FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

January 30, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JABER)
DIVISION OF WATER AND WASTEWATER (WILLIS, CHASE, RENDELL)

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 920199-WS
COUNTY: BREVARD, CHARLOTTE/LEE, CITRUS, CLAY, DUVAL, HIGHLANDS, LAKE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, VOLUSIA, WASHINGTON, COLLIER, AND HERNANDO

CASE: APPLICATION FOR A RATE INCREASE

AGENDA: FEBRUARY 6, 1996 - REGULAR AGENDA - MOTION FOR RECONSIDERATION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\920199-R.RCM

CASE BACKGROUND

Southern States Utilities, Inc., (SSU or utility) is a Class A water and wastewater utility operating in various counties in the State of Florida. On May 11, 1992, SSU filed an application to increase the rates and charges for 127 of its water and wastewater service areas regulated by this Commission. The official date of filing was established as June 17, 1992. According to the information contained in the minimum filing requirements (MFRs), the total water annual revenue filed in this application for 1991 was $12,319,321 and the net operating income was $1,616,165. The total wastewater annual revenue filed in this application for 1991 was $6,669,468 and the net operating income was $324,177.

In total, the utility requested interim rates designed to generate annual revenues of $16,806,594 for water and $10,270,606 for wastewater, increases of $3,981,192 (31.57%) and $2,997,359 (41.22%), respectively, according to the MFRs. The utility requested final rates designed to generate annual water revenues of $17,998,776 and $10,872,112 for wastewater, increases of $5,064,353 (40.16%) and $3,601,165 (49.53%), respectively, according to the MFRs. The approved test year for determining both interim and

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final rates is the historical year ended December 31, 1991.

By Order No. PSC-92-0948-FOF-WS, issued September 8, 1992, and as amended by Order No. PSC-92-0948A-FOF-WS, issued October 13, 1992, the Commission approved interim rates designed to generate annual water and wastewater revenues of $16,347,596 and $10,270,606, respectively.

By Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, the Commission approved an increase in the utility's final rates and charges, basing the rates on a uniform rate structure. On September 15, 1993, pursuant to the provisions of Order No. PSC-93-0423-FOF-WS, Commission Staff approved the revised tariff sheets and the utility proceeded to implement the final rates. On October 8, 1993, Citrus County and Cypress and Oak Villages (COVA), now known as Sugarmill Woods Civic Association (Sugarmill Woods), filed a Notice of Appeal of the Final Order in the First District Court of Appeal. That Notice was amended to include the Commission as a party on October 12, 1993. On October 18, 1993, the utility filed a Motion to Vacate Automatic Stay. By Order No. PSC-93-1788-FOF-WS, issued December 14, 1993, the Commission granted the utility's motion to vacate the automatic stay. The Order on Reconsideration, Order No. PSC-93-1598-FOF-WS, was issued on November 2, 1993. On November 19, 1993, the Office of Public Counsel (OPC) filed its notice of appeal.

On April 6, 1995, the Commission's decision in Order No. PSC-93-0423-FOF-WS was reversed in part and affirmed in part by the First District Court of Appeal, Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). A mandate was issued by the First District Court of Appeal on July 13, 1995. SSU sought discretionary review by the Florida Supreme Court. The Commission filed a Notice of Joinder and Adoption of SSU's Brief. On October 27, 1995, the Supreme Court denied jurisdiction.

On October 19, 1995, Order No. PSC-95-1292-FOF-WS was issued, Order Complying with Mandate, Requiring Refund, and Disposing of Joint Petition. By that Order, the Commission ordered SSU to implement a modified stand alone rate structure, develop rates based on a water benchmark of $52.00 and a wastewater benchmark of $65.00, and to refund accordingly.

On November 3, 1995, SSU timely filed its Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. With the motion for reconsideration, SSU filed a Request for Oral Argument. OPC, Citrus County, Spring Hill Civic Association (Spring Hill), and Sugarmill Woods Civic Association (Sugarmill Woods) filed responses

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to SSU's motion. Spring Hill is not a party in this docket. In Order No. PSC-95-1292-FOF-WS, the Commission noted this fact and stated that it did not consider arguments made by Spring Hill. Accordingly, Staff has not specifically incorporated Spring Hill's arguments in this recommendation. However, Staff notes that the response filed by Citrus County and Spring Hill is a joint response. On November 15, 1995, Sugarmill Woods filed a Motion to Strike Affidavits of Forrest L. Ludsen and Scott Vierima and Portions of Motion for Reconsideration. On November 27, 1995, SSU filed its Response to Sugarmill Woods' Motion to Strike. SSU also filed a Motion for Leave to File Reply and Proposed Reply. On December 11, 1995, OPC filed a Response in Opposition to SSU's Motion for Leave to File Reply. This recommendation addresses all of the outstanding pleadings filed in this docket.

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DISCUSSION OF ISSUES

ISSUE 1: Should SSU's Request for Oral Argument be granted?

