BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/ Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-96-1046-FOF-WS ISSUED: August 14, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

FINAL ORDER ON REMAND AND REQUIRING REFUND

BY THE COMMISSION:

BACKGROUND

On May 11, 1992, Southern States Utilities, Inc., (SSU or utility) 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. 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. These uniform rates were designed to generate annual water and wastewater revenues of $15,849,908 and $10,188,775, respectively. 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.

Notices of appeal of Order No. PSC-93-0423-FOF-WS were filed with the First District Court of Appeal by Citrus County and Cypress and Oak Villages (COVA), now known as Sugarmill Woods Civic Association (Sugarmill Woods) and by the Office of Public Counsel (Public Counsel). On October 18, 1993, the utility filed a Motion to Vacate Automatic Stay, which was in effect as a result of the appeal. That motion was granted by the Commission by Order No. PSC-93-1788-FOF-WS, issued December 14, 1993.

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 (decision on remand). By that Order, we 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 filed a Motion for Reconsideration of Order No. PSC-95-1292-FOF-WS. At the February 20, 1996, Agenda Conference, we voted, inter alia, to deny SSU's motion for reconsideration.

On February 29, 1996, subsequent to our vote on the utility's motion for reconsideration but prior to the issuance of the order memorializing the vote, the Supreme Court issued its opinion in GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). Because we found that the GTE decision may have an impact on our decision in this case, we voted to reconsider, on our own motion, our entire decision on remand. Order No. PSC-96-0406-FOF-WS, issued March 21, 1996. We invited all parties of record in this docket to file briefs "to address the generic issue of what is the appropriate action the Commission should take upon the remand of the SSU decision in light of the GTE decision." We requested that the briefs include, at a minimum, discussion on: "whether reopening the record in Docket No. 920199-WS is appropriate, whether refunds are appropriate, and whether a surcharge as set forth in the GTE decision is appropriate." The parties in the docket, with the exception of Public Counsel, filed briefs on April 1, 1996. SSU filed a Request for Oral Argument with its brief.

On May 9, 1996, the City of Keystone Heights, the Marion Oaks Homeowners Association, and the Burnt Store Marina, hereinafter referred to as "petitioners," filed a request for oral argument and a petition to intervene. On May 16, 1996, May 21, 1996, and May 24, 1996, SSU, Citrus County, and Sugarmill Woods, respectively, timely filed their responses in opposition to the petitioners' pleading. On May 15, 1996, the petitioners filed a Motion to File Memorandum Out of Time and a Memorandum of Law on Reconsideration of Order No. PSC-95-1292-FOF-WS.

This Order addresses all outstanding matters in this docket, discusses the impact of the GTE decision on this docket and expresses our final decision on remand.

PETITIONERS' REQUEST FOR ORAL ARGUMENT

In support of the request for oral argument on their petition to intervene, petitioners stated that they are customers of SSU who have sought leave to intervene to protect their rights regarding the refund and rate design issues now before the Commission. The petitioners further stated that they comprise part of the group of customers who would be most dramatically affected by our ruling in this matter. In consideration of the foregoing, we granted the request for oral argument on the petition to intervene filed by the City of Keystone Heights, the Marion Oaks Homeowners Association, and the Burnt Store Marina.

PETITION TO INTERVENE AND MOTION TO FILE MEMORANDUM OUT OF TIME

In their Petition to Intervene, the petitioners assert that they are customers of SSU; that Public Counsel has determined that it cannot advocate on behalf of all customers on refund and rate design issues; that the Commission permitted petitioners' intervention in Docket No. 950495-WS; and that outside counsel has only recently been retained to represent petitioners. The petitioners further assert that "certain groups of customers will have no representation on the issue of whether they will be backbilled to effectuate a refund to other customers," and that our disposition of the implementation of a refund, if any, and other rate structure issues will affect the substantial interests of intervenors. See Agrico Chemical Co. v. DER, 406 So. 2d 478 (Fla. 2d DCA 1981), which requires a showing of injury in fact and that such injury be of the type the proceeding is designed to protect. Finally, the petitioners cite to Sections 120.57, 366.041, 366.06, and 366.07, Florida Statutes, in support of their petition.

