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February 11, 1997

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Water Services Corporation ("Florida Water") are the following documents:

1. Original and fifteen copies of Florida Water Services Corporation's Motion for Reconsideration of Order No. PSC-97-0099-FOF-WS;

2. Original and fifteen copies of Florida Water Services Corporation's Request for Oral Argument on Motion for Reconsideration of Order No. PSC-97-0099-FOF-WS; and

ACK _____ 3. A disk in Word Perfect 6.0 containing a copy of the
AFA _____ document.

APP 1 Please acknowledge receipt of these documents by stamping the
CFC _____ extra copy of this letter "filed" and returning the same to me.

CFC _____ Thank you for your assistance with this filing.

Sincerely,

William B. Willingham
William B. Willingham

WBW/rl

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DOCUMENT NUMBER-DATE

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EPSC-RECORDS/REPORTING

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Motion
DOCUMENT NUMBER-DATE

01548 FEB 11 5

EPSC-RECORDS/REPORTING

ORIGINAL
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate)
increase and increase in service)
availability charges by Southern)
States Utilities, Inc., for)
Orange-Osceola Utilities, Inc. in)
Osceola County, and in Bradford,)
Brevard, Charlotte, Citrus, Clay,)
Collier, Duval, Highlands, Lake,)
Lee, Marion Martin, Nassau, Orange,)
Osceola, Pasco, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

Docket No. 950495-WS

Filed: February 11, 1997

FLORIDA WATER SERVICES CORPORATION'S MOTION FOR RECONSIDERATION
OF ORDER NO. PSC-97-0099-FOF-WS

FLORIDA WATER SERVICES CORPORATION, formerly known as Southern States Utilities, Inc. (hereinafter "Florida Water" or "Utility"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby moves the Commission to reconsider the hereinbelow identified portion of Order No. PSC-97-0099-FOF-WS, issued in this docket on January 27, 1997. In support of this Motion for Reconsideration, Florida Water states as follows:

1. Order No. PSC-97-0099-FOF-WS (the "Stay Order") granted in part and denied in part Florida Water's 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. Specifically, the Stay Order (1) granted a stay of the refund of interim rates to Lehigh and Marco Island wastewater customers required by Order No. PSC-99-1320-FOF-WS, issued October 30, 1996 (the "Final Order"); (2) denied any reduction to the amount of the bond securing a refund of interim revenues during the pendency of

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the appeal; and (3) denied a stay of reduced Allowance for Funds Prudently Invested ("AFPI") charges imposed by the Final Order. Florida Water seeks reconsideration of the Stay Order insofar as it denied Florida Water's Motion to Stay Reduction to AFPI Charges Pending Appeal (the "AFPI Stay Motion").

2. The Commission must reconsider that portion of the Stay Order identified above for the following reasons: (1) the Stay Order is premised on a mistake of fact as to the substance of Florida Water's AFPI Stay Motion, (2) the Stay Order is premised on a mistake of law as to applicable legal standards, and (3) the Stay Order is inconsistent with other Commission decisions and therefore an abuse of discretion (a mistake of law). See Diamond Cab Company of Miami v. King, 146 So.2d 888, 891 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). The AFPI Stay Motion should therefore be granted.

3. The Stay Order is premised on a mistake of fact concerning the substance of the AFPI Stay Motion. On page 5 of the Stay Order, the Commission states as follows:

There are other difficulties with SSU's proposal which make the request for stay inappropriate. Several of the charges identified in the utility's attachment were not addressed in the Final Order, or were not 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. We 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.

Our analysis of the schedules attached to [the AFPI Stay Motion] also revealed that for some facilities [the Utility] has requested that the higher charge remain into [sic] effect until the lower charge escalates to a point where it increases above the other charge. . . . This "switching" of the charge structure was not previously presented to this Commission or contemplated in the Final Order. (Emphasis added).

Further, at the Agenda Conference, Commission staff made the following statements concerning the substance of Florida Water's request:

[W]e found several problems with that structure in terms of picking and choosing between the service areas and proposing a few rates that we didn't think had been in the original proposal. . . .

