

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

APRIL 24, 1997

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

FROM: DIVISION OF LEGAL SERVICES (JABER) *AS* *JL* *CR* *bl*
DIVISION OF WATER & WASTEWATER (WILLIS, CHASE, RENDELL) *W*

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: MAY 6, 1997 - REGULAR AGENDA - DECISION ON
RECONSIDERATION OF ORDER MODIFYING STAY - PARTICIPATION
IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

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

CASE BACKGROUND

On May 11, 1992, Florida Water Services Corporation, formerly known as Southern States Utilities, Inc. (hereinafter "FWSC" 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 FWSC 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, FWSC 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 FWSC'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 FWSC implement the modified stand alone rate structure and make refunds to customers. However, the Commission found that FWSC 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, FWSC 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, FWSC 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 FWSC'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, FWSC timely filed its response to OPC's motion.

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The Commission heard oral argument on OPC's motion and FWSC's response during the January 21, 1997 agenda conference. By Order No. PSC-97-0175-FOF-WS, issued February 14, 1997, the Commission denied OPC's motion for reconsideration and clarification, but granted OPC's alternative motion to modify the stay. The Commission modified Order No. PSC-96-1046-FOF-WS to reflect that only FWSC's refund obligation was stayed pending appeal, and that FWSC shall implement the modified stand-alone rate structure for FWSC's Spring Hill facility in Hernando County, consistent with prior Commission Orders Nos. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS.

On February 28, 1997, FWSC filed a Motion For Reconsideration of Order No. PSC-97-0175-FOF-WS and Motion For Stay Of Order No. PSC-97-0175-FOF-WS Pending Disposition Of Motion For Reconsideration. On March 7, 1997, OPC timely filed its responses to FWSC's motions. FWSC and OPC did not request oral argument. This recommendation addresses FWSC's motions for reconsideration and stay.

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DISCUSSION OF ISSUES

ISSUE 1: Should FWSC's motion for reconsideration of Order No. PSC-97-0175-FOF-WS be granted?

RECOMMENDATION: No, FWSC's motion for reconsideration of Order No. PSC-97-0175-FOF-WS should be denied. (JABER, CHASE, RENDELL)

STAFF ANALYSIS: By Order No. PSC-97-0175-FOF-WS, the Commission granted OPC's alternative motion to modify Order No. PSC-96-1046-FOF-WS to reflect that only FWSC's refund obligation was stayed pending appeal, and that FWSC should implement the modified stand-alone rate structure for the Spring Hill customers consistent with prior Commission Orders No. PSC-95-1292-FOF-WS and PSC-96-1046-FOF-WS. On February 28, 1997, FWSC filed a motion for reconsideration and motion for stay of Order No. PSC-97-0175-FOF-WS. FWSC requests that the Commission reconsider that portion of Order No. PSC-97-0175-FOF-WS requiring FWSC to implement modified stand-alone rates for its Spring Hill facilities in Hernando County.

Spring Hill 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.

In its decision on remand of the uniform rate order, the Commission ordered FWSC to implement a modified stand-alone rate structure for the 127 facilities in Docket No. 920199-WS and to make corresponding refunds. For the facilities that were part of the most recent rate proceeding, Docket No. 950495-WS, the modified stand-alone rates were implemented when the interim rates were approved. The Spring Hill facility was not included in Docket No. 950495-WS. See Order No. PSC-95-1385-FOF-WS, issued November 7, 1995. As a result, the customers of the Spring Hill facility continued to have the uniform rate structure.

In support of its motion for reconsideration, FWSC asserts that the Commission made a mistake of law in failing to apply the mandatory provisions of Rule 25-22.061(1)(a), Florida Administrative Code. FWSC argues that Order No. PSC-97-0175-FOF-WS's modification of stay, requiring the implementation of modified stand-alone rates for the Spring Hill facilities, results in a reduction of rates for the Spring Hill customers. FWSC contends that:

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like the refund requirement, the reduction of rates for the Spring Hill facilities under the modified stand-alone rate structure squarely falls within the express language of Rule 25-22.061(1)(a) requiring that such decisions be stayed upon motion of Florida Water and the posting of adequate security.

OPC timely filed its response to FWSC's motion on March 7, 1997. In its response, OPC states that FWSC's argument ignores that the orders requiring modified stand-alone rates for Spring Hill complete the process of moving away from the uniform rates. Further, OPC states that the change in rate structure results in no change in revenues.

