FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

April 4, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER)
DIVISION OF WATER AND WASTEWATER (WILLIS)

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 950495-WS
CASE: SOUTHERN STATES UTILITIES, INC. APPLICATION FOR RATE INCREASE AND INCREASE IN SERVICE AVAILABILITY CHARGES FOR ORANGE-OSCEOLA UTILITIES, INC. IN OSCEOLA COUNTY, AND IN BRADFORD, BREVARD, CHARLOTTE, CITRUS, CLAY, COLLIER, DUVAL, HERNANDO, HIGHLANDS, HILLSBOROUGH, LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, POLK, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND WASHINGTON COUNTIES.
COUNTY: SEE ABOVE

AGENDA: APRIL 16, 1996- REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495RV.RCM

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. On June 28, 1995, SSU filed an application for approval of interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes. The official date of filing was August 2, 1995.

The Office of the Public Counsel (OPC), the Sugarmill Woods Civic Association, Inc. (Sugarmill Woods), the Spring Hill Civic Association, Inc. (Spring Hill), the Marco Island Civic Association, Inc. (Marco Island), the Concerned Citizens of Lehigh Acres (Lehigh Acres), and the Harbour Woods Civic Association (Harbour Woods) have intervened in this docket. The Commission has scheduled and held customer service hearings throughout the state. Technical hearings are now scheduled to begin on April 29, 1996,

and continue into May. Special Agenda Conferences to decide SSU's revenue requirements and rates are scheduled for July 31, 1996, and August 15, 1996, respectively.

By memoranda dated December 28, 1995, and January 3, 1996, Chairman Clark disclosed that she had received two letters (with letters attached) pertaining to this docket. The first was a one-page letter from Florida Lieutenant Governor McKay, dated December 21, 1995, to which was attached a four-page letter, dated November 21, 1995, from Arend Sandbulte, Chief Executive Officer (CEO) of Minnesota Power, the parent corporation of SSU, to the Honorable Lawton Chiles, Governor of the State of Florida. The second was a two-page letter from Charles Dusseau, Secretary of the Florida Department of Commerce, dated January 2, 1996, to Chairman Clark.

On February 16, 1996, Sugarmill Woods, Marco Island, Spring Hill, Lehigh Acres, and Harbour Woods (Petitioners) filed an Initial Motion for Assignment of All Dockets Involving Southern States Utilities, Inc., to the Division of Administrative Hearings (DOAH) for Hearing of Matters Involving Substantial Interests and Issuance of Recommended Orders (attached to this motion was a September 8, 1995 letter from John Cirello, President and C.E.O. of SSU, to the Lieutenant Governor). On February 23, 1996, SSU filed its Response to Motion for Assignment of All Dockets Involving SSU to the Division of Administrative Hearings.

Subsequent to the filing of the above motion, OPC and the Petitioners filed on March 12, 1996, a joint Motions to Dismiss and a Request to Schedule Evidentiary Hearing on that motion. SSU timely filed its Response in Opposition to the motion on March 19, 1996.

The February 16th motion (motion to reassign) and response was considered at the March 19th Agenda Conference. After hearing argument, the Commission voted to deny the motion.

This recommendation addresses the appropriate action for the Commission to take as the result of the motion to dismiss and request for evidentiary hearing of the Petitioners. Also, Citrus County filed its own Motions to Dismiss on March 25, 1996 before filing a petition to intervene. In that motion, Citrus County adopts the Motions to Dismiss of the other intervenors and requests that its motion be considered at the same time as the other Intervenors' Motions to Dismiss. Citrus County has not been granted party status yet.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission allow oral argument on the Petitioners' Motions to Dismiss and Request for Evidentiary Hearing.

RECOMMENDATION: Yes. Because the rate case has not gone to hearing yet, oral argument should be permitted, with each side allocated ten minutes. (JAEGER)

STAFF ANALYSIS: Because the rate case has not yet gone to hearing, parties should be given the opportunity to address the Commission on this matter. Therefore, Staff recommends that the Commission grant each side ten minutes for oral argument.

ISSUE 2: Should the Commission grant the Intervenors' request for an evidentiary hearing on their Motions to Dismiss?

