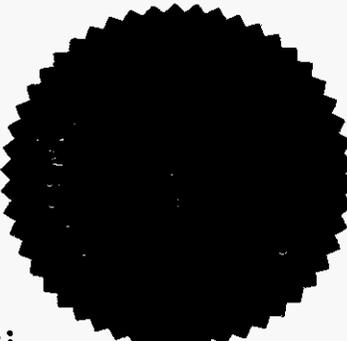


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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Application for rate increase in Brevard
Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake,
Marion, Martin, Nassau, Orange, Osceola, Pasco,
Putnam, Seminole, Volusia, and Washington Counties
by Southern States Utilities, Inc.; Collier County
by Marco Shores Utilities (Deltona); Hernando County
by Spring Hill Utilities (Deltona); and Volusia
County by Deltona Lakes Utilities (Deltona).

DOCKET NO. 920199-WS



BEFORE: CHAIRMAN SUSAN F. CLARK
COMMISSIONER J. TERRY DEASON
COMMISSIONER JULIA L. JOHNSON
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 37

DATE: Tuesday, June 11, 1996

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Notary Public in and for the
State of Florida at Large

BUREAU OF REPORTING

RECEIVED 6-17-96

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FPSC-RECORDS/REPORTING

1 PARTICIPATING:

2 JOE McGLOTHLIN, representing Marion Oaks Civic
Association and the City of Keystone Heights.

3 DAVID HOLMES, representing Burnt Store Marina.

4 KENNETH A. HOFFMAN, BRIAN ARMSTRONG and FOREST
5 LUDSEN, representing Southern States Utilities.

6 MICHAEL B. TWOMEY, representing Citrus County.

7 MS. FOX, representing Sugar Mill Woods.

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STAFF RECOMMENDATIONS

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12 Participation: Reconsideration of decision on remand -
Participation dependent upon vote on Issues Nos. 1 and 4.
13 Issue 1: Recommendation that the request for oral argument
on the petition to intervene, filed by the City of Keystone
14 Heights, the Marion Oaks Homeowners Association, and the
Burnt Store Marina, be denied.

15 Issue 2: Recommendation that the petition to intervene
filed by the City of Keystone Heights, the Marion Oaks
Homeowners Association, and the Burnt Store Marina, be
16 denied.

17 Issue 3: Recommendation that the motion to file memorandum
out of time, filed by the City of Keystone Heights, the
Marion Oaks Homeowners Association, and the Burnt Store
18 Marina, be denied if the Commission approves Issue No. 2.

19 Issue 4: Recommendation that SSU's request for oral
argument should be permitted at the agenda conference, but
argument should be limited to five minutes for each party.

20 Issue 5: Recommendation that the record in Docket No.
920199-WS should not be reopened. Further, neither a refund
21 nor a surcharge should be ordered.

22 Issue 6: Recommendation that, in addition to the decisions
made outlined in staff's memorandum dated May 30, 1996, the
Commission should reaffirm and incorporate the other
23 decisions made in Order No. PSC-95-1292-FOF-WS and at the
February 20, 1996 Agenda Conference, in the order
24 memorializing the Commission's decision.

25 Issue 7: Recommendation that, if the Commission orders that
refunds and/or surcharges are appropriate, SSU should submit
within 14 days of the date of the Agenda Conference, the

1 information as detailed below for the purposes of
2 verification. The refunds and/or surcharges should cover
3 the period between the initial effective date of the uniform
4 rate up to and including the date the interim rates in
5 Docket No. 950495-WS were implemented. Consistent with the
6 GTE decision, customers not receiving service during this
7 time period should not receive a refund nor be surcharged.
8 Any refunds should be made with interest pursuant to Rule
9 25-30.360, F.A.C., and any surcharges should be assessed
10 with the appropriate amount of interest. Refunds should be
11 made as a credit to the customers' bills. SSU should be
12 required to file refund reports pursuant to Rule
13 25-30.360(7), F.A.C. SSU should apply any unclaimed refunds
14 as contributions in aid of construction (CIAC) for the
15 respective plants, pursuant to Rule 25-30. 360(8), F.A.C.
16 Issue 8: Recommendation that this docket be closed.
17 However, if the Commission determines that refunds and/or
18 surcharges are appropriate in Issue 5, the docket should be
19 administratively closed upon staff's verification that the
20 utility has completed the required refunds and/or collected
21 the appropriate surcharges. Further, the utility's bond can
22 be released upon staff's verification that the refund has
23 been completed.

13 CERTIFICATE OF REPORTER ~

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P R O C E E D I N G S

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CHAIRMAN CLARK: Item Number 37.

MS. JABER: Commissioners, Item Number 37 is staff's recommendation addressing the Commission's reconsideration on its own motion of its remand --

CHAIRMAN CLARK: Just a minute. Mr. Hansen, I know people are coming in, and we can't hear while they are coming in, so we're going to wait until everybody gets in, but if you would let them know that we are waiting on them.

Go ahead, Ms. Jaber.

MS. JABER: Commissioners, Item Number 37 is staff's recommendation addressing the Commission's reconsideration on its own motion of its decision on remand of Order Number 930423 in light of the recent GTE decision.

Just to give you a very brief outline of events for purposes of this recommendation, on October 19th, 1995, Order Number 95-1292 was issued addressing the remand by ordering SSU to implement a modified stand-alone rate structure and by requiring a refund. At the February 20th, 1996 agenda reconsideration of that order was denied. Before we could issue the order on reconsideration, the Supreme Court of Florida issued the GTE Florida, Inc. versus Clark decision. In this

1 recommendation, staff has identified eight issues and
2 we recommend that we go issue-by-issue.

3 CHAIRMAN CLARK: Ms. Jaber, just so I'm clear, now
4 we need to take up -- do we need to take up Issue 1 and
5 then 4, or do you want to just go in the order?

6 MS. JABER: Issue 1, 2, and 3 are related. I
7 really do think we can go in the order.

8 CHAIRMAN CLARK: All right. Commissioners, Item
9 Number 1 -- Issue Number 1. Discussion? Is there a
10 motion?

11 COMMISSIONER DEASON: I move we deny staff.

12 CHAIRMAN CLARK: Is there a second?

13 COMMISSIONER JOHNSON: This is on allowing them
14 oral argument?

15 CHAIRMAN CLARK: No. This is --

16 COMMISSIONER JOHNSON: Allowing key --

17 CHAIRMAN CLARK: Yes, this is the petition for
18 oral argument on the petition to intervene.

19 COMMISSIONER JOHNSON: Okay. So, it's not on the
20 petition itself?

21 COMMISSIONER DEASON: No. My motion is to deny
22 staff, which would allow oral argument.

23 COMMISSIONER JOHNSON: Oral argument on the
24 petition, but not -- and then we will hear that and
25 then Issue 2 would be whether or not we grant it?

1 COMMISSIONER DEASON: Yes.

2 CHAIRMAN CLARK: Correct.

3 COMMISSIONER JOHNSON: I can second that.

4 CHAIRMAN CLARK: There is a motion and a second on
5 the recommendation that the oral argument be denied.
6 So the effect of the motion is that oral argument on
7 the petition to intervene be granted. All those in
8 favor say aye.

9 COMMISSIONER GARCIA: Aye.

10 COMMISSIONER DEASON: Aye.

11 COMMISSIONER JOHNSON: Aye.

12 CHAIRMAN CLARK: Opposed, nay.

13 COMMISSIONER KIESLING: Nay.

14 CHAIRMAN CLARK: Nay.

15 The petition to have oral argument is granted. I
16 would indicate -- Commissioners, is there a preference
17 as to time? I would think five minutes ought to do it.

18 COMMISSIONER DEASON: I think five minutes would
19 be a maximum and it should be shorter than that.

20 MR. MCGLOTHLIN: It's my motion and that will be
21 ample, Commissioners.

22 CHAIRMAN CLARK: Go ahead, Mr. McGlothlin.

23 MR. MCGLOTHLIN: Commissioners, my name is Joe
24 McGlothlin. I represent the Marion Oaks Civic
25 Association and the City of Keystone Heights, both of

1 whom are represented by me here today.

2 Commissioners, obviously the Commission has the
3 discretion to waive its five-day rule governing the
4 time of interventions. The Commission did so recently,
5 and it did so to allow these same parties the ability
6 to intervene as full parties in SSU's pending rate
7 case. It did so in recognition of the efforts that the
8 Office of Public Counsel had made to ensure that all
9 different customer perspectives were adequately
10 represented in that case. You have the discretion.
11 I'm going to give you three reasons why you should use
12 that discretion and grant our petition to intervene in
13 this proceeding.

14 First of all, the same consideration that led you
15 to grant our petition to intervene in the rate case is
16 present here. We have filed a petition to intervene in
17 furtherance of the same initiative of Public Counsel to
18 ensure that all customer perspectives are represented.
19 Following the issuance of the GTE decision, the Office
20 of Public Counsel recognized that it could not
21 zealously represent the customer views on the issues
22 raised by your decision to reconsider your refund order
23 on your own motion. For that reason, you should allow
24 the parties full party status so that their rights can
25 be protected.

1 Secondly, the second reason you should use your
2 discretions is because the GTE decision and your
3 decision to reconsider the refund order on your own
4 motion essentially is a new deal. As a matter of fact,
5 in response to a letter I wrote on procedural points,
6 SSU referred to the Commission's de novo review of
7 certain decisions in this case. And in a very real
8 sense, you're starting over and it's appropriate to use
9 your discretion to allow affected parties the
10 opportunity to intervene.

11 Thirdly, in your decision you recognized that the
12 impact of the GTE decision on the outcome of this case
13 raises very important, very significant issues. I
14 think the fact that you invited parties to submit
15 briefs on the question indicates that the Commission
16 wants to be fully informed and apprised of all
17 arguments and all points of view. It's appropriate
18 then that you allow intervention to accomplish that
19 end.

20 And in that vein, I'd like to point out that while
21 in its recommendation the staff recommends that you
22 rigidly apply the intervention rule, it also indicates
23 that on remand the usual procedure is to deny parties
24 participation in the agenda conference. Staff
25 recognizes that these issues are significant and for

6263

1 that reason recommends that you depart from the usual
2 procedure and allow parties the opportunity to address
3 you for five minutes each. Were that procedure absent,
4 our intervention gets you where you want to go.
5 Consider from whom you would hear if our petition to
6 intervene is not granted. You would hear from those
7 customers who are interested in getting a refund; you
8 would be hearing from the utility, who, if there is a
9 refund, is very interested in imposing a surcharge, but
10 you would not hear directly from the class of customers
11 who are exposed to the possibility of a surcharge. So,
12 to achieve your objective of becoming fully informed
13 and to protect the interests of customers who would not
14 otherwise be represented given this new deal, we ask
15 that you grant party status. Thank you.

16 CHAIRMAN CLARK: Thank you, Mr. McGlothlin. It
17 was your motion, is that correct, on behalf of
18 Keystone, Marion Oaks?

19 MR. MCGLOTHLIN: I'm speaking on behalf of Marion
20 Oaks and the City of Keystone Heights. There was a
21 joint motion also for the Burnt Store customers who are
22 represented today, also. This is David Holmes who is
23 the attorney for Burnt Store.

24 CHAIRMAN CLARK: Excuse me?

25 MR. MCGLOTHLIN: This is David Holmes, who is here

1 on behalf of Burnt Store.

2 MR. HOLMES: We are joint movants in the petition
3 to intervene, and I have some brief comments in
4 addition to those that were just made by Mr.
5 McGlothlin, if I could briefly address the Commission.

6 CHAIRMAN CLARK: Go ahead.

7 MR. HOLMES: In addition to all of the factors
8 that were just mentioned, I think there is at least one
9 other good reason why the petition to intervene should
10 be granted. This is ultimately an issue of
11 representation. Public Counsel has made the
12 determination that it cannot represent groups of
13 customers with competing interests. SSU in its
14 response to our petition has rightfully also addressed
15 that issue and taken the stance that representation
16 exists because of the prior opposition of OPC.
17 However, at this point where now the refund surcharge
18 issue is front row center, it is crucial that those
19 customers who are potentially impacted by the proposed
20 surcharge have representation as we go forward on
21 remand. And for that reason, we would urge the
22 Commission to allow the intervention. Thank you.

