

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

RECEIVED

APR 30 1998

9:55  
FPSC - Records/Reporting

M E M O R A N D U M

APRIL 30, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (OTTINOT, REYES) *AKO*  
DIVISION OF WATER AND WASTEWATER (WILLIS, RENDELL) *Willis*

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 12 (ref)*  
~~APRIL 7~~ 1998 -- REGULAR AGENDA -- DECISION ON STAY OF  
REMAND ORDER - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

FILE LOCATION: I:PSC\LEG\WP\920199.RCM

CASE BACKGROUND

On June 17, 1997, the First District Court of Appeal issued its opinion in Southern States Utils., Inc. v. Florida Public Service Comm'n, reversing Order No. PSC-96-1046-FOF-WS, issued August 14, 1996, implementing the remand of the Citrus County v. Southern States Utils., Inc., decision (citation omitted). 704 So. 2d 554 (Fla. 1st DCA 1997).

On December 15, 1997, the Commission held a Special Agenda Conference to address the remand of the Southern States decision. At the Special Agenda Conference, the Commission voted on all issues related to the remand. By Order No. PSC-98-0143-FOF-WS, issued January 26, 1998, the Commission required the utility to make refunds to the Spring Hill customers for the period of time January 23, 1996 to June 14, 1997, but did not require the utility to make refunds or to surcharge other customers.

On February 18, 1998, Sugarmill Woods Civic Association, Inc., formerly known as Cypress and Oaks Villages Association (Sugarmill

DOCUMENT NUMBER-DATE

04868 APR 30 88

FPSC-RECORDS/REPORTING

7935

DOCKET NO. 920199-WS  
MARCH 26, 1998

Woods), filed a Notice of Appeal of Order No. PSC-98-0143-FOF-WS. On February 24, 1998, FWSC notified the Commission that it had appealed Order No. PSC-98-0143-FOF-WS to the First District as well. On that same day, FWSC filed a Motion for Stay of Order No. PSC-98-0143-FOF-WS. On February 24, 1998, Joseph J. DeRouin, Victoria M. DeRouin, Peter H. Heeschen, Elizabeth A. Riordan, Carvel Simpson and Edward Slezak (DeRouin, et al.) notified the Commission that they are joining the appeal as appellees, and on February 25, 1998, the Citizens of Nassau County (Nassau County) notified the Commission of its appeal. On February 26, 1998, Senator Ginny Brown-Waite, Mr. Morty Miller, the Board of County Commissioners of Citrus County, Spring Hill Civic Association, Inc., Sugarmill Manor Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc., and Hidden Mills Country Club Homeowners Association, Inc. (Associations) notified the Commission that they had joined the appeal as appellants.

This recommendation addresses FWSC's Motion for Stay of Order No. PSC-98-0143-FOF-WS.

DOCKET NO. 920199-WS  
MARCH 26, 1998

**ISSUE 1:** Should the Commission grant FWSC's Motion for Stay of Order No. PSC-98-0143-FOF-WS?

**RECOMMENDATION:** Yes. Because the order involves the refund of monies to customers in Spring Hill, the Commission should grant the motion for stay, in accordance with Rule 25-22.061(1), Florida Administrative Code. (OTTINOT, REYES)

**STAFF ANALYSIS:** Order No. PSC-98-0143-FOF-WS requires FWSC to make refunds to Spring Hill customers of the difference between the uniform rate and the modified stand-alone rate from January 23, 1996, through June 14, 1997. The modified stand-alone rates were implemented on January 23, 1996 in Docket No. 950495-WS; however, the Spring Hill facility was not included in Docket No. 950495-WS. See Order No. PSC-95-1385-FOF-WS, issued November 7, 1995. Accordingly, the Spring Hill customers remained on the uniform rate structure until June 14, 1997, when a rate change resulted from a settlement agreement between Hernando County and the utility. As stated in the background, on February 24, 1998, FWSC has filed an appeal of that portion of Order No. PSC-98-0143-FOF-WS requiring FWSC to provide refunds to Spring Hill customers. FWSC has also filed a motion to stay that portion of the Order.

As stated in the background, several parties have appealed Order No. PSC-98-0143-FOF-WS and other parties have joined in the appeal. Those parties include Nassau County and Citrus County, governmental bodies. Pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, and Rule 25-22.061(3)(a), Florida Administrative Code, an appeal of an order by a governmental body operates as an automatic stay of that order. Accordingly, Nassau County's notice of appeal triggered an automatic stay of Order No. PSC-98-0143-FOF-WS. However, on April 3, 1998, the First District Court of Appeal dismissed the appeal filed by Nassau County. Thus, the dismissal has vacated the automatic stay that was triggered by Nassau County's notice of appeal.

