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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Application for rate increase for Orange-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, by Southern States Utilities, Inc.	DOCKET NO. 950495-WS SERVED: June 10, 1996

JOINT POST-HEARING BRIEF OF MARCO ISLAND CIVIC ASSOCIATION, INC., SUGARMILL WOODS CIVIC ASSOCIATION, INC., CONCERNED CITIZENS OF LEHIGH ACRES, EAST COUNTY WATER CONTROL DISTRICT, CITRUS COUNTY BOARD OF COUNTY COMMISSIONERS, SPRINGHILL CIVIC ASSOCIATION, INC., HIDDEN HILLS COUNTRY CLUB HOMEOWNERS ASSOCIATION, CITRUS PARK HOMEOWNERS ASSOCIATION AND THE HARBOUR WOODS CIVIC ASSOCIATION

The Marco Island Civic Association, Inc. ("Marco Island"), Sugarmill Woods Civic Association, Inc. ("Sugarmill Woods"), Concerned Citizens of Lehigh Acres ("Concerned Citizens"), East County Water Control District ("East County"), Citrus County Board of County Commissioners ("Citrus County"), Spring Hill Civic Association, Inc. ("Spring Hill"), Hidden Hills Country Club Homeowners Association ("Hidden Hills"), Citrus Park Homeowners Association ("Citrus Park") and the Harbour Woods Civic Association ("Harbour Woods"), who shall be referred to collectively as the ("Consumer Parties") by and through their undersigned attorneys, file the following Joint Post-Hearing Brief in accordance with earlier procedural orders issued in this docket.

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INTRODUCTION

The Consumer Parties take the general overall position that the instant case is so large as to be unmanageable by any of the parties to the proceeding, including the Commission Staff and the Office of the Public Counsel. The technical hearings took over ten full days, involved some 90 or more witnesses, depending on how you count direct and rebuttal witnesses, and occupied over 5,300 pages of transcript, not counting the full day required for the final Prehearing Conference or the additional portion of a day taken considering the last minute rate case expenses proposed by SSU. 256 exhibits were admitted in the record of the hearing, not counting those admitted during the last day dealing with rate case expenses, tens, if not hundreds, of thousands of pages were included in SSU's three sets of MFR's filed in this case, and the total paper filed in the entire case, including the massive amounts of discovery, must easily exceed a million pages. Irrespective of the exact count, the Consumer Parties suggest that the volume is simply too much for any large party, including the Commission Staff and Public Counsel, to deal with, let alone the bill-paying customers of any of the over 140 separate systems involved in this case.

The complexity of dealing with this case is greatly compounded by the consideration, and very real threat, of uniform rates being reimposed. This is because uniform rates make the utility plant and plant specific operating expenses of each and every utility system, facility, or service area, the economic or revenue responsibility of every customer served by this utility. Historically, it has been an exceedingly difficult process for customers at one geographic service area to participate in their rate setting by attempting to analyze the prudence and necessity of the plant and expenses that were claimed by the utility to be necessary to provide them service at the location where service was being provided. Now that the customers of each system are

potentially responsible for the expenses of 141 systems (more in the future if the approval of uniform rates is used as an means to erase the adverse economic consequences of developer incompetence), the task of any customer group trying to review the totality of plant and expenses they may be held responsible for is rendered impossible. The potential quest for administrative efficiency by bundling more and more geographically distinct utility systems with widely varying costs of service has reached and exceeded any reasonable bounds. If the Commission is to reasonably carry out its statutory responsibilities to both the customers and the utility, it must put a stop to proceedings of this type.

The Consumer Parties attempted to fully participate in every aspect of this proceeding so as to protect themselves from unwarranted rates and charges to the greatest extent possible. However, in this brief the Consumer Parties will attempt to focus their efforts primarily on the need for the Commission to either dismiss this entire case for the misconduct of SSU in connection with soliciting and obtaining ex parte communications designed to wrongfully influence the Commission, or, failing that, to impose a penalty on SSU's return on equity sufficient to dissuade SSU from engaging in this unacceptable conduct in the future. Secondly, the Consumer Parties will focus on attacking SSU's proposed uniform rates as illegal, unfair, unconstitutional, and nothing short of a form of regulatory socialism. Wherever the Consumer Parties have not specifically taken a position on the issues in this brief, they adopt the positions taken by the Office of the Public Counsel, which agency the Consumer Parties believe has done a very admirable job in this case despite the overwhelming size of the case.

In general terms, the Consumer Parties believe that this Commission must act forcefully and resolutely to reverse the unacceptable course of conduct this essentially out-of-state utility

has exhibited for at least the last four or five years. Prior to discussing the Motion to Dismiss, the Consumer Parties thought it might be instructive to reflect on what they perceive as the general lack of candor and credibility they think should be attributed to Sandbulte's testimony. Reflecting that he is, or was, the leader of the SSU crew might provide some explanation for SSU's conduct.

Paper, electrics, used cars, didn't understand "used & useful", water and sewer, expensive goodwill, we deserve better treatment, just asking for help
or
The SSU Management/Acquisition Philosophy Didn't Fall Far From The Minnesota Tree

Arend J. Sandbulte

Although he is bowing out of Minnesota Power (apparently to the gratification of some on Wall Street), Arend Sandbulte has been at the helm of Minnesota Power during all the utility's involvement in regulated utility activities in Florida. If not the central actor in the efforts to obtain ex parte communications from the Florida Executive, Sandbulte was clearly the instigator by his November 21, 1995 letter to Governor Chiles. He came to Tallahassee in this case to testify about Minnesota Power's shareholder expectations from Florida regulators. He has taken some pretty serious shots at the Commission in his communications with the Governor and wasn't adverse to maligning a couple of deceased, but highly regarded, PCS Commissioners ("We find out there has been some other stuff going on behind the scenes" [Tr. -187,188] and "We had a rate filing in '90 that resulted in the case being thrown out by Commissioner Gunter in '91" [Tr. -190]). Sandbulte has apparently not been reticent about throwing his weight around in Florida, even though some might view him and his utility to be intruders most times, or, at best, visitors.

Arend Sandbulte has been employed with Minnesota Power since 1964 and rose through the ranks until elected President and CEO in 1988. He was named Chairman of the Board in

1989, but relinquished his title as President in May 1995. [Tr. - 127, 128]. He was still CEO when he prefiled his written testimony, but relinquished that title in January, 1996 to Edwin Russell and will apparently step down as Chairman of the Board the end of May, 1996. [Tr. - 185] One of the primary purposes of Sandbulte's testimony was to summarize shareholder concerns about Minnesota Power's investment in SSU. [Tr. - 128]. Sandbulte's testimony regarding shareholder and securities rating agencies' doubts about the drag SSU's earnings have on Minnesota Power's overall performance was somewhat misleading, at best. Furthermore, Minnesota Power's recent investment and managerial history should call into question the quality of management of the "electric utility" as well as provide some background for the questionable investments SSU has made in Florida.

Sandbulte testified that SSU does not have publicly traded shares, but that its performance receives considerable attention from Minnesota Power shareholders , investment analysts and securities rating agencies because of its significance to the consolidated Minnesota Power operations. He said that Minnesota Power shareholders shared the views of securities rating agencies regarding SSU's performance, which was that performance had been "sluggish", "lagging" and inadequate and he strongly suggested that Minnesota Power's bond downgrading was a "consequence" of SSU's "inadequate regulatory support" from this Commission. [Tr. - 130, 131]. What Sandbulte failed to mention was that the securities ratings agencies and others had downgraded Minnesota Power's bonds or otherwise adversely commented on the company for other, more fundamental management problems. For example, AJS-1 of Exhibit 62, is an excerpt of a Moody's Investors Service Rating Notice, dated March 1, 1995, reflecting Moody's downgrading of Minnesota Power's credit rating and that of Square Butte Electric Cooperative,

whose ultimate credit support derives from a power sales agreement with Minnesota Power. The actual quote regarding "sluggish" performance states:

> The rating action is based on continued sluggish performance at MPs water utility and non-regulated operations and the announcement by the company that it plans to acquire ADESA Corporation, an auto auction company.

The "sluggish performance" comment reflected, not only on SSU's operations (Minnesota Power also owned Heater Utilities in the Carolinas) but all of Minnesota Power's non-regulated operations as well. Any inference that the sluggish performance referred only to SSU's operations, or that the bond downgrading, resulted from SSU's performance, is misleading, at best.

Moody's action was sweeping and included the downgrading of Minnesota Power's first mortgage bonds, secured pollution control bonds, shelf registration of senior secured debt, unsecured pollution control bonds, shelf registration for preferred stock, and a downgrading of its commercial paper. [AJS -1, Exhibit 62]. Moody's explained its downgrading, saying:

> MP's financial performance continues to be adversely impacted by weak water utility performance exacerbated by a one-time write-off in 1994 of securities investments. In addition, financial protection measures weakened as interest expense increased 19.6% as a result of increased borrowing by paper operations.
>
> MP has signed a definitive merger agreement to acquire ADESA for $160 million. The planned acquisition of ADESA will be funded by the liquidation of almost 60% of MP's $280 million investment portfolio. ADESA, established in 1992, owns and operates 16 automobile auction centers in the US and Canada and provides a wide range of auto related services. Through a separate subsidiary, ADESA also offers financing to purchasers. The risks associated with ADESA include vulnerability to competitive pressures and a level of tangible net worth of less than $45 million. Additionally, the proposed acquisition will substantially alter the risk profile of MP, increasing the percent on non-regulated assets from 13% to more than 20%.

[AJS -1, Exhibit 62]. (Emphasis supplied).

Actually, according to Sandbulte, Minnesota Power paid $167 million for some 83% ownership of ADESA, which means that it paid approximately $122 million for the "goodwill" of a three-year old used car outfit. [Tr. - 146, 147].

As reflected on Exhibit 62, AJS-2, Duff & Phelps Credit Rating Co., on March 16, 1995, followed Moody's actions by also downgrading Minnesota Power's debt and preferred stock. While it is true that the downgrading was, in part, "a reflection of the still lagging financial performance of the water utility operations in Florida and the Carolinas", the rating agency attributed its downgrade to the "changing financial fundamentals and risk profile", which included: (1) expected improvement in credit protection measures not materializing, (2) weaker investment portfolio performance, (3) the stagnant electric service territory economy[1], and (4) previously depressed paper prices which negatively impacted the company's investments in that industry. Duff & Phelps also pointedly noted that Minnesota Power's partial liquidation of its investment portfolio to fund the acquisition of ADESA would "reduce liquidity and lower portfolio interest income near term."

Much of Sandbulte's other prefiled exhibits reflected similar concerns by agencies with the ADESA purchase, much higher than average dividend payout ratios (99% vs. 78% industry average), a $10 million write-off to its investment portfolio, which Sandbulte attributed to outside mismanagement [Tr. - 181], and poor earnings experience from Minnesota Paper, Rendfield

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[1] In response to a question by Chairman Clark, Sandbulte stated that fully 60% of the electric utility's revenues were from industrial sales, which high percentage he conceded was a concern of the securities rating agencies. [Tr. - 149, 150]. Concern over this fact is reflected in Exhibit 62, AJS-4, an A.G. Edwards Research Comment, date January 1, 1995, which reflects that 62% of Minnesota Power's 1993 revenues came from industrial customers, who are generally more volatile (hence riskier) than other customer classes.

equipment, Recycled Fiber, and corporate overhead which was expected to supply a $0.15 share "drag" in 1994 and prospectively, and the fact that the ADESA purchase represented fully some 30 percent of Minnesota Power's equity. [Exhibit 62, AJS - 3, 4, 5, and 6].

It appears that the brightest prospect for Minnesota Power earnings improvements, at least from the prospective of the rating agencies, was the planned departure of Sandbulte -"the anticipated improvement is attributed to management changes which should lead to better strategic planning and improved earnings" - [Exhibit 64, March 11, 1996, Standard & Poor's Creditweek], although Sandbulte seemed to attribute this improved outlook to the employment of John Cirello as President of SSU and the addition of Edwin Russell, not his own imminent departure. [Tr. - 163, 164, 185, 186].

In short, Minnesota Power is not really an electric utility: Rather, as described above, it is part electric company, that derives almost two-thirds of its revenues from industrial customers, part coal company, has paper producing operations, some type of equipment operation (Rendfield), and recycled fiber operations, almost all of which have poor earnings. It once had a large ($280 million) investment portfolio, $10 million of which was apparently lost through mismanagement and some $160-167 million of which was sold to buy the third largest used car auction company (ADESA) in the country. The latter move, coupled with other diversification efforts, has frightened Wall Street into downgrading a multitude of Minnesota Power's bonds, commercial paper, and other securities. A fair reading of the securities rating agencies' reports and comments attached to Arend Sandbulte's testimony is that they were an indictment of management of that company.

While it's true that Minnesota Power owns water and sewer utilities in three states, including Florida, the Consumer Parties do not think it was fair of Sandbulte to suggest that inadequate or unfair regulation from this Commission was the basis for Minnesota Power's bond degrading. Sandbulte's attempts to suggest otherwise should be considered when reflecting on the credibility to be given to his remaining testimony, especially that dealing with his role in obtaining the ex parte communications from Lt. Governor MacKay and Commerce Secretary Dusseau.

It is also curious that Sandbulte did not appear to readily understand the import of Chairman Clark's question to him as to whether his Minnesota Power electric rates, or classes of rates, were at parity to each other and, if not, what sort of subsidies were involved. [Tr. -150,151]. He told the undersigned that the percentage that industrial rates were above parity was only slight, less than 20 percent for sure, but that he was reluctant, in fact, refused to state that he would accept rates from each of his SSU systems designed to return the 12.25 percent on equity SSU was seeking. Strangely, when asked how much above parity class rates should be allowed to rise, he said, "Well, I don't have an exact number. I guess if everybody is served off the same system, the subsidy issue or the parity issue should be relatively narrow. (Emphasis supplied). [Tr. -173-177]. Doesn't he think SSU is one system?

Sandbulte also seemed perplexed that Charlie Beck would question him about Lehigh Acquisition reportedly earning a 56 percent return on equity in 1994 (which Sandbulte admitted), notwithstanding that Minnesota Power, SSU and other affiliates had succeeded in convincing the Commission that all of the 60 percent discount they had obtained from the Resolution Trust Corporation should go to the land, and none to the regulated utility, because they claimed the land

had a reduced value. "Risk/reward, you know", he told Beck in explaining why that level of return was obtained and warranted. [Tr. -154-157].

Sandbulte also denied to Chairman Clark knowing about any divestiture plan for the systems held by SSU even though we learned later in the hearing that Charles Sweat had drawn up such a plan and circulated it. [Tr. -163-165].

Sandbulte told Chairman Clark that SSU had analyzed every utility acquisition to determine what repairs had to be made and that type of thing, although we found out later in the hearing from the excerpts of the Staff Management Audit work papers [Exhibit 197 that SSU was criticized for its lack of a formalized process for prior evaluation of newly acquired "systems", which left it at risk for costly undiscovered defects. The same exhibit reflected employee comments that SSU bought a few "dogs", frequently encountered "surprises", and found previous acquisitions to be in "disastrous" condition.

Another strange discussion occurred when Sandbulte complained that the Commission's treatment of used and useful plant in prior cases had deprived SSU of the ability to earn its allowed return. When Chairman Clark asked Sandbulte if he didn't investigate the level of used and useful property before he made his utility purchases here in Florida, he responded:

> WITNESS SANDBULTE: Well, I'm not sure that we understood the full ramifications of used and useful going back to the time when we made our water acquisitions. When we were putting a lot of investment into reclaimed water, for example, which someone else will testify as to the rate base

treatment of that.

CHAIRMAN CLARK: Let me go back to used and Useful. You had made an indication that you didn't understand as well as perhaps you should have the Commission's policy or the law regarding used and useful in the water and wastewater industry when you made your acquisitions; is that correct?

WITNESS SANDBULTE: No. I think we understood the law. But a lot of the things have happened, for instance, on reuse and other areas where I think the law says we're supposed to get 100% used and useful on reuse, yet I think the Staff is proposing in this case -- certainly, the intervenors are -- that we get less than 100% used and useful on reuse.

I mean, the law is evolving just like our business is evolving. I don't say that we understood every nuance of used and useful in great detail, but I would say this. My belief is that the used and useful criteria have, if anything, been tightened, particularly when we are spending a lot of money or investing a lot of money as compared to what is

allowed in the rate base or was allowed in the rate base when we got into the business in the first place. We didn't have reuse; we didn't have some of that stuff.