In its response, SSU states that: the petition to intervene is untimely pursuant to Rule 25-22.039, Florida Administrative Code; the petitioners' reliance on Chapter 366, Florida Statutes, is misplaced; the petitions to intervene filed since April, 1993, have consistently been denied as untimely; and Keystone's first petition to intervene, filed on January 17, 1996, was denied. SSU further asserts that the petitioners' argument that this situation is analogous to the intervention granted in Docket No. 950495-WS is without merit because the petitioners were granted intervention in Docket No. 950495-WS, prior to the conclusion of the hearing once Public Counsel remedied the defect in its previously filed proposal by procuring funds out of its own budget to pay for alternate counsel. Citrus County agrees with SSU on this point.

We agree with SSU and Citrus County. The Commission's rule on intervention is clear. Rule 25-22.039, Florida Administrative Code, states that petitions for leave to intervene must be filed at least 5 days before the final hearing. The final hearing in this docket was held on November 6, 1992. Pursuant to Rule 25-22.039, Florida Administrative Code, the petitioners' request for intervention is not timely. Accordingly, the petition to intervene filed by the City of Keystone Heights, the Marion Oaks Homeowners Association, and the Burnt Store Marina, is denied.

As stated earlier, on May 15, 1996, the petitioners filed a motion to file memorandum out of time with attached memorandum. In its motion, the petitioners state that parties to the docket filed briefs on April 1, 1996, but counsel for the petitioners was not retained until May 3, 1996. The petitioners allege that their interests diverge sharply from the other customers who have representation in this case. In further support of the motion, petitioners allege that if they are not permitted to file the memorandum, their interests will not be represented before the Commission and those interests will be substantially affected by the Commission's decision on reconsideration.

Upon consideration, we find that the petitioners had ample opportunity to participate in this docket prior to the hearing. We note that one of the petitioners, the City of Keystone Heights, first sought intervention in this docket on January 22, 1996. At the February 20, 1996, Agenda Conference, we voted to deny the City of Keystone Heights' first petition to intervene pursuant to Rule 25-22.039, Florida Administrative Code. Accordingly, the petitioners' motion to file memorandum out of time is denied.

SSU'S REQUEST FOR ORAL ARGUMENT

SSU's Request for Oral Argument, filed with its brief, contains no support for allowing oral argument. However, we have consistently heard oral argument from the parties in this matter following remand by the Court. This case is unique and very complex. Because we believed that oral argument would benefit us in fully understanding the issues in this docket on remand, we granted SSU's request for oral argument.

DECISION ON REMAND

In reversing that portion of Order No. PSC-93-0423-FOF-WS approving increased rates and charges for SSU based upon a uniform rate structure, the First District Court of Appeal directed that the cause be "remanded for disposition consistent herewith." The Court stated that "[t]he Commission's order must be reversed based on our finding that chapter 367, Florida Statutes, did not give the Commission authority to approve uniform statewide rates for these utility systems which are operationally unrelated in their delivery of utility service." Citrus County, 656 So. 2d at 1311. The Court further stated that "[h]ere, we find no competent substantial evidence that the facilities and land comprising the 127 SSU systems are functionally related in a way permitting the PSC to require that the customers of all systems pay identical rates." Id. at 1310.

In light of the Court's decision, by Order No. PSC-95-1292-FOF-WS, we required the utility to implement a modified stand-alone rate structure and make refunds. However, subsequent to our reconsideration of that Order, the Supreme Court decided GTE Florida, Inc. v. Clark, which held that GTE should be allowed to recover erroneously disallowed expenses through the use of a surcharge. In light of the GTE decision and its seeming departure from previous Commission practice, by Order No. PSC-96-0406-FOF-WS, we voted to reconsider our entire remand decision. There were three specific points to our reconsideration: "whether reopening the record in Docket No. 920199-WS is appropriate, whether refunds are appropriate, and whether a surcharge as set forth in the GTE decision is appropriate." Following a summary of the GTE decision, we address below each of those three points and our conclusions thereon. As set out below, we construe the holding in GTE to be limited to the unique facts of that case and do not find that it mandates that a surcharge be authorized in the instant case.