RECOMMENDATION: Yes. Oral argument should be permitted at the agenda conference, but argument should be limited to fifteen minutes for each side. (JABER)

STAFF ANALYSIS: On November 3, 1995 (with its motion for reconsideration), SSU filed a Request for Oral Argument, wherein SSU requests that each side be granted no less than 30 minutes for oral argument. SSU cites to Rules 25-22.058(1) and 25-22.060(1)(f), Florida Administrative Code, in support of its request. SSU asserts that oral argument will assist the Commission in clarifying and understanding the factual and legal issues set forth in Order No. PSC-95-1292-FOF-WS.

Recommendations which concern the appropriate actions the Commission should take on an order remanded by the Court have traditionally been noticed as "Parties May Not Participate," the rationale being that the proceeding involves a post-hearing decision, and participation should be limited to Commissioners and Staff. It would logically follow that participation on the Commission's consideration of a motion for reconsideration of the Order addressing the remand should also be limited in the same manner. However, in Docket No. 920188-TL, In re: Application for a rate increase by GTE Florida, Inc., and in the instant case, the Commission heard oral argument from the parties. This case is unique and very complex. Accordingly, Staff believes that argument from all parties is appropriate in this instance.

Rule 25-22.060(1)(f), Florida Administrative Code, provides that oral argument on a motion for reconsideration shall be granted solely at the discretion of the Commission. Staff recommends that the Commission grant SSU's request for oral argument. Staff recommends that the Commission allow all parties to make the oral argument at the February 6, 1996, agenda conference. Further, Staff recommends that the oral argument be limited to 15 minutes for each side.

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ISSUE 2: Should the Commission grant Putnam County's Petition for Leave to Intervene?

RECOMMENDATION: No. Putnam County's Petition for Leave to Intervene should be denied. (JABER)

STAFF ANALYSIS: On November 27, 1995, Putnam County filed a Petition to Intervene, wherein it asserts that it is entitled to participate in these proceedings because the substantial interests of a "great many of its citizens will be affected by the outcome of the proceeding and the final decision of the Commission." Putnam County further asserts that it is a customer of SSU and will be directly impacted by the ultimate decision made by the Commission. No party has filed a response to Putnam County's Petition to Intervene.

The Commission's rule regarding intervention, Rule 25-22.039, Florida Administrative Code, provides in pertinent part that persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene; but such petition for leave to intervene must be filed at least 5 days before the final hearing. Pursuant to Rule 25-22.039, Florida Administrative Code, Putnam County's petition is not timely filed.

The final hearing in this docket was held on November 6, 1992. Putnam County's opportunity to participate in this proceeding has long expired. Furthermore, Staff has verified that Putnam County itself has not been a customer of SSU since 1992. Staff's recommendation for this issue is consistent with Order No. PSC-93-1598-FOF-WS, issued November 2, 1993, in this same docket. By that Order, the Commission denied the petitions to intervene filed by Sugarmill Manor, Inc., Senator Brown-Waite, Spring Hill Civic Association, Inc., Cypress Village Property Owners Association, Hernando County and Volusia County Council Members Giorno, McCoy and Northey, stating that their petitions to intervene were filed 5 months or more after the final hearing. Accordingly, Staff recommends that Putnam County's petition to intervene be denied.

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ISSUE 3: Should the Commission grant The City of Keystone Heights' Petition for Leave to Intervene?

RECOMMENDATION: No. Keystone Heights' Petition for Leave to Intervene should be denied. (JABER)

STAFF ANALYSIS: On January 22, 1996, Keystone Heights filed a Petition to Intervene, wherein it asserts that "a great many of its citizens will be affected by the outcome of these proceedings and the final decision of the Commission, including any appeals of such decision, concerning Southern's rate structure." Like Putnam County, Keystone Heights further asserts that it is a customer of SSU and will be directly impacted by the ultimate decision made by the Commission.

Keystone Heights, in recognizing that this rate case has already proceeded to final hearing, further alleges that the recent decision by the Commission to impose a modified stand alone rate structure raises new issues that will have financial impacts on the City of Keystone Heights (both the city and the residents--customers of SSU). Staff has verified that the City is a water customer of SSU. The City cites to In re Adoption of a Minor Child, 593 So. 2d 185, 190 (Fla. 1992) and requests to intervene to secure its right to pursue an appeal of the Commission's ultimate rate structure decision.

In In re Adoption, the grandparents of an adopted child petitioned to intervene after a final judgment was entered. The Court held that the grandparents were entitled to notice and could intervene. Id. at 189. In reaching its decision, the Court stated that it "must ensure that when courts are deciding these issues in the first instance, they have all of the pertinent information and appropriate parties before them." Id.