Contrary to his earlier statement that SSU closely examined all systems before purchase he states:

> We didn't have as much rising cost, we bought some old systems that were in need of repair. So we put a lot of capital in this business.

CHAIRMAN CLARK: I'm getting a little confused, because I think you're comparing different periods or different events.

You had indicated you thought some of the reasons that you were not earning the rate of return was the fact that -- up until now -- was the treatment of used and useful. Regardless of what the Staff may recommend in this case. I don't think that's an issue or not a basis on which you can indicate your past revenues were affected by used and useful.

I'm trying to understand on what basis you

believe that we have -- that the used and useful has affected your rate of return in the past.

WITNESS SANDBULTE: Okay. In the case of reuse, as I said --

CHAIRMAN CLARK: Let me state it another way and see if this is what you are saying. You assumed when you were acquiring these facilities that used and useful would be treated in the same way as for electric companies, it would be treated the same way for water and wastewater companies?

WITNESS SANDBULTE: In the long run, yes. Because this is an emerging business and going from a very fragmented business to one that has critical mass of its own. Yes, I think that would have been the assumption.

CHAIRMAN CLARK: And that assumption impacted the return on equity you were anticipating and what you in fact realized?

WITNESS SANDBULTE: We had some used and useful which we acknowledged. Sunny Hills is a good example we talked about this morning. We knew there

was some used and useful, yes. The degree of that, that is a changing, a changing scene that we certainly hope to be treated as any other utility using the same set of criteria. Electric --

CHAIRMAN CLARK: But is it still your opinion that the way used and useful was treated in the last rate case was a factor that contributed to you not earning the rate of return on equity that you were authorized?

WITNESS SANDBULTE: Yes.

[Tr. -191-199]. Thought SSU should be treated like an electric company!

General Problems and General Statements on the Issues

As demonstrated by the many customer service hearings conducted in this case, customer dissatisfaction with this utility is epidemic. Water in many locations is reported to be undrinkable, ruins clothes, appliances and plumbing systems. Customer service locations have been reduced in the name of greater efficiencies with the result that customer access to utility personnel has been reduced as well. The Public Counsel is briefing this case in some great deal as it relates to the "quality of service" and the Consumer Parties adopt Public Counsel's brief on that issue. Suffice it to say, though, that customer comments complimentary of SSU, if any, were as scarce as hen's teeth at the many customer service hearings. Few customers were happy with the quality of the water and customer service they obtain from SSU and virtually none were happy with the rates

and charges they are faced with. The record of the customer service hearings is replete with the testimony of retirees and working class families whose water and sewer bills are now rivaling their electric bills and for water they are often afraid to drink.

SSU's response to the adverse reactions of their customers is to repeatedly attempt to pit one group of customers against another. Those who oppose uniform rates have repeatedly been tagged as greedy, selfish, and users of excessive amounts of water, who are unwilling to help the other SSU customers. Politicians who have not acceded to the SSU company line have been attacked in various forums, while those who have been receptive or misled have had letters to the Commission drafted for them by the utility. Cost-based rates have consistently been stated as excessively as possible in order to scare some customer groups into supporting uniform rates. Ironically, in hearings held in buildings named after Commissioners Gunter and Easley, SSU chose to attack both for improperly dismissing its 1990 rate case. Both, of course, are deceased and unable to defend themselves. Both the Commission and the Commission Staff were attacked for their insensitivity to issues dear to SSU and the DEP by paid witnesses brought in to testify by SSU.

It is now clear that SSU misled the Commission in the last Lehigh Acres case on the value of the non-utility assets it obtained from the Resolution Trust Corporation, with the result that the Commission overstated the rate base of the regulated utility purchased with the golf courses and other real estate. SSU's actions in the last Lehigh case are sufficiently misleading and fraudulent to warrant the Commission repairing the damage done in that case and in rebuking SSU in the process. [Exhibit 177 and Dismukes Second Supplemental Direct Testimony].

SSU clearly "cooked the books" on the level of success of its pilot conservation program at Marco Island by removing irrigation water from residential and other customer classifications after it had established the base line for measuring its success with these irrigation amounts included. SSU can quibble about how it still saved or conserved water at Marco Island even without considering the "conservation" obtained through computer or bookkeeping stunts, but the fact remains that the changes SSU made to remove irrigation water from the residential and other classes occurred only at Marco Island! It was a tactic that greatly overstated the extent of conservation, if any, achieved by SSU's extensive and expensive water conservation programs. It is clearly a tactic that appeared to be intentional given that it was conducted only at this one location, which had been highlighted for its great conservation successes. [Exhibit 209, 246]. The Commission should investigate the extent, if any, to which SSU's claimed success at Marco Island was used to obtain conservation grants or awards.

SSU has engaged in buying various types of utilities for many years. Some were reasonably well maintained and adequately financed in terms of CIAC. On the other hand, whether it did so of its own volition or was pushed by the DEP or other agencies, SSU has bought a great many systems that were truly in disrepair in either a physical or economic sense. Some, such as Palm Valley, were so poorly maintained that they had to be completely rebuilt from the ground up. Palm Valley was completely reconstructed at a cost of over $1.173 million to serve less than 200 customers. Curiously, these sums were spent on Palm Valley in 1991-1993, while the system was still under the jurisdiction of St. Johns County, but, according to Terrero, apparently only because the utility believed that it would be able to spread the resulting costs through uniform rates. Terrero said that SSU would not have made this level of expenditures at

Palm Valley unless it felt it would get uniform rates. Terrero also said he didn't think that either he or the company told residents not to worry about the size of the expenditures because they would be spread through uniform rates. [Tr. -484-489]. SSU's experience at Palm Valley and many other "bad" systems is consistent with excerpts taken from the PSC management audit of SSU [Exhibit197], which reveal that "the process by which newly acquired systems are evaluated leaves the company at risk for costly undiscovered defects." In the same light, this exhibit reveals comments by SSU officials that old systems purchased had "poor or non-existent plans", that SSU "frequently encountered 'surprises' once they get into systems", that new acquisitions were mostly in "bad shape", that "previous acquisitions have been in 'disastrous' condition", and similar comments evidencing a failed acquisition policy at the utility for years. SSU has attempted to take public credit for the rehabilitation of these systems, but has hidden the fact that they were "dogs" when purchased, and has consistently and exhaustively attempted to push the costs of rehabilitation off on other customers, who located at responsible developments and paid reasonable levels of CIAC, through uniform rates.

By its purchase of the former Deltona utility systems, SSU bought the ashes of wildly over-optimistic development plans. In places like Sunny Hills, utility infrastructure was installed to serve thousands who never came, leaving the 500 or so customers who did to bear the burden of carrying the system's costs. Not satisfied with the traditional means of determining used and useful transmission and distribution facilities (the lot count method), which already results in excessive rates for many former Deltona systems, SSU has invited the PSC to dramatically increase rate base and, thus, revenues and rates at these systems by requesting the use of an engineering design methodology (hydraulic modeling) as the means for greatly increasing used

and useful plant at the four systems with the largest amounts of non-used and useful plant. Clearly, if accepted for these four systems, SSU and all utilities will be back to the PSC in short order demanding that this concept be applied to all water systems. Current and former DEP engineers were trotted in by SSU to defend this proposition, but not one of these engineers was qualified to distinguish regulatory ratemaking from his own hindquarters. The proposal is wrong from a regulatory perspective and a clear invitation to the Commission to gratuitously harm itself even more with the consuming public it is charged with protecting. It should be rejected out of hand.

Similar boneheaded proposals designed by SSU to needlessly depart from Commission precedent and greatly increase revenues and rates and, with them, increase adverse Commission visibility in the public eye, are SSU's proposals to (1) retain higher used and useful calculations from old orders in the face of new calculations reflecting lower numbers, (2) dramatically increasing the margin of reserve to make SSU more like the electric company Arend Sandbulte apparently thinks it should be, (3) enacting the guaranteed revenue clause SSU is pushing so that all business risks will be pushed from SSU to its customers, (4) increasing levels of allowed unaccounted-for-water and acceptable levels of infiltration and/or inflow, (5) including in rate base water mains in the ground, but not connected to the distribution system, (6) including fire flow requirements even where fire flow provision is not proven by sufficient fire flow test records, (7) using the single maximum day flow in calculating the used and useful percentages for water facilities instead of the average of 5 maximum day flows, (8) counting reuse facilities as 100 percent used and useful without regard for their actual usage, (9) not imputing CIAC on ERCs included in margin reserve, if margin reserve is approved, (10) not recognizing negative

base for facilities purchased at less than book value, (11) include deferred debits associated with the attempt to obtain a water supply for Marco Island when they should have already been expensed, (12) approve excessive amounts of rate case expense, including for old dockets not connected with this case, (13) not reflect gains or losses on the sale of SSU plants as above the line income, (14) approve SSU's proposed weather normalization clause, (15) approve SSU's requested increase shift of revenue responsibility from the gallonage charge to the BFC, which will automatically increase base facility charges irrespective of water consumption, increase assured monthly utility revenues and, in the process, dilute the price signal associated with water consumption and, thus, impair efficient water conservation, (16) charge a common, "market-based" service availability charge for all SSU systems without any regard to the existing level of CIAC at each location and without any regard for the actual costs of utility plant necessary to provide service to future customers at each location, and (17) approve uniform rates that ignore the costs of providing service, impair conservation by degrading the true price signal sent to consumers, and which "socialize" the adverse economic consequences of poor decisions made by SSU in acquiring "bad" systems, wildly optimistic real estate developers in installing too much plant or not charging adequate CIAC, and, in some cases, the decisions of individual consumers to locate in areas with poor utility conditions or to pay less in up-front CIAC payments than was reasonable.

By each of the above-described proposals, SSU has invited the Commission to gratuitously increase SSU's customer rates in the face of public outrage that is already unprecedented in the utility regulatory history of this state. There are sound regulatory, practical and legal reasons for rejecting all of SSU's unfounded requests and the Commission should do the

consuming public, and itself, a favor by availing itself of every legitimate opportunity to limit the rate increases sought by SSU in this case.

Again, the Consumer Parties adopt the positions and arguments taken by the Office of the Public Counsel in his brief for every issue where specific positions are not otherwise stated.

"BAD COMPANY" - THE UTILITY
THIS CASE SHOULD BE DISMISSED

On March 12, 1996, the Office of the Public Counsel, Intervenors from Amelia Island and the Consumer Parties filed a Motion to Dismiss SSU's rate case because of the utility's misconduct of interfering with the due process rights of the customer parties. The specific misconduct alleged included (1) soliciting ex parte communications intended to influence the Commission, (2) interference with the notice to customers, and (3) interference with the customers' right to counsel. The Commission deferred ruling on the Motion to Dismiss until the conclusion of the hearings and until after the parties had an opportunity to present evidence on the issue, which was incorporated into Issue No. 5. Ideally, Commission approval of Issue 5, by granting the Motion to Dismiss, would render all other issues moot. Accordingly, Consumer Parties will start with this issue.

Issue 5: Has there been misconduct or mismanagement on the part of SSU, and, if so, what is the appropriate sanction or remedy?

Position: Yes, SSU's misconduct is of such an egregious degree that its rate application should be dismissed. Failing outright dismissal, the Commission should assess SSU an additional 100 basis point penalty to its authorized return on equity to punish it for its widespread efforts to

pressure this Commission through its extensive ex parte communications, as well as for its misleading notices to customers and its attempts to interfere with all customers right to counsel.

Discussion: Lt. Governor Buddy MacKay, after being "burned" by his apparently short association with SSU, described the utility in terms consistent with those voiced by many SSU customers throughout the state at customer service hearings. In his March 20, 1996 letter to Minnesota Power Chairman Arend Sandbulte, which letter is included in Exhibit 60, the Lt. Governor said:

Dear Mr. Chairman:

Since I have received your letter of November 23, 1995, some disturbing facts have come to light about the operations of your subsidiary, Southern States Utilities (SSU). Based on what I've learned, it seems that there is far more to these issues than either your or your representatives indicated to my staff and me.

To begin with, your letter neglected to mention that the matter at hand was a contested issue before the Florida Public Service Commission (PSC). That was a serious omission to say the least. However, my staff did not research the question thoroughly, so I accept full responsibility for the subsequent letter we sent to the PSC. That's my problem.

Yours is that SSU has developed a reputation among its consumers as something of a rogue organization. And if the letters and sworn statements I've read are any indication, that reputation is well deserved.

For example, Gus and Sherry Alexakos, from Zephyrhills, Florida, are senior citizens who have seen their water bills double -- even though their consumption decreased -- as a result of your interim rate increase. More troubling are their unanswered questions about the quality and safety of that water.

Additionally, I have enclosed a sample of the testimony taken by the PSC in reference to SSU and its actions toward some of its customers around

the state. I strongly suggest that you and the leadership of SSU take time to review and consider these statements.

Mr. Sandbulte, I am deeply committed to helping responsible businesses provide good jobs for Floridians. However, I will not allow my reputation to be tarnished by an organization that so blatantly abuses its customers.

Sincerely,

Buddy MacKay

Convinced that SSU "so blatantly abuses its customers" and apparently concerned that the utility had already tarnished his reputation, the Lt. Governor called SSU a "rogue organization." While "rogue" has a number of definitions, none of them are especially complimentary. The Doubleday Dictionary, 1975 Edition defines rogue as follows:

> **rogue** (rōg) **n. 1** A dishonest and unprincipled person; scoundrel. **2** One who is innocently mischievous or playful. **3** A dangerous animal separated from the herd: also used adjectively: a **rogue** elephant. **--v. rogued, ro-guing v.t. 1** To practice roguery upon; defraud **--v.i. 2** To live or act like a rogue.[?] -- **Syn.** Ne'er-do-well, dastard, good-for-nothing, scamp, knave, rascal.

While we do not know from the record precisely what Lt. Governor MacKay intended by the term "rogue", we can construct from record evidence some of the events that caused him to write his letter to Sandbulte.

On April 6, 1995, the First District Court of Appeal published its opinion in the case of Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 1307 (1995), which opinion began making apparent the possibility that SSU was going to have to pay for an incredibly stupid

decision it had made almost two years earlier. The Citrus County decision reversed this Commission's (Commissioners Beard and Clark participating) earlier order[2] approving so-called "uniform rates" for some 127 water and sewer systems included in SSU's rate case in Docket 920199-WS. The incredibly stupid and unnecessary SSU decision, which was now on the verge of haunting the utility, centered on SSU's insistence that the Commission lift an "automatic stay" obtained by Citrus County.[3] Reconsideration was denied by the First District and it published its Mandate to the Commission on July 13, 1995, which led SSU to engage in a near orgy of attorneys fees being incurred as the result of its hiring of at least two new expensive law firms to resist the threatened refunds that were now on the horizon.[4]

Notwithstanding the assistance of the new law firms, SSU's quest for discretionary review by the Florida Supreme Court was denied on October 27, 1995. Worse yet, just eight days earlier, the Commission had published Order No. PSC-95-1292-FOF-WS, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition, which required SSU to do away with the uniform rates in effect and, instead, implement a "modified stand alone rate structure." In addition to requiring the rate structure change, this order required that SSU make some $8.2 million in refunds to its customers who had been overcharged through the implementation of

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[2] Order No. PSC-93-0423-FOF-WS, issued March 22, 1993.

[3] The Consumer Parties suggest that the decision to lift the stay was foolhardy because SSU could have recovered virtually all of its final revenue requirement through the generous interim rates then being charged and with no risk of having to make refunds to any customers in the event the uniform rates were overturned on appeal.

[4] SSU is seeking recovery of these legal fees in this case. The amounts are based on maximum fees of $500 per hour for the Miami-based law firm retained and $295 for the Brooklyn, New York firm.

uniform rates. SSU delayed the refunds by seeking reconsideration of the order in question, but, finally, on February 20, 1996, the Commission voted to deny SSU's motion for reconsideration.[5]

SSU arguably had several problems facing it. Shortly after the initial First District Court decision, SSU had, on June 28, 1995, filed an application in the instant docket seeking approval of interim and permanent rates for 141 of its water and sewer systems located in 25 counties throughout Florida. Notwithstanding the First District's reversal of uniform rates on April 6, 1995, SSU had filed its instant rate application seeking the approval of interim and permanent rates based only on the uniform rate structure! On November 1, 1995, the Commission denied SSU's request for uniform interim rates by its publication of Order No. PSC-95-1327-FOF-WS, which order allowed the unusual opportunity for a second request for interim rate relief.[6] Thus, within a relatively short time span, SSU was faced with the reversal of uniform rates, which not only required the refund of $8.2 million or more, but which also prejudiced the request for uniform rates in the instant case. Viewed from a different perspective, the denial of uniform interim rates in the instant proceeding clearly tended to prejudice the possibility that the Commission would favorably reconsider its order imposing a modified stand-alone rate structure, readopt uniform rates and, thus, eliminate the customer refund requirement. Clearly, something had to be done.