Commissioners, they had things that the Commission had denied in the final order. They requested some rates specifically denied, and there were other rates that we never even addressed.

. . . .

[T]he utility's filing . . . included things that the Commission has not considered in the record during the hearing. They proposed a few separate charges that were not considered at all by the Commission and are not in the record, and we had serious concerns about that. That if you do permit the utility to implement its Alternative 1, you will have rates that were not considered by the Commission.

Transcript at pp 5-6, 10. Florida Water submits that these statements and representations are in error or are irrelevant to the issues.

4. It should first be understood that the AFPI Stay Motion did not propose anything impermissably not "in the record." The AFPI charges in both of the alternative requests for relief which Florida Water proposed are either approved by the Commission or in the MFRs. Florida Water did not calculate new AFPI charges for

purposes of the AFPI Stay Motion, as the above quotes imply. By its own admission, staff concedes the Commission erred in several ways when it established AFPI charges, and in particular, by failing to approve AFPI charges for a number of plants where the Commission found non-used and useful property present. Thus, the AFPI charges which were "never addressed," referring to the quoted language above, were never addressed because of the Commission's error, not Florida Water's. In those cases where the Commission erred by failing to approve AFPI though it appears the Commission should have, Florida Water took the following approach in the AFPI Stay Motion: (1) if Florida Water did not request AFPI in the MFRs, none was requested in AFPI Stay Motion and (2) if Florida Water did request AFPI in the MFRs, Florida Water did request AFPI in the AFPI Stay Motion.¹ In any event, Florida Water limited its requests to information on the record and should not now be made to suffer for errors made by the Commission staff or the Commission. If the correction of such errors impacts a particular AFPI charge in any appreciable way, the proper course for the Commission is to correct its errors, deny a request in part, not deny the AFPI Stay Motion in its entirety.

5. There is no valid basis for criticizing Florida Water's "switching" the charge structures as proposed in the AFPI Stay

¹Florida Water notes with respect to the latter category of cases that the Beacon Hills and Palm Port water treatment plant AFPI charges were correctly submitted, but it appears none of the others plants/components falling in this category involved a potential resetting of existing AFPI, just an omission of Commission approved charges.

Motion. This measure was designed as a condition for the proposed stay to insure that no backbilling/surcharges would be imposed. The argument that the "switching" itself is not in the record is therefore without relevance or substance. (See discussion below concerning legal standards for granting/conditioning stays.) It also goes without saying that the Commission has often before reached a conclusion based on a combination of extrapolated facts and theories in the record.

6. The Stay Order and transcript of the Commission's consideration of the AFPI Stay Motion also evinces the Commission's misunderstanding of the applicable legal standards for three distinct but related issues: 1) the purpose and effect of a stay, as opposed to reconsideration of the underlying decision; 2) the legality and propriety of partitioning an order for purposes of imposing a stay; and 3) the discretionary standard in general.

7. On the subject of the first of these issues, the Commission stated as follows:

After careful consideration of SSU's proposal, we deny SSU's request to impose a stay of the reduction of the AFPI charges. 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.

.

. By granting the partial stay, we would in effect be reconsidering the denial of SSU [sic] request to implement some of the older charges.

.

. By granting either one of SSU's proposals, we would not just by staying the effectiveness of the Final Order, but materially changing that order.

Stay Order, pp. 4-5. The quoted language reflects a

misapprehension of law because the Commission ignored entirely: 1) the accepted principle that a stay serves to protect the status quo and 2) its own authority to impose lawful conditions for a stay pursuant to Rule 9.310(a) of the Florida Rules of Appellate Procedure and Rule 25-22.061(2), Florida Administrative Code.

8. The court in Hirsch v. Hirsch, 309 So.2d 47 (Fla. 3rd DCA 1975), described the nature of a supersedeas (a stay by writ)² as follows:

The function and purpose of a supersedeas is, generally, to stay further judicial proceedings in the trial court, to restore or preserve the status quo or to stay execution of an order or judgment.

