; App. 3 at 9-10).[12] In sum, refunds can be ordered in the discretion of the Commission,[13] *but the Commission lacks any discretion to impair Southern's recovery of the aggregate revenue requirements which the district court approved.* The *Citrus County* decision of the district court is the law of this case as to revenue requirements. *Strazzulla v. Hendrich*, 177 So. 2d 1, 2-3 (Fla. 1965); *Barry Hinnant v. Spottswood*, 481 So. 2d 80, 82 (Fla. 1st DCA 1986); *Mendelson v. Mendelson*, 341 So. 2d 811, 813-14 (Fla. 2d DCA 1977).

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[11] The Commission may choose to limit the offsetting effects of refunds and surcharges to those persons who were in fact customers of Southern during the pendency of the appeal and remand proceedings, and thus avoid a result that imposes the remand remedy on new customers. See the penultimate paragraph in *GTE Florida* (App. 1 at p. 2).

[12] Southern has recommended that any ordered refunds be implemented through prospective billing credits over a four-year period, that the corresponding surcharges required to recoup the refund expense be implemented over the same four-year period, and that interest payments and recoupments thereof be limited or eliminated. (App. 2 at pp. 6, 11-15, 47-48 and appended affidavit of Forrest Ludsen). Each of these recommendations warrants serious consideration by the Commission, as they are measures the Commission may wish to adopt to mitigate the rate and financial impacts of the remand remedy it prescribes.

[13] *E.g.*, *Tamiami Trail Tours, Inc. v. Railroad Comm'n*, 174 So. 451 (Fla. 1937).

It is not necessary to reward any customers with a refund, however. They had no vested rights to a refund, as *GTE Florida* firmly establishes. It follows that the issue of granting refunds, or not, so far as Southern is concerned, is a matter wholly within the discretion of the Commission. The *Citrus County* decision that uniform rates were not properly authorized necessarily meant that some customers might be found on remand to have overpaid the utility during the pendency of the appeal, while others would have underpaid. The choice of a revised rate structure on remand, however, cannot result in a penalty to Southern, or an impairment of its entitlement to earn the overall performance requirements authorized by the district court.

4. The Commission has authority to reopen the record when an appellate court reverses a Commission order

In its March 21 Order, the Commission asked the parties to brief whether reopening the record is appropriate. That request stems from Chairman's question at the March 5 hearing concerning the Commission's authority on remand from an appellate decision which vacates a Commission order based on a newly-adopted standard. Specifically, Chairman Clark requested the parties to address whether the Commission's only option is to act narrowly on the matter that the court addressed by reference only to the existing record, or whether the Commission has broader authority on remand.

The Commission's concern, obviously, stems from the district court's decision in this case.[14] In *Citrus County*, the court required a finding of functional relatedness as a

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[14] The *GTE Florida* decision did not involve a standard newly-adopted at the appellate level. The Florida Supreme Court in fact made clear in its opinion that it was following established precedent, quoting with approval a prior decision of the Court dating from 1966 saying that:

(continued ..)

prerequisite to authorization of a uniform rate structure, although (i) no one had argued that position in the course of the Commission proceeding and (ii) the statute that requires functional relatedness as a basis for jurisdiction had no apparent relation to the rate structure issue.

Southern fully addressed the Commission's authority to reopen the record and reconsider its prior rate structure decision in Southern's Motion for Reconsideration. (App. 2 at 11-15). To this discussion Southern would add a reference to the *Village of North Palm Beach* case,[15] cited with approval by the *GTE Florida* court. In that case, the Florida Supreme Court affirmed action on remand by the Commission to supply findings and conclusions in support of a prior rate order that had been quashed by the Court, *and* to affirm the right of the affected utility to recovery of its authorized revenue requirements back to the date of the rate order that had been reversed on appeal.

CONCLUSION

The polestar principle as regards Southern and all of its customers is that any decision of the Commission on remand should be "revenue neutral" for Southern. That result is compelled by the *Citrus County* decision, other applicable precedent, all relevant equitable considerations, and the Commission's own recognition (both in establishing the proper revenue requirements for Southern in September of 1993 and in the Refund Order that has been reconsidered) that the level of revenues established for Southern "results in rates that are just, fair, and reasonable."[16]

(..continued)

> While the facts of *Village of North Palm Beach v. Mason*, 188 So. 2d 788 (Fla. 1966), were different from those we now encounter, we find that Justice O'Connell's reasoning is appropriate in this case.

(App. 1 at p. 2).

[15] *Village of North Palm Beach v. Mason*, 188 So. 2d 778 (Fla. 1966).

[16] 93 F.P.S.C. 3:504 at 595-96, 607; Refund Order at 5.

Southern has only one means to recover its authorized revenue requirements — through proper rates and remand remedies applicable to *all* of its customers. There is no lawful way to distinguish customer rate refunds from customer rate surcharges, and no one in this proceeding has suggested any lawful basis for differentiation. Within its discretionary authority to establish rates appropriately designed, however, the Commission has the authority either to provide a combination of refunds and equivalent surcharges, or simply deny refunds altogether and move from uniform rates to such other rate structure as is found justified on a fully prospective basis only.

Respectfully submitted,

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Public utilities—Telephone companies—Rates—Where Court reversed portion of Public Service Commission order which denied utility recovery of certain costs simply because those expenditures involved purchases from utility's affiliates, PSC erred, in its order implementing remand, in allowing recovery of disputed expenses on a prospective basis only—Utility to be allowed to recover erroneously disallowed expenses through use of surcharge of customers who received services during disputed period of time—Imposition of surcharge would not constitute retroactive ratemaking—It would be inequitable for either utilities or ratepayers to receive a windfall from an erroneous PSC order

GTE FLORIDA INCORPORATED, Appellant, vs. SUSAN F. CLARK, etc., et al., Appellees. Supreme Court of Florida. Case No. 85,776. February 29, 1996. An Appeal from the Public Service Commission. Counsel: Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tallahassee; and Marceil Morrell and Kimberly Caswell of GTE Florida Incorporated, Tampa, for Appellant. Robert D. Vandiver, General Counsel and David E. Smith, Director of Appeals, Florida Public Service Commission, Tallahassee; and Jack Shreve, Public Counsel and Charles J. Beck, Deputy Public Counsel, on behalf of the Citizens of the State of Florida, Tallahassee, for Appellees.

(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 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.)

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

* * *

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: November 3, 1995

MOTION OF SOUTHERN STATES UTILITIES, INC. FOR RECONSIDERATION OF ORDER NO. PSC-95-1292-FOF-WS

Pursuant to Rule 25-22.060, Florida Administrative Code, Southern States Utilities, Inc. ("SSU") hereby files its Motion for Reconsideration of the Commission's October 19, 1995 "Order Complying With Mandate, Requiring Refund, and Disposing of Joint Petition" ("Refund Order")[1] in the captioned proceeding. Specifically, SSU seeks reconsideration of that portion of the Refund Order that directed SSU (1) to make certain refunds, with interest, for the period "between the initial effective date of the uniform rate up to the date at which a new rate structure can be implemented,"[2] while making no provision for recovery by SSU of the refund expense; (2) to calculate its final rates on a "modified stand alone rate structure," rather than the uniform rate structure approved in the Commission's March 22, 1993 "Final Order Setting

[1]Order No. PSC-95-1292-FOF-WS.

[2]Refund Order at 8.

Rates;"[3] and (3) to adjust the final rates for selected service areas to reflect base facilities charges ("BFC") for 5/8 x 3/4 inch meters, rather than the 1-inch meters actually installed to serve the customers in those service areas.[4] Prompt Commission review and reconsideration of the Refund Order is warranted because the Commission's directives are arbitrary, capricious, and otherwise unlawful. The end results of the decisions made in that order are violative of SSU's rights under the Constitutions of the United States and the State of Florida and contrary to the letter and spirit of the Water and Wastewater Regulatory System Regulatory Law (the "Act"), Chapter 367, Florida Statutes (1993).

In support of its Motion for Reconsideration, SSU respectfully shows:

BACKGROUND

In the interests of administrative efficiency, SSU generally accepts the Commission's brief summary (Refund Order at 1-3) of the relevant orders, decisions, and procedures leading to issuance of the Refund Order and would add the following facts which are crucial to a proper understanding and disposition of the issues presented on remand from the Court's decision in Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA 1995), review denied, _____ So.2d _____ (Fla. October 27, 1995) (hereinafter "Citrus County"):

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[3]Order No. PSC-93-0425-FOF-WS, 93 F.P.S.C. 3:504 (1993) (the "1993 Final Order").

[4]Refund Order at 6.

- the one immutable element in this case is the approved level of SSU's revenue requirements; the 1993 Final Order set SSU's combined water and wastewater revenue requirement at some $26 million annually; in Citrus County, the Court affirmed the Commission's revenue requirement determinations in all respects over a challenge by the Office of Public Counsel ("OPC"); hence, the Commission's revenue requirements determinations are now final and must be implemented by the Commission pursuant to the Court's remand and mandate from the Citrus County decision;

- the impacts of the Refund Order were not considered; the effects of the Refund Order are to deny SSU any opportunity to recover in excess of $8 million of its authorized revenue requirement, and to impair the financial integrity of SSU and its ability to secure required capital on reasonable terms;

- in prescribing the uniform rate structure in the 1993 Final Order, the Commission rejected SSU's modest proposal to move gradually toward a uniform rate structure by "capping" customers' bills at a 10,000 gallon level of consumption -- the same rate structure that the Commission has now prescribed in the Refund Order;[5]

- in rejecting SSU's rate structure proposal, the Commission elected not to credit the testimony of SSU witnesses Ludsen and Cresse "that uniform rates would not be appropriate," and disregarded the similar recommendation of its own Staff witness, Mr. Williams, who counseled that the long term goal of

[5]See 1993 Final Order at 93.

uniform rates should be preceded by other necessary changes (Id. at 93-94 (emphasis added));

- in requesting that the Commission vacate the automatic stay imposed as the result of the appeals taken by Citrus County, SSU repeatedly made it clear that the only legitimate purpose of any bond or corporate undertaking required as a condition for lifting the stay was to secure refunds to consumers in the event the reviewing court ultimately determined that the Commission erred in setting the level of SSU's revenue requirement; and

- in ordering that the automatic stay be vacated, the Commission did not even hint, much less expressly state, that SSU was being required to assume exclusive responsibility for the adverse effects of any later modification of the rate structure imposed by the Commission.

LEGAL STANDARD FOR RECONSIDERATION

The purpose of a Motion for Reconsideration is

> [T]o bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance.

Diamond Cab Co. of Miami v. King, 146 So.2d 889, 891 (Fla. 1962); Pingree v. Quaintence, 394 So.2d 161, 162 (Fla. 1st DCA 1981). As the Commission has confirmed time and again, an "overlooked point" may include a mistake in law or a mistake in fact. See, e.g., In Re: Complaint and Petition of Cynwyd Investments against Tamiami Village Utility, Inc., etc., Order No. PSC-94-0718-FOF-WS, 94 F.P.S.C. 6:166, 167 (1994).

As more specifically discussed in this Motion, the Refund Order is premised on misstatements of fact as well as the failure of the Commission to consider material facts in reaching its determinations in the Order. Further, the Refund Order is based on an erroneous construction of case law and imposes results which are incorrect and unsupportable as a matter of law. Thus, reconsideration is the proper remedy where, as in this case, the Commission has rendered an Order that contains mistakes of fact and mistakes of law affecting the Commission's determinations and materially and adversely affecting SSU. Those mistakes of fact and mistakes of law are discussed in detail in this Motion.

GROUNDS FOR REHEARING

In the Refund Order, the Commission acted arbitrarily, capriciously and otherwise unlawfully in the following respects:

(1) the Commission disregarded entirely the fact that its Refund Order effectively nullified in large part its own determinations in the 1993 Final Order regarding the approved revenue requirement that SSU must be afforded a reasonable opportunity to earn, and its lack of authority to alter the Citrus County decision affirming that revenue requirement level as lawful for SSU;

(2) the Commission failed to exercise properly the ample discretion it has following the Court's remand because it:

(a) disregarded the devastating financial impact of its Refund Order on SSU; and

(b) refused to reaffirm its original 1993 decision to impose a uniform rate structure by taking the appropriate procedural steps necessary to allow it to give recognition to the findings and conclusions in its July 21, 1995 "Final Order Determining Jurisdiction Over Existing Facilities And Land Of Southern States Utilities, Inc. Pursuant To Section 367.171(7), Florida Statutes," issued July 21, 1995 (the "Jurisdictional Order");[6]

(3) the Commission erroneously concluded that affording SSU an opportunity to recover the extraordinary current expenses associated with the Commission's refund requirement would constitute retroactive ratemaking;

(4) the Commission erroneously determined that, by filing a bond, SSU must be deemed to have assumed all financial risks of any subsequent modification of the Commission-imposed uniform rate structure;

(5) the Commission erred in adjusting the rate structure it adopted in the Refund Order by requiring SSU to reduce the BFC rates for Pine Ridge Utilities and Sugarmill Woods water customers on 1-inch meters to the applicable 5/8 inch x 3/4 inch BFC rates for each service area; and

(6) the end results of the Refund Order were unreasonable and in violation of SSU's rights under the United States and Florida Constitutions.

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[6]Order No. PSC-95-0894-FOF-WS, appeal pending sub nom., Hernando County v. Public Service Commission, 1st DCA Case No. 95-2935.

ARGUMENT

A. THE COMMISSION FAILED TO PROPERLY EXERCISE THE AMPLE DISCRETION IT HAD FOLLOWING THE COURT'S REMAND

1. The Commission Has And Must Exercise Discretion To Establish Just And Reasonable Rates And Remedies In The Wake Of Judicial Reversal Of That Aspect Of Its 1993 Final Order That Prescribed A Uniform Rate Structure

The Legislature has entrusted the Commission with broad discretion to establish rates for the public utilities subject to its jurisdiction. The Commission exercises that discretion in accordance with the criteria and standards contained in its enabling statutes and subject to applicable constitutional limitations.

Once the Commission has made a decision, such as the 1993 Final Order that required SSU to collect its approved revenue requirement through Commission-imposed uniform rates, affected parties have the right to seek judicial review thereof. However, a reviewing court's role in the ratemaking process is limited. The court examines the Commission's decision to confirm that the Commission acted within the scope of its statutory authority, did not abuse its discretion, and supported its decision with competent, substantial evidence. Stated another way, reviewing courts may set aside Commission orders establishing unjust, unreasonable, or unfairly discriminatory rates but, with rare and limited exceptions, the courts do not prescribe new rates or rate remedies because that is a legislative function that has been delegated to the Commission. City of Pompano Beach v. Oltman, 389

So.2d 283, 286 (4th DCA 1980), pet. denied, 399 So. 2d 1144 (Fla. 1981); Mohme v. City of Cocoa, 328 So.2d 422, 424-425 (Fla. 1976), app. after remand, 356 So.2d 2 (Fla. 4th DCA 1977); Cooper v. Tampa Electric Co., 17 So.2d 785 (Fla. 1944). Accordingly, following a remand the Commission has broad discretion to fashion remedies that will fairly protect and accommodate the legitimate interests of all affected parties. Tamiami Trail Tours, Inc. v. Railroad Commission, 174 So. 451 (Fla. 1937).

In Tamiami, the Court described the legal effects of a reversal of an agency order on the parties and subject matter of the order:

> When the order is quashed ... it leaves the subject matter (of the order) ... as if no order or judgment has been entered and the parties stand[ing] upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded, had the order reviewed not been entered. (Emphasis supplied).

Tamiami, 174 So. at 453. See also State of Florida v. East Coast Railway Co., 176 So.2d 514 (Fla. 1st DCA 1965) cert. dismissed, Harvell v. Rotary Disc File Corp., 188 So.2d 819 (Fla. 1966). These and other similar cases stand for the principle that "an agency, like a court, can undo what is wrongfully done by virtue of its [earlier] order." See United Gas Improvement v. Callery Properties, Inc., 382 U.S. 223 (1965).

The teachings of these cases are very simple. It is incumbent upon the Commission to return SSU to the status which it would have

been entitled to attain had the rate structure determination in the 1993 Final Order not been required. That means that the Commission adopted remedy must permit SSU the opportunity to earn the final revenue requirements ordered by the Commission and affirmed by the First District Court of Appeal. The Refund Order violates this principle by returning only the customers whose rates were higher under uniform rates to the pre-appeal status quo -- the customers whose rates were lower under uniform rates receive a windfall while SSU is penalized by having to pay refunds to the customers whose rates were higher under uniform rates. The results are arbitrary, capricious, inequitable and violative of the legal requirement that the Commission return all parties to the pre-appeal status quo.

2. The Commission Abused Its Discretion By Failing to Consider The Devastating Financial Impact of the Refund Order on SSU

While the Commission has broad discretion on remand to fashion an appropriate remedy for the legal error identified by the Court regarding the Commission's decision to require SSU to implement uniform rates, the transcript of the September 12, 1995 oral argument in this proceeding and the Commission's Refund Order reveal that the Commission acted arbitrarily and capriciously by failing to exercise that discretion in a responsible and even-handed fashion. The Commission's principal error lay in its failure to even consider, much less analyze, the practical effect of its Refund Order and the devastating financial impacts of that order on SSU.

Under Section 367.081, Florida Statutes (1993), the Commission is charged with "fix[ing] rates which are just, reasonable, compensatory, and not unfairly discriminatory" (emphasis added). The Commission discharged its duty to prescribe compensatory rates for SSU by basing the final rates authorized in its 1993 Final Order on a combined revenue requirement of some $26 million for water and wastewater. The revenue requirements aspect of the Commission's 1993 Final Order was affirmed by the Court in Citrus County in all respects. 656 So.2d at 1311.

Despite the fact that SSU's revenue requirement had been established by the Commission after extensive hearings, was reaffirmed by the Court, and has long since become final and binding on all parties, the practical, inevitable effect of the Refund Order is to deprive SSU of the opportunity to recover that Commission-approved revenue requirement and the opportunity to earn a fair rate of return. These facts were confirmed by Staff member Willis during the following exchange with Commissioner Garcia at the September 12, 1995 Agenda Conference:

> COMMISSIONER GARCIA: Well, that's what happened with this whole case, isn't it? I mean, the cost of litigating this to this point and everything that has gone on is clearly going to be passed on to all the customers at one point or another, correct?
>
> MR. WILLIS: At one point, but if you actually make refunds on one side and don't collect on the other side, and allow for no recovery, they will not get that money. You have actually put the Company into an underearnings posture at that point and have not allowed them a fair rate of return.

See copy of page 142 from transcript of September 12, 1995 Agenda Conference attached hereto as Exhibit A.

The Commission's decision to deprive SSU of its approved revenue requirement, an action which the Commission took well after the fact and without even acknowledging the consequences of its act, is contrary to the Citrus County Court's decision and mandate on revenue requirement issues. Hence, the Refund Order effects an unconstitutional confiscation of SSU's property, and otherwise is wholly inequitable and arbitrary. Similarly, the Commission failed to acknowledge, let alone justify, the devastating impacts that the Refund Order will have on SSU's precarious financial situation.

The Commission's broad discretion to fashion an appropriate remedy here cannot be exercised in derogation of the full range of procedural and substantive protections that are available to SSU in any ratemaking context. In any case of this nature, the Commission must strike a fair balance between the consumer, the regulated entity, and those interests that fall in between. See, e.g., Mesa Petroleum Co. v. FPC, 441 F.2d 182, 186 (5th Cir. 1971) (citations omitted). A review of the Refund Order shows that, far from satisfying this minimum standard, the Commission did not even try. That is the fundamental error that the Commission must redress on rehearing.

