

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

M E M O R A N D U M

DECEMBER 26, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MO JHT DM*
DIVISION OF WATER AND WASTEWATER (WILLIS, MERCHANT, B. DAVIS, RENDELL) *W*

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

AGENDA: JANUARY 7, 1997 -- REGULAR AGENDA -- POST-HEARING DECISION -- PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-S.RCM

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. In 1994, the utility recorded total company operating revenues of \$23,498,289 and \$16,985,104 for water and wastewater, respectively. The resulting total company net operating income for that same period was \$3,445,315 for water and \$2,690,791 for wastewater. SSU reported that in 1994 it had 102,514 and 43,131 respective water and wastewater customers for the total utility.

On June 28, 1995, SSU filed an application for approval of uniform interim and final water and wastewater rate increases for

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141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes, respectively. The utility also requested a uniform increase in service availability charges, approval of an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested (AFPI). August 2, 1995, was established as the official date of filing. The utility's application for increased final water and wastewater rates was based on the projected twelve-month period ending December 31, 1996. The utility requested a rate of return of 10.32 percent, which would result in additional annual operating revenues of \$18,137,502 for the utility's combined water and wastewater operations.

By Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, the Commission denied SSU's initial request for interim rate relief based on a projected test year, suspended the proposed final rates, and allowed the utility to file another petition for interim rates. SSU filed its supplemental petition for interim revenue relief on November 13, 1995 which was granted by Order No. PSC-96-0125-FOF-WS (Interim Order), issued January 25, 1996, based upon the historical test year ended December 31, 1994. The Interim Order required SSU to post security as a condition for collecting interim rates, and SSU did so by filing a bond in the amount of \$5,864,375. That bond expires on January 8, 1997.

The Commission held 24 customer service hearings throughout the state during the pendency of this rate proceeding, and a ten-day technical hearing from April 29 through May 10, 1996. The Commission also held an additional day of hearing on May 31, 1996, to consider rate case expense.

On October 30, 1996, the Commission issued Order No. PSC-95-1320-FOF-WS, (Final Order) on the rate proceeding. On November 1, 1996, SSU filed a notice of appeal of the Final Order with the First District Court of Appeal. On November 14, 1996, several intervening parties filed a joint motion for reconsideration with the Commission. On that same date, those parties filed a motion for relinquishment of jurisdiction with the First District Court of Appeal so that the Commission could consider the motion for reconsideration. SSU did not object to the motion to relinquish jurisdiction, and on November 26, 1996, filed a cross-motion for reconsideration with the Commission.

On December 2, 1996, the First District Court of Appeal issued an order abating the appeal pending the PSC's disposition of the motions for reconsideration. On December 3, 1996, SSU filed a Motion to Stay Refund of Interim Rates and Reduction to AFPI Charges Pending Appeal and Motion to Release/Modify Bond Securing Refund of Interim Rates (Motion). SSU requested expedited review

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of the Motion because of the pending expiration of the bond on January 8, 1997. OPC filed a response in opposition to SSU's Motion. OPC's response centers upon the reduction of the bond, and is therefore only addressed in Issue 3 of this Recommendation.

This recommendation addresses SSU's Motion for stay and reduction of bond, and OPC's response. The motion and cross-motion for reconsideration will be addressed in a subsequent recommendation.

Staff also notes for informational purposes that on December 4, 1996, OPC filed a Motion for Reconsideration and Clarification with the First District Court of Appeal. OPC has requested that the court reconsider and clarify its December 2, 1996, order to allow all parties to file motions for reconsideration. SSU responded to OPC's motion, which is still pending before the court.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant SSU's motion to stay the refund of interim rates pending appeal?

RECOMMENDATION: Yes. According to the Commission's rules, when an order involves a refund, the Commission must impose a stay if requested by the utility. (O'SULLIVAN)

STAFF ANALYSIS: Pursuant to Rule 9.310(a), Florida Rules of Appellate Procedure, the Commission has continuing jurisdiction to review requests for stay pending appellate review. Rule 25-22.061, Florida Administrative Code, provides for the imposition of a stay pending judicial proceedings. SSU has requested a stay of the provisions of the Final Order relating to the refund of a portion of the interim rates and the imposition of new charges for Allowance for Funds Prudently Invested (AFPI).