309 So.2d at 50. Thus, a stay, by its very nature, results (temporarily) in a state of affairs contrary to that ordered by the judgment stayed. Therefore, the Stay Order's reasoning that the Utility's request was effectively reconsideration of the Final Order, or materially changing same, is an utterly flawed legal premise. For illustration purposes, recall that Florida Water's AFPI Stay Motion contained a primary and an alternative request. Generally stated, the alternative request sought a temporary continuation of the AFPI charges in effect **prior to** the Final Order for those plants where the Commission reset AFPI -- a restoration of the status quo prior to issuance of the Final Order.³ Thus, the

² Supersedeas is the name of a writ containing a command to stay proceedings at law. In modern times, it is often used synonymously with a "stay of proceedings" and designates the effect of an act or proceeding which of itself suspends the enforcement of a judgment. Black's Law Dictionary 1289 (5th ed. 1979).

³ Florida Water will appeal the Final Order's resetting AFPI at zero for those plants identified in the AFPI Stay Motion.

Commission clearly misapprehended the legal nature of a stay as applied to Florida Water's AFPI Stay Motion (in regards to the alternative request at a minimum) and, therefore, must reconsider its decision.

9. As stated above, pursuant to Rule 9.310(a), Fla. R. App. P., and Rule 25-22.061(2), Florida Administrative Code, the Commission may impose any lawful conditions for a stay. Florida Water's AFPI Stay Motion (as to both its primary and alternative requests) seeks relief and the imposition of conditions for a stay which are lawful. The Stay Order cites no authority which suggests that Florida Water's proposed conditions are not lawful. Rather, the Stay Order raises a philosophical objection (altering the Final Order) which misses the point concerning stay conditions entirely. The Commission made a mistake of law in its Stay Order by failing to recognize its authority to impose conditions for a stay which temporarily sanctions relief different from a judgment, subject to adequate security protections.

10. The Stay Order is premised upon a mistake or misunderstanding of law as to the Commission's ability to and the propriety of partitioning an order for purposes of issuing a stay.⁴

Florida Water agreed that its proposed AFPI collections pending appeal were subject to refund if Florida Water's appeal is unsuccessful and agreed to post a bond as security.

⁴ Commissioner Clark expressed concern with staying parts of orders. See Agenda Conference Transcript, pp. 7-8. Further, the Stay Order stresses in four instances the significance of Florida Water's having requested to implement some AFPI charges but not others, even though the order acknowledges that the Commission has stayed portions of orders in prior cases.

No authority exists prohibiting a trial level court or administrative agency from staying only a portion of an order. E.g. Lopez-Cantera v. Lopez-Cantera, 578 So.2d 726 (Fla. 3rd DCA 1991). More importantly, neither a court nor agency is justified in imposing, as a condition to granting a stay to a portion of an order appealed, a requirement that that portion of the order not appealed also be stayed. Thomas Jefferson, Inc. v. Hotel Employees Union, Local 255, 81 So.2d 731, 733 (Fla. 1955). The Stay Order in this cases imposes just such an unlawful condition on Florida Water wherein the Stay Order declares:

[I]t is not appropriate to stay the effect of the Final Order as to some, but not all, of the AFPI charges.

Order at p. 6. Florida Water intends to raise on appeal, and seeks a stay of, the Final Order's resetting certain pre-existing AFPI charges to zero, thereby depriving Florida Water of unrecovered but accrued carrying costs for prudently invested plant. Motion at pp. 4-7.⁵ Where parts of an order are severable, and the practical effect of refusing to stay the part of the order from which the appeal is taken is to put the appellant in the untenable position where it cannot adequately protect its rights, the court cannot refuse the stay requested. Thomas Jefferson, Inc., supra. Since the AFPI charges are set on a plant-by-plant and component basis, there is no logical reason why a stay cannot operate as to some but

⁵ As specified in Florida Water's AFPI Stay Motion, Florida Water accepted resetting AFPI charges in its Minimum Filing Requirements ("MFRs") in a limited number of cases. Florida Water's appeal and the AFPI Stay Motion do not concern these situations.