There are very distinct differences between In re Adoption and the instant case. A case on adoption in which a child's grandparents did not receive notice of the adoption proceeding can hardly be compared to the instant case. First, Keystone Heights, as well as Putnam County, received notice in Docket No. 920199-WS and were afforded all opportunities to participate in the proceeding. Second, the main issue on appeal has always been rate structure; therefore, Keystone Heights' argument that new issues have been raised is without merit. The order on remand only requires the utility to implement a different rate structure based on the record in Docket No. 920199-WS. Third, Keystone Heights' petition is not timely filed pursuant to Rule 25-22.039, Florida Administrative Code. As stated earlier, the final hearing in this

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docket was held in November of 1992. According to the Commission's rule, a petition for leave to intervene must be filed at least five days before the final hearing.

For the reasons stated here and in the previous issue, Staff recommends that Keystone Heights' petition to intervene be denied.

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ISSUE 4: Should Sugarmill Woods Civic Association's Motion to Strike Affidavits and Portions of Motion for Reconsideration be granted?

RECOMMENDATION: Sugarmill Woods' motion as it relates to the request to strike affidavits should be granted. Sugarmill Woods' motion as it relates to the request to strike portions of the motion for reconsideration should be denied. (JABER)

STAFF ANALYSIS: In its motion to strike, Sugarmill Woods requests that the Commission strike the portions of SSU's motion for reconsideration that discuss the financial impact of Order No. PSC-95-1292-FOF-WS on SSU. Further, Sugarmill Woods requests that the Commission strike the affidavits of Forrest L. Ludsen and Scott Vierima that are attached to SSU's motion. In support of its motion, Sugarmill Woods states that the financial impact of the refund order on SSU is an inappropriate basis for reconsideration, is irrelevant to the refund issue, and is presented only for sympathy. Further, Sugarmill Woods asserts that the affidavits do not constitute newly discovered evidence or evidence that could not have been discovered prior to the final hearing. See, e.g, Roberto v. Allstate Insurance Co., 457 So. 2d 1148 (Fla. 3rd DCA 1984).

In response, SSU reiterates its request to incorporate the affidavits into the record of Docket No. 920199-WS and states that Sugarmill Woods offers no relevant case law in support of its positions. It is SSU's position that the Commission's order fails to address the financial impacts and the affidavits demonstrate what those impacts are.

The Commission's decision clearly rejects, as a matter of policy, the request to reopen the record for additional evidence. SSU's request to incorporate the affidavits into the record of Docket No. 920199-WS is an attempt to reargue the Commission's decision in that regard. Since the affidavits are not part of the existing record, if the Commission accepts the affidavits, it must allow the parties the opportunity to cross-examine on the affidavits, thereby reopening the record for that purpose. At the September 12, 1995, Agenda Conference, the Commission engaged in extensive discussion on this issue. In its Order, the Commission specifically states:

> We will not reach the question of whether we can or cannot reopen the record to address the court's concern, because as a matter of policy in this case, we find that the record should not be reopened.

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Order No. PSC-95-1292-FOF-WS at 4.

The Commission clearly chose to base its decision on what was already in the evidence presented in Docket No. 920199-WS, nothing more. In that regard, Staff recommends that Sugarmill Woods' motion to strike the affidavits attached to SSU's motion for reconsideration be granted.

However, Staff believes that the Commission did consider and did find relevant the financial impact of the Commission's decision on SSU. Sugarmill Woods is incorrect in that regard. SSU's arguments in its motion regarding financial impact are relevant.

After considering the financial impact of its decision on SSU and the financial integrity of the utility, the Commission rejected SSU's arguments and Staff's primary recommendation which addressed these very same concerns. In rejecting those arguments, the Commission found that SSU assumed the risk when it chose to implement the uniform rate structure pending the conclusion of the appeal. Even Sugarmill Woods states, in its response, that "the discussion of financial impact addresses matters which are inherent in the refund order, not something that was overlooked or misapprehended by the Commission." Accordingly, Staff recommends that Sugarmill Woods' request to strike portions of SSU's motion for reconsideration be denied. Whether SSU has met the reconsideration standard is a different issue which will be discussed in greater detail in the next issue.

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ISSUE 5: Should SSU's Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS be granted?

RECOMMENDATION: SSU's motion for reconsideration should be granted in part and denied in part as set forth below. (JABER, CHASE, RENDELL)

STAFF ANALYSIS: Rule 25-22.060(1), Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order. The standard for reconsideration is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). In that case, the Florida Supreme Court stated that the purpose of a petition for rehearing is merely to bring to the attention of the trial court or the administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment. Id. at 891. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based on specific factual matters set forth in the record and susceptible to review. We have applied these standards in our review of SSU's motion.

By Order No. PSC-95-1292-FOF-WS, the Commission required SSU to calculate its final rates on a modified stand alone rate structure, make certain refunds, with interest, for the period between the initial effective date of the uniform rate up to the date at which a new rate structure can be implemented, and adjust the final rates for selected service areas to reflect base facility charges for 5/8 x 3/4 inch meters. SSU timely filed its Motion for Reconsideration on November 3, 1995. The parties filed responses to SSU's motion.