SSU first requests a stay of the refund of a portion of the interim rates, specifically, those collected from the Lehigh and Marco Island service areas. The Final Order required SSU to refund with interest 5.69% and 27.53% of the wastewater revenues collected from Lehigh and Marco Island, respectively. Citing Rule 25-22.061(1)(a), Florida Administrative Code, SSU contends that because the Final Order requires a refund, the Commission must grant its request to stay the refund of interim rates. That subsection states:

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to the customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

Rule 25-22.061(1)(a) requires a mandatory stay if a refund is involved. Staff recommends that the Commission grant SSU's request for a stay as to the refund of interim rates relating to Lehigh and Marco Island. Staff has addressed the appropriate security for the duration of the stay in Issue 3.

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ISSUE 2: Should the Commission grant SSU's motion to stay the reduction to AFPI charges pending refund of interim rates pending appeal?

RECOMMENDATION: No. SSU's request for a partial stay exceeds the purpose of a stay. Issues regarding the calculation of AFPI charges are more appropriately addressed on reconsideration. However, the utility should put any customer who requests a connection during the pendency of the appeal that the AFPI charges are the subject of a pending appeal, and may increase or decrease. (O'SULLIVAN, B. DAVIS, MERCHANT)

STAFF ANALYSIS: SSU's second request involves the stay of the reduction of AFPI charges. SSU states that it intends to appeal the Commission's decision regarding the reduction of AFPI charges. The Final Order established AFPI charges for those SSU facilities which were below 100 percent used and useful. The calculations were based upon Rule 25-30.434, Florida Administrative Code. The Commission approved SSU's request to cap AFPI charges for two separate situations. However, the Commission denied SSU's request to allow it to maintain existing AFPI charges in instances where the revenues would be greater than the new AFPI charges that would result from the calculations. The Final Order cancelled SSU's prior AFPI charges as of January 1, 1997.

SSU first contends that the AFPI charges are comparable to rates charged to customers, and therefore, a stay is mandatory under Rule 25-22.061(1)(a). Staff does not believe that Rule 25-22.061(1)(a) contemplates AFPI charges, which are, as the utility acknowledges, service availability charges. Rule 25-22.061(1)(a) refers to rates only, not rates and charges. Furthermore, service availability charges are granted pursuant to a separate statutory provision than rates.

While the rule does not specifically address the distinction between rates and charges, in a recent docket the Commission made a distinction between the two for the purposes of appeal. By Order No. PSC-95-1431-FOF-WS, issued November 27, 1995, in Docket No. 940963-SU, the Commission addressed the distinction between Rule 25-22.061(3)(a) and (3)(b), Florida Administrative Code. The imposition of North Fort Myers Utility's service availability charges was at issue on appeal. While those rules dealt with the appeal by a public body, the underlying conclusion can be applied in this situation. The Commission reasoned that because the mandatory provision -- subsection (3)(a) -- addressed an increase in a utility's or company's rates, and the discretionary provision -- subsection (3)(b) -- addressed all other situations, "Rule 25-22.061(1)(b) implicitly applies to orders on appeal which do not involve an increase in a utility's or company's rates. In other

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words, the Commission found that an appeal relating to service availability charges did not involve rates, and therefore, did not invoke a mandatory stay.

SSU requests that, in the alternative, a discretionary stay be imposed pursuant to Rule 25-22.061(2), Florida Administrative Code. Rule 25-22.061(2) specifies several factors which the Commission may consider in granting a discretionary stay. SSU has addressed each of them in turn. First, SSU intends to appeal the reduction of SSU's previously approved AFPI charges, and believes that it is likely to succeed on that point. Secondly, SSU argues that it will suffer irreparable harm if a stay is not imposed. It contends that collection of increased AFPI charges, if the utility is successful on appeal, would be difficult. Once a developer has completed a project, SSU alleges that it would face problems in collecting the charges, especially because disconnection of service would not be viable in many cases. Third, SSU alleges that a delay in SSU's ability to collect its previously authorized AFPI charges would harm SSU in that it would have difficulties in collecting any backbilled charges. According to the utility, "recovery of its prudent costs is essential to SSU's financial health and its ability to provide service to its customers."