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[5] Further delay was engendered by the Commission's inquiry into whether the refund order was impacted, if at all, by the Florida Supreme Court's decision in GTE Florida, Inc. V. Clark, 21 Fla. L. Weekly S101 (Fla. Feb. 29, 1996). Consideration of this issue is now scheduled for June 11, 1996.

[6] Ultimately, the Commission approved interim rate relief for SSU by its publication of Order No. PSC-96-0125-FOF-WS, which, although SSU had again alternatively requested interim rate relief based on a uniform rate structure, granted interim rates based on a modified stand-alone rate structure.

As earlier as August 30, 1995, SSU lobbyist Jeff Sharkey had arranged a meeting between the Lt. Governor and SSU President John Cirello. As reflected in Cirello's September 8, 1995 thank you note to the Lt. Governor [BLH-3, Exhibit 188], Cirello recalled talking to the Lt. Governor on that occasion about a "single tariff' rate structure that would help meet their "common interest in directing growth to the more water rich, interior portions of the State through pricing mechanisms." As was brought out during the hearing, particularly in the testimony of Staff witness Dr. Jan Beecher, "single tariff" rates are synonymous with what we have come to imprecisely call "uniform rates." So, notwithstanding the First District's reversal of "uniform rates" and the fact that the issue was now back before the Commission on remand, as well as the fact that SSU had a new rate case "pending " before the Commission requesting "uniform rates", Cirello, Sharkey, Tracy Smith, and General Counsel Brian Armstrong, among others, were at the Capitol talking to the Lt. Governor about their apparent "common interest" in single tariff rate structures.[7] It should be noted that Sharkey and the SSU management team were only meeting with the Lt. Governor because Sharkey had failed in arranging a meeting with Governor Chiles. A meeting on these issues, especially the uniform rate issue, with the Governor could have been profitable since it is the Governor who appoints Public Service Commissioners. Section 350.031(6), F.S. Sharkey was aware that the Governor appointed the Commissioners.

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[7] This wasn't the first time Sharkey had attempted to broach the topic of uniform rates with the Lt. Governor. As shown by Page 9, Exhibit 89, a December 3, 1993 memorandum from Sharkey to "Buddy MacKay", Sharkey suggested that the Commission's approval of uniform rates for SSU had somehow prompted a dialogue that resulted in MacKay appearing before the Commission to discuss statewide water policy issues. Sharkey noted that SSU was "interested in being a partner in the State's effort to develop a comprehensive water conservation control, and cost policy" and attached a background paper describing the "rationale and implications of the [uniform rate] decision."

[Tr. -633, 634]. Furthermore, Sharkey was aware at the time of the meeting that SSU had a pending rate case before the Commission. [Tr. -598]. It can be assumed, of course, that Cirello, Smith and Armstrong were aware that they had both the reversal of the uniform rate order before the Commission on remand from the First District, as well as the new rate case requesting uniform rates. Sharkey did not remember any discussion with the Lt. Governor about the fact that SSU had a pending rate case before the Commission. [Tr. -591]. It is clear from the Lt. Governor's letter to Sandbulte that he does not recall being advised of the pending cases either.

Although he tended toward the modest during the hearings, Jeff Sharkey's association as a agent/lobbyist for SSU clearly offered the utility critical governmental access it probably otherwise would not have had. For example, Sharkey worked as either a volunteer or paid worker on both of Governor Chiles gubernatorial campaigns [Tr. -637], he knew both the Governor and Lt. Governor and the personnel in the Governor's Office, and he was a former business associate of the Governor's son, Bud Chiles, at Chiles Communications, Inc. [Tr. -637-638]. Sharkey knew Commerce Secretary Charles Dusseau and DEP Secretary Virginia Wetherall, whose agency had a concern and position on the Commission's used and useful calculations that ultimately favored SSU. [Tr. -637, 638]. And, although he described his relationship with Governor Chiles as being a "close professional relationship" [Tr. -638], the Governor and First Lady gave Sharkey a "tribute dinner" in early-1995 to which Sharkey was allowed to invite a number of his major clients, including Mike Raynor of Southern Bell and Tracy Smith of SSU. [Pages 4-5, Exhibit 89]. In a thank you letter to Sharkey [Page 3, Exhibit 89], SSU's Tracy Smith observed Sharkey's relationship with the Governor and Mrs. Chiles in glowing terms, saying: "The praise and kind words of appreciation given you by Governor and

Mrs. Chiles were obviously heartfelt. There is a special bond between you and the Chiles that can only be build [sic] through a long association of respect and love. I treasure having been able to witness that show of affection." It is clear to the Consumer Parties that Sharkey not only had perceived influence and access, but the real thing as well, especially if one desired to have the ear of someone in a position to affect the futures of PSC Commissioners.

At some point, apparently in 1995, Sandbulte was sponsored to membership on the Florida Council of 100 and, later yet, managed to meet both the Governor and Lt. Governor at one of the Council's meetings at the Breakers in November, 1995. [Page 3, Exhibit 86]. Sandbulte parlayed this meeting into an excuse to write Governor Chiles a three-page letter, dated November 21, 1995. [Pages 3-5, Exhibit 86].[8] At hearing, Sandbulte testified that he had written the first and third pages of his letter, while SSU personnel, through Ida Roberts, had supplied the text of the second page. [Tr. -206, 207]. Sandbulte said that John Cirello, President of SSU, knew the letter was being sent, but hadn't provided any input to it. Likewise, Sandbulte denied that SSU General Counsel Brian Armstrong had any input to the letter. [Tr. -207].

In the lower part of his first page, Sandbulte says to Governor Chiles, who is the appointment authority for PSC commissioners,[9] the following:

> . . . . Our investment strategy -- earning fair and reasonable profits in Florida -- Is based on a vibrant marketplace, with respect to real estate, and based on fair regulatory treatment from the Florida Public Service Commission (FPSC). With respect to the latter, we have a serious problem. Please allow me to explain.

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[8] Sandbulte acknowledged sending the three page letter but denied having ever seen the fourth page, a "bullet sheet" titled Financial Impact of FPSC Order Reversing Uniform Rates and Ordering Refund, that was later sent to the Lt. Governor and forwarded by him to the PSC with the letter. [Tr. -206].

[9] Section 350.031(6), F.S.

> SSU is a vital partner with the State of Florida, the Department of Environmental Protection (DEP) in particular,[10] in not only providing safe drinking water to the company's water customers, but in protecting the state's precious water resources and aquifer through proper wastewater treatment and through special reclaimed water projects, aquifer storage and recovery wells, and award-winning conservation programs[11] and, in some instances, by taking over failing systems at the request of Florida regulators and bringing them into compliance because there was no adjacent or willing municipality ready to perform that state purpose. [12]

(Emphasis supplied).

The second page, which Sandbulte says SSU personnel drafted, recites the Commission's abandonment of the uniform rate structure as the result of being reversed by the First District Court of Appeal at the hands of one customer group,[13] complains that the Commission refused to reopen the record to find "functionally-relatedness", decries the huge increases to some of its retiree customers, and bemoans the fact that the Commission ordered it to make $8 million in refunds which it could not collect from its other customers. The second page ends with this paragraph:

> The impact of this decision on SSU is staggering. If it stands, the financial result will be devastating on SSU's ability to attract financing and continue to

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[10] Recall that Jeff Sharkey had already been in personal contact with DEP Secretary Wetherall and SSU had also hired a specialized law firm for the specific purpose of currying favor with the DEP.

[11] Question how much of this based on overstated conservation at Marco Island.

[12] Section 367.165, F.S. places the responsibility for abandoned systems specifically on county governments.

[13] SSU can't resist whining to the Governor about Sugarmill Woods Civic Association, Inc. beating them because it is in their economic best interest to have stand-alone rates and can't resist throwing in the oft-repeated shot that this group of customers uses too much water.

> make investments in Florida's future.[14] The Commission awarded SSU $6.7 million in additional revenue in 1993, and now they are asking that $8 million be refunded. This will create mass confusion and severe financial ramifications with our customers. Monthly bills for homeowners in nearly 100 communities throughout the state will increase, some by as much as 300 percent. And the rates of the high-use customers who appealed will drop even further, encouraging less conservation concern than ever among these high-use customers.

On the third page, Sandbulte mentions that they have had to seek reconsideration from the Commission of this decision and will, if necessary, have to seek fair treatment from the Courts.[15] He continues, bashing the Commission for its decision, stating:

> . . . Court action may engender negative publicity for MP: however, we have no choice but to seek fair treatment. We'll not be driven from Florida without a fight, a fight thrust on us by an inconsistent and problematical FPSC decision-making process and record. (Emphasis supplied).

Sandbulte adds that "[t]he public-private partnership is just not working, and it needs to be fixed!" Sandbulte concludes by stating that "[a]ny advice guidance, counsel or constructive criticism you can offer to normalize the current unfortunate situation will be appreciated and seriously considered." The letter was copied to the Lt. Governor with blind copies to Cirello, Brian Armstrong, and Ida Roberts. [Page 5, Exhibit 86]. [16]

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[14] As will be discussed later, the truth is that SSU's investment were largely being made to pay for its own incompetence and that of developers.

[15] Not surprisingly, Sandbulte and SSU had the apparent foresight to write this letter demanding the normalization of the unfortunate situation brought about by the "inconsistent and problematical FPSC" before the Commission took up SSU's motion for reconsideration and before it took up the utility's second request for interim rate relief in the instant docket.

[16] Sandbulte acknowledged that his letter to Chiles was sent months after the filing of the instant rate case, but admitted that at no time did he tell either the Governor or the Lt. Governor that there was a pending rate case. [Tr. -216-218]. When pressed on what he thought the Governor could do to legally affect the type regulation SSU was receiving, Sandbulte said:

> All right. He might consider legislation that would improve the regulatory

Despite any SSU suggestions to the contrary, the Consumer Parties would argue that "advice, guidance, counsel or constructive criticism" from Governor Chiles wasn't going to do SSU a great deal of good in its then current predicament. For, while the Governor had the authority to appoint PSC Commissioners, and, in fact, will have the opportunity to address reappointing three of the sitting commissioners, he did not have a vote in either the reconsideration of the uniform rate abandonment and associated $8 million refund, or the related vote on SSU's second request for interim rate relief. It seems clear then, at least to the Consumer Parties, that SSU's best hope for relief, under the circumstances, was to have the Governor's Office express its concerns about the rejection of uniform rates and SSU's critical financial situation directly to the PSC Commissioners with the hope that the Commissioners would take prudent heed of the status of the messenger. And, who better to arrange this communication of concern from the Governor's Office but Jeff Sharkey, who worked in the campaigns and ate a tribute meal in honor of himself at the Governor's Mansion?

From the documentation in the record, it appears that SSU acted quickly to enlist the help of the Governor's Office. According to Sharkey, he had received a copy of the Sandbulte letter from Ida "Sam" Roberts (the "fax banner" at the top of the three page letter shows that it was transmitted to Sharkey at 3 p.m., Wednesday, November 28, 1995) just a week after Sandbulte's letter was dated to Governor Chiles. [Tr. -610 and Page 1, Exhibit 85]. In a facsimile message drafted the next day (November 29, but not transmitted until November 30, [Exhibit 85, at Page

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climate for water utilities. I don't know what he would. That would be a purpose, I think, of a meeting to discuss this issue.

I mean, he does propose things to the legislature which effect utilities.

1]), Sharkey reports to Roberts and Tracy Smith that he found the Sandbulte letter "good", that he spoke to Buddy MacKay and Estis Whitfield about the Sandbulte letter,[17] and that he had also talked with Sec. Wetherell about the PSC issues and that "she was amazed." Sharkey also states that he is "[s]till waiting for the bullet sheet to distribute." The bullet sheet, or "fourth page" is faxed to Sharkey from SSU an hour after he asked for it. [Page 6, Exhibit 86].

There was a problem though. According to Sharkey, when he asked the Lt. Governor's chief of staff, Karl Koch, whether the Governor's Office had responded to Sandbulte's letter, Koch didn't know what letter Sharkey was talking about. [Tr. -610]. Sharkey then faxed Sandbulte's letter to Koch, as well as the bullet sheet, on the morning of December 13, 1995, along with a draft letter from the Lt. Governor to Chairman Susan Clark. [Exhibit 86]. Sharkey's fax cover sheet to Koch states:

> **Karl:**
>
> **I would like to see if the Lt. Governor would send a letter to this effect to Susan Clark in response to the attached letter from the CEO of Minnesota Power and SSU's financial difficulties. I will talk with you. Thanks**
>
> **-Jeff**

Sandbulte's letter to the Governor and the bullet sheet were forwarded to Chairman Susan Clark by a letter on the Lt. Governor's letterhead, dated December 21, 1995, eight days after Sharkey's facsimile message to Karl Koch. [Page 3, Exhibit 66]. The letter mentions the Lt. Governor's recent discussions with the President of SSU on the direction of the state's water,

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[17] Sharkey denies at hearing that he actually spoke specifically with either MacKay or Whitfield about the letter, but, rather, "with Buddy MacKay's Office." [Tr. -595-596]

cites SSU as playing a "valuable role in preserving the quality of Florida's water by purchasing and upgrading small, often rural, failed water and wastewater systems", mentions being in receipt of the recent Sandbulte to Chiles letter detailing the economic impacts of PSC decisions on SSU, repeats Sandbulte's - a Florida Council of 100 member - concern for positive economic development and jobs in Florida and his added concern for the PSC's regulatory environment, "which over the last year have [sic] resulted in a year-to-date loss of $453,749 and reduced the utilities [sic] rate of return on investment to -.43 percent." The letter states an awareness of the complexity of ratemaking and stresses the Governor's Office's refusal to question detailed, case specific decisions, but then immediately states that the Lt. Governor "would be very concerned if we were to place in serious financial jeopardy a unique private water utility that is providing quality water and wastewater treatment facilities throughout the state." The letter closes by requesting information on the overall economic and financial consequences facing SSU as outlined in Sandbulte's letter. [Page 3, Exhibit 66].

With respect to the draft letter from MacKay to Clark, Sharkey claims to have written the draft himself. Comparison of the Sharkey draft to the actual letter sent to Chairman Clark by the Lt. Governor's Office shows that, aside from splitting one of Sharkey's paragraphs, the final letter is virtually identical to the draft faxed by Sharkey. [18]

Sharkey and SSU did not stop with just soliciting ex parte communications from the Lt. Governor to the PSC regarding the demise of uniform rates and SSU's dire financial status. As

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[18] Although not important to the point of SSU's eliciting the ex parte communications, the Lt. Governor claimed in his deposition that he had never seen the letter, let alone signed it, and testified that it had been approved and signed by his chief of staff, Karl Koch, in his absence and through a failure of his office procedures.

shown by Exhibit 87, Sharkey had, also on December 13, 1995, sent a facsimile message to Commerce Secretary Charles Dusseau asking Dusseau to send an attached draft letter to Susan Clark regarding the financial situation of SSU, which Sharkey described as "critical." Specifically, the cover fax stated:

> **Charles:**
>
> **Here is the letter for the PSC regarding the financial condition of Southern States Utilities. The situation is critical. Please let me know if you can send it. I have provided the backup letter from the CEO. Thanks**
>
> **-Jeff**

The attached draft supplied by Sharkey mimics much of what was said in the draft drawn for the Lt. Governor's signature in terms of what a valuable, "stakeholder" SSU was, and how the utility was being impaired financially by the current "regulatory conditions" at the PSC. Identical in substance, this draft had a "commerce spin" to it.

