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May 15, 1996

HAND-DELIVERED

Blanca S. Bayo, Director
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

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. 920199-WS

ACK ✓
AFA 4
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG 1
LIN 5
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and sixteen copies of the City of Keystone Heights', Marion Oaks Homeowners Association's, and Burnt Store Marina's Motion to File Memorandum Out of Time and Memorandum of Law on Reconsideration of Order No. PSC-95-1292-FOF-WS in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Yours truly,

Joseph A. McGlothlin

JAM/jei

Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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. 920199-WS FILED: May 15, 1996

THE CITY OF KEYSTONE HEIGHTS', MARION OAKS HOMEOWNERS ASSOCIATION'S AND BURNT STORE MARINA'S MOTION TO FILE MEMORANDUM OUT OF TIME

The City of Keystone Heights, the Marion Oaks Homeowners Association and Burnt Store Marina (Intervenors), pursuant to rule 25-22.037, Florida Administrative Code, request that they be permitted to file a memorandum of law (attached hereto as Attachment A) in this docket out of time. As grounds therefor, Intervenors state:

1. In Order No. PSC-96-0406-FOF-WS, Order on Reconsideration of Remand Decision and Allowing Parties to File Briefs, the Commission directed parties to file briefs addressing three issues in light of the Florida Supreme Court's decision in GTE Florida, Inc. v. Clark, 698 So.2d 971 (Fla. 1996).

2. The Commission reconsidered its entire order in this case and specifically asked the parties to, at a minimum, discuss:

> whether reopening the record in Docket No. 920199-WS is appropriate, whether refunds are appropriate, and whether a surcharge as set forth in the GTE decision is appropriate.

Id. at 3. Parties to the case filed their briefs on April 1, 1996.

3. As set forth in Intervenors' Petition to Intervene, filed on May 9, 1996, the interests of Intervenors diverge sharply from those of other customers who have representation in this case. The undersigned were retained to represent Intervenors' interests on May 3. Intervenors moved to intervene in this case as expeditiously as possible. Intervenors now seek permission to file, out of time, a memorandum of law on the issues which other parties have already had the opportunity to brief.

5. If Intervenors are not permitted to file their memorandum, their interests will not be represented before the Commission. Intervenors' interests will be substantially affected by the Commission's decision on reconsideration. Principles of due process require that their position be fully represented before the Commission.

6. By directing parties to file briefs, the Commission clearly indicated its desire to be apprised of all competing arguments concerning the impact of the GTE decision. Yet, unless the Commission considers the attached memorandum of law, it will not have considered the arguments of the customers who are potentially the most affected by reconsideration. No other party shares Intervenors' interests; no other party would view the GTE case from Intervenors' perspective.

7. The other parties to this case, who have already made their positions known to the Commission, will not be prejudiced by permitting Intervenors to file out of time. The Commission's

deliberations on the significant issues before it and its ability to make the best, most informed decision will be facilitated by the full development of all points of view.

WHEREFORE, Intervenors request that they be permitted to file the attached memorandum out of time.

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Attorneys for Burnt Store Marina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Intervenors' Motion to File Memorandum Out of Time (and the attached memoranda) have been furnished by hand delivery* or by U.S. mail to the following parties of record, this 15th day of May, 1996:

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Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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. 920199-WS FILED: May 15, 1996

MARION OAKS HOMEOWNERS ASSOCIATION'S, THE CITY OF KEYSTONE HEIGHTS', AND BURNT STORE MARINA'S MEMORANDUM OF LAW ON RECONSIDERATION OF ORDER NO. PSC-95-1292-FOF-WS

Introduction

Subject to the disposition of the pending motions described below, the Marion Oaks Homeowners Association, the City of Keystone Heights, and Burnt Store Marina (Intervenors) file this memorandum of law addressing the issues raised in Order No. PSC-96-0406-FOF-WS. As detailed in Intervenors' Motion to Intervene, filed on May 9, 1996, Intervenors have only recently obtained counsel in this case. They have expeditiously sought to intervene and have also moved for leave to file this memorandum out of time.