3. The Commission Arbitrarily Failed To Exercise Its Authority to Implement A Uniform Rate Structure

Another flaw in the Commission's deliberations on remand is the failure to grant SSU's specific request that it reopen the record in this proceeding for the limited purpose of incorporating the Commission's own record and findings of fact and conclusions of

law in its Jurisdictional Order. The Commission's only apparent rationale for ignoring its own findings and conclusions is contained in the following terse passage:

> We will not reach the question of whether we can or cannot reopen the record to address the court's concern, because as a matter of policy in this case, we find that the record should not be reopened.

Refund Order at 4. Since the Commission has not identified what policy considerations motivated this determination, and has not explained why it found particular policy considerations persuasive and others unpersuasive, the Commission's decision does not meet the standard for reasoned decision making by an administrative agency.

Pursuant to Order No. PSC-95-1043-FOF-WS issued August 21, 1995 in Docket No. 950495-WS, the Commission found that SSU's exclusion of minimum filing requirements information for Hernando, Hillsborough and Polk Counties in its Application for Increased Water and Wastewater Rates rendered the Application "deficient" because "... the fact that we have found that SSU's facilities and land constitute a single system, requires that the utility include all of its facilities when seeking uniform rates." Order No. PSC-95-1043-FOF-WS, at 3. Effectively, the Commission determined that it had jurisdiction over SSU's land and facilities in those counties as a result of the Jurisdictional Order. Although the Commission has been stayed from exercising jurisdiction over SSU's land and facilities in those counties as a result of the filing of notices of appeal by the Counties, the Commission's findings are not deemed vacated by such appeals. The Commission is not bound to

ignore the findings contained in the Jurisdictional Order although it must refrain from exercising jurisdiction under Section 367.171(7) until the appeal is decided.[7] Accordingly, on reconsideration the Commission should remedy this clear error by reopening the record of this proceeding in order to incorporate the findings made in the Jurisdictional Order and the related administrative record. By taking these steps, the Commission can remedy the sole defect found by the court in the Commission's earlier decision requiring SSU to implement a uniform rate structure -- the lack of a finding that SSU's land and facilities are functionally related and constitute one system.

The Commission need not be concerned that it lacks legal authority to take these necessary and wholly appropriate steps as a response to the Citrus County remand. As a general matter, reopening the record to incorporate, or to afford parties an opportunity to elicit, additional or new evidence relevant to a determination previously made by an agency is a lawful response to a court reversal and remand. Air Products and Chemicals v. FERC, 650 F.2d 687 at 699-700 (D.C. Cir. 1981); Public Service Commission of the State of New York v. FPC, 287 F.2d 143 at 146 (D.C. Cir.

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[7] "A supersedeas on appeal from a final judgment stays the execution but does not undo the performance of the judgment." City of Plant City v. Mann, 400 So.2d 952, 953 (Fla. 1981) (citations omitted). "Being preventive in its effect the stay does not undo or set aside what the trial court has adjudicated ... it merely suspends the order." Id. at 954 (citations omitted). See also Wait v. Florida Power & Light Company, 732 So.2d 420, 423 (Fla. 1979) (a stay is procedural in nature and concerned only with "the means and method to apply and enforce" substantive rights).

1960). Such action is particularly appropriate where, as here, the court decision is based on a new rule of law not advanced by the parties in the appeal or considered by the agency in the first instance. McCormick Machinery v. Johnson & Sons, 523 So.2d 651, 656 (Fla. 1st DCA 1988).

Moreover, in this case that procedure is entirely proper and advisable for several reasons. First, contrary to the suggestions of the parties seeking immediate refunds, the Court decision did not require that the Commission prescribe refunds. Indeed, in the face of Citrus County's specific demand that "the Court make it abundantly clear that . . . the next action for the PSC to undertake is to order customer refunds to those individuals who have been unlawfully overcharged,"[8] the Court declined to so instruct or constrain the Commission.[9] The implications of this decision are obvious: consistent with generally accepted principles of constitutional law, the Court fulfilled its judicial review function by pointing out to the Commission the legal error inherent in the 1993 Final Order and left it to the Commission's discretion to fashion a rate remedy that was fair to all parties. Second, the proceedings that led ultimately to the Jurisdictional Order were instituted to address precisely the question that the Citrus County

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[8]See Citrus County's Response To Motions For Rehearing, Etc., And Suggestion For Motion To Show Cause Why Monetary And Other Sanctions Should Not Be Imposed, dated May 8, 1995, at 12-13.

[9]Significantly, Citrus County also demanded that the Court declare that "the stand-alone rates calculated by the PSC in the final order are the correct and only lawful rates." Id. This the Court also declined to do.

decision held the Commission should have addressed and decided as part of its decision imposing uniform rates. Accordingly, the procedure of adopting the findings from the Jurisdictional Order provides an appropriate and administratively sound method of complying with the Court's remand.

In addition, maintenance of the uniform rate structure is fully justified by the evidence and policy considerations underlying the Jurisdictional Order. While the Court in Citrus County faulted the Commission for not making a specific finding about the functional interrelationship of the system used to serve SSU's various service areas, the Court did not state, or even imply, that such a finding could not be made. Indeed, the Commission had already made the requisite finding that SSU's 127 systems are functionally related when the Court's mandate issued on July 13, 1995,[10] and this finding was fully supported. Moreover, the same facts and circumstances that underpin the Jurisdictional Order have existed for some time. Thus, contrary to the repeated assertions of Citrus County and COVA, there is no iniquitous rate subsidy inherent in uniform rates and no legal or equitable reason for the Commission to refrain from reaffirming and continuing the uniform rate structure. Finally, maintenance of the existing uniform rates will avoid the significant rate shocks many customers would experience upon reintroduction of stand alone rates. In this

[10]The Commission, upon a full investigation of the facts, voted on the Jurisdictional Order at its meeting of June 17, 1995. At a minimum, in the event refunds are required by the Commission, the period for calculation of refunds should terminate as of that date.

regard, if the Commission were to follow-up its planned reintroduction of stand alone rates with imposition once again of uniform rates in SSU's pending rate proceeding, the result would be a series of unnecessary and otherwise avoidable gyrations in the rates of all customers.

For all of these reasons, sound agency practice and substantial evidence support continued implementation of uniform rates in SSU's service areas. It was arbitrary and capricious of the Commission to disregard its own findings that support uniform rates and the substantial evidence that supports those findings.

B. THE COMMISSION MUST REMEDY THE UNLAWFUL EFFECTS OF THE REFUND ORDER BY EITHER (1) RESCINDING ITS ORDER; OR (2) AUTHORIZING SSU TO RECOVER ALL REFUND COSTS

As discussed in the prior section of this Rehearing Application, the Commission abused its discretion by not reopening the record in this proceeding, giving effect to the findings in its recent Jurisdictional Order, and thereby affirming the result reached in its 1993 Final Order prescribing the uniform rate structure. On reconsideration, the Commission should correct this error and rescind or eliminate any refund requirement. For the reasons given above, that is the most effective, efficient, and equitable response to the Court's decision and remand, which did not require the Commission to incorporate refunds in its rate remedy.

Nevertheless, the route chosen by the Commission in its Refund Order could be converted into a workable and lawful remedy, but only if the requirement for payment of refunds in certain service

areas is balanced with corresponding and coextensive authority for SSU to recover the extraordinary expense resulting from the refund order. While reaffirming the uniform rate structure in the manner described is a preferred and legally-defensible solution, an alternative could be employed to resolve the remand issues in a fair and constitutionally sound manner -- by combining the Refund Order's refund requirement with authority for SSU to recover the current costs of making the required refunds through prospective charges applicable to customers' future consumption of the Company's water and wastewater services.[11]

The Commission initially rejected such an equitable alternative out-of-hand on the grounds that (1) allowing SSU to recover the current expenses associated with making refunds would violate a perceived prohibition against retroactive ratemaking, and (2) SSU "accepted the risk" of implementing final rates based on the Commission-dictated uniform rate structure. Refund Order at 6-7. As demonstrated below, the Commission was wrong on both counts.

1. To the Extent that Revenues are Reduced by Unrecoverable Refunds Below the Approved Overall Revenue Requirements, the Commission's Refund Order Violates "The Law of the Case"

In its 1993 Final Order, the Commission set SSU's combined revenue requirements at some $26 million annually, based on an express finding that these amounts are "fair, just and reasonable." See 93 F.P.S.C. 3:504 at 595-96, 607. These approved revenue

[11]SSU's proposed remedy, which would involve rate credits to disburse refunds and rate surcharges to recover the costs thereof -- is detailed in the Affidavit of Forrest Ludsen attached as Exhibit B.

levels, although less than SSU had requested, represented increases of 26.77% and 48.61%, respectively.

The 1993 Final Order was appealed by OPC, Citrus County and COVA. Of the three appellants, only OPC challenged the revenues which the Commission prescribed:

> The arguments of Citizens will address only Commission findings regarding the revenue level approved for the utility. ... Specifically, the Citizens argue herein that Commission failure to require the utility to recognize for ratemaking purposes a substantial gain on the sale of utility property is contrary to Florida law.[12]

Citrus County [and COVA] abjured any challenge to the revenue levels: "Arguments will be limited to several issues surrounding the 'statewide uniform' rate structure approved in this case."[13]

The First District Court of Appeal considered the increased revenue requirements determined by the Commission, and addressed both that aspect of the 1993 Final Order and the rate structure challenge. The court rejected the contentions of OPC that the revenue requirements determined by the Commission were excessive and should be reduced:

> On March 22, 1993, the PSC issued its Final Order, approving a 26.77% increase in SSU's annual revenue from its water systems, and a 48.61% increase in revenue from its wastewater system. The order also approved a new rate structure for SSU .... [W]e reverse on the ground that the PSC exceeded its statutory authority when it approved uniform statewide

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[12]Citizens' Amended Initial Brief to First District Court of Appeal, at pp. iv-v.

[13]Initial Brief of Citrus County to First District Court of Appeal, at p. 1.

> rates....
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> * * *
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> Lastly, we address the Office of Public Counsel's contention .... We are not persuaded by this argument.
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> * * *
>
> The Commission did not deviate from the essential requirements of law when it declined to take the proceeds into account in determining SSU's rates and thus, this portion of the order should be affirmed.[14]

On remand the Commission purported to recognize that the district court affirmed the revenue requirements determinations set in the 1993 Final Order.[15] Notwithstanding that acknowledgment, by directing refunds to some customers without offsetting that refund expense with comparable recoveries from other customers, the Refund Order necessarily produces overall revenues for SSU that are substantially below SSU's approved revenue requirements. The adverse financial effects of the Refund Order -- an obligation for SSU to incur the cost of over $8 million in refunds without compensating recoveries -- are described in the affidavit of its Chief Financial Officer, Mr. Vierima, which is attached to this Motion for Reconsideration as Exhibit C.[16]

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[14]Citrus County, 656 So.2d at 1309, 1311.

[15]On April 6, 1995, the Commission's decision ... was reversed in part **and affirmed in part** by the First District Court of Appeal. A mandate was issued by [that court] on July 13, 1995." (Refund Order at p. 2).

[16]SSU requests that the attached Affidavits of Mr. Ludsen (Exhibit B) and Mr. Vierima (Exhibit C) be incorporated into and made a part of the record in this proceeding. See McCormick Machinery v. Johnson & Sons, supra. If necessary and if deemed

Under "the law of the case" doctrine, the Commission lacked authority to require any reduction of the aggregate revenue requirements which had been prescribed in the 1993 Final Order and affirmed by the Court (let alone precipitate the substantial financial impairment which results from the Refund Order). That doctrine is well-entrenched in Florida law, as the Court observed in Strazzulla v. Hendrick, 177 So.2d 1, 2 and 3 (Fla. 1965).

> Early in the jurisprudence of this state it was established that all points of law adjudicated upon a former writ or error or appeal became "the law of the case" and that such points were "no longer open for discussion or consideration" in subsequent proceedings in the case. (citations omitted).
>
> • * *
>
> This is so, because the former opinion has conclusively settled the law of this case in so far as it was duly put in issue for decision upon the assignments and cross-assignments of error then presented.

The doctrine has been duly and faithfully followed by the several courts of Florida. E.g., Barry Hinnant, Inc. v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986) ("The doctrine of the law of the case ... requires adherence to the principle that questions of law decided on an appeal to a court of ultimate resort must govern the case in the same court and the trial court throughout all subsequent stages of the proceeding ... so long as the facts on which the decision was predicated continue to be the facts in the

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appropriate by the Commission, Messrs. Vierima and Ludsen will be produced to testify before the Commission on the matters set forth in their respective Affidavits.

case.").[17] Adherence to the "law of the case" doctrine is mandatory, not discriminatory. See Robinson v. Gale, 380 So.2d 513 (Fla. 3rd DCA 1980); Mendelson v. Mendelson, 341 So.2d 811, 813 (Fla. 2d DCA 1977).

Accordingly, the Commission must modify or rescind the Refund Order on reconsideration to give due and proper effect to the First District Court of Appeal's affirmance of the Commission's revenue requirements determinations.

2. Permitting SSU To Collect Current Refund Expenses Via A Prospective Surcharge Would Not Constitute Retroactive Ratemaking

Under directly applicable precedents, unlawful retroactive ratemaking occurs only when new rates are applied to prior consumption. Citizens of State v. Public Service Commission, 448 So.2d 1024, 1027 (Fla. 1984) ("Citizens").[18] In proposing that it be permitted to collect, by means of a refund expense recovery mechanism, the substantial expense that the Refund Order requires SSU to incur for refunds to certain service areas, SSU is not advancing a proposal that would violate the rule against

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[17]The "facts" in the case are those foundation facts on which the Commission set SSU's revenue requirements, none of which have changed.

[18]In Citizens supra, the Florida Supreme Court upheld the Commission's decision to apply an amended version of a cost recovery formula to a project that had qualified for the cost recovery formula at a time when the formula was different. The Court rejected claims that application of the amended formula constituted retroactive ratemaking holding that retroactive ratemaking occurs only when new rates are applied to prior consumption.

retroactive ratemaking.[19] Instead, SSU is proposing an entirely lawful prospective surcharge mechanism designed to recover the extraordinary current expense occasioned by the Commission's Refund Order. This surcharge mechanism will not be applied to prior consumption, but applies prospectively to recover current expenses in future rates once appropriate Commission approvals are obtained.[20]

Although there do not appear to be any Florida decisions directly on point on the unique facts of this case, where prospective surcharges to some service areas are required to

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[19]The Commission attempts to justify its "refund without recoupment" requirement by stating that the remedy prescribed would not violate retroactive ratemaking concepts. In support of this statement the Commission cites United Telephone Company v. Mann, 403 So.2d 962 (Fla. 1981). The Commission's reliance on United Telephone Company to support its one-sided remedy under the facts in this case is totally misplaced. United Telephone Company did not involve a challenge to nor a reversal of a Commission approved rate design. The refund issue discussed in the case focused solely on total revenue requirements and how much money collected by the utility during the interim rate period should be refunded to all ratepayers.

[20]In its Refund Order the Commission cited Citizens, supra, and Gulf Power Co. v. Cresse, 410 So.2d. 492 (Fla. 1982), ("Gulf Power") in support of its view that it could not permit SSU to retroactively surcharge its customers' prior consumption in order to recoup amounts refunded to other customers. SSU agrees that a proposal to apply a surcharge to prior consumption might violate the rule against retroactive ratemaking as described in the Citizens and Gulf Power decisions. However, SSU is not proposing to apply a surcharge to prior consumption. Rather, SSU is proposing to apply a refund cost recovery charge prospectively based on its customers' future consumption. This would allow SSU to collect an extraordinary current expense that would accrue as of the effective date of a refund order. Hence, SSU's surcharge proposal would not violate the rule against retroactive ratemaking described in the Citizens and Gulf Power decisions and is entirely consistent with the Citrus County affirmance of SSU's Commission-approved revenue requirements.

recover the expense associated with a refund ordered by the Commission for customers in other service areas in response to a judicially invalidated rate structure, numerous courts in other jurisdictions have considered the issue and properly held that surcharges were appropriate and lawful. See, Public Service Commission v. Southwest Gas Corp., 662 P.2d 624 (Nev. 1983); Application of Hawaii Electric Light Co., 594 P.2d 612 (Haw. 1979); California Manufacturers' Association v. P.U.C., 595 P.2d 98 (Cal. 1979); Southwestern Bell Telephone Co. v. Public Utility Commission, 615 S.W.2d 947 (Tex. Civ. App. 1981), aff'd, 662 S.W.2d 82 (Tex. 1981). In a number of these cases the courts have explicitly rejected arguments that such surcharges constitute retroactive ratemaking. Southwest Gas, supra, 662 P.2d at 629; Southwestern Bell Telephone, supra, 615 S.W.2d at 957.

The above-cited decisions are consistent with rulings by the Commission and Florida's courts in analogous contexts. For example, for many years the Commission has with judicial approval permitted Florida utilities to surcharge for prior period underrecoveries of fuel expenses under fuel adjustment clauses. Citizens v. Florida Public Service Commission, 403 So.2d 1332 (Fla. 1982). Moreover, the Florida Supreme Court has recognized that a disallowance of past period costs recovered through a fuel adjustment clause mechanism does not constitute retroactive ratemaking. Gulf Power Co. v. Public Service Commission, 487 So.2d 1036 (Fla. 1986). The court's decision was based on the proposition that a fuel adjustment proceeding is "a continuous

proceeding." Id. at 1037.

Similarly, SSU's proposal to surcharge customers prospectively in order to recover current refund expenses does not constitute retroactive ratemaking -- rather, it is nothing more than a means to enable the Commission equitably and lawfully to resolve issues in a continuous proceeding. When the First Circuit Court of Appeals invalidated the Commission-prescribed uniform rate structure, the Court returned the parties to the same position that they would have been in had that rate structure never been required. Tamiami Trail Tours, Inc. v. Railroad Commission, 174 So. 451, 453 (Fla. 1937); State of Florida v. East Coast Railway Co., 176 So.2d 514 (Fla. 1st DCA 1965). By authorizing recovery of refund expenses occasioned by the Refund Order, the Commission merely would be recognizing the impact of its prior rate structure order upon all parties, including SSU, and reasonably restoring those parties, through prospective refunds and surcharges, to the position that they would have attained if the uniform rate structure had not been required by the Commission. Plainly, this is not retroactive ratemaking. See, Southwest Gas, supra, 662 P.2d at 630.

3. The Circumstances Surrounding SSU's Motion To Vacate The Commission's Original Rate Order Provide No Justification For The Commission's Decision To Require SSU to Implement Refunds Without Corresponding Provision For Recovery of the Refund Costs

The system of ratemaking embodied in the Act exposes a utility like SSU to significant risks, including the risk that interim rate

relief will be inadequate, or the risk that the Commission or an appellate court will reject a significant portion, and potentially all, of the utility's claimed increased revenue requirement.[21] In this case, SSU bore the risks associated with proving its entitlement to a claimed annual increase of $8.6 million in revenue requirements.[22] The Act does not expressly, or by necessary implication, require the utility to assume the risks associated with a new rate structure imposed on the utility by the Commission. The Commission's ill-considered alteration of this common sense allocation of regulatory risks in this case cannot stand.

The Commission's reliance upon the transcript of the November 23, 1993 oral argument on SSU's motion to lift the automatic stay and its December 14, 1993 Order[23] granting that relief provide no support whatsoever for the Commission's claim that SSU somehow "assumed" all risks associated with a potential later judicial reversal of the Commission-imposed uniform rate design. If anything, the pertinent facts and circumstances support SSU's position on the matter.

The transcript of the November 23, 1993 oral argument, pertinent portions of which are attached hereto as Exhibit D,

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[21]As the proponent of increased revenues, the utility also bears the burden of proof.

