



FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

JANUARY 14, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JABER) 
DIVISION OF WATER & WASTEWATER (WILLIS, CHASE, RENDELL) 

RE: DOCKET NO. 920199-WS - 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)

AGENDA: JANUARY 21, 1997 - REGULAR AGENDA - DECISION ON
RECONSIDERATION OF ORDER ON STAY - PARTICIPATION IS
DEPENDENT UPON VOTE ON ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\920199MC.RCM

CASE BACKGROUND

On May 11, 1992, Southern States Utilities, Inc., (SSU or utility) filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure. On September 15, 1993, Commission staff approved the revised tariff sheets and the utility proceeded to implement the final rates.

Notices of appeal of Order No. PSC-93-0423-FOF-WS were filed with the First District Court of Appeal by Citrus County and Cypress and Oak Villages (COVA), now known as Sugarmill Woods Civic Association (Sugarmill Woods) and the Office of Public Counsel (OPC). On October 18, 1993, the utility filed a Motion to Vacate Automatic Stay, which the Commission granted by Order No. PSC-93-1788-FOF-WS, issued December 14, 1993.

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FPSC-RECORDS/REPORTING

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On April 6, 1995, the Commission's decision in Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District Court of Appeal, Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). On October 19, 1995, Order No. PSC-95-1292-FOF-WS was issued, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition (decision on remand). By that Order, the Commission ordered SSU to implement a modified stand alone rate structure, develop rates based on a water benchmark of \$52.00 and a wastewater benchmark of \$65.00, and to refund accordingly. On November 3, 1995, SSU filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. At the February 20, 1996, Agenda Conference, the Commission voted, inter alia, to deny SSU's motion for reconsideration.

On February 29, 1996, subsequent to the Commission's vote on the utility's motion for reconsideration but prior to the issuance of the order memorializing the vote, the Supreme Court of Florida issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). By Order No. PSC-96-0406-FOF-WS, issued March 21, 1996, after finding that the GTE decision may have an impact on the decision in this case, the Commission voted to reconsider on its own motion, its entire decision on remand.

By Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, the Commission affirmed its earlier determination that SSU implement the modified stand alone rate structure and make refunds to customers. However, the Commission found that SSU could not implement a surcharge to those customers who paid less under the uniform rate structure. The utility was ordered to make refunds to its customers for the period between the implementation of final rates in September, 1993, and the date that interim rates were placed into effect in Docket No. 950495-WS. The refunds were to be made within 90 days of the issuance of the order.

On September 3, 1996, SSU notified the Commission that it had appealed Order No. PSC-96-1046-FOF-WS to the First District Court of Appeal. On that same date, SSU filed a motion for Stay of Order No. PSC-96-1046-FOF-WS. By Order No. PSC-96-1311-FOF-WS, issued October 28, 1996, the Commission granted SSU's motion for stay. On November 12, 1996, OPC filed a Motion for Reconsideration and Clarification or, in the Alternative, Motion to Modify Stay. On November 18, 1996, SSU timely filed its response to OPC's motion. This recommendation addresses OPC's Motion for Reconsideration and Clarification or, in the Alternative, Motion to Modify Stay.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission allow participation by the parties?

RECOMMENDATION: Yes, the Commission should allow SSU and OPC to participate at the agenda conference. Argument should be limited to five minutes for each side. (JABER)

STAFF ANALYSIS: Participation on post hearing decisions is limited to Commissioners and Staff. However, this recommendation addresses issues which were not specifically addressed by SSU or OPC in their pleadings. Due to the complexity of the case and the issues discussed herein, Staff recommends that the Commission allow OPC and SSU to participate at the agenda conference. Argument should be limited to five minutes for each side.

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ISSUE 2: Should the Office of Public Counsel's Motion for Reconsideration and Clarification or, in the Alternative Motion to Modify Stay be granted?