SSU requests that the Commission stay the reduction of certain AFPI charges, and proposes two alternate methods for staying the reduction:

a. As its primary and preferred request, SSU requests that it be allowed (1) to assess the higher of the AFPI charges SSU requested in its filing or those the Commission approved for plants where SSU requested no change in AFPI charges and (2) to implement the Commission-approved charges for the remaining plants. Attachment C of the Motion reflects the AFPI charges SSU proposes to collect pursuant to this request. SSU alleges that this request would provide it the ability to collect amounts adequate for recovery of previously and currently approved carrying costs on prudent investment, as well as generate funds sufficient for a refund, if necessary, after appeal.

b. Alternatively, SSU requests that it be allowed to retain its pre-rate case AFPI tariffs for those plants where SSU requested no change in AFPI and implement the Commission-approved AFPI charges for all remaining plants. Attachment D of the Motion reflects the proposed charges. SSU argues that this method would allow SSU to assess AFPI charges in accordance with SSU's pre-rate case tariffs in those cases where SSU requested such, and

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AFPI for all remaining plants will be implemented as the Commission has approved.

SSU also notes that the AFPI schedules attached to the Final Order contain omissions and arithmetic calculation errors.

Staff recommends that the Commission deny SSU's request to impose a stay of the reduction of AFPI charges. This recommendation is based upon several grounds. First, a stay of service availability charges is discretionary. The Commission may look at the three factors listed in Rule 25-22.061(2), or any other factors, but is ultimately not required to impose a stay. More importantly, SSU's request exceeds the general purpose of a stay, which is intended to stop or suspend the effectiveness of an order or an action to be taken.

SSU's request is unusual in that the utility has not asked that the entire ruling as to AFPI charges be stayed, but only those charges which have been reduced. While in the past the Commission has stayed portions of orders which relate to a particular subject (e.g. refunds or performance of a specific action), SSU here seeks to stay some of the AFPI charges, while implementing others.

SSU's proposed implementation of AFPI charges is complicated, in that the two alternate methods involve implementing some, but not all, of the approved AFPI charges. In essence, the utility is proposing to choose which charge it should implement. In the Final Order, the Commission denied SSU's request to keep previously approved AFPI charges if they were higher than the new calculations. By granting the partial stay, the Commission would in effect be reconsidering its denial of SSU request to implement some of the older charges.

There are other difficulties with SSU's proposal. Staff analyzed the components of SSU's proposed AFPI charges as they were listed in SSU's attachment. Several of the charges identified in the utility's attachment were not addressed in the Final Order, or were not a part of SSU's initial filing. For example, in some instances the utility assumed a facility to be 100 percent used and useful in its filing, and therefore, did not request an AFPI charge. The Commission determined that the facility was less than 100 percent used and useful, but failed to specifically authorize an AFPI charge in the Final Order. In other cases SSU requested an AFPI charge for a facility, but the Final Order failed to include it. This situation is further complicated by the fact that some omitted facilities had prior AFPI charges, and others did not.

Staff's analysis of the schedules attached to SSU's Motion also revealed that for some facilities SSU has requested that the

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higher charge remain into effect until the lower charge escalates to a point where it increases above the other charge. For example, for Citrus Springs wastewater treatment and disposal, the Commission authorized an escalating schedule of AFPI charges, beginning at \$3.60 for January of 1997 (Final Order, page 1032). SSU's proposed implementation of AFPI under its Alternate 1 indicates that the pre-rate case tariff charge of \$120.17 is used until August of 1999, when the escalating charge approved in the Final Order begins to exceed that amount. This "switching" of the charge structure was not previously presented to the Commission or contemplated in the Final Order.

SSU's proposal clearly exceeds the purpose and function of a stay. By granting either one of SSU's proposals, the Commission would not just be staying the effectiveness of the Final Order, but materially changing that order. Those charges for facilities that SSU requested in its filing but were not addressed by the Commission the Final Order may be addressed by the Commission when it takes up the Final Order on reconsideration. However, the implementation of a partial stay is not the appropriate method of correcting those alleged omissions.

Staff does not believe that it is appropriate to stay the effect of the Final Order as to some, but not all, of the AFPI charges. The AFPI issue is a complex one, and the Commission may wish to revisit its findings on its own motion when it takes up reconsideration of the Final Order. Staff recognizes that errors have been made in the calculation of AFPI charges, and will recommend that the Commission reconsider those charges. However, SSU's Motion for a partial stay of the imposition of AFPI charges is not the appropriate vehicle to address calculation errors or mistakes of fact or law, and for the reasons listed above, Staff recommends that the Motion be denied in this regard.