23 CHAIRMAN CLARK: Okay. Now, as I recall the
24 companies and the individuals that already have party
25 status were in opposition to this. Ms. Fox, is that

1 correct? Have you filed anything in opposition? Did
2 you file anything?

3 MR. FOX: Yes, I did. I filed a response.

4 CHAIRMAN CLARK: All right. Mr. Hoffman, you go
5 ahead, and then we will hear from Mr. Twomey and then
6 Ms. Fox.

7 MR. HOFFMAN: Thank you, Madam Chairman. I'm
8 Kenneth A. Hoffman, representing Southern States
9 Utilities. With me is Brian Armstrong, Mr. John
10 Cirello, the President of the company, and Mr. Forest
11 Ludsen, the Vice President of the company.

12 Very quickly, Madam Chairman, one of the things
13 Mr. McGlothlin raised was the significance of the
14 issue. And, of course, the potential significance of
15 the issue provides no legal basis for intervention and
16 he certainly could not cite you to any authority which
17 would support that contention.

18 Secondly, the Public Counsel has previously filed
19 a memorandum of law with you, and has appeared before
20 you on the remand stage of this proceeding, opposing a
21 surcharge if refunds are required. So, the fact is
22 those positions that are advocated by Mr. McGlothlin
23 and Mr. Holmes have already been advocated by the
24 Office of Public Counsel before you.

25 From a historical standpoint, Madam Chairman, I

1 think it's worth mentioning that since the final
2 hearing in this rate case was concluded, you have had a
3 number of petitions to intervene all addressing rate
4 structure issues, all of which have been denied.
5 Interestingly enough, the most recent one came from
6 Keystone, who is back again. Keystone has asked to
7 come in, Keystone has asked to intervene after the
8 Citrus County decision was made. They filed a petition
9 to intervene back in January of 1996, and you said no,
10 you denied it. They didn't ask for reconsideration.
11 The mere fact that they have recently retained counsel
12 is meaningless.

13 Now one of the things they have said in their
14 petition is, "Well, this is kind of like the rate case
15 in 950495 where you let us intervene." Well, it's not.
16 In the rate case, a motion was filed by Mr. Shreve's
17 office asking for separate counsel for different
18 customer classes. Well, you denied that motion. You
19 denied that motion because you found there was no
20 statutory authority to require the company to pay for
21 the lawyers. Well, he remedied that defect, so you let
22 them come in and you let them come in before the
23 hearing was concluded. This, obviously, is a different
24 situation. The hearing has been over for about three
25 years. They are coming in very late, just like the

1 other petitioners who have raised rate design related
2 issues.

3 The only other things I would add, Madam Chairman,
4 is that their petition relies on portions of Chapter
5 366 in support of their intervention. And, obviously,
6 Chapter 366, which is the electric and gas statute, has
7 nothing to do with this case.

8 The other is they contend in their petition that
9 the potential conflict between customers when you look
10 at a no refund situation versus a refund plus surcharge
11 situation didn't arise until the GTE Florida decision.
12 That's wrong. The GTE Florida decision was issued on
13 February 29th of 1996. This potential conflict that
14 they talk about between a no refund situation versus a
15 refund plus surcharge situation was actually raised by
16 Southern States in the motion for reconsideration that
17 we filed on November 3rd of 1995, where we said to you,
18 "Commissioners, you cannot impair our revenue
19 requirement. That is the law of the case. So, while
20 we think no refunds are appropriate, if you do order
21 refunds, then we think you need to also order the
22 revenue recoupment, the surcharge that we propose in
23 our motion for reconsideration." So this issue was
24 raised back in November of 1995.

25 We oppose their intervention. Thank you.

1 CHAIRMAN CLARK: Mr. Twomey.

2 MR. TWOMEY: Yes, ma'am. Madam Chairman,
3 Commissioners, very briefly. I'm here on behalf of
4 Citrus County.

5 Mr. McGlothlin filed a letter with you several
6 days ago in which he noted that I agreed that I was
7 unaware when I filed my opposition to their
8 intervention that the Public Counsel had extended
9 funding to this case for Mr. McGlothlin and his clients
10 in addition to the new rate case. That's correct. It
11 doesn't, however, affect Citrus County's opposition to
12 their intervention in this case.

13 As pointed out by Mr. Hoffman, other parties have
14 for some three years plus now, I think it is, sought
15 intervention from this Commission in this docket. What
16 are you going to do now? Are you going to go back and
17 call Senator Ginny Brown-Waite and allow her to
18 intervene now, Spring Hill. There are a myriad of
19 other customers of this utility who have sought
20 intervention over the last 2-1/2 or three years and
21 they were denied.

22 It is simply too late, as Mr. Hoffman pointed out.
23 The granting of the intervention after the start of a
24 hearing but during the conduct of the hearing is one
25 thing. Granting intervention fully three years after

1 the conclusion of a hearing is another thing entirely.
2 It is too late. We would ask that you deny the
3 petition. Thank you.

4 CHAIRMAN CLARK: Ms. Fox.

5 MS. FOX: I don't have anything further to add.

6 CHAIRMAN CLARK: Okay. Commissioners, do you have
7 questions? Does staff have anything that they want to
8 add at this point?

9 MS. JABER: There is nothing we need to add at
10 this point.

11 CHAIRMAN CLARK: Okay. We are on Issue 2,
12 Commissioners.

13 COMMISSIONER JOHNSON: Who do you represent, Mr.
14 McGlothlin?

15 MR. MCGLOTHLIN: I represent the Marion Oaks Civic
16 Association --

17 CHAIRMAN CLARK: Mr. McGlothlin, you need to make
18 sure the light is off.

19 MR. MCGLOTHLIN: I represent the Marion Oaks Civic
20 Association and the City of Keystone Heights.

21 COMMISSIONER JOHNSON: And I guess staff can help
22 me out because I'm confused, apparently. When we
23 allowed them to intervene with respect to what in that
24 last proceeding, Marion --

25 MS. JABER: In the pending rate case, we limited

1 the intervention to the rate structure and service
2 availability issues. And I think that the Chairman was
3 very specific in recognizing that they were limited to
4 those two issues. And based on the circumstances of
5 the case and that the hearing was not over yet and that
6 Mr. Shreve had filed a motion for alternate counsel and
7 had only recently obtained the funding.

8 COMMISSIONER JOHNSON: Okay. And that's going
9 forward on that particular case. This is a different
10 matter.

11 MS. JABER: This is completely different.

12 CHAIRMAN CLARK: Commissioners, is there a motion
13 on Issue 2?

14 COMMISSIONER DEASON: I move we deny staff on
15 Issue 2.

16 CHAIRMAN CLARK: Is there a second? Hearing no
17 second, is there a motion to approve staff on Issue 2?

18 COMMISSIONER KIESLING: I move staff on Issue 2.

19 CHAIRMAN CLARK: Is there a second?

20 COMMISSIONER GARCIA: Second.

21 CHAIRMAN CLARK: All those in favor, say aye.

22 COMMISSIONER KIESLING: Aye.

23 CHAIRMAN CLARK: Aye.

24 COMMISSIONER JOHNSON: Aye.

25 COMMISSIONER GARCIA: Aye.

1 CHAIRMAN CLARK: Opposed, nay.

2 COMMISSIONER DEASON: Nay.

3 CHAIRMAN CLARK: Okay. We also need to vote on
4 Issue 3, is that correct?

5 COMMISSIONER KIESLING: I move staff.

6 CHAIRMAN CLARK: All those in favor -- is there a
7 second?

8 COMMISSIONER JOHNSON: Second.

9 CHAIRMAN CLARK: All those in favor say aye.

10 COMMISSIONER KIESLING: Aye.

11 COMMISSIONER JOHNSON: Aye.

12 CHAIRMAN CLARK: Aye.

13 COMMISSIONER GARCIA: Aye.

14 CHAIRMAN CLARK: Opposed, nay.

15 COMMISSIONER DEASON: Well, I'm in a quandary.
16 Obviously, if they don't have intervention status, we
17 can't consider the memorandums, so I'm in support of
18 that. But that is recognizing the fact that I thought
19 they should be given status, so I vote with the
20 majority on Issue 3.

21 CHAIRMAN CLARK: If they don't have status, we
22 shouldn't consider their memorandum, but you would
23 allow them status.

24 COMMISSIONER DEASON: Right. So, I will vote with
25 the majority on Issue 3 with that understanding.

1 CHAIRMAN CLARK: Okay. We are on Issue Number 4.

2 MS. JABER: In Issue 4, staff recommends that each
3 party should be permitted five minutes oral argument.
4 This is a departure from what we have recommended
5 before and what the Commission has done in the past,
6 because it is not so clear anymore what the sides are,
7 so we are recommending five minutes per party.

8 COMMISSIONER DEASON: Move approval of staff.

9 COMMISSIONER JOHNSON: Second.

10 CHAIRMAN CLARK: All those in favor, say aye.

11 COMMISSIONER DEASON: Aye.

12 COMMISSIONER GARCIA: Aye.

13 COMMISSIONER KIESLING: Aye.

14 CHAIRMAN CLARK: Aye.

15 COMMISSIONER JOHNSON: Aye.

16 CHAIRMAN CLARK: Opposed, nay.

17 Now, just so I'm clear, who should go first?

18 MR. ARMSTRONG: Madam Chair, if we could address
19 that, as well. Since we are the party with the burden
20 of proof in this case, we would request that if it's
21 going to be five minutes per side, that we at least be
22 given two minutes in rebuttal, if necessary. Given the
23 fact that five minutes of our side will give ten
24 minutes, at least, to the other side.

25 MS. JABER: And that has been consistent with the

1 way you have done it in the past. You have allowed the
2 utility to begin.

3 CHAIRMAN CLARK: But I think what he is suggesting
4 is there are two parties here --

5 MR. ARMSTRONG: Five, five, five, five, two.

6 CHAIRMAN CLARK: -- and each one of those are
7 going to get five. And they are on one side and they
8 would -- well, I'm not sure you could categorize them
9 as being completely opposite each other, but -- so,
10 they're getting five while another side is getting ten.
11 I would suggest that I think five is going to be
12 adequate, but we will give you time for rebuttal.

13 MR. ARMSTRONG: I will only take it if I need it.

14 CHAIRMAN CLARK: I think we have been more than
15 fair in allowing people to completely address these
16 issues. So, I would note on the other arguments we
17 gave them more than five minutes. We do have to be
18 mindful, however, we still have a full agenda. With
19 that, Mr. Armstrong, go ahead.

20 MR. ARMSTRONG: Thank you.

21 CHAIRMAN CLARK: And then, Mr. Twomey, should we
22 hear from you next and then Ms. Fox?

23 MR. TWOMEY: I think it would be better if you go
24 with Ms. Fox, and I will be last.

25 CHAIRMAN CLARK: All right.

1 MR. ARMSTRONG: Good afternoon, Commissioners. My
2 name is Brian Armstrong. In addition to Ken Hoffman,
3 we also have John Cirello, our company's president, and
4 Forrest Ludsen, a vice president with me today.

5 We would like to begin our presentation by reading
6 a couple of quotes from the GTE Florida decision.
7 Quote, "We view utility ratemaking as a matter of
8 fairness. Equity requires that both ratepayers and
9 utilities be treated in a similar manner." A second
10 quote, "It would clearly be inequitable for either
11 utilities or ratepayers to benefit, thereby receiving a
12 windfall from an erroneous PSC order." The
13 Commission's legal obligation to treat both Southern
14 States and our customers fairly when fashioning a
15 remand remedy could not be more clearly stated.