RECOMMENDATION: A separate hearing should not be held, but the issue of misconduct should be added as an issue in this case and the parties should be allowed to present evidence at the formal hearing, on whether there is or was misconduct, and what is the appropriate remedy.

STAFF ANALYSIS: The Intervenors have all filed a joint Motions to Dismiss based on three separate alleged instances of misconduct by SSU, i.e.: (1) Soliciting ex parte communications intended to influence the Commission; (2) Interference with the notice to customers; and (3) Interference with the Citizens' right to counsel. In conjunction with this joint motion, the Intervenors have requested that an evidentiary hearing be held.

The first instance of alleged misconduct concerns the sending of two letters to Chairman Clark and the actions taken by SSU which led up to these letters.

As stated in the Case Background, Chairman Clark, upon receiving the letters of Secretary of Commerce Dusseau and Lieutenant Governor McKay (to which Arend Sandbulte's four-page letter was attached), placed those documents on the record of these proceedings. In her cover memoranda, the Chairman stated that the letters addressed matters relevant to pending proceedings, and that her actions were taken pursuant to Section 350.042, Florida Statutes.

Her memoranda also stated that all parties should be given notice of these communications and that they should be informed that they had 10 days from receipt of the notice to file a response. Subsection 350.042(4), Florida Statutes, specifically states that any response must be received by the Commission within 10 days after receiving notice that the ex parte communication has been placed on the record. However, no timely response was received.

The Intervenors allege that these two letters were solicited by SSU's lobbyist Jeff Sharkey, and that a letter sent by Mr. Sharkey to the Lieutenant Governor asked the Chairman to respond to the Lieutenant Governor about the overall economic and financial consequences facing SSU. Also, the Intervenors allege that Mr. Sharkey also sent two facsimiles to the Secretary of Commerce advising him that the situation was critical and that the "deadline" was January 3, 1996 (the day before the Commission's second vote on interim rates).

For the second instance of misconduct, the Intervenors allege that SSU has interfered with the notice to customers. The Intervenors allege that SSU, by sending out these post cards which only presented one side of the uniform rate issue, insinuated that the notice required by the Commission was inadequate. Intervenors further allege that the postcards, and SSU's subsequent meetings with customers, led the customers to believe that the required revenue was a foregone conclusion and that the only issue affecting their rates in this case is the uniform rates vs. the stand-alone rates issue. The Intervenors claim that these actions may have convinced the customers that the Commission had been influenced through ex parte contacts, and that such actions amount to an improper attempt to obstruct the notice required by the Commission and an interference with the due process rights of the Citizens.

For the third instance, the Intervenors state that the actions of SSU interfere with the Citizens' right to representation by the Public Counsel. In particular, the Intervenors allege that SSU advised its customers that OPC "had a conflict with what, according to Southern States was the only important remaining issue in the case: uniform rates vs. stand-alone rates." Although OPC admits to this conflict on rate structure, they deny that it is the only important remaining issue.

Based on these alleged actions of misconduct, the Intervenors, state that, pursuant to the case of Jennings v. Dade County, 589 So. 2d 1337, 1342 (Fla. 3d DCA 1991), they are entitled to an evidentiary hearing on the motion. The Jennings case was a zoning case in Dade County. In that case, Mr. Schatzman applied for a variance to permit him to operate a quick oil change business on his property, which was adjacent to the property of Mr. Jennings. Mr. Jennings opposed this variance, but after a quasi-judicial hearing, the County Commission upheld the Zoning Appeals Board granting of a variance.

Subsequent to this decision, Mr. Jennings found out that a lobbyist hired by Mr. Schatzman had had ex parte communications with some or all of the county commissioners prior to the vote. Mr. Jennings then filed an action for declaratory and injunctive relief in circuit court alleging that such contacts denied him due process both under the United States and Florida constitutions.

The Third District Court of Appeal noted that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled. However, it went on to say that certain standards of basic fairness must be adhered to in order to afford due process, and that a quasi-judicial decision based upon the record is not conclusive if these minimal standards of due process are denied. The court then

concluded that the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action, and that upon proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. In reviewing the above arguments, staff notes that ratemaking is a legislative function, rather than a judicial function (See, Chiles v. Public Service Commission, 573 So. 2d 829, 832 (Fla. 1991), Also, the Intervenors have not directly alleged that the actions of SSU have caused prejudice or bias, and Jennings directed that on remand such allegation be made (presumably the allegation was required, but, once made, prejudice would be presumed in a quasi-judicial case). Therefore, staff believes that Jennings is not controlling.