[22]The 1993 Final Order authorized an increase in final revenue requirements of $6.7 million -- approximately 23% less than the $8.7 million refund liability and expense imposed by the Refund Order. See paragraph 10, Ludsen Affidavit (Exhibit B).

[23]Order No. PSC-93-1788-FOF-WS (Order Vacating Automatic Stay).

confirms that SSU did not intend or undertake to "assume the risk" of a court reversal on rate structure issues. Moreover, the transcript demonstrates that the Commissioners understood this and did not construe or consider the actions taken as binding SSU or the Commission to any predetermined refund exposure or result in the event of a Court reversal on the rate structure issues. At the oral argument, SSU counsel, Mr. Hoffman, responded unequivocally to then-Chairman Deason's direct and specific question on the issue as follows:

CHAIRMAN DEASON: Well, do you agree that if the stay is vacated there are going to be customers that are going to be paying more under statewide rates?

MR. HOFFMAN: Yes.

CHAIRMAN DEASON: And if the stay is vacated and the appeal is successful on COVA and Citrus County's part, you're saying there is not going to be a refund to those customers who are paying more?

MR. HOFFMAN: Our position that we have taken, Mr. Chairman, is that there is not a refund. And I think I have already explained to you why. By what I'm saying to you is we do not dispute, particularly now that Public Counsel has filed an appeal and they are going to put revenue requirements at issue, we do not dispute the need for corporate undertaking or bond at this point of this proceeding and we ar willing to make sure that it's posted.

CHAIRMAN DEASON: But that is a question of overall revenue requirements, not customer-specific rates?

MR. HOFFMAN: That's correct.

CHAIRMAN DEASON: Does Staff agree with that?

MS. BEDELL
(staff attorney): Yes.

See Tr. 53-54. This transcript excerpt makes it abundantly clear that SSU was providing a bond against the possibility of a court reversal on a revenue requirements issue, and equally clear that SSU, by that action, was not assuming potential additional risk attendant upon a subsequent modification of the Commission-imposed uniform rate design. Any doubt on that score was removed by Chairman Deason's subsequent summary (Tr. 57) of SSU's position:

> CHAIRMAN DEASON: And what Mr. Hoffman is saying, it's his opinion that the Company is not putting itself at risk, it does not have the liability to make the customer-specific whole. Their only requirement is to make customers as a general body of ratepayers whole. That is, if they have collected more total revenue than what they are authorized as a result of the final decision on appeal, they are liable for that, but they are not liable to make specific customers whole.

Moreover, the transcript also shows that, at least when they voted on the December 17, 1993 Order, the Commissioners' knew exactly what the Company's position was and that, notwithstanding the posting of a bond, SSU's shareholders would not be responsible ultimately for the expense of a potential refund remedy adopted as a consequence of a court reversal on the rate structure issue. See Tr. 54-56 (Commissioner Clark's colloquy with Messrs. Willis and Hill). Finally, the transcript shows (at 60-61) that Chairman Deason voted against the measure finally adopted by the Commission precisely because he recognized that merely requiring the Company to furnish a bond should not and would not shift the entire risk of

a later modification of the uniform rate structure to SSU under the circumstances that, in fact, have now occurred:

> CHAIRMAN DEASON: It has been moved and seconded. Let me state right now that I'm going to vote against the motion. I am persuaded by the argument that we are moving into a new area here where there are differences between rates for different customers in different areas, and that in my opinion we should keep the status quo, which are interim rates, and let the court give the guidance to the Commission that it sees fit. I don't see where -- even though there is going to be a bond posted, it's not going to be for the purposes of making individual specific customers whole, it's going to be for the purpose of making customers as a total rate paying body whole. And that's really not the main crux of this appeal, so I would oppose that. But, anyway, we have a motion and a second --

Page 139 of the transcript of the September 12, 1995 Agenda Conference (Exhibit A) provides further confirmation that Staff's understanding of the intent and language in the Order Vacating Automatic Stay was that the refund provisions of the Order were directed only to a potential reversal by the Court on a revenue requirements issue:

> MS. JABER (staff attorney): ... What (Mr. Hill) was trying to say (at the November 23, 1993 Agenda Conference) was if revenue requirement does get appealed, and revenue requirement does get overturned, there will be a refund that's generated. It's the difference in the revenue requirement that is going to create a refund.

Just as the transcripts do not support the Commission's revisionist theory that SSU "assumed the risk" of court reversal of the Commission's uniform rate structure policy, the Commission's December 14, 1993 Order Vacating Automatic Stay provides no support

for that novel proposition. First, the very notion that the order could work such a fundamental change in the understanding of the Commissioners and affected parties is absurd on its face. Second, although the Commission did not indicate which portions of the December 17 Order support its newly-adopted position, the following excerpts from that order fully support SSU's position:

> We are concerned that the utility may not be afforded its statutory opportunity to earn a fair rate of return, whether it implements the final rates and loses the appeal or does not implement final rates and prevails on appeal. Since the utility has implemented the final rates and has asked to have the stay lifted, we find that the utility has made the choice to bear the risk of loss that may be associated with implementing the final rates pending the resolution of the appeal.
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> By providing security for those customers who may have overpaid in the event the Final Order is overturned, the customers of this utility will be protected in the event a refund may be required . . . . [I]n the event the Final Order is not affirmed, the utility may lose revenues which this Commission determined the utility to be entitled to have the opportunity to earn.

Order Vacating Automatic Stay, at 4-5. (Emphasis supplied). These passages state only that the utility may be required to bear a risk of loss in the event the Commission's decision was reversed.[24] These passages in the December 17 Order are consistent with the comments made by the Commissioners at the November 23 Oral Argument which confirm that the Commission declined to resolve or otherwise

[24]Because these passages made no substantive determination to impose a loss on SSU, and left the matter of remedies that might be associated with later court decisions to the future, SSU was without standing to seek judicial review of these December 1993 observations and surely cannot now be bound to the Commission's after-the-fact attempt to treat the passages as a predetermination of the issues only now squarely presented.

predetermine the issues of refunds, losses, or other potential future remedies relating to rate structure issues at that time. They provide no support for the belated risk assumption theory reflected in the Refund Order.

4. The Rates Based On The Commission-imposed Uniform Rate Structure Were The Only Lawful Rates Available To The Company Following The 1993 Final Order

Implicit in the Commission's theory that SSU "assumed" the rate design risks is an unstated conclusion that SSU had other feasible choices available to it and voluntarily elected to undertake risks on an issue where SSU was merely a stakeholder. The facts do not support such a conclusion.

The natural consequence of the Commission's 1993 Final Order was that the new uniform rates prescribed in that order superseded SSU's interim stand alone rates as of September 15, 1993, the date on which the new uniform rates issued in compliance with that Order were accepted for filing.[25] Under that Order, those were the only lawful rates available to the Company. In other words, absent a new, superseding Commission order, SSU was powerless to charge the superseded interim rates or any other stand alone rates.

Any notion that SSU might have had some other viable rate options at the time was dispelled conclusively at the Commission's November 23, 1993 oral argument. There, the parties objecting to implementation of uniform rates specifically requested that the

[25]There is no little irony to the fact that the automatic stay at issue in the latter part of 1993 became effective on October 8, 1993, after the uniform rates SSU filed in compliance with the Commission's 1993 Final Order were accepted.

Commission order the Company to charge the interim stand alone rates pending the outcome of court review. Continuing the interim stand alone rates in effect was one of the specific alternatives proposed by the Commission's Staff and the preferred approach of Chairman Deason. Nonetheless, with the Commission's vote to vacate the automatic stay, whatever remaining viability the interim rate option arguably might have had at that juncture (and SSU maintains that the interim rates were unavailable, as a matter of law, and would have been unconstitutionally confiscatory)[26] was definitively removed from consideration. In sum, following issuance of the 1993 Final Order, SSU had only one rate option that would comply with the Commission's directives and provide a reasonable opportunity to recover the revenue requirements found justified by the Commission -- rates based on the Commission's uniform rate structure.

For all of the foregoing reasons, the suggestion in the Refund Order that SSU voluntarily assumed all refund risks associated with court reversal of the Commission's uniform rate structure, and any

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[26]As a matter of law, SSU was authorized to collect its interim rates only "... until the effective date of the final order." §367.082(1), Fla. Stat. (1993). With respect to SSU's final rates, the final order became effective upon approval of SSU's tariff sheets reflecting the approved final rates. The final rate tariff sheets were approved and effective September 15, 1993, well before Citrus County filed its October 8, 1993 Notice of Appeal and months before the November 23, 1993 Agenda Conference on SSU's Motion to Vacate the Automatic Stay. Moreover, maintenance of the interim rates would have exposed the Company to continuing non-recovery of a substantial portion of the revenue requirements that the Commission had found justified in the 1993 Final Order which was issued in March of 1993. See Tr. 52 (Exhibit D). Rate alternatives preordained to deny SSU recovery of its approved revenue requirement offer a Hobson's choice that would be unlawful on its face.

subsequent remedy the Commission might devise, is without any legitimate basis in fact or logic and must be rescinded on reconsideration.

5. The Commission Acted Arbitrarily And Capriciously By Failing To Address Potential Adverse Financial Consequences On Remand In A Manner Comparable To That Afforded Other Utilities Subject To Its Jurisdiction

The complete insensitivity, in the Refund Order, to the impact of its one-sided refund remedy on SSU stands in stark contrast to the extraordinary measures that the Commission has taken in similar situations to assure adequate means for recovery of approved utility revenue requirements in the event a Commission-imposed rate design change is overturned on appeal.

For example, in a case involving the appropriate method for pass-through of municipal franchise fees, the Commission ordered the utility to change the method by which it recovered municipal franchise fees. The utility had been using the "spread method" which recovered these costs from all customers on the system. The Commission directed the utility to replace the "spread method" with a "direct method," which placed the financial burden of the municipal franchise fees only on the customers who resided in the municipality that levied the fees. City of Plant City v. Mann, 400 So. 2d 952 (Fla. 1981). When a municipal appeal resulted in an automatic stay of the Commission's rate design order, the Commission lifted that stay on condition that Tampa Electric continue to bill the franchise fees to non-municipal customers, charge municipal customers the higher charges resulting from

application of the newly imposed "direct method," and place excess franchise fee collections in an escrow fund, for ultimate distribution to whichever class of customers prevailed.[27] In so doing, the Commission properly took effective steps to assure Tampa Electric a fair opportunity to continue recovering its revenue requirement and to provide Tampa Electric excess funds which then could be used to make refunds to the prevailing parties. Thus, the Commission fairly recognized the utility's position as a stakeholder.

SSU submits that the Commission's action regarding Tampa Electric constitutes a sound policy reasonably assuring an opportunity to recover approved revenue requirements in the face of court challenges on Commission-imposed rate design changes. Simply stated, the Commission did not shift the risk of its own rate structure policy initiatives to the regulated utility. That policy can and should be applied by the Commission here to afford similar protection to SSU regarding recovery of its Commission-approved and Court-affirmed revenue requirement. The Commission's failure, in the Refund Order, to even acknowledge the existence of this policy, explain its departure from this policy[28] or explain why SSU was not

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[27]In contrast to the remedy provided to Tampa Electric, SSU is not seeking to "double recover" the relevant costs. Under the remedy it has proposed in this case, at no time will SSU collect, or have collected, "excessive" funds from its customers in relation to SSU's overall revenue requirements.

[28]See, e.g. Greater Boston Television Corp. v. FERC, 444 F. 2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) ("[a]n agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating

being afforded comparable basic assurances regarding recovery of approved revenue requirements here on remand was arbitrary and capricious.[29]

6. The Commission's Decision To Reduce The Base Facilities Charges For Pine Ridge and Sugarmill Woods Customers Was Arbitrary, Unsupported, and In Conflict With Essential Requirements of Law

The Commission, sua sponte, raised and resolved an issue in the Refund Order on a matter that was never at issue on appeal -- the appropriateness of 1-inch meter base facilities charge ("BFC") rates for Pine Ridge and Sugarmill Woods water customers. Water customers on 1-inch meters comprise approximately 85% and 89% of the Pine Ridge Utilities and Sugarmill Woods customers, respectively.[30] The Commission ordered the 1-inch meter BFC rates for these customers reduced to the 5/8 inch x 3/4 inch BFC rates under the new modified stand-alone rate structure. For the

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that prior policies and standards are being deliberately changed, not casually ignored and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute." (444 F. 2d at 852)). The Commission definitely crossed that line in its Refund Order. See also Section 120.68(12)(b) and (c), Florida Statutes (1993), which requires a reviewing court to remand an agency decision which is "inconsistent with an agency rule" or "inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency;" and, Beverly Enterprises v. DHRS, 573 So.2d 19, 23 (Fla. 1st DCA 1990) (Court reversed where agency changed its interpretation of controlling statutes without offering a sufficient record predicate or otherwise offering a reasonable explanation for its abandonment of previous announced interpretation).

[29]See footnote 41, infra.

[30]Refund Order, at 6.

following reasons, the Commission's decision must be reconsidered and rescinded.

The Commission's decision carries a number of legal infirmities. There was never an issue raised in the rate case as to whether the Pine Ridge and Sugarmill Woods 1-inch meter customers should be charged pursuant to a 5/8 inch x 3/4 inch meter BFC rate.[31] Since there was no issue raised in the rate case, there is no discussion of this issue or finding placing the 1-inch BFC in issue for these service areas in the 1993 Final Order. Nor was this issue raised on appeal. Hence, no reasonable argument can be made that an adjustment to the 1-inch meter BFC for the Pine Ridge and Sugarmill Woods service areas is either required by, or falls within the scope of, the court's remand and mandate to the Commission. Clearly, it does not and the time has long since passed when the issue could otherwise be raised in this proceeding.

The revenue impact of this aspect of the Refund Order highlights another fatal legal infirmity. The reduction of the 1-inch meter BFC rates to the 5/8 inch x 3/4 inch meter BFC rates results in a revenue deficiency of approximately $105,000 on an annual basis. The Refund Order and the rates prescribed therein make no provision for recovery of the revenue deficiency caused by this adjustment. See Affidavit of Forrest Ludsen, Exhibit B. As previously discussed, the principle of the law of the case requires this Commission to authorize SSU to implement rates sufficient to

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[31] Prehearing Order, Order No. PSC-92-1265-PHO-WS issued November 4, 1992.

recover the final revenue requirements approved by the Commission and affirmed by the court. The Commission's decision to reduce the 1-inch meter BFCs for the Pine Ridge and Sugarmill Woods customers is not permissible under the law of the case since such a reduction results in rates that cannot recover the total authorized revenue requirements.[32] Similarly, this aspect of the Commission's decision on the 1-inch meter BFCs effects an unconstitutional taking of SSU's property through outright foreclosure of any opportunity for SSU to recover the costs of facilities required to serve the affected customers.[33]

The Commission's decision also has the effect of unlawfully increasing SSU's refund liability by approximately $210,000. See Affidavit of Forrest Ludsen, Exhibit B. In the Refund Order, the Commission set forth a refund methodology based on the difference between revenues under uniform rates and revenues under the approved modified stand-alone rates required by the Order.[34] The Refund Order does not provide for or even contemplate any further

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[32]Attachment A to the Ludsen Affidavit also shows the corrected BFC rates that would be required to properly implement the decision on this issue reflected in the Refund Order without creating a revenue deficiency for the affected service areas.

[33]The Commission's decision also departs from prior agency practice and policy of imposing a higher BFC rate for 1-inch meter water customers (as compared to 5/8 inch x 3/4 inch meter water customers) with no explanation or justification for this sudden change in policy. The Commissions's lack of explanation or justification for its change in policy renders its decision defective as a matter of law because it fails to meet the standard set forth in Section 120.68(12)(c), Florida Statutes (1993) and cases under Florida jurisprudence. See, e.g., Beverly Enterprises v. DHRS, supra.

[34]Refund Order, at 8.

adjustment of past period rates between customer classes as an additional basis for determining refund amounts. Yet it appears that is precisely what the Commission has done. By retroactively adjusting past period BFCs for the Pine Ridge and Sugarmill Woods areas, the Commission has increased SSU's refund liability and surcharges by up to approximately $210,000 depending on the refund calculation period selected by the Commission. Such an arbitrary result cannot stand.

Finally, rescission of the Commission's 1-inch meter BFC decision is necessary to achieve a consistency currently lacking in the Refund Order. In the Refund Order, the Commission rejected the Joint Petitioners' demand for refunds of interim rate revenues because "[t]he parties did not appeal the orders on interim rates, and never took issue with the interim revenue requirements or the interim rate structure."[35] The same is true with respect to the BFC for 1-inch meters. No party raised this issue as an issue on appeal, and the only fair and consistent approach requires the Commission to rescind its decision on the 1-inch meter BFC issue.

[35]Refund Order, at 10.

7. It is Improper and Unlawful for the Commission to Require SSU to Pay Interest on These Refunds

Citing Section 367.081(6),[36] Florida Statutes, and Rule 25-30.360(4)(a), the Refund Order has directs SSU to calculate and pay interest on the more than $8 million principal amount of required refunds. Refund Order at 8-9. As indicated in the attached Affidavit of Forrest Ludsen (Exhibit B), estimated interest on the refunds required by the Refund Order now stands at more than $400,000. Under the circumstances of this case, the Commission must rescind the requirement that SSU pay interest on refunds.

At the outset, SSU notes that under Rule 25-30.360, the Commission has discretion not to require the payment of interest in an appropriate case.[37] SSU submits that requiring it to pay

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[36]It is not clear why the Commission has relied upon this section of the Act to support application of interest on refunds flowing from the "correction" of the Commission's imposition of the uniform rate structure. That section deals with rates charged and revenues collected at the instance of the utility subject to refund prior to the Commission's final order in a rate increase proceeding and specifically contemplates interest on refunds of "such portion of the [utility's] increased rates which are found not to be justified and which are collected during the period specified." Here, SSU's final increases in revenue requirements were approved and compliance rates implemented pursuant to the 1993 Final Order.

[37]Rule 25-30.360(1) provides in pertinent part that "all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule unless otherwise ordered by the Commission" (emphasis added). This provision for Commission discretion is further supported by the introductory phrase of Rule 25-30.360(4)(a), the portion of the Rule dealing specifically with interest on refunds, which indicates that it applies "[i]n the case of refunds which the Commission orders to be made with interest," thereby acknowledging that there can be instances when the Commission will not order interest on refunds. In this context, failure to explain why interest on refunds was ordered in this case was arbitrary and capricious.

interest would be highly improper.

Conventional requirements for a utility to pay interest on refunds are based on the notion that the utility had the use of "excess" customer funds. Typically, the requirement to pay interest on refunds arises when a particular component of the Company's claimed overall revenue requirement is collected, subject to refund, in interim rates and is found, after hearing, not to be justified. That certainly is not the case here. Here, the Commission established SSU's just and reasonable revenue requirements in its 1993 Final Order and the Citrus County decision rejected the sole challenge thereto. Neither the Commission nor any other party has ever claimed, much less demonstrated, that SSU has collected more revenue than was authorized in the 1993 Final Order. Accordingly, unlike the typical case, here SSU never had the use of "excess" customer funds. For this reason, there is no logical or equitable basis for ordering SSU to pay interest on refunds.