PRIMARY RECOMMENDATION: No. The Commission lacks jurisdiction at this time to make a ruling on OPC's motion. However, Staff recommends that the Commission immediately request that the First District Court of Appeal relinquish jurisdiction of the Commission's order for the purpose of addressing the issues raised by OPC and the concerns identified by Staff. (JABER, WILLIS, CHASE, RENDELL)

ALTERNATIVE RECOMMENDATION: No. The Commission lacks jurisdiction at this time to make a ruling on OPC's motion. (JABER, WILLIS, CHASE, RENDELL)

PRIMARY STAFF ANALYSIS: By Order No. PSC-96-1311-FOF-WS, the Commission granted SSU's motion to stay Order No. PSC-96-1046-FOF-WS and established the appropriate security. On November 12, 1996, OPC filed its Motion for Reconsideration and Clarification or, in the Alternative, Motion to Modify Stay. In its motion, OPC requests that the Commission "reconsider and clarify" that the stay applies only to SSU's refund obligation and not to the rates charged by SSU in the Spring Hill service area. Alternatively, OPC requests that the Commission modify the stay so that it only applies to the refund obligation. In response to OPC's motion, SSU asserts that because OPC failed to file a response to SSU's motion for stay, it cannot now raise new arguments concerning the motion for stay in a motion for reconsideration, and that because the Order on Stay relied upon Rule 25-22.061(1)(a) in full, the entire final order was stayed.

For the purpose of fully understanding the issue discussed in OPC's motion, additional information is necessary. The Spring Hill facility, in Hernando County, was one of the facilities affected by the uniform rate structure originally approved in Docket No. 920199-WS. On April 5, 1994, Hernando County rescinded Commission jurisdiction. However, pursuant to Section 367.171(5), Florida Statutes, the Commission retained jurisdiction of the pending case as it was filed. Accordingly, the Spring Hill facility remained part of Docket No. 920199-WS.

The Spring Hill facility was not included in SSU's most recent rate proceeding, Docket No. 950495-WS. See, Order No. PSC-95-1385-FOF-WS, issued November 7, 1995. In its decision on remand of the uniform rate order, the Commission ordered SSU to implement a modified stand alone rate structure for the 127 facilities in

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Docket No. 920199-WS and to make corresponding refunds. That decision is now on appeal. As a result, the customers of the Spring Hill facility continue to have the uniform rate structure. However, for the facilities that were part of the most recent rate proceeding, the modified stand alone rates were implemented when the interim rates were approved. As an aside, those customers are currently on the new cap band rate structure. It is OPC's position that the Spring Hill customers should have the modified stand alone rates. The Spring Hill customers are the only customers who continue to be billed based upon the uniform rate structure.

Rule 25-22.060, Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). In Diamond Cab, the Court held that the purpose of a petition for reconsideration is to bring to an agency's attention a point (of fact or law) which was overlooked or which the agency failed to consider when it rendered its order. After reviewing the order on stay and OPC's motion, Staff believes that there is legitimate confusion with respect to the Commission's action as it concerns the Spring Hill customers. However, the cause of the confusion goes beyond the order on stay.

During the remand stage of this docket, it was in Order No. PSC-95-1292-FOF-WS, issued October 19, 1995, that the Commission first required SSU to implement a modified stand alone rate structure for the facilities addressed in Docket No. 920199-WS and to refund accordingly. Clearly, Spring Hill was part of that docket and that order. See, Order No. PSC-95-1292-FOF-WS at 14. After reviewing the GTE opinion, the Commission issued Order No. PSC-96-1046-FOF-WS, reaffirming its earlier decision on the modified stand alone rate structure and the refund required. See, Order No. PSC-96-1046-FOF-WS at 15. The Commission's action in the stay order as it affects Spring Hill is not as clear. One could argue, as SSU does, that its request for stay addresses a stay of the entire order. That is clearly what the title and the prayer for relief of SSU's pleading state. However, Staff believes that there is some merit to OPC's argument that the Commission overlooked whether the implementation of the modified stand alone rate structure for Spring Hill was part of the stay request. In reviewing SSU's motion for stay, it is apparent that the body of the motion does not reference rate structure or the Spring Hill facility. The Commission's order on the stay does not specifically address whether the stay impacted Spring Hill.

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Rule 25-22.061(1)(a), Florida Administrative Code, states that:

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to 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.

In granting SSU's request for a stay, the Commission clearly relied upon the above-referenced rule. The confusion arises in determining whether the Commission granted a partial stay for the refund obligation or a stay of the entire order. Staff believes that the Commission contemplated granting the stay only with respect to the refund obligation. At the very least, the Commission's decision should be clarified.

Moreover, in reviewing OPC's motion, Staff has discovered that the Commission overlooked the Spring Hill facility in that it did not specifically establish the refund period for those customers. By Order No. PSC-96-1046-FOF-WS, the Commission established the refund period for the 127 facilities recognizing that the modified stand alone rate structure had been implemented when interim rates for Docket No. 950495-WS were implemented. However, because Spring Hill was not part of Docket No. 950495-WS, the refund period established by that order is not appropriate for Spring Hill. Staff believes that the Commission merely overlooked this facility and could reconsider, on its own motion, whether and when the modified stand alone rate structure should have been implemented for Spring Hill and the appropriate refund period.