Instead of focusing "on the effect of the ex parte communication on the decision maker" as the court did in Jennings, the Intervenors have focused "instead on the misconduct of Southern States in attempting to influence the Commission, whether those actions by Southern States were successful or not." Petitioners argue that, where there has been a deliberate and contumacious disregard of a court's authority in discovery abuse cases, dismissal has been found to be appropriate. The Intervenors further allege that the actions of SSU in securing the letters of the Lieutenant Governor and Secretary of Commerce were much worse than any discovery abuse, and show this deliberate and contumacious disregard for the Commission's authority.

In its response to the Motions to Dismiss, SSU argues that the letters do not address the merits of this proceeding, are not ex parte communications as contemplated by Section 350.042(1), Florida Statutes, and are constitutionally permitted. SSU also argues that dismissal is the wrong remedy.

Notwithstanding the above, staff believes that the allegations of the Intervenors require further review. Intervenors allege that through SSU's attempt to gain an advantage through outside or ex parte influence, SSU has subverted "the fundamental notion of a fair process and deprive parties of due process." Without using the word "prejudice", the Intervenors seem to indirectly be alleging that there is prejudice. Specifically, Intervenors allege that SSU solicited the ex parte communications and that this is improper.

SSU has raised the question of whether the letters of the Lieutenant Governor and Secretary of Commerce are even ex parte communications. Black's Law Dictionary, Revised Fourth Edition (1982), defines ex parte as:

> On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

Also, Section 120.66, Florida Statutes, states:

> no ex parte communication relative to the merits, threat, or offer of reward shall be made . . . to the hearing officer by:
>
> * * *
>
> (b) . . . any person who, directly or indirectly, would have a substantial interest in the proposed agency action . . .

It would appear that the Commission should first determine whether the letters were sent or "done for in behalf of, or on the application of" SSU. A part of this question would appear to be did SSU solicit the communications, and were they made on its behalf? Staff does not believe that a review of the letters themselves answers that question.

Based on all the above, staff recommends that a separate hearing should not be held, but the issue of misconduct should be added as an issue in this case and the parties should be allowed to present evidence at the formal hearing, on whether there is or was misconduct, and what is the appropriate remedy.

The phrasing of the issue could be specifically decided at the Prehearing Conference, but could probably read something like:

> "Has there been misconduct on the part of SSU, and, if so, what is the appropriate sanction or remedy?"

ISSUE 3: Should the Commission grant the Intervenors' Motions to Dismiss.

RECOMMENDATION: Pending the outcome of the evidentiary hearing, the Commission should not rule on the Motions to Dismiss. However, if the Commission should deny the Request to Schedule Evidentiary Hearing, and make a determination based on the pleadings, then the Motions to Dismiss should be denied. (JAEGER, WILLIS)

STAFF ANALYSIS: As stated in Issue 2, staff recommends that the issue of misconduct should be added in this case and the parties should be allowed to present evidence at the formal hearing already scheduled to begin on April 29, 1996. If the recommendation for Issue 2 is approved, then the Commission should postpone ruling on these Motions to Dismiss. However, if Issue 2 is not approved, then the following analysis applies.

In the case of Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Florida Supreme Court went on to say in that same case that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side."

As stated in the Background portion of this Recommendation, the Intervenors filed their Motions to Dismiss SSU's rate case on March 12 and 25, 1996, respectively. SSU responded to the first motion on March 19, 1996. In their motions, the Intervenors list three separate instances of alleged misconduct. These are: (1) soliciting ex parte communications intended to influence the Commission; (2) interference with the notice to customers; and (3) interference with the Citizens' right to counsel. An analysis of each of these claims is set out below.