With respect to Rule 25-22.061, Florida Administrative Code, FWSC made the same argument in its response in opposition to OPC's motion for reconsideration and clarification, or, in the alternative, motion to modify stay. At page 3 of its November 18, 1996 response, FWSC asserted that:

OPC's Motion for Reconsideration states that [FWSC]'s Motion for Stay refers only to the refund requirement of the Final Order. OPC fails to advise the Commission that [FWSC's] Motion for Stay and the Order granting the Stay cited and relied upon Rule 25-22.061(1)(a), F.A.C., in full. That rule provides that a stay shall be granted when the order being appealed involves 'a decrease in rates charged to customers....' A move to modified stand-alone rates for Spring Hill would result in a decrease in rates charged to the Spring Hill customers. Pursuant to Commission Rule, [FWSC] was and is entitled to the stay ordered by the Commission -- a stay of the Final Order in its entirety including the change to a modified stand-alone rate structure for the Spring Hill service area.

The Commission heard oral argument on OPC's motion and FWSC's response during the January 21, 1997 agenda conference. At that time, counsel for FWSC again argued that modification of the stay would involve a decrease in rates for the Spring Hill system, for which FWSC would be entitled to a stay under the rule cited above.

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Rule 25-22.060(1), 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 purpose of a motion for reconsideration is to bring to the attention of the Commission some point of fact or law which it overlooked or failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingtree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). The granting of a motion for reconsideration should not be based upon an arbitrary feeling that mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

The standard for judging the motion in this case, then, should be whether or not the Commission made a mistake or an oversight in modifying the stay. Staff has applied these standards in review of FWSC's motion, and believes that FWSC has not shown that the Commission has overlooked any point of fact or law requiring reconsideration. Rather, FWSC's motion for reconsideration attempts to reargue the merits of the modification, without introducing any point of fact or law which was not already considered and heard by the Commission prior to the issuance of Order No. PSC-97-0175-FOF-WS. FWSC has raised these assertions on two prior occasions: first, in FWSC's response in opposition to OPC's motion for reconsideration or modification of stay, and again during oral argument at the January 21, 1997 agenda conference. Assertions as to how Rule 25-22.061(1)(a) should operate with respect to the modification of stay were heard, considered, and dispensed with by the Commission. These same assertions may not properly be reargued in FWSC's instant motion for reconsideration merely because the utility disagrees with the Commission's judgment.

In Order No. PSC-97-0175-FOF-WS, issued February 14, 1997, the Commission stated that:

In granting [FWSC's] request for a stay, we relied upon Rule 25-22.061(1)(a), Florida Administrative Code. It has been our intent, however, to require the implementation of the modified stand-alone rates for all of the facilities in Docket No. 920199-WS. Consistent with our intent, we find it appropriate to modify our order on stay. We

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find that Rule 9.310(a), Florida Rules of Appellate Procedure, provides us with sufficient authority to modify the order on stay.

Order No. PSC-97-0175-FOF-WS at page 4.

The remainder of FWSC's instant motion for reconsideration contends that OPC failed to provide "any basis for deviation from the mandatory requirements of Rule 25-22.061(1)(a)," and that the Commission clearly made a mistake of law by ordering what amounts to a variance or waiver of Rule 25-22.061(1)(a) where no such request was made by OPC. FWSC essentially contends that, as a prerequisite to the Commission's modification of the stay pursuant to Rule 9.310(a), Florida Rules of Appellate Procedure, that OPC was first required to apply for a waiver or variance under Chapter 120. Section 120.542(5), Florida Statutes, provides that a person who is subject to regulation by an agency rule may file a petition with that agency requesting a variance or waiver from the agency's rule.

Staff does not believe that, under the instant facts, such action was either required, or indeed contemplated, by the applicable statutes and rules. Rule 9.310(a), Florida Rules of Appellate Procedure provides in its pertinent part that:

a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, at its discretion, to grant, modify, or deny such relief. (emphasis added)

FWSC's motion fails to establish that obtaining a waiver or variance pursuant to Section 120.542(b) was a prerequisite to the Commission's exercise of its discretion under Rule 9.310(a), Florida Rules of Appellate Procedure. Indeed, the appellate rule, upon which the Commission based its modification of stay, is not discussed or referenced at all in FWSC's motion for reconsideration.