16 Southern States agrees with the staff's
17 recommendation in large part. We note that staff
18 reiterates the primary recommendation it made to the
19 Commission back in August of 1995, no refund. The
20 staff decision pays appropriate deference to the
21 Florida Supreme Court's GTE Florida decision which
22 rejects the waiver, stay and risk arguments this
23 Commission has heard before and to some extent agreed
24 with in the past. Perhaps of greater significance is
25 the staff's emphasis on the fact that Southern States

1 revenue requirements as lawfully established by this
2 Commission in 1993, were left intact by the Court of
3 Appeals. The single challenge to the Commission's
4 revenue determination was rejected by the court.
5 Simply put, the Commission's determination of Southern
6 States' revenue requirements remains the law of the
7 case, and nothing can be done now which would deprive
8 Southern States of the opportunity to obtain that
9 revenue.

10 If the Commission adopts the staff recommendation,
11 an appeal is possible. In light of a potential appeal,
12 Southern States requests that the Commission agree to
13 incorporate into this proceeding the record from Docket
14 Number 930945. As the Commission will recall, in that
15 docket, the Commission determined that Southern States'
16 land and facilities statewide are functionally related
17 so as to constitute one system.

18 The Commission staff has recognized that there is
19 nothing in the Court of Appeals' decision which would
20 prohibit the Commission from reopening the record.
21 And, in fact, the Commission has broad discretion in
22 its handling of such matters.

23 We all know that this Commission's rate structure
24 was reversed not only basis argued by the parties or
25 their counsel, but because the appeals court on its own

1 initiative created a new standard for determining when
2 a uniform rate structure is appropriate. That standard
3 requires a functional relationship. The functional
4 relationship finding is all that was missing from the
5 Commission's final order in this case. Since the
6 Commission already made this finding in June of 1995,
7 by incorporating the record from that case in this
8 record, the Commission will provide further
9 substantiation of the fairness of a no refund decision.
10 Therefore, we request that the record be reopened
11 solely to incorporate the record from Docket Number
12 930945 as further support for the staff's
13 recommendation.

14 Staff also discussed the possibility of refunds
15 with surcharges. By way of clarification, not
16 criticism, Southern States notes that staff
17 mischaracterizes the surcharge as a back-billing
18 situation. The surcharge charge is not a back-billing
19 for past expenses. Past expenses were incurred and
20 Southern States already recovered those expenses from
21 customers. The surcharge, if ordered by the
22 Commission, would be a method of collecting from
23 customers a current refund expense prospectively based
24 on their future consumption. It would not constitute a
25 back-billing situation, and under the GTE Florida

1 decision, would not constitute retroactive ratemaking.

2 Also, Southern States requests that the Commission
3 accept into the record the information contained in the
4 sworn affidavit of Forrest Ludsen, which is attached in
5 the appendix to our brief. This information would
6 provide record support for the refund and surcharge
7 methodology which is largely consistent with that
8 contained in the staff recommendation. The only
9 material difference between the method set forth in the
10 affidavit and the staff's mechanism is the length of
11 the refund and surcharge recovery period. Staff
12 suggests a period of approximately 24 months or 28
13 months. Mr. Ludsen proposed 48 months. Southern
14 States continues to support the longer 48-month period
15 to reduce the rate impact on customers if the
16 Commission orders a refund and surcharge.

17 Finally, Southern States requests that if the
18 refund and surcharge is to be required, the period for
19 calculating these amounts be cut off at June 19th,
20 1995, the date that the Commission originally voted
21 that Southern States' facilities statewide were
22 functionally related.

23 There is no reason to increase the rate impact of
24 the refund and surcharge by ignoring that Commission
25 finding. The stay imposed by the counties' appeal of

1 that order stays the effectiveness of the order such
2 that the Commission cannot assert jurisdiction in those
3 counties that are affected, but it does not require the
4 Commission to ignore the underlying findings.

5 To conclude, Southern States urges adoption of
6 staff's recommendation. And we thank you for your time
7 and attention.

8 COMMISSIONER DEASON: Let me ask a question at
9 this point. Mr. Armstrong, you indicated, and I think
10 my notes are correct, that the court's decision that
11 there was no finding of functional relatedness was the
12 only thing, quote, unquote, "only thing missing," and
13 that if the Commission had made that finding, well,
14 then everything would have been fine and the uniform
15 rates would have been upheld.

16 MR. ARMSTRONG: Right.

17 COMMISSIONER DEASON: Well, as I recall the
18 court's decision, and I may be incorrect, is they
19 didn't reach any of those other issues because they
20 said, "Because of this deficiency concerning a lack of
21 finding of functional relatedness, we don't have to
22 address the other issues that have been raised
23 concerning the appropriate rate structure." Now, which
24 is it?

25 MR. ARMSTRONG: That's a matter of judicial or

1 appellate review. The courts will not address
2 additional issues if they find a reason, particularly a
3 reason of their own, to do a reversal. It's very, very
4 infrequent that they will find a reason of their own to
5 do this. It's an extraordinary circumstance that has
6 occurred here. And it is a circumstance that gives
7 further support for the reopening of the record, since
8 nobody had any advance notice that this standard would
9 be applied in this situation.

10 COMMISSIONER DEASON: Well, I think you're missing
11 the point of my question. Because you go on in your
12 argument to say that if there is to be a refund, that
13 it should be limited to the point to where the
14 Commission made a decision of functional relatedness.
15 And I guess my question in trying to tie the two points
16 together is that the court really didn't say that
17 everything else is fine if there had been a finding of
18 functional relatedness. I think the court said that
19 there was not a finding of functional relatedness,
20 therefore, the uniform rate structure is not
21 appropriate and we don't even have to address the other
22 issues that have been raised on appeal by other parties
23 concerning the appropriateness of the rate structure.

24 MR. ARMSTRONG: I think, you know, as a lawyer we
25 all can read into orders in a number of ways. I don't

1 have the specific language before me. But Southern
2 States' reading of that case, and I believe it's an
3 accurate reading, would be that the court stated that
4 Southern States cannot implement the uniform rates
5 until there is a finding that all the service areas
6 that are going to be part of that uniform rate are
7 functionally related. That's our sole reading of that
8 decision.

9 CHAIRMAN CLARK: Let me state his question a
10 little bit differently and maybe get to the point.
11 Even if we found it was -- if we go back and we assume
12 that we find it's functionally related, will the court
13 then have the opportunity to address the other issues,
14 the other basis on which the petitioners alleged it was
15 unlawful, one of those being lack of notice? And I
16 think that is a concern the Commissioner has, is even
17 if we go back and do this are we going to solve this
18 case once and for all, given the fact that they said,
19 "We don't have to reach those other decisions because
20 this is dispositive." If we cure that defect, are they
21 going to come back and say, "Well, that may be right
22 but, you know, you didn't do notice and things like
23 that."

24 MR. ARMSTRONG: Of course, I can't be a
25 prognosticator of what the court would do. Is it a

1 possibility that the court could look at those other
2 issues? I would have to suggest that it is a
3 possibility. Given what they did in the first instance
4 here, I would say that anything is a possibility at
5 this point in time. You know, I can't surmise as to
6 what might happen.

7 CHAIRMAN CLARK: I think if we turn the question
8 to Mr. Twomey, and if we did that, certainly, they
9 would raise those issues again on appeal.

10 MR. ARMSTRONG: Well, there was a discussion about
11 competent substantial evidence -- not a discussion, a
12 reference. But, again, as lawyers are aware, that
13 that's a tool. Judges don't like to be reversed,
14 either. And that's a tool that judges use not to be
15 reversed before a higher court. Whether that has any
16 significance or would play in the court's mind, you
17 know, we don't know that.

18 CHAIRMAN CLARK: Ms. Fox.

19 COMMISSIONER JOHNSON: Can I ask him another
20 question?

21 CHAIRMAN CLARK: I'm sorry, go ahead.

22 COMMISSIONER JOHNSON: Or are we going to do it at
23 the end?

24 CHAIRMAN CLARK: We will have an opportunity for
25 questions at the end, but if you feel you need to ask

1 it now because you might forget it or it's consistent
2 with what we are discussing, by all means, go ahead.

3 COMMISSIONER JOHNSON: I don't know how consistent
4 it is, but it was something that Mr. Armstrong raised
5 in his argument. And he stated that the GTE case was
6 controlling with respect to the waiver, stay and risk
7 arguments made, I guess, by the Commission. Could you
8 elaborate on how the GTE case is applicable to the risk
9 argument raised by the Commission? And more
10 specifically in its language that I know you all cited
11 in your order. The first order that we issued where we
12 stated -- and that was Order 93-1788-FOF-WS, where we
13 stated that, "We are concerned that the utility may not
14 be afforded its statutory authority to earn a fair rate
15 of return, whether it implements the final rates and
16 loses the appeal or does not implement final rates and
17 prevails on appeal. Since the utility has implemented
18 the final rates and has asked to have the stay lifted,
19 we find that the utility has made the choice to bear
20 the risk of loss that may be associated with
21 implementing the final rates pending the resolution of
22 the appeal." And there is more discussion in the
23 paragraphs before that and after that. I'm wondering
24 if that is the provision that you are suggesting is
25 somehow controlled by GTE.

1 MR. ARMSTRONG: It is directly. What I was
2 referring to is the fact that subsequent to the final
3 order -- in the discussions, the reconsideration made
4 by Southern States of the order, the refund order back
5 on October 19th, the Commission did adopt to some
6 extent the arguments from other counsel. And you cited
7 one argument that the Commission appears to have
8 adopted. What I'm saying, GTE Florida, the situation
9 there was that the utility came in for a rate increase.
10 The Commission denied that rate increase, gave a rate
11 decrease. GTE Florida did not agree with the rate
12 decrease and argued a number of issues, several of
13 which were revenue requirement issues. The court
14 reversed the Commission's denial of that revenue
15 requirement. The parties then came before the
16 Commission. I believe the Commission staff at that
17 time didn't support this argument that GTE Florida
18 should have come in and asked for a stay, asked to
19 recover those dollars that it was suggesting were
20 improperly denied. They didn't do that. We are not
21 going to give them to them now. The court rejected
22 that argument.

23 In our case, we asked for the dollars and we got
24 the dollars. The Commission granted us, after full
25 hearing, revenue requirements. We got the dollars.

1 They are lawfully set. The law of the case says those
2 revenue requirements have to be -- the opportunity to
3 get those revenue requirements have to be provided to
4 Southern States. Now to suggest that because we went
5 in and the happenstance that one of the people who
6 appealed was a county that got an automatic stay, and
7 we went in and said, "We need those revenues. And we
8 need them not subject to refund. We need those
9 revenues. If we don't get this stay removed, we are
10 going to lose revenue." To suggest that that action
11 now places us in a worse situation than GTE Florida,
12 just is inconceivable to the company. GTE Florida was
13 denied the revenue, didn't ask for a stay and the court
14 said, "That's irrelevant." We were granted the
15 revenue. And if we didn't get the vacation of that
16 automatic stay, we wouldn't have gotten it. Revenue
17 you said we should get. It's inconceivable that our
18 situation isn't more compelling to say that that action
19 by us should not be determined -- held against us.

20 COMMISSIONER JOHNSON: I understand the facts as
21 you just articulated them. But in that particular
22 proceeding, you did come in and you said you needed the
23 revenue and, certainly, you met the necessary
24 requirements for us to actually lift the stay. But
25 with respect to lifting the stay, I thought that -- and

1 I'd like for you to respond to this -- that this
2 Commission in the transcripts and as reflected in this
3 order stated that to the extent that the stay is
4 lifted, and that if we are in a situation -- if we are
5 faced with a situation that we're in today where there
6 may be the need, if you're overturned and there is the
7 need to for the refund, then you assume the risk that
8 if you get that refund, then, you know, you're going to
9 lose -- if you're overturned and you have to refund,
10 you're going to lose those revenues. And that that is
11 what this order codifies. Now, how is that related to
12 GTE or where do you disagree with what I'm saying?

13 MR. ARMSTRONG: With all due respect, I disagree
14 100 percent or 180 degrees from the representation you
15 made of the record. The record speaks for itself,
16 obviously. And Southern States indicated in that
17 record that we did not believe that there would be a
18 refund in any instance where a rate structure is
19 reversed. Now, at the time that the discussion was
20 going -- and our recollection of the record is that the
21 Commission decided that is not an issue before you and
22 you are not going to decide that issue.