GTE Florida, Inc. v. Clark

In the first GTE appeal, GTE Florida, Inc. v. Deason, 642 So. 2d 545 (Fla. 1994), the Supreme Court affirmed in part and reversed in part our order which denied GTE's request for a rate increase and ordered GTE to reduce revenues by $13,641,000. The order was reversed to the extent that it denied GTE recovery of costs because those costs involved purchases from GTE's affiliates. On remand, we allowed recovery of the expenses prospectively from May 3, 1995. We took this action believing that, in view of GTE's failure to request a stay pending appeal, any surcharge would be unfair to customers and would constitute prohibited retroactive ratemaking. The initial order was issued May 27, 1993. GTE appealed our order on remand and that order was reversed by the Court. The Court held that GTE's requested surcharge did not constitute retroactive ratemaking. The Court further held that GTE should be allowed to recover its erroneously disallowed expenses through the use of a surcharge. On remand, we ordered a one-time, usage insensitive surcharge of $8.65 per line on the local ratepayers. Order No. PSC-96-0667-FOF-TL[1]

Reopening the Record

SSU asserts that we erred in denying its request to reopen the record for the limited purpose of incorporating the record from Docket No. 930945-WS, wherein by Order No. PSC-95-0894-FOF-WS, issued July 21, 1995, we determined that this Commission had jurisdiction over existing SSU facilities and land pursuant to Section 367.171(7), Florida Statutes. 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). SSU states that reopening the record is appropriate when the court decision is based on a new rule of law not advanced by the parties in the appeal or considered by the agency in the first instance. See McCormick Machinery v. Johnson & Sons, 523 So. 2d 651, 656 (Fla. 1st DCA 1988).

In its brief, Sugarmill Woods first objects to our reconsideration of this matter and states that we do not have authority to entertain this reconsideration on our own motion. It is Sugarmill Woods' argument that the Commission only has authority

[1] Notice of Proposed Agency Action; protest filed, June 7, 1996 by the Office of the Public Counsel).

on its own motion to correct clerical errors and errors arising from mistake or inadvertence. Taylor v. Department of Professional Regulation, 520 So. 2d 557 (Fla. 1988).

Sugarmill Woods further argues that the GTE decision does not provide any basis for reopening the record and consistent with the underlying GTE order on remand, no further hearing is appropriate. Sugarmill Woods cites to Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966) and states that the Commission may make more explicit factual findings if the findings are supported by the existing record and the Court's order calls for further findings. However, it is Sugarmill Woods' position that additional findings cannot be made on an insufficient record. Further, Sugarmill Woods argues that the Court declined to rule on all of the points on appeal because the finding that the Commission lacked the statutory authority to order SSU to implement a uniform rate was dispositive. Sugarmill Woods argues that if the record is reopened, the remaining issues would have to be resolved by the Court. Finally, Sugarmill Woods argues that reopening the record would violate the law of the case doctrine because the Court has found that SSU's facilities are not functionally related and reopening the record to make that finding is in contradiction of the Court. Citrus County adopts Sugarmill Woods' brief and states that there is no legal basis or necessity for reopening the record.

Upon consideration of the foregoing arguments, we find that there is nothing in the GTE decision or any additional analysis that would require a change in our original assessment on this point. Based on the foregoing, the record in Docket No. 920199-WS shall not be reopened.

Refund and/or Surcharge

As stated earlier, in our initial decision on remand, Order No. PSC-95-1292-FOF-WS, we ordered SSU to implement a modified stand-alone rate structure. The utility did not implement that rate structure in accordance with our decision because it sought reconsideration. However, subsequent to that decision, by Order No. PSC-96-0125-FOF-WS, issued January 25, 1996, in Docket No. 950495-WS, SSU was granted interim water and wastewater rates based on a modified stand-alone rate structure. The issue of whether refunds are appropriate is a result of the change from the uniform rate structure to the modified stand-alone rate structure. The need to address the refund issue arises out of the difference in the way customers' rates were calculated under the uniform rate structure which was overturned and in the way rates are now being calculated under the modified stand-alone rate structure.