On October 19, 1995, the Commission entered Order No. PSC-95-1292-FOF-WS (Refund Order). This Order implemented the First District Court of Appeal's remand of the Commission's rate order for Southern States Utilities, Inc. (SSU). In Order No. PSC-95-1292-FOF-WS, the Commission replaced the "uniform" rates it had previously approved with "modified stand-alone" rates. The Refund

Order also directed that SSU refund charges overpaid by some of SSU's customers. The Commission stated that "the utility cannot collect from customers who have paid less under the uniform rate structure." Id. at 6.

On March 21, 1996, the Commission entered Order No. PSC-96-0406-FOF-WS (Reconsideration Order). In this Order the Commission directed parties to brief certain issues in light of the Florida Supreme Court's recent decision in GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996). Specifically, the Commission said:

> We request that the briefs include, at a minimum discussion on: whether reopening the record in Docket No. 920199-WS is appropriate, whether refunds are appropriate, and whether a surcharge as set forth in the GTE decision is appropriate.

Reconsideration Order at 3. Intervenors' positions on these issues follow.

I. The GTE decision does not support a surcharge on customers in this case.[1]

Applying the GTE decision to the facts of this case necessarily leads to the conclusion that, if the Commission requires SSU to make a refund to certain customers, it should not impose a corresponding surcharge on Intervenors.

The essential holding of the GTE decision is that the issue of whether to require customers to pay a surcharge after a Commission order fixing rates has been reversed must be decided by the application of equitable principles to the facts. In GTE, the Court reasoned that a surcharge in that case would be appropriate

[1] Intervenors have arranged the issues in order of importance.

and equitable, based on these facts: (1) the Commission had improperly denied recovery of certain legitimate costs incurred by GTE; (2) customers had been represented by Public Counsel throughout, and so would not be subjected to unexpected charges; and (3) the rule providing for stays did not preclude GTE, who did not request a stay, from recovering the costs which it was entitled to collect.

In this case, compared to the situation assessed by the GTE Court, the facts are critically different; the corresponding equities are far different; and so the Commission's conclusion must be different. Consider the following:

Critical Difference No. 1. In GTE, the Court observed that, because customers had been represented by Public Counsel throughout the case, they could not claim to have been subjected to unexpected charges. In this case, Public Counsel announced early in the proceeding that his office could not represent all of the divergent interests created by the utility's requested rate design. Intervenors did not secure representation until May 3, 1996.

Critical Difference No. 2. In GTE, the Court determined that the Commission had improperly refused to allow GTE to recover certain legitimate costs through rates. Here, SSU did not appeal any aspect of the Commission's revenue requirements determination; nor did the reviewing court direct the Commission to increase the amount of revenues that SSU was authorized to collect through rates.

Critical Difference No. 3. In GTE, the only way the utility could recover the revenues to which it believed it was entitled was to affirmatively challenge and overturn the Commission's order. By contrast, to enjoy full revenue recovery, the action required of SSU in this case was that it do nothing. Here, rates generating the full amount of revenues (and more) were in effect as a consequence of the automatic stay associated with the appeal by Citrus County. To avoid a potential shortfall in revenue between the time the notice of appeal was lodged and the time the reviewing court entered its decision, SSU had only to accept the stay.

Critical Difference No. 4. In the GTE case, the Staff had advised the Commission that a surcharge under the circumstances of that case would not constitute retroactive ratemaking. In sharp contrast, in this case the Staff and the Commission pointed out the hazard to SSU -- in the form of a potential economic loss -- associated with a challenge of the automatic stay:

> Since the utility has asked to have the stay lifted, Staff believes the utility has made the choice to bear the particular loss that may be associated with implementing the final rates pending the resolution of the appeal. In its motion, the utility asserts that it does not believe it will suffer any losses based on its position that it will prevail on appeal.

Staff recommendation, November 16, 1993, p. 6 (emphasis provided). In short, in this case the utility -- not its customers -- was "on notice" of the possibility that the course of action it chose could lead to an undesirable outcome for the utility. SSU elected to fight the stay anyway.

Critical Difference No. 5. In GTE, the Court concluded that the rule governing stays did not require the utility, which was experiencing a shortfall, to request a stay in order to claim its right to recover the withheld revenues after it prevailed on appeal. This case presents virtually the antithesis of the GTE situation. SSU did not forego requesting a stay. Rather, SSU, which was neither experiencing a shortfall nor appealing the order, demanded removal of an automatic stay that operated to assure SSU of full revenue recovery. SSU thereby unilaterally placed some of the revenues it was receiving at risk.