However, as stated earlier, a notice of appeal of Order No. PSC-96-1046-FOF-WS has been filed. The record has been transmitted to the First District Court of Appeal and initial briefs have been filed. Pursuant to Rule 9.600(b), Florida Rules of Appellate Procedure, "[i]f the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal." Staff recognizes that there have been omissions with respect to establishing the appropriate refund period for Spring Hill. Staff also recognizes that clarification of the order on stay is also necessary. To do

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anything to remedy this situation at this time would have a substantive affect on the order on appeal. In consideration of the foregoing, Staff recommends that the Commission immediately request that the First District Court of Appeal relinquish jurisdiction of the Commission's order for the purpose of addressing the issues raised by OPC and the concerns identified by Staff.

ALTERNATIVE STAFF ANALYSIS: This analysis differs from the primary only to the degree that Staff recognizes that the Commission has the option of waiting for the appeal process to run its course to address Spring Hill's rate structure and the appropriate refund period. Staff notes that the utility's appellate reply brief is due January 24, 1997. Requesting that the Court relinquish jurisdiction prolongs the appeal process. The Commission may not wish to take action which would prolong the appeal recognizing that SSU is collecting uniform rates from the Spring Hill customers subject to refund.

The Spring Hill customers are protected and will be made whole in the event that SSU loses its appeal and the order to refund the difference between the uniform rate and the modified stand alone rate is upheld. In this analysis, Staff also recognizes that if the First District Court of Appeal relinquishes jurisdiction and the Commission orders the implementation of the modified stand alone rate structure for Spring Hill, SSU could then seek a stay of that order. Pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, such a stay would be mandatory, as the implementation of a modified stand alone rate structure results in a decrease in rates and a refund for the Spring Hill customers. Therefore, while these issues must be ultimately addressed by the Commission for the Spring Hill customers, it does not appear that a final decision can be made and implemented until the Court makes a decision on the SSU appeal. Accordingly, there appears to be no benefit to requesting that the Court relinquish jurisdiction at this juncture.

For the reasons discussed in the primary analysis regarding the jurisdiction of the docket while on appeal, OPC's motion should be denied. However, Staff recommends that the Commission not request that the Court relinquish jurisdiction.

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ISSUE 3: Should SSU be required to modify its current appeal bond in order to secure any potential refunds pending appeal?

RECOMMENDATION: Yes, SSU should be required to increase its current appeal bond to the amount of \$24,400,000. (RENDELL)

STAFF ANALYSIS: Pursuant to Rule 25-30.061(1)(a), Florida Administrative Code, a stay should 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.

On October 28, 1996, the Commission issued Order No. PSC-96-1311-FOF-WS granting a stay of Order No. PSC-96-1046-FOF-WS, and requiring additional security. On December 2, 1996, SSU filed a Surety Rider which increased its appeal bond from \$8 million to \$10 million.

Upon further review, staff has determined that it made an error of omission in its original calculations. In these calculations staff estimated a potential refund based upon 1991 consumption that could range as high as \$2,359,639 for water and \$1,352,970 for wastewater. This annual estimate was for a one year period and did not include interest but did include the potential refunds to Spring Hill. However, staff stated that the uniform rates were collected over a two year period. Staff assumed that all potential refund liabilities ended with the implementation of the interim rates in Docket No. 950495-WS. These interim rates were based upon the modified stand alone rates approved by the Commission. However, Spring Hill was not included in that docket and SSU has not implemented the modified stand alone rates for these customers, as mentioned in Issue 2.

In Order No. PSC-96-1311-FOF-WS, the original estimated total amount of refund was \$10,000,000, including interest. In its motion filed September 3, 1996 SSU also indicated that the potential refund amounts to approximately \$10 million (at p. 2). Upon further review, staff has determined that additional security is required. Due to the fact that SSU has not implemented the modified stand alone rates in its Spring Hill service area, the potential of a refund liability continues to accrue.

