

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

ORIGINAL

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
JOHN R. ELLIS
KENNETH A. HOFFMAN
THOMAS W. KONRAD
MICHAEL G. MAIDA
J. STEPHEN MENTON
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

OF COUNSEL:
CHARLES F. DUDLEY

GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

April 12, 1999

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

RECEIVED-FPSC
99 APR 12 PM 3:06
RECORDS AND REPORTING

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's Motion for Abatement and Continuance and Request for Expedited Ruling; and
2. A disk in Word Perfect 6.0 containing a copy of the document.

ACK _____
AFA 1 Please acknowledge receipt of these documents by stamping the extra copy of this letter
APP (Py I-1) and returning the same to me.

CAF _____ Thank you for your assistance with this filing.

CMU _____

CTR _____

EAG _____

LEG 1

LIN 5

OPC _____ KAH/rl

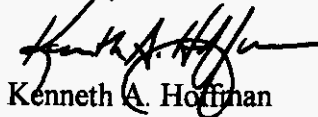
RCH _____ Enclosures

SEC 1

WAS cc: All Parties of Record

OTH _____

Sincerely,


Kenneth A. Hoffman

DOCUMENT NUMBER-DATE

04665-APR 12 99

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern States Utilities, Inc. for rate increase and increase in service availability charges 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, Polk, Putnam, Seminole, St. Johns, St. Lucie, Volusia and Washington Counties.

Docket No. 950495-WS

Filed: April 12, 1999

FLORIDA WATER SERVICES CORPORATION'S MOTION FOR ABATEMENT AND CONTINUANCE AND REQUEST FOR EXPEDITED RULING

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, hereby moves for an abatement and continuance of this proceeding, and as grounds therefor, states as follows::

BACKGROUND

This case stems from an application for increased water and wastewater rates filed by Florida Water in 1995. The final hearing was held on April 29 through May 10, 1996. The Commission entered its final order on October 30, 1996. Following appeals by Florida Water and other parties, on June 10, 1998, the First District Court of Appeal issued its opinion in Southern States Utilities v. Florida Public Service Commission, 714 So.2d 1046 (Fla. 1st DCA 1998) ("Southern States II").¹

¹A motion for rehearing was denied by the court on July 5, 1998.

DOCUMENT NUMBER-DATE
04665 APR 12 1999
FPSC-RECORDS/REPORTING

In Southern States II, the court reversed the Commission and accepted the Commission's confession of error on a multitude of issues affecting Florida Water's revenue requirements and allowance for funds prudently invested charges. On remand, in accordance with the Southern States II decision, the Commission approved an increase in rates in response to the court's reversal of the Commission's: (1) failure to afford 100% used and useful treatment for reuse facilities; (2) unlawful reduction to Florida Water's equity due to the one-sided refund order issued in Docket No. 920199-WS subsequently reversed by the court; and (3) confession of error in failing to use the average flows in the maximum month in the calculation of the used and useful investment for three wastewater treatment plants. Surcharges also were ordered by the Commission in connection with the increased revenue requirements as a result of these reversals; however, the issue of how such surcharges are to be collected remains pending due to a protest filed by Sugarmill Woods Civic Association, Inc. See Order No. PSC-99-0093-FOF-WS issued January 15, 1999.

In addition to the above issues, the court reversed the Commission's use of average annual daily flows in the numerator of the calculation of used and useful for four wastewater treatment plants and the Commission's use of the lot count method in determining the level of used and useful investment in water transmission and distribution and wastewater collection facilities. The court held that both of these determinations constituted departure from Commission policies that were not supported by record evidence. The court authorized the Commission, on remand, to adduce evidence, if it can, to support the Commission's departure from established policies. The hearing currently scheduled for June 23-25, 1999 has been set in response to the court's reversal and remand on the wastewater treatment plant and lot count used and useful issues.

