

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into) DOCKET NO. 930945-WS
Florida Public Service) ORDER NO. PSC-94-1520-PCO-WS
Commission Jurisdiction over) ISSUED: December 9, 1994
SOUTHERN STATES UTILITIES, INC.)
in Florida)
_____)

ORDER GRANTING IN PART AND DENYING IN PART SOUTHERN STATES UTILITIES, INC.'S MOTION TO STRIKE PORTIONS OF DIRECT TESTIMONY OF WITNESS PAULA ZWACK ON BEHALF OF POLK COUNTY

On October 20 1994, Southern States Utilities, Inc. (SSU or the Utility) filed with this Commission a Motion to Strike Portions of Direct Testimony of Witness On Behalf of Polk County. On June 6, 1994, the Commission issued Order No. PSC-94-0686-DS-WS, in which we denied SSU's petition for a declaratory statement delineating Commission jurisdiction over the utility's water and wastewater operations in the nonjurisdictional counties of Polk and Hillsborough under Section 367.171 (7), Florida Statutes. In that order, this Commission also initiated an investigation to determine

which of SSU's facilities and land in Florida are functionally related and ... whether the combination of functionally related facilities and land, wherever located, constitutes a single system as that term is defined in section 367.021 (11)² and as contemplated in section 367.171 (7).

Order No. PSC-94-0686-DS-WS at p.2.

In Order No. PSC-94-0814-PCO-WS, an Order Establishing Procedure in this docket, the Commission identified the following four preliminary issues:

¹The statute provides that
Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements

²The statute provides that
"System" means facilities and land used or useful in providing service and, upon a finding by the commission, may include a combination of functionally related facilities and land.

DOCUMENT NUMBER-DATE

12392 DEC-94

FPSC-RECORDS/REPORTING

1. Are SSU's facilities and land functionally related?
2. Does the combination of functionally related facilities and land, wherever located, constitute a single system?
3. Does the Commission have exclusive jurisdiction over all SSU systems in the State of Florida?
4. Will the Commission have exclusive jurisdiction over all SSU systems acquired in the future?

Order No. PSC-94-0814-PCO-WS at p.5.

On September 6, 1994, the Commission issued Order No. PSC-94-1181-PCO-WS, granting Polk County (the County) leave to intervene in this docket. Further, on September 29, 1994, the Commission issued Order No. PSC-94-1190-PCO-WS, granting the County an extension of time until October 6, 1994 to file direct testimony and exhibits. On October 7, 1994, the County filed the testimony of Paula Zwack, Fiscal and Franchise Manager, Polk County Utilities Division. Although the County's testimony was not timely filed, in the interest of constructing a complete record, the County's testimony shall be considered. Further, the Utility did not take issue with the late filing. SSU's Motion to Strike is made in relation to this testimony. Polk County has not filed a response to the SSU motion.

Generally, SSU asserts that very little of Ms. Zwack's testimony is relevant to any of the issues set forth in the Order Establishing Procedure, Order No. PSC-94-0814-PCO-WS, or to any issue that could be reasonably argued to be relevant to the Commission's jurisdictional determination under Section 367.171 (7), Florida Statutes.

SSU particularly asserts that Ms. Zwack's testimony concerning Polk County's current rates and SSU's statewide uniform rates, approved in Docket No. 930880-WS, Order No. PSC-94-1123-FOF-WS, issued September 13, 1994 and amended in Order No. PSC-94-1123A-FOF-WS, issued September 27, 1994,³ is not relevant to the jurisdictional issues to be decided in this proceeding. SSU is clearly correct. The purpose of this docket is one of jurisdiction. None of the issues will address the subject of uniform rates, which was previously decided in Docket No. 930880-WS. Therefore, Ms. Zwack's testimony at Page 8, Line 13 and Lines 16 through 26; at Page 9, Lines 1 through 3; and in Exhibit B, with

³Page 8, Lines 13, 16-26; Page 9, Lines 1-3; Exhibit B.

related questions,⁴ is stricken.