not all of the AFPI charges. Further, the Commission has placed Florida Water in a position where Florida Water cannot protect its rights. The difference in AFPI due pursuant to the pre-rate case AFPI charges as compared to that due pursuant to the new AFPI charges for only one month's connections is substantial. See Exhibit A, attached hereto and incorporated herein by reference. If the Commission does not stay **any** of the AFPI charges imposed by the Final Order, Florida Water suffers inadequate recovery of previously approved carrying costs. If the Commission stay's **all** of the AFPI charges imposed, Florida Water suffers still. In either case, it is presently doubtful Florida Water will ever recover the lost carrying costs it hopes to win on appeal notwithstanding the Stay Order's provision that notice be given connecting customers/developers. As asserted in the AFPI Stay Motion, recouping previously unrecovered carrying costs through backbilling/surcharging AFPI is problematic and uncertain at best; and by the Commission's recent decision in Docket No. 920199-WS,⁶ uncertainty now exists as to how consistently the Commission will allow backbilling/surcharging in cases where the Commission is reversed on appeal. Thus the Stay Order has the practical effect of refusing Florida Water adequate protection of its rights and must, therefore, be reversed. See Thomas Jefferson, Inc., supra.

11. The Stay Order manifests a misapplication of the standard of discretion to be applied to consideration of the AFPI Stay

⁶ Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, now pending on appeal before the First District Court of Appeal.

Motion. On the subject of discretion generally, the Stay Order states as follows:

We initially observe that a stay of service availability charges is discretionary. We may examine the three factors listed in Rule 25-22.061(2), or any other factors, but are ultimately not required to impose a stay.

Stay Order at p. 4. Aside from appearing to establish a predisposition for denying a stay request, the quoted language gives the impression that a stay request may be rejected even if a stay is justified. This is not the proper standard for the exercise of discretion.⁷ A stay order will be reversed if deemed arbitrary or unreasonable. See All Florida Surety Co. v. Coker, etc., 79 So.2d 762, 765 (Fla. 1955) and Thomas Jefferson, Inc., supra. Further, as the Court explained in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), as to the exercise of discretion generally:

The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

382 So.2d at 1203. Florida Water maintains that the Commission misunderstood and misapplied the discretion standard in its Stay

⁷ The Commission also errs in the Stay Order by failing to address the factors listed in Rule 25-22.061(2) despite having done so consistently in prior cases. See e.g., 96 F.P.S.C. 2:667 (Order No. PSC-96-0274-FOF-EI) and 95 F.P.S.C. 7:360 (Order No. PSC-95-0918-FOF-TP).

Order and therefore must grant reconsideration. For the reasons explained herein, the Commission's Stay Order was neither reasonable nor consistent with Commission action taken even in the same order.

12. The Stay Order is inconsistent with other Commission decisions made in the very same order and, therefore, the Commission has abused its discretion and should reconsider the Stay Order.

a. The Stay Order stayed the Final Order's interim refund requirement to wastewater customers of Lehigh and Marco Island. The Final Order, however, also imposed a refund obligation on Florida Water for interim revenues collected from the Enterprise service area. Florida Water did not seek to stay this portion of the Final Order, and the Commission did not impose a stay requirement. In other words, the Commission stayed certain severable portions of the Final Order which Florida Water will appeal (interim refunds to Lehigh and Marco Island) while not staying or requiring a stay to that portion Florida Water will not appeal (interim refunds to Enterprise). Florida Water submits that there is no logical or legal distinction between the partial stay of the refund of interim revenues and the partial stay sought by Florida Water in the AFPI Stay Motion.⁸

