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STATE OF FLORIDA

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December 12, 1994

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

Re: Docket No. 940109-WU
(St. George Island Utility Compnay, Ltd.)

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizen's Response to Motion for Reconsideration and Cross Motion for Reconsideration.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Harold McLean
Associate Public Counsel

Enclosures

ACK ____
AFA 2
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG Pierson
LIN 3
OPC ____
RCH ____
SEC 1
WAS Willis
OTH ____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Interim and Permanent Rate Increase in Franklin County, Florida by ST. GEORGE ISLAND UTILITY COMPANY, LTD.	)))))	DOCKET NO. 940109-WU Filed December 12, 1994

RESPONSE TO MOTION FOR RECONSIDERATION
-and-
CROSS MOTION FOR RECONSIDERATION

The Citizens of the State of Florida (Citizens) by and through JACK SHREVE, Public Counsel, respond to the Motion for Reconsideration (Motion) of the Final Order in this docket filed by St. George Island Utility Co. Ltd. (SGIU) filed November 29, 1994 and file this their Cross motion for Reconsideration and say:

RESPONSE:

Preliminary: As to the preliminary matter alleged by SGIU in the Motion, the Citizens accept the dates as therein set forth but reject the following matters as allegations unsupported in the record:

- that the Commission staff participated in the hearing as a party;
- that SGIU is adversely affected by the Final Order.

Failure to Credit CIAC to Plant in Service:

Duplication of Proforma CIAC Adjustment: SGIU alleges that there is a duplication of CIAC in the amount of $22,220. (Motion at pp. 5-6.) SGIU argues that the $22,220 proforma adjustment included in its 1992 rate base was also included in the 1993 CIAC balance used by the Commission to adjust the Company's CIAC to a 1993 level. Evidence of this allegation was never produced in this proceeding which is clearly evident by the Company's failure to cite a transcript page or exhibit supporting its contention. Evidence justifying the Company's position--that this CIAC was actually booked in 1993--could have been easily produced by SGIU at the hearing or in its rebuttal testimony. It was not. Accordingly, SGIU has pointed out no error of fact or law. SGIU's request for reconsideration on this issue should be denied.

Property Contribution to CIAC Without Matching to Plant in Service: SGIU contends that the Commission's adjustment to move its 1992 balance of CIAC to a 1993 level is in error because the contributed property was not included in the 1993 amount of investment. (Motion at p. 6.) The Company thus asks the Commission to increase rate base by $68,068. Like its argument concerning an alleged duplication of CIAC, there is no evidence to support the Company's contention. The Company's failure to produce the evidence substantiating this claim is clear by the omission of any cite of the record in its motion for reconsideration. The Commission has made no error of fact or law. Consequently, the Commission should deny the Company's Motion on this issue.

Disallowance of State Park Line Without Removal of Associated CIAC Received: SGIU claims that the Commission must remove $27,873 of CIAC allegedly

included in rate base because plant associated with the state park has not been included in rate base. Again there is no evidence in the record to support either the amount of CIAC allegedly included in rate base, or the suggestion that it was included in rate base. The Commission should deny the Company's request for reconsideration.

Failure to Credit Engineering Design Fees:

The Company claims that there is no evidence in the record to support the Commission's determination that $21,000 of engineering design fees were previously recorded by the Company. In making the finding that the engineering fees were previously recorded, the Commission appropriately disallowed the Company's request to capitalize $21,000 of engineering design fees. The evidence supporting the Commission's decision is the testimony of the Staff auditor, wherein she found that the engineering fees had either been expensed or capitalized. (Exhibit 27, p.30.) Contrary to the Company's assertion, the Commission's decision is based upon the evidence in the record, there is no mistake, and the Company's Motion should be denied.

Failure to Recognize Travel of Tallahassee Employees:

SGIU claims that the Commission's determination regarding travel for administrate employees is based upon a mistaken view of the facts regarding travel actually undertaken by these employees. (Motion at p. 9.) The Commission found that there was no evidence to support the requested travel amounts. (Order at p. 44.) The Commission's finding is supported by the testimony of the Citizens' witness at Tr. 657

and 775. The Company's argument is nothing more than rehash of the same claims made in its post hearing proposed findings of fact. The Company has pointed to no errors of fact or law made by the Commission. The Commission should deny the Company's request for reconsideration.