SSU asserts that we lack any discretion to "impair" SSU's recovery of the aggregate revenue requirements which the Court approved, and that any decision on remand must be revenue neutral to SSU. SSU argues that: 1) the GTE decision governs this proceeding and the outcome of the two cases should be identical; 2) a surcharge imposed after appellate review to recoup undercollection by virtue of an erroneous order does not constitute retroactive ratemaking; and 3) it assumed no risk of a refund when it requested that the automatic stay be lifted.

Sugarmill Woods argues that the GTE decision confirms the propriety of making refunds to the customers who overpaid for service. Sugarmill Woods further argues that SSU had rates in effect that would have allowed SSU to recover its full revenue requirement. Sugarmill Woods distinguishes the GTE decision by stating that in GTE, the utility did not request a stay, whereas SSU had a stay in effect and requested that it be vacated. Accordingly, Sugarmill Woods argues that SSU has waived its right to seek surcharges. Citrus County adopts Sugarmill Woods' brief on these points and further states that the customers temporarily advantaged by uniform rates were not aware of the advantage and therefore, would not now be aware of any potential rate surcharges.

In reaching our decision herein, we have considered all of the arguments made by the parties in their briefs and at the Agenda Conferences. We have reviewed our conclusions in Order No. PSC-93-1788-FOF-WS, the Order Vacating Automatic Stay, and we have analyzed the GTE decision to determine its relevance to this docket. We find that we have fully considered every point of fact or law on the matters discussed herein.

GTE states that "utility ratemaking is a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner." 668 So. 2d at 972. Upon our review of the GTE decision, we find that the factual differences between the two cases make the GTE decision inapplicable to the instant docket. The decision on what was fair and equitable in GTE was much simpler; there were only two interests to balance. The Court, in GTE, was not faced with the issue of whether one group of customers should provide the revenue for a refund for another group of customers or whether the utility was liable for the difference in rates. In the instant case, "fairness" must be determined from three perspectives: the utility's and the two different groups of customers.

As further discussed below, there are crucial, dispositive differences between the GTE case and this one. First, the potential surcharge payers here were not represented by the Public

Counsel on the issue of rate structure. Second, in the remand phase, this case is one of rate structure only. Third, SSU assumed a risk where GTE did not. Fourth, and closely associated with the assumption of the risk issue, is the fact that SSU did not need to implement the uniform rate structure in order to recover the required revenues. Finally, any individual surcharge in this case would be usage-based and imposed on individual historical consumption (which customers would be unable to adjust) and for which no notice was given. In GTE, in contrast, the surcharge is proposed to be a one-time surcharge of less than $10 on the fixed monthly charge. We discuss these distinctions below.

With respect to the matter of representation and notice, in GTE, the Court specifically pointed out that:

> We cannot accept the contention that customers will now be subjected to unexpected charges. The Office of Public Counsel has represented the customers at every step of this procedure. (emphasis added)

GTE, 668 So. 2d at 973. Thus, in GTE, the customers were fully represented by Public Counsel and were put on notice of possible outcomes of the appeal. In the instant case, Public Counsel had indicated from the beginning by virtue of taking no position in the prehearing statement that it could not represent the interests of some customer groups over the interests of another customer group. As noted above, and consistent with his position, the Public Counsel did not file a brief on the surcharge issue.

At odds with the facts in GTE, the instant case clearly raises the specter of "unexpected charges" to the potential surcharge payers. This possibility was created by the lack of legal representation and notice. As discussed below, SSU's actions in implementing the uniform rates created the risk to the customers whose interests initially seemed to benefit by those rates. Originally, SSU advocated consistent with these customers' interests on the rate structure issue -- both in lifting the stay and before the Court. However, once the uniform rates were declared unlawful, SSU's interests and those of the potential surcharge payers diverged on the issue of rate structure.

SSU is before us now seeking relief from its decision to prematurely implement uniform rates. The utility wishes to recover, via a surcharge on these unrepresented customers, millions of dollars in the cost of making the required refunds. We find that the lack of representation, coupled with the lack of notice and the assumption of risk in early implementation of the uniform

rate structure violates our sense of fundamental fairness and equity. As such this situation does not comport with the equitable underpinnings of the holding in GTE. Accordingly, we find that on this point the facts in the GTE decision are distinguishable from those in this case.