23 COMMISSIONER GARCIA: What risk were you assuming?

24 MR. ARMSTRONG: We don't assume any risk. No
25 risk. The only risk that's there is that the revenue

1 requirement issues might be raised. At that time we
2 knew Public Counsel had filed a notice of appeal. With
3 that notice we don't know what the issues are that are
4 going to be appealed. There could have been revenue
5 requirement issues appealed, so we could be required to
6 post a bond to secure that vacation of the stay,
7 because ultimately you might have a revenue requirement
8 issue that is reversed. In that instance -- and our
9 thinking is if that happens, you have a revenue
10 requirement reversed and in addition you have a rate
11 structure reversed. Then possibly the Commission might
12 want to take the revenue requirement reversal and say,
13 "Well, those dollars, you know, you aren't entitled to.
14 We're going to give them back to these other fellows
15 under rate structure." Possibly that could happen.
16 But we can't fathom and guess and be asked to speculate
17 as to those things happening. But our reading of the
18 record is totally inconsistent with that that you've
19 just represented. And, actually, our reading is
20 consistent with what the staff's reading is in their
21 recommendation today and their reading back on August
22 31st.

23 COMMISSIONER JOHNSON: Sure. But unfortunate for
24 me or maybe for you, our reading of the record perhaps
25 is different. I would agree with you with respect to

1 the fact that we did say that we didn't have to rule on
2 that issue that day, but that we did put the company on
3 notice that that was an issue. If that appeal came
4 back to us that we were -- you all were assuming the
5 risk. But we didn't have to rule on it at that point
6 in time, and that is the legal point that I would like
7 for you to address. And I have the record here since
8 the record does speak for itself. And to the extent
9 that we stated to you in that record, although
10 certainly Mr. Hoffman's statements are clear with
11 respect to he didn't want to assume that risk and the
12 company did not want to assume that risk. But the
13 Commissioners in their response to you all was that let
14 the order be clear that we will have -- we may have
15 another opportunity to view this issue. And at that
16 point in time we want these customers to be protected.
17 And to the extent that they are protected, that would,
18 in fact, affect your revenue, and that you were
19 assuming that risk. That's the issue that I would like
20 for you to respond to.

21 MR. ARMSTRONG: And I will respond to that. It
22 was our position throughout the case in all of our
23 pleadings that we do not -- it would be unlawful for
24 the Commission to force us to refund dollars based on a
25 rate structure reversal without some commensurate

1 surcharge or some other mechanism to give us back those
2 dollars. That has been our position consistently.

3 There was one misread in a staff recommendation
4 which I think might have shown up in the order that
5 said, "We are confident, not that we won't have to give
6 the money back if there is a rate structure reversal,
7 but we are confident we are going to win on appeal."
8 That's not what we said, and that's not what our
9 pleading said. Our pleading said, "We are confident
10 that even if we lose on appeal it would be unlawful for
11 this Commission to require us to refund those dollars."
12 So, in other words, what the Commission indicated in
13 its order was, "We are putting you on notice that we
14 might do something unlawful in the future. And by
15 putting you on notice we might do something unlawful,
16 its okay to do something unlawful in the future."
17 That's our read. That's what happened.

18 COMMISSIONER JOHNSON: So you're actually agreeing
19 that that's what we said, we were putting you on notice
20 that there could be a situation where you would have to
21 refund customers and that you would assume the risk?

22 MR. ARMSTRONG: No, not that we assume the risk.
23 There is no risk involved as far as we are concerned.
24 Remember, we don't believe there is a risk because we
25 believe it would be unlawful. GTE Florida is not new

1 law as far as the regulated utilities are concerned.
2 We have seen this type of argument before and we know
3 that to be the law.

4 COMMISSIONER JOHNSON: To the extent that you
5 thought what we were suggesting was unlawful, why
6 didn't you appeal the order? I mean, is that something
7 that you would need to do or can you just not do that?
8 And I don't know the legal answer. Is that something
9 that you suggested?

10 MR. ARMSTRONG: It's a quandary, Commissioner, but
11 recall that you granted our motion. It was a motion --
12 I don't even know whether the Court of Appeals would
13 entertain a motion that says -- and we don't think it
14 would. As a matter of fact, we made that
15 determination. The court, an appellate court isn't
16 going to sit there and say, "Southern States, you're
17 appealing to me the fact that the Commission said that
18 maybe in the future they might do something to you if
19 we ultimately reversed an issue in that case?" That's
20 not an appealable order. That's not something the
21 court would take two seconds to throw you out on your
22 ear and say, "This isn't a judiciable issue."

23 COMMISSIONER JOHNSON: So you're saying that with
24 respect to those provisions, even if we said what I
25 think we said, that you couldn't have appealed it

1 anyway?

2 MR. ARMSTRONG: There is no doubt in my mind that
3 a court would not here an appeal that says, "You are
4 appealing to us the fact that they put in this order
5 something that says maybe if we do something in the
6 future, maybe we are going to do this to you in the
7 future." That's not an appealable order. As a matter
8 of law that is not an appealable order.

9 COMMISSIONER JOHNSON: And if in this order that
10 we just stated that you were assuming the risk, that
11 that risk was on you, something that you said would be
12 illegal to do, would they not entertain that?

13 MR. ARMSTRONG: No. No. We could not show an
14 impact to the company from that order. You know, you
15 have to have the case of controversy before the court.
16 We would not have had that. There is no doubt that as
17 a matter of law the court would have thrown us out on
18 the ear because we did not have a case of controversy.

19 COMMISSIONER JOHNSON: Thank you.

20 MR. ARMSTRONG: Thank you.

21 CHAIRMAN CLARK: Questions, further questions?

22 Ms. Fox.

23 MS. FOX: (Microphone not on).

24 COMMISSIONER JOHNSON: Make sure you turn your
25 mike on.

1 MS. FOX: Okay. Is that better?

2 All right. On your question, Commissioner
3 Johnson, we did ask the First District Court to review
4 the order lifting the stay. And this is under rule --
5 I believe it's 9.330 of the Rules of Appellate
6 Procedure, an order lifting or modifying a stay is
7 reviewable by motion, by simple motion to the court.
8 It's not even a separate appeal. And we did seek
9 review of that order in the First District. And that
10 was denied. And I assure you it was at least in large
11 part based upon the representations of SSU and the
12 Commission that the customers would be protected. So,
13 you know, we haven't gone to the trouble of dredging
14 all of those things up, but certainly they would be
15 worth looking at before you accept the argument that
16 Mr. Armstrong is giving you today.

17 And I would also point out to you that there is
18 another way to look at this which is that you lifted
19 the stay on the condition that they were, in fact,
20 taking the risk of making the customers whole. Now,
21 Mr. Armstrong said that it wouldn't make any sense that
22 just because one party was the county and had an
23 automatic stay that that should be treated differently
24 than how a stay might be granted in other conditions.
25 I would like to point out to you that the automatic

1 stay is under a Supreme Court rule, and those are the
2 procedures that are binding on this Commission and on
3 the Appellate Court. It's not really for you to
4 question that.

5 Now, if there hadn't been an automatic stay, then
6 the customers could have applied for a stay by other
7 means. They could have had to post a bond, for
8 example. There are a number of different ways that
9 things could have happened differently and the parties
10 could have been protected by different mechanisms put
11 in place. But the law gave the customers that appealed
12 an automatic stay and SSU sought to lift that stay.
13 The Commission had some legitimate concern about
14 protecting the customers pending the appeal and you
15 made a provision in your order that covered that. That
16 provision was reviewed by the First District. It was
17 upheld. That's law of the case, too, just like
18 everything else that was decided there is law of the
19 case. So, with that said, I'm going to go back and
20 just cover my -- kind of summarize the basic points
21 that we are making here.

22 The first one is that, just for the record, as we
23 stated in our brief in response to your order, we don't
24 think that the reconsideration is appropriate at this
25 point. There was nothing overlooked or misapprehended.

1 The facts haven't changed. The law, as Mr. Armstrong
2 just conceded, has not changed. So, there is not, in
3 fact, a basis for reconsideration. So, for the record
4 -- I won't belabor that any further, but for the
5 record, we do argue that you shouldn't be doing this.

6 On the merits of the reconsideration issue, we
7 would argue, first of all, that you cannot and should
8 not reopen the record. What you have here essentially
9 is a situation where a party or parties failed to
10 present competent substantial evidence to support the
11 relief that they are requesting. And when that happens
12 and the case gets reversed on appeal, those parties
13 don't get another chance to do what they neglected to
14 do the first time. They can't just go back and put
15 some more material in the record to bolster it.

16 Either SSU or the staff had the burden of proof of
17 supporting the combination for ratemaking purposes
18 during the first go around in this case, and they
19 failed to carry that burden. But even if you had the
20 discretion to reopen the record, you couldn't reopen it
21 to insert new issues. That would circumvent the law of
22 the case. And I'm going to read you a very brief quote
23 from a case. It's Don Sun Tan Corporation versus
24 Tanning Research Laboratories. It's 505 So.2d, Page
25 35, which says, "In order to prevent later events in

1 the lower tribunal from circumventing or mootng the
2 binding aspects of an appellate adjudication, the
3 general rule is that once an appeal has been taken, the
4 decision on appeal becomes the law of the case. And on
5 remand, amendments to the pleadings cannot be made to
6 present new and different issues of fact or law unless
7 the Appellate Court in its opinion has authorized such
8 amendments."

9 Now, your staff tells you that functional
10 relatedness was not an issue during the prior hearing.
11 And your staff and SSU have repeatedly gone to the
12 District Court of Appeal with that argument and failed
13 to get anywhere with either allowing them to relinquish
14 jurisdiction or to reopen that issue for further
15 debate. So it simply wouldn't be right for you to hold
16 otherwise. It wasn't an issue in the first case and
17 everyone knows that it wasn't. The problem, however,
18 of course, was that the court held that you didn't have
19 statutory authority to do what you did. Now, you have
20 already decided once that you would exercise your
21 discretion not to reopen the record. The facts have
22 not changed since you made that decision. The law has
23 not changed. Reopening the record would, therefore,
24 just really be a flip-flop at this point and by
25 definition an arbitrary and capricious act.

1 And just following up on Commissioner Clark's
2 questions, the instruction not to reopen the record is
3 implicit in the court's remand in the fact that they
4 didn't address those other questions. If they were
5 remanding it for a new trial essentially, they would
6 have had to address those issues. So by looking at the
7 questions not disposed of, it's easy to see the
8 intentions that they had on remand.

9 Moving on to the question of refunds. We would
10 say, as we have all along, that the parties who lost
11 money under the terms of an erroneous order are
12 entitled to get it back. That's due process. That's
13 black letter law. That's your refund policy as set
14 forth in your rules and in all of your decisions.
15 That's what you told us when we were in here arguing
16 over whether or not the stay ought to be lifted. GTE
17 doesn't change that, as Mr. Armstrong has admitted.
18 GTE confirms that, if anything. Because GTE lost money
19 under an erroneous order, GTE was entitled to get it
20 back. This is not a matter of discretion. It's not a
21 matter of some amorphous sort of fairness.

22 COMMISSIONER KIESLING: May I inquire if
23 Mr. Twomey is ceding you some time?

24 MS. FOX: Okay. Am I over time?

25 COMMISSIONER KIESLING: Oh, yes. I mean, if you

1 want to cede her some of your time --

2 MR. TWOMEY: We don't have any arrangements for
3 that, so that's you all giving her extra time, I
4 believe, Madam Chairman.