Staff has recalculated the potential refund and has determined that the total liability could be as high as \$24,372,830, including interest. Since this amount is substantially higher than the current bond, staff believes a brief explanation is necessary. As to the collection of revenues in the Spring Hill service area, SSU

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began collecting the uniform rates in September 1993, and continues to do so. Again assuming a time frame of a two year appeal, if left unchanged, these rates will be collected until approximately September 1998. This amounts to a potential refund of \$13,456,146, without interest. When interest is included, this amount increases to \$17,892,637 over this six year period. As to the remaining service areas, the uniform rates were collected from September 1993, to January 1996. The total amount of potential refunds for these areas amounts to \$5,822,697, without interest. Again, assuming a two year appeal time, the amount increases to \$6,480,193 including interest. These calculations are shown on Schedule No. 1.

Therefore, staff believes that SSU should be required to again increase the original bond to the amount of \$24,400,000 which should be sufficient to cover the total potential refund. Further, the bond should state that it will remain in effect during the pendency of the appeal and will be released or terminated upon subsequent order of the Commission addressing the potential refund.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. The docket should remain open pending resolution of the appeal process. (JABER)

STAFF ANALYSIS: Order No. PSC-96-1046-FOF-WS has been appealed. This docket should remain open pending final resolution of the appeal by the First District Court of Appeal.

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SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 920199-WS

Schedule No. 1

WATER AND WASTEWATER

**POTENTIAL
 REFUNDS**

Spring Hill service area	\$2,242,691
/12 months	12
	<u>\$186,891</u>
Number of months until potential refunds completed: (assume refund by 09/98)	72
	\$13,456,146
(13-month average annual interest rate 5.495%)	
Factored interest rate for 72 month period (per AFAD on 01/02/97)	<u>1.3297</u>
Potential refund for Spring Hill	<u>\$17,892,637</u>

Potential annual refund for all other service areas	\$2,303,114
/12 months	12
	<u>\$5,182,007</u>
Number of months until interim rates were implemented: (SEPTEMBER 1993 -JANUARY 1996)	27
	\$5,182,007
(13-month average annual interest rate 5.495%)	
Factored interest rate for 27 month period (per AFAD on 01/02/97)	<u>1.1236375</u>
Potential refund as of January 1996	\$5,822,697
13-month average annual interest rate 5.495%	<u>1.05495</u>
(per AFAD on 01/02/97)	
Amount of potential refunds for remaining service areas:	\$6,480,193

\$24,372,830

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ISSUE 3: Should SSU be required to modify its current appeal bond in order to secure any potential refunds pending appeal?

RECOMMENDATION: Yes, SSU should be required to increase its current appeal bond to the amount of \$19,552,000. (RENDELL)

STAFF ANALYSIS: Pursuant to Rule 25-30.061(1)(a), Florida Administrative Code, a stay should 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.

On October 28, 1996, the Commission issued Order No. PSC-96-1311-POF-WS granting a stay of Order No. PSC-96-1046-POF-WS, and requiring additional security. On December 2, 1996, SSU filed a Surety Rider which increased its appeal bond from \$8 million to \$10 million.

Upon further review, staff has determined that it made an error of omission in its original calculations. In these calculations staff estimated a potential refund based upon 1991 consumption that could range as high as \$2,359,639 for water and \$1,352,970 for wastewater. This annual estimate was for a one year period and did not include interest but did include the potential refunds to Spring Hill. However, staff stated that the uniform rates were collected over a two year period. Staff assumed that all potential refund liabilities ended with the implementation of the interim rates in Docket No. 950495-WS. These interim rates were based upon the modified stand alone rates approved by the Commission. However, Spring Hill was not included in that docket and SSU has not implemented the modified stand alone rates for these customers, as mentioned in Issue 2.

In Order No. PSC-96-1311-POF-WS, the original estimated total amount of refund was \$10,000,000, including interest. In its motion filed September 3, 1996 SSU also indicated that the potential refund amounts to approximately \$10 million (at p. 2). Upon further review, staff has determined that additional security is required. Due to the fact that SSU has not implemented the modified stand alone rates in its Spring Hill service area, the potential of a refund liability continues to accrue.

Staff has recalculated the potential refund and has determined that the total liability could be as high as \$19,551,616, including interest. Since this amount is substantially higher than the current bond, staff believes a brief explanation is necessary. As to the collection of revenues in the Spring Hill service area, SSU

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began collecting the uniform rates in September 1993, and continues to do so. Again assuming a time frame of a two year appeal, if left unchanged, these rates will be collected until approximately September 1998. This amounts to a potential refund of \$10,578,582, without interest. When interest is included, this amount increases to \$14,066,340 over this six year period. As to the remaining service areas, the uniform rates were collected from September 1993, to January 1996. The total amount of potential refunds for these areas amounts to \$4,928,726, without interest. Again, assuming a two year appeal time, the amount increases to \$5,485,275 including interest. These calculations are shown on Schedule No. 1.