We recognize that, with respect to the issues on remand, the utility's revenue requirement in this case was not specifically in dispute. Rather the dispute is over the revenue recovery methodology. The Commission and certain intervenors have stated in various stages of this remand proceeding that one of the reasons no surcharge is appropriate is because SSU assumed the risk of a refund by requesting vacation of the automatic stay and by implementing the uniform rate structure. We continue to strongly adhere to this view.

As to the utility's argument that the revenue requirement cannot be "impaired," we note that it is settled that regulated utilities are entitled to no more than an opportunity to earn a fair or reasonable rate of return. See United Telephone Co. of Fla. v. Mann, 403 So. 2d 962, 966 (Fla. 1981). We further find that SSU was given a reasonable opportunity, for the entire refund period, to earn the revenue requirement that we established and which the court upheld. SSU forsook that opportunity when they implemented uniform rates, and then after the Citrus County Notice of Appeal was filed, continued to charge them. By their own actions the company injected the risk of revenue underrecovery into this case. The interim rates were set at a level that yielded substantially, if not all, of the revenue requirement established in the final order, Order No. PSC-93-0423-FOF-WS, issued March 22, 1993. Only the management decision on SSU's part in implementing and maintaining the uniform rates prior to the final resolution (through judicial review) of the rate structure caused the situation we find today. Our orders make it abundantly clear that the company was on notice that the company assumed the risk of bearing the cost of the refund, if the surety did not. In analyzing our past decisions in this case, the record, and the arguments made by the parties, we further find that SSU was put on notice that it may be faced with a situation of having to refund monies without the opportunity for recoupment.

In our initial order on remand, we stated that "[u]pon reviewing the language from the Order Vacating the Stay and the transcripts from 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." Order No. PSC-95-1292-FOF-WS at 7. Pursuant to the provisions of Rule 25-22.061(3)(a), Florida Administrative Code, we vacated the automatic

stay upon the utility's request and subject to the posting of sufficient bond. Upon review, we find that we clearly expressed our concern to SSU that the customers be adequately protected by the security we required even if it required a change in the nature of the bond to recognize the unique rate structure posture of the case. We specifically held proceedings regarding the lifting of the stay. Therein SSU was specifically warned and put on notice about the risk of bearing the cost of any rate-structure generated refund. In the GTE docket, no such proceedings were held since GTE was under no obligation to seek the imposition of a stay, as the Supreme Court noted. GTE, 668 So. 2d at 973. We further find that SSU acknowledged that it would make all refunds if the First District Court of Appeal overturned our decision. In Order No. PSC-93-1788-FOF-WS, Order Vacating Stay, we stated:

> Since the utility has implemented the final rates and has asked to have the stay lifted, we find that the utility has made the choice to bear the risk of loss that may be associated with implementing the final rates pending the resolution of the appeal.

Order No. PSC-93-1788-FOF-WS at 4.

After discussing the difficulties raised by the rate structure appeal and in making the required determination regarding the sufficiency of SSU's security, we further stated at pages 4-5:

> The utility currently has a $5,800,000 bond which has been renewed through September 4, 1994. We find that this bond, which was originally the security for the interim rate increase, would be sufficient for the purposes of appeal if the bond issuer is willing to accept the change in the nature of the purpose of the bond.
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> We previously determined that the uniform rate structure is appropriate and that the rates based on that rate structure are just, reasonable, compensatory, and not unfairly discriminatory. By providing security for those customers who may have overpaid in the event the Final Order is overturned, the customers of this utility will be protected in the event a refund may be required. The

> County argues that these particular customers will be irreparably harmed because of their age and income status. We find that by requiring security from the utility, the customers of SSU who may possibly be affected are adequately protected. In fact, once the security is in place, the unique circumstance of this case is reduced to the simple distinction that in the event the Final Order is not affirmed, the utility may lose revenues which this Commission determined the utility to be entitled to have the opportunity to earn.

Order No. PSC-93-1788-FOF-WS at 4-5.

We also note a further significant distinction between the two cases. In GTE the proposed surcharge would be a one-time charge of less than $10 on the flat-rated monthly bills of the telephone customers. While not an insignificant amount, it may well pale in comparison to the potential surcharge any one individual customer might be required to make in this case. Also, any surcharge on the water and wastewater customers would be based on their consumption which has already occurred and for which no notice was given so that they might adjust their consumption. At this point customers have no way of adjusting their usage that occurred over a two-plus year period.

