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July 28, 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. 920199-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's Response to July 16 Petition to Intervene, Motion to Compel Rate Reductions and Rate Refunds, and for Maximum Penalty; and
2. A disk in Word Perfect 6.0 containing a copy of the Response.

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

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman
Kenneth A. Hoffman

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cc: All Parties of Record
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EPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL COPY

In re: Application of)
Southern States Utilities,)
Inc. and Deltona Utilities,)
Inc. for Increased Water and)
and Wastewater Rates in Citrus,)
Nassau, Seminole, Osceola, Duval,)
Putnam, Charlotte, Lee, Lake,)
Orange, Marion, Volusia, Martin,)
Clay, Brevard, Highlands,)
Collier, Pasco, Hernando, and)
Washington Counties.)
_____)
)
)

Docket No. 920199-WS

Filed: July 28, 1997

**FLORIDA WATER SERVICES CORPORATION'S
RESPONSE TO JULY 16 PETITION TO
INTERVENE, MOTION TO COMPEL RATE REDUCTIONS
AND RATE REFUNDS, AND FOR MAXIMUM PENALTY**

Florida Water Services Corporation ("Florida Water"), formerly Southern States Utilities, Inc., hereby files its Response to the July 16 Petition to Intervene filed by Senator Ginny Brown-Waite and Morty Miller ("Petitioners") and the Petitioners' Motion to Compel Rate Reductions and Rate Refunds, and for Maximum Penalty.

A. INTRODUCTION

1. Throughout this proceeding, Florida Water has consistently maintained the same basic position before the Commission. Florida Water's position has been and continues to be that the Commission should not order refunds as a result of the decision in Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DA 1995) ("Citrus County"). If refunds are ordered, then the Commission must also require the imposition of surcharges on customers who paid less under the uniform rates so that Florida Water's Commission approved and court affirmed final revenue requirement will not be impaired. The Commission Staff, on

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two occasions, filed written recommendations that no refunds be ordered for customers who paid more under the uniform rate structure than they would have paid under uniform rates.¹ The Commission rejected these recommendations and ordered refunds without offsetting surcharges. See Final Order on Remand and Requiring Refund issued August 14, 1996 ("Refund Order").² The First District Court of Appeal reversed the Commission and held that refunds could not be imposed without offsetting surcharges. Southern States Utilities, Inc. v. Florida Public Service Commission, 22 Fla.L.Weekly D1492 (Fla. 1st DCA, June 17, 1997) ("Southern States").

2. The mandate in the Southern States decision was issued on July 3, 1997. The mandate terminated the appellate process thereby placing jurisdiction of the second remand phase of this proceeding before the Commission. Pursuant to the court's remand in the Southern States decision, the Commission must now reconsider its denial of the petition to intervene filed by Keystone Heights, Marion Oaks Civic Association and Burnt Store Marina, as well as "any petitions for intervention that may be filed by other such groups subject to a potential surcharge in this case."³ The Commission must also reconsider its decision requiring refunds without offsetting surcharges and determine whether: (a) refunds

¹See Staff Memoranda dated August 31, 1995 (Primary Recommendation) and May 30, 1996.

²In Re: SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 8:198 (1996).

³Southern States, 21 Fla.L.Weekly at D1493.

shall be ordered; and (b) if refunds are ordered, the amount, terms and conditions of the refunds and surcharges.

3. Petitioners have placed the following five affirmative requests for relief before the Commission:

- a) the Petition to Intervene;
- b) the Motion to Compel Refunds through Customer Surcharges;
- c) the Motion to Compel Refunds to be financed directly by Florida Water;
- d) the Motion to Compel Implementation of Modified Stand-Alone Rates; and
- e) the Motion to Impose Maximum Penalty.

Each of these requests will be addressed below.

B. THE PETITION TO INTERVENE

4. The Petition to Intervene raises a fundamental point concerning the Southern States decision and the remand by the court. The clear intent of the court's remand was to grant customers subject to potential surcharges the opportunity to contest the imposition of refunds and thereby avoid potential surcharges. The opposition to refunds and resulting avoidance of surcharges is the critical substantial interest at stake for the potentially surcharged customers on remand.