5 MS. FOX: Well, I just have one more brief point,
6 if I could make it.

7 The staff says that if you give refunds it would
8 interfere with the aggregate revenue requirement, and
9 this is I would submit to you sort of a Catch-22 type
10 of argument. And it's a fallacy that you have to
11 understand here, because there is no aggregate revenue
12 requirement. These systems are not combined for
13 ratemaking purposes. That's what the First District
14 Court held. You have to find functional relatedness
15 before you can combine them. So what you have to do is
16 go back and look at each system, and if SSU
17 overcollected the revenue requirements of that system,
18 those customers have to get their money back. If they
19 undercollected, then you could award rates that meet
20 that revenue requirement for that system based on the
21 record you have. But if SSU never asked --

22 CHAIRMAN CLARK: Are you saying we could surcharge
23 those customers?

24 MS. FOX: I think that -- I'm not representing
25 those customers, but I think --

1 CHAIRMAN CLARK: I see, you have no opinion.

2 MS. FOX: -- as a matter of law you could award a
3 revenue requirement that is based on what SSU asked for
4 those systems. But they never asked for compensatory
5 rates for a lot of those systems to begin with.

6 CHAIRMAN CLARK: Okay.

7 MR. FOX: Thank you.

8 CHAIRMAN CLARK: Mr. Twomey.

9 MR. TWOMEY: Yes, ma'am. Thank you. First of
10 all, I want to thank you all for giving a time certain
11 for the customers who journeyed here long distance to
12 watch this decision and your deliberations. Thank you
13 on their behalf.

14 Now, why are we here? Let's try and narrow the
15 issues real quickly. Three years have passed. During
16 that time, you have approved uniform rates, had an
17 appeal. Your order was reversed on uniform rates.
18 You've considered remand. You had an order on remand,
19 reconsideration was taken. You considered issues
20 there, it was denied. What did you decide? You
21 decided you had to reverse uniform rates, which you
22 did. You implemented stand-alone or modified
23 stand-alone rates. You decided that you weren't going
24 to reopen the record. There was a lot of discussion
25 about that for months past, maybe a year now. You

1 decided that refunds would be made to the Sugar Mill
2 Woods folks and others who were overcharged pursuant to
3 the uniform rates. Lastly, you decided when this issue
4 was debated that the refunds would not be paid by the
5 other customers, that they would be paid by the
6 utility. Now, you reconsidered all of that and you
7 decided that you weren't going to change any of it.
8 That was it, your rate issue, your order.

9 The GTE case came out. We came back here. We
10 briefed and we're asking ourselves -- you're asking
11 yourselves, I assume, I hope, what affect, if any, and
12 I repeat, if any, does the GTE case have on the present
13 case? Because GTE does not necessarily have to have
14 any effect on what you have done so far. So, what
15 effect does GTE have?

16 As cited to you by the utility, the court said,
17 "Equity requires that both ratepayers and utilities be
18 treated in a similar manner." They also said on the
19 same page, "We view utility ratemaking as a matter of
20 fairness." Now, someplace in the process your staff,
21 in recommending that the refunds be cast aside, which I
22 recognize is consistent for your staff because they
23 have urged that to you repeatedly throughout this
24 process, someplace in the process the staff missed the
25 point.

1 I think that in GTE, the court said, "You have to,
2 in fairness, give GTE, the utility, some money that
3 you, in your erroneous order, didn't award them
4 previously." It wasn't in rates, as the court pointed
5 out in this opinion, it was costs. Costs from an
6 affiliate corporation that they were purchasing items
7 from. So, they said in fairness, you have to take care
8 of GTE. And in GTE there were only two parties that
9 you could look to. The Commission wasn't going to pay
10 for the erroneous decision, financially, that is.
11 There were only customers, okay. And the court said,
12 in opposition to the Public Counsel, and I guess you
13 all, said, "Hey, the customers shouldn't have to pay,
14 the company didn't get a stay." And the court said,
15 "No, the stay is not at issue in that case, it's not
16 mandatory," and so forth. There wasn't a stay. The
17 court said they didn't have to get one.

18 Now, the court also said, "Hey, the customers out
19 there were represented by Public Counsel," okay. "And,
20 therefore, we are going to have a surcharge on the
21 customers who benefited by the erroneous order, but
22 only those customers who were receiving service during
23 the disputed time period," that is during the time
24 period from the date of the order. So the court said,
25 "You have to give the money back. Don't worry about

1 the stay right now, they were represented."

2 The critical distinction here, Commissioners, is
3 that, as Commissioner Johnson pointed out and Ms. Fox
4 mentioned, there was a stay in effect. There was only
5 a marginal difference in the amount of revenue they
6 would have gotten through the generous interim rates
7 that were in effect. Be that as it may, there was a
8 stay. They aggressively sought to have it lifted and
9 it was, in fact, lifted. They knew they were at risk.
10 The Commission knew they were at risk. The record
11 shows that of this case, that they were at risk. You
12 have found that since on remand.

13 Now, the only question of GTE is who should have
14 to pay the refund, SSU or the other customers? Someone
15 has to pay. Someone has to pay Mr. Hansen and these
16 people. It should be the utility and this is why. No
17 customer, the other customers who benefited by the
18 uniform rate subsidies were not represented at any
19 point in this hearing vis-a-vis the rate structure
20 issues. Public Counsel declared early on a conflict on
21 that matter. There was no representation, contrary to
22 and in distinction to the GTE case.

23 Secondly, and because of that, they had no
24 awareness whatsoever as opposed to what the court found
25 in GTE that they were being subject to these amounts,

1 okay. The amounts in some cases here are massive
2 compared to what is going to be surcharged in GTE. The
3 time period is longer, the amounts are larger. So,
4 where do the equities lie? If utility regulation and
5 utility ratemaking is supposed to be equitable and it's
6 supposed to be grounded in fairness, and if you assume
7 that somebody has to make the refunds to my clients and
8 the others who were harmed economically by your
9 erroneous order, who has to make it? The utility has
10 made all the decisions. They had the lawyers. They
11 had the awareness. They had the knowledge. They took
12 out the appeal bond and the security bond. They have
13 it now, and they are not faced in the pending rate case
14 with increased rates yet as the customers who would be
15 forced to pay the surcharges would be.

16 So, I say to you, Commissioners, I respectfully
17 request that you find that there is no necessity to
18 change anything by the GTE decision. Enter your order
19 on reconsideration; require the refunds be made; don't
20 reopen the record; make the utility make the refunds.
21 You've already voted and reconsidered the time period.
22 Make them give the money back pursuant to your rule as
23 you decided before.

24 And one last thing on the issue of they have to
25 get the refund requirement, they can't lose any

1 revenues. You gave them the rates that would have
2 given them the necessary revenue requirement. That's
3 all you have to do. They can gamble with it if they
4 want to. The executives can go to Reno, or the
5 executives can decide they want to buy a used car
6 outfits, or they can decide that they want to take a
7 chance on forcing some of their customers to pay
8 excessive rates through uniform rates and put
9 themselves in a position to make refunds. That's what
10 they did. Thank you very much.

11 CHAIRMAN CLARK: Thank you, Mr. Twomey.

12 Mr. Armstrong.

13 MR. ARMSTRONG: A two-minute rebuttal will do
14 fine.

15 CHAIRMAN CLARK: Go ahead.

16 MR. ARMSTRONG: Thank you. First, you heard
17 argument from Ms. Fox that the bond was posted and why,
18 according to Ms. Fox, to make her individual customers
19 whole at Sugar Mill Woods. The transcript of the
20 proceeding which we've been referring to regarding the
21 motion to vacate stay has the following quote from then
22 Chairman Deason, whose was the only Commissioner who
23 voted against the vacation of that stay, and I would
24 like to read that to you or a portion of it to you. "I
25 don't see where -- even though there is going to be a

1 bond posted, it's not going to be for the purposes of
2 making individual specific customers whole. It's going
3 to be for the purpose of making customers as a total
4 ratepaying body whole." That is consistent with
5 Southern States' view of why that bond was posted.
6 There could have been and actually were revenue
7 requirement issues that were appealed.

8 COMMISSIONER JOHNSON: Mr. Armstrong, how do you
9 explain a couple of pages later Commissioner Clark's
10 statement with respect to the bond, which provides
11 that, "All we need to do at this point in time is make
12 sure that the bond is sufficient to cover the increase,
13 and because it is still at issue and covered, that is
14 the amount of any refund that would be due, if it is
15 decided that a refund is due to those people who paid
16 more under statewide rates than they would have paid
17 under stand-alone rates." She's talking rate
18 structure.

19 MR. ARMSTRONG: And there she said, "because it is
20 still at issue."

21 COMMISSIONER JOHNSON: That's right. I'm not
22 disputing that, that we did not decide the question.

23 MR. ARMSTRONG: We are not suggesting that you
24 decided that there would no refunds. We're certainly
25 not suggesting that. We are suggesting that as a

1 matter of law, you could not make us refund even if
2 there was a rate structure reversal. And we have said
3 that all along, not without some commensurate recovery
4 from Southern States. And that is what we have always
5 argued. And the fact was that that was left at issue.
6 So, again, we couldn't go appeal that order because it
7 was at issue.

8 COMMISSIONER JOHNSON: So, the first opportunity
9 that you will have to appeal that will be if we,
10 indeed, pursuant to what we said we could do back then,
11 do it in this instance.

12 MR. ARMSTRONG: That's right.

13 COMMISSIONER JOHNSON: And it wouldn't be that you
14 have changed positions or that we've changed positions,
15 it would just be a matter of the whole time you thought
16 what we wanted to do was illegal, and it would be up to
17 the courts to decide whether we thought we were doing
18 it in order to protect the customers. And that
19 language is stated again and again in the order, and
20 that the way we could protect the customers would,
21 indeed, be through -- when we get to this point, making
22 a decision and that we could require refunds to these
23 customers, you would suggest that the issue, if we were
24 to decide that today, is now ripe for the District
25 Court to decide.

1 MR. ARMSTRONG: That is the first opportunity we
2 would have through prior orders that had "ifs" and
3 "mays" abounding in it, and I think that's support for
4 what we have indicated.

5 COMMISSIONER JOHNSON: And you said another thing
6 that with respect to the other order, the reason why
7 you wouldn't have appealed that is because it wasn't
8 ripe at that point in time.

9 MR. ARMSTRONG: I think I characterized it as we
10 would be thrown out on our ears, and that's what we
11 firmly believe.

12 A second point I would like to address is the
13 question of the impact of the stay that did apply when
14 -- the automatic stay when the county appealed.
15 Suggestions that Southern States could have been whole,
16 would have been whole, nobody can sit here now and
17 suggest that only a portion of that order was stayed.
18 That the revenue requirements and all of that, that was
19 going to go forward, no problem. That order was stayed
20 in toto by the filing of that appeal on the automatic
21 stay. And there is nobody that can sit here today on
22 this side of the table and say, "No, it wasn't the
23 whole order. It was just that rate structure issue."
24 That's not the case. As I said, OPC had filed a brief
25 -- I mean, a notice of appeal. Even at that point in

1 time we don't know whether there could have been
2 additional issues on revenue requirements by this
3 party, you know, the parties who filed their notice of
4 appeal before that might have been raised.

5 The last point, issues of customer representation.
6 As Mr. Hoffman suggested earlier, the last time we were
7 here before the Commission on these very issues, there
8 was a representative of the Office of Public Counsel
9 who appeared on behalf of the customers opposing a
10 surcharge. I don't think we can have a situation where
11 there is a picking and choosing of when we are going to
12 come appear for customers. Again, OPC's role is
13 counsel for all customers.

14 Now, in that role if there is a conflict and he
15 cannot represent customers on an issue, and if it's
16 their position they can't do that for rate structure,
17 they then -- and I'm sure they do this -- they advise
18 their customer -- I mean their client, their clients
19 which are our customers, they advise them, "I can't
20 advocate on this position, you'd better get your own
21 lawyers." We see Sugar Mill Woods, they have been in
22 here advocating their positions on rate structure
23 consistently. And that is appropriate if they want to
24 contest the rate structure. But it's not Southern
25 States' burden, and it shouldn't impact your decision

1 at all in this case, any argument you have heard about
2 representation of customers.