We find that it is unfair to impose a surcharge on some customers on a prospective basis for consumption which occurred in the past. Further, from a practical standpoint, we cannot know at this point what the amount of surcharge would be without obtaining the necessary information from SSU. However, that information is not necessary because we find that a surcharge is not appropriate in this case.

In consideration of the foregoing, we reject SSU's reliance on GTE for the proposition that SSU should be authorized to collect a surcharge from the customers who paid less under the uniform rate structure. For the many reasons set out above, we find this case to be fundamentally different from GTE. In GTE, the utility's decision to not request a stay allowed the utility to immediately implement the rates approved by the Commission, although these rates were the result of a revenue decrease and did not recover affiliate expenses. SSU's request for vacation of the stay resulted in SSU's collecting the uniform rate rather than the

interim rate. The interim rates were higher for some customers than the uniform rates. Thus, SSU abandoned any protection that a stay would have provided as to the rates collected from these customers.

SSU shall make refunds to those customers who paid more under the uniform rate structure than under the modified stand alone rate structure approved on remand.

Refund Methodology

To determine the refund, the revenue requirement allocated to the individual plants under the uniform rate shall be calculated, less miscellaneous service revenues. The resulting amount shall be compared to the revenue requirement allocated to those plants under the approved modified stand-alone rates, less miscellaneous service revenues. The resulting percentage difference shall then be applied to the service revenues collected from each customer of those plants, during the time the refund is ordered. That result would be the refund due to the water and wastewater customers. Refunds shall be made as a credit to the customers' bills. SSU shall also make appropriate adjustments to the refund amount to factor in the two index and pass-through adjustments approved since our original decision in Docket No. 920199-WS.

Refund Period

The First District Court of Appeal has determined that uniform rates should not have been implemented for any period of time in this docket because the finding that SSU's facilities and land were functionally related was not made. The utility implemented the final rates in September, 1993. Therefore, the utility must determine the refunds for the entire period, from the date the uniform rate was implemented until the date the interim rate in Docket No. 950495-WS was implemented.

The refunds shall be made with interest pursuant to Rule 25-30.360, Florida Administrative Code, within 90 days of the date of this Order. We recognize that if the utility believes that the refunds cannot be completed within 90 days of the date of this Order, the utility may petition for an extension of time. SSU shall file refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. SSU shall apply any unclaimed refunds as contributions in aid of construction (CIAC) for the respective plants, pursuant to Rule 25-30.360(8), Florida Administrative Code.

Incorporation of Other Decisions

We reaffirm in all respects that portion of Order No. PSC-95-1292-FOF-WS which addresses our finding that a further refund of interim rates is not appropriate. We also reaffirm our finding that the record in Docket No. 920199-WS supports implementation of a rate based upon the modified stand-alone rate structure. As stated earlier, at the February 20, 1996 Agenda Conference, we ruled on the utility's motion for reconsideration. Prior to our issuance of an order memorializing that decision, we chose to reconsider our entire remand decision in light of the GTE opinion. Accordingly, we reaffirm the decisions made at the February 20, 1996 Agenda Conference not previously addressed herein, and a brief discussion of those decisions follows.

Intervention Petitions

On November 27, 1995 and January 22, 1996, Putnam County and Keystone Heights, respectively, filed a Petition to Intervene, wherein they assert that they are customers of SSU and are entitled to participate in these proceedings because the substantial interests of their citizens will be affected by the outcome of the proceeding and the final decision of the Commission. Both petitions to intervene were denied as untimely in accordance with Rule 25-22.039, Florida Administrative Code.

1-Inch Water Meters

In its motion for reconsideration of Order No. PSC-95-1292-FOF-WS, the utility asserts that we raised and resolved an issue that was not 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 percent and 89 percent of the Pine Ridge and Sugarmill Woods residential customers, respectively. By Order No. PSC-95-1292-FOF-WS, we 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. Our 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. 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. Accordingly, we granted the utility's motion for reconsideration in this regard.