Therefore, staff believes that SSU should be required to again increase the original bond to the amount of \$19,552,000 which should be sufficient to cover the total potential refund. Further, the bond should state that it will remain in effect during the pendency of the appeal and will be released or terminated upon subsequent order of the Commission addressing the potential refund.

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SOUTHERN STATES UTILITIES, INC. DOCKET NO. 920199-WS		Schedule No. 1 REVISED 01/15/97
<u>WATER AND WASTEWATER</u>		
		POTENTIAL REFUNDS
Spring Hill service area		\$1,763,097
/12 months		<u>12</u>
		\$146,925
Number of months until potential refunds completed: (assume refund by 09/98)		<u>72</u>
		\$10,678,682
(13-month average annual interest rate 5.495%)		
Factored interest rate for 72 month period (per AFAD on 01/02/97)		<u>1.3297</u>
Potential refund for Spring Hill		\$14,066,340
Potential annual refund for all other service areas		\$1,949,512
/12 months		<u>12</u>
		\$162,459
Number of months until interim rates were implemented: (SEPTEMBER 1993 -JANUARY 1996)		<u>27</u>
		\$4,386,402
(13-month average annual interest rate 5.495%)		
Factored interest rate for 27 month period (per AFAD on 01/02/97)		<u>1.1236375</u>
Potential refund as of January 1996		\$4,928,726
13-month average annual interest rate 5.495%		
(per AFAD on 01/02/97)		<u>1.05495</u>
Amount of potential refunds for remaining service areas:		\$5,485,275
AMOUNT OF TOTAL POTENTIAL REFUNDS:		\$29,551,938

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 3954-C

ITEM NO.

CASE

29 DOCKET NO. 920199-WS - 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 Opened: 3/2/92

Critical Date: None

Hearing Dates: Available upon request

Commissioners Assigned: Full Commission
Prehrq Officer CL

Staff: WAW: Willis, Chase, Rendell
LEG: Jaber

PARTICIPATION TO BE DETERMINED IN ISSUE NO. 1.

Issue 1: Recommendation that the Commission should allow Southern States Utilities, Inc. (SSU) and the Office of Public Counsel (OPC) to participate at the agenda conference. Argument should be limited to five minutes for each side.

Issue 2: Recommendation that OPC's motion for reconsideration and clarification or, in the alternative motion to modify stay be denied. The Commission lacks jurisdiction at this time to make a ruling on OPC's motion. However, the Commission should immediately request that the First District Court of Appeals relinquish jurisdiction of the Commission's order for the purpose of addressing the issues raised by OPC and the concerns identified by staff.

Alternative Recommendation: Recommendation that OPC's motion for reconsideration and clarification or, in the alternative motion to modify stay be denied. The Commission lacks jurisdiction at this time to make a ruling on OPC's motion.

Issue 3: Recommendation that SSU be required to modify its current appeal bond in order to secure any potential refunds pending appeal. SSU should be required to increase its current appeal bond to the amount of \$24,400,000.

Issue 4: Recommendation that this docket remain open pending resolution of the appeal process.

WATER AND WASTEWATER

**POTENTIAL
REFUNDS**

Spring Hill service area	\$1,763,097
/12 months	12
	<u>\$146,925</u>
Number of months until potential refunds completed: (Assume refund by 09/98)	60
	\$8,815,485
(13-month average annual interest rate 5.495%)	
Factored interest rate for 60 month period (per AFAD on 01/02/97)	<u>1.27475</u>
Potential refund for Spring Hill	<u>\$11,237,540</u>

Potential annual refund for all other service areas	\$1,949,512
/12 months	12
	<u>\$162,459</u>
Number of months until interim rates were implemented: (SEPTEMBER 1993 -JANUARY 1996)	27
	\$4,386,402
(13-month average annual interest rate 5.495%)	
Factored interest rate for 27 month period (per AFAD on 01/02/97)	<u>1.1236375</u>
Potential refund as of January 1996	\$4,928,726
13-month average annual interest rate 5.495%	
Factored interest rate for 31 month period (Assume refund by 09/98)	<u>1.14195417</u>
	\$5,628,379

\$16,865,918