3 COMMISSIONER JOHNSON: Let me ask you another
4 question on the rate structure issue. Are you, then,
5 suggesting that the law or perhaps the Commission
6 policy with respect to rate structure is that the
7 customers, if there is a rate structure issue, they are
8 always assuming the risk and that the company is not?
9 Is that the policy argument or is that the law? And to
10 the extent it's the law, if you could provide me with
11 more information on that, or to the extent you believe
12 it's a Commission policy, if you could elaborate on
13 that. Because it appears to me that what you're saying
14 here is on a rate structure issue, the customers are at
15 risk. And I have -- are always at risk and the company
16 is never at risk. And we may just fundamentally
17 disagree with that, and the court may have to decide
18 that for us. But could you explain that?

19 MR. ARMSTRONG: And I'd like to confine it to this
20 case, you know, because I think that -- that's the most
21 important thing because we have talked about and
22 bantered the word "risk" around so often. But I think,
23 certainly, given the facts in this case, the company
24 was not at risk regarding the rate structure
25 determination. I'm certain if I tried to make any

1 overall and absolute statement that there would be
2 something that could be found to negate that to some
3 extent, so I don't want to make an absolute.

4 COMMISSIONER JOHNSON: In this case on these facts
5 I think you've argued -- and I perhaps may be putting
6 words in your mouth -- that we did not have the
7 discretion to not allow the stay to be lifted, that
8 the law was clear and that our rules were clear once
9 you did the necessary steps that we had to lift that
10 stay. And if we lifted that stay and there is this
11 issue out there of rate structure, you're saying under
12 these circumstances, from day one, the customers were
13 at risk. Those people that were overpaying were just
14 overpaying, because you all were going to get your
15 money, and that there was no way that this Commission
16 could protect them or those that underpaid because the
17 bottom line was the utility would get paid. Is that
18 what you're saying?

19 MR. ARMSTRONG: No. I think GTE Florida and the
20 law, constitutional law, as it applies says there has
21 to be fairness to the utility and to the customers.
22 And I firmly believe that. The only reason that
23 Ms. Fox indicated they could go file their appeal of
24 the issue on the vacating of the stay is that they were
25 an adversely affected party. We were granted the

1 motion that we applied for. And then we had this
2 conditional whatever language that caused us not to be
3 able to. But it was their position they were adversely
4 affected right off the bat. The court --

5 CHAIRMAN CLARK: Is it correct that you can't
6 appeal an order that is not adverse to you?

7 MR. ARMSTRONG: I've never even thought about
8 appealing an order that was not adverse. But I do know
9 that if it has got an if, and, or but in there, that
10 the court based upon judicial economy, based on the
11 cases in controversy clause in the constitutions will
12 and can throw you out on your ear.

13 COMMISSIONER JOHNSON: My question is how can the
14 customers be protected in this rate structure issue?
15 Are you suggesting that there is no way to have
16 protected those particular customers?

17 MR. ARMSTRONG: No, there could be mechanisms that
18 the Commission could divine. And, you know, one is to
19 allow the company to charge the higher of either of the
20 rate structures and hold dollars subject to refund.
21 Whoever wins the rate structure issue or whoever -- you
22 know, whatever rate structure is selected the other
23 people get a refund back.

24 COMMISSIONER GARCIA: We are having the citizens
25 of this state help finance your company. Why are we --

1 MR. ARMSTRONG: No, that would just be that the
2 dollars would come back after the rate structure is
3 determined.

4 COMMISSIONER GARCIA: But are we not giving them
5 the risk here? Aren't they the ones that had to
6 assumed the risk over this rate structure as opposed to
7 the company?

8 MR. ARMSTRONG: No. You know, we keep talking
9 about risk, and I don't even know why we are talking
10 about risk. I mean, I think --

11 COMMISSIONER JOHNSON: Well, let me explain it in
12 how I see it. We had some customers who thought that
13 our rate structure was illegal or unconstitutional.
14 They challenged that. But we, because you -- and you
15 rightfully so came in and you got the stay lifted. Are
16 they at risk for challenging it? I mean, how can they
17 ever be protected under the scheme that we have set up
18 where you automatically get a stay lifted, the rates go
19 into effect, but the whole time they are saying, "Hey,
20 wait a minute. Hey, wait a minute, this is wrong and
21 we are overpaying every day." How do we protect them?

22 MR. ARMSTRONG: First, the Commissioners did not
23 agree with our position that it was an automatic, that
24 they had to vacate automatic. But, second, the
25 customers who then appealed that rate structure --

1 COMMISSIONER JOHNSON: Actually, we did agree with
2 you that we didn't have the discretion and that we had
3 to lift the stay. That's also in the order.

4 MR. ARMSTRONG: Okay, Commissioner. I didn't read
5 it that way.

6 COMMISSIONER JOHNSON: It's on that same page,
7 that we said that it was not a discretionary provision
8 and that it mandates that the automatic stay be lifted
9 when you take the steps that you took.

10 MR. ARMSTRONG: Okay. Well, that was our
11 position, so I'm glad you agreed with it. That was one
12 we got.

13 But the second point was if the customers in that
14 instance come forward and they ask for -- you know,
15 they are successful on their appeal, then prospectively
16 the rate structure would be changed. And even at that
17 point, I don't know that it would be changed to the one
18 that they have advocated, but it would have to be
19 changed to one that is supported in the record.

20 So, even in that instance it's not a given that
21 the customers are going to get what they ask for. Rate
22 structure is something that is always at issue in every
23 single rate case that we have, and you all know that.
24 I'm talking to the people who know that very well.
25 Customers have to be advised or should be advised that

1 rate structure is an issue in every single case. And
2 to suggest that the company, as in the current case, we
3 had to up front let customers know that we have asked
4 for X, but there might be a Y rate structure out there.
5 I think it is rather onerous, and I don't think it is
6 something that is contemplated right now in the way the
7 law reads.

8 CHAIRMAN CLARK: Mr. Armstrong, we have
9 interrupted you several times. Have you completed your
10 rebuttal?

11 MR. ARMSTRONG: Yes, I have. Thank you very much.

12 COMMISSIONER JOHNSON: Yes, he said he was
13 finished.

14 CHAIRMAN CLARK: I'm sorry. Commissioners,
15 further questions? Do you have questions of the staff?
16 I have a question of staff with respect to assumption
17 of the risk. And if I have understood SSU's argument
18 is that when they posted the bond, they certainly
19 assumed the risk that some of their revenue requirement
20 might be disallowed and they would have to refund. But
21 they did not assume the risk with respect to rate
22 structure. And by asking for a lifting of the stay,
23 even though we said that we thought there might be a
24 waiver in that request for lifting of the stay and that
25 the rates go into effect, it's your view that the court

1 would say to us, based on GTE, that there has been no
2 assumption of the risk or waiver.

3 MS. JABER: And that's correct. What I have been
4 debating on how to say, Chairman Clark, is a response
5 to Commissioner Johnson's question. And I'm going to
6 do my best and I can be corrected if I'm wrong. Here
7 is where staff was coming from. The God's honest truth
8 in response to your question is it is staff's view that
9 rate structure in this case is revenue neutral. When
10 the court overturned the Commission's decision on rate
11 structure, it didn't generate the refund. It's the
12 changes in the revenue requirement that generate a
13 refund. The answer to your question in this case is
14 it's not the change in the rate structure that gets the
15 refund. SSU didn't assume a risk. I also don't agree
16 with the term "risk." And you also know that there are
17 -- my interpretation of the reading of the order and
18 the transcript, it is subject to interpretation. But
19 even more importantly, it doesn't matter what the
20 Commission thought at that time, in my opinion, and it
21 doesn't matter what staff thought at that time, in my
22 opinion, because the truth is the conditions have
23 changed. The circumstances have changed. We didn't
24 know the court was going to come back --

25 CHAIRMAN CLARK: You mean the law has changed. We

1 have gotten further explanation of the law from the
2 highest court in the state.

3 MS. JABER: That's correct. The law has changed,
4 but staff's interpretation of what generates a refund
5 is consistent; it is the change in the revenue
6 requirement, and maybe Mr. Willis can add something
7 more, but --

8 COMMISSIONER JOHNSON: So is it staff's position
9 with the question I was asking Mr. Armstrong is that
10 the customers assume the risk in a rate structure
11 issue, and that if they appeal it, like these people
12 did, that there is no protection? To the extent they
13 overpaid, that's just too bad.

14 MS. JABER: It's very difficult to answer it that
15 way, and I will tell you why. I don't look at it as
16 who assumed the risk; I look at it as customers can be
17 afforded the opportunity to be made whole on a
18 going-forward basis. You fix the mistake as the court
19 has told us we have made by changing the rate
20 prospectively. Yes, that doesn't mean refund. That's
21 staff's recommendation. That's staff's opinion. It
22 doesn't mean refund. So, I'm trying to stay away from
23 assuming the risk because, you know, if you want me to
24 answer that question, I would tell you, no, they
25 haven't assumed anything because the way you correct

1 the problem is you change the rate prospectively.

2 COMMISSIONER JOHNSON: And what do you do about
3 the overpayment? That's a nonissue?

4 CHAIRMAN CLARK: Well, no. I mean, in this case
5 what do you do about the refund? That's my concern.
6 If you go with your recommendation, you're saying that
7 there is no refund based on people who paid more than
8 they would have paid under stand-alone, is that right?

9 MS. JABER: That's correct, because to make a
10 refund, to order a refund would take away from the
11 utility's revenue requirements.

12 CHAIRMAN CLARK: It seems to me that as I tried to
13 work through the notion of waiver and the arguments or
14 assumption of the risk, I agree with you that it's not
15 really an issue of assumption of the risk what the
16 court has said, it's a matter of equity. And what they
17 have said is that we had a concern that we could not
18 order the surcharge because it's retroactive
19 ratemaking, and the courts have been fairly consistent
20 in saying that a surcharge would have been retroactive
21 ratepaying because it would have imposed an additional
22 charge for service already rendered.

23 What the court seems to be telling us is that when
24 you have some changes, you have to make revenue
25 requirements for how you collect that revenue based on

1 a decision -- a reversal or some altercation -- not
2 altercation, alteration of the decision. It is not
3 retroactive ratemaking when you go back and correct
4 that through a surcharge. And to that extent it seemed
5 to me that the notion of whether or not SSU assumed the
6 risk as we categorized it, we were basing it on what we
7 thought was the law. And what the court has said now
8 is, "No, that is not the status of the law and you have
9 to go back and do equity."

10 MS. JABER: I would agree with that.

11 CHAIRMAN CLARK: And it seems to me that we have
12 -- I don't think we can do what you're suggesting and
13 no refund without going back and reopening the record
14 and making the necessary findings. I think our choices
15 are either that, on a going-forward basis, that we
16 surcharge customers as indicated further, or we go back
17 and open up the record and make the necessary findings.

18 COMMISSIONER JOHNSON: Just adding to that, I
19 don't think that we are in a position to -- not that I
20 would agree to a surcharge anyway, but if we were to do
21 that, given the information that we have in this
22 recommendation, I would feel uncomfortable imposing a
23 surcharge. We don't even know what it is. We don't
24 even know how much these customers would be assessed.
25 We don't even know what kind of an impact we would be

1 CHAIRMAN CLARK: Commissioners, you know, I have
2 been struggling with what is the best way to go in
3 light of the GTE decision. And I guess I should say
4 that having read the GTE decision, even though we
5 talked about assumption of the risk in terms of posting
6 of the bond and seeking a lifting of the stay, I think
7 the court would be even more disposed to find that that
8 doesn't have a bearing on whether or not -- that it
9 can't be the basis for saying the refunds will come
10 from the company and not through a surcharge from other
11 customers, because it would have denied them what the
12 court found to be a reasonable revenue requirement.
13 They would not have gotten their revenue requirement.
14 They would have gotten nothing for -- I guess what I'm
15 saying in the GTE case, if they had gone for the stay,
16 they could have kept the rates where they were.

17 MS. JABER: That's correct.

18 CHAIRMAN CLARK: And then we wouldn't have had the
19 issue of surcharge, because the rates were higher. The
20 current rates were higher in the GTE case.

21 MS. JABER: That's correct. The Commission
22 ordered a rate reduction.

23 CHAIRMAN CLARK: Yes, but we didn't -- we might
24 have put something subject to refund, but the rates in
25 effect prior to the rate case were higher.