In its Motion, SSU argues that 1) the Commission failed to properly exercise the discretion it had following the Court's remand; 2) abused its discretion by failing to consider the financial impact of Order No. PSC-95-1292-FOF-WS on SSU; 3) failed to exercise its authority to implement a uniform rate structure; 4) erred in reducing base facility charges for Pine Ridge and Sugarmill Woods customers; and 5) erred in requiring refunds and interest on refunds.

Discretion Following Remand and Abuse of Discretion

SSU cites to Tamiami Trail Tours, Inc. v. Railroad Comm., 174 So. 451 (Fla. 1937) and states that following a remand the

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Commission has broad discretion to fashion remedies that will fairly protect and accommodate the legitimate interests of all affected parties. SSU argues that it is incumbent upon the Commission to return SSU to the status which it would have been entitled to attain had the rate structure determination in the 1993 Final Order not been required. Specifically, SSU argues that the Commission must permit SSU the opportunity to earn the final revenue requirements ordered by the Commission and affirmed by the First District Court of Appeal. See Harvell v. Rotary Disc File Corp., 188 So. 2d 819 (Fla. 1966); State v. East Coast Railway Co., 176 So. 2d 514 (Fla. 1st DCA 1965), for the principle that "an agency, like a court, can undo what is wrongfully done by virtue of its order." SSU asserts in its motion that Order No. PSC-95-1292-FOF-WS violates this principle by returning only the customers whose rates were higher under uniform rates to the pre-appeal status quo.

SSU argues that the Commission acted arbitrarily and capriciously by failing to exercise its discretion "in a responsible and even-handed fashion." SSU believes that the Commission should have considered the financial impacts of Order No. PSC-95-1292-FOF-WS on SSU. SSU states that the effect of that Order is to deprive SSU of the opportunity to recover the revenue requirement approved in the Final Order and upheld by the Court, and further SSU is deprived of the opportunity to earn a fair rate of return. SSU asserts that the Commission's fundamental error is that in this case, it did not attempt to create a fair balance between the consumer, the regulated entity, and those interests that fall in between. See, e.g, Mesa Petroleum Co. v. FPC, 441 F.2d 182, 186 (5th Cir. 1971).

In relation to the previous argument, SSU also alleges that the Commission has violated the Florida and U.S. Constitutions by unlawfully confiscating SSU's property (revenue requirement) and denying SSU equal protection of the law. SSU asserts that the Refund Order denies SSU the opportunity to secure a fair return on investment and the utility's financial integrity is materially impaired. As to equal protection, SSU asserts that the Refund Order explicitly precludes any corresponding remedy to SSU and its investors.

In response, OPC asserts that SSU's filing is not a valid motion for reconsideration in spite of the citations to Diamond Cab. OPC asserts that SSU does not attempt to identify mistakes of law or fact; but rather, "SSU asserts summarily that a result contrary to its interest could only result from a mistake...." OPC further asserts that SSU's motion does not contain anything to show

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that the Commission was unaware of the consequences from the requirement to implement the modified stand alone rate structure. OPC also points out that SSU's motion merely indicates disagreement with the Commission's decision. With respect to alleged violations of the Florida and U.S. Constitutions, OPC states that SSU has not demonstrated that it did not have an opportunity to be heard or that it will not, through prospective rates, have a reasonable opportunity to earn a fair rate of return. Further, OPC cites to Boyd v. Southeastern Telephone Co., 105 So. 2d 889, 894 (Fla. 1st DCA 1958) and states that a utility cannot suffer a taking in the constitutional sense while the regulatory process, including an appeal of the Commission's decision runs its course. OPC also cites to United Telephone Co. v. Mayo, 345 So. 2d 648, 653 (Fla. 1977), which states that "just compensation safeguarded by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service."

Sugarmill Woods agrees with OPC and correctly points out that the Commission did discuss the utility's revenue requirement at the Agenda Conference and in Order No. PSC-95-1292-FOF-WS. As stated in the previous issue, Sugarmill Woods asserts that SSU's arguments regarding financial impact are improper and should be stricken. With respect to the taking and equal protection arguments, Sugarmill Woods states that those arguments should be disregarded as well because if SSU did not agree with the Commission's initial decision on uniform rates, it could have appealed that Order or allowed the automatic stay to remain in effect. Citrus County adopts the positions of OPC and Sugarmill Woods.

Staff also agrees with OPC's analysis on this portion of the issue. SSU has not demonstrated that the Commission has made a mistake of fact or law in the remedy it chose for addressing the remand by the court. In fact, the Commission made its decision from two options presented to it by its Staff. Staff notes that there were two recommendations involving most of the issues in Staff's recommendation addressing the remand. After considering both recommendations and after lengthy discussion with Staff and all of the parties, and two agendas on the matter, the Commission made its decision. Contrary to SSU's assertion, the Commission did recognize that it had broad discretion in this matter and it chose the option that it did after reviewing the evidence in Docket No. 920199-WS. SSU does not agree with the option the Commission chose. It is accurate to say that the Commission fully considered every point of fact or law in making its decision to require SSU to implement the modified stand alone rate structure.