Furthermore, SSU asserts that Ms. Zwack's testimony that a transfer of jurisdiction would violate SSU's agreement to be bound by Polk County jurisdiction⁵ is, one, irrelevant to this proceeding, and, two, would raise an issue beyond the jurisdiction of the Commission, i.e., the effectivity of private franchise agreements. SSU notes that this testimony constitutes expert witness testimony concerning a legal issue appropriately addressed only in a party's posthearing brief. SSU is correct to the extent that Ms. Zwack's testimony concerning the franchise agreement is legal argument that may only be addressed to the Commission in a party's posthearing brief. However, SSU is incorrect as to the perceived relevance of the agreements because the substance of Ms. Zwack's testimony concerning Polk County's franchise agreements with SSU could be relevant to this proceeding and should be, by virtue of the nature of this proceeding, decided at the conclusion of the case. The Commission has stated that it is to determine in this docket whether specific SSU utilities, whose operation and service distribution are contained within a single county that has not elected to be subject to the Commission's jurisdiction, but which may receive administrative direction and operational support from outside the county, are to be considered part of a system as contemplated in Section 367.171 (7), Florida Statutes, and subject, therefore, to the Commission's jurisdiction. For this reason, the existence of franchise agreements and legal argument about alleged conflict of those agreements with Commission jurisdiction should not be precluded, but rather reserved for the post hearing briefs. Therefore, Ms. Zwack's testimony at Page 3, Line 7, beginning at "and to establish," through Line 10, ending at "regulation;" Page 8, Lines 5 through 8, and at Page 9, Lines 8, 12, 17 through 19, and 23 through 26, with related questions,⁶ is stricken.

⁴Except for Question at Page 7, Line 23.

⁵Page 3, Line 7, beginning with "and to establish," - Line 10, ending with "regulation;" Page 8, Lines 5-8; Page 9, Lines 8, 12, 17-19, 23-26.

⁶Except for Question at Page 3, Line 25.

Finally, SSU asserts that neither Ms. Zwack's testimony that states that the best interests of SSU's Polk County customers would not be well served by transferring jurisdiction to the Commission, nor her testimony that states that the quality of utility regulation under County jurisdiction is superior,⁸ is relevant to the issues to be decided in this proceeding. SSU contends that the Legislature has determined that regulation should reside with the Commission if the service provided by a utility system transverses county boundaries,⁹ and, as construed by the Florida Court of Appeal, First District, if the utility's system consists of a combination of functionally related facilities and land.¹⁰

As already noted, the Commission is to determine in this docket which of SSU's facilities and land in Florida are functionally related and whether the combination of functionally related facilities and land, wherever located, constitutes a single system as that term is defined in Section 367.021 (11), Florida Statutes, and as contemplated in Section 367.171 (7), Florida Statutes. Ms. Zwack's testimony identifies local regulation public policy concerns with customer service,¹¹ political accountability,¹² and the ordinances and procedures followed by Polk County in rate applications as they effect regulatory efficiency.¹³ Her testimony may be helpful to the Commission's understanding of the broad jurisdiction issues we set forth in Order No. PSC-94-0686-DS-WS, and particularly to the issues that ask whether the Commission has exclusive jurisdiction over all existing and future-acquired SSU systems in Florida, including those operating entirely within a single nonjurisdictional county's boundaries. In making its determination, the Commission may need to consider underlying regulation policy as construed by the counties. The nature of this investigation into the Commission's

⁷Page 6, Lines 9-26.

⁸Id.

⁹Sections 367.021 (11) and 367.171 (7), Florida Statutes.

¹⁰Board v. Beard, 601 So. 2d. 590.

¹¹Page 2, Lines 23-26; Page 3, Line 1; Page 4, Lines 2-26; Page 5, Lines 1-17 and 21-26; Page 6, Lines 1-5; Page 7, Lines 3-11, 15, 18, 19, 22, and 26; Page 8, Lines 1-4.

¹²Page 6, Lines 9-26.

¹³Page 3, Lines 16-24.

ORDER NO. PSC-94-1520-PCO-WS
DOCKET NO. 930945-WS
PAGE 5

jurisdiction over all SSU systems in Florida allows room to consider the public policy concerns addressed in the Polk County testimony. Therefore, SSU's Motion to Strike is denied as it relates to Ms. Zwack's testimony sought to be stricken at Page 2, Lines 23 through 26; Page 3, Line 1 and Lines 16 through 24; Page 4, Lines 2 through 26; Page 5, Lines 1 through 17 and Lines 21 through 26; Page 6, Lines 1 through 5; Page 7, Lines 3 through 11, Lines 15, 18, 19, 22, and 26; and Page 8, Lines 1 through 4.

Based on the foregoing, it is, therefore,

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that Southern States Utilities, Inc.'s Motion to Strike Portions of Direct Testimony of Witness On Behalf of Polk County is hereby granted in part and denied in part as set forth above.

By ORDER of the Florida Public Service Commission, this 9th day of December, 1994.



JULIA L. JOHNSON, PREHEARING OFFICER
Florida Public Service Commission

(S E A L)

CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.