1 MS. JABER: Exactly.

2 CHAIRMAN CLARK: And if they say that didn't
3 constitute a waiver, then I think this is the more
4 compelling reason, because the rates -- by letting the
5 rates go into effect, they are getting a revenue
6 requirement. I don't think I've made myself clear.
7 They would have had to give up money not to apply for a
8 vacation of the stay. In the GTE case, they would have
9 kept the money and there would have been no need for a
10 surcharge, and they would have had to do some refunding
11 of money. And if the court concluded that not seeking
12 a stay was not a waiver, I think in this case seeking
13 the vacation of the stay could not be interpreted as a
14 waiver or assumption of the risk.

15 And I think that leaves us with two alternatives.
16 And, you know, quite frankly, Commissioners, I'm still
17 struggling with what is the best way to go. I'm not
18 sure we could characterize either of them as the best
19 way to go. But it seems to me that we cannot do what
20 staff is recommending now, in my opinion, without
21 reopening the record. And I think that goes contrary
22 to what the court said. They said without making a
23 finding, you can have that rate structure. So, I think
24 we have to go back and make that finding if we intend
25 to not make a refund for that period of time.

1 The alternative is -- and in that case we would
2 have to reopen the record and reach the conclusion that
3 for that period of time that there was that functional
4 relatedness. There are several problems with that as I
5 see. We currently have that issue on appeal. What if
6 we do that now and the courts say it's not functionally
7 related?

8 MS. JABER: Right. Or if you can even make the
9 finding. I mean --

10 CHAIRMAN CLARK: Yes. That makes the assumption
11 that you can and that's not in the record.

12 MS. JABER: Right.

13 CHAIRMAN CLARK: Also, we would have to have more
14 proceedings on it. On the other hand, it has the
15 advantage of allowing -- I think it may have the
16 advantage of allowing people who -- if we are going to
17 have another hearing, we may consider letting people
18 who are going to be affected by it participate. And it
19 seems to be one of the rationales the court used in the
20 GTE case for saying there hasn't been a lack of notice
21 on the part of customers that the surcharge may be
22 coming as Public Counsel was representing them. I'm
23 not sure that that would be the same in this case. And
24 the surcharge is of concern to me because I think it's
25 going to be a large amount. We would have to struggle

1 with the period of time over which it should be done,
2 and it does have the element of charging for services
3 rendered in the past. There is no opportunity for
4 those customers to adjust their consumption based on
5 the level of rates.

6 COMMISSIONER KIESLING: Let me add my thoughts,
7 which run somewhat similar to yours. After reading and
8 rereading and rereading and rereading the GTE opinion,
9 I came away with a couple of thoughts. One of them was
10 this whole fairness thing that, you know, we need to
11 craft a method that does not end up penalizing the
12 utility or the customers, no matter which side of the
13 equation they fall on. It does not mean that, you
14 know, they shouldn't pay for services received, but I
15 don't think it should be a penalty. And I kept going
16 back, since I was not even a Commissioner when 199 was
17 heard. I didn't come in until the generic
18 investigation docket on the theory and policy
19 considerations of uniform rates, but I came away from
20 that proceeding, which I think is probably still on
21 appeal, with the opinion that is reflected by my vote
22 in that case. That I'm not willing to exclude single
23 tariff pricing as one of the rate designs that is
24 available in the right circumstances.

25 So, I came down to the only way I could resolve,

1 in my mind, what should happen is the same place that
2 you came to. And that is we either need to reopen the
3 record, because there was no evidence in that record on
4 functional relatedness, mainly because no one thought
5 that was an issue, since our opinion at the time was
6 that functional relatedness was a question that was
7 only called into play when you had jurisdictional
8 problems. And every one of the 127 systems was a
9 jurisdictional county. So, since that was not an
10 argument or an issue that was foreseeable by the
11 utility, by the staff, by the Commission, by anyone, I
12 think that we need to go back, reopen the record, and
13 at least see if we can determine from evidence
14 presented the question of whether there was a
15 functional relationship between these 127 systems at
16 the time that the single tariff pricing went into
17 effect with that test year. And if we can do that, and
18 if we make that finding, then we don't need to do
19 anything else because it will go back to the court, I
20 assume on appeal, to decide whether that satisfied
21 their needs or whether there are other issues in that
22 case that, again, we didn't think about.

23 CHAIRMAN CLARK: Well, let me ask you a question.
24 I'm just not clear. I'm sure there is nothing in the
25 record that goes to functional relatedness.

1 COMMISSIONER KIESLING: I'm sure.

2 CHAIRMAN CLARK: But you're suggesting we would
3 take further evidence on that issue as to whether
4 during the time period of the test year it was.

5 COMMISSIONER KIESLING: That was the failure of
6 the order that the court cited. Granted, they did not
7 look at all of the issues raised because they felt that
8 it could be disposed of on that. But I do agree with
9 staff in their recommendation that it was essentially a
10 general remand that did allow the discretion for us to
11 reopen the record to try to take more evidence and
12 satisfy that evidentiary failing.

13 CHAIRMAN CLARK: Would you agree that the
14 alternative is to surcharge?

15 COMMISSIONER KIESLING: Yes. That's the flip side
16 for me. The only other alternative to doing that is to
17 grant a refund and a surcharge. Because that is the
18 only way that the revenue requirement, which has not
19 been overturned, can be met and the customers -- what
20 the customers pay eventually or receive as a refund
21 eventually would bear some resemblance to the cost of
22 service or the service that they had used during that
23 time period. I can't find any other way. I mean, God
24 knows I have tried and tried and tried. And, you know,
25 I don't really care that much about the waiver and the

1 stay issue in the sense that even if when that stay --
2 when we granted the lifting of the stay, even if we had
3 pointed out that, you know, "Company, you're now
4 assuming the risk that you might have to make refunds."
5 I think that because the First District Court of Appeal
6 raised an issue which none of us thought about, that
7 being the functionally related, I think that the
8 penalty that we would be imposing on the company for
9 having asked for the lifting of the stay, which is a
10 reasonable action for them to take had they not
11 foreseen, had they not been clairvoyant and we
12 certainly weren't clairvoyant. I just think that that
13 is a penalty which is -- when I weigh the equities of
14 it and look at fairness, you know, tilts it too far the
15 other way toward penalizing the company for what was
16 essentially not that unreasonable or not that
17 questionable of an action in lifting the stay.

18 COMMISSIONER DEASON: Well, it was very
19 questionable at the time it was discussed at the
20 Commission.

21 COMMISSIONER KIESLING: I've read that transcript.
22 But I'm talking about the avenue of requesting that the
23 stay be lifted was one that under law was available to
24 the company that they availed themselves of.

25 CHAIRMAN CLARK: That we didn't have discretion to

1 do.

2 COMMISSIONER KIESLING: That we didn't have
3 discretion to do in large part and which no matter what
4 we said, we were not in a position to put conditions
5 on.

6 CHAIRMAN CLARK: I guess what you're saying is
7 even though we said it constitutes an assumption of the
8 risk, the law says otherwise.

9 COMMISSIONER KIESLING: That's exactly what I
10 think. And I don't think --

11 CHAIRMAN CLARK: At least the law as currently
12 articulated by the court.

13 COMMISSIONER KIESLING: Yes. So, that's the
14 quandary I'm in. I don't see any other solution except
15 for those two. And if anyone else has one, I'm really
16 willing to listen. But I tried sitting down with paper
17 and pencil and working through every scenario; refund
18 but no surcharge; you know, no refund; no surcharge; no
19 opening the record; and every one of them came down
20 that there would be a great inequity to one of the
21 sides. So, that's where I came down to.

22 CHAIRMAN CLARK: Other Commissioners can feel free
23 to jump into this discussion.

24 COMMISSIONER DEASON: I'm ready to vote on the
25 issues.

1 CHAIRMAN CLARK: Okay. All right. We have had
2 Issue Number 5. Issue Number 4. Issue Number 5.

3 COMMISSIONER KIESLING: Well, that's the crux of
4 the whole thing right there, isn't it?

5 CHAIRMAN CLARK: Is there a motion?

6 COMMISSIONER DEASON: I move that we grant staff
7 to the extent that the record is not reopened and that
8 we order a refund to customers with no surcharge.

9 COMMISSIONER JOHNSON: What was the first part of
10 that? What was the first part you said?

11 COMMISSIONER DEASON: We basically affirm what we
12 did before, before the GTE case.

13 COMMISSIONER JOHNSON: Second.

14 CHAIRMAN CLARK: Further discussion?

15 COMMISSIONER GARCIA: Yes. Can I ask Commissioner
16 Deason to give me his thinking on it, so that I --

17 COMMISSIONER DEASON: Sure, I will be glad to. I
18 think there has been a broader reading of the GTE case
19 discussed here than what I attribute to that case. I
20 notice that are many differences. First of all, in the
21 GTE case it was an issue that was on appeal which was a
22 revenue requirements issue. There was no revenue
23 requirements issue on appeal in the SSU case.

24 CHAIRMAN CLARK: Yes, there was. The revenue
25 requirements, some of the revenues requirements were --

1 COMMISSIONER DEASON: They were on appeal, but
2 there was no remand --

3 CHAIRMAN CLARK: Decision of the court, I agree
4 with that.

5 COMMISSIONER DEASON: -- from the court changing
6 any of the revenue requirements for SSU.

7 COMMISSIONER GARCIA: In fact, it wasn't
8 addressed, right?

9 COMMISSIONER DEASON: Right.

10 CHAIRMAN CLARK: They found no error.

11 COMMISSIONER DEASON: They found no error in the
12 revenue requirements portion of the SSU case. The
13 court put great emphasis on the fact that in the GTE
14 case there were basically two sides, that being the
15 company and the customers. And the customers were
16 fully represented by the Public Counsel's office and
17 basically put on notice in all regards concerning those
18 possibilities. I think that is either expressly said
19 in the order or it can be read into the court's
20 opinion. That is not the case here with this SSU
21 situation.

22 We basically have three parties in effect, that
23 being the company, one group of customers, and another
24 group of customers, depending upon whether they benefit
25 from uniform rates or not. I think that is another

1 distinction. I think that it is important to realize
2 that even with the GTE decision that there is no
3 guarantee of revenue requirement. The only thing we
4 are obligated to do is to give a company a reasonable
5 opportunity to set rates so they have a reasonable
6 opportunity to earn that revenue requirement. And I
7 respectfully disagree. I think that the discussion
8 that we had concerning the stay put the company on
9 notice that what they were requesting, that they were
10 basically assuming a risk, that they may be faced with
11 a situation of having to refund money with no
12 opportunity to have a way to recoup that. I think
13 there is ample discussion on the record of that
14 transcript and in the record which does that. And I
15 think that it is not a viable alternative to simply
16 say, no refund, no surcharge. Because, in my opinion,
17 that would violate the DCA's order saying that uniform
18 rates were unlawful, because the net effect of that
19 would be we would be saying uniform rates were okay for
20 two years or whatever time period that they were in
21 effect until we implemented the interim rates in the
22 most recent rate case.

23 I am the first to admit there is no easy answer to
24 any of this. You know, in retrospect, I wish that we
25 had not granted vacating the stay. But that's all

1 water under the bridge. I would note that if that stay
2 had remained in effect, the company would have -- the
3 revenue requirements would have been less than what the
4 final decision had been, but it would have been only a
5 few, as I understand it, \$100,000, \$200,000 a year in
6 revenue requirements. Which I'm not saying is not
7 insignificant, but it would be a much more palatable
8 situation to find ourselves in now than we are looking
9 at refunds of multi-millions of dollars. I just
10 believe that SSU is fundamentally different from GTE
11 and that there are some unique situations surrounding
12 SSU's case which would allow the Commission to order
13 the refund, which I think we are obligated to do. And
14 that it is fundamentally unfair at this point to impose
15 a surcharge on those customers on a prospective basis,
16 which would be basically for consumption which occurred
17 in the past.