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The Commission clearly has recognized that SSU's revenue requirement was not specifically at issue on appeal. The Commission also recognized that SSU's revenue requirement should not be changed. By Order No. PSC-95-1292-FOF-WS, the Commission specifically stated that the "utility's revenue requirement was never challenged as a point on appeal and it shall not be changed. Therefore, the approved rates shall be designed to produce total annual operating revenues for all 127 systems of $15,828,704 for water and $10,179,468 for wastewater." Order at 5. With respect to the utility's financial integrity, the Commission at page 5 of the Order also stated "We find that this rate structure maintains the basic financial integrity of each service area as expressed in rates, while at the same time, recognizes that the utility has consolidated various administrative operations to achieve efficiencies."

In addressing SSU's arguments regarding creating a fair balance between it and the customers, the Commission stated the following:

> We believe that the utility cannot collect from the customers who have paid less under the uniform rate structure than the new rate structure would allow. We find that such action would violate the prohibition against retroactive ratemaking. See Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982) and Citizens v. PSC, 448 So. 2d 1024, 1027 (Fla. 1984), which hold that "retroactive ratemaking occurs when new rates are applied to prior consumption."

Order No. PSC-95-1292-FOF-WS at 7.

Applying the Diamond Cab standard, Staff believes that SSU has not demonstrated that the Commission has overlooked a point of fact or law; accordingly, SSU's motion for reconsideration in this regard should be denied.

Reopening the Record

SSU asserts that the Commission erred in its failure to grant SSU's request to reopen the record for the limited purpose of incorporating the record from Docket No. 930945-WS, the jurisdiction docket, wherein the Commission found that SSU's facilities and land constituted a single system. In that regard, SSU states that the Commission is not bound to ignore the findings contained in the order on jurisdiction although SSU recognizes that the Commission must not exercise jurisdiction under Section

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367.171(7), Florida Statutes, until the appeal is decided. In support of its argument to reopen the record to incorporate or take new evidence, SSU cites to Air Products and Chemicals v. FERC, 650 F.2d 687, 699 (D.C. Cir. 1981) and Public Service Commission of the State of New York v. FPC, 287 F.2d 143, 146 (D.C. Cir. 1960).

In its response, Sugarmill Woods states that this issue was argued extensively at the September 12, 1995, Agenda Conference, and the Commission did not overlook any point of fact or law in this regard. Again, Staff believes that SSU is making the same argument it made at the September 12, 1995, Agenda Conference. SSU's arguments were rejected by the Commission. The Commission found that the evidence in Docket No. 920199-WS was sufficient to allow it to choose a different rate structure. The Commission fully considered this issue and rejected the option of reopening the record. Staff notes that there were two different recommendations made on this issue by Staff and extensive arguments made on this issue by all parties. The Commission fully considered whether it should reopen the record. No point was overlooked. In fact, the Commission stated "we will not reach the question of whether we can or cannot reopen the record to address the court's concern, because as a matter of policy in this case, we find that the record should not be reopened." (emphasis added). The Commission could not have been any clearer in its decision. Accordingly, SSU's motion for reconsideration should be denied in this regard.

Refunds

SSU requests that the Commission rescind or eliminate any refund requirement. In the alternative, SSU requests that the Commission allow it to recover the costs involved in making the refunds by allowing SSU to implement rate surcharges. In support of its request, SSU argues that directing refunds to some customers without offsetting the refund expense with comparable recoveries from other customers results in the overall revenues falling substantially below SSU's approved revenue requirements. Further, SSU asserts that the collection of the surcharge would not constitute retroactive ratemaking because that this is a prospective mechanism designed to recover extraordinary current expense. SSU is proposing to apply a refund cost recovery charge prospectively based on its customers' future consumption.

SSU cites to "the law of the case" doctrine for the proposition that the Commission lacked authority to require that refunds be made because the refunds will create a reduction in the revenue requirement. See, e.g., Hinnant, Inc. v. Spottswood, 481

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So. 2d 80, 82 (Fla. 1st DCA 1986), which holds that the doctrine of the law of the case requires adherence to the principle that questions of law decided on an appeal to a court of ultimate resort must govern the case in the same court and the trial court throughout all stages of the proceeding so long as the facts on which the decision was predicated continue to be the facts in the case.

In its response regarding the surcharge, OPC asserts that SSU merely disagrees with the Commission's end result and SSU does not identify a mistake that compels a different interpretation. Further, OPC states that "the law of the case" cannot dictate a result that is contrary to statutes and prevailing case law, i.e., retroactive ratemaking. In other words, retroactive ratemaking principles demand that rates cannot be increased for consumption during the pendency of the appeal.