Failure to Consider Legal Fee Paid by Comparable Utility:

The Company claims that the Commission's decision concerning legal fees is a mistake of fact and law. (Motion at p. 10.) In its Motion the Company makes several assertions which warrant a response.

First, the Company claims that the Commission based its determination on the appropriate amount of legal fee based upon the testimony of a witness who admitted that she was not qualified to determine when it is necessary to secure legal services. This is a mischaracterization of the record.

Ms. Dismukes stated that Mr. Brown should make the determination as to the amount of time he thought should be charged as legal versus management--clearly under traditional circumstances, management decides when to secure legal services and for what purpose. The Commission decides if the cost for such services should be borne by ratepayers. The Commission apparently decided, like Ms. Dismukes, that certain legal services did not require the expertise of a lawyer. (Tr. 643 and 733.) There was no admission by Ms. Dismukes that she was unqualified to testimony on the subject of legal fees.

Second, SGIU claims that the so-called comparable utility purchased its water

from a larger utility and had no legal issue regarding the source of its water supply. SGIU further claims that Ms. Dismukes admitted that a utility comparable to SGIU--Mad Hatter--had legal fees in the amount of $11,289. This amount, is similar to the amount requested by SGIU. SGIU claims the Commission should use this amount instead of the $3,000 granted. SGIU fails to make clear the complete record with respect to these claims.

SGIU is correct that Ms. Dismukes stated that Jasmine lakes did not have legal issues regarding its source of supply. However, SGIU failed to disclose that Ms. Dismukes pointed out that the utility requested excessive legal fees because it wanted to monitor the rate its was being charged from its wholesaler and because it was pursuing a lawsuit again the county. The Commission disallowed these expenses because it was not appropriate to recover them from ratepayers. (Tr. 736-37.) SGIU is also partly correct that Ms. Dismukes stated that Mad Hatter was "perhaps a little bit more like St. George Island." The reason, however, escaped the Company's attention--"because it had been in trouble with DEP." (Tr. 739.) As Ms. Dismukes testified, such legal expenses are not appropriately borne by ratepayers. (Tr. 643.) As such, from a regulatory standpoint, the fact that such expenses were incurred by a similarly litigious utility, is not reason to allow a similar amount of expense for SGIU.

Finally, SGIU failed to acknowledge that Ms. Dismukes' recommendation, which formed the basis of the Commission decision, was not based only what the Commission allowed Jasmine Lakes in a recent rate case. It was also based upon the amount incurred by all other Class B water utilities. (Tr 644-45.) The Citizens would also point to their brief on this subject, pp. 33-35, wherein numerous problems associated

with the Company's legal expenses where admitted to by the Company during the hearings.

Unlike SGIU's claim, there is no error of fact or law, upon which the Commission made its decision. The Commission's decision with respect to the foregoing issues was based upon substantial competent evidence. Accordingly, the Commission should reject the Company's request for reconsideration on this issue.

Original Cost and the Bishop Reports:

Section II E. of the Motion addresses original cost. The Motion complains of the Commission's reliance on the two Bishop appraisals (which SGIU calls hearsay) and the Commission's rejection of evidence identified by SGIU, but not admitted into evidence. Section II E. also contains an invitation to the Commission to consider an affidavit which is outside the record. The invitation to the Commission to consider matters patently outside the record is improper and it would be equally improper for the Commission to consider such material. The Citizens move to strike attachment 3 to the motion in a separate pleading.

SGIU objects to the Commission's reliance on the two Bishop appraisals because SGIU now says the appraisals are hearsay. SGIU never established a hearsay objection to either Bishop appraisal. In any case, the Bishop appraisals are the subject of a well recognized exception to the hearsay rule and are adequately corroborated. Finally, SGIU argues that material from the last case should been considered by the Commission.

The 1978 Bishop Appraisal

The 1978 William Bishop Appraisal was identified in this docket as Exhibit No. 6 (Tr. 192) and admitted in the absence of a hearsay objection. (Tr. 256) The only objection to Exhibit No. 6 was one of authentication, not hearsay. (Tr. 254) If SGIU regarded Exhibit No. 6 as hearsay, it should have interposed a hearsay objection[1]. It is well settled that an objection not raised is waived.