It also would be improper to order SSU to pay interest on refund amounts because, with respect to the rate structure issue, SSU is merely a stakeholder. As part of its case-in-chief, SSU made a specific proposal to collect its approved revenue requirements by application of a modified stand alone rate structure. The Commission rejected SSU's proposal and imposed its own uniform rate structure. However, the application of the uniform rate structure clearly was intended by the Commission and

understood by SSU and all parties to be "revenue neutral." In other words, the uniform rates were designed and intended to provide recovery of the authorized revenue requirements -- no more and no less. To be sure, based on the Court's reversal of the uniform rate structure and the Commission's subsequent determination of substitute rates in the Refund Order, in hindsight some customers paid rates that were higher than the substitute rates. But it does not follow that SSU benefited from that state of facts or received excess customer funds. To the contrary, the only parties who "benefited" from imposition of the Commission's uniform rates were those who, in retrospect, paid lower rates than the rates which the Commission now has determined are appropriate in the Refund Order. If, contrary to SSU's position, the Commission persists in requiring interest on refunds, these previously "favored" customers are the only parties from whom that interest expense can equitably and lawfully be recovered.[38]

For these reasons, the Commission must rescind that portion of the Refund Order that requires SSU to pay interest on refund amounts.

8. Long Term Policy Considerations Warrant Rescission of the Refund Order

As demonstrated above, the requirements of the Refund Order will have an immediate, devastating impact on SSU and should be

[38]The Affidavits of Forrest Ludsen and Scott Vierima, attached hereto as Exhibits B and C, respectively, set out the facts pertinent to the interest issue. Mr. Ludsen's Affidavit describes the interest computation proposed by SSU for rate credits and surcharges in the event the Commission persists in requiring interest.

reconsidered and rescinded for that reason alone. However, wholly aside from the adverse impacts of the Refund Order on SSU, that Order has far reaching adverse policy ramifications for the Commission and all other utilities subject to its jurisdiction.

The message of the Refund Order for SSU and other utilities is clear: the Commission may hold you responsible through an after-the-fact refund requirement to redress perceived "wrongs" flowing from legally deficient rate structure policies the Commission imposed upon you in the first instance. That is a chilling message that utilities will disregard only at their financial peril. It also is a message which would undermine the intent and substantive effect of the file and suspend procedures embodied in the Act.

First, to the extent this message effectively constrains a utility, pending judicial review, to continue charging interim rates that are lower than the final rates approved by the Commission, such message is directly contrary to the letter and spirit of Section 367.081(6), Florida Statutes (1993), which is intended to provide the utility with final rate relief within 12 months of the official date of filing. In effect, by adopting the Refund Order's arbitrary approach to the risks associated with a reversal of Commission-sponsored rate design charges, the Commission would be engrafting onto the Act a new, and far longer, "regulatory lag" than the Legislature authorized. Such action is unlawful on its face. The effect on utilities would be devastating financially and perversely ironic in light of the intent of the file and suspend law to limit regulatory lag.

Second, as a direct result of the Refund Order, the Commission can be certain that its future cost allocation, rate design and rate structure policy reforms, no matter how well justified and urgently needed, will not be carried into effect in a timely manner because no utility will jeopardize its financial standing by moving to vacate the automatic stay resulting from a county's or municipality's petition for judicial review. In other words, even if the Commission determines that an existing rate structure produces rates that are "unfairly discriminatory" or otherwise unreasonable in violation of the Act, it will be powerless to remedy such unjust and unreasonable rate consequences for years, i.e., until after the parties who benefit from maintenance of the existing discriminatory rate structure have exhausted all available judicial review.

Finally, the inevitable consequence of the Refund Order will be to make utilities unwilling even to suggest rate reforms that may be in the best interests of their customers. Because utilities have the most in depth knowledge of their facilities and customers and because generally they have nothing to gain or lose through revenue neutral changes in rate structure, they are uniquely qualified to develop balanced rate structures that are fair to all customers. However, if left to stand, the Refund Order will dissuade SSU and other utilities from advancing rate structure reforms in the first instance. Clearly, that is not an outcome that is in the best interest of the citizens of Florida or this Commission.

For these reasons, the Commission should give careful consideration to the adverse policy implications of its Refund Order, and take such matters into account in fashioning a fair and equitable remedy in this case.

9. The Commission's Refund Order Constitutes A Clear Violation Of SSU's Constitutional Rights

a. The Impact Of The Order Is An Unconstitutional Taking Of SSU's Property

The Refund Order is devoid of any assessment of the impact of the Commission's actions on SSU or any attempt to balance investor and consumer interests to fashion a fair and even-handed remedy in response to the Court's invalidation of the Commission-ordered uniform rate structure. As shown in the attached affidavits of Messrs. Vierima and Ludsen, the end results of the Refund Order are an arbitrary and unlawful confiscation of SSU's property in violation of both the Federal and State Constitutions.[39] Where, as here, the effects of a rate order are such that utility investors are denied an opportunity to secure a fair return on investment and the utility's financial integrity is materially impaired, there is an unlawful taking or confiscation of the utility's property. See Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944); Gulf Power Co. v. Bevis, 296 So.2d 482, 484 (Fla. 1974); Keystone Water Co. Inc. v. Bevis, 278 So.2d 606 (Fla. 1973);

[39]The Fifth Amendment to the United States Constitution provides in pertinent part, ". . . nor shall property be taken for public use, without just compensation." U.S. Const. Amend. V; Article I, Sections 2 and 9, and Article X, Section 6, Florida Constitution.

Southern States Utilities v. Duval Co. Bd., 82 P.U.R. 3d 452, 458 (4th Cir. Fla. 1969).

As set out in the attached affidavit of Scott Vierima, the Refund Order, coupled with the failure of the Commission to provide for the recovery of the refund expense, necessarily precludes SSU from earning a fair return on utility investment devoted to public service and materially impairs SSU's financial integrity.[40] Without recoupment of the refund expense, SSU has no prospect of recovering its authorized revenue requirements, attracting capital on reasonable terms, or fairly compensating its investors for the use of capital devoted to utility service. These end results undoubtedly comprise an unconstitutional deprivation of SSU's property. See Tamaron Homeowners Ass'n, Inc. v. Tamaron Utilities Inc., 460 So.2d 347, 352 (Fla. 1984); Gulf Power Co. v. Bevis, 296 So.2d 482, 484 (Fla. 1974); United Tel. Co. v. Mann, 403 So.2d 962, 966 (Fla. 1981).

b. The Commission's Refund Order Violates SSU's Equal Protection Rights

The Refund Order incorporates a one-sided remedy that addresses the consumer interest only -- indeed, the Order

[40]SSU has incurred a year-to-date loss on continuing operations, and is now incurring monthly losses; its ability to meet debt covenants and raise necessary capital is impaired. The Refund Order, if implemented, is anticipated to result in a 1995 after tax loss in excess of $5 million, which would wipe out all of SSU's retained earnings. These end results occur whether the impacts of the Order are considered in isolation, or in conjunction with other recent Commission actions affecting SSU's rates. Vierima Affidavit (Exhibit C) at 3-5.

explicitly precludes any corresponding remedy to SSU and its investors and lenders for the injuries that result from the Refund Order and SSU's good faith compliance with the Commission's rate structure directives. Whether the Refund Order is the product of a Commission failure to fairly exercise the broad discretion we have demonstrated it does possess to fashion an even-handed remedy, or some perceived inability of the Commission to do so, the arbitrary and disparate treatment of SSU and its investors on the one hand, and customers that would benefit from the Refund Order on the other hand is without rational basis and necessarily denies the utility and its owners equal protection of the law in violation of the Federal and Florida constitutions.[41]

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[41]The Fourteenth Amendment to the United States Constitution provides in pertinent part, "[no State shall] . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1; Article I, Section 2, Florida Constitution. Such constitutional equal protection provisions have been applied to invalidate statutory and/or regulatory schemes that grant a right or remedy to utility customers without conferring an equivalent right or remedy on the utility. See, e.g., Village of Saratoga Springs v. Saratoga Gas, Elec., Light & Power Co., 191 N.Y. 123, 149, 83 N.E.3d 693, 701 (1908); Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1983) ("Inconsistent results based upon similar facts, without a reasonable explanation, violate [Chapter 120, Florida Statutes] as well as the equal protection guarantees of both the Florida and United States Constitutions"); Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So.2d 92, 96 (Fla. 1983) (Commission's discretionary authority may not be applied in an arbitrary or discriminatory manner "... that would permit the charitable contributions of one utility to be included as an operating expense while denying such treatment to another utility").

c. The Commission's Refund Order Imposes an Unconstitutional Penalty

The Commission has confirmed in the Order Vacating Automatic Stay that SSU implemented the approved uniform rates in accordance with applicable statutes and Commission rules and orders.[42] SSU properly moved to vacate the automatic stay and posted a bond in accordance with Commission rules[43] in order to vacate the stay and continue billing the uniform rates. There has been no showing that, in doing so, SSU violated a statute, or Commission rule or order. Nonetheless, the effect of the Refund Order would be to penalize SSU for its compliance with the 1993 Final Order as well as all applicable law. The devastating financial impact of the penalty is reflected in Mr. Vierima's Affidavit (Exhibit C) which shows that SSU's projected 1995 return on equity for combined water and wastewater operations was -0.43% and that for the first nine months of 1995 SSU incurred a cumulative loss on continuing operations of $254,703 -- all before booking and payment of the $8.7 million refund liability. Incurrence of the refund liability imposed by the Commission would wipe out SSU's retained earnings. Such a penalty would clearly violate Article I, Section 18 of the Florida Constitution.[44] See Florida Tel. Corp. v. Carter, 70 So.2d

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[42] See Order Vacating Automatic Stay, at 6-7.

[43] See Fla. Admin. Code R. 25-22.061(3)(a).

[44] Article I, Section 18 of the Florida Constitution provides that "[n]o administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Section 367.161, Florida Statutes (1993), subjects a utility to specifically enumerated financial penalties if the utility "knowingly refuses to comply with, or willfully

508 (Fla. 1954); Deltona Corporation v. Mayo, 342 So.2d 510 (Fla. 1977) (Commission exceeded authority by denying rate increase or imposing penalty to deny rate increase); compare Gulf Power Co. v. Wilson, 597 So.2d 270 (Fla. 1992) (Commission's reduction of utility's return on equity by 50 basis points not an unconstitutional penalty because utility not denied opportunity to earn a reasonable rate of return).

CONCLUSION

WHEREFORE, for all the foregoing reasons, SSU respectfully requests that the Commission consider and act upon this Motion for Reconsideration at the earliest possible time, granting the following relief:

1. Rescind any refund requirement, incorporate the findings and conclusions from the Commission's Jurisdictional Order, and reaffirm the uniform rate structure heretofore required for SSU;

2. If and only if refunds are required, (a) adopt and approve the prospective refund plan and correlative refund expense recoupment mechanism proposed by SSU herein; (b) provide that the period for calculation of refunds terminates as of June 19, 1995, the date the Commission voted to adopt the findings and conclusions set out in its Jurisdictional Order; and (c) eliminate the Refund Order's requirement to accrue and pay

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violates any provision of this chapter or any lawful rule or order of the Commission...."

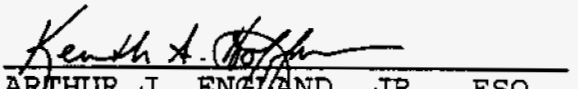
interest;

3. If and only if a change from the uniform rate structure is required, provide that such change will be effective on a prospective basis only;

4. In any event, vacate that portion of the Refund Order that would require SSU to implement 5/8 inch meter base facilities charges in service areas where customers are served predominantly through 1-inch meters; and

5. Grant such other and further relief to SSU as has been justified in the premises, eliminating any penalty or injury imposed upon SSU by virtue of the Refund Order and its good faith compliance with the Commission's rate structure directives.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion of Southern States Utilities, Inc. for Reconsideration of Order No. PSC-95-1292-FOF-WS was furnished by U. S. Mail to the following this 3rd day of November, 1995:

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By: _____
KENNETH A. HOFFMAN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: 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. 921099-WS

BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	26(**)
DATE:	Tuesday, September 12, 1995
PLACE:	The Betty Easley Conference Center Hearing Room 148 4075 Esplanade Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

EXHIBIT A

confusion. A first reading of transcript, especially when you have different people giving you the excerpts of the transcripts that is appropriate for their position, you understand why there is confusion. The transcript that we've attached to the recommendation is the entire transcript related to that very issue.

When I went back and I read that entire transcript, it is clear that Mr. Hill did say a refund would be required. It is clear that the utility said a refund would not be required. And let me tell you where they were each coming from. The utility has always maintained a refund wasn't going to be necessary because they were under the impression that revenue requirement was not going to be appealed. What I think Mr. Hill was saying, not that it matters, because Staff isn't the one that makes the decision, it's the Commission. What he was trying to say was if revenue requirement does get appealed, and revenue requirement does get overturned, there will be a refund that's generated. It's the difference in the revenue requirement that is going to create a refund.

Now, what Commissioner Clark and then Chairman Deason recognized was that it would be the difference of the revenues, and I think that's clear in the transcript.

MR. WILLIS: The other thing in creating a regulatory asset is if you do that, and you properly apply it, you're going to be having everyone in the system paying for recovery of that regulatory asset, uniformly. I mean, everyone is going to get a piece of it through an allocation. So, you're back to giving it back to those customers that you took it away from or you're taking it away from the customers you're getting it back from, partially.

COMMISSIONER GARCIA: Well, that's what happened with this whole case, isn't it? I mean, the cost of litigating this to this point and everything that has gone on is clearly going to be passed on to all the customers at one point or another, correct?

MR. WILLIS: At one point, but if you actually make refunds on one side and don't collect on the other side, and allow for no recovery, they will not get that money. You have actually put the Company into an underearnings posture at that point and have not allowed them a fair rate of return.

COMMISSIONER DEASON: I think we need to go back, and we were having this discussion at the time that there was a motion to vacate the stay. And my recollection is more akin to that of Commissioner Johnson, and that's why I asked the questions that I

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water 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: November 3, 1995

State of Florida)
County of Orange)

AFFIDAVIT OF FORREST L. LUDSEN

Before me, the undersigned authority, appeared FORREST L. LUDSEN, personally known to me, who after being duly sworn, deposes and says:

1. I am Vice President of Finance and Administration of Southern States Utilities, Inc. ("SSU"). My business address is 1000 Color Place, Apopka, Florida 32703.

2. I submit this Affidavit in support of SSU's Motion for Reconsideration of the Commission's October 19, 1995 "Order Complying With Mandate, Requiring Refund, and Disposing of Joint Petition" ("Order").[1]

3. As Vice President of Finance and Administration, I have supervisory responsibility for rates and rate-related matters, and as such am familiar with the facts and circumstances set out in this affidavit and in SSU's Motion for Reconsideration.

4. I have reviewed the Order and am familiar with the facts and circumstances surrounding that Order, the relevant holdings of which appear to require SSU:

(a) to revise its final rates to reflect a modified stand alone rate structure and to

[1]Order No. PSC-95-1292-FOF-WS.

EXHIBIT B

implement such rates prospectively;

(b) to refund with interest alleged overcharges to certain customers for the period "between the initial effective date of the uniform rate up to the date at which a new rate structure can be implemented",[2] with no provision for recovery by SSU of the current refund expense incurred by virtue of the Order;

(c) to adjust the modified stand alone structure rates the Commission has now prescribed to reflect base facilities charges for certain SSU service areas for 5/8-inch meters, despite the fact that the customers in these service areas are supplied through 1-inch meters.

I understand that SSU is required to calculate the refunds required by the Order on the hypothesis that the modified stand alone rate structure now required by the Commission was in effect since September 15, 1993 -- the date the uniform systemwide rate structure heretofore required by the Commission was made effective.

5. I am also familiar with and have evaluated the anticipated rate impacts of the Commission's Order on both SSU and its customers.

6. The purpose of my affidavit is threefold. First, I will discuss the impacts of the Commission's arbitrary adjustment regarding base facility charges for 1" meters in certain service areas. Second, I will describe the results of the refund liability analyses I have performed. Third, I will describe the rate methodologies by which SSU proposes to effectuate the refunds and recover the expense associated therewith in the event the Commission adheres to its decision to abandon the uniform rate structure it previously required and retains a requirement that refunds be made. In that connection, I will explain why accumulation and payment of interest on the

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[2]Order at 8.

refunds is not justified in this case, and why SSU proposes to effect the refunds and recover the related expense over a four-year period to mitigate unnecessary rate disruptions and disparities, as well as the adverse financial impacts described by Mr. Vierima of refunding over a shorter period of time.

Error In Base Facility Charge Adjustment

7. The Order directs SSU to adjust its rates for selected SSU service areas in which SSU's residential customers are served primarily through 1-inch meters. As I understand this adjustment, the Commission has arbitrarily required SSU to reduce the base facility charges in these areas to the level that would otherwise apply for service through 5/8 inch x 3/4 inch meters. The cost of service for the 1-inch meters remains, as do the meters themselves, which are properly sized to meet the service requirements of these customers.

8. The Order makes no provision for recovery of the revenue deficiency caused by this adjustment to base facility charges, which deficiency amounts to approximately $105,000 per year. This failure increases SSU's liability under the Order by about $210,000, and guarantees that the rates required by the Order will not be sufficient to generate revenues that cover SSU's revenue requirements as approved by the Commission. The calculation of the deficiency is provided in the Attachment A to this affidavit.

Refund Estimates

9. I have evaluated and quantified the estimated refund expense based on two sets of facts. First, I have calculated the estimated refund expense assuming SSU's Motion for Reconsideration is granted in all respects, except for the directives to make refunds and to implement modified stand-alone rates. Second, I have calculated the estimated refund expense,

including interest, assuming reconsideration is denied entirely. My calculations were brought down to September 30, 1995, where appropriate.

10. In the first case, which reflects elimination of the requirements to accrue and pay interest on the refunds, and to reduce the 1-inch meter charges in selected service areas, and reflects a calculation of refunds over the period September 15, 1993 through June 19, 1995, aggregate water service refunds would amount to approximately $4.3 million, and aggregate wastewater service refunds would approximate $2.7 million, a total of $7 million. In the second case, which includes refunds and interest as specified in the Order calculated through September 30, 1995, the total water service refund liability would be approximately $5.4 million, and total wastewater service refund liability some $3.3 million, a total of $8.7 million.

Refund and Recovery Methodology

11. In the event the Commission fails to reaffirm the uniform rate structure and continues to require refunds, SSU proposes that any refund requirement be coupled with corresponding authority for SSU to recover the current costs of the refunds through prospective charges applicable to future consumption of the Company's water and wastewater services. Specifically, SSU proposes that refunds be implemented through rate credits to all future bills in those service areas in which the Commission requires refunds, and that the current expense associated with these refund credits be recovered via surcharges to all future bills in SSU'S remaining service areas in this docket.

12. The refund expense and related amounts to be recovered will be calculated using the rate structure ultimately approved by the Commission as compared to the previously-approved uniform rate structure, and rate credits and surcharges would be issued and billed based on future

consumption in the relevant SSU service areas, rather than past period quantities. This will assure that the amounts to be refunded and collected are fully passed through to consumers. It will also obviate the need for separate checks, tracking and crediting unclaimed refunds, customer by customer accounting, and the associated administrative costs and difficulties.

13. SSU further proposes that the rate credits and corresponding surcharges be implemented on a level basis in each affected service area over a four year period. Disbursement of the refunds and implementation of the surcharges over a four year period will mitigate the rate disparities and anomalies that otherwise would be experienced in the affected service areas if the refunds and refund expense recoveries were to be compressed into a ninety-day period, or any other period that is shorter than the extended period in which the uniform rate structure was in effect. At the same time, this rate plan will recognize SSU's position as a stakeholder on the rate structure issue, and mitigate the substantial disruptions to SSU'S financial condition that otherwise would result from immediate disbursement of current refunds in the $7.0 million to $8.7 million range I have calculated.

14. The gallonage credit or surcharge will be developed based on the total refund or refund expense recovery calculated for each service area amortized over a four year period. The annual amortization amount would be divided by the annual consumption of each service area to develop the rate credit or surcharge. The annual consumption should be the same as used to develop the underlying rates for each service area.