Unlike the apparent situation with Koch at the Lt. Governor's Office, Charles Dusseau appeared to have been personally involved in revising his letter to the PSC even though out of the country for a time. The modifications to Sharkey's draft in Exhibit 87 were made in Dusseau's office and Dusseau, or his aides, required another draft from Sharkey, who sent one [Exhibit 88] on December 21, the same day the Lt. Governor's letter was mailed to Chairman Clark. The cover sheet of the message forwarding the revised draft bore in handwritten print the statement "Deadline is Jan. 3rd." Sharkey did not remember whether he mentioned a January 3 deadline to Charles Dusseau. [Tr. -620]. He denied that he knew that the Commission was deciding the second interim rate request in the instant docket on January 4, 1996, saying:

A I did not know that. I knew there was a meeting; I didn't know what they were dealing with. But what I knew is that Sam Roberts was coming to town with Brian Armstrong.

Q And that is the reason for a deadline?

A I wanted to deliver the letter or some response to Mr. Sandbulte's letter when they came to town.

[Tr. -620].

According to Stephanie Smith, in her deposition, which was stipulated to in lieu of her testifying at hearing [Exhibit 184], she wrote the note about the "Deadline is Jan. 3rd" and did so on the instruction of a woman employee at Capital Strategies, Inc. As is reflected in Exhibit 66, Commerce Secretary Dusseau beat his Sharkey imposed deadline by a day and got his fairly presumptuous letter to the Commission on January 2, 1996.

On January 4, 1996, the Commission rejected SSU's second petition for interim rates based on the uniform rate structure, but granted the utility some $5.9 million in interim rate increases under a modified stand-alone rate structure. Order No. PSC-96-0125-FOF-WS.

Both the MacKay and Dusseau letters were "ex parte" and intended to pressure the PSC

Aside from style changes, there is little meaningful difference in the substance of what Sharkey offered and what Dusseau sent. Like the letter sent from the Lt. Governor, Dusseau's letter stressed the value of SSU to the state and the state's citizens and the harm that resulted to SSU's financial condition as the result of the PSC's actions. Neither communication can reasonably be interpreted as merely requesting information from the PSC. Both letters state that SSU and its parent, Minnesota Power, are in critical financial condition and suggest, not too subtly, that the Florida Public Service Commission has placed these utilities in these positions.

Both letters are essentially a demand for an explanation of the PSC's actions with respect to SSU. Dusseau's letter, from a executive branch official with no apparent responsibility or connection to utility regulation, was presumptuous to an extreme and, absent some unapparent presumption to speak for the Governor, should have been ignored out-of-hand.

The letter from the Lt. Governor is another matter entirely. While the Florida Public Service Commission Nominating Council plays a key role in nominating persons to the position of Florida Public Service Commissioner, it is the Governor who has the final say in determining which of the nominees takes the oath of office. Section 350.031, F.S. The Consumer Parties suggest that it would take an obtuse or extremely brave PSC commissioner to completely ignore such a pointed and timely, although impermissible, inquiry from the Governor's Office on behalf of a regulated utility. The Consumer Parties would suggest that the fact that the letter is apparently from the Lt. Governor, not the Governor, is of no meaningful consequence.

Furthermore, to suggest, as SSU has on numerous occasions, that the utility's attempts to seek assistance from the Governor's Office were related only to the "refund" issue and not the pending rate increase case in this docket argues a difference with truly no legal distinction. The letters were written while two extremely important and docketed matters to SSU were "pending" before the Florida Public Service Commission. Both the remand determination resulting from the First District Court of Appeal's reversal of the uniform rate order and the pending interim rate decision in the instant rate case involved choosing between uniform and stand-alone rates, as well as determining whether SSU would lose millions of dollars. Most utilities would give a pretty penny to be able to obtain similar letters to the PSC from the Governor's Office on their behalf. SSU, through its paid agent Jeff Sharkey, both wrote the letters and got them communicated to

the PSC along with the SSU-supplied bullet sheet. Fortunately for the public, generally, and SSU's customers, specifically, Sharkey was too careless and left his "fingerprints" on the "Lt. Governor's letter in the form of the facsimile "banners." Additionally, as required by law, Chairman Susan Clark provided copies of all the documents to the parties pursuant to the ex parte communication law and, thus, put them all on notice of what was being attempted in the Lt. Governor's name. [Exhibit 66]. If Sharkey is to be believed, he, not SSU, wrote the letters. It does not matter, however, since Sharkey was SSU's agent and clearly acting within the scope of what he was hired to do. Besides, Ida Roberts clearly knew of Sharkey's actions and Sandbulte, with virtually everyone's knowledge, had set the play in motion with his letter to the Governor.

The January 4, 1996, memorandum from the Director of the Division of Records and Reporting [Page 1, Exhibit 66] to all parties in the instant docket forwarding letters to Chairman Clark from Lt. Governor Buddy MacKay and Commerce Secretary Charles Dusseau bore the following statement:

> **These letters, copies of which are attached, are being made a part of the record in these proceedings. Pursuant to Section 350.042, F.S., any party who desires to respond to an ex parte communication may do so. The response must be received by the Commission within 10 days after receiving notice that the ex parte communication has been placed on the record. (Emphasis supplied).**

Argument

The Rate Case Should Be Dismissed

The record in this case shows that SSU lobbyist Jeff Sharkey solicited both the Lieutenant Governor and the Secretary of Commerce to contact the Commission. The letters by both officials expressed concern about the regulatory environment at the Commission which resulted in

a year-to-date loss for SSU. They also expressed concern if the Commission were to place Southern States in serious financial jeopardy.

As recited above, Sharkey knew that both the instant case and the remand case from the First District Court of Appeals were matters pending before the Commission. Sharkey's clear intent, on behalf of SSU, whose legal agent he was serving as, was to influence the Commission on pending matters and to the prejudice of other parties in the case, whether or not those matters were known to the Lt. Governor.

Members of the Florida Public Service Commission are nominated to the Governor by the Florida Public Service Commission Nominating Council. The Governor appoints members of the Florida Public Service Commission from those nominated by the Florida Public Service Commission Nominating Council. Section 350.031, F.S. (1995). The power of the Governor over appointments to the Florida Public Service Commission was known both to Sharkey and SSU.

Sharkey's request to the Secretary of Commerce was similar to the request made to the Lt. Governor, stating that "the situation is critical" and, in fact, giving the Commerce Secretary a deadline of January 3, 1996, which was the day before a critical Commission vote on interim rates in the instant rate case.

Based on Sharkey's solicitations on SSU's behalf, both the Lt. Governor and the Secretary of Commerce sent letters to the Commission while this case was pending.

The gravity of SSU's misconduct in obtaining ex parte communications from the Governor's Office to the Commissioners here is tantamount to contacting the employers of jurors

in a civil suit and asking the employers to influence the jurors. No circuit court judge would condone this sort of behavior, and neither should the Commission in this case.

Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d D.C.A. 1991) sets the standard for a court's review of the effect of ex parte communications on quasi-judicial proceedings, such as this proceeding under section 120.57(1), Florida Statutes (1995). The allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action. Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. In determining the prejudicial effect of an ex parte communication, the trial court considers whether, as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect.

In making this determination regarding ex parte communications, a number of considerations may be relevant: the gravity of the ex parte communication; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefitted from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

The criteria set forth in Jennings applies to an ordinary ex parte contact, but the ex parte contact procured by SSU here was anything but ordinary. SSU deliberately procured the ex parte contact through the office that appoints Commissioners to their positions. Thus, these ex parte

communications carried a significance far beyond an ex parte contact coming directly from SSU. While the Jennings case focused on the effect of the ex parte communication on the decision maker, the Commission here should focus instead on the misconduct of SSU in attempting to influence the Commission, whether those actions were successful or not.

A deliberate and contumacious disregard of a court's authority warrants dismissal, as will bad faith, willful disregard or gross indifference to an order of a court, or conduct which evidences deliberate callousness. Watson v. Peskoe, 407 So.2d 954, 956 (Fla. 3d D.C.A. 1981); Bedflower v. Cushman & Wakefield of Florida, Inc., 510 So.2d 1130, 1131 (Fla. 2d D.C.A. 1987); Morales v. Perez, 445 So.2d 393 (Fla. 3d D.C.A. 1984); Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu, 413 So.2d 102 (Fla. 3d D.C.A. 1982). SSU's efforts to influence the Commission reflect a deliberate and contumacious disregard of the Commission's authority, show bad faith, and evidence deliberate callousness on the utility's part. Accordingly, SSU's request for a rate increase should be dismissed.

The broad authority conferred by section 367.121(1)(g), F.S. (1995) empowers the Commission to dismiss SSU's application for a rate increase on account of this misconduct. This section provides the Commission with the power, in the exercise of its jurisdiction, 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 order and requirements. SSU's actions subvert the fundamental notion of a fair process and deprived the other parties of due process. By its actions it attempted to subvert the executive and administrative functions of the State of Florida. In the process, this utility unnecessarily and unapologetically embarrassed the Executive Office of the Governor and gratuitously called into question the impartiality of this Commission's

decision on the second interim rate request, as well as on other pending decisions on the remand/refund issue, uniform rates, and, indeed, the ultimate outcome of this rate case. The rule of law demands that such behavior be answered with grave consequences. The Commission cannot condone this type of behavior and should dismiss the case.

Failing Dismissal, the Commission Should Reduce SSU's Allowed ROE by 100 Basis Points

In the case of Gulf Power Co. v. Wilson, 597 So.2d 270 (1992) the Florida Supreme Court approved this Commission's determination that Gulf Power's rate of return on equity should be reduced from the 12.55% level it otherwise would have approved to 12.05% because Gulf Power was guilty of mismanagement. Should the Commission decline to dismiss SSU's rate case for the misconduct described above in connection with the ex parte communication, it should then reduce SSU's authorized rate of return on equity by 100 basis points for the "mismanagement" reflected by the utility's ex parte communications misconduct.

In Gulf Power, the Commission determined that the utility's reasonable rate of return on equity lay between 11.75% and 13.50%. It then set the mid-range of Gulf Power's return on equity at 12.55%, but determined that its findings of mismanagement justified a reduction in Gulf Power's return on equity of fifty basis points. The resulting approved rate of return used in establishing the revenue requirement was 12.05%, or thirty points above the minimum of the range found reasonable.

The Commission found Gulf Power had been mismanaged during the 1980s due to various instances of misconduct by one of its management. Specifically, the Commission found:

> The record is clear: Gulf Power Company admitted that corrupt practices took place at Gulf Power Company from the early 1980s through 1988, including but not limited to theft of company property, use of company employees on

company time to perform services for management personnel, utility executives accepting appliances without payment, and political contributions made by third parties and charged back to Gulf Power Company. The majority of the unethical/illegal activities involved Jacob Horton, the Senior Vice President of Gulf Power Company. Mr. Horton was killed in a plane crash on April 10, 1989.

The Commission concluded:

> This record reflects a disregard for the ratepayers and public service, however. Accordingly, we will reduce Gulf Power Company's ROE by fifty (50) basis points for a two year period. This results in a final ROE of 12.05%.
>
> This final ROE is well within the parameters established as fair and reasonable by expert testimony of record. This reduction in the authorized ROE for a two year period is meant as a message to management that the kind of conduct discussed above, which was endemic for at least eight years at this company, will not be tolerated for public utilities which operate in Florida. We have limited the reduction to a two year period to reflect our belief that Gulf Power has turned the corner on dealing with the extensive and long-standing illegal/unethical behavior within the company.

The Florida Supreme Court rejected Gulf Power's assertion that the equity reduction was a penalty not authorized by Florida Statutes and was of the type of penalty prohibited by Article I, Section 18, of the Florida Constitution and, furthermore, rejected the assertion that the only "penalties" that the Commission may impose are those expressly authorized by statute, i.e., Section 366.095, F.S. In short, the Court found that the Commission could, under proper circumstances, reduce a utility's authorized return on equity so long as it was still within the range it found to be reasonable. Finding the Commission's final equity reward to have been within the range of reasonableness on equity, the Court found that the reduction was neither a penalty nor confiscatory. In approving the reduction, the Court stated:

> It is well established that all a regulated public utility is entitled to is "an opportunity to earn a fair or reasonable rate of return on its invested capital." United Tel. Co. v. Mann, 403 So.2d 962 [1981 Fla.SCt 2626], 966 (Fla.1981). See also Gulf Power Co. v. Bevis, 289 So.2d 401 [1974 Fla.SCt 518] (Fla.1974).

What constitutes a fair rate of return for a utility depends upon the facts and circumstances of each utility, and this Court has expressly recognized that the Commission must be allowed broad discretion in setting a utility's appropriate rate of return. United Tel. Co. v. Mayo, 345 So.2d 648 [1977 Fla.SCt 456] (Fla.1977). In Mann, we explained the purpose of setting a rate of return range:

> By establishing a rate of return range in addition to establishing a specific rate of return, the commission is acknowledging the economic reality that a company's rate of return will fluctuate in the course of a normal business cycle. Earnings in excess of the authorized rate of return could possibly be offset by lower earnings in later years. Thus the purpose of having a range is to give the commission some flexibility in deciding whether a public utility's rates should be changed. The existence of the range does not limit the commission's authority to adjust rates even though a public utility's rate of return may fall within the authorized range. For example, if a public utility is consistently earning a rate of return at or near the ceiling of its authorized rate of return range, the commission may find that its rates are unjust and unreasonable even though the presumption lies with the utility that the rates are reasonable and just. The commission's discretion in this matter is not annulled by the establishing of a rate of return range.

403 So.2d at 967-68 (emphasis added). Furthermore, this Court explained that, after setting the rate of return range, "the commission can make further adjustments to account for such things as accretion, attrition, inflation and management efficiency" Id. at 966 (emphasis added). Accordingly, we find that the Commission's adjustment of Gulf Power's rate of return within the fair rate of return range falls within those powers expressly granted by statute or by necessary implication. City of Cape Coral v. GAC Utilities, 281 So.2d 493 [1973 Fla.SCt 2744] (Fla.1973). This Court has previously recognized that this authority includes the discretion to reward, within the reasonable rate of return range, for management efficiency. In fact, Gulf Power has in the past received a ten basis point reward for efficient management through its energy conservation efforts. Gulf Power Co. v. Cresse, 410 So.2d 492 [1982 Fla.SCt 293] (Fla.1982). We find that, inherent in the authority to adjust for management efficiency is the authority to reduce the rate of return for mismanagement, as long as the resulting rate of return falls within the reasonable range set by the Commission. This concept of adjusting a utility's rate of return on equity based on performance of its management is by no means new to Florida or other jurisdictions.

In a competitive market environment, the market would provide the necessary incentives for management efficiency and corresponding disincentives

for mismanagement. However, for a utility that operates as a monopoly, this discretionary authority to reward or reduce a utility's rate of return within a reasonable rate of return range is the only incentive available. A commentator on public utility regulation has explained:

> While exceptional management is rarely explicitly rewarded, and mediocrity infrequently penalized, it suggests more systematic and deliberate efforts on the part of regulating agencies to distinguish, somewhat as competition is presumed to do, in favor of companies under superior management and against companies with substandard management. The distinction might take the form of an explicit and publicly recognized differential in the allowed rate of return. There is ground for the conviction that the opportunity of a well-managed utility to earn a return liberally adequate to attract capital is in the public interest as encouraging rapid technological progress and long-run policies of operation. Objection might be raised to a substandard rate of return on the grounds that it would make bad matters worse, but one might hope that the restriction of a company, by virtue of a commission finding of inferior management, to a minimum rate of return measured, say, by a bare bones estimate of the cost of capital, could become so intolerable to the stockholders that they would enforce a change of management.

James C. Bonbright et al., Principles of Public Utility Rates 366-67 (2d ed. 1988).

Gulf Power's final argument is that the Commission's reduction in its rate of return violates the fundamental principles of rate making. Gulf Power asserts that the Commission was impermissibly setting future rates based on past matters that are not part of the test year relied upon by the Commission in projecting Gulf Power's future expenses and operating costs. Gulf Power argues that the Commission may only reward or reduce the rate of return for management efficiency to the extent it impacts future service, facilities, or rates. That philosophy would effectively exonerate the utility for all past management inefficiency, eliminate the underlying purpose for consideration of this factor in setting a utility's specific rate of return within the reasonable rate of return range, and require this Court to recede from Mann. Gulf Power has benefited from this management efficiency factor in the past, and now must accept a reduction for its mismanagement.

The order of the Public Service Commission is hereby affirmed.

It is so ordered.