CLOSING OF DOCKET

Upon our Staff's verification that the utility has completed the required refunds, the utility's bond may be released and this docket shall be closed administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that the record in Docket No. 920199-WS shall not be reopened for further proceedings. It is further

ORDERED that Southern States Utilities, Inc.'s request to impose a surcharge is denied. It is further

ORDERED that the portions of Order No. PSC-95-1292-FOF-WS which address refund of interim rates and the implementation of the modified stand alone rate structure are reaffirmed as set forth herein. It is further

ORDERED that refunds shall be made with interest pursuant to Rule 25-30.360, Florida Administrative Code, within 90 days of the date of this Order. It is further

ORDERED that Southern States Utilities, Inc., shall file refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. It is further

ORDERED that Southern States Utilities, Inc., shall apply unclaimed refunds as contributions in aid of construction, pursuant to Rule 25-30.360, Florida Administrative Code. It is further

ORDERED that upon staff's verification that Southern States Utilities, Inc., has completed the required refunds, the security may be released. It is further

ORDERED that upon staff's verification that Southern States Utilities, Inc., has completed the required refunds, this docket shall be closed administratively.

By ORDER of the Florida Public Service Commission, this 14th day of August, 1996.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

Commissioner Deason concurs in a special limited concurrence.

I write in concurrence to emphasize and correct a point that was made during the vote in this matter. Part of my feeling so strongly about the actions SSU took in acting affirmatively to seek to lift the stay in this case was my understanding that the then existing interim rates -- not to be confused with the interim rates that are currently in effect in Docket No. 950495-WS -- gave SSU virtually all the revenue that the uniform rate structure would have. In fact I stated at the Agenda Conference that the deficiency was "$100,000, $200,000" annually (June 11, 1996 Agenda Conference Tr. at 75). Further review of the record in this case reveals that the interim revenue award under the stand-alone interim rate structure would actually have yielded higher revenue than the uniform rate structure. In fact, the interim water rates were designed to generate revenues of $16,347,596 while the final (uniform) rates were designed to yield revenues of $15,849,908. Interim wastewater rates were designed to generate revenues of $10,270,606 while final uniform rates would have yielded revenues of $10,188,775. Order No. PSC-93-0423-FOF-WS (Final Order Setting Rates in Docket No. 920199).

In both instances, the interim revenues would have yielded a slightly higher level of revenues during the pendency of any appeal, had SSU not implemented the uniform rates and not sought a vacation of the stay. For the water system the interim revenues would have been $497,688 or 3.14% greater than the final revenue award, while the wastewater revenues would have been $81,831 or

0.8% higher than uniform rate-generated revenues. Combined, the interim rate-generated revenues would have been 2.22% or $579,519 greater than the total system revenues under the uniform rate structure that SSU implemented.

My sole reason for concurring specially is to emphasize that, in seeking to lift the stay and in implementing uniform rates, SSU made a conscious decision to walk away from the closest this Commission can come to guaranteeing an opportunity to earn the required revenues. This only bolsters the Commission's contention that the Company assumed the risk of not recovering the fair and reasonable revenue requirement that the Commission ordered and the Court upheld.

Chairman Susan F. Clark dissents with opinion as follows:

I respectfully dissent from the Commission's decision. This Commission has only two options available that are consistent with the principles enunciated recently by the Florida Supreme Court in GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996). One option is to reopen the record for the purpose of determining whether SSU's systems involved in this docket were functionally related, and, if they were, reaffirm the uniform rates approved in this case. The other is to institute a surcharge and a refund. As the decision by the majority followed neither of these options, I must dissent.

The majority's decision is inconsistent with the law enunciated in GTE because a refund is ordered without a corresponding surcharge to maintain revenue neutrality to the Company. The majority believes that SSU assumed the risk that a refund would be necessary when it asked that an automatic stay of our order be lifted. Indeed, at the time the stay was lifted, the Commission expressed the view that SSU may have assumed the risk of a refund without a corresponding surcharge because of the belief that a surcharge would have constituted prohibited retroactive ratemaking. Now, however, GTE makes it clear that the imposition of a surcharge does not constitute prohibited retroactive ratemaking and, equity and fairness require a surcharge to maintain the revenue requirement found to be fair, just and reasonable.