15. Although the amortization will not change due to a change in the underlying rates during the amortization period, the credit or surcharge recoveries may vary due to changes in actual consumption. SSU will reconcile any imbalances at the end of the amortization period,

and file proposed adjustments to the credit and surcharge rates, if necessary to eliminate material imbalances during that period.

16. As I have noted, estimated interest of approximately $414,000 attributable to the past period would have to be credited and paid by SSU if the Order is not modified as requested by SSU. In the unique circumstances of this case, however, SSU did not have the use of "excess" customer funds, as would be the situation if a utility had collected funds in excess of its approved revenue requirement or a court had overturned a revenue requirements determination of the Commission.

17. Here, SSU is merely a stakeholder. The real parties in interest are the customer classes that incurred higher or lower rates by virtue of the Commission-initiated uniform rate structure change. Stated another way, this uniform rate structure change as a matter of fact was "revenue-neutral" to SSU, did not result in collection of any funds by SSU in excess of its approved revenue requirements, and hence should not result in SSU being saddled with an interest obligation.

18. All of these considerations also are applicable to the prospective four year period covered by SSU's refund and expense recovery plan. That plan also is "revenue neutral" to SSU and involves neither retention nor use of customer funds in excess of SSU's approved revenue requirements. Indeed, the only practical effect of a requirement to accumulate additional interest during the prospective period would be to increase the rate disparities between the customer classes incurring rate surcharges and those receiving rate credits.

19. If the Commission nonetheless requires that interest be calculated and paid, we propose to compute interest based on a four year amortization period using the actual average

interest rate in effect for the historical refund calculation period. The annual amortization with interest will then be used to develop the rate credit or surcharge to be applied to future consumption over a four year period. I have developed a schedule in Attachment B hereto that shows the estimated overall annual water and wastewater service amounts to be credited and recovered under this plan. This schedule, showing the assumptions used, is attached to my affidavit.

FORREST L. LUDSEN
Vice President of Finance and Accounting
Southern States Utilities, Inc.

Sworn to and subscribed this 2nd day
of November, 1995 by Forrest L. Ludsen,
who is personally known to me.

NOTARY PUBLIC
State of Florida at Large
My commission expires: 7-6-96

OFFICIAL NOTARY SEAL
DONNA L HENRY
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC212595
MY COMMISSION EXP. JULY 6,1996

Comparison of Modified (Capped) Stand Alone Rates & Revenues w/ & w/out AWWA Factors Applied to 5/8" through 1" Meters

Company: SSU / Citrus / Sugarmill Woods
Docket No: 950495-WS
Schedule Year Ended: 12/31/91
Water[x] Wastewater[ ]
Interim[ ] Final[ ]
Historical [x] Projected[ ]

FPSC
Schedule: Revenue Comparison
Page 1 of 2

Explanation: Provide a calculation of revenues using modified (capped) stand alone rates with and without AWWA factors applied to 5/8" through 1" meters, using the 1991 billing analysis.

ATTACHMENT A

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
				Comparison of Modified (Capped) Stand Alone Revenues					
				Standard (with AWWA Factors)		FPSC-Ordered (without AWWA Factors)		Corrected FPSC-Ordered (without AWWA Factors)	
Line No.	Class/Meter Size	No. of Bills	Consumption (MG)	Rates	Revenue	Rates	Revenue	Rates 1/	Revenue
1	**Residential**								
2	5/8 x 3/4"	1,843		$2.64	$4,866	$2.64	$4,866	$5.88	$10,837
3	3/4"	439		$3.96	$1,738	$2.64	$1,159	$5.88	$2,581
4	1"	18,856		$6.60	$124,450	$2.64	$49,780	$5.88	$110,873
5	1 1/2"	71		$13.20	$937	$13.20	$937	$29.40	$2,087
6	2"	12		$21.12	$253	$21.12	$253	$47.04	$564
7	Gallonage Charge/MG:								
8	All Gallonage		323,695	$0.85	$275,141	$0.85	$275,141	$0.85	$275,141
9	Total	21,221	323,695		$407,385		$332,136		$402,083
10	**Commercial**								
11	5/8" x 3/4"	48		$2.64	$127	$2.64	$127	$5.88	$282
12	3/4"	73		$3.96	$289	$2.64	$193	$8.82	$644
12	1"	138		$6.60	$911	$2.64	$364	$14.70	$2,029
13	1 1/2"	144		$13.20	$1,901	$13.20	$1,901	$29.40	$4,234
14	2"	48		$21.12	$1,014	$21.12	$1,014	$47.04	$2,258
15	Gallonage Charge/MG:								
16	All Gallonage		13,107	$0.85	$11,141	$0.85	$11,141	$0.85	$11,141
17	Total	451	13,107		$15,383		$14,740		$20,588
	Total	21,672	336,802		$422,768 2/		$346,876		$422,671
	Revenue Deficiency ($)						$75,892		
	Revenue Deficiency (%)						17.95%		

1/ Refer to page 2 of 2 for computation.

2/ The ordered capped revenue requirement is $424,396. This revenue requirement is calculated by indexing up the 1991-based capped revenue requirement of $420,862 by the staff-approved 1993 Index of 0.67% and 1994 Pass-Through and Index of -0.03% from staff recommendation dated 9/21/1995.

SSU Corrected FPSC-Ordered Rates without AWWA Factors

Company: SSU / Citrus / Sugarmill Woods
Docket No: 950495-WS
Schedule Year Ended: 12/31/91
Water[x] Wastewater[ ]
Interim[ ] Final[ ]
Historical [x] Projected[ ]

FPSC
Schedule: Corrected Rates

Explanation: Provide a calculation of corrected rates using the 1991 billing analysis.

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
			Standard ERC Calculation		FPSC-Ordered ERC Calculation			
Line No.	Class/Meter Size	No. of Bills	Standard Meter Factor	ERCs	FPSC-Ordered Meter Factor	ERCs	Base Revenues 1/	New 5/8" Rate (C7L14/C6L14)
1	**Residential**							
2	5/8 x 3/4"	1,843	1.00	1,843.0	1.00	1,843.0	$4,866	$5.88
3	3/4"	439	1.50	658.5	1.00	439.0	$1,738	
4	1"	18,856	2.50	47,140.0	1.00	18,856.0	$124,450	
5	1 1/2"	71	5.00	355.0	5.00	355.0	$937	
6	2"	12	8.00	96.0	8.00	96.0	$253	
7	Total	21,221		50,092.5		21,589.0	$132,244	
8	**Commercial**							
9	5/8" x 3/4"	48	1.00	48.0	1.00	48.0	$127	
10	3/4"	73	1.50	109.5	1.50	109.5	$289	
10	1"	138	2.50	345.0	2.50	345.0	$911	
11	1 1/2"	144	5.00	720.0	5.00	720.0	$1,901	
12	2"	48	8.00	384.0	8.00	384.0	$1,014	
13	Total	451		1,606.5		1,606.5	$4,242	
14	Total	21,672		51,699.0		23,195.5	$136,486	

1/ From Column 5, page 1 of 2.

Comparison of Modified (Capped) Stand Alone Rates & Revenues w/ & w/out AWWA Factors Applied to 5/8" through 1" Meters

Company: SSU / Citrus / Pine Ridge
Docket No: 950495-WS
Schedule Year Ended: 12/31/91
Water[x] Wastewater[ ]
Interim[ ] Final[ ]
Historical [x] Projected[ ]

FPSC
Schedule: Revenue Comparison

Explanation: Provide a calculation of revenues using modified (capped) stand alone rates with and without AWWA factors applied to 5/8" through 1" meters, using the 1991 billing analysis.

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
				Comparison of Modified (Capped) Stand Alone Revenues					
				Standard (with AWWA Factors)		FPSC-Ordered (without AWWA Factors)		Corrected FPSC-Ordered (without AWWA Factors)	
Line No.	Class/Meter Size	No. of Bills	Consumption (MG)	Rates	Revenue	Rates	Revenue	Rates 1/	Revenue
1	**Residential**								
2	5/8 x 3/4"	656		$4.85	$3,182	$4.85	$3,182	$10.21	$6,698
3	3/4"	7		$7.28	$51	$4.85	$34	$10.21	$71
4	1"	3,975		$12.13	$48,217	$4.85	$19,279	$10.21	$40,585
5	2"	48		$38.80	$1,862	$38.80	$1,862	$81.68	$3,921
6	Gallonage Charge/MG:								
7	All Gallonage		61,724	$1.85	$114,189	$1.85	$114,189	$1.85	$114,189
8	Total	4,686	61,724		$167,501		$138,546		$165,464
10	**Commercial**								
11	5/8" x 3/4"	65		$4.85	$315	$4.85	$315	$10.21	$664
12	1"	12		$12.13	$146	$4.85	$58	$25.53	$306
13	2"	36		$38.80	$1,397	$38.80	$1,397	$81.68	$2,940
14	Gallonage Charge/MG:								
15	All Gallonage		1,428	$1.85	$2,642	$1.85	$2,642	$1.85	$2,642
16	Total	113	1,428		$4,500		$4,412		$6,552
	Total	4,799	63,152		$172,001 2/		$142,958		$172,016
	Revenue Deficiency ($)						$29,043		
	Revenue Deficiency (%)						16.89%		

1/ Refer to page 2 of 2 for computation.

2/ The ordered capped revenue requirement is $171,809. This revenue requirement is calculated by indexing up the 1991-based capped revenue requirement of $167,726 by the staff-approved 1993 index of 1.36% and 1994 Pass-Through and index of 1.06% from staff recommendation dated 9/21/1995.

SSU Corrected FPSC-Ordered Rates without AWWA Factors

Company: SSU / Citrus / Pine Ridge
Docket No: 950495-WS
Schedule Year Ended: 12/31/91
Water[x] Wastewater[ ]
Interim[ ] Final[ ]
Historical [x] Projected[ ]

FPSC
Schedule: Corrected Rates

Explanation: Provide a calculation of corrected rates using the 1991 billing analysis.

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
			Standard ERC Calculation		FPSC-Ordered ERC Calculation			
Line No.	Class/Meter Size	No. of Bills	Standard Meter Factor	ERCs	FPSC-Ordered Meter Factor	ERCs	Base Revenues 1/	New 5/8" Rate (C7L14/C6L14)
1	**Residential**							
2	5/8 x 3/4"	656	1.00	656.0	1.00	656.0	$3,182	$10.21
3	3/4"	7	1.50	10.5	1.00	7.0	$51	
4	1"	3,975	2.50	9,937.5	1.00	3,975.0	$48,217	
5	2"	48	8.00	384.0	8.00	384.0	$1,862	
6	Total	4,686		10,988.0		5,022.0	$53,312	
7	**Commercial**							
8	5/8" x 3/4"	65	1.00	65.0	1.00	65.0	$315	
9	1"	12	2.50	30.0	2.50	30.0	$146	
10	2"	36	8.00	288.0	8.00	288.0	$1,397	
11	Total	113		383.0		383.0	$1,858	
12	Total	4,799		11,371.0		5,405.0	$55,170	

1/ From Column 5, page 1 of 2.

SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 920199-WS
SUMMARY OF ESTIMATED REFUNDS

	Refund Period 9/15/93 - 6/19/95	Water	Sewer	Total
	Refund Without Interest or Base Facility Charge Error (Est.):			
(1)	Annual Refund	$2,475,161	$1,551,601	$4,026,762
(2)	Total Refund @ 6/19/95 (W/O Interest)	$4,331,532	$2,715,302	$7,046,834

	Refund Period 9/15/93 - 9/30/95	Water	Sewer	Total
	Refund Without Interest (Est.):			
(1)	Annual Refund	$2,475,161	$1,551,601	$4,026,762
(2)	Total Refund @ 9/30/95 (W/O Interest)	$4,950,322	$3,103,202	$8,053,524
	Refund With Interest and Base Facility Charge Error (Est.):			
(3)	Monthly Payment (PMT)	$206,263	$129,300	$335,564
(4)	Average Interest Rate 9/93-9/95 (I)	4.79%	4.79%	4.79%
(5)	Number of Payments (N)	24	24	24
(6)	Interest	$254,728	$159,681	$414,409
(7)	Refund With Interest (FV)	$5,205,050	$3,262,883	$8,467,933
(8)	Base Facility Charge Error	$209,870		$209,870
(9)	Total Refund With Interest and Base Facility Charge Error	$5,414,920	$3,262,883	$8,677,803

ATTACHMENT B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water 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: November 3, 1995

State of Florida)
County of Orange)

AFFIDAVIT OF SCOTT VIERIMA

Before me, the undersigned authority, appeared SCOTT VIERIMA, personally known to me, who after being duly sworn, deposes and says:

1. I am Vice President and Chief Financial Officer of Southern States Utilities, Inc. ("SSU"). My business address is 1000 Color Place, Apopka, Florida 32703.

2. I submit this Affidavit in support of SSU's Motion for Reconsideration of the Commission's October 19, 1995 "Order Complying With Mandate, Requiring Refund, and Disposing of Joint Petition" ("Order").[1]

3. As Vice President and Chief Financial Officer of SSU, I have supervisory responsibility for financial records and reporting, cash management, budgeting, financial forecasting and planning, as well as financing/credit matters, and as such am familiar with the facts and circumstances set out in this affidavit and in SSU's Motion for Reconsideration.

4. I have reviewed the Order and am familiar with the facts and circumstances surrounding that Order, the relevant holdings of which appear to require SSU:

[1]Order No. PSC-95-1292-FOF-WS.

EXHIBIT C

(a) to revise its final rates to reflect a modified stand alone rate structure and to implement such rates prospectively;

(b) to refund with interest alleged overcharges to certain customers for the period "between the initial effective date of the uniform rate up to the date at which a new rate structure can be implemented",[2] with no provision for recovery by SSU of the current refund expense incurred by virtue of the Order;

(c) to adjust the Commission-prescribed modified stand alone structure rate to reflect base facilities charges for certain SSU service areas for 5/8-inch meters, despite the fact that customers in these service areas are supplied through 1-inch meters.

I understand that SSU is required by the Order to calculate the refunds on the hypothesis that the modified stand alone rate structure now required by the Commission was in effect since September 15, 1993 -- the date the uniform rate structure heretofore required by the Commission was made effective.

5. I am also familiar with and have assessed the substantial adverse financial impacts that implementation of the refund directive contained in the Order will have on SSU -- impacts that were neither considered nor addressed in the Order.

6. If SSU is required to implement refunds as required by the Order, without any corresponding provision to permit recovery of the extraordinary refund expense in future rates, SSU necessarily and inevitably will have been precluded from earning even the minimum rate of return authorized on SSU's investment devoted to serving its customers. Indeed, as I discuss below, SSU is not now, and for the period that uniform rates were in effect, has not been earning

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[2]Order at 8.

that minimum return on investment. The refunds mandated by the Order will compound this situation, with devastating impacts on SSU.

7. On October 6, 1995, the Commission voted to deny SSU's pending application for interim rate relief, which was and still is required if SSU is to have any opportunity to avoid losses on its continuing operations in 1995, and to mitigate the serious difficulties now being experienced in meeting its obligations to lenders.

8. According to the pro forma projections of rate base, revenues and expenses for the year ending December 31, 1995 that were prepared and filed by SSU in connection with its interim rate request, SSU's projected 1995 return on equity would be 0.6% and -1.93% for water and wastewater operations, respectively. This equated to a projected 1995 negative return on equity for combined water and wastewater operations of -0.43%, before the impacts of the refunds contemplated by the Order.

9. As of the date of this affidavit, actual results are now available through the end of the third fiscal quarter of the 1995 projected period. Such results confirm the accuracy of SSU's projections -- for the nine-month period ended September 30, 1995, SSU incurred a year-to-date loss on continuing operations of $254,703. SSU is incurring monthly losses, including $260,169 for the most recent month, September.

10. Quite clearly, the denial of interim rate relief alone will cause SSU to incur losses on its continuing operations in 1995. This has impaired SSU's ability to meet its debt covenants and attract the capital required to fund necessary construction and other ongoing capital requirements on reasonable terms. As a consequence of denial of interim rate relief, SSU has been placed on the private placement equivalent of a credit watch by its principal lending

institutions (see Attachment A which contains copies of correspondence from CoBank and SunBank, N.A. and my notification letter to SunBank dated September 21, 1995 referred to therein). Covenants in SSU's credit instruments require creditors to be notified of events that may have material adverse effect on SSU's financial condition. As such, SSU has notified its lenders of the denial of interim rate relief, the reversal of uniform tariffs, and the order for refunds exceeding $8 million. The lenders expressed deep concerns over these developments in view of SSU's year-to-date net loss, and pre-tax interest coverage below 1.0 for the nine-month period, a level classified as non-investment grade by rating agencies. Moreover, denial of interim rate relief alone has created significant liquidity uncertainties and serious doubts as to whether SSU can continue to meet operating, construction, and debt service requirements. Additionally, SSU was in the final stages of negotiations with lenders for a back-up credit line and, before the denial of interim rate relief, had received a proposal under terms and rates beneficial to customers and shareholders. The proposal was withdrawn by the prospective lender. Consequently, even before the substantial additional adverse impacts of the refunds required by the Order there existed a serious threat to the continued ability of SSU to meet its financial obligations and maintain access to capital markets.

11. The refund requirement, if implemented as proposed with no provision for SSU to recover the associated refund expense, materially compounds these financial difficulties. Our calculations confirm that the refunds required by the Order will amount to approximately $8.7 million, including additional interest of approximately $414,000. I should note that the Order requires SSU to compute and pay interest on the refund amounts, even though SSU at no time had the use of "excess" customer funds, i.e., collections in excess of SSU's Commission-approved

revenue requirement. If the Commission reaffirms the Order on reconsideration, and SSU is required to book this refund expense, I project an aggregate after-tax loss on continuing operations of in excess of $5 million for 1995, which will wipe out all of SSU's retained earnings.

12. I should note that even if the Commission were now to grant the full level of interim rate relief sought by SSU, such action would not be sufficient to resolve the financial difficulties and distress I have discussed. SSU has been advised by its primary bonding company (SafeCo Surety) that it will be unable to obtain performance bonding for either interim rates or the ordered refund, without parent company (Topeka Group, Inc.) indemnification (see Attachment B which contains a copy of correspondence from SafeCo Surety). In addition, as of September 30, 1995, SSU had unrestricted cash of less than $0.6 million, and unused credit lines of $5 million. Liquidity will deteriorate substantially in the fourth quarter without interim rate relief, making the ability to independently fund a cash refund in excess of $8 million doubtful.

13. Considering both the principal and interest components of the refunds, the Order has the effect of denying SSU the opportunity to recover more than $8.7 million of its legitimate, prudent and approved costs as reflected in the revenue requirement determined by the Commission, a determination that I am advised was not disturbed by the reviewing Court. The Order imposes a current expense and cash requirement on SSU that can be discharged (if at all) only by taking capital that is devoted to serving SSU's customers, and by further impairing SSU's financial condition.

14. The Order contains no finding of imprudence, mismanagement, or incurrence of excessive or unreasonable costs as a basis for imposing these liabilities on SSU. Indeed, SSU

had done nothing more than proceed in good faith pursuant to the only course of action available to it to comply with the Commission's decisions and implement the rates and systemwide rate structure the Commission authorized. Therefore, reconsideration of the Commission's Order, with full knowledge of the financial consequence, is essential.

SCOTT VIERIMA
Vice President and Chief Financial Officer
Southern States Utilities, Inc.

Sworn to and subscribed this 2nd day of November, 1995, by Scott Vierima, who is personally known to me.