In its motion, SSU makes a new request in an attempt to recover its perceived loss of revenue. Staff believes that the request is inappropriate for reconsideration. SSU's request is contrary to the Commission's finding that SSU assumed the risk of making the refunds at the outcome of the appeal. The Commission has found that SSU has overcollected from some customers and therefore, a refund of those revenues is appropriate. To allow a surcharge is another way of collecting the revenues in part from the same customers entitled to a refund. SSU's request might not constitute retroactive ratemaking in that it could legitimately be a prospective mechanism, but SSU's request is contrary to the Commission's practice of not permitting the administrative costs of a refund to be borne by the ratepayers. See, i.e., the standard language used in rate case proceeding orders where the Commission states: "in no instance should the maintenance and administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility." Orders Nos. PSC-95-1605-FOF-SU, PSC-94-0245-FOF-WS and PSC-95-0474-FOF-WU.

SSU is correct that some courts in some states have upheld the implementation of surcharges. In New England Telephone and Telegraph Co. v. Rhode Island 358 A.2d 1 (R.I. 1976), the Rhode Island Supreme Court distinguished some of those cases. For example, where the court has held that the revenues collected by the utility, though superficially appearing to be recoupment for past losses, were in fact deferred collections of presently effective rates, a surcharge may be appropriate. Id. This cannot be analogous to the SSU situation. In the absence of Florida cases on the matter, and based on the Commission's finding that SSU

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assumed the risk of a potential refund, the Commission should reject SSU's surcharge proposal.

The utility's argument regarding "the law of the case" is tenuous. First, the Commission did not change the utility's revenue requirement. The Commission only ordered that a different rate structure be implemented. The Commission did recognize that the change in the rate structure results in a decrease for some customers and an increase for others. Prospectively, the new rate structure should allow SSU to earn a fair rate of return. Second, since revenue requirement was not a specific issue, the court did not address it directly.

In its August 31, 1995, recommendation, Staff presented the Commission with numerous scenarios in the Primary Recommendation. The Commission fully considered those scenarios which ranged from: 1) refunding the difference to those customers who overpaid under uniform rates and allowing the utility to backbill those customers that paid too little; 2) refunding the difference to those customers who overpaid but only allowing the utility to implement rate increases to those customers who underpaid on a prospective basis; and 3) applying the new rate structure prospectively, but not requiring a refund. The Commission may recall that Primary Staff recommended that the Commission approve Option 3 discussed above. The Commission after extensive discussion and argument rejected Primary Staff's recommendation and ordered the utility to refund with interest, for the period between the initial effective date of the uniform rate up to the date at which a new rate structure can be implemented. On this matter, the Commission stated:

> This change in the rate structure results in a rate decrease for some customers and a rate increase for others. We believe that the utility cannot collect from the customers who have paid less under the uniform rate structure than the new rate structure would allow. We find that such action would violate the prohibition against retroactive ratemaking.

Order No. PSC-1292-FOF-WS at 7.

The Commission was very clear in its order on every point that was considered. The Commission believed that it was within its discretion to order the refund, that SSU assumed the risk of making the refunds, and that the refund requirement did not violate the principle of retroactive ratemaking. The Commission also stated that:

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> Upon reviewing the language from the Order Vacating the Stay and the transcripts of the Agenda Conference in which we voted on the utility's Motion to Vacate the Stay, we find that the utility accepted the risk of implementing the rates. It is clear that we recognized the need to secure the revenue increase both as a condition of vacating the stay and to insure funding the refunds in the event refunds were required. Having established a refund condition for those revenues, we can order a refund without violating retroactive ratemaking concepts. United Telephone Company v. Mann, 403 So. 2d 962 (Fla. 1981).

Id.

The reconsideration standard cannot be used to make a new request, reargue a case or to express disagreement. Staff believes that the Commission did not overlook any point of fact or law. SSU has not demonstrated that the Commission has overlooked any point of fact in its decision nor does SSU cite to case law which indicates that the Commission has made a mistake of law. Accordingly, Staff recommends that SSU's motion for reconsideration be denied in this regard.

1-Inch Water Meters

In its Motion for Reconsideration, the utility asserts that the Commission raised and resolved an issue that was never at issue on appeal -- that being the appropriateness of the 1-inch meter base facility charge (BFC) rates for Pine Ridge and Sugarmill Woods water customers. As discussed in Order No. PSC-95-1292-FOF-WS, water customers on 1-inch meters comprise approximately 85% and 89% of the Pine Ridge and Sugarmill Woods residential customers, respectively. In Order No. PSC-95-1292-FOF-WS, the Commission ordered that the 1-inch meter BFC rates for these customers be reduced to the 5/8 x 3/4 inch BFC rates under the approved modified stand-alone rate structure.