5. It is only the substantial interests of the potentially surcharged customers which fall within the scope of the court's remand. The Southern States court did not authorize the Commission to entertain, on remand, requests for intervention by customers where interests already are represented in this proceeding --

customers who desire refunds. Accordingly, the Petition to Intervene should be denied.⁴

6. Florida Water also suggests that to give effect to the court's intent that other potentially surcharged customers be granted an opportunity to intervene, the Commission should establish appropriate procedural requirements for notice and customer intervention.

C. THE MOTION TO COMPEL REFUNDS THROUGH CUSTOMER SURCHARGES

7. As Florida Water has stated time and again to this Commission, Florida Water is a mere stakeholder on the issue of whether the Commission should decline to order refunds or order refunds and offsetting surcharges. Florida Water's paramount interest, vindicated by the court in Southern States, is that any action taken by the Commission cannot impair the final revenue requirement ordered by the Commission and affirmed by the court in this rate case.

8. The Petitioners implicitly assume that the Southern States court ordered the Commission to permit intervention to the customers subject to a potential surcharge for the limited purpose

⁴Had the Southern States court authorized the Commission to permit intervention on remand by additional customers supporting refunds, Senator Brown-Waite's standing to intervene would be limited to the Motion to Compel Refunds through Customer Surcharges. Having ceased her status as a Florida Water customer after October, 1994, Senator Brown-Waite's substantial interests would not be immediately and substantially affected by the post-October, 1994 allegations purporting to support the remaining motions contained in the July 16 pleading. See Fla.Admin.Code R. 25-22.039; Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 1st DCA 1981), rev. den., 415 So.2d 1359 (Fla. 1982); Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988).

of advocating positions on the amount, terms and conditions of surcharges. The Petitioners are mistaken. The court did not order refunds. The court only made clear that under GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996) ("GTE Florida"), refunds could not be ordered without offsetting surcharges. And so the court directed the Commission, on remand, to allow for intervention of groups "subject to a potential surcharge in this case."⁵ If the court had intended to foreclose consideration of whether refunds should be ordered, there would have been no need to insert the word "potential" before the word "surcharge." The Commission should not assume that the court crafted its opinion by inserting unnecessary language.

9. The Commission is left with the basic choice of either not ordering refunds or ordering refunds and surcharges commensurate with any refund amount. Florida Water suggests that such a decision should not be precipitously made without the opportunity for intervention and participation by the customers subject to potential surcharges. Accordingly, Florida Water requests that Petitioners' Motion to Compel Refunds Through Customer Surcharges be denied.

D. THE MOTION TO COMPEL REFUNDS TO BE FINANCED DIRECTLY BY FLORIDA WATER

10. The Southern States court also found that attempts to justify the segregation of a particular group or groups of customers for beneficial treatment, regardless of the impact of

⁵22 Fla.L.Weekly at D1493 (emphasis supplied).

such treatment on Florida Water, did not hold water. Yet, such segregation and beneficial treatment once again is requested by Petitioners. The immediate refunds sought by Petitioners would violate the court's decision in Southern States and unjustifiably prejudge issues, prior to an appropriate opportunity for hearing, in a manner violative of the due process rights of Florida Water and all of its customers other than Mr. Miller and Senator Brown-Waite (a former customer).

11. Further, the granting of this request would directly violate the "law of the case" established in the Southern States decision. In Southern States, the court held that the customers who paid less under the uniform rates in effect during the appellate process should bear the cost of any Commission ordered refunds through the payment of surcharges. The court rejected the notion that Florida Water should bear the cost of any refunds which may be ordered by the Commission. No party requested rehearing of this aspect of the Southern States decision by filing a motion for rehearing with the court. The mandate has been issued and the court's decision is final. The Petitioners' belated attempt to raise this issue before the Commission must be rejected as the court's decision on this issue represents the law of the case and may not be revisited by the Commission.⁶ Moreover, this issue

⁶See, e.g., Strazzulla v. Hendrich, 177 So.2d 1, 2-3 (Fla. 1965); Barry Hinnant v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986); Mendelson v. Mendelson, 341 So.2d 811, 813-814 (Fla. 2nd DCA 1977):

clearly falls outside the scope of the Southern States court's remand to the Commission.