Finally, the arguments regarding the requirements of Section 120.542(5), Florida Statutes, have been raised for the first time in FWSC's motion for reconsideration. As FWSC ably pointed out in its November 18, 1996 response in opposition to OPC's motion, the Commission has stated on multiple occasions that a motion for reconsideration is not the appropriate vehicle for introducing new

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arguments and issues not previously raised by a party. In re: Development of Local Exchange Telephone Company Cost Study Methodology(ies), 92 F.P.S.C. 3:666 (1992).

For the reasons set forth above, Staff recommends that FWSC's motion for reconsideration of Order No. PSC-97-0175-FOF-WS be denied.

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ISSUE 2: Should FWSC's motion for stay of Order No. PSC-97-0175-FOF-WS pending disposition of motion for reconsideration be granted?

RECOMMENDATION: If the Commission approves Staff's recommendation in Issue 1, a ruling on the motion for stay is not required. If the Commission defers ruling on Issue 1, FWSC's motion for stay should be granted and Staff will prepare a subsequent recommendation to address the adequate security. (JABER, CHASE, RENDELL)

STAFF ANALYSIS: In Issue 1, Staff recommends that FWSC's motion for reconsideration be denied. FWSC's motion for stay seeks a stay pending disposition of its reconsideration. If the Commission approves Staff's recommendation in Issue 1, a ruling on FWSC's motion for stay does not appear to be necessary. If however, the Commission for some reason defers ruling on Issue 1, or determines that a ruling on the utility's motion for stay is necessary, Staff offers the following analysis.

The utility has not yet implemented the modified stand-alone rates for the Spring Hill facility. On February 28, 1997, FWSC filed a motion for stay pending reconsideration of Order No. PSC-97-0175-FOF-WS which modified Order No. PSC-96-1046-FOF-WS to reflect that only FWSC's refund obligation was stayed pending appeal, and that FWSC shall implement the modified stand-alone rate structure for the Spring Hill customers consistent with prior Commission Orders No. PSC-95-1292-FOF-WS and PSC 96-96-1046-FOF-WS.

Rule 25-22.060(c), Florida Administrative Code, states that a motion for reconsideration of an order does not serve to automatically stay the effectiveness of such order. Accordingly, FWSC has filed a motion for stay and asserts that:

it is administratively efficient to retain the current uniform rates pending disposition of its motion for reconsideration. If Florida Water is required to implement modified stand-alone rates and the Commission grants its motion for reconsideration, Florida Water will be required to incur unnecessary administrative expenses for the noticing and implementation of two rate changes within a relatively short time period.

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FWSC further asserts that the mandatory stay provisions of Rule 25-22.061(1)(a), Florida Administrative Code, apply to both Commission ordered refunds and reductions in rates. Therefore, in FWSC's opinion, Rule 25-22.061(1)(a) should apply because the implementation of modified stand alone rates in Spring Hill results in a decrease in rates. In its motion, the utility indicates that if its reconsideration motion is denied, it will appeal such decision and file a motion for stay pending appeal. Finally, the utility cites to Rule 25-30.360(2), Florida Administrative Code, which indicates that stays may be granted for orders requiring refunds pending disposition of motions for reconsideration.

OPC timely filed its response to FWSC's motion on February 28, 1997. OPC asserts that the motion for stay should be denied because the Commission's order is correct and FWSC is unlikely to prevail on appeal.

The utility's reliance on both rules cited has some merit. Rule 25-30.360(2) addresses refunds, which this Commission has previously stated has resulted by the change in the utility's rate structure. Rule 25-22.061 addresses automatic stays pending appeal when a decrease in rates is ordered. Staff recognizes that this situation does not fit squarely within either rule. Regardless of which rule the Commission relies upon in reaching its conclusion, staff believes it would be inefficient to require the time and expense necessary to administer a change from uniform to modified stand-alone rates for the Spring Hill customers, prior to the Commission disposing of the pending FWSC motion for reconsideration. In addition, the customers of the utility are protected during the pendency of the disposition of this motion for reconsideration as Rule 25-30.360(4) provides that interest continues to accrue until the refund, currently subject to stay, is made. Accordingly, if the Commission defers ruling on Issue 1 or finds it necessary to rule on FWSC's motion for stay, the motion for stay should be granted pending the disposition of FWSC's motion for reconsideration in this matter.

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ISSUE 3: Should this docket be closed?

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

STAFF ANALYSIS: The utility has filed an appeal of Order No. PSC-96-1046-FOF-WS with the First District Court of Appeal. Oral Argument was heard on April 18, 1997. This docket should remain open pending final resolution of the appeal by the First District Court of Appeal.