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April 17, 1996

HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. ~~950495-WS~~

Dear Ms. Bayo:

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

1. Original and fifteen copies of SSU's Response to the Commission Staff's Request to Strike Testimony of Witnesses Who Have Not Prefiled Testimony; and
2. A disk in Word Perfect 6.0 containing a copy of the document.

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

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman
Kenneth A. Hoffman

ACK

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APP _____

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WAS Willis

cc: All Parties of Record
Trib. 3

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application by Southern)
States Utilities, Inc. for rate)
increase and increase in service)
availability charges for Osceola)
Utilities, Inc., in Osceola)
County, and in Bradford, Brevard,)
Charlotte, Citrus, Clay, Collier,)
Duval, Highlands, Lake, Lee,)
Marion Martin, Nassau, Orange,)
Osceola, Pasco, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)
_____)

Docket No. 950495-WS

Filed: April 17, 1996

**SSU'S RESPONSE TO THE COMMISSION STAFF'S
REQUEST TO STRIKE TESTIMONY OF WITNESSES WHO
HAVE NOT PREFILED TESTIMONY**

SOUTHERN STATES UTILITIES, INC., ("SSU") by and through its undersigned counsel, and pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, hereby files this Response to the Commission Staff's Request to Strike Testimony of Witnesses Who Have Not Prefiled Testimony (the "Motion") filed by the Commission staff ("Staff") on April 10, 1996. In support of this Response, SSU states as follows:

1. The Commission should not apply the prefiled testimony requirement which Staff invokes in its Motion inconsistently from case to case; yet that is precisely what Staff proposes the Commission do here.

2. Commission precedent on the question of the prefiled testimony requirement is such that no consistent standard or pattern emerges as to the application of the requirement. In its response to the Staff Motion, the Office of Public Counsel ("OPC") points out that the Commission has not historically applied the

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prefiled testimony requirement in telecommunication cases so as to compel a party to prefile testimony or deposition transcripts of all witnesses. SSU adds that in Docket No. 930880-WS (Investigation of SSU's Rate Structure), the Commission not only allowed certain witnesses who were employed by the South Florida Water Management District ("SWFWMD") and appearing at the request of Hernando County (a party) to testify on substantive issues at customer service hearings without prefiled testimony, but the Commission also allowed Mr. John Parker, one of the two witnesses, to testify at the technical portion of the hearing in Tallahassee without prefiled testimony despite Mr. Parker's having expressly announced that he was present at the request of Hernando County.¹ The Commission should further note that in none of the cases Staff cites in its Motion were witnesses not allowed to testify even though prefiled testimony was not submitted.

3. The Commission should not impose a prefiling testimony standard on the parties which the parties did not and could not have had notice of from the plain language of the Order when read in conjunction with past practice. Staff reads the prefiled testimony requirement too strictly. Indeed, if one examines the prefiled testimony requirement in isolation and without

¹ SSU also notes that to counsel's best recollection, at the Prehearing Conference in Docket No. 900386-WU (Sunshine Utilities of Central Florida, Inc. rate case), Commissioner Wilson held that the transcript of the deposition of a staff auditor taken by the utility should not properly be considered prefiled testimony for the utility, although the transcript was filed as such. The utility was allowed to call the auditor as part of its direct case, and staff agreed to produce the auditor for that purpose.

qualification as Staff suggests, the testimony of the government officials who sometimes appear at service hearings and the customers must also be prefiled, for Order No. PSC-95-1208-PCO-WS (the Order Establishing Procedure) states "each party shall prefile, in writing, all testimony that it intends to sponsor." Order Establishing Procedure at p. 2. Neither the Order nor Rule 25-22.048(4)(a), Florida Administrative Code, qualify the requirement as to certain witnesses.