The 1982 Bishop Appraisal

The 1982 William Bishop Appraisal was identified in this docket as exhibit 47. (Tr 1152) The Citizens note that the 1982 Appraisal, of which SGIU now complains, was introduced for identification (Tr. 1152) and moved into evidence *by SGIU.* (Tr. 1668) The introducing party cannot be heard to complain of perceived inadequacies in the evidence it introduced, as SGIU does here.

Late filed Exhibit No. 21 from the previous case

SGIU also complains that Exhibit 21 from a prior rate proceeding was excluded (SGIU says inexplicably). An exhibit which SGIU purported to be the same as Exhibit 21 was marked in this docket as exhibit 76[2]. The argument and explanation

[1] This would have permitted the parties, including the Citizens to answer a hearsay objection by establishing an exception to the hearsay rule, namely, party admission discussed later.

[2] Whether Exhibit 76 was the same as the late-filed exhibit 21 from the previous case is unclear: Ms. Withers testimony at page 1592, line 9 of the transcript seems to indicate

surrounding Exhibit 21 begin in the transcript at page 1649 and continue thereafter. In essence the Commission observed that there was little need to hear sworn testimony as to what was in the original record, as everyone agreed, including counsel for the Commissioners, the record speaks for itself. Whether the Commission "denied SGIU the right to present evidence, including Exhibit 21 from the prior rate proceeding" is highly questionable since SGIU never moved the admission of Exhibit 76. Moreover, Mr. Brown was permitted by the Commission to testify at length about matters considered in the previous case over recurring objection from the Citizens. (Tr. 1651 --1660; Tr. 1448 -- 1452). In short, this record contains a body of evidence as to what was considered in the previous case. If the Commission had found anything persuasive in the earlier case, the Commission could have caused the Final Order to so state.

Reliance on the Bishop Reports

SGIU did not interpose a hearsay objection to the 1978 Bishop Appraisal and SGIU itself introduced the 1982 Bishop appraisal into evidence. SGIU's position to complain that either Bishop Appraisal is hearsay is waived.

In an abundance of caution, however, the Citizens address the alleged hearsay nature of the Bishop Appraisals.

Hearsay evidence may be admitted by the Commission but may not be sufficient in itself to support a finding *unless it would be admissible over objection in*

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that Exhibit 76 was somewhat more inclusive.

civil actions[3].

Florida Statutes, common law, and common sense all recognize the party admission exception to the hearsay rule. Put simply, both appraisals are admissible over objection in the civil courts of this state because each is a party admission.

Section 90.803(18) Florida Statutes (1993) provides:

> The provisions of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> . . . .
>
> (18) a statement that is offered against a party and is:
>
> (a) his own statement in either an individual or a representative capacity;
>
> (b) a statement of which he has manifested his adoption or belief in its truth;
>
> (c) a statement by a person specifically authorized by him to make a statement concerning the subject.

The Bishop appraisals are each a product of a person who was authorized and hired by SGIU to perform an appraisal of the SGIU system (Exhibit 64, page 72, line 14); the utility's principal engineering witness adopted the 1978 Bishop in all respects (Tr. 248); the utility principal, Mr. Brown adopted the Bishop Appraisal under oath in a Florida Court (Exhibit 64, page 124, line 2). The Bishop appraisals are party

[3] See Section 120.58 Florida Statutes (1993)

admissions, authorized by SGIU, adopted by their witness, and admissible over objection in a civil action.

Professor Erhardt discusses the common sense wisdom supporting the party admission exception. It is particularly relevant here because of SGIU's complaint that it could not cross-examine the author of the appraisals.

> Admissions by a party-opponent have historically been admissible as substantive evidence. These out-of-court statements and actions are admissible, not because they were against the interests of the party when they were made, but because they are statements made by an adversary and *because the adversary party cannot complain about not cross-examining himself.* (Footnotes omitted, italics supplied)

Ehrhardt, Florida Evidence, §803.18 (1992 ed.)