SOLICITING EX PARTE COMMUNICATIONS INTENDED TO INFLUENCE THE COMMISSION

For this instance of alleged misconduct, the Intervenors claim that the actions of SSU in securing the letters from the Lieutenant Governor and the Secretary of Commerce constitute a deliberate and contumacious disregard of the Commission's authority. Citing the cases of Watson v. Peskoe, 407 So. 2d 954, 956 (Fla. 3d DCA 1981); Belflower v. Cushman & Wakefield of Florida, Inc., 510 So. 2d 1130, 1131 (Fla. 2d DCA 1987); Morales v. Perez, 445 So. 2d 393 (Fla. 3d DCA 1984); Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu, 413 So. 2d 102 (Fla. 3d DCA 1982); Section 367.121 (g), Florida Statutes, and Rule 25-22.034, Florida Administrative Code, the

Intervenors note that the Commission certainly has the power to dismiss for discovery abuses. They then allege: that the actions of SSU amount to an attempt by SSU to gain an advantage through outside influence, that such attempts subvert the fundamental notion of a fair process and deprive the parties of due process; that such actions are far more egregious than any discovery abuse; and that "[t]he rule of law demands that such behavior be answered with grave consequences," i.e., dismissal.

Section 367.121(1)(g), Florida Statute, states:

> (1) In the exercise of its jurisdiction, the commission shall have power:
>
> (g) to exercise all judicial powers, issue all writs, and do all things necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements:

Rule 25-22.034, Florida Administrative Code, deals with discovery and provides that sanctions for abuse of discovery may include the sanction of dismissal as authorized by Rule 25-22.042, Florida Administrative Code. Rule 25-22.042 (1), Florida Administrative Code states:

> The failure or refusal of a party to comply with any lawful order may be cause for dismissing the party from the proceeding.

OPC argues that since the conduct of SSU is so much worse than any abuse of discovery, and dismissal is allowed for discovery abuses, then dismissal should also be allowed for the alleged misconduct of SSU.

SSU responds to this first allegation by arguing that the two letters are not ex parte communications, that the letters contain no information relevant to the merits of this proceeding, that Chairman Clark followed the appropriate procedures set out in Section 350.042, Florida Statutes, and that Subsection 350.042(4), Florida Statutes, requires a response within 10 days and makes the available remedy withdrawal if that is the only way to eliminate the effect of an ex parte communication.

Also, SSU states that the Jennings case requires a party seeking to establish entitlement to a new hearing due to an ex parte communication must allege that the ex parte communication caused him prejudice, and that if prejudice is alleged and proven, the remedy is either a new hearing if a (tainted) hearing has been

held, or a new commissioner or commissioners if a hearing has not been held, and not dismissal of a proceeding which has not yet reached the hearing stage. SSU further states that the goals of Section 350.042, Florida Statutes, and the Jennings case are to ensure a party prejudiced by an ex parte communication receives a fair hearing before an unbiased tribunal with the due process protections provided under Chapter 120, Florida Statutes.

In reviewing the motions and SSU's response, staff has first looked at the cases cited by the Intervenors dealing with dismissal for discovery abuses. In the Watson case, the Third District Court of Appeal noted that the sanction of dismissal is the most severe of all sanctions and should be employed only in extreme circumstances. However, in that case, the trial court had on two separate occasions issued orders requiring the production of the same documents and those orders had been ignored by the plaintiffs. The trial court therefore, on the third motion for sanctions, granted dismissal, and this was upheld by the Third District Court of Appeal.

In the Belflower case, the Second District Court of Appeal overturned an order of dismissal. The appellant had failed to appear to testify at a properly noticed deposition and the appellant had moved for sanctions. The trial court (at the December 9th hearing) ordered the appellant to appear for a second deposition to be held within two weeks. A proposed order was forwarded to the trial court on December 18, 1986, and in that order the proposed deposition was set as December 23, 1986. However, the trial court did not issue the order until December 23, 1986. Even so, the trial court dismissed the case for this failure to attend the second deposition. The district court found that dismissal was improper.

The Merrill Lynch and Marales cases were similar to the Watson case in that the appellants had repeatedly violated discovery rules and had on numerous times failed to comply with orders relating to discovery. The Third District Court of Appeal, in upholding dismissal, noted that unless there was a clear abuse of discretion, such orders of dismissal will not be reversed on appeal.