According to the utility's motion, there was never an issue identified in the rate case as to whether these customers should be charged the BFC rate of the 5/8 x 3/4 inch meter. Further, there was no discussion of this matter in the Final Order and no finding made by the Commission to place the 1-inch BFC at issue for these service areas. Therefore, according to the utility, no reasonable argument can be made that an adjustment to the 1-inch meter BFC for these service areas is either required by, or falls within the scope of, the Commission's order and the court's opinion.

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In its response to the Motion for Reconsideration, OPC states that the utility did nothing in its motion to show that the Commission overlooked relevant facts or law in reaching its decision on this matter. Sugarmill Woods takes no position on this issue.

After reviewing SSU's motion and the record in this case, Staff agrees with the utility. This matter was raised by Pine Ridge customers at the final hearing in Docket No. 920199-WS and a late-filed exhibit was requested by the Commission indicating the percentage of residential water customers with 1-inch meters at Pine Ridge and Sugarmill Woods. (TR 650, 653, 662, 670-1, 663, 1838, EXH 126) The Staff recommendation in this docket dated February 3, 1993, contains a discussion of this matter; however, there was no identified issue and no Commission vote on the appropriateness of the 1-inch meter BFC water rates for these two service areas. Therefore, these customers have been paying the 1 inch BFC rates under the uniform rate structure. Further, the 1 inch BFC rate was not appealed and was not addressed in the Court's opinion.

The billing determinants that were used to calculate rates referred to in Order No. PSC-95-1292-FOF-WS were based on the 1-inch BFC being applicable to these two service areas. Therefore, the utility is correct that a reduction in the BFC rates results in a revenue deficiency on an annual basis and would increase SSU's refund liability.

For the above reasons, Staff recommends that the Commission grant SSU's motion for reconsideration in this regard. The Commission's decision to require the reduction of the 1-inch meter BFC water rate to the 5/8 x 3/4 inch BFC rate for the Pine Ridge and Sugarmill Woods service areas was in error. Customers in these service areas with 1-inch meters should continue to pay the BFC applicable to that size meter. For point of information, granting SSU's motion on this point does not require a recalculation of the rates for these service areas.

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ISSUE 6: Should SSU's Motion for Reconsideration be granted as it relates to the interest required on the refund?

PRIMARY RECOMMENDATION: No. SSU's motion as it relates to the interest on refunds should be denied. (JABER, CHASE)

ALTERNATIVE RECOMMENDATION: Yes. SSU's motion as it relates to the interest on refunds should be granted. Further, Staff recommends that the Commission modify Order No. PSC-95-1292-FOF-WS to reflect that refunds should be made without interest. (JABER, CHASE)

PRIMARY STAFF ANALYSIS: In its motion, SSU requests that the Commission rescind the requirement that SSU pay interest on refunds. In support of its request, SSU states that under Rule 25-30.360, Florida Administrative Code, the Commission has discretion not to require the payment of interest in an appropriate case. SSU asserts that when the Commission requires a utility to pay interest on refunds, such action is based on the notion that the utility had the use of "excess" customer funds. SSU asserts that in this instance, neither the Commission nor any other party has ever claimed or demonstrated that SSU has collected more revenues than was authorized in the 1993 Final Order. Further, SSU asserts that it was merely a "stakeholder" in this case; it was the Commission that imposed its own uniform rate structure.

In its response, OPC states that Rule 25-22.061(4), Florida Administrative Code, addressing stays and vacation of stays, allows the Commission to set the rate of interest "in the event the Court's decision requires a refund to customers." OPC states that the Commission understands that refunds should be made from revenues collected by the utility during the pendency of the appeal, not from surcharges imposed at a later date. Sugarmill Woods cites to Mann v. Thompson, 118 So. 2d 112 (Fla. 1st DCA 1960), and states that interest on funds paid under an erroneous judgment is an essential aspect of restitution.

First, OPC's reference to Rule 25-22.061(4), Florida Administrative Code, is not applicable to this argument because the Commission did not set the interest rate in its Order Vacating Stay. Second, arguably, the interest section of Rule 25-30.360, Florida Administrative Code, sounds discretionary. Rule 25-30.360(1), Florida Administrative Code, states that "all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission." (emphasis added). Further, Rule 25-30.360(4)(a), Florida Administrative Code, states that:

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> [i]n the case of refunds which the Commission orders to be made with interest, the average monthly interest rate until refund is posted to the customer's account shall be based on the 30 day commercial paper rate for high grade, unsecured notes sold through dealers by major corporation in multiples of $1,000 as regularly published in the Wall Street Journal.

Assuming arguendo that the Commission did have some discretion in ordering that refunds be made without interest, the fact that it did not exercise that discretion does not mean that the Commission has made a mistake of fact or law.