Staff notes that the denial of the stay may lead to a potential need to backbill those customers that connect during the pendency of appeal, if the utility is successful in its appeal and the court reverses the Commission's decision. See GTE Florida Incorporated v. Clark, 668 So.2d 971 (Fla. 1996). Even if the utility were to seek a full stay of the Final Order regarding AFPI charges, the potential for backbilling would exist. SSU's proposals would allow the utility to collect the highest possible AFPI charges, thereby putting the utility in the position of possibly having to make refunds, but removing the possibility of backbilling. While this is a valid concern, it does not justify granting the partial stay under the alternates proposed by SSU. The utility should address this concern by putting a customer or developer on notice upon hookup and assessment of the charge that

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the AFPI charges are the subject of a pending appeal, and may increase or decrease.

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ISSUE 3: Should SSU's request to release or modify its current bond securing any potential interim refund be granted?

RECOMMENDATION: No. SSU's bond securing any potential interim refund should not be released or modified. Therefore, the current bond should be renewed on or before January 8, 1997, the date of expiration. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, SSU should continue to provide a report by the 20th of each month indicating the total amount of money subject to refund and the status of the security. (RENDELL)

STAFF ANALYSIS: By letter dated January 10, 1996, SSU filed a bond in the amount of \$5,864,375 to secure any potential interim revenue refunds. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, established final rates in this proceeding. Pursuant to this order, SSU was required to refund, with interest, all interim water and wastewater revenues collected from its Enterprise service area, 5.69% of wastewater interim revenues collected from Lehigh, and 27.53% of wastewater interim revenues collected from Marco Island. According to the utility, the interim water and wastewater refunds ordered to Enterprise will not be appealed.

In its Motion, SSU has requested that the bond securing any potential interim refund should be modified to lower the amount from \$5,864,375 to \$2,500,000. This amount includes any potential refunds of AFPI charges. SSU further indicates that reducing the current bond to \$2.5 million would save SSU \$9,114. SSU has estimated approximately \$1.25 million in AFPI potential refunds with interest over an 18 month period. No supporting calculations of AFPI charges were provided. Due to the fact that AFPI charges are only applicable to future customers, it is extremely difficult to ascertain a definite amount of potential AFPI refunds.

As stated in the case background, OPC filed a response in opposition to SSU's Motion. In its Response, OPC states that if the First District Court of Appeal relinquishes jurisdiction, OPC intends to seek reconsideration of the Commission decision to deny interim refunds to all facilities that were part of Docket No. 920199-WS. If the First District Court of Appeal does not relinquish jurisdiction, OPC intends to raise this issue in the pending appeal. OPC contends that the Commission was inconsistent in its approach to setting interim rates and refunding interim rates, and thus violated the interim statute.

Based upon the fact that there are pending Motions for Reconsideration and pending Appeals, staff does not believe it appropriate to grant SSU's Motion to release or modify its current bond securing any potential interim refund. Staff does not have all of the issues that may be reconsidered or appealed before it.

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Further, it is impossible to determine the final Commission decision on reconsideration or the final opinion of the First District Court of Appeal.

Order No. PSC-96-0125-FOF-WS, issued January 25, 1996, indicates that the appropriate security for interim rates was calculated to be \$5,864,375. Staff has determined that this calculated amount assumed a 10 month interim revenue collection period. SSU implemented its interim rates on January 23, 1996 and its final rates on September 20, 1996. Therefore, the interim rates were collected over an 8 month period. Staff has recalculated the total potential interim refund for this 8 month period to be \$4,648,169, with interest. Staff then took this amount and calculated interest for the appeal period. For this calculation, staff assumed a two year appeal time. The final total potential interim refund was calculated to be \$5,157,887. Consistent with staff's recommendation in Issue 2, the potential AFPI refunds should not be included in the calculation.

Therefore, staff recommends that SSU's bond securing any potential interim refund should be not be released or modified in order to adequately protect the customers of SSU. Therefore, the current bond should be renewed on or before January 8, 1997, the date of expiration. Further, pursuant to Rule 25-30.360(6), Florida Administrative Code, SSU should continue to provide a report by the 20th of each month indicating the total amount of money subject to refund and the status of the security.