As noted, all of the above cases dealt with abuses of discovery and refusal to comply with discovery orders of the court. Where such actions amounted to a deliberate and contumacious disregard for the court's authority, the appellate courts have upheld dismissal. Contumacious is defined in the New College Edition of the American Heritage Dictionary (1981) as follows: "obstinately disobedient or rebellious; insubordinate." Also, Black's Law Dictionary, Revised Fourth Edition (1968), defines contumacy as: "The refusal or intentional omission of a person

. . . to obey some lawful order or direction made in the cause."

The Intervenors allege that the letters of Arend Sandbulte and SSU lobbyist Sharkey show this deliberate and contumacious disregard for the Commission's authority. However, the Sharkey letters were not attached to the Motions to Dismiss. Further, staff does not believe the Sandbulte letter, in and of itself, shows this deliberate and contumacious disregard. The letter does complain of the Commission's actions and requests any advice, guidance, counsel, or constructive criticism. Also, it states the history of the 920199-WS rate case, and alludes to its total investment in Florida, and annual investments in its Florida utilities. Staff just does not see how this shows a contumacious disregard for the Commission's authority.

Also, although the Intervenors cite Section 350.042, Florida Statutes, they do not seek the remedy provided by that section. Sections 350.042(4) and (6), Florida Statutes, respectively, provide for the withdrawal of a commissioner (if he or she deems it necessary to eliminate the effect of an ex parte communication), or for his or her removal (if they fail to place on the record any such communication). No where in Section 350.042, Florida Statutes is there a provision for dismissal.

Mr. Sandbulte's letter definitely appears to be a complaint letter and could possibly be interpreted as requesting some assistance. However, staff does not believe that the contents of the Sandbulte letter arise to the level of showing a deliberate and contumacious disregard for the Commission's authority. Therefore, for this alleged area of misconduct, staff does not believe that the Intervenors have shown grounds for dismissal.

INTERFERENCE WITH THE NOTICE TO CUSTOMERS
AND
INTERFERENCE WITH THE CITIZENS' RIGHT TO COUNSEL

Staff believes that the Intervenors' second and third claim of misconduct are closely related and will be considered together. In their second claim, Intervenors allege that there was Interference with the Notice to Customers by SSU. The Intervenors argue that the notice sent out pursuant to Rule 25-22.0407, Florida Administrative Code, is designed to apprise the party being "sued" of the nature of the suit and lets that party know the extent to which their interests may be affected. They then allege that SSU, by sending the postcards inviting the customers to "an informative meeting with SSU representatives to discuss uniform rates", has subverted the purpose of the second notice to customers. The Intervenors also allege that at the meetings themselves SSU misrepresented that the revenue requirement was a foregone

conclusion and that "the only issue affecting their rates in this case is the uniform rates vs. stand-alone rates issue."

For their third claim, the Intervenors claim that SSU has also interfered with the citizens' right to counsel. In addition to the actions set out above, Intervenors claim that, at the meetings described in the postcards sent to customers, SSU advised its customers that the Office of Public Counsel had a conflict with representing the customers on the only important remaining issue in the case, i.e., uniform rates vs. stand-alone rates. The Intervenors state that the actions of SSU set out in these two claims is further misconduct and deprives parties of due process and shatters the fairness of the process.

For the second and third claims, SSU responds that there were numerous inquiries from customers who were confused by the supplemental customer notice. Because of this confusion, SSU states that it elected to educate its customers about the ramifications of the different rate structures on potential rate increases.

SSU further claims that pursuant to the holdings in Pacific Gas and Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 89 L. Ed. 2d 1, 106 S. Ct. 903 (186) and a Kentucky Public Service Commission order which was attached to its response, that it has the constitutional right to communicate its views on substantive issues with it customers without interference from or granting an opportunity to OPC to respond.

In the Pacific Case, the California Public Utilities Commission attempted to require the utility to allow a consumer group to place its opposing point of view in a bill stuffer that the utility sent out. While the United States Supreme Court was divided in its views, the majority opinion noted that the utility "'might well conclude' that, under these circumstances, 'the safe course is to avoid controversy,' thereby reducing the free flow of information and ideas. Miami Herald Publishing Co. v. Tornillo, 418 US 241, 257 41 L ed 2d 730, 94 S Ct. 2831." In Pacific Gas, the United States Supreme Court went on to say:

> The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. . . . The identity of the speaker is not decisive in determining whether speech

> is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster. . . . Thus, in Bellotti, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum.
>
> Similarly, in Consolidated Edison Co. v. Public Service Comm'n of NY, 447 US 530, 544, 65 L Ed 2d 319, 100 S Ct 2326 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.