Critical Difference No. 6. In GTE, neither the utility nor the Commission took any action relative to a stay of the Commission's order. In this case, the utility asked the Commission to lift an automatic stay, and the Commission complied. However, it is clear that the Commission granted SSU's motion to lift the stay only because it was convinced the utility had assumed the risk of loss associated with removal of the stay.

Import of Differences:

Having been warned that to challenge the automatic stay would be to risk the possibility of a revenue shortfall in the event the reviewing court reversed the Commission's decision on rate design, SSU pressed ahead, presumably confident in its belief that the order would be affirmed. Under these facts, the question to be answered in light of the GTE decision is this: Where the utility was recovering all revenues it was entitled to collect, and, despite notice of the possible adverse consequences, consciously

and deliberately placed those revenues in jeopardy, is it fair -- is it equitable -- to require certain customers to keep the utility whole?

The decision to impose or lift a stay is in itself, in part, a balancing of equities. Intervenors submit that if the Commission had known the utility would later seek to shift to customers the risk of loss it had so daringly (and unnecessarily) accepted, such that customers were the only persons who could be injured by the removal of the stay, that knowledge would have influenced the Commission's deliberations profoundly. Why would the Commission participate with the utility in the creation of the circumstances giving rise to the possibility of a surcharge on customers, when the possibility could be avoided by continuing the status quo -- a status quo that did not prejudice the utility in any way? Said differently, it is inequitable for SSU to first indicate it was accepting the risk, and later attempt to alter the premise upon which the Commission granted SSU's motion to lift the stay, only after encountering the unhappy consequences of its chosen strategy.

Intervenors believe the equities are clear. The GTE case does not require customers to serve as unwilling guarantors of a management gamble gone sour. If the Commission orders a refund, it must reject as inequitable -- and therefore unlawful -- SSU's belated and unseemly demand that it be funded by Intervenors.

II. If there is a refund, it should be made by SSU.

The Commission has the authority to order a refund when supported by substantial competent evidence. Gulf Power Company v.

Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986). Because SSU collected higher rates from some customers under an erroneous Commission order, a refund may be warranted in this case. See, GTE. However, if the Commission determines that a refund is warranted, it should be made by SSU, not financed by other ratepayers. See Section I. Intervenors should not bear the burden of financing a refund with a surcharge.

III. The record should be reopened only if the Commission considers surcharging one group of customers to benefit another.

The Commission can reopen the record. In Village of North Palm Beach v. Mason, 188 So.2d 778 (Fla. 1966), the 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. The fact that the Court expressly found that there was no substantial evidence to support the functional relationship standard in this case is not dispositive. The Supreme Court also stated: "Until the Commission finds that the facilities owned by SSU . . . are functionally related as required by statute, uniform rates may not lawfully be approved." Citrus County v. Southern States Utilities, 656 So.2d, 1311 (Fla. 1st DCA 1995), emphasis added. Thus, the Court recognized the Commission's authority to reconsider the issue of functional relatedness. Authority to reopen the record for further factual determinations on that issue naturally follow, and is supported by law.

Based on the arguments developed above, Intervenors submit the Commission should reject any notion of a surcharge. However, if

the Commission considers surcharging customers, it should reopen the record to take further evidence on functional relatedness before it takes such radical action. If additional evidence supports a uniform rate structure, no refund or surcharge would be necessary.

Conclusion

When pursuing its motion to lift the automatic stay, SSU indicated that it was aware of and accepted the risk that its request could lead to an economic loss for the utility -- one that it would not experience with the stay in place. The Commission's willingness to remove the stay was clearly based in part on its view that only the utility could be adversely affected by a lifting of the stay. Now that the uniform rate structure on which SSU was depending to remain whole has been overturned, SSU has lost its sense of corporate derring-do, and wants the Commission to require Intervenors to provide the utility with a soft landing from its ill-considered decision. Nothing in the GTE decision requires such a result. In fact, the emphasis in the GTE case upon the application of equitable principles requires the Commission to reject the proposal of a surcharge. As the risk of loss was purely the creation of management, it is only equitable that management be held responsible for the consequences. Protecting customers from imprudent actions and unnecessary costs remains the Commission's

chief reason for being. Any refund associated with SSU's decision to seek a lifting of the stay must be absorbed by SSU's shareholders.

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