Although it may be observed that Mr. Bishop is not the actual party, it is certain that he was at the time of both reports authorized by SGIU to prepare the appraisals on is behalf. Section 90.803(18)(c) speaks directly to the issue of admissions authorized by a party. Moreover, Section 90.803(18)(b) speaks directly to the issue of admissions adopted by the party. Both Mr. Brown, throughout exhibit 64 and Mr. Coloney in his live testimony adopted Mr. Bishop's 1978 appraisal. The introduction into evidence of Mr. Bishop's 1982 report by SGIU constitutes an adoption. Finally, to say that Mr. Coloney merely adopted the Bishop Study is to fail the true import of his adoption. His words were:

> I have since seen Mr. Bishop's study. I think that it is accurate and excellent.
> . . . .

> Actually, as I've previously stated, I feel that my report and that of Mr. Bishop is totally and completely consistent. And I think if Mr. Bishop were present today he would state that his study was accurate, and I think he would agree with my discussion of my study and of his study. I find no disagreement in any way between his and mine.

(Tr. 248)

This, it should be remembered is the same Bishop Appraisal which SGIU says it should have been allowed to cross-examine: a contemporaneous appraisal of the SGIU system, performed at SGIU's instance by SGIU's design engineer, held forth by the utility's principal, embraced and adopted by their current consulting engineer. That they object on the basis of their lack of opportunity to cross-examine is not sound reasoning.

Similarly, the utility complains that it wasn't able to cross-examine the 1982 Bishop Appraisal. That, it should be remembered, is a report *SGIU* introduced into evidence, prepared by SGIU's engineer, and adopted as accurate and true by SGIU's introduction. SGIU's alleged lack of an opportunity to cross-examine this report is flawed as well.

Even if Mr. Bishop's appraisals were hearsay as SGIU alleges, there was no unavoidable prejudice to SGIU. Mr. Bishop's 1978 Appraisal was filed as part of Witness Dismukes' direct testimony months before the hearing. SGIU does not explain why they did not call Mr. Bishop if it wanted to cross-examine him. As Mr. Pfeiffer established, Mr. Bishop is alive and working on a project with Mr. Coloney. (Tr. 246) Presumably, he was available to be called by SGIU as their witness.

Even if the appraisals were in need of corroboration (which they are not) adequate corroboration is provided. Exhibit 64 shows independent testimony by Mr. Brown as to the costs of building the system. Ms. Withers adopted the 1978 Bishop Appraisal in her testimony as did Mr. Siedman. The beginning point for the annual reports is a number consistent with the 1978 Bishop Appraisal and Mr. Colony not only adopted the appraisal, but found it consistent with his own study.

In summary as to original cost, the utility has waived any hearsay objection it may have had with respect to either of the Bishop Appraisals. In the case of the 1978 appraisal, no hearsay objection was raised. In the case of the 1982 appraisal, SGIU itself introduced it into evidence. In addition, both of the Bishop Appraisals were admissible over objection in civil actions in this state because each of the appraisals qualifies as a party admission. There is adequate corroboration of the Appraisals in the record and, finally, there was no prejudice to SGIU in the consideration of the Bishop Appraisals: SGIU could have called Mr. Bishop as a witness. They had months of notice that Mr. Bishop's work would be offered by the Citizens.

With respect to the record of the previous proceeding allegedly excluded by the Commission: it was not moved into evidence by SGIU. Moreover, there was extensive testimony concerning that evidence, and the Commission noticed the record in the previous case. If the Commission had accorded the same weight to the matters in the previous case SGIU does, it might not have openly sought the introduction of original cost evidence in a future case.

The Commission's reliance on the Bishop Appraisals is justified and should

not be reconsidered.

CROSS MOTION:

There are two matters addressed in the Final Order which should be reconsidered by the Commission. The first is a minor omission, the second is a misapplication of the law of considerable consequence.

TMB Expenses:

The Commission found in the Final Order at page 63 under the heading "rate case consultant" that the expense for TMB associates claimed by SGIU in its late filed exhibit should be disallowed apparently because of its contrary testimony at hearing. While the Citizens have no quarrel with the adequacy of the basis for that disallowance, the Final Order ignores a more compelling reason for its disallowance, a reason apparently overlooked by the Commission.

Upon receipt of SGIU's late filed exhibit concerning rate case expense, the Citizens filed a motion to strike the exhibit, noting the contrast between SGIU's testimony in the case and its claim for expenses for TMB associates. SGIU's August 31st, 1994 response to that motion expressly withdrew the hitherto claimed TMB expenses. The Citizens believe that SGIU expressly withdrew its claim for TMB expenses and that the rationale expressed in the Final Order is unnecessary.