The Consumer Parties would urge to this Commission that the actions of SSU in the instant case far outweigh the actions for which the Commission imposed a fifty basis point penalty on Gulf Power. The bulk of what Gulf Power stood accused of involved misappropriation of utility property and the inappropriate use of company personnel to the advantage of management. There was no apparent evidence that Gulf Power or its executives or agents attempted to subvert or otherwise improperly influence the Commission with respect to a Gulf Power proceeding by any means, let alone through the good offices of the Executive Office of the Governor. SSU's actions directly attempted to influence the Commission's actions and demonstrated a much greater disregard for the Commission and the public. Accordingly, SSU's actions of mismanagement or misconduct should be found to be of a greater degree than those punished in Gulf Power and its penalty should be 100 basis points below what the Commission would otherwise find was as a fair and reasonable return on equity. So long as SSU's final equity reward, including penalty, falls within the original range of equity found to be reasonable, the Commission's penalty should pass the judicial muster required by Gulf Power. SSU must be punished for its reckless and unscrupulousness behavior if it and other utilities are to be dissuaded from attempting similar conduct in the future.

The Legal Issue: Are Uniform Rates Legal?

Sir Winston Spencer Churchill had a famous quote appropriate to the substance of much of what is being attempted against the majority of SSU 's customers in this case. He said:

> The inherent vice of capitalism is the unequal sharing of blessings;
> the inherent virtue of socialism is the equal sharing of miseries.

Familiar Quotations, John Bartlett, Fourteenth Edition, p. 925a.

The Consumer Parties would suggest that the record in this case demonstrates that there is plenty of misery to go around. It is there position, however, that it is not this Commission's duty or within its authority to direct that any of the misery be borne by those not responsible for it.

Issue 146: Are uniform rates as proposed by SSU in the instant case both in accord with statutes and constitutional?

Position: The Consumer Parties take the position that uniform rates as proposed are not statutorily allowable because they charge for capital costs not "used and useful" in providing service and also for expenses not necessary in the provision of services and, furthermore, because they are unduly discriminatory amongst customer groups. Lastly, the Consumer Parties take the position that the uniform rates, as proposed are unconstitutional because they are a "taking" in violation of the Fifth Amendment to the United States Constitution.

Discussion: Both the Commission Staff and SSU take the apparent position that uniform rates, as proposed in the instant case, may be approved so long as the Commission finds the utility's land and facilities are "functionally related." They both cite to Citrus County v. Southern States Utilities, Inc. 656 So. 2d 1307 (Fla. 1st DCA 1995) for this proposition. They both misunderstand the Court's holding in Citrus County.

As noted by the Court, both Citrus County and Cypress and Oaks Villages Association (now Sugarmill Woods Civic Association, Inc.) appealed the PSC's decision to approve statewide uniform rates for the affected utility systems, arguing that (1) there was no evidence in the record to support such rates; (2) the rates violated section 367.081(2)(a), Florida Statutes; (3) they were

denied due process because the statewide uniform rate issue was not properly noticed; (4) the new rate structure resulted in a taking of their contributions-in-aid-of-construction (CIAC); (5) the order violated the doctrine of administrative res judicata; and (6) the staff's implementation of the new rates before the final order became final violated their due process rights. The Court did not reject any of the grounds raised by the customers in opposition to uniform rates in Citrus County. Instead, it declined to address each of those issues separately because it reversed on the ground that the Commission had exceeded its statutory authority when it approved uniform statewide rates for the 127 systems involved in this proceeding, based on the evidence produced.

Specifically, the Court concluded that Chapter 367, F.S. does not give the Commission authority to set uniform statewide rates that cover a number of utility systems related only in their fiscal functions by reason of common ownership. Instead, the Court found that Florida law allows uniform rates only for a utility system that is composed of facilities and land functionally related in the providing of water and wastewater utility service to the public. The Court based this conclusion largely on its finding that Section 367.171(7), F.S. (1991), granted the Commission exclusive jurisdiction, with some exceptions, over ``all utility systems whose service transverses county boundaries", and the term ``system" is defined as ``facilities and land used or useful in providing service and, upon a finding by the commission, may include a combination of functionally related facilities and land."

In Citrus County, the Court did not find competent substantial evidence that the facilities and land comprising the 127 SSU systems were functionally related in a way permitting the Commission to require that the customers of all systems pay identical rates. Rather, the Court found that the Commission had made no finding that SSU's service areas or facilities in the case

were a ``combination of functionally related facilities and land" and, further, that no such finding could have properly be made given the apparent absence of evidence that the systems were operationally integrated, or functionally related, in any aspect of utility service delivery other than fiscal management. The Court specifically found that the fact that Commissioners Beard and Clark set identical rates for the 127 water and wastewater systems owned by SSU because they believed that the benefits of uniform statewide rates outweighed the benefits of the traditional approach of setting rates on a stand-alone basis was insufficient to support the order.

The Court cited to the testimony of Forrest L. Ludsen in that case noting that he felt that in the future SSU may be ready for uniform rates set according to rate bands that would lump the customers of similarly situated systems together, but that they were not ready at that time. The Court also cited to the testimony of Staff witness John D. Williams, who testified that it would be too extreme to set uniform rates in the case, especially without restructuring the CIAC for each system. As will be discussed below, nothing has changed! Forrest Ludsen may have attempted to change his views on a number of important factors from one case to the next, but the critical underlying facts have not changed. Likewise, while John Williams avoided testifying on CIAC in the instant case, the same infirmities in CIAC from system to system that he complained of in 1992 remain unchanged.

The Citrus County Court specifically noted that the systems in that case were "not functionally related as required by section 367.021(11), their relationship being apparently confined to fiscal functions resulting from common ownership." The Court specifically stated:

> SSU's systems differ greatly in their levels of CIAC, their size, their age, the number of customers served, the status of the system when SSU acquired it, their consumption levels, and the type of treatment used. Counsel for SSU indicated at

> oral argument that, although the 127 systems involved in this case are fiscally related, they are not otherwise related in a utility operational sense. Until the Commission finds that the facilities and land owned by SSU and used to provide its customers with water and wastewater services are functionally related as required by the statute, uniform rates may not lawfully be approved.

There seems to be a simplistic notion, or perhaps dream, among the Commission Staff and SSU personnel that the Commission need only say the words "functionally related" and everything will be back on course for SSU's buying and rehabilitating lousy water and sewer systems, reinvigorating the wildly optimistic dreams of developers, who are responsible for many of the problems confronting the Commission, and towards reducing Commission Staff and Commission workload and by the financing of it all by socializing the costs to all involved without any regard to who is responsible for the costs incurred. The Court was looking for a great deal more in terms of "operational functional relatedness" than either what was presented to it in earlier declaratory petitions, that had no true evidence and no true facts, or what was presented in this case.

Perhaps, just as importantly, there is nothing in the Citrus County opinion that states that uniform rates that ignore cost of service will be found statutorily acceptable by the Court. The Staff, SSU and this Commission should keep focused on the fact that the Court did not reject Citrus County's or Sugarmill Wood's arguments that there was no evidence in the record to support such rates; that the rates violated section 367.081(2)(a), F.S., that the uniform rate structure resulted in a "taking" of contributions-in-aid-of-construction (CIAC), or that the rates were "unduly discriminatory." Quite simply, the Court did not address those arguments because it found a single fatal issue to hang its reversal on. The Court didn't need to address the other

arguments, so it did not. The Consumer Parties would suggest to the opposing parties in this case that they are engaging in wishful thinking if they believe that a reversal of non-cost based, uniform rates, as proposed here, cannot be had on the other arguments raised previously by the customers.

As will be discussed below, Courts, and this Commission, have consistently found rates "unduly discriminatory" either because two or more customer groups or classes were charged identical rates, despite the fact that their costs of service were significantly different, or because they were charged significantly different rates, despite the fact that their costs of service were identical or nearly so. This case involves the former situation, whereby SSU is asking this Commission to charge all its customers precisely the same rates, despite the undisputed fact that the costs of service are dramatically different and in no case the same, and despite the fact that the actual rates of return on equity that will be borne by some customer locations will exceed 200 and 300 percent!

The conduct of this utility to get to the point it is at today in demanding uniform rates is shameful and despicable. The very idea of forcing any group of customers to pay the outrageous returns on equity inherent in uniform rates, while depriving them of the CIAC they were forced to pay by PSC-approved tariffs, is outrageous and should make the individuals involved hide. If SSU or any other person involved with this process thinks the underlying stench associated with uniform rates in this case can be cured with the simple finding that everything is "functionally related", they deceive no one but themselves.

THE STATEWIDE UNIFORM RATES PROPOSED BY SSU ARE UNJUST, UNREASONABLE, EXCESSIVE, AND UNFAIRLY DISCRIMINATORY, IN VIOLATION OF SECTION 367.081(2)(a), F.S.

In fixing and changing rates and charges for water and wastewater systems, the Commission must follow Chapter 120, F.S. and the specific dictates of Section 367.081(2)(a), F.S., which provides:

> The commission shall, either upon request or its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service, which shall include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service. (Emphasis supplied)

The same section provides a strict limitation on the "property" the Commission may consider when allowing in rates the associated "operating expenses" and "fair return." It states:

> However, the commission shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during a rate proceeding; and accumulated depreciation on such contributions-in-aid-of-construction shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered a cost of providing utility service. (Emphasis supplied)

"Rate base" is the commonly used term for property used and useful in the public service. Rate base represents the utility's investment in providing service to the public. Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 785 (Fla. 1983). It is "the utility property which provides the services for which rates are charged." State v. Hawkins, 364 So.2d 723, 724 (Fla. 1978). In Florida, rate base is the original cost, minus accumulated depreciation, of property found to be "used and useful" by the Commission in providing the regulated utility

service. The computation of rate base is critical to the rate-making process because the rate of return a utility may earn on its investment is a percentage of the rate base established to provide a reasonable return for the utility's investors. Rolling Oaks Utilities v. Florida P.S.C., 533 So.2d 770 (Fla. 1st DCA 1988). Rate base cannot include property unrelated or unnecessary to providing regulated utility services, and it cannot include utility plant unnecessary to the service of current customers, plus a reasonable margin for reserve. Gulf Power Co. v. Florida Pub. Service Com'n, 453 So.2d 799, 803 (Fla. 1984). (Commission rejects utility's request to have Florida rate payers pay for portion of generating plant not presently needed to serve them as result of imprudent load forecasting), Rolling Oaks Utilities v. Florida P.S.C., supra. The Commission must find utility property "used and useful" and, more importantly, for appellate purposes, the record must demonstrate the same. The burden of proof is the utility's and the statutory responsibility is the Commission's.[19]

As is uncontroverted in the record of this case, SSU has taken what it describes as the used and useful rate base of each of the 141 systems, thrown them in one of three pots (water, with the exception of two reverse osmosis plants that were thrown together without any rhyme or reason, and wastewater), has done the same with non-common, non-allocated plant-specific operating expenses, and then calculated statewide uniform rates for each service area without any regard for whether the rate base and operating expenses are necessary ("used and useful") to the utility service provided the customers paying the rates at each of the 141 different locations. SSU suggests this theory is acceptable on the notion that Chapter 367, F.S. gives the Commission the

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[19] Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982) and Section 367.081(2)(a), F.S.

authority to set rates for "utilities," not "systems." While this statement may be generally correct, it does nothing to negate the statutory requirement of Section 367.081(2), F.S. that only used and useful property be included in rate base and that customers be given credit for their contributions in aid of construction ("CIAC"). To deny a customer of one system, credit for the thousands of dollars, in some cases, paid in CIAC, and make him or her pay the costs of providing utility service to the customers of distant, non-interconnected utility systems, whose only commonality is the joint (often recent) ownership by SSU, is unfair, unreasonable, illogical, unfairly and unduly discriminatory, contrary to Commission precedent and the case law, and illegal.

As acknowledged by SSU, it was at one time engaged in an aggressive program of acquiring Florida water and wastewater systems. As a consequence, most of the 141 systems at issue here were formerly separate and distinct utility systems, if not true "utilities" in the legal sense. Many, if not all, were built to serve real estate developments. As a consequence, the separate systems or "facilities" or "service areas" as SSU and the Staff like to call them, are widely dispersed geographically and rarely interconnected. With the exception of several pairs of water systems, the systems are not interconnected and the physical plant of each system ("rate base") cannot possibly provide service (be "used and useful") to the customers of other systems. Likewise, the system-specific operating costs of each system are used only to serve that individual system and cannot be considered "necessary" to providing service to the others. Stated differently, it is impossible for the utility plant of any given system, whether "used and useful" or not, to provide utility services to the customers of any other non-connected system. The result, physically and legally, is that the investment in any system is "used and useful" only in serving its own customers, who, alone, should have to support its operations and costs.

The same is true with operating expenses specific to each system, which can and do vary dramatically depending upon the age, geographic location, size and type of operation. Some customers have elected to live in locations (islands, coastal zones, and the like) that necessitate higher capital and operating costs. As with the CIAC levels, an individual's decision on where to live affects the operating costs of the utility serving him or her. However, each customer of each system made an individual decision affecting the cost of their utility service by deciding to locate where they did. The economic consequences of an individual customer's decision should not be manipulated by the Commission so that other customers are forced to subsidize the decisions made by the customers of other systems. Even if these subsidies, or regulatory socialism, were a good idea, which they are not, the legislature has not given the Commission the requisite authority to act and, without it, it cannot.

SSU has claimed certain cost savings and operational efficiencies result from its common ownership of these 141 systems. Notwithstanding this generalized claim, not one SSU witness during this case could support a single dollar of quantified savings. When the undersigned pressed SSU Vice President Forrest Ludsen for demonstrable savings achieved from the implementation of uniform rates, this was the exchange that followed:

2 My question to you, Mr. Ludsen, is can you
3 name me one cost savings, aside from whatever expense
4 savings you associate with the filing of a
5 consolidate annual report that you would not
6 otherwise obtain simply from centralized management?
7 A Well, I think that -- I can't identify any

specific cost savings. I know there are inherent cost savings in your billing and your customer service with uniform rates. Wherever you reduce the matrix of rates it does create efficiency, but I think what you have to look at is over the long term how uniform rates will enable the company to grow, which allows you to have economies of scale. And I think ultimately you do realize significant cost savings from uniform rates.

Q Mr. Ludsen, this is at least the third uniform rate case you've participated in. It is at least the fourth proceeding, is it not, that questioned the advantages of uniform rates in the last five to six years; isn't that correct?

A Yes.

Q Your company is asking for something in the neighborhood of 18.1 million dollars in increase rates in this proceeding, right?

A Yes.

Q You are asking this Commission to change the rate structure currently imposed in your interim rates to uniform rates, right?

A Yes.

Q We are in what is hopefully the last hour of the last day of a two-week hearing. My question to you is, isn't it now time to give to this Commission and to your customers some tangible evidence, some concrete evidence of savings that will accrue by having uniform rates over merely having centralized management?

A Well, I think again you have to look at the whole picture. You just can't look at one element relating to uniform rates. One of the big factors is the potability. If you get the customer complaints that we've gotten from the rates that are currently in place, you would understand that it is very critical to our customers to have uniform rates.

Q Let me try one more time. You have spoken before of achieved savings from a consolidated filing of an annual report, right? Have you quantified those savings in this case in dollars and cents?

A Well, we have talked about the savings related to our costs of capital. We've quantified

that savings. That has been confirmed that there would be a savings of cost capital. We talked about the annual report.

Q Let me start again. Can you quantify for me the savings in dollars and cents that you will tell these five commissioners your customers will accrue as a result of you being granted uniform rates versus merely operating as a centralized management? Can you give us the dollars and cents?

A I told you before we haven't calculated it, but we do know there is administrative efficiency, we do know that it does ultimately result in a lower cost of capital. It does result in customers that can afford to pay their bills. It insulates from rate shock. So there are many benefits associated with uniform rates.

And cost is not, cost savings is just not one of the benefits. There is also the savings associated with the annual reports, which is not

significant, but it is an example of how you can become more efficient when you don't have to deal with the magnitude of numbers that you have to deal with on a stand alone basis.

Q I take your answer to be that not only can you not give me dollar and cents cost savings

1 benefitting from uniform rate structure over any
2 other type of rate structure involving centralized
3 management, but isn't it true that you cannot give me
4 a single quantification in dollars and cents of
5 savings of uniform rates over just centralized
6 management?
7 A We admitted before we haven't quantified
8 the dollars.

[Tr. - 5331-5334].

Not one dollar of quantified savings as the result of uniform rates over centralized management! After a succession of four or more cases running since 1990 in which SSU has either publicly demanded or acceded to Commission-imposed uniform rates, neither Forrest Ludsen nor his company can quantify a single dollar of savings by which customers will benefit from uniform rates.