In this case, the argument that SSU is entitled to collect a surcharge under principles of equity and fairness is even more compelling than in GTE. In GTE, the Commission and Public Counsel argued that GTE was not entitled to a surcharge because it would be retroactive ratemaking, and that GTE could have protected its revenues by seeking a stay of the Commission's order. The Commission had ordered a rate decrease, and by requesting a stay

GTE could have continued to charge the higher rates in effect prior to the Commission's final order, thus protecting the revenues to which GTE thought they were entitled. The Supreme Court rejected this argument and, instead, found that since ratepayers could benefit from a refund of previously collected rates, "fairness dictates that a surcharge is proper in this situation." GTE Florida, Inc. v. Clark, 668 So. 2d 971, 973 (Fla. 1996). So, despite the fact that GTE had the ability protect a higher revenue level by asking for a stay, the Court found a surcharge was still required. In this case, SSU had no similar ability to protect its revenue requirement. The Commission ordered a $6,680,033 water and wastewater rate increase, and a stay was automatic when the decision was appealed by Public Counsel and Citrus County. SSU asked to have the stay lifted to collect the revenue requirement the Commission found it was entitled to, and, under our rules, when SSU posted the necessary bond, it was entitled to have the stay lifted. Had SSU not asked to have the stay lifted, it would have foregone the collection of increased revenues authorized by the Commission's order.

As a basis for reaching a conclusion that a surcharge is not required, the majority relies on the fact that this case involved a court reversal on a rate design issue, rather than a revenue requirement issue, and SSU had notice that a refund may be required. However, those differences provide no basis for distinguishing this case from GTE. If the Commission orders the refund in this case, the principles of equity and fairness which required a surcharge in GTE also require a surcharge in this case.

Commissioner Diane K. Kiesling dissents with opinion as follows:

I join in Chairman Clark's dissent in its entirety and add the following in support of the option of reopening the record. I believe the Commission has the authority to, and should have, reopened the record in light of the 1st D.C.A.'s order on remand, Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), which did not specifically give us general or explicit directions. I also believe that in initially considering whether to reopen the record, we should have not only recognized the unavoidable implications of a refund, but also we should have recognized the very reasonable probability that the need for a refund may have been obviated by reopening the record. Our error in failing to reopen the record on remand is being compounded by the current actions of the majority. In reaching the conclusion that we are not prohibited from reopening the record, I rely on the following: 1) the 1st D.C.A.'s decision was based on a failure of proof on a law never previously applied to a rate proceeding because that law related only to our jurisdiction; and 2) the

Commission's original decision on the appropriate revenue requirement was upheld on appeal. Further in concluding that we should reopen the record, I rely on the reasonable assumption that based on our findings in the collateral decision, Order No. PSC-95-0894-FOF-WS, issued July 21, 1995, that SSU's systems are functionally related, there is a high probability that the systems involved in this proceeding, would be found functionally related as well.

Commissioner Deason dissents from the decision to deny intervention as follows:

I dissent from the decision to deny intervention to the City of Keystone Heights, Marion Oaks Homeowners Association and the Burnt Store Marina. I would have granted intervention due to the unforeseen, unique and complex nature of this case at this juncture.

I do agree that the rule 25-22.039, Florida Administrative Code, if applied to this situation, would bar intervention. However, I do not believe that the rule was necessarily intended to apply to a situation where the law has changed to the extent that a customer group is unexpectedly placed in jeopardy of having to pay significant surcharges. This risk became apparent only with the February 29, 1996 GTE decision. That case of first impression came 9 days after our decision to deny intervention to some of these intervenors. I concurred in that denial of intervention and continue to agree with the decision on that point as reaffirmed in the body of this order. With regard to the instant intervention, however, I would have found the rule inapplicable or, at a minimum, would have supported a waiver of the rule.

I do not necessarily find fault with the majority's application of the rule. Certainly granting intervention at this late stage of the proceeding would not have placed this case any more in accord with GTE on the crucial issue of customer representation. Rather, the absence of legal representation only highlights the significant difference between this situation and the facts giving rise to the GTE decision.

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 the Commission's final action in this matter may request 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.