NOTARY PUBLIC
State of Florida at Large
My commission expires: 7-6-96

OFFICIAL NOTARY SEAL
DONNA L HENRY
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC212595
MY COMMISSION EXP. JULY 6,1996

CoBANK
Rural America's Cooperative Bank

200 Galleria Parkway N W
Suite 1900
Atlanta, Georgia 30339
Phone: (770) 818-3200
Fax: (770) 818-3202

November 3, 1995

Mr. Scott Vierima, Vice President
Southern States Utilities
1000 Color Place
Apopka, Florida 32703

Dear Scott:

This letter is intended to document our continuing conversations regarding the FPSC's recent decisions to order $8 million in refunds from your last rate case, to reverse the uniform rate structure, and to deny interim relief on your current application. In view of these events, I believe that withdrawing our pending line proposal is appropriate at this time until the related written orders from the FPSC and SSU's legal remedies can be further evaluated or at least some items resolved. Clearly these events are material from a credit perspective and if the orders are not reversed, will cause cash, capital and earnings plan changes for the remainder of 1995 and for 1996. An obvious concern is the source of funding for a lump sum cash refund, if that requirement emerges, and the pricing relative to that risk and associated reduced levels of cash flow generated from normal operations.

While I agree that your positions on appeal appear persuasive, I am hopeful that the issues can be resolved quickly to the mutual benefit of your customers and capital providers alike. Please keep us closely informed of further developments as they unfold.

On other matters, I am reviewing the mortgage issues you raised relative to a possible refunding of your existing tax-exempt debt and the assumption of the Orange Osceola Utilities taxable debt. If you have any questions or comments, please do not hesitate to call me.

Sincerely,

John P. Cole
Assistant Vice President
Rural Utility Banking Group

ATTACHMENT A

ATLss/UWSostatesC/ltr-1103.doc

SunBank, N.A.
P.O. Box 3833
Orlando, Florida 32802-3833

November 2, 1995

Mr. Scott Veriema
Vice President, Finance and CFO
Southern States Utilities, Inc.
1000 Color Place
Apopka, FL 32703

Dear Scott:

I wanted to take an opportunity to respond to some of the issues raised in your letter of September 21, 1995.

As you can imagine, we see the recent vote of the Florida Public Service Commission (the "FPSC") to order refunds to certain SSU customers as a cause for significant concern, particularly when combined without the offsetting right to collect "backbills" for those other customers who initially benefited from the uniform rate design in question. The probable negative impact of this decision on revenues and cash flow is a major credit issue from our standpoint.

As you may recall, the final approval of SSU's 1993 rate case was an important consideration in SunTrust Bank of Central Florida's ("SunTrust" - you may recall that we recently changed our name from Sun Bank, N.A.) decision to approve various credit exposures for Southern States. Our further assumption of revenue levels driven by the rate structure in the last case was also important in the methodology we used to price our various credit exposures to SSU.

Finally, we are also very concerned about the likelihood of SSU's violation of the year end 1.25x coverage test. Although we understand the reasons for the likely shortfall, we do view it as a serious event.

Scott, as you know, SunTrust does value its relationship with Southern States Utilities. We look forward to on-going dialogue with you concerning these issues in the next several weeks and months.

Sincerely,

Christopher J. Aguilar
First Vice President

SSU
Southern States Utilities • 1000 Color Place • Apopka, FL 32703 • 407/880-0058

September 21, 1995

Christopher J. Aguilar
SunBank, N.A.
200 S. Orange Avenue
Orlando, Florida 32801

RE: Recent Florida Public Service Commission (FPSC, the "Commission") Action on Florida First District Court of Appeal (FDCA, the "Court") Remand Order of Docket No. 920199-WS.

To confirm our telephone conversation of September 13, 1995; the FPSC voted 5-0 at its regularly scheduled agenda conference of September 12, 1995 to order refunds (within 90 days of written order) to SSU's customers whose rates were higher under the uniform design approved by the Commission in September of 1993, than those rates would have been under a modified separate facility design. This vote was in response to a FDCA ruling in April of 1995 that found the Commission erred in its implementation of uniform rates prior to a finding that SSU functions as one state-wide "system".

Although the exact amount of the potential refund won't be known until September 26, 1995, SSU estimates the amount to be $8 million. SSU intends to request reconsideration; and if that fails, to initiate court appeals on various grounds including the facts that; SSU implemented a Commission approved rate design, that refunds without backbills are contrary to the accepted revenue neutrality of rate design disputes, and that such an action constitutes retroactive ratemaking. It should also be noted that the Commission's action was in opposition to the primary recommendation of their own legal staff, and that in June the Commission confirmed, in separate formal proceedings, that SSU does function as one system.

I do not expect this issue to be resolved in 1995, but will keep you advised of further developments and forward a copy of the written order when received in early October.

On another note, as we had discussed at our Letter of Credit closing, we do not expect to meet the year-end coverage test of 1.25:1.00 in our Revolver and LOC Agreements. Continued heavy rainfall has suppressed irrigation related demand compared to plan. Per your request, we continued to covenant that ratio in our Master LOC Amendment, and will formally request a temporary waiver as we approach the December 31, 1995 test date.

Sincerely,
Southern States Utilities, Inc.

Scott W. Vierima
Vice President Finance and CFO

SWV/alt

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SAFECO

SAFECO INSURANCE COMPANIES OF AMERICA
REGIONAL SURETY
1551 JULIETT ROAD
STONE MOUNTAIN, GA 30083

PHONE (770) 879-3378
FAX (770) 879-3349

November 1, 1995

Mr. Scott Vierima
Chief Financial Officer
Southern States Utilities
1000 Color Place
Apopka, Florida 32703

RE: Docket #920199-WS

Dear Mr. Vierima,

It is my understanding that the Public Service Commission is reqesting an increase for bond #5723795 from $3,000,000 to approximately $8,000,000. Please be advised that any requested increase in the current bond will require the indemnity of your parent company, Topeka Group, Inc. Additionally, a premium increase is not an acceptable substitute for parent company indemnification at this time.

If you have any questions, please call.

Sincerely,

Drew Meadows on behalf of David Patton
Safeco Surety

cc: Mark W. Edwards
McGriff, Seibels & Williams

ATTACHMENT B

KAH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Application for a rate increase by SOUTHERN STATES UTILITIES, INC.

DOCKET NO. 920199-WS

COPY

BEFORE:	CHAIRMAN J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER LUIS J. LAUREDO COMMISSIONER JULIA L. JOHNSON
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	25A**
DATE:	November 23, 1993
PLACE:	106 Fletcher Building Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

EXHIBIT D

MR. HOFFMAN: If what, if the interim rates are implemented?

CHAIRMAN DEASON: We have before us the question of whether we are going to vacate the stay or not. Regardless of whether the stay is vacated or not, is Southern States going to receive the same dollar of revenue from its customers?

MR. HOFFMAN: There is a difference.

CHAIRMAN DEASON: There is a difference, because if the stay is vacated what rates will you collect?

MR. HOFFMAN: The final rates, which subject to check, Mr. Chairman, amounts to a rate increase of approximately $6.7 million. And if the automatic stay is enforced, if it's not vacated and you then go to our revised interim rates, I believe that, subject to check, that revenue requirement is at 6.4 million. It's a different number. But I would reiterate to you that we do not believe there is any discretion and that the rule is mandatory. But that's my answer to your question, Mr. Chairman.

CHAIRMAN DEASON: Let me ask you this. If the stay is vacated, do you agree that Southern States is putting itself at risk to make those customers whole whose rates are higher under statewide rates?

MR. HOFFMAN: No, I don't. But I don't think that

the Commission needs to resolve that issue today. Because in our opinion, Mr. Chairman, we believe that on a rate structure appeal, where we are implementing the rates authorized by the Commission, in an appeal which would be strictly revenue neutral, that the Company does not place itself at risk. However, if we are wrong in that position, and the first District Court of Appeal reverses the Commission, there will be a corporate undertaking or a bond on file with this Commission to protect the customers in the event we are wrong.

CHAIRMAN DEASON: Now, is that protection just for the difference in revenue amounts and not customer-specific?

MR. HOFFMAN: I think it could be tailored by the Commission, Mr. Chairman. I think that the Staff recommendation recommended a bond amount which would protect the customers of the systems who are currently paying higher rates under the uniform rates.

CHAIRMAN DEASON: Well, do you agree that if the stay is vacated there are going to be customers that are going to be paying more under statewide rates?

MR. HOFFMAN: Yes.

CHAIRMAN DEASON: And if the stay is vacated and the appeal is successful on COVA and Citrus County's

part, you're saying there is not going to be a refund to those customers who are paying more?

MR. HOFFMAN: Our position that we have taken, Mr. Chairman, is that there is not a refund. And I think I have already explained to you why. But what I'm saying to you is we do not dispute, particularly now that Public Counsel has filed an appeal and they are going to put revenue requirements at issue, we do not dispute the need for corporate undertaking or bond at this point of this proceeding and we are willing to make sure that it's posted.

CHAIRMAN DEASON: But that is a question of overall revenue requirements, not customer-specific rates?

MR. HOFFMAN: That's correct.

CHAIRMAN DEASON: Does Staff agree with that?

MS. BEDELL: Yes.

COMMISSIONER CLARK: Surely this has come up before where we have had a rate design at issue. Maybe it's not come up, maybe not in water and sewer.

MR. WILLIS: Commissioners, I can't remember in the past where we had a rate design at issue after the final decision of the Commission.

COMMISSIONER CLARK: Well, the fact of the matter is it's not at all clear as to whether or not there

would be a refund for those people who overpaid based on -- who would pay more under statewide rates than stand-alone.

MR. WILLIS: That's correct.

COMMISSIONER CLARK: It's not at all clear that it just wouldn't be from a going-forward standpoint that you would address the rates, and the rates that were in effect is water under the bridge.

MR. WILLIS: I agree with you, Commissioner, it's not clear at all.

COMMISSIONER JOHNSON: So how do we make these people whole? Or we can't.

MR. WILLIS: Well, Commissioner, I think if there is protection in place, whether it be a corporate undertaking or a bond, which we are recommending a bond, those customers will be held whole. I mean, if someone in the future dictates that those customers who are paying more now under uniform rates than they would be under stand-alone are deserving of a refund, then those customers would receive a refund with interest.

COMMISSIONER CLARK: That's the part that's not clear, that we have never addressed before when it's an issue of money between customers and not the overall revenue what you do.

MR. WILLIS: (Indicating yes.)

MR. HILL: The customers are going to be protected. There is not a doubt in my mind about that. It's the Company that's going to be at risk, and I won't try to drag this out to explain it.

COMMISSIONER CLARK: But I think that Commissioner Johnson is correct, is that the customers as a whole are protected, but not individual customers that under statewide rates are paying more than they would under stand-alone.

MR. HILL: I believe that if the courts say --

COMMISSIONER CLARK: A bond doesn't address that at all.

MR. HILL: I understand. And if the courts say that you cannot do what you have done, then you have got to go back to a system-specific rate and revenue requirement. That's where you have to go, there is no other place to go. And we may end up arguing with the utility over refunds, but there isn't a doubt in my mind that if we are reversed on that and have to redo it, they have collected money they should not have collected and it will have to be refunded. And the Company will end up on the short end of it.

COMMISSIONER CLARK: Well, they have collected money they should have recovered from the wrong people.

MR. HILL: Absolutely, and they will have no way

to go back to the right people and collect those funds.

COMMISSIONER CLARK: Unless you do an adjustment on a going-forward basis to remedy that, but I'm not sure you can.

CHAIRMAN DEASON: And what Mr. Hoffman is saying, it's his opinion that the Company is not putting itself at risk, it does not have the liability to make the customer-specific whole. Their only requirement is to make customers as a general body of ratepayers whole. That is, if they have collected more total revenue than what they are authorized as a result of the final decision on appeal, they are liable for that, but they are not liable to make specific customers whole.

MR. HILL: And while that's an interesting argument, I think that if indeed we are overturned by the courts, then the revenue requirements fall out on a system-specific basis, and I think the Company will be on shaky ground with that argument and will lose money.

MS. BEDELL: May I make a suggestion? In terms of trying to make a determination of what the Company may have to do in terms of a refund, under both the appellate rule on stays -- it provides that you can set conditions for the stay, or for vacating the stay it would seem to me. If you set a condition related to how, you know, the end result when the appellate court

quickly as possible. What's your pleasure? In other words, let's move along one way or the other.

COMMISSIONER CLARK: Mr. Chairman, I don't see that we have any discretion, and I agree with Commission Staff on this point. I think we set out the rules that indicate that a posting of a bond will allow us a vacation of the stay, and as Mr. Hoffman pointed out, the Commission order, which did concern me, only provided for a stay of refund of the interim rates, it wasn't with respect to the implementation of the rates. And for that reason I would move Staff on all three issues.

COMMISSIONER JOHNSON: Second.

CHAIRMAN DEASON: It has been moved and seconded. Let me state right now that I'm going to vote against the motion. I am persuaded by the argument that we are moving into a new area here where there are differences between rates for different customers in different areas, and that in my opinion we should keep the status quo, which are interim rates, and let the court give the guidance to the Commission that it sees fit. I don't see where -- even though there is going to be a bond posted, it's not going to be for the purposes of making individual specific customers whole, it's going to be for the purpose of making customers as a total

rate paying body whole. And that's really not the main crux of this appeal, so I would oppose that. But, anyway, we have a motion and a second --

COMMISSIONER CLARK: Mr. Chairman, can I just ask a question? The concern I have is the interim rates don't generate the rates that we concluded they were entitled to. I mean --

CHAIRMAN DEASON: The interim rates, what are the differences between the interim rates and the final rates that have a statewide rate structure? Very minimal, is it not?

MR. TWOMEY: They generate more, Mr. Chairman.

CHAIRMAN DEASON: That's what I thought. I thought it was either minimal or it either generated more. What's the case, Mr. Hoffman?

MR. HOFFMAN: My understanding is that as revised, the interim rates as revised after Commissioner Clark's motion for reconsideration is a total revenue requirement increase of 6.4 million as opposed to 6.7 million final rates.

COMMISSIONER CLARK: Which is the final rates?

MR. HOFFMAN: Yes.

CHAIRMAN DEASON: I consider that difference to be pretty inconsequential given the magnitude of the real issue, which is the rate structure involved. I would

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern State Utilities, Inc. and Deltona Utilities, Inc. for Increased Water 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: November 27, 1995

MOTION OF SOUTHERN STATES UTILITIES INC. FOR LEAVE TO FILE REPLY AND PROPOSED REPLY

I. MOTION FOR LEAVE TO FILE REPLY

Pursuant to Rule 25-22.037(2), Florida Administrative Code, Southern State Utilities, Inc. ("SSU") hereby files its Motion for Leave to File Reply, along with its proposed Reply, to certain "Responses"[1] to SSU's November 3, 1995 Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS in this proceeding.

SSU respectfully submits that good cause exists to grant this Motion for Leave to File Reply, and for Commission consideration of SSU's Reply, for each of the following reasons: (1) the Responses raise and rely upon matters neither considered nor discussed by the Commission in the October 19, 1995 Order[2]; (2) these matters could

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[1]Responses of Citrus County Board of County Commissioners, et al. ("Citrus County"), Sugarmill Woods Civic Association, Inc. ("Sugarmill Woods"), and Office of Public Counsel ("OPC"). By separate Response of even date herewith, SSU responds to the Motion to Strike filed by Sugarmill Woods Civic Association, Inc.

[2]Order No. PSC-95-1292-FOF-WS ("Order Complying With Mandates, Requiring Refund, and Disposing of Joint Petition") (the "Refund Order").

not reasonably have been anticipated and addressed in SSU's Motion for Reconsideration; (3) as the party having the ultimate burden of persuasion on the relief requested in the pending Motion for Reconsideration, and given the significance and uniqueness of the issues presented, SSU should be accorded a full and fair opportunity to reply on matters raised in opposition to reconsideration of the Refund Order; and (4) basic considerations of due process and reasoned agency decision-making warrant acceptance and consideration of the Reply tendered herewith.

II. REPLY

The arguments advanced and matters raised in the Responses provide no valid basis for denial of the relief requested in SSU's Motion for Reconsideration.

1. At the outset, it is important to recognize that the Responses either affirmatively recognize or do not seriously dispute the following significant matters and governing principles of law:

- the 1993 Final Order established and the Citrus County Court affirmed SSU's just, reasonable, and compensatory combined revenue requirements at some $26 million annually, and those determinations have become the law of the case under well settled principles of Florida law;[3]

- under the interim rates, which were superseded by the Commission's uniform rate structure rates, SSU would not have had a realistic opportunity to recover the revenue requirements found lawful in the 1993 Final Order;

- taken as a whole, the circumstances leading to lifting of the automatic stay in December 1993, including (1) SSU's clear statements that the purpose of a bond was to secure

[3]SSU's Motion for Reconsideration at 3, 17-21.

customer refunds if the Company's increased revenue requirement was successfully challenged on appeal, not to secure refunds in the event the Commission's rate structure change was overturned, and (2) the record of the Commission's deliberations at the November 23, 1993 Oral Argument and Agenda Conference and the Order Vacating Stay, all support SSU's position that the Commission did not predetermine the result set out in the Refund Order and SSU did not "waive" or otherwise relinquish its rights to a fair and even-handed remand remedy that did not involve a penalty to SSU or a confiscation of its property;

- "[t]he Commission's adoption of statewide uniform rates explicitly rejected the company's own rate proposals",[4] thereby eliminating the option to recover authorized revenue requirements via the modified stand-alone rate structure proposed by SSU;

- as expressed by the Court in Tamiami Trail Tours, Inc. v. Railroad Commission, 174 So. 451 (Fla. 1937), the effect of the Court's remand was to afford the Commission the opportunity and authority to return the parties to their former positions, preserving all the rights and options they had prior to imposition of the uniform rate structure in the 1993 Final Order;

- the prospective refund/recoupment plan proposed by SSU is the only remand remedy before the Commission that, as nearly as practicable in the circumstances of this case, will place the parties in the positions they would have attained had the Commission adopted the basic rate structure prescribed in the Refund Order at the time it entered the 1993 Final Order, without economic penalties or windfalls to any affected interest;

- By engrafting an entirely new base facilities charge (BFC) on the Refund Order for some service areas, the Commission has imposed on SSU an unwarranted (and, we trust, unintended) additional refund liability and ongoing rate deficiency of some $105,000 annually.[5]

Instead, the Responses fall back on a combination of (1) mischaracterizing the Commission's Refund Order and the deliberations leading thereto, (2) materially distorting SSU's arguments and

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[4]OPC Response at 4.

[5]SSU's Motion for Reconsideration at 35-37.

prospective refund/recoupment plan, (3) misstating relevant, irrefutable facts, (4) improperly interjecting irrelevant "factoids" that have no logical or equitable bearing on the proper disposition of the issues presented, and (5) placing reliance on inapposite precedent. Nothing in the Responses[6] warrants denial of the relief requested by SSU in its Motion for Reconsideration.

2. OPC (Response at 2-3) seeks to summarily dismiss several of SSU's positions by suggesting, variously (i) that SSU's contention that the Refund Order nullified the revenue requirements found lawful in the 1993 Final Order represents merely SSU's "slant on the result," (ii) that the Refund Order's disregard of SSU's precarious financial situation constitutes merely "an evaluation of alternatives with which SSU disagrees," (iii) that SSU's concerns regarding the Commission's apparent conclusion that the "retroactive rate making" doctrine bars an equitable, even-handed remedy on remand can be explained away as a "simple disagreement with the result," and (iv) that the Refund Order cannot be reconsidered because it constitutes "agency action taken within a range of options." There is absolutely no merit in such suggestions.