Staff notes that Citrus County's status as an appellant in the Associations' notice of joinder may trigger an automatic stay. (emphasis added) Pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, a "timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review". (emphasis added) The committee notes of Rule 9.310(b)(2) provide for an automatic stay without bond as soon as a notice invoking jurisdiction is filed by a public body. Staff has thoroughly researched the issue and found that the law is not clear on whether

a notice of joinder triggers an automatic stay. In Premier Industries v. Mead, the court stated that an appellee failed to invoke the jurisdiction of the court by not filing a notice of appeal, notice of cross of appeal, or notice of joinder in the appeal. 595 So. 2d 122 (1992). While the Premier Industries court seems to imply that the court's jurisdiction is invoked by a notice of joinder, there is no specific case law on the issue of whether the notice of joinder triggers the automatic stay provisions of Rule 9.310(b)(2), Florida Rules of Appellate Procedure. If the law clearly indicated that an automatic stay was triggered by Citrus County's notice of joinder, a ruling on the utility's motion for stay would be unnecessary. However, because the law is not clear, staff believes that the Commission should rule on the utility's motion.

In its motion, FWSC states that the Commission is required to stay the Spring Hill refund requirement pending the disposition of the appeal pursuant to Rule 25-22.061(1)(a), Florida Administrative Code.

Rule 25-22.061(1)(a), Florida Administrative Code, provides 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. (emphasis added)

Rule 25-22.061(1)(a), Florida Administrative Code, is mandatory in nature in that it requires the Commission to grant a stay pending judicial proceedings when the order being appealed involves a refund to customers. Therefore, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, the Commission is required to grant FWSC's motion upon posting of a sufficient bond or a corporate undertaking.

Based on the foregoing, staff recommends that the Commission grant FWSC's motion for stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, pending the resolution of the judicial proceedings.

DOCKET NO. 920199-WS  
MARCH 26, 1998

ISSUE 2: Should FWSC's request for posting of a corporate undertaking be approved?

RECOMMENDATION: No. FWSC should be required to post a bond in the amount of \$2,705,331; therefore, the current appeal bond may be reduced to this amount. (RENDELL)

STAFF ANALYSIS: Pursuant to Rule 25-22.061(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 February 14, 1997, Order No. PSC-97-0175-FOF-WS, was issued which required FWSC to increase its appeal bond to \$13,848,225. This bond was to secure any potential refunds to all of the service areas affected by the Court's remand decision. This amount included the refund to the Spring Hill service area. On March 13, 1997, FWSC filed a rider which increased its appeal bond to \$13,848,225.

As stated in the case background, the Court reversed the Commission's earlier decision on refunds and stated that the Commission erred by ordering SSU to provide refunds to customers who overpaid under the erroneous uniform rates without allowing SSU to surcharge customers who underpaid under these rates. Southern States Utils., Inc. v. Florida Public Service Comm'n, 704 So. 2d 554, 559 (Fla. 1st DCA 1997). Based upon this directive, the Commission issued Order No. PSC-98-0143-FOF-WS, which required the utility to make refunds to the Spring Hill customers, but did not require the utility to make refunds or to surcharge other customers.

Since the Court has ruled that FWSC should be allowed to surcharge customers who underpaid if the utility is required to provide refunds to customers who overpaid during the period before modified stand alone rates were implemented, staff does not believe these amounts should be included in the amount of appeal security. Therefore, staff calculated the potential refund to the Spring Hill service area from January 23, 1996 to June 14, 1997. Assuming a decision from the First District Court of Appeal by January, 1999, staff has determined the total amount of refund through this date to be \$2,705,331, including interest.

FWSC has requested that it not be required to incur the expense of posting a bond to secure the refund. Instead, FWSC requests that the Commission permit it to post a corporate

DOCKET NO. 920199-WS  
MARCH 26, 1998

undertaking. Following a review of FWSC's financial statements by the Division of Auditing and Financial Analysis, it has been determined that the utility cannot support a corporate undertaking in this amount. Although the utility has adequate liquidity both as a trend and for the most recent 12-month period, FWSC's equity ratio has trended downward and is low for 1996. In addition, the interest coverage is weak compared to the S&P benchmark for water companies. For these reasons, FWSC's request should be denied.

Staff recommends that FWSC's current appeal bond in the amount of \$13,848,225 may be reduced to \$2,705,331. This should result in a savings to FWSC in the annual renewal amount of the appeal bond.

DOCKET NO. 920199-WS  
MARCH 26, 1998

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open until the disposition of the remand is complete. (OTTINOT)

STAFF ANALYSIS: No, this docket should remain open until the disposition of the remand is complete.