18 COMMISSIONER JOHNSON: And for your edification, I
19 would agree with all the comments made by Commissioner
20 Deason. And I guess I would not be in agreement with
21 the comments made by Commissioner Kiesling in that I'm
22 not so sure that what we did by putting a condition on
23 the company was not legally sufficient. And to the
24 extent that I'm wrong, I'm sure they are going to
25 appeal it, and we will let the DCA court tell me that

1 I'm wrong. But I want to do what I intended to do and
2 what I thought was occurring, that we were protecting
3 those customers, that they would receive their refunds
4 and that there would be no surcharge imposed.

5 Now, if a higher court disagrees with me, then so
6 be it, I will have to deal with that. But right now to
7 the extent that the comments that we made when we
8 originally made this decision, and even when we heard
9 the reconsideration before, the discussions that
10 occurred, that was my intent. And I would like to see
11 that intent through and allow the District Court of
12 Appeals or wherever this is appealed to, to then tell
13 me what I should do with the ratemaking process. But I
14 believe what we have done here is sufficient, is fair,
15 protected the customers, and that the utility was,
16 indeed, on notice.

17 CHAIRMAN CLARK: There has been a motion and a
18 second. Is there further discussion?

19 COMMISSIONER GARCIA: I will just state, I guess,
20 before I vote so that we don't have to go back to it.
21 To be quite honest, before that vote and when we cast
22 that vote, if there was one thing that made me
23 comfortable were the limitations that Commissioner
24 Deason brought up. And they made me more comfortable
25 at that time about what we were doing in terms of

1 protecting the ratepayers. And I believed that there
2 was an assumption there of the risk. I still believe
3 it to this day. And clearly reading the record as I
4 did, cold it doesn't pick up what I think was out here
5 when we were discussing this. And I was certain of
6 what I was voting for then. That said, though, I
7 believe that we have to deny staff, and I guess
8 Commissioner Johnson seconded the motion, so --

9 CHAIRMAN CLARK: There has been a motion and a
10 second. All those in favor, say aye.

11 COMMISSIONER DEASON: Aye.

12 COMMISSIONER GARCIA: Aye.

13 COMMISSIONER JOHNSON: Aye.

14 CHAIRMAN CLARK: Opposed, nay.

15 COMMISSIONER KIESLING: Nay.

16 CHAIRMAN CLARK: Nay.

17 The motion carries.

18 Issue Number 6.

19 MS. JABER: Issue 6, Madam Chairman, is some
20 housekeeping, I believe. Just give me one minute.

21 CHAIRMAN CLARK: Yes. I think we do have to vote
22 on that and that is reaffirming what we've already
23 decided. Is there a motion on Issue 6?

24 COMMISSIONER DEASON: So moved.

25 CHAIRMAN CLARK: Without objection, Issue 6 is

1 approved.

2 Now, Issue 7, I think, is moot.

3 MS. JABER: It is and it isn't. We need to go
4 back and affirm that refunds need to be made within 90
5 days. Is that what you would like to do? And whether
6 or not they need to be made with interest.

7 COMMISSIONER DEASON: It would be my intent to
8 reaffirm exactly what we did before, and I know that
9 was not a unanimous decision on the 90 days, even
10 assuming there was going to be a refund. But it would
11 be my intent to reaffirm exactly what was done prior to
12 the GTE case and the reconsideration on our own motion.

13 CHAIRMAN CLARK: Okay. There's a --

14 COMMISSIONER KIESLING: Could I ask something
15 about Issue 6, which I realize that we kind of skipped
16 over, but I'm still trying to grasp what all is
17 included within that.

18 CHAIRMAN CLARK: We didn't skip over it.

19 COMMISSIONER KIESLING: Oh, I know. But we didn't
20 give it much discussion.

21 CHAIRMAN CLARK: Okay.

22 COMMISSIONER KIESLING: It was called
23 housekeeping, and I'm not so sure that it is
24 housekeeping, because it would seem to me that for me
25 to have been consistent with the vote that I made today

1 after the deliberations that I've put in in the last
2 couple of weeks on this, that I would not have voted
3 the same way then. And so to that extent, I dissent
4 from Issue 6. I'm afraid it's not unanimous.

5 CHAIRMAN CLARK: Let me be clear, Commissioner
6 Kiesling, and I guess that's probably what needs to be
7 clear with respect to Issue 7, too. I would not go
8 forward with what we had concluded in the original
9 order on remand.

10 MS. JABER: If I could, I apologize, Commissioner
11 Kiesling, I think you're correct. If we can walk by
12 section by section, because I don't think you mean to
13 dissent to the entire issue.

14 COMMISSIONER KIESLING: I agree, but I can't do it
15 just as a housekeeping one, either.

16 MS. JABER: Okay. The specific issue of refund of
17 interim was raised by Mr. Twomey, I believe, on behalf
18 of his client, and the argument was that a further
19 refund of interim was required. And the Commission,
20 after finding that interim rates were refunded to the
21 degree that they needed to be, voted to deny
22 Mr. Twomey's petition. And that's all that decision is
23 right there.

24 COMMISSIONER KIESLING: Okay.

25 CHAIRMAN CLARK: But I think what Commissioner

1 Kiesling may be talking about is other decisions in
2 that rate structure and final rate. To that extent, I
3 will entertain a motion to reconsider the vote on
4 Issue 6.

5 COMMISSIONER KIESLING: I would request that you
6 reconsider the vote on Issue 6. I wasn't even there
7 when we were voting on it.

8 CHAIRMAN CLARK: Is there a second?

9 COMMISSIONER JOHNSON: Second.

10 CHAIRMAN CLARK: All those in favor of
11 reconsidering.

12 COMMISSIONER JOHNSON: Aye.

13 COMMISSIONER KIESLING: Aye.

14 COMMISSIONER GARCIA: Aye.

15 CHAIRMAN CLARK: Aye.

16 COMMISSIONER DEASON: Aye.

17 CHAIRMAN CLARK: Opposed, nay.

18 Now we are back on Issue 6. Let's break out the
19 various points we have, because I, likewise, want to be
20 consistent with the idea that I don't think that the
21 GTE case allows us to do what the Commission has
22 ordered.

23 COMMISSIONER KIESLING: The only issue or the only
24 item in Issue 6 with which I would not vote the same
25 way now that I did during that proceeding is the rate

1 structure and final rate section. And so I guess my
2 dissent can just be recorded as to that portion of it
3 that I would not --

4 CHAIRMAN CLARK: I think you're correct and,
5 likewise, show that because I dissented from ordering
6 the refund as indicated in our original order on
7 remand, that I would likewise dissent from that. All
8 right.

9 COMMISSIONER DEASON: I guess I'm a little
10 confused, and just for clarification, what is it that
11 -- in light of GTE, what is it that you cannot agree
12 with that was previously voted upon other than the
13 question of refund and surcharges, or is that what it
14 is?

15 CHAIRMAN CLARK: Well, because it is rate
16 structure and final rates. And I guess I'm looking
17 over consistent with the decision to implement modified
18 stand-alone rate structure, the Commission ordered SSU
19 to calculate rates based on the modified rate
20 structure.

21 COMMISSIONER KIESLING: And my problem is that at
22 the time I agreed with the majority on the question of
23 reopening the record or not reopening the record.

24 CHAIRMAN CLARK: Right.

25 COMMISSIONER KIESLING: But now I believe firmly

1 that we should reopen the record, and then we could
2 avoid all the rest of it. And my understanding was
3 that by reaffirming that order, and that is what I'm
4 trying to make sure I understand, by reaffirming that
5 order, which we have already taken back for
6 reconsideration, that it would have the appearance that
7 I am in agreement with not reopening the record. And
8 that is what I am not in agreement on.

9 MS. JABER: I think it would. If I understand it
10 correctly, Commissioner Deason, what happened the first
11 time was that the Commission as a policy decision chose
12 not to reopen the record because there was sufficient
13 evidence in the record to support a different rate
14 structure.

15 CHAIRMAN CLARK: And consistent with -- I mean,
16 and consistent with the notion that Commissioner
17 Kiesling and I dissented on the notion of reopening the
18 rate structure, then it doesn't necessarily follow we
19 would agree with the order that is currently under
20 reconsideration that we would agree on a going-forward
21 basis that you do modified stand-alone.

22 COMMISSIONER DEASON: So you're not saying there
23 is not evidence in the record to support modified
24 stand-alone?

25 COMMISSIONER KIESLING: No, I'm not at all

1 saying that.

2 CHAIRMAN CLARK: Okay. Issue Number 7. Now,
3 staff, do we need to modify that or do Commissioner
4 Kiesling and I just have to vote? We do have to modify
5 it.

6 COMMISSION STAFF: If you will give me a minute.
7 On the previous where we ordered a refund and no
8 surcharge, we ordered them to make the refunds within
9 90 days. And they were ordered, also, to submit the
10 information within seven days. This has been modified.
11 Taking into effect a surcharge, we recommend a further
12 period of time and gave them -- recommended a longer
13 time to submit the information. So, if you reaffirm
14 the old order in the old decision and the 90 days, then
15 this issue is moot, or you can modify this and make the
16 refunds within the 90 days.

17 CHAIRMAN CLARK: Is there a motion on Issue 7?

18 COMMISSIONER KIESLING: I think it's moot. I
19 agree with --

20 COMMISSIONER JOHNSON: But we need a modified
21 motion. Well, either this one is moot and then we have
22 to frame another issue or --

23 CHAIRMAN CLARK: We could take a motion that the
24 issue is moot based on the fact that the majority has
25 voted to reaffirm the decision that sets out the time

1 frames. I mean, conceivably people who voted in the
2 majority could want to change the time frame. Is there
3 a motion?

4 COMMISSIONER JOHNSON: So moved, that this is moot
5 and that we reaffirm the time lines that were in the
6 previous order.

7 MS. JABER: We will do that.

8 CHAIRMAN CLARK: Okay. I would dissent from this
9 issue --

10 COMMISSIONER KIESLING: And I do, too.

11 CHAIRMAN CLARK: -- because I don't think we
12 should go back to the original order on remand.

13 Issue 8. Is there a motion?

14 COMMISSIONER JOHNSON: Does this impact what we
15 did or can we close the docket?

16 COMMISSION STAFF: We still have to verify the
17 refund from May to June, the 90 days.

18 CHAIRMAN CLARK: So, Issue Number 8 should be the
19 docket should be closed, however -- no, that the docket
20 should not be closed until the staff has verified the
21 utility has completed the required refunds.

22 COMMISSIONER DEASON: That's what staff has
23 recommended, so we can just approve staff.

24 CHAIRMAN CLARK: Right.

25 MS. JABER: And we would close the docket

1 administratively.

2 CHAIRMAN CLARK: I don't think so, because it
3 says, "The docket should be closed. However, if the
4 Commission determines that refund and/or surcharges are
5 appropriate," and the majority said refunds are
6 appropriate.

7 MS. JABER: Right. We would just take out the
8 surcharge part.

9 COMMISSIONER DEASON: It says and/or, so it would
10 be refunds. And you still have to keep the docket open
11 to administer the refunds.

12 CHAIRMAN CLARK: Right. I mean, this assumed that
13 there was no further action and there is further
14 action, is what I'm trying to suggest. So, what is
15 your recommendation?

16 MS. JABER: We would recommend that the docket
17 remain open pending verification that the refunds are
18 made. At that time, we will close the docket
19 administratively.

20 CHAIRMAN CLARK: Okay.

21 COMMISSIONER JOHNSON: Second, or so moved.

22 COMMISSIONER DEASON: Second.

23 CHAIRMAN CLARK: All those in favor say aye.

24 COMMISSIONER DEASON: Aye.

25 COMMISSIONER JOHNSON: Aye.

1 COMMISSIONER GARCIA: Aye.

2 CHAIRMAN CLARK: Opposed, nay. Nay.

3 COMMISSIONER KIESLING: Nay.

4 CHAIRMAN CLARK: I think that's consistent with
5 the notion that we need to reopen the record. Thank
6 you very much.

7 MR. ARMSTRONG: Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings was transcribed from cassette tape, and the foregoing pages numbered 1 through 86 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 17th day of June, 1996.



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