12. In addition, Petitioners' "factual" premise for asking the Commission to order Florida Water to finance any refunds which may be ordered for the period following approval of interim rates in Docket No. 950495-WS is misleading and erroneous. The Spring Hill land and facilities were removed from the Docket No. 950495-WS rate case by the Commission, sua sponte, after a presentation by a Hernando County Commissioner, at the October 13, 1995 customer service hearing in Brooksville.⁷ Thus, when interim revenues pursuant to a modified stand-alone rate structure were approved in Docket No. 950495-WS on January 25, 1996,⁸ the Spring Hill customers already had been removed from the rate case. At that time, issues concerning the appropriate rate structure and rates for Spring Hill arising out of the Citrus County remand were still pending before the Commission. The Spring Hill customers, including Mr. Miller, never voiced any objection to their removal from the rate case. Further, with the removal of the Spring Hill customers from the Docket No. 950495-WS rate case, Florida Water was required, as a matter of law, to charge the Spring Hill customers the tariffed, approved uniform rates in effect at the time the January 25, 1996 Interim Rates Order in Docket No. 950495-WS was entered. See §367.081(1), Fla. Stat. (1995).

⁷In Re: Southern States Utilities, Inc., 95 F.P.S.C. 11:301, 302 (1995).

⁸In Re: Southern States Utilities, Inc., 96 F.P.S.C. 1:475 (1996).

13. As discussed above, the proposition that Florida Water should be held financially accountable for any refunds ordered as a result of the Citrus County decision has been expressly rejected by the Southern States court. That holding is the law of the case. Further, the remand instructions of the Southern States court certainly do not contemplate the Commission revisiting the court's (law of the case) decision that Florida Water shall not bear the financial responsibility for any refunds arising out of the Citrus County remand. Nonetheless, should the Commission act on Petitioners' Motion to Compel Refunds to be financed directly by Florida Water, an action which Florida Water believes to be in contravention of the law of the case and remand instructions established in the Southern States decision, then the Commission must at least allow the opportunity for hearing to examine the issues and equities arising from Petitioners' Motion.⁹

14. Petitioners effectively allege that Florida Water should now shoulder a refund liability resulting from: (a) Hernando County's decision to rescind Commission jurisdiction; (b) the Commission's decision to exclude the Spring Hill facilities from the Docket No. 950495-WS rate case; and (c) Florida Water's lawful pursuit of remedies before this Commission and the First District Court of Appeal challenging the Commission's orders in the initial

⁹Moreover, Florida Water takes issue with the staff's assertion and prejudgment that the customers for whom modified stand-alone rates were implemented in January, 1996 in Docket No. 950495-WS would be excluded from consideration of the appropriate and equitable disposition of the Spring Hill refund issue. See Staff Memorandum dated July 24, 1997 in Docket No. 920199-WS, at pp. 11-12.

remand stage of this proceeding. The Southern States court held that Florida Water could not be held liable for refunds, without offsetting surcharges, as a result of Florida Water's lawful pursuit of a motion to vacate a stay pursuant to Commission rules and implementation of final rates ordered by the Commission. The Petitioners' allegation that Florida Water should bear the financial burden for any refunds resulting from Hernando County's decision to rescind Commission jurisdiction, the Commission's order excluding Spring Hill from the 1995 rate case, and Florida Water's pursuit of lawful remedies before the Commission and First District Court of Appeal pursuant to applicable rules of procedure, must similarly be rejected.

15. For these reasons, the Motion to Compel Refunds to be Financed Directly by Florida Water should be denied.

E. THE MOTIONS TO COMPEL IMPLEMENTATION OF MODIFIED STAND-ALONE RATES AND FOR MAXIMUM PENALTY

16. On April 5, 1994, pursuant to Section 367.171(1), Florida Statutes, Hernando County rescinded Commission jurisdiction over privately-owned water and wastewater utilities in Hernando County. As recognized by the Commission in the order acknowledging Hernando County's rescission of Commission jurisdiction, the Commission retained jurisdiction over then-pending cases pursuant to Section 367.171(5), Florida Statutes.¹⁰

¹⁰In Re: Request for Acknowledgement of Resolution Rescinding Florida Public Service Commission jurisdiction over private water and wastewater utilities in Hernando County, 94 F.P.S.C. 6:172 (1994).