4. In consideration of the above, the Commission has in the past and should here look to a practical solution to the issue which is fair to all parties. SSU again emphasizes that in none of the cases Staff cites in its Motion, were witnesses not allowed to testify. Staff posits that "scrutiny must be given to a party's intention to present testimony at hearing without having prefiled testimony for a particular witness." However, Staff then suggests no level of scrutiny, but rather moves to strike the testimony of all witnesses who have not prefiled testimony. Staff's requested remedy is inappropriate and unfair.

5. SSU submits that the proper standard for requiring prefiled testimony should not be whether the witness is "adverse," but whether the witness is within the control of the party such that the party may prefile the testimony of the witness with the witness's consent and cooperation. SSU argues several reasons favor such a standard.

a. Whether a person is an adverse party witness or adverse in the sense of being a "hostile" witness for purpose

of direct examination has no bearing on whether the witness's testimony is relevant to the proceeding. Further, it will be difficult in many cases for the Commission to make a determination that a witness is a hostile witness prior to hearing that witness's testimony, thus making a "hostile witness" test unworkable as a practical matter.

b. Allowing only the testimony of adverse party witnesses not to be prefiled serves as an undue advantage to OPC, since OPC, in this case and more often than not, will present the testimony of utility witnesses; whereas the objectives and interests of the utility, other parties, and staff in presenting the testimony of other witnesses may be more diverse than OPC's. The standard applied on the question of whether testimony must be prefiled here and in all cases must be even-handed to all parties.

c. The alternative to prefilng testimony as posed by some of the Orders Staff cites, is to prefile deposition transcripts of the witnesses as prefiled testimony. Pursuant to the Commission's standard procedures and requirements, this "prefiled testimony" would then presumably be inserted into the record at the hearing. This alterative places the parties in an almost absurd position. Generally speaking, depositions are taken for the purpose of discovery and are conducted pursuant to the Rules of Civil Procedure for that purpose. With a prefilng requirement, the deposition itself will become unworkable and the hearing process cumbersome. The

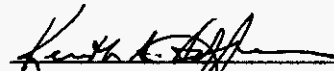
questioning party will not know at the deposition whether or not it may use leading questions, significantly impacting the party's presentation of the evidence. The calling party may have no opportunity to conduct further direct examination, absent another deposition. Questions, answers and exhibits which the questioning party may not want to be part of the record are subject to becoming part of the record, including questions and exhibits relevant for discovery but not for hearing purposes and unresponsive answers. At the hearing, the Commission would be forced to sift through deposition transcripts line by line ruling on objections -- both those made during the deposition and those raised prior to the testimony being placed into the record. Further, each party would be forced to conduct copious depositions early on in the case in order to insure at great expense to the party and to the customers that all of the testimony the parties may need is prefiled by the designated date. In consideration of the above, the deposition transcript alternative raises more problems than it solves.

6. With respect to the SSU rebuttal witnesses at issue here, the parties and staff could have deposed the witnesses at anytime after having received notice that SSU intended to call those witnesses. No one has chosen to do so. Staff counsel broached with counsel for SSU the possibility of deposing two of the SSU witnesses in question, but Staff apparently made a conscious decision not to depose said witnesses. Counsel for SSU represented

then and represents now as follows: (1) that the testimony of the SSU rebuttal witnesses in question will focus on the Department of Environmental Protection's views of used and useful as those views have been made known in a workshop staff held last year on the subject² and (2) the SSU rebuttal witnesses at issue were contacted by SSU and have refused to prefile testimony in this case.

WHEREFORE, in consideration of the foregoing, SSU requests that the Commission deny the Commission Staff's Request to Strike Testimony of Witnesses Who Have not Prefiled Testimony.

Respectfully submitted,



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² Those views are stated in the letters attached to the prefiled direct testimony of SSU witness Hartman and the prefiled rebuttal of SSU witness Harvey.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of SSU's Response to the Commission Staff's Request to Strike Testimony of Witnesses Who Have Not Prefiled Testimony was furnished by U. S. Mail to the following on this 17th day of April, 1996:

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