First, a review of both the transcript of the September 12, 1995 Agenda Conference and the Refund Order evidences no indication that the Commission was aware that imposition of a one-sided refund

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[6]Citrus County (Response at 1) adopts OPC's Response, and both Citrus County and Sugarmill Woods repeat variations on OPC's arguments. Accordingly, SSU's replies to OPC's Response should be taken to encompass the similar arguments of Citrus County and Sugarmill Woods.

requirement would vitiate, sub silentio, both the revenue requirements it had established in the 1993 Final Order and the Citrus County Court's affirmation of the lawfulness of those revenue requirements. Clear Florida authority on the law of the case doctrine demonstrates the error in any such agency action.[7] These documents also show that the Commission did not give reasoned consideration to SSU's financial situation when it issued the Refund Order, a clear violation of its basic regulatory responsibilities under the circumstances.[8] Second, SSU's Motion for Reconsideration (at 21-24) explained why provision for recoupment of current extraordinary refund expenses would not constitute impermissible retroactive ratemaking. It is ludicrous to suggest that, by bringing to the Commission's attention the Refund Order's apparent misperceptions regarding the nature, validity, and effect of a prospective remand remedy, SSU is merely quibbling with "the result," and should therefore be denied the opportunity to seek

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[7]OPC's alternative assertions that the law of the case concerning SSU's authorized revenue requirements is "completely defeated by the proscription against retroactive ratemaking", or that the Commission gave "full effect" to the law of the case by affording SSU "a fair opportunity to earn the intended return on equity" in the remand remedy, are wrong as a matter of fact and erroneous as a matter of law. The Commission cannot lawfully discharge its responsibilities on remand by ignoring or failing to give balanced consideration to the known financial "end results" of its orders. SSU's Motion for Reconsideration at 6, 43-44. The "future" is now; and all of the financial consequences and impacts of a remand remedy are current and prospective, as are the elements of SSU's proposed refund/recoupment plan, which does not involve "back-billing" on any prior customer consumption. OPC's verbal gymnastics cannot alter these facts.

[8]SSU's Motion for Reconsideration at 5, 9-11.

reconsideration.[9] Finally, a review of the September 12, 1995 transcript and the Refund Order indicates that the Commission did not have before it, and hence could not make a full and fair evaluation of, the complete "range of options" available on remand from the Citrus County decision.

For these reasons, SSU's Reconsideration Motion does not constitute an improper attempt to reargue issues adequately considered and ruled upon by the Commission. Instead, SSU's Motion for Reconsideration is confined to important matters of fact and law overlooked or mistakenly construed or applied -- matters that are entirely proper to bring to the Commission's attention at this juncture. Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla 1962).

3. OPC also improperly resorts to distorting SSU's arguments and mischaracterizing the intent and import of SSU's actions. For example, after conceding that "[t]he Commission's adoption of ... uniform rates explicitly rejected the company's own rate proposals," OPC suggests (Response at 4) that SSU was "free to contest this adverse action" and that SSU abandoned "its own rate proposals", "embraced" or "endorsed" the Commission's uniform rates, and therefore should now be deemed to have voluntarily assumed the

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[9]In a similar vein, OPC suggests (Response at 3) that SSU takes issue with the Refund Order's one inch meter adjustment merely because the Company "would prefer a different base facility charge" for certain service areas. The facts and circumstances pertinent to this aspect of the Refund Order present a classic case for reconsideration, rather than a mere choice between equally valid results. See SSU's Motion for Reconsideration at 34-37.

entire "risk" of appellate reversal of that rate structure. OPC's arguments are based on a fundamental misunderstanding of a public utility's interests in the ratemaking process. When a water company like SSU files for an increase in its rates, the company's overriding interest is in achieving recovery of the revenue requirement it believes is just and reasonable. Matters of rate design and rate structure are secondary considerations so long as the company is afforded a reasonable opportunity to recover its allowed revenue requirement under any reasonable range of rate design/rate structure options. That is precisely what occurred in this case. SSU sought recovery of increased revenue requirements and proposed to recover its costs through a modified stand alone rate structure that represented a measured, gradual movement toward uniform rates. The Commission approved SSU revenue requirements of some $26 million, but rejected SSU's proposed rate structure, replacing it with a uniform rate structure. The Commission's uniform rate structure afforded the Company a reasonable opportunity to realize the $26 million of revenue requirements that the Commission had authorized. Accordingly, SSU had no logical or factual basis for contesting the Commission's rate structure on reconsideration or appeal.

Moreover, by the time the automatic stay became effective, the uniform rate structure rates were the only rates available to SSU that would provide the Company with an opportunity to realize its

authorized revenue requirements.[10] Accordingly, OPC's theory that SSU should now be found to have relinquished its rights because it should or could have sought reinstitution of the wholly inadequate interim rates solely to revert to a Commission-rejected rate structure that might avoid potential refund liability is wrong.[11] The notion that a voluntary "waiver" or "assumption of risk" can be found because SSU "embraced" or "endorsed" the Commission's uniform rate structure is pure hokum.[12] There is no greater merit in OPC's

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[10]No party has suggested, nor could they, that having rejected SSU's modified stand-alone rate structure and prescribed uniform rates by final order, the Commission would even entertain a request by SSU to recover its authorized final revenue requirements under the rejected rate structure. No party has disputed, nor could they, that the interim rates, as finally revised, were designed to produce annual revenues some $400,000 less than the revenue requirements found compensatory by the Commission. See SSU's Motion for Reconsideration at 31. Moreover, since the interim rates had been superseded by the uniform rates almost one month before the automatic stay of the 1993 Final Order took effect, those rates were not a viable alternative in any event. Id. at 30-31.

[11]The fallacy in such arguments is that, under OPC's legal theories, such action would be ineffective to protect the Company from having to make refunds if, on remand, the Commission chose to implement any rate structure change not advocated by the parties, as it effectively did in the Refund Order by engrafting a novel base facilities charge on rates for certain service areas. As SSU has shown, imposition of the new base facilities charge alone creates a $105,000 annual revenue deficiency. SSU Motion for Reconsideration at 34-36.

[12]Nor does the fact that SSU supported the Commission's rate structure on appeal or in a subsequent proceeding mean that the Company should now be held to have "assumed the risk" of judicial reversal of the Commission's rate structure. The Commission must remember that the appellants were seeking to reinstate a stand alone rate structure that was fundamentally at odds with the integrated nature and operation of SSU's water and wastewater service. Thus, of the two contending rate structures on appeal, the Commission's uniform rate structure was more closely attuned to the goals of SSU's own modified stand alone methodology and the realities of its operations.

related claim (Response at 4) that, by implementing the Commission's uniform rate structure, SSU placed itself "in the same position as any other utility which defers to the Commission to fashion rates"[13] and must necessarily bear the risk that the Commission-prescribed uniform rate structure "would fail appellate scrutiny". OPC disregards the significance of City of Plant City v. Mann and comparable cases. See SSU's Motion for Reconsideration at 23-24, 32-33. In sum, the Commission and other agencies have adopted appropriate measures and remedies to assure that regulated utilities are not subjected to revenue undercollections solely because an agency-promulgated rate structure is overturned on appeal. Contrary to OPC's unsupported assertions, other utilities have not routinely been required by the Commission or other agencies to act as sureties of agency-imposed rate structure policies or initiatives. Indeed, the Commission's failure to adopt a remand remedy that affords SSU the same basic treatment provided other regulated utilities vis-a-vis recovery of authorized revenue requirements in these circumstances is itself an independent ground for rescinding the Refund Order's one-sided refund requirement.

4. OPC (Response at 3, 8 (n. 3)) contends that SSU's prospective refund/recoupment plan would "give [SSU] more protection that it would have had if the uniform statewide rates had been upheld on appeal." SSU assumes that OPC's claim is based on a misunderstanding of SSU's proposal and not an intentional distor-

[13]Such mischaracterization of SSU's position flies in the face of OPC's admission (Response at 4) that "[t]he Commission ... explicitly rejected the company's own rate proposals."

tion thereof. In either event, the claim is entirely erroneous. The refund/recoupment plan is prospective only in its operation and effects -- it begins with the current refund expense occasioned and determined by the Refund Order (or any modification thereof on reconsideration). To the extent that the uniform rates charged to customers during prior periods failed to produce aggregate revenues equal to SSU's Commission-approved revenue requirements, or failed to recover the actual costs prudently incurred by SSU to provide service, the refund/recoupment plan does not compensate SSU for those deficiencies.[14] Further, the refund and recoupment features of SSU's plan are designed and will be implemented to disburse and recover only those amounts specified by the Commission in its remand remedy. Hence, factors that cause or result in prospective differences between SSU's costs to serve and base rate revenues are not treated or compensated for in the refund/recoupment plan. For these reasons, there is no logical or factual foundation for OPC's suggestion that the plan contemplates or provides protection from the normal ongoing risks to which any regulated utility is exposed.

5. OPC (Response at 6, 12) charges that SSU's Motion for Reconsideration should be rejected because the Company failed to avail itself of Rule 25-22.061 (2) and "thereby forfeited any claim of harm from having to refund overcharges." OPC's purely procedural objection would improperly deny SSU the substantive consideration that its Motion for Reconsideration is due, and should

[14]In fact, SSU has been experiencing continuing losses, under rates that are not sufficient to recover its ongoing cost of service. See SSU's Motion for Reconsideration at 44.

be rejected for that reason alone. In any event, OPC's argument is based on a complete misreading of the Commission's Rule. The specific provision cited, Rule 25-22.061 (2), is available to "a party seeking to stay a final or nonfinal order of the Commission pending judicial review." Since SSU was not a party seeking judicial review of the 1993 Final Order or the party seeking to stay that Order, the cited provision of the Rule did not apply to SSU.

6. As support for OPC's contention that implementing SSU's prospective refund/recoupment plan would violate established ratemaking principles, OPC relies on a number of court decisions that either do not stand for the proposition cited or simply have no application to the facts of this case. For example, citing Utilities Operating Co. Inc. v. King, 143 So. 2d 854, 858 (Fla. 1962), OPC contends (Response at 8-9) that this is simply a case where "the utility itself breaks the link between rates and revenue requirements." Nothing could be further from the truth. Utilities Operating Co. involved a factual situation where the utility voluntarily sought a rate increase that could not provide a fair return. 143 So. 2d. at 855. That certainly is not the case here. From the outset SSU sought, the Commission approved, and the Court unequivocally affirmed revenue requirements for SSU that were calculated to provide a fair return on investment. Accordingly, Utilities Operating Co. has no legitimate application to the facts of this case.

OPC's reliance on City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968) also is misplaced.[15] That case stands for the proposition that, once a utility has final rates established by the Commission, the Commission is without authority to order a retroactive reduction in such final rates for any period prior to the date it makes appropriate findings that the utility's existing rates are excessive and fixes new, prospective rates that are just and reasonable. 208 So. 2d 259-60.[16] That is

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[15]The decisions in Westwood Lake, Inc. v. Dade County, 264 So. 2d 7 (Fla. 1972) and Keystone Water Co. v. Bevis, 278 So. 2d 606 (Fla. 1973) add nothing to OPC's argument (Response at 12). Indeed, those decisions support SSU's position that the Refund Order effected an unconstitutional taking of SSU's property. See, Keystone, 278 So. 2d at 608-09.

The reasons why the decision in Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982) does not bar implementation of SSU's prospective refund/recoupment plan are fully explained in SSU's Motion for Reconsideration (at 22, n. 20) and need not be repeated here. In addition, OPC's argument on this score is a red herring. In Gulf Power Co., the Court affirmed the Commission's decision to limit prospective application of the utility's new rates to meter readings taken on or after thirty days following the effective date of the new rates. The Commission reasoned, and the Court agreed, that to allow the new rates to be applied to meter readings made on the day following the end of the suspension period would "result in billing of energy consumed before the end of the suspension period and before the effective date of the Commission's action. 410 So. 2d at 493. The simple and complete answer to OPC's argument is that SSU has not asked that its remand remedy be implemented at a date that would violate the Gulf Power Co. rule.

[16]The City of Miami case represents the counter balancing, complementary principle to the general rule expressed, inter alia, in Boyd v. Southeastern Telephone Co., 105 So. 2d 889, 894 (Fla. 1st DCA 1958), namely that a utility seeking a rate increase cannot make such increase effective back to the filing date (or any date prior thereto) and cannot retroactively collect the difference between revenues generated by inadequate interim rates ultimately found too low and the higher revenue requirements later determined to be lawful. Neither of these

not the situation the Commission faces in this case. Accordingly, City of Miami provides no bar to approval of SSU's prospective refund/recoupment plan.[17]

7. Citrus County urges the Commission to "take seriously SSU's persistent complaints or 'threats' that it cannot afford to make PSC-ordered refunds", while simultaneously contesting SSU's evidence of severe financial distress, citing the disposition of SSU's Venice Gardens facilities and the proposed purchase by SSU of the Orange-Osceola facilities. Citrus County Response at 3-4.

The relevant facts on these transactions provide no support for Citrus County's claims. The Venice Gardens facilities were taken under threat of governmental condemnation. In late 1994, SSU received proceeds of $37.4 million on assets with a book basis of $18.2 million, producing a book gain of $19.2 million before income taxes. Cash available after tax deferrals of $6.4 million was used to: 1) repay credit line draws associated with the December 1, 1994 final debt service payment on the 1984 series Deltona Utilities first mortgage bonds ($15.6 million); 2) internal needs such as capital improvement projects ($3.4 million); and 3) a dividend to the parent company intended to maintain a balanced capital structure until suitable replacement facilities are

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decisions is applicable to SSU's plan, which provides prospective rate mechanisms to discharge a current expense incurred in 1995 as a consequence of a remand remedy.

[17]If anything, City of Miami provides additional support for SSU's position that the Commission's retroactive reduction in the base facilities charges for some service areas was ultra vires and otherwise unlawful for a host of reasons. See, SSU Motion for Reconsideration at 34-37.

acquired or construction needs arise ($12.0 million). The Venice Gardens facilities were not regulated by or subject to the jurisdiction of the Commission.

SSU has agreed to pay approximately $13.5 million to purchase the Orange-Osceola facilities, subject to satisfaction of certain conditions. Of the agreed upon purchase consideration, some $10 million involves assumption of existing debt and does not require a cash outlay by SSU. This transaction has not closed as of this date, and SSU's current ability to fund the $3.5 million cash required from its own resources is not assured for the reasons expressed by Mr. Vierima.[18]

Where feasible and contractually permissible, SSU has taken steps to address capital requirements that are consistent with its current financial distress. For instance, SSU has sought the views of the Commission Staff on the appropriate means of transferring the certificate of authority to operate the water and wastewater facilities serving the Enterprise service areas. SSU operates these facilities as a court appointed receiver. SSU has determined that SSU cannot invest approximately $1 million required by the Department of Environmental Protection ("DEP") to bring the

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[18]SSU entered into the contract to purchase the Orange-Osceola facilities on September 23, 1994, long before the Commission issued the Refund Order. SSU now is contractually bound to complete the sale according to the purchase contract's terms. Nevertheless, unlike the $8 million extraordinary expense imposed by the Refund Order, the Orange-Osceola transaction involves acquisition of assets with continuing cash flow and earnings, on terms that are beneficial to SSU and its overall utility operations. Hence, there is reason to expect that the necessary financing for the transaction can be secured.

Enterprise wastewater facilities into compliance in light of the Commission's recent rate actions. Thus, SSU is in the process of relinquishing the Enterprise receivership to the courts. Similarly, SSU recently informed DEP that SSU is not in a position at this time to acquire another utility in order to assist DEP in restoring compliance at such utility's facilities.

8. Sugarmill Woods (Response at 4) cites two case decisions that may have relevance to aspects of an appropriate remand remedy in this case.[19] In both cases, the appellate court made it abundantly clear that, upon reversal of a trial court decree or decision, the lower tribunal (a) has broad discretion to fashion restitution remedies on remand, (b) has "inherent power" and a duty to correct its errors by applying equitable principles, (c) should, upon proper request, investigate the facts pertinent to an appropriate remedy, and (d) must, in fashioning a remedy, properly treat not only gains obtained, but also losses or deprivations incurred, under the erroneous decision. The Refund Order is wholly inconsistent with these sound decisional standards, all of which support the remand remedy and refund/recoupment plan recommended by SSU.

9. One final point deserves mention. In a statement embodying the oft-repeated views of Sugarmill Woods and Citrus County and what is apparently the conclusion of the Commission in its Refund Order, Sugarmill Woods states that if SSU was truly

[19]Mann v. Thompson, 118 So.2d 112 (Fla. 1st DCA 1960) and Sheriff of Alachua County v. Hardie, 433 So.2d 15 (Fla. 1st DCA 1983).

disinterested in the rate structure issue on appeal, "... it could have protected itself in various ways, including by simply allowing the automatic stay to remain in effect." (Sugarmill Woods' Response, at 6). This statement reflects a significant mistake of fact and law which continues to taint the Commission's resolution of the refund issue in response to the Citrus County remand.

The March 22, 1993 Final Order in this proceeding authorized an increase in SSU's final revenue requirements of $6.7 million. When Citrus County appealed the Final Order, that appeal stayed the entire order, not just that portion of the Final Order imposing the uniform statewide rate structure. This fact is confirmed by Citrus County's own statements found in its October 26, 1993 Response in Opposition to SSU's Motion to Vacate Automatic Stay where Citrus County stated as follows:

> Citrus County is a "public body" within the meaning of Rule 9.310(b)(2), Fla.R.App.P. and its filing of a Notice of Appeal with the First District Court of Appeal on October 8, 1993 automatically operated as a stay of Order No. PSC-93-0423-FOF-WS, and, among other provisions of that Order, stayed the implementation of the uniform rates, pending that Court's judicial review.[20]

As confirmed by Citrus County, Citrus County's Notice of Appeal triggered an automatic stay of the entire Final Order including the $6.7 million of increased water and wastewater

[20]See Citrus County's Response in Opposition to Southern States' Motion to Vacate Automatic Stay and Motion for Reduced Interim Rates Pending Judicial Review, for Recalculated Customer Bills, Refunds and Imposition of Penalties for Violating Automatic Stay filed October 26, 1993 in the above-captioned docket, at paragraph 14. (Emphasis supplied).

revenues. SSU's only legally available means to secure the opportunity to earn the $6.7 million of additional revenues authorized by the Commission was to file a motion to vacate the automatic stay pursuant to Rule 25-22.061(3)(a), Florida Administrative Code. This is precisely the course SSU followed and SSU should not be penalized for its compliance with Commission rules and taking the only steps available and necessary to continue collection of its Commission authorized final revenue increase.

CONCLUSION

SSU respectfully requests that its Motion for Leave to Reply be granted, and that the Commission accept and consider the Reply set out above and grant the relief requested in SSU's Motion for Reconsideration at the earliest possible time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion of Southern State Utilities, Inc. for Leave to File Reply and Proposed Reply was furnished by U.S. Mail to the following this 27th day of November, 1995:

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IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED Appellant, vs. SUSAN F. CLARK, etc., et al., Appellees.	)	CASE NO. 85,776

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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ARGUMENT

I. THE COMMISSION WAS CORRECT IN ITS DECISION THAT GTE'S FAILURE TO SEEK A STAY OF THE COMMISSION'S ORDER PROHIBITED RETROACTIVE RECOVERY OF AFFILIATE EXPENSES DURING THE PENDENCY OF APPEAL AND REMAND PROCEEDINGS.

To force a basis for its arguments, GTE several times in its Brief states that the only reason the Commission disallowed recovery of affiliate expenses during the pendency of the appeal was the Company's failure to seek a stay. In a superficial sense, that is correct. The Remand Order states: "GTEFL's failure to ask for a stay pending its appeal shall preclude any recovery for the expenses not recovered during the pendency of the appeal and implementation of the mandate." R. 380.

GTE would have the Court believe that the Commission's holding is "of no legal import" and provided no basis to deny recovery of the disallowed expenses back to the beginning of the appeal. Thus, GTE would have the Court consider the equitable remedy of restitution and general principles of supersedeas, but not the consequences of the Company's choice not to seek a stay. It would also lead the court away from the fundamental ratemaking law in which those consequences are founded. The Court should decline to accompany GTE on this detour.