Pursuant to the above case, staff believes that SSU has a constitutional right to discuss controversial issues with its customers, and that this right is not abrogated just because there is a rate case being litigated.

As noted in Issue 2 above, and in the Chiles case, ratemaking is a legislative function. In setting rates, and acting in a legislative manner, the Commission must make many policy decisions that will affect the public interest. As stated in Pacific Gas, the range of information and ideas to which the public is exposed should not be unduly limited. By the customers hearing all sides of the issues, and then being given an opportunity to address the Commission, the Commission can itself be better informed and better able to make the policy decisions that it must make.

Further, in State v. Globe Communications Corporation, 622 So. 2d 1066, 1077 (Fla. 4th DCA 1993), the Fourth District Court of Appeal discussed the First Amendment and the rights of free speech, and specifically said:

> Because of the obvious importance of the free exchange of information in a democratic society, the First Amendment strictly limits any government activity that might impede that exchange. While the right of free speech is not absolute, the United States Supreme Court

> has permitted restrictions on its exercise only to the extent that the restrictions are narrowly tailored to serve identifiable and compelling state interests. In other words, the state must have a very good reason to restrict speech of any kind, and even then must be careful that its restriction is narrowly crafted and contains only those provisions necessary to serve its limited purpose. E.g., Clark v. Community for Creative Non-Violance, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L.Ed.2d 221 (1984) (government may impose reasonable restrictions on time, place, or manner of protected speech, provided the restrictions are, itner alia, narrowly tailored to serve a significant government interest); Police Dep't of the City of Chicago v. Mosely, 408 U.S. 92, 101, 92 S.Ct. 2286, 2293, 33 L.Ed.2d 212 (1972) (citing Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) for the proposition that "[t]he Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.

Therefore, staff believes that SSU does have a right to address its customers, but that there are limits on this right. Reviewing the letters of Arend Sandbulte to Governor Chiles and the postcard notice sent out to its customers, staff does not believe that SSU, through its actions, has exceeded those limits. By the post cards, it appears to staff that SSU has requested an opportunity to present its side of the rate case to its customers, and those customers may address the Commission. If other customers disagree, then they may also address the Commission. By this process, there is a free flow of ideas, and the Commission can make a completely informed decision.

However, the Intervenors allege that much more than that was behind Sandbulte's letter, and that much more than that went on at these meetings, and request an opportunity to present evidence as to the misconduct. The Intervenors analogize the actions of SSU to an employer contacting jurors in a civil suit, and asking the employers to influence the jurors. As stated in Issue 2 above, staff is recommending that the Intervenors be allowed to put on evidence of any alleged misconduct.

If the Commission chooses to deny staff's recommendation for an evidentiary hearing, then staff does not believe that dismissal

is the appropriate remedy. Based on the analysis set out above, the actions of SSU do not rise to the level of a direct and contumacious disregard for the Commission's authority.

Also, although the Intervenors do not use the words bias or prejudice, they do state that the actions of SSU "subvert the fundamental notion of a fair process and deprive parties of due process." To staff, this sounds like a roundabout way to allege prejudice.

If there is prejudice and it cannot be remedied, then Sections 120.66 and 350.042(4), Florida Statutes, would apparently call for withdrawal of the Commissioners. However, the Intervenors have not directly alleged bias, prejudice, or interest on the part of the commissioners, and have not sought recusal or disqualification.

Based on what has been presented so far, staff does not believe that the Intervenors have demonstrated that SSU has exceeded its constitutional right of free speech. However, the Intervenors have expressly requested an evidentiary hearing so that they could present further evidence, and staff has recommended that they be given such hearing in conjunction with the technical hearing scheduled to start on April 29, 1996.

If there is misconduct, then this can be addressed as an issue in the hearing itself. Therefore, staff recommends that pending the outcome of the evidentiary hearing, the Commission should not rule on the Intervenors' Motions to Dismiss. However, if the Commission should deny the Request to Schedule Evidentiary Hearing then, based on all the above, the Motions to Dismiss should be denied.