In challenging the Commission's determinations of used and useful for the four wastewater treatment plants, Florida Water argued before the court that the Commission had departed from established Commission policy without adequate record support, that the new policy produced used and useful levels below those previously authorized by the Commission, and that the lowering of previously established used and useful investments was a departure from Commission precedent, in violation of the doctrine of administrative finality and constituted an unconstitutional confiscation of Florida Water's property. The court reversed the Commission on the ground that the Commission's new policy was not supported by record evidence in violation of applicable statutory requirements under Chapter 120, Florida Statutes, and applicable decisions thereunder.

In remanding the case to the Commission, the court held:

[b]ecause this policy shift was essentially unsupported by "expert testimony, documentary opinion or other evidence appropriate to the nature of the issue involved," ... (citation omitted), the PSC must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored.

Southern States II, 714 So.2d at 1056. Having reversed on this ground, the court did not address the additional grounds for reversal urged by Florida Water. See Southern States II, 714 So.2d at 1059 ("We find it unnecessary to address any of the constitutional questions Florida Water raises.").

As previously stated, Florida Water also challenged the Commission's use of the lot count method in calculating the level of used and useful investment in water transmission and distribution and wastewater collection facilities. As with the wastewater treatment used and useful issue, Florida Water asserted that the use of the lot count method was an unsupported departure from prior Commission rejections of the lot count method, unlawfully lowered previously established used and

useful levels, and unconstitutionally confiscated Florida Water's property. The court reversed on the basis that the Commission had failed to provide adequate record support for its employment of the new lot count method. The court held:

The PSC's conceded change of method in calculating used and useful percentages for distribution and collection systems is another "policy shift... essentially unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved,' (citation omitted)." For this policy shift, too, the PSC must give a reasonable explanation on remand and adduce supporting evidence, if it can, to justify a change in policy required by no rule or statute. That failing, the PSC should adhere to its prior practices in calculating used and useful percentages for water transmission and distribution systems and wastewater collection systems serving mixed use areas. (Footnote omitted).

Southern States II, 714 So.2d at 1057.

On January 29, 1999, the prehearing officer issued an Order Establishing Procedure on Remand² outlining the following controlling dates for this remand proceeding:

- | | | |
|----|---|-------------------------------|
| 1) | Direct testimony and exhibits,
all parties and staff | April 20, 1999 |
| 2) | Rebuttal testimony and
exhibits, all parties and staff | May 10, 1999 |
| 3) | Prehearing Statements | May 17, 1999 |
| 4) | Prehearing Conference | June 4, 1999 |
| 5) | Hearing | June 16-18, 1999 ³ |
| 6) | Briefs | July 16, 1999 |

²See Order No. PSC-99-0181-PCU-WS.

³The final hearing subsequently was rescheduled to June 23-25, 1999.

GROUNDS FOR ABATEMENT AND CONTINUANCE

During the course of the remand proceeding, the Commission has issued two orders which impact the specific factual, policy and legal issues which properly fall within the scope of the Southern States II mandate. These orders are:

1. Order Denying Utility's Motion for Protective Order on Staff's Interrogatory Number 5, Order No. PSC-99-0612-PCO-WS issued April 2, 1999; and
2. Order Denying Motion to Transfer Remand Proceeding, Granting Petition for Formal Hearing Concerning Surcharges, and Approving List of Issues for Consideration on Remand, Order No. PSC-99-0664-PCO-WS issued April 5, 1999.

Florida Water intends to appeal the above referenced orders by filing a motion with the First District Court of Appeal for enforcement of the Southern States II mandate. Florida Water may also appeal the order addressing Florida Water's Objections to the Office of Public Counsel's First Set of Interrogatories and Second Request for Production of Documents on Remand and Motion for Protective Order, depending on the rulings reflected in said order.⁴ Florida Water's appeal will challenge, at minimum, the Commission orders requiring Florida Water to respond to discovery requests seeking information or documents outside the 1996 test year used for ratemaking purposes and/or outside the scope of the mandate from the Southern States II decision. Florida Water's appeal also will challenge the Commission's decisions establishing the issues for hearing and declining to

⁴As of this date, the order addressing Florida Water's Objections to the Office of Public Counsel's First Set of Interrogatories and Second Request for Production of Documents on Remand and Motion for Protective Order had not been issued.

order an informal hearing in response to the protest to the Commission's proposed agency action authorizing the collection of surcharges.