17. Section 367.171(5), Florida Statutes, preserves Commission or court jurisdiction over cases pending at the time a county rescinds Commission jurisdiction until the case is "disposed of in accordance with the law in effect on the day such case was filed...."

18. At the time Hernando County rescinded Commission jurisdiction, revenue requirements and rate structure determinations in this rate case were pending before the First District Court of Appeal. The case returned to the Commission on remand from the Citrus County decision. On August 14, 1996, the Commission ordered Florida Water to implement modified stand-alone rates and pay refunds without offsetting surcharges. Florida Water requested a stay of the August 14, 1996 Refund Order. On October 28, 1996, the Commission granted the stay.¹¹ At the request of the Office of Public Counsel, on February 14, 1997, the Commission modified the stay and required Florida Water to implement that portion of the Refund Order requiring the implementation of modified stand-alone rates for Spring Hill.¹² Florida Water requested reconsideration of the modification of the stay and a stay pending disposition of the reconsideration request. The motion for reconsideration was denied on May 14, 1997,¹³ thereby

¹¹In Re: SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 10:365 (1996).

¹²In Re: SOUTHERN STATES UTILITIES, INC., 97 F.P.S.C. 2:256 (1997).

¹³In Re: SOUTHERN STATES UTILITIES, INC., Order No. PSC-97-0552-FOF-WS.

terminating the Commission's jurisdiction over Florida Water's rates for its Spring Hill facilities. Florida Water subsequently appealed the modification of the stay. That appeal was denied by order issued by the First District Court of Appeal on June 25, 1997.

19. Pursuant to a settlement agreement between Florida Water and the Hernando County Board of County Commissioners which resolved a rate case filed by Florida Water and related circuit court actions, Florida Water implemented stand-alone rates for the Spring Hill customers effective June 14, 1997.

20. The Petitioners do not allege that this Commission currently has jurisdiction pursuant to Section 367.171(5) to adjust the Spring Hill rates, particularly in light of the settlement agreement between Florida Water and Hernando County. Clearly, it does not.

21. Florida Water properly pursued lawful remedies in seeking reconsideration and an appeal of the order modifying the stay. The pursuit of lawful remedies, pursuant to the Commission's procedural rules and the Florida Rules of Appellate Procedure, provides no factual or legal basis for the imposition of a fine.

22. In May of 1993, Senator Brown-Waite and the Spring Hill Civic Association filed post-hearing petitions to intervene and motions for reconsideration of the March 22, 1993 Final Order urging the Commission to reconsider and rescind uniform statewide

rates in favor of stand-alone rates.¹⁴ Now, Florida Water has implemented stand-alone rates authorized by the Hernando County Board of County Commissioners. Petitioner Miller recommended that the Board approve these new rates. Petitioners have sought such stand-alone rates for over four years. The Petitioners' request that the Commission impose a fine on Florida Water for implementing a stand-alone rate structure long sought by Petitioners is absurd.

23. For these reasons, the Commission should deny the Petitioners' Motion to Compel Implementation of Modified Stand-Alone Rates and Motion to Impose Maximum Penalty.

WHEREFORE, Florida Water requests that the Commission enter an order denying the Petition to Intervene and Petitioners' Motion to Compel Refunds Through Customer Surcharges, Motion to Compel Refunds to be Financed Directly By Florida Water, Motion to Compel Implementation of Modified Stand-Alone Rates and Motion to Impose Maximum Penalty.

Respectfully submitted,


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¹⁴See May 24, 1993 "Petition of the Spring Hill Civic Association, Inc. for Intervention and for Reconsideration of Order No. 93-0423" and May 26, 1993 "Petition from the Office of State Senator Ginny Brown-Waite, District 10 for Intervention and for Reconsideration of Order No. 93-0423," both of which incorporate by reference the April 2, 1993 Motion for Reconsideration filed by Cypress and Oak Villages Association.

and

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Attorneys for Florida Water Services
Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Response to July 16 Petition to Intervene, Motion to Compel Rate Reductions and Rate Refunds, and For Maximum Penalty was furnished by U. S. Mail to the following this 28th day of July, 1997:

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