Ludsen's failure to quantify any "uniform rates" savings demonstrates that any "legitimate savings" from SSU's centralized management are reflected in the allocation of "common" costs to each of the distinct systems, which allocations are spread exactly the same under both the uniform and stand-alone rate calculations according to Ludsen. [Tr. - 1476]. This fact is entirely consistent with SSU's own response to the Commission Staff's 1998 survey regarding the

advisability of imposing uniform rates. SSU's response, which is included both in Exhibits 252 and 253, concede that no savings could be envisioned from the implementation of uniform rates over those that would result solely from multi-systems under centralized management. Ludsen was incapable at hearing of refuting any of the comments his utility made in 1988. Moreover, contrary to positions more recently taken by SSU and reported by PSC Staff as fact, SSU reported to the PSC in 1988 that it only charged uniform rates within counties and felt comfortable doing so because the systems were of similar design, costs of operation, geographic and other factors that reduced the chances of undue discrimination resulting. SSU was clearly opposed to the concept of implementing uniform rates for all of its systems on a statewide basis, and, yet, that conclusion was misstated in the Commission staff's final report that is Exhibit 253.

It is logically and mathematically correct that forcing the customers of Sugar Mill Woods in Citrus County, Marco Island in Collier County or any other group to pay for a pump or treatment plant at Sunny Hills in Washington County, or at other locations, will reduce the expense to the customers of the latter system. However, the pump or treatment plant and their associated operating costs are no more "used and useful" or "necessary" to the service being provided the customers of the former than they would have been before the customers of any of the systems had heard of SSU. Forcing Budd Hansen or any other customer to pay the utility expenses of customers of the Dade County system would clearly reduce utility rates for the people served by Dade County, but it wouldn't be right, fair or legal. Attempting to force such subsidies among systems owned by SSU makes no more sense, is no less wrong, unfair or illegal than attempting to force SSU customers to subsidize utility rates anywhere else in Florida, or the Nation for that matter. Moreover, by forcing such income or revenue subsidies from system to

system, the Commission will destroy legitimate expectations that customers were purchasing both service availability and lower rates through their higher levels of CIAC.[20] Ludsen recognized this reality when he conceded that his defense of uniform rates that they gave "short-run lower rates for utility customers" was solely the result of averaging. [Tr. -1472, 1474]. He also conceded to Commissioner Deason that the supposed advantage of uniform rates that they would stimulate increased development and growth in some areas through lower uniform rates, could, on average, be diminished by curbing growth in the areas whose rates were artificially raised rates through uniform rates. [Tr. -1474].

Massive Subsidies Demonstrated

While no SSU or staff witness could demonstrate even a single dollar of efficiencies obtained from imposing uniform rates as opposed to merely having stand-alone rates implemented by a utility enjoying certain savings from centralized management, the indefensible "costs" of uniform rates obtained by straight averaging are easy to see from Ludsen's Late-filed Exhibit 130. Accepting the numbers on this document as correct, the first page of Exhibit 130 shows that the uniform rates proposed by SSU would have the customers of 15 water systems paying annual uniform rate subsidies of $5,724,694 to the customers of the 82 which would receive subsidies in an equal amount under uniform rates. The customers of 16 sewer systems would pay annual subsidies totaling $2,880,820 to the 28 systems receiving subsidies. Total forced subsidies would equal $8,605,514 annually. A number of systems' customers would be forced to pay subsidies on

[20] For example, as a result of the large amounts of CIAC they paid, the customers of Sugar Mill Woods, received a rate reduction, not a rate increase, when the Commission gave SSU an interim rate increase on a "modified stand-alone" basis and abandoned the uniform rates previously in place.

both their water and sewer rates. Not surprisingly, this group includes the customers at Sugarmill Woods, Marco Island, Beacon Hills, and Amelia Island.

Forced water subsidies range from a system high of $2,648,029 annually from the water customers at Deltona to a low of $765 from those at Lake Harriet Estates. Comparable forced sewer subsidies range from a high of $882,863 annually at Marco Island to a low of $3,986 at University Shores. Under SSU's scheme, the average water customer at Sugarmill Woods would pay an annual subsidy, over and above the rates that would otherwise be dictated by cost of service, of $252. The average sewer customer at Sugarmill Woods would pay an annual subsidy of another $252, so that the total annual subsidy for a customer with both water and sewer service at Sugarmill Woods would be $504. This subsidy would be paid totally without regard to the income of the individual being forced to pay it, or, in fact, their ability to shoulder such payments. As testified to by Budd Hansen and others, there are some 38 or more customers at Homosassa Commons, who are receiving federal subsidies and who would be forced to pay annual subsidies over and above their costs of service. [Tr. -3118]. Large numbers of the other customers at Sugarmill Woods are retirees and live on fixed incomes. More importantly, there is no definitive evidence in the record of this case about what the incomes are at each of the service areas or systems or whether rates of any level are "affordable" or not.

In contrast to the customers paying subsidies, the average customer at Palm Valley, which SSU purchased while the system was under DEP consent order, and spent over $1 million completely rebuilding for less than 200 customers, would receive an annual rate subsidy of $1,032 per year. The apparent water jackpot winners under uniform rates would be the 33 customers at the Fountains who would receive annual uniform rate subsidies of $1,318 per customer. The

biggest water "losers" under uniform rates, on a per customer basis, are those at Amelia Island, who would pay annual subsidies of $319 in excess of the costs to provide them water service.

Testimony of Dr. Jan Beecher

Much of the testimony of Staff witness Jan Beecher bears directly on the legal issue surrounding uniform rates, as well as the factual issues. First, she testified that "uniform" rates really refer to a situation in rate design in which the same price per unit of service is charged irrespective of the amount of consumption. What we in Florida have been calling "uniform rates", and which the undersigned will continue referring to as "uniform rates" for much of the remainder of this brief, is properly called "single-tariff pricing." Single-tariff pricing includes the situation in which a utility is allowed to charge the same tariff rate to all of its customers, at all of its system locations, irrespective of whether the systems are interconnected, and also irrespective of whether the costs of providing service at these locations are the same or not. [Tr. -1572, 1573].

Dr. Beecher also stated that typically in her experience "utilities" were the corporate entities that owned utility water and sewer "systems", while "systems" typically referred to the geographic service areas actually providing service. She stated that the United States Environmental Protection Agency generally defined a "system" to mean a stand-alone operating system. [Tr. -1574]. While SSU may want to pretend that there is only one SSU "system", the reality in the rest of the world is that there is one "utility", SSU, and 140 or more "systems." Finding a different result in this hearing, or pretending otherwise, will not validate what are otherwise "unduly discriminatory" rates.

Dr. Beecher made clear that she was not testifying in support of the single tariff rate structure. [Tr. -1576]. In fact, she recognized in her writings [Exhibit 133, Page iv] that she has

taken the position that "the theoretical pricing standard is to set rates equal to the cost of service. That is rate differentials are based on cost differentials." Furthermore, she testified that this standard was the prevailing standard in the public utility pricing literature. [Tr. -1577]. She also testified that "prices that accurately reflect costs send correct signals to consumers about the value and cost of water, and thereby encourage wise use and discourage wasteful consumption." [Tr. -1578]. She acknowledged that the converse would be true and that prices that do not accurately reflect costs would of necessity send incorrect signals to consumers and could encourage wasteful consumption, especially in those cases in which the rate charged was less than the cost of providing service. [Tr. -1579]. She added, "If regulators were concerned about encouraging conservation, they would certainly pay attention to the pricing signal, but they would also probably consider other incentives for water conservation", which she stated could include low-use shower heads, toilets and that type of thing. [Tr. -1579, 1580]. Dr. Beecher recognized that "load management" might be a reason for a utility to not be indifferent between single-tariff and stand-alone pricing from a revenue perspective, but recognized that load management required interconnection. [Tr. -1585].

Dr. Beecher said that she did "not feel we have as a matter of public policy a clear standard on affordability." She added that to determine affordability, one would have to know the incomes of the customers involved. [Tr. -1586]. Dr. Beecher stated with respect to subsidies, "I think for subsidies to be used they have to be explicitly recognized and a justification has to be provided for their use." She added, "Subsidies that provide revenues outside of the utility rate structure, or subsidies within the utility from one class of customers to another will tend to undermine the price signal to customers", and "In general, it's not preferable to use subsidies."

[Tr. -1587, 1588]. Dr. Beecher conceded that customers who are charged a rate that is less than their cost of service, as a result of an interclass subsidy, would tend to consume more water than they otherwise would if they had the correct price signal. [Tr. -1590, 1591]. She also acknowledged that rate classifications in other industries, such as the electric power industry, were usually based on cost of service and that the rationale for industrial rates, for example, was made largely on the basis of differentials in the cost of providing service. She also acknowledged that when the relative parity or subsidy that flows from one group of customers to another gets too large, regulators have to become worried about "rates becoming unduly discriminatory." [Tr. -1591, 1592]. She added that, generally, in her experience that differentials in the cost of providing service were also the basis for charging different water and sewer rates to bulk customers versus residential customers. [Tr. -1593].

Dr. Beecher stated that it was her experience that, almost without exception, regulatory bodies throughout the United States attempted to set water and sewer rates that reflected cost of service. She could not name a single instant in which a regulatory body intentionally strayed from the basic notion of cost of service. [Tr. -1599]. While she pointed to her survey of state commission staffs to indicate that some commissions had approved single-tariff pricing, she acknowledged that she did not know the differentials in the cost of providing service from one system to another in cases in which single-tariff rates had been approved, or whether any differentials in cost of service existed. [Tr. -1599].

With respect to the problem of the proliferation of water and sewer systems in the United States, Dr. Beecher recognized that there were a great many more utility systems than utilities. She also recognized that Florida was one of the leading states in terms of the number of utilities,

but that the number of utilities in the state had declined in the last decade from some 288 in 1989 to 210 in 1995, for a decline of about 27 percent during the period. She also understood that acquisitions and mergers were the leading causes of the decline of Florida water and sewer utilities. [Tr. -1605, 1606]. She recognized her earlier writing in which she was quoted as saying: "The distinction between utilities and systems can be important in that some utilities encompass multi community water systems particularly in certain states. The leading example is Florida, where 210 regulated water utilities provide service through 1,363 community water systems." Dr. Beecher added that, using these definitions, she would describe SSU as being one utility with 140 or more systems. [Tr. -1607].

Referring to her writings contained in Exhibit 144, Dr. Beecher testified that, generally, local economies should support the full cost of their own water service, and that, in fact, "barriers to market entry are necessary whenever a local economy cannot support the full cost of water service from a new water system." [Tr. -1629]. Referring to page 12 of Exhibit 144, Dr. Beecher agreed that Florida experienced a growth in regulated utilities from 260 in 1980 to 357 in 1990. She added that this growth (37 percent) was due primarily to population growth and real estate speculation and that [page 26] many small systems are established on the speculation about real estate development and growth and that lack of expected growth was the most prevalent stress for young systems. [Tr. -1634]. Dr. Beecher conceded that her report [Exhibit 144] at Table 2-11 showed that Florida led the nation in the number of small systems with negative net income with a total of 462 in 1991, and another 39 that had a negative net worth in same year. She said that Florida had a large number of systems with serious financial difficulties. [Tr. -1637, 1638]. Dr. Beecher also recognized in her report [page 54] that "The blame for the proliferation of

nonviable small water systems (usually privately owned) has often been laid at the door of the state public utility commissions." [Tr. -1639].

Dr. Beecher conceded that with the physical interconnection of utility plant you could obtain economies of scale in supply and treatment , for example, chemical cost and other kinds of treatment costs, operating costs, and without physical interconnection you would have to look for economies in other areas of operation. Importantly, she conceded that whatever other economies you would find from centralized management would exist irrespective of whether you have single-tariff rates or stand-alone rates. [Tr. -1649].

Beginning at page 1652 of her testimony Dr. Beecher discussed the concept of "zonal pricing" and conceded that in many regards it was the opposite of single-tariff pricing. She acknowledged that "water systems or water utilities faced with substantial spikes in costs may need to consider zonal pricing", which, "places an emphasis on costs that are differentiated on the basis of physical differences in systems." [Tr. -1652, 1653]. She also noted that physical or geographic location could be a key factor in electing zonal pricing and that zonal pricing can be used in utilities with zones that are highly differentiated on the basis of cost. [Tr. -1653].

The assignment of rate base and costs to distinct units of a larger system for the purpose of setting rates, as in the "zonal rates" discussed by Dr. Beecher, has been a consideration for many years in utility regulation. 64 AmJur 2d Public Utilities states:

> [s.] 142.---Territorial Units
>
> In fixing the valuation of public utility property for the purpose of making rates for services to a particular territory or community which is but a part of a broader or general system, it is usually held that the property devoted to the service of the particular territory or community may be taken as a unit.[footnotes omitted] Thus, a valuation put upon the property of a public utility company distributing and selling electricity, in fixing the rates to be charged in a city served

> by it, will not be deemed so low as to result in confiscation where it includes the value of all property of the utility company in fact used or useful for supplying electricity to the city, by taking the value of the local property and a proportionate part of the value of the general system determined by the ratio of actual sales in the city to the total sales of electricity throughout the territory served . . . . [footnote 29. Wabash Valley Electric Co. v. Young, 287 U.S. 488, 53 S. Ct. 234, 77 L. Ed. 447 (1932)

In Wabash, supra., the Supreme Court addressed a very similar situation to the one before this Commission. Wabash Valley Electric was one of seven affiliated public utility corporations organized under the laws of Indiana whose combined stock and security was owned by the Central Indiana Power Company. As noted by the Court:

> The officers and directors of the several corporations are the same, and the operations of the entire group are under a common control, so that, in substance, the business of all is carried on as though they constituted a single entity. Their lines are interconnected, and the electrical energy distributed by them is drawn from common sources. Appellant owns and operates an interconnected system in a territory comprising thirteen counties of the state, and sells and distributes electric current to approximately fifty cities and towns therein, including the inhabitants of the city of Martinsville, and also to a large number of industrial plants and customers outside the limits of such cities and towns. Appellant's system consists in the main of general transmission and transformation properties, and local distributing plants. Among other local plants it owns one in the city of Martinsville, which was built by former owners to supply that city and its inhabitants. In the hands of the original owners, this was a separate and complete plant, generating electrical energy as well as distributing it.

Seventeen citizens of Martinsville, customers of Wabash, and the city of Martinsville, challenged Wabash's rates as being unreasonable and discriminatory. The Court continued:

> At that time, and prior thereto, appellant had on file with the commission a schedule of rates applicable only in that city. After hearing, the commission made an order, effective as of February 1, 1929, reducing the rates for electric service to be charged and collected by appellant in Martinsville.
>
> Rate Base. The court below held that under the provisions of the state statute and in the light of the facts, not the entire property [and] system of appellant, but the city of Martinsville alone, should be treated as the unit for the purpose of determining the schedule of rates to be charged therein.

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Upon that basis, in fixing the value of the property used and useful for supplying electric current to the city, the court determined the value of the local property, to which it added that proportionate part of the value of the system property which it found to be fairly attributable to the Martinsville service.

Appellant's chief contention is that its entire operating property should be taken as a unit in fixing the rate base, and that the action of the court in failing to do so deprived it of its property without due process of law.

The Martinsville plant, prior to its acquisition by appellant, had produced within itself the whole of the electric current which its owners sold and distributed. That it then was a distinct unit for the purpose of fixing rates, if and when necessary, is, of course, clear. If the former owners had simply abandoned the use of the local generating appliances and purchased electric current from outside sources, the plant, for all purposes of rate making and regulation, would have remained a distinct and separate unit. It was this unit which appellant acquired; and, if appellant had continued to operate it as it then was being operated, that is to say, as a generating, as well as a distribution, plant for the entire electric current supplied to the city, the value of the plant with appropriate allowances for expenses, etc., would have continued to be the lawful rate base. But that method of operation was abandoned; and the question is whether, because the local plant now is interconnected with appellant's general distributing system and the electric current is drawn from outside sources, the city still may be treated as a separate unit for rate-making purposes.

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Normally, the unit for rate-making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit.

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In addition to what already has been said, it should be noted that appellant not only furnishes electric current to the fifty separate and unrelated towns and cities, in none of which the plant is used or useful for the rendition of service to any other town or city . . . .