⁸ Any attempt to distinguish the two on the basis that a stay of a refund requirement is not discretionary under Rule 25-22.061(1)(a), Florida Administrative Code, must be rejected. Such an argument presumes that no rational basis supports the rule or that the Commission has no discretion for setting conditions for a

b. The rejection of the AFPI Stay Motion is also inconsistent with the Stay Order's requirements concerning the bond securing a possible refund of interim rates. In response to Florida Water's Motion to Release/Modify Bond Securing Refund of Interim Rates, the Office of Public Counsel ("OPC") stated such relief was inappropriate because OPC would seek reconsideration of and appeal the refund calculation. In the Stay Order, the Commission effectively reconsidered/altered the Final Order, increasing the potential refund liability through action taken on the amount of the bond pending appeal. Such action is supported by the very same reasoning used as the basis for rejecting the AFPI Stay Motion. Looked at another way, the Commission did not want to face the prospect of an unsecured potential interim rates refund if OPC's arguments proved correct on reconsideration or appeal; but as to AFPI, the Commission accepted the prospect of driving Florida Water toward an unrecoverable backbilling/surcharge of AFPI if Florida Water's arguments prove correct on appeal.⁹

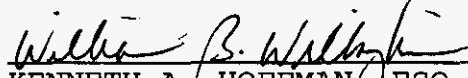
stay of refunds (which it does have). Nor can the Enterprise refund be distinguished on the basis that the Enterprise facilities were excluded from the instant rate case as a matter of law. The Final Order does not state that Enterprise was excluded on this basis. See Final Order at p. 36. Even if the Final Order did, one must question why Enterprise was not similarly excluded from the case for interim rate purposes.

⁹ Florida Water does not herein seek reconsideration of that portion of the Stay Order refusing to reduce the amount of the bond securing interim refunds. Florida Water merely points out the inconsistency and unfairness of the Commission's approach to the two matters -- what Florida Water is denied compared to what OPC is granted. Florida Water hereby makes it clear that by having posted bond in the amount required by the Stay Order, Florida Water does

The Supreme Court's recent directive that ratemaking is a matter of fairness and that "[e]quity requires that both ratepayers and utilities be treated in a similar manner," GTE Florida, Inc. v. Clark, 668 So.2d 971, 972 (Fla. 1996), should also lead the Commission to reverse its disparate treatment of Florida Water in the Stay Order.

WHEREFORE, in consideration of the foregoing, Florida Water Services Corporation moves that the Commission reconsider Order No. PSC-97-0099-FOF-WS as set forth hereinabove and grant Florida Water Services Corporation's Motion to Stay Reduction to AFPI Charges Pending Appeal.

Respectfully submitted,



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not surrender any rights or concede any arguments respecting the impropriety of any refund of interim revenues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following on this 1/14 day of February, 1997:

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KENNETH A. HOFFMAN, ESQ.

**EXHIBIT A
PAGE 1 OF 1**

**FLORIDA WATER SERVICES
AFPI Charges Comparison in January 1997 (FPSC Regulated)**

PLANT NAME	NUMBER OF CONNECTIONS	AFPI DUE UNDER PRE-RATE CASE TARIFF	AFPI DUE UNDER NEW TARIFF
Amelia Island	7	\$ 4,865.28	\$ 171.78
BVL	1	\$ --	\$ 6.60
Citrus Springs	3	\$ 2,191.77	\$ 54.90
Deep Creek	3	\$ --	\$ 18.18
Deltona	54	\$ 8,617.32	\$ 1,233.90
Fountains	1	\$ 24.46	\$ 0.78
Fox Run	1	\$ 817.41	\$ --
Geneva Lake	1	\$ --	\$ 2.05
Keystone Heights	1	\$ 297.16	\$ 4.42
Lakeside	1	\$ --	\$ 3.07
Lehigh	14	\$ 17,279.92	\$ 514.78
Marco Island	3	\$ 28,898.73	\$ 80.25
Marco Shores	1	\$ 1,816.45	\$ 20.51
Marion Oaks	6	\$ 11,159.04	\$ 161.46
Pine Ridge	5	\$ 1,522.40	\$ 56.30
Silver Lake	2	\$ --	\$ 7.06
SMW	3	\$ 1,189.26	\$ 39.27
University Shores	3	\$ 3,531.18	\$ 29.01
Woodmere	6	\$ 3,161.82	\$ 10.50
TOTAL	116	\$ 85,372.20	\$ 2,414.82

Note:

- (1) Fees based on 169.62 total ERCs
- (2) Old Fees are based on Tariff Sheets prior to 12/31/96
- (3) New Fees are based on Tariff Sheet effective 2/5/97