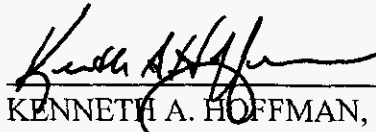
Florida Water maintains that the time and resources of the parties and Commission will be minimized by an abatement and continuance of the remand proceeding pending the disposition of Florida Water's appeal of the above-referenced orders. This rate case was filed in June, 1995 and has already been through one round of appeals. Florida Water's appeal is intended to resolve pending disputes concerning the scope of discovery and the issues for hearing prior to the submission of testimony, the pursuit of further discovery and the final hearing on remand. All parties, the Commission Staff and the Commission will benefit from this cost effective approach to the litigation of the issues on remand. Judicial economy for the Commission will be enhanced by resolving pending issues affecting the scope of discovery and issues for hearing prior to engaging in further discovery, preparation and submission of testimony, and participation in the final hearing on remand.⁵

Counsel for Florida Water has conferred with counsel for the parties to this proceeding and is authorized to represent that the Office of Public Counsel takes no position and the remaining parties either take no position or have no objection (or agree) to the relief requested in this motion. Since no party objects to the relief requested herein and to minimize the expenditure of resources by the parties, Florida Water requests a ruling on this motion on an expedited basis.

⁵The Commission postponed and rescheduled filing and hearing dates under similar circumstances for Florida Cities Water Company in Docket No. 950387-SU, on remand, pursuant to Order No. PSC-98-0762-PCO-SU issued June 2, 1998.

WHEREFORE, for the foregoing reasons, Florida Water respectfully requests that this remand proceeding be abated and continued and that new dates for the filing of testimony and exhibits and prehearing statements and new dates for the prehearing conference and final hearing be re-established following the disposition by the First District Court of Appeal of Florida Water's motion to enforce mandate.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(850) 681-6788

and

BRIAN P. ARMSTRONG, SENIOR VICE PRESIDENT AND
GENERAL COUNSEL
MATTHEW J. FEIL, ESQ.
Florida Water Services Corporation
P. O. Box 609520
Orlando, Florida 32860-9520
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery (*) and U. S. Mail to the following on this 12th day of April 1999:

Ralph Jaeger, Esq.(*)
Division of Legal Services
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

Ms. Anne Broadbent
President
Sugarmill Woods Civic Asso.
91 Cypress Blvd., West
Homosassa, FL 34446

Charles J. Beck, Esq.
Office of Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Arthur I. Jacobs, Esq.
P. O. Box 1110
Fernandina Beach, FL 32305-1110

Michael B. Twomey, Esq.
P. O. Box 5256
Tallahassee, FL 32314-5256

Mr. Frank Kane
1208 E. Third Street
Lehigh Acres, FL 33936

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 S. Gadsden Street
Tallahassee, FL 32301

John R. Jenkins, Esq.
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301

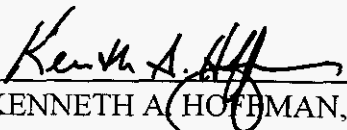
Mr. Paul Mauer, President
Harbour Woods Civic Association
11364 Woodsong Loop N
Jacksonville, FL 32225

Darol H.N. Carr, Esq.
David Holmes, Esq.
Farr, Farr, Emerich,
Sifrit, Hackett & Carr, P.A.
2315 Aaron Street
P. O. Drawer 2159
Port Charlotte, FL 33949

Larry M. Haag, Esq.
111 West Main Street
Suite #B
Inverness, FL 34450

Charles G. Stephens, Esq.
1400 Prudential Drive, Suite 4
Jacksonville, FL 32207

Frederick C. Kramer, Esq.
Suite 201
950 North Collier Boulevard
Marco Island, FL 34145

By: 
KENNETH A. HOFFMAN, ESQ.