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Valuation and Expense Allowances. Appellant further contends that, assuming this method to be free from constitutional objection, the valuation put upon the property is so low as to result in confiscation. To meet this objection it is only necessary that there shall be brought into the rate base the value of all property of appellant which is in fact used and useful for supplying the electric current to the city. Manifestly, the local plants in other towns and cities bear no such relation to the Martinsville plant. As already shown, these various plants are separate and distinct from one another, and they were properly left out of the

calculation. [citation omitted]

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> Upon the basis adopted, that is, first to value the local property and then add that proportionate part of the value of the general distributing system found to be fairly attributable to the Martinsville service, the figures finally arrived at by the master and the court were $102,947 for the local plant, and $101,191 for the proportionate value of the other property, or a total of $204,138. In arriving at the second figure, a proportionate part of the total value of the general system was allocated to Martinsville "on the basis of the ratio of actual sales of Kw. H. to Martinsville and its consumers to the total sales of Kw. H. by plaintiff during the year 1929, that being the last calendar year before the date of the hearing."

Like the Martinsville plant, SSU's many acquired systems were distinct units for the purpose of setting rates prior to the joint ownership and, indeed, until, for some, until this case. Unlike the Wabash electric systems, which were interconnected and, in many cases, received power from common generating plants, the 141 SSU systems involved here, with the noted exceptions, are not physically interconnected and are scattered virtually the length of the state. Here, unlike the interconnection in Wabash, there is no physical interconnection of the service assets of the utility.[21]

In Wabash, the Court determined a smaller rate fixing unit was required, because it found that while the parent electric company "furnishes electric current to the fifty separate and unrelated towns and cities, in none of which the plant is used or useful for the rendition of service to any other town or city . . . ." The territorial unit concept, like the zonal rate, is particularly important where the costs and investment of serving a given area are capable of precise discernment and critically important where, as here, there is a wide variation in costs and investment between the territorial units. SSU has already discerned the precise cost to serve each

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[21] It should be clear in Wabash that even the remaining Martinsville distribution facilities were not "used and useful" in providing service to the other systems jointly owned by Wabash Valley Electric.

system by its calculation of the traditional stand-alone rates. The stand-alone rates represent what historically has been considered by all to include what is truly used and useful in providing service. Here, the allocation of SSU's return on common investment plant, such as the new testing lab, computer equipment and the like, as well as the allocation of common operating expenses have already been separately accomplished through an allocation methodology. The allocation of the general and common costs and return on common plant has been made on a "per customer" basis and is incorporated in both the stand-alone and uniform rates calculated by the Commission. Accordingly, the complete recovery of the common and general costs is not dependent upon the uniform rates.[22]

The Commission, as did the U.S. Supreme Court in Wabash, should find, despite their now common ownership by SSU, that the 141 separate and distinct water and wastewater systems should be treated as separate units for rate-making purposes. The Consumer Parties submit that since the uniform rates require customers to pay returns and operating expenses on utility plant that does not, and cannot, serve them, such rates are in contravention of Chapter 367, F.S.

The logic and legal support for treating SSU's non-interconnected water and wastewater systems as "territorial units" does not rest solely on Wabash. More recently, the Florida Supreme

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[22] While not an issue in this case, it should be apparent that even the common costs have been "loaded" with expenses more appropriately attributable to individual systems with the result that the customers of the other systems must pay for services not "necessary" to the services they receive. Furthermore, most, if not all, of the benefits SSU claims as flowing from uniform rates are, if they exist, the result of common cost allocations and centralized management and have nothing to do with uniform rates.

Court had occasion to consider a similar decision by this Commission in Action Group v. Deason, 615 So.2d 683 (1993).

Action Group involved the Sebring Utilities Commission ("Sebring"), which, with Florida Power Corporation ("Florida Power"), jointly petitioned the Commission asking for approval of their agreement and certain conditions precedent to Florida Power purchasing the assets and providing service to Sebring's existing and future customers in the Sebring service territory.

By their agreement, Florida Power would, among other things, retire Sebring's outstanding bonds and recover the associated costs, but only from those new Florida Power customers residing in the former Sebring service territory. The debt retirement cost would be recovered through a separate rate or "rider" over and above the rates charged to the remainder of Florida Power's current customers. Thus, the former Sebring customers would become Florida Power customers but would pay higher rates than its other customers in order to retire the debt incurred by Sebring's management.

Several Sebring customer groups, including the Action Group, protested the rider, arguing the Commission lacked the jurisdiction to impose such a special charge. The Commission rejected the Action Group's jurisdictional argument, saying:

> Action Group's argument is a rate discrimination argument, not a jurisdictional one. The proper question to ask here is not whether the proposed Sebring Rider is a rate. The proper question to ask is whether the proposed Sebring Rider unduly discriminates between customers who are similarly situated and who receive essentially the same service. Action Group does not question our jurisdiction to answer the question when it is posed this way.

The Commission went on to find that the rider was not unduly discriminatory, stating:

> the rider accurately represents the additional cost to serve the Sebring customers because of Sebring's financial difficulties, and we believe that it would be

> discriminatory to pass that additional cost to Florida Power's general body of ratepayers. . . .
> . . . The record of this proceeding makes it perfectly clear, despite many Sebring customers' wish that it be otherwise, that the cost of the Sebring debt is a cost to serve the Sebring customers. That cost attaches to that class of customers, and distinguishes it from other classes of customers, no matter who provides the electric service. It will not simply go away.

(Emphasis supplied)

The Commission approved the Sebring rate rider requiring Sebring customers to pay more in rates than other Florida Power customers of the same class. In fact, it went a step further by deciding new Florida Power customers, who had not previously been Sebring customers, but who were located in the former Sebring service territory, would also have to pay the rate rider during its projected 15 year term. In doing so, the Commission clearly attached the responsibility for the "additional cost" to the former Sebring service territory and not just to the former Sebring customers, many of whom lived outside Sebring's municipal boundaries.

The Commission's decision to hold the existing Florida Power customers harmless for debts accumulated by the Sebring system was both logically and legally sound since the existing Florida Power customers had nothing to do with the Sebring service territory prior to Florida Power's purchase of it, and should not have been forced, through their electric utility rates, to subsidize debt costs resulting from Sebring's financial mismanagement.

On appeal, the Florida Supreme Court rejected the Action Group's claim that the Commission lacked subject matter jurisdiction to approve the Sebring rider. In rejecting the Action Group's claim as being too narrow, the Court noted that "[i]t ignores all other statutory factors, including the costs of providing that service to a given class of customers". The Court went on to say:

Section 366.041(1), Florida Statutes (1991), provides that in fixing the 'just, reasonable, and compensatory rates, charges, fares, tolls, or rentals' to be charged for service by utilities under its jurisdiction,

> the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities....

(Emphasis added.) In apparent harmony with this broad grant of authority, the Commission exercised its jurisdiction by approving imposition of the SR-1 rate rider on customers in the Sebring territory, reasoning that repayment of Sebring's debt "is a cost to serve the Sebring customers" that "attaches to that class of customers, and distinguishes it from other classes of customers, no matter who provides the electric service."

The Supreme Court approved the Sebring rate rider,

concluding:

> The proposed amount to be charged to customers in the Sebring service area is Florida Power's regular rate plus the Sebring rider which reflects the cost of the Sebring debt, a cost necessarily associated with the provision of electric service to that class of customers. Moreover, because the Sebring rider clearly results in differential charges to customers within and without the Sebring service area it constitutes a classification system and therefore is a matter of "rate structure" subject to the jurisdiction of the Public Service Commission.

Action Group is important and relevant to the instant case because the factual, policy and legal issues facing this Commission in Action Group and the instant case are substantially identical.

First, the statutory language controlling the setting of rates for electric and water and wastewater utilities are essentially the same.[23] In setting rates for both electric utilities and water

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[23] Compare Section 366.041(1), F.S. (1995), which provides, in part:

> (1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all

and wastewater utilities, the Commission is charged with considering "the cost of providing the service." Usually considerations of cost of service result in the Commission establishing different customer "classes" and correspondingly different rates to reflect the differing costs for a utility to serve each class. Reflecting variations in the cost to serve in different rate classifications is not merely a discretionary act for the Commission. Rather, as shown in Action Group, supra., failure to take into account such differences will result in unlawful rates that are "unduly discriminatory."

It is clear from the record in this case that some of SSU's acquired water and wastewater systems were in a state of disrepair and required "rehabilitation" of some kind. What is more clear is that SSU acquired systems with a broad range of CIAC in their rate bases. It is this broad range of CIAC, coupled with an equally broad disparity in operating costs specific to each separate and distinct system, that makes this case analogous to Action Group and which should compel consistent treatment by the Commission and the continuation of stand-alone rates. As in

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> public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources....
> (Emphasis supplied.)

to Section 367.081(2)(a), F.S., (1991), which provides:

> The commission shall, either upon request or own its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service, which shall include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service. (Emphasis supplied.)

Action Group, the "debt" represented by the low and non-existent level of CIAC in certain specific systems is the result of the "mismanagement" of the companies historically operating the systems and/or the Commission in regulating them. Likewise, high operating costs may be the result of mismanagement or simply a result of the geographic area the customers chose to live in. Irrespective of the cause, these higher costs to serve are a cost to serve these specific customers, which attaches to them as a class of customers, and distinguishes them from customers of other systems. The traditional, stand-alone rates the Commission could easily calculated for each water and wastewater system in this case would reflect the "additional cost to serve" those customers who paid little CIAC, lived in water poor areas, or bought from developers with huge infrastructures and little reasonable hope for many buyers. Despite SSU's apparent "wish that it be otherwise," these costs attach to the customers of each systems and distinguish them from the customers of each other system. The costs "will not simply go away." To not recognize these cost differentials will result in discriminatory rates. See also, City of Plant City v. Hawkins, 375 So.2d 1072 (Fla. 1979), wherein the Court approved the Commission's use of the "direct" as opposed the "spread" method for collecting municipal franchise fees.[24]

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[24] At p. 1073, the Court stated:

> The direct method places the financial burden for franchise fees on the resident-customers of the municipality imposing the fees, as opposed to the "spread method" which distributes the cost among all customers of the utility.

The Court approved the imposition of the direct method, finding that the Commission, this time, had record support, including:

> (4) the fact that the spread method of allocation discourages energy conservation by customers living outside franchise areas because the franchise fee is based upon consumption by customers living within the franchise areas; and (5) the incentive for cities to increase the fee because almost sixty percent of such fees are paid by

The uniform rates proposed here by SSU are "unduly discriminatory" in the words of the statute and are unlawful. They should be rejected.

The uniform rates are also unlawful for the reason that they force the customers of the subsidizing systems to pay "excessive" returns on the utility investment serving them, while not requiring the customers of the subsidized systems to pay the costs of providing them service. Testimony in this case has shown that while SSU is asking for a return on equity of 12.25 percent, it is asking some of its customers to pay rates that pay returns on equity of more than 300 percent! As suggested by Chairman Clark in her questioning of Sandbulte, this addresses the issue of rate parity. It is foolhardy to suggest, as apparently Sandbulte tried, that it is impermissible to wander far from parity when dealing with discrimination between classes, but that the sky is the limit when dealing with customers who have previously been determined to be in the same class, as in the residential class in the instant case. Such a view displays either abject dishonesty or total ignorance of the entire history of ratemaking in this country. Quite simply, rate classes were derived to recognize markedly different costs of service and so as to avoid undue discrimination.

Even utility plant truly "used and useful" may not earn a return in rates unless it is the utility's "investment." Section 367.081(2)(a), F.S. Utility plant is not the "investment of the

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customers who live outside franchise areas and have no voice in city affairs.

The franchise fees are costs associated with a specific area in the same way that the Sebring debt costs were in Action Group. They are, of course, similar to the specific costs to serve for each of the 127 SSU systems as reflected in the "stand-alone rates" calculated for each. Furthermore, the reasons found by the Commission in the instant order finding conservation a rationale for adopting uniform rates are countered by the reasoning recognized by an earlier Commission in City of Plant City v. Hawkins.

utility" and cannot legally earn a return in rates if it has been donated or contributed. As stated earlier, Section 367.081(2)(a), F.S., mandates that "the commission shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during a rate proceeding." CIAC is defined in Section 367.021(3), F.S.[25]

The Commission has found, and the Court has upheld in Florida Waterworks v. Florida Pub. Ser. Com'n, 473 So.2d 237 (1985), that CIAC and "service availability charges" are synonymous. (Commission proposed rules on service availability policies and charges, including maximum and minimum amounts of CIAC in relation to system's facilities and plant supported by competent, substantial evidence). In Florida Waterworks, the Court quoted with approval a Commission order considered in Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1029-30 (Fla. 1980) stating:

> We recognize that the customers (be it the developer who builds the service facility or the owner thereof), by payment to the utility of the service availability charges (CIAC) are 'purchasing' water and sewer utility service availability. However, CIAC is a contribution to the utility's capital and is so recognized by both State and Federal law. [citation omitted] So long as the initial utility that receives the CIAC provides the service, the customer receives the benefit of his contributions in the form of lower rates because CIAC is deducted from the company rate base. (emphasis supplied)

Earlier in H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913, 916 (Fla. 1979), the Court, observing the functions of CIAC, noted:

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[25] "Contribution-in-aid-of-construction" means any amount or item of money, services, or property received by a utility, from any person or governmental authority, any portion of which is provided at no cost to the utility, which represents a donation or contribution to the capital of the utility, and which is used to offset the acquisition, improvement, or construction costs of the utility property, facilities, or equipment used to provide utility services.

> The crucial time in regard to service-availability charges must be the date of connection since there can be no ascertainment of the actual cost of maintaining sufficient capacity until that date. Just as rates offset the cost of service and are determined by past costs, so do service-availability charges offset the costs of preserving plant capacity and are determined by past costs. The Commission must have the ability to alter service-availability charges to defray the expenses of preserving plant capacity with changing economic factors: otherwise the whole point of having service-availability charges would be lost and existing customers would subsidize future connections. (emphasis supplied)[26]

While not unheard of, rate cases considering multiple systems have been rare. Considering 141 systems jointly is without precedent. As described in the cases cited above, CIAC, in the context of stand-alone utility systems (whether multi-system or not), recognizes customer financing of a utility system (a down payment of sorts) by excluding the CIAC from rate base. As noted in Duval Utility Co., supra., customers paying CIAC assumed they were "purchasing" both water and wastewater service availability and "lower rates." The Commission has a statutory duty to prospectively modify service availability charges to require new customers to bear their proportionate share of plant necessary to serve them so "new customers will not be subsidized by existing customers." The Commission not only has the flexibility to set service availability

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[26] See also, Christian and Missionary Alliance v. Florida Cities, 386 So.2d 543, 545 (Fla. 1980), wherein the Court stated:

> The private water utility is required to record all connection charges in account number 271 (Uniform System of Accounts) as contributions-in-aid-of-construction which are thereafter deducted from the utility's investment for rate-making purposes. Consequently, the collection of service-availability charges by a private utility has the effect of reducing, or at least controlling, rates to customers. Thus, the objective expressed in the Commission's order: "that the new customer will bear the expense of expansion of the facilities to provide him service in order that such new customers will not be subsidized by existing customers," is met. (emphasis supplied)

charges, it has the mandatory statutory obligation to set just and reasonable charges and conditions for service availability.[27]

The payment of service availability charges lowers monthly rates and a sound service availability policy and charge modifications, if necessary, balance the costs of contributed property necessary to serve current and future customers and keeps either group from subsidizing the other. So long as a system continues to have its rates set on a stand-alone basis, each customer makes his fair down payment on the utility plant necessary to serve him, and all customers pay a return on the utility's remaining used and useful investment, as well as reasonable, necessary and prudent operating costs. This relationship is unique to customers served by the same system, and water and wastewater systems are markedly different than other regulated utilities in this regard. As noted in the final order in Docket No. 920199-WS, both witnesses Cresse and Williams stated

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[27] 367.101(1) "The commission shall set just and reasonable charges and conditions for service availability. The commission by rule may set standards for and levels of service-availability charges and service-availability conditions. Such charges and conditions shall be just and reasonable. The commission shall, upon request or upon its own motion, investigate agreements or proposals for charges and conditions for service availability." (emphasis supplied)

The Commission has had this requirement since 1971. It did not adopt rules (Rule 25-30, F.A.C.) setting standards for service availability charges until 1982. The rules require CIAC not to be less than the cost of the distribution lines and equipment and not more than 75% of the total plant. As noted, this Court upheld the rules in Florida Waterworks. However, as evidenced by the service availability charges of the 127 systems at issue here, the Commission has done little to effectively enforce these standards. If it had, there would not be systems, such as Sugar Mill Woods, with over 100% CIAC and others, such as South Forty, with little or none.