Original Cost:

Like SGIU, the Citizens are not in agreement with the analysis of original cost set forth in the Final Order. The Citizens, if permitted to do so, would suggest a different weighing of the evidence. A reweighing of the evidence is, however, an idea inconsistent

with reconsideration.

Reconsideration is proper where oversight, mistake, or misapplication of the law is apparent. The Final Order reflects a fundamental misapplication of the law of regulation. The error is summed up in a Commission rationale set forth on page 19 of the final order:

> We agree with Messrs. Seidman and Coloney that original cost should be based upon what is in the ground.

Were the question of original cost such a simple proposition, the Citiznes would also agree with Messrs. Seidman and Coloney. Mr. Seidman and Coloney's premise would be entirely accurate if Florida law didn't require the Commission to consider *who* paid for what is in the ground as well as what's in the ground. The Commission's analysis, i.e., looking only to the ground, does not show who paid for the assets. In order for a utility owner to show entitlement to a reasonable return on an asset, the owner must show not only that the asset is in the ground, the owner must show that the investment required to place it there was that of the owner.

OPC's methodology is characterized by the Final Order as "straightforward and easy to calculate" and as "based on information prepared for or by the utility". It shows what the utility owners' investment in the system was and is. Messrs. Seidman and Coloney's analysis shows what is in the ground. The difference between what is in the ground and what the utility invested amounts to nearly half of the utility's rate base, or 1.4 million dollars. (Tr. 1591) The Commission considered what's in the ground. The Commission now needs to consider who paid for it. The utility has the burden to bring

forth evidence on both questions.

The Commission properly entered adjustments to what the utility said was in the ground but apparently engaged a presumption that the utility paid for what was found there. The utility's books and records, its financial statements, its federal tax returns, the affidavit of its longest tenured accountant, OPC's witness, and the annual reports it submitted to this Commission, all suggest that the utility paid for about half of what's in the ground, and is thus entitled to a return on about half of it.

The Commission order erroneously applies Section 367.081(2)a, F. S. which provides in relevant part:

> In every such [rate] proceeding, the commission shall consider . . . the cost of providing the service, which shall include . . . a fair return on the investment *of the utility* in property used and useful in the public service. (italics added)

It is the utility's burden to show what its investment is. Whereas the Final Order indulges a presumption that the utility invested what is in the ground, it should have required proof that what is in the ground was invested by the utility.

Were the utility's records simply silent as to where the investment in the ground came from, the validity of the apparent presumption would be doubtful. But where the overwhelming weight of the evidence -- most of which was compiled at the hand of the utility itself-- suggests a far lesser investment than what is in the ground, the presumption is indefensible.

The Bishop Reports show what's in the ground. SGIU's books and records,

its financial statements, its federal tax returns, the affidavit of its longest tenured accountant, OPC's witness, and the annual reports it submitted to this Commission show that SGIU paid for about half of it. SGIU isn't entitled to a return on the other half if SGIU can't prove to the Commission that it invested the money. All the credible evidence in the record suggest that they didn't.

WHEREFORE, the Citizens of the State of Florida move the Commission to reconsider the Final Order and enter a reconsidered order finding that the utility's books and records, its financial statements, its federal tax returns, the affidavit of its longest tenured accountant, and the annual reports it submitted to this Commission correctly reflect its investment in this utility system, and that the Commission approve rates which provide a return only upon that investment in utility plant which this record supports; and the Citiznes of the State of Florida also move the Commission to deny SGIU's Motion for Reconsideration in all respects.

Respectfully submitted,

Harold McLean
Associate Public Counsel

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Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 940109-WU

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 12th day of December, 1994.

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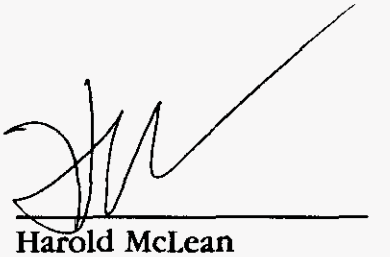

Harold McLean
Associate Public Counsel