The interest requirement recognizes the time value of money and the time value of the refund monies should be recognized and passed to the customers along with the refund. This is longstanding Commission practice. See, Order No. 20474, issued December 20, 1988, in Docket No. 880606-WS: In re: Complaint by Kelly Tractor Co. Inc. against Meadowbrook Utility Systems, Inc. regarding refund for overpayments in Palm Beach County. In that proceeding, the Commission after reviewing a request similar to SSU's stated:

> Rule 25-30.360, Florida Administrative Code, the Commission's rule on refunds for water and sewer utilities contains a provision regarding interest. It is the Commission's policy to require refunds with interest in recognition of the time value of the customer's money when it was in the utility's hands.

Order No. 20474 at 3.

In consideration of the foregoing, Staff believes that SSU has not demonstrated that the Commission has made a mistake of fact or law by requiring that refunds be made with interest. The Commission's interpretation of Rule 25-30.360, Florida Administrative Code, is consistent with longstanding Commission practice. Accordingly, Staff recommends that SSU's motion for reconsideration be denied in this regard.

ALTERNATIVE STAFF ANALYSIS: As mentioned in the primary staff analysis, Staff believes that the interest section of Rule 25-30.360(1), Florida Administrative Code, is discretionary. This point was never addressed as an option in Staff's recommendation, by the parties, or by the Commission at either Agenda Conferences.

Staff agrees with the utility's assertion that neither the

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Commission nor the Court has found that SSU has collected more revenues than was authorized in the 1993 Final Order. In fact, on several occasions in the Order, the Commission states that the utility's revenue requirement was not specifically challenged on appeal and it should not be changed. Typically, a requirement for a utility to pay interest on refunds is based on the notion that the utility had the use of excess customer funds. This case is unusual in that the refund is required as a result of a change in rate structure, not revenue requirement. The Court rejected the Commission's decision on the utility's rate structure not the overall revenue requirement. For that reason, one could argue that Section 367.081(6), Florida Statutes, which requires a refund with interest for "such portion of the increased rates which are found not to be justified..." does not apply with respect to interest.

Therefore, Staff believes that the Commission did overlook its discretion to order refunds without requiring that refunds be made with interest. Accordingly, using the Diamond Cab standard, it appears that the Commission failed to consider the discretionary nature of the interest provision found in Rule 25-30.360, Florida Administrative Code, when it rendered its order. Therefore, Staff recommends that SSU's motion for reconsideration be granted in this regard. Further, due to the unique circumstances of this case, Staff recommends that the Commission modify Order No. PSC-95-1292-FOF-WS to reflect that refunds should be made without interest.

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ISSUE 7: Should SSU's Motion for Leave to File Reply be granted?

RECOMMENDATION: No. SSU's Motion for Leave to File Reply should be denied. (JABER)

STAFF ANALYSIS: On November 27, 1995, SSU filed a Motion for Leave to File Reply, along with its proposed reply. In support thereof, SSU asserts that the responses raise and rely upon matters neither considered nor discussed in Order No. PSC-95-1292-FOF-WS, that these matters could not have been anticipated and discussed in SSU's motion for reconsideration, and that as the party having the ultimate burden of persuasion on the relief requested in the pending motion, and given the uniqueness of these issues, SSU should be afforded a full and fair opportunity to rely on matters raised in opposition of the motion for reconsideration.

On December 11, 1995, OPC filed a Response in Opposition to SSU's Motion for Leave to File Reply and Proposed Reply, wherein it asserts that SSU's motion for leave to file its reply should be denied. OPC asserts that although SSU cites to Rule 25-22.037(2), Florida Administrative Code, in support of its filing, that Rule is found in the Commission's prehearing procedures and it does not allow for the filing of replies. The Commission's post hearing procedures only contemplate the filing of a motion for reconsideration, a motion to impose a stay, or a motion to vacate an automatic stay.

Staff agrees with OPC. Rule 25-22.037(2), Florida Administrative Code, provides that motions may be filed in opposition to the proceeding, or for other purposes during the proceeding. This rule is indeed in the prehearing section and even so, the Rule does not allow parties to file a reply to a response. Further, Rule 25-22.060, Florida Administrative Code, on reconsideration, allows a party who is adversely affected to file a motion for reconsideration and a party may file a response to that motion. The Rule clearly does not allow parties to file a reply to a response to a motion for reconsideration. The pleading cycle must stop at a reasonable point and the rule reflects that. Accordingly, Staff recommends that SSU's motion for leave to file its reply be denied.

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ISSUE 8: Should Docket No. 920199-WS be closed?

RECOMMENDATION: Yes. The docket should be closed administratively after the order disposing of reconsideration has been issued, upon Staff's verification that the refunds have been made, and after all other requirements of Order No. PSC-95-1292-FOF-WS have been met. (JABER)

STAFF ANALYSIS: Order No. PSC-95-1292-FOF-WS required SSU to make refunds with interest for the time specified in the Order. The docket should be closed administratively after the order disposing of reconsideration has been issued, upon Staff's verification that the refunds have been made, and after all other requirements of Order No. PSC-95-1292-FOF-WS have been met.

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