Although it dismissed SSU's earlier rate petition with the suggestion that it incorporate even more systems in its next application, the Commission took no initiative "upon its own motion" in either case to address the obvious service availability charge disparities associated with the constituent systems, which vary from 0% to 217%, and from $0 to $2,500 per customer in CIAC or service-availability charges.

that differences in CIAC or service availability charges needed to be addressed before uniform rates could be imposed, if they should be imposed at all. Nothing has changed in this case. If not addressed, differences in CIAC can result in the customers of identical systems legally being charged markedly different rates. For example, consider two identical hypothetical wastewater utilities with $1,000,000 in used and useful plant and each serving their maximum capacity of 500 customers. If one system charged each of its customers CIAC of $2,000, while the other charged only $100, the following investment rate bases and revenue requirements would result, exclusive of operating expenses:

System A

Total Plant	=	$1,000,000	
CIAC/customer	=	$2,000	
X 500 customers			
Total CIAC	=	1,000,000	
Net Rate base	=	$ -0-	
X 15% ROI			
Annual Return	=	$ -0-	/ 500 customers
Annual Return/customer	=	$ -0-	

System B

Total Plant	=	$1,000,000	
CIAC/customer	=	$100	
X 500 customers			
Total CIAC	=	50,000	
Net Rate base	=	$ 950,000	
X 15% ROI			
Annual Return	=	$ 142,500	/ 500 customers
Annual Return/customer	=	$ 285	

Under this scenario and assuming operating expenses were identical, which is rarely the case among the 141 SSU systems, the monthly difference in utility bills due solely to return on investment is $23.75 ($285/12) per customer. Of course, the System B customers could invest or

spend the $1,900 CIAC differential as they saw fit, but they would have to pay a higher return on the utility's investment in their monthly rates.

There are even greater CIAC disparities between the several SSU systems in this case. Establishing common service availability charges and, thereby, ignoring the actual capital costs to provide service to future customers is not the answer to the problem and will only serve to compound it. Each of the systems had its service availability rates set independently and most were separate entities. While CIAC might have been managed better historically, there is nothing unfair about the result when systems have stand-alone rates. The resulting differentials in CIAC and monthly rates are the result of utility management decisions ratified by the Commission. Presumably each utility customer considered both CIAC and monthly rates when purchasing a home. Each got what they bargained for and none is responsible for the rates of the other.

Requiring the subsidizing customers to pay uniform rates forces them to provide SSU with returns on "investment" "used and useful" in serving them typically exceeding 20, 50, and 80 percent, and in some cases over 300 percent as mentioned earlier.

By treating SSU as a single "system," the Commission will not technically allowed CIAC in rate base, but, rather will shift the revenue responsibility of systems with low levels of CIAC and/or high operating costs to systems with high levels of CIAC and/or low operating costs. In doing so, the Commission will shift the additional costs of serving some customers to the general body of water and wastewater customers, which is precisely what it refused to do in Action Group.

Shifting the costs of serving one group of customers to another is not only discriminatory because it causes the latter to pay more than their fair share, it is discriminatory because it results

in the utility and the Commission giving unlawfully preferential treatment to those customers who do not have to pay the costs of their services. This issue was directly addressed by the Florida Supreme Court in 1988 in the case of C.F. Industries v. Nichols, 536 So.2d 234, 238-239, where the Court said:

> In setting rates, the PSC has a two-pronged responsibility: rates must not only be fair and reasonable to the parties before the PSC, they must also be fair and reasonable to other utility customers who are not directly involved in the proceedings at hand. Standby rates which did not recover the cost-of-service would unfairly discriminate against other customers by requiring them to subsidize the standby service.

The statewide uniform rates requested by SSU are unlawful both because they force the subsidizing customers to pay excessive returns on the "investment" actually serving them and for operating costs not related to their service, but also because they result in unfairly discriminatory rates in favor of those customers who do not even pay for the costs of the utility services they are receiving. The Commission has no generalized statutory authority to "do good" in the regulation of utilities. Even if one assumes that the so-called "benefits" cited by SSU for adopting uniform rates exist, these benefits are not comprehended by the statute.

In City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (1973), the Florida Supreme Court held:

> Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, [citations omitted]. The Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities.

The Commission should reject the statewide uniform rates for these reasons and order SSU to implement the traditional stand-alone rates.

THE ADOPTION OF STATEWIDE UNIFORM RATES WILL RESULT IN A CONFISCATION OF CUSTOMERS' CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION, WITHOUT JUST COMPENSATION, AND THEREFORE WILL BE AN ILLEGAL TAKING UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS

Each of the Consumer Parties has paid some measure of CIAC when he or she first took service from SSU or its predecessor utility as a precondition to that service. As stated earlier, these payments reduce the utility's rate base on which it is allowed to earn a fair rate of return, and, thereby, necessarily reduce the customers rates. It is the law and it is recognized in the case law. Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237 (Fla. 1st DCA 1985), recognized that "the customer receives the benefit of his contribution in the form of lower rates because CIAC is deducted from the Company rate base." It is a formula, the more you pay up front, the less you pay in monthly rates. Unless, you get caught up in uniform rates.

All Consumer Parties have paid some CIAC, but Sugarmill Woods have paid the most, paying, on average, about $3,500 to finance the construction of the Sugarmill Woods water and wastewater systems. In part, the CIAC paid by Sugarmill Woods customers was paid as part of the sales price of the lots they built their homes on, and in part it was paid for directly to the utility in the form of service availability charges. All Consumer Parties paid reasonable service availability charges and they paid them, almost without exception, pursuant to tariffs approved by this Commission. Some of the other systems' customers, who will now benefit by lower rates under uniform rates, paid zero, or near zero, CIAC.

The Fifth Amendment of the Constitution of the United States provides that private property shall not be taken for public use without just compensation. The Florida Constitution, in Article X, Section 6, provides that private property shall not be taken except for a public purpose

and with "full compensation."

The Consumer Parties submit that their interest in their CIAC must be considered protected private property pursuant to Blumberg v. Pinellas County, Case No. 91-1255-CIV-T-17A, the Middle District of Florida, in which the Court relied upon Webb's Fabulous Pharmacies, Inc. V. Beckwith, 449 U.S. 155 (1980) and Henkels v. Sutherland, 271 U.S. 290 (1926). The gist of these cases is that:

> The Fifth Amendment's guarantee of just compensation for a governmental taking "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."

In this case, a similar taking to that found prohibited in Blumberg will take place, except that it will not even be for a "public purpose." Rather, if the Commission reimposes uniform rates it will have chosen to simply redistribute customer CIAC property from one subdivision's rate base to another by lumping them together for ratemaking purposes. Doing so, under the circumstances of this case, constitutes an impermissible taking of property in violation of both the Federal and State Constitutions.

SPECIFICALLY RETAINED POSITIONS

Marco Island retains the position that rate base should be reduced by $5,833,617 to reflect the actual cost of the Collier Pit purchase, to remove overhead allocations and to allocate a portion of the purchase price to non-utility property. Furthermore, Marco Island retains the position that SSU's rate base at Marco Island should be reduced by $1,319,227 and amortization expense by $293,162 to remove the effect deferred debits associated with the source of water supply project for the period 1992-93. SSU should not be allowed to transfer the Marco Island and Deltona sites out of their classifications as property held for future use, and, therefore, total

rate base should be reduced $235,885 to reflect retention of these properties as property held for future use.

Consumer Parties continue to agree with Public Counsel's position that negative acquisition adjustments should be recognized so that SSU only receives a return on its actual investment. For the Lehigh systems, a negative acquisition adjustment of $3,873,763 should be made to reflect the fact that SSU's corporate parent purchased all its Lehigh holdings from the Resolution Trust Corporation, including the water and sewer systems, for approximately 40 cents on the dollar. Concerned Citizens and East County continue to concur with Public Counsel's proposed adjustment that SSU's rate base at Lehigh be reduced to reflect adjustments to land held for future use and for the cost of the land and that the water rate base should be reduced by $122,035 and sewer by $272,123. Concerned Citizens and East County concur with Public Counsel's adjustment that the water and sewer rate bases and depreciation expense should be reduced to reflect K. Dismukes' adjustments on her schedule 38 that SSU's rate base at Lehigh be reduced to reflect non-used and useful lines constructed by Lehigh Acquisition Corporation. Furthermore, CIAC be imputed in association with assets constructed by Lehigh Corporation in the amount of $769,000 as reflected in the supplemental testimony of K. Dismukes.

SSU's proposed weather normalization clause should not be adopted

SSU's proposed split of 60%/40% on base facility charge and gallonage charges should not be approved. Rather, the split or allocation at each system or facility should be based on the relationship of fixed versus variable costs at each location and should be designed with the goal of allowing the base facility charge to recover the fixed costs at each location and the gallonage charge the variable costs of production at each location. Approval of this change would also tend

to dilute the conservation price signal of the BFC/gallonage rate structure by placing more of the revenue requirement in the base facility charge and less in the gallonage charge so that the customer has more control over his or her total bill through conservation.

It appears unlikely that the new raw water supply site at Marco Island will have production facilities in place during 1996 and, therefore, be used and useful during the test period. The cost of the entire 160-acre facility should be removed from rate base.

SSU's systems in this filing are not a "combination of functionally related facilities and land. With the exception of those few systems that are physically interconnected by pipes so that water or wastewater can be transmitted from one to the other, no systems are functionally related in a manner that operations at one plant have any impact on relevant service operations at another. SSU's attempts to "tie" its systems together through purchasing, accounting, and management operations, involve functions that neither involve land or facilities.

The Consumer Parties , except Concerned Citizens and East County, take the position that any rates or rate structure that require customers from any system to pay more than 5 percent more than their actual cost of service are unacceptable from a fairness and legal perspective. Current application of the proposed uniform rates would often have low-income customers subsidizing the utility services of high-income customers without any regard for their relative income levels. If the Commission finds that it has the legal authority and necessity to provide rate supports to truly needy customers, it should attempt to obtain funding from the state's general revenue fund or promote a lifeline assistance program similar to United Telephone's Lifeline Plan.

SSU's classifications of expenditures as to "growth", "regulatory", etc. are not well-founded and reasonable. Rather, SSU's classifications tend to shift most capital expenditures to

"regulatory mandate" to give the false impression that the money is being spent in conformance with environmental regulations.

It appears that a minimum of 600,000 gallon ground level storage tank is required at Sugarmill Woods to meet the requirements of Citrus County Ordinance No. 86-10. Furthermore, the correct wastewater treatment plant capacity to use for calculation of SSU's used and useful percentage at Sugarmill Woods is either 700,000 gallons per day as permitted by DEP, which would bring the used and useful calculation to 51.69 percent, or the 500,000 gallons per day established by the current DEP operating permit. In no case should the 400,000 gallons arbitrarily used by SSU in the MFRs be allowed.

The five year margin reserve is not appropriate for sewer plant and the three year margin reserve is not appropriate for water plant. The water plant at Sugarmill Woods has been at 100 percent used and useful since the 1991 test year and SSU has been using up fire protection reserve to cover growth. It appears doubtful, based on SSU's poor history in meeting construction projections, that the new water storage tank and service pumps will be completed at Sugarmill Woods in 1996 as forecast in SSU's MFR's.

CIAC has been imputed to cover the margin reserve for lines, water and sewer plant in the last two or more cases for the majority of systems involved in this case and there are no circumstances warranting a change from this practice.

It appears that SSU's sewer main extension charge of $280 under the heading of "present charges" been never been approved for Sugarmill Woods by PSC order and that it should not be allowed.

SSU should be required to make refunds of prepaid CIAC to Sugarmill Woods lot owners

who will have built a house on their lot as of the date of the PSC order in this case.

SSU should not be allowed to use a hydraulic analysis to determine the used and useful percentages for distribution lines at Pine Ridge, Citrus Springs, Marion Oaks and Sunny Hills.

SSU be required to use the five maximum days in the maximum usage month.

SSU's Price Elasticity program is not practical as a water conservation proposal, is inequitable and imposes too many hardships on low income customers.

Harbour Woods takes the position that SSU has exceeded the legal requirements for lead and copper contamination at its Beacon Hills water system in Duval County since at least late-1994 and that it has not fully met the requirements of DEP's educational rule requirement, to include placing the required warning on the bill in "large" type.

SSU should be required to use a "stand-alone" cost of debt calculation for Marco Island based on the 1990 and 1992 Series bonds issued by Collier County. Reflecting the lower cost rates of these bonds would result in a correct rate of 10.11 percent versus the system rate of 10.32 percent calculated by SSU. The savings to Marco Island customers would be $99,315 annually in lower interest costs. SSU has not correctly calculated its 1996 water revenues at Marco Island, but, rather, has understated its revenues. The price elasticity used by SSU for Marco Island understates the sales and resulting revenues SSU is likely to receive from its customers at Marco Island. Historical data do not support the variations claimed by SSU to necessitate the weather normalization clause proposed by SSU on Marco Island. Additionally, the clause would likely confuse customers at Marco Island and at other systems. Lastly, the clause is merely a mechanism for shifting revenue or "business risks" from the utility, or business, on to the backs of its customers. The amortization of $1,465, 810 of expense for the Marco Island water

supply studies are not appropriate. Reasonable and prudent costs associated with these studies should be capitalized and depreciated over a period of forty years.

SSU's calculation for used and useful percentages for water and sewer lines at Marco Island is not correct. SSU's claim of 100 percent used and useful for the distribution and collection lines is based solely on the PSC's erroneous decision in the 1992 rate case. Development at Marco Island is less than fifty percent built out, with the result that current SSU customers there are paying for SSU's investment to serve future customers. SSU needs to develop appropriate CIAC charges and AFPI charges and be granted a used and useful calculation of less than fifty percent that appropriately reflects the capital requirements of its existing customers. As discussed earlier in this brief, this tactic by SSU is not acceptable at any system that has a lower calculated "lot count" used and useful percentage than previously approved by the Commission in an earlier case.

The $209,000 of Minnesota Power's shareholder expenses allocated to SSU's customers is not appropriate and should be removed. SSU's inclusion of the reuse projects on Marco Island as 100 percent used and useful in the wastewater rate base are not appropriate.

The Commission has no statutory authority to depart from cost of service considerations in rate setting in order to affect water conservation. Properly structured Base Facility Charge and separate gallonage or usage charge rates may encourage water conservation by properly reflecting the costs of consuming the water in the gallonage charge. This goal can only be met if the gallonage charge accurately reflects the percentage of costs associated with the variable costs of producing the water. Differing consumption and cost data from plant site to plant site dictate that the split of revenue responsibility between the base facility charge and the

gallonage charge should vary from system to system or plant site to plant site. Furthermore, the concept of uniform rates totally defeats the ability of the Base Facility Charge/Gallonage Charge rate structure to encourage conservation by completely masking the "price signal" of the true cost of producing the water at each location. The result is that some high cost areas with a great necessity for water conservation will actually be encouraged to consume more water because of the subsidies inherent in uniform rates, while others will be forced to utilize less because of the subsidies they are forced to pay. Charging each system stand-alone rates designed to recover the actual revenue responsibility for that plant through the Base Facility Charge/Gallonage Charge Methodology is the best way to legally affect water conservation.

The Commission has no statutory basis for considering any "goals and objectives" that are not related to the recovery of the legitimate costs of providing service at each plant location from the customers being served by each system. The rates must be "fair and reasonable and not unduly discriminatory." For the rates to be so they must be set on a stand-alone basis and, thereby, be designed to recover the return on investment and the reasonable and prudent expenses necessary to provide service at each location, along with the allocation of truly "common costs" through a reasonable cost allocation methodology. It is essential that the return on equity and the overall return at each location equal the returns approved for the utility by the Commission. The "goals and objectives" business appears to merely be another attempt of staff to provide a basis for again recommending uniform rates or whatever proposal they have in mind.

Plant capacity charges should be established on a system-by-system basis irrespective of what the levels of CIAC are at each site.

CONCLUSION

For the reasons stated above, as well as for the reasons contained in the brief of the Office of the Public Counsel, the Commission should reduce the revenue requirement of SSU to the lowest possible level and then approve rates for SSU on a stand-alone, cost-based, rate structure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail this 10th day of June, 1996 to the following persons:

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