A. GTE waived the protection that a stay would have afforded.

The Commission has recognized that its rate orders may be subject to appeal. It has thus adopted a specific rule intended to protect both the interests of the utility and its ratepayers. That rule is Rule 25-22.061, Florida Administrative Code, - Stay Pending

Judicial Review; Vacation of Stay Pending Judicial Review. As is applicable to the Commission's order decreasing GTE's rates in this case, the rule provides in section (1)(a):

> When the order being appealed involves the refund of monies to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

The rule allows a utility to go on charging its old rates, or hold the refund money, pending judicial review. The utility must post a bond to guarantee that the revenues for any required refund will be available at the end of the appeal.

There is no argument that GTE was entitled as a matter of right to obtain a stay of the Commission's order during the pendency of the appeal. All it had to do was ask and post an appropriate bond or corporate undertaking.

If GTE had asked for a stay, there would have then been no need for this appeal of this Commission Remand Order. GTE could have continued to collect the revenues associated with the rate decrease pending the resolution of the appeal. The Company's interests would have been protected, since it would have been entitled to keep the collected revenues if the Commission's order was reversed on appeal. The ratepayers' interests would have similarly been protected, since they would have been assured that the Company had sufficient funds set aside to provide for refunds or credits if the Commission's decrease order were upheld.

Only GTE knows why it did not take advantage of this rule. What is known is that GTE can be presumed to have been aware of this long standing Commission rule and either made a choice not to seek a stay or neglected to do so. In either case, GTE must be responsible for its own actions.

The simple fact is that, by failing to seek a stay, GTE waived any right to the protection a stay would have afforded. At the point it took an appeal of the Commission's rate order, GTE decided which rates it wanted to implement. The Company's ratepayers were entitled to rely on that decision and to consider it as establishing an appropriate level of charges for telephone service. The Commission correctly concluded in its Remand Order that it would be unfair for current ratepayers to retroactively pay for GTE's choice not to protect its financial interest during the pendency of the appeal. Having chosen to waive its right to a stay of the Commission's rate order, GTE should not be heard to complain to this Court. See, Citizens v. Wilson, 571 So. 2d 1300 (Fla. 1991). (Public Counsel waived right to contest recovery of conservation costs from firm customers where he was aware of issues and made no objection to recovery).

B. The equitable remedy of restitution cannot apply in this case.

Through its discussion of the Court's observations in Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966) GTE would have this Court make the jump from statutory ratemaking to the equitable remedy of restitution. Mann v. Thompson, 118 So. 2d 112 (Fla. 1st DCA 1960). That is a long and perilous leap.

GTE's arguments do not establish a right to recover from its ratepayers. "Equity and good conscience" will hardly be offended if the ratepayers are allowed to retain the voluntarily bestowed benefit, if there is any, of disallowed affiliate expenses. 118 So. 2d 115.

The Court should also consider that the application of the law of restitution to ratemaking would result in chaos. Ratepayers would be able to demand restitution for past overcharges, even if rates were lawfully in effect; utilities could demand to recoup past losses to make them whole. Ratemaking would become an unmanageable contest among whichever parties felt they were wronged under past charges. There would be little certainty and order in the process. Prospective ratemaking is a logical and fair doctrine which is not weakened by the arguments GTE brings to this Court now.

C. The relief sought by GTE would constitute prohibited retroactive ratemaking.[1]

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[1] Since GTE has taken the tack that the only reason that the Commission denied recovery of expenses during pendency of the appeal, it will doubtless argue that arguments about retroactive ratemaking are unsupported by the Commission's order. It is true that the order does not expressly discuss the applicability of that doctrine. However, it is not true that it played no part in the Commissioners' decision. Commissioners Kiesling and Clark especially felt that the issue of the effective date of the rate adjustment was controlled by the prohibition against retroactive ratemaking. Commissioner Kiesling stated:

> Well, I guess my feeling on it is that when I look at what is a long-running, you know, history of cases involving retroactive ratemaking, it seems -- and, you know, what we have done traditionally, that we ought to follow that until the court tells us differently. And it seems like going back to any other date than now runs afoul of that retroactive ratemaking. R. 355-356.

GTE's focus on the effect of its failure to request a stay and the availability of restitution leads the Court away from a confrontation with the unavoidable legal issue of retroactive ratemaking. This case involves the setting of rates by an administrative agency, not the award of a judgment by a court. As this Court and others have enunciated countless times, ratemaking is prospective in nature, not retroactive. Westwood Lake, Inc. v. Dade County, 264 So. 2d 7 (Fla. 1972). That simple fact has broad implications for this case. Even if GTE may be heard to complain on appeal about a situation of its own making, it cannot so easily sidestep the legal issues underlying the Commission's decision.

In its Remand Order, the Commission noted that

> [h]aving failed to protect its right to receive, on an ongoing basis, the revenues associated with its affiliate transactions, the Company should not be permitted to collect these monies retroactively. R. 378.

The significance of GTE's failure to request a stay is that without it the Commission was unable to capture and preserve jurisdiction over the disposition of the disallowed affiliate

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Chairman Clark echoed that view, stating that " . . . to me, allowing the recovery of a previous expense in future rates is clearly retroactive ratemaking in some circumstances." R. 356. Presumably, that included the issue at hand.

Notwithstanding exactly how the Commission expressed its conclusions on why the affiliate expenses were allowed only on a prospective basis from the date of the remand decision, the law is what it is. The Commission cannot waive the law prohibiting retroactive ratemaking. Even if the Court found that the Commission had relied on the wrong authority for its Remand Order, the Court would be correct in upholding the Commission's decision based on retroactive ratemaking. Saunders v. Saunders, 346 So. 2d 1057 (Fla. 1st DCA 1977) (Trial court's order upheld where result was correct, even though court relied on wrong rule).

expenses. Unless the Commission takes some action to capture funds associated with rate increases or decreases on a going-forward basis, it loses control of the final disposition of these funds. It cannot arbitrarily go back and adjust rates to the beginning of the rate case, or to any other point in the past. See, United Telephone Company v. Mann, 403 So. 2d 962 (Fla. 1981) (Commission had discretion to determine amount of interim rate refund so long as amount did not exceed amount ordered subject to refund at the interim hearing). This is a reflection of the fundamental principle that ratemaking is prospective in nature. The Commission cannot simply set rates at a level which it thinks ought to have been charged in the past. Rates must be set on a going-forward basis to be charged in the future. As this Court noted in City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 260 (Fla. 1968), "the new rates are prospective as of the date they are fixed". In a normal rate setting proceeding such as GTE's rate case, the only way that the Commission can adjust rates retrospectively is to have established the rates as conditional from some point in the past. This is accomplished by making the affected revenues subject to refund guaranteed by bond or corporate undertaking.[2]

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[2]As an example, this procedure is embodied in the telephone interim rate statute, section 364.055, Florida Statutes which requires that interim rate increases or decreases be implemented subject to refund guaranteed by bond or corporate undertaking. The same applies for rates implemented after the expiration of eight months pursuant to section 364.05, Florida Statutes, where the Commission has not established new rates by that time.

The fundamental legal principle embodied in this process is the prohibition against retroactive ratemaking. There have been many formulations of that concept based on specific circumstances. However, retroactive ratemaking basically involves an attempt to set rates on a going-forward basis to recoup past losses or to refund past over-earnings. City of Miami, supra; Citizens v. Florida Public Service Commission, 448 So. 2d 1024 (Fla. 1984); Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982). As an illustration, it would be retroactive ratemaking if the Commission failed to establish interim rates subject to refund but nevertheless attempted to make its final rate decision effective during the interim period. See, Friends of the Earth v. Wisconsin Public Service Commission, 254 N.W. 2d 299 (Wisc. 1977) (To retain jurisdiction to make a refund and not violate retroactive ratemaking the commission's interim order must contain a refund condition).

The principle of prospective ratemaking and the prohibition against retroactive ratemaking has other applications. For example, if the Commission determines, based on a utility's surveillance reports, that it is overearning, the Commission must initially take some action to capture those overearnings on a going-forward basis. See, Order No. 22377, 90 F.P.S.C. 1:60, 61 (1990) (Reversed on other, procedural grounds in United Telephone Company v. Beard, 611 So. 2d 1240 (Fla. 1993). This is normally done by requiring the utility to hold money subject to refund pending the outcome of an earnings review. At the end of the

proceeding, the Commission is then able to adjust rates to cover the duration of the overearnings review.

The same prohibition against retroactive ratemaking applies as a result of GTE's failure to request a stay of the Commission's rate decrease order pending appeal. At the point the Commission issued its final order decreasing GTE's rates, those were the lawful permanent rates to be charged thereafter. The effect of GTE's failure to seek a stay of the Commission's order was to leave the Commission without any mechanism to control the future disposition of revenues associated with the rate decrease during the pendency of the appeal and remand proceedings. The Commission could not go back after the appeal was over and retroactively adjust rates back to the beginning of the appeal. To do so would violate the prohibition against retroactive ratemaking. The Commission was put in the position of making an adjustment to existing permanent rates after the remand. That adjustment had to be prospective to be consistent with the Commission's statutory authority[3] and the prohibition against retroactive ratemaking.

The Court should note that the prohibition against retroactive ratemaking is not simply a doctrine of convenience. Regulated utilities have the right to earn a fair rate of return collected through their rates. However, a utility's customers are entitled to be charged only those rates which are lawfully approved and in effect at any given time. Customers have the right to know what rate they will be charged and to adjust their consumption

[3] Sections 364.035; .05; .055 and .14, Florida Statutes.

accordingly. Similarly, a utility has the right to collect its lawfully approved rates until such time as the rates are changed. Surely, GTE would not contend to this Court that the Commission should go back and require the Company to refund overearnings it may have had prior to the initiation of its last rate case.

There is nothing inconsistent with the basic ratemaking principles described above and the Court's holding in Village of North Palm Beach v. Mason relied on by GTE. In that case, this Court found that its decision quashing the Commission's rate order did not render the order void ab initio. As a result, the rate increase granted by the Commission was allowed to stand from the time it was entered through the proceedings on remand. Ordinarily, if the order had been voided through the Court's quashal as the Village argued, the Court could not have allowed the rate increase to be effective back to the time when it was approved. As the Court apparently recognized, this would have been retroactive ratemaking. However, it was not the Court's intention to render the order void by the use of the term "quashed". Instead, the Court meant only that the Commission's findings were deficient in its order even though

> this deficiency was easily corrected by entry of an amendatory or supplemental order upon the same record on which the original order was entered.

188 So. 2d 781. Because the Court did not intend to quash the Commission's order but only point out what amounted to a technical deficiency, it allowed the order to stand from the time it was rendered.

IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED, Appellant, vs. SUSAN F. CLARK, etc., et al. Appellee	)	Case No. 85,776 On Appeal from an Order of the Florida Public Service Commission Docket No. 920188-TL

CITIZENS' ANSWER BRIEF

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SUMMARY OF ARGUMENT

GTE Florida, Inc. ("GTE") would have this Court sanction and require the use of retroactive ratemaking for the first time. Retroactive ratemaking would require the Florida Public Service Commission ("Commission") to charge current customers for services rendered in the past whether or not these customers previously received any services from GTE. Prior decisions by this Court prohibit retroactive ratemaking.

GTE's request for relief would have this Court require the Commission to order such an action. GTE seeks to impose a surcharge on current customers to pay for services provided by the company earlier.

The Commission carefully crafted a rule governing stays of Commission orders that protects all parties during an appeal while avoiding the imposition of retroactive rates. GTE failed to seek a stay available under the Commission's rules during GTE's initial appeal to this Court. On remand, the Commission refused to engage in retroactive ratemaking to rectify GTE's failure to seek a stay.

The Commission properly exercised its broad discretion in handling this case on remand from this Court.

IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED,

Appellant,

vs.

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

Appellees.
_____/

Case No. 85,776

On appeal from an order of the
Florida Public Service Commission
Docket No. 920188-TL

REPLY BRIEF OF APPELLANT GTE FLORIDA INCORPORATED TO ANSWER BRIEFS OF THE FLORIDA PUBLIC SERVICE COMMISSION AND PUBLIC COUNSEL

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Attorneys for Appellant,
GTE Florida Incorporated

S#6825r :

GTE to recover the erroneously denied expenses, without running afoul of the prohibition against retroactive ratemaking.[8/]

The PSC further asserts that "a utility's customers are entitled to be charged only those rates which are lawfully approved and in effect at any given time." [PSC Br. 14]. It contends that allowing GTE to recover the erroneously denied expenses on remand would violate the right of GTE's customers to know what rate they will be charged and to adjust their consumption accordingly. [PSC Br. 14]. The inescapable fact, however, is that GTE's customers were fully represented by Public Counsel in GTE's appeal of the PSC's rate orders, and, as such, were on notice of GTE's challenge to those rate orders and the possibility that this Court might reverse them.

The PSC's argument further presumes that the original rate orders entered by the PSC in this case were lawful, which they were not. This Court specifically determined that they were unlawful to the extent they denied GTE the recovery of certain of its affiliate expenses. GTE's customers certainly do not have a vested right to the promulgation of unlawful rates by the PSC, nor do the PSC or Public Counsel contend otherwise.

[8/] In an effort to avoid this Court's decision in Village of North Palm Beach, allowing the Commission to grant a rate increase from the date of the Commission's original order, the PSC asserts that the Court there did not intend to "quash" the Commission's order, but only to fix certain deficiencies in it, allowing the order to stand from the time it was rendered. But that is precisely what happened here as well. This Court did not "quash" the PSC's rate orders. Rather, it simply reversed that portion of the orders which had denied GTE its affiliate expenses to correct the PSC's application of the wrong standard in determining their recoverability. It affirmed the remainder of the PSC's orders. Village of North Palm Beach is therefore perfectly applicable here, and illustrates that the relief sought by GTE is appropriate and does not run afoul of the prohibition against retroactive ratemaking.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: 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. 921099-WS

BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	26(**)
DATE:	Tuesday, September 12, 1995
PLACE:	The Betty Easley Conference Center Hearing Room 148 4075 Esplanade Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

PARTICIPATING:

MS. SUSAN FOX, representing Sugarmill Woods Civic Association.

MICHAEL B. TWOMEY, representing Sugarmill Woods Civic Association, Spring Hill Civic Association and Marco Island Civic Association.

KENNETH HOFFMAN and BRIAN ARMSTRONG, representing Southern States Utilities.

MARY ALICE PURITT, representing Hernando County

* * * * * *

STAFF RECOMMENDATIONS

(**) Participation will be permitted if the recommendation in Issue 1 is approved.

Issue 1: Recommendation that parties be allowed to participate in this proceeding, with participation limited to fifteen minutes for each side.

Issue 2: Recommendation that, in the absence of directions from the appellate court for the Commission to make an additional finding or to reconsider its decision in light of the court's decision, the Commission should not reopen proceedings to take additional evidence.

Alternative Recommendation: The Commission may reopen the record for the sole purpose of taking evidence on whether or not SSUs' facilities and land were functionally related during the test year in Docket No. 920199-WS.

Issue 3: Recommendation that, if the Commission approves the alternative recommendation in Issue 2, the Commission should reopen the record. A hearing should be scheduled immediately. SSU should have 20 days from the conference to file testimony on only the issues identified in the analysis portion of Staff's memorandum dated August 31, 1995. Parties should be allowed 14 days from the date the utility files its testimony to file their testimony on these issues. All other dates should be established later by the prehearing officer in a future order on procedure governing this proceeding. If the record is reopened, the rate currently being charged should remain in effect pending the conclusion of the administrative hearing.

Issue 4: Recommendation that, if the Commission approves the primary recommendation in Issue 2, SSU's final rates should be calculated based on a modified individual system basis, with the exception of Welaka and Sarasota Harbor,

Silver Lake Estates and Western Shores, Park Manor and Interlachen Lakes, and Rosemont and Rolling Green, which are combined for water ratemaking purposes. All other existing uniform rates should be unbundled. The rates should be developed based on a water benchmark of $30.00 and a wastewater benchmark of $46.75 for a total bill of $76.75. These benchmarks should be calculated at 10,000 gallons of water usage. Revenue deficiencies caused by the staff-recommended benchmark should be recovered from each industry's customers. The recommended rates, before any adjustments for subsequent indexes and pass-throughs, are shown on Attachment A of Staff's memorandum dated August 31, 1995, which contains Schedules 1 and 2. Since this decision was rendered, SSU has had two indexes and one pass-through approved by the Commission for the 127 service areas. Therefore, SSU should make any necessary adjustments for indexes and pass-throughs and be required to recalculate and submit the recommended rates within 7 calendar days of the Agenda Conference. SSU should also be required to file the supporting documentation, as well as a computer disk in a format which may be converted to Lotus 1-2-3 by Staff. The utility should be required to file revised tariff sheets and a proposed customer notice to reflect the appropriate rates. The approved rates should be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), F.A.C., provided the customers have received notice. The rates may not be implemented until proper notice has been received by the customers. The utility should provide proof of the date notice was given within 10 days after the date of the notice.

Issue 5: Recommendation that no refunds are appropriate to customers who ~~receive a rate reduction because revenue~~ requirement was not an issue on appeal. The ~~rate~~ changes should be made prospectively and no refunds should be ~~required. Further,~~ no refund of interim revenues is ~~appropriate.~~

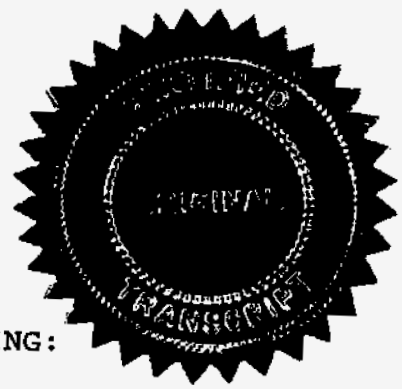
~~Alternate~~ Recommendation: There should be a refund to customers who receive a rate reduction, in the event the Commission changes the uniform rates of SSU to another alternative.

Issue 6: Recommendation that, if the Commission requires that refunds be made, SSU should submit, within 7 days of the date of the Agenda Conference, the information detailed in Staff's memorandum for purposes of refunds. The refunds should cover the period between the initial effective date of the uniform rate up to and including the date at which new rates are implemented. Any such refunds should be made with interest pursuant to Rule 25-30.360, F.A.C., by crediting customers' bills over the same time period the

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: 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); and Volusia County by Deltona Lakes Utilities (Deltona). (Deferred from the 2/6/96 Commission Conference)

DOCKET NO. 920199-WS



BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	11
DATE:	February 20, 1996
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Notary Public in and for the State of Florida at Large

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CHAIRMAN CLARK: That's up to you. Mr. Howe, Mr. Twomey, and Ms. Fox, when I get to you, please let me know how you want your time divided. Mr. England, go ahead.

MR. ENGLAND: Thank you, Madam Chairman. I really believe the Commission and each of you is fully familiar with the background for this hearing. I want to set the stage, however, with just a few highlights of the events that brought us to this juncture. In March of 1993, the Commission ordered a revenue increase for Southern States of $6.7 million based on uniform rate design in order to produce a revenue requirement of $26 million roughly in the combined systems. Now, Citrus County and a few of the homeowner associations appealed the uniform rate design, and Public Counsel appealed the revenue requirement to the First District Court of Appeal.

Sixteen months later, the district court invalidated the rate design for finding an absence of functional relationship, and most importantly to today's hearing. The district court rejected the challenge of Public Counsel and affirmed your order setting a revenue requirement of $26 million in the aggregate. And it's important to make that observation at this stage, because it appears that the Commission