RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
KENNETH A. HOFFMAN
THOMAS W. KONRAD
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE
R. MICHAEL UNDERWOOD
WILLIAM B. WILLINGHAM

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

TELEPHONE (904) 681-6788
TELECOPIER (904) 681-6515

GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

January 27, 1997

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 950495-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Water Services Corporation are the following documents:

1. Original and fifteen copies of Florida Water's Response in Opposition to Motion for Reconsideration of Order No. PSC-96-1320-FOF-WS filed by Office of Public Counsel and Adopted by Citizens of Nassau County; and

2. A disk in Word Perfect 6.0 containing a copy of the document.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

ACK
AFA
APP
CAF
CMU
CTR
EAG ~~KAH/rl~~
LEG 1
LIN
OPC
RCH
~~SEC~~
WAS
OTH

cc: 5 All Parties of Record
Trib.3

DOCUMENT NUMBER-DATE
01034 JAN 27 97
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application by Southern States Utilities, Inc. for rate increase and increase in service availability charges for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Polk, Putnam, Seminole, St. Johns, St. Lucie, Volusia and Washington Counties.	)	Docket No. 950495-WS
	)	Filed: January 27, 1997

FLORIDA WATER SERVICES CORPORATION'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER NO. PSC-96-1320-FOF-WS FILED BY OFFICE OF PUBLIC COUNSEL AND ADOPTED BY CITIZENS OF NASSAU COUNTY

Florida Water Services Corporation ("Florida Water"), formerly Southern States Utilities, Inc., by and through its undersigned counsel, hereby files its Response in Opposition to the Motion for Reconsideration of Order No. PSC-96-1320-FOF-WS ("Final Order") filed by the Office of Public Counsel ("OPC") and adopted by Amelia Island Community Association, Inc., Residence Condominium Association, Inc., Residence Property Owners Association, Inc., Amelia Retreat Condominium Association, Inc., Amelia Surf and Racquet Property Owners Association, Inc. and Sandpiper Condominium Association, Inc. ("Citizens of Nassau County").

A. THE APPLICABLE STANDARD OF REVIEW

1. The Supreme Court of Florida has set forth the legal standard articulating the limited circumstances under which reconsideration of a final order is appropriate. In Diamond Cab Company of Miami v. King, 146 So.2d 888, 891 (Fla. 1962), the court

held:

> The purpose of a petition for rehearing is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. (citations omitted). It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order.

See also, Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). Time and again, the Commission has employed the Diamond Cab Company standard in reviewing the merits of a motion for reconsideration. See, e.g., Order No. PSC-96-1231-FOF-TP issued October 1, 1996 in Docket No. 950985-TP, at 2.

2. The Supreme Court of Florida also has established the means by which a party may establish that reconsideration is appropriate under the standard set forth in the Diamond Cab Company and Pingree decisions. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974), the court held that a petition for reconsideration (and the granting thereof):

> [s]hould not based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review. (emphasis supplied).

3. In addition, the Commission will not allow a party to use a motion for reconsideration as a vehicle to raise new arguments and issues not previously raised by that party.[1] Nor is a motion

[1]See e.g., In re: Development of Local Exchange Telephone Company Cost Study Methodology(ies), 92 F.P.S.C. 3:666, 667 (1992).

for reconsideration "an appropriate venue for rehashing matters which were already considered" by the Commission.[2]

B. BACKGROUND

4. On October 30, 1996, the Commission issued Order No. PSC-96-1320-FOF-WS ("Final Order") in this docket. On November 1, Florida Water filed its Notice of Appeal of the Final Order. Florida Water's appeal was assigned First District Court of Appeal Case No. 96-04227. Subsequently, notices of cross-appeal were filed in First District Court of Appeal Case No. 96-04227. On November 26, OPC filed a Notice of Cross-Appeal and on November 27, a Notice of Cross-Appeal was filed by Intervenors Citrus County Board of County Commissioners, et. al. (hereinafter referred to collectively as "Citrus County").

5. In the meantime, on November 14, Citrus County timely filed a Motion for Reconsideration of the Final Order with the Commission. On the same date, Citrus County filed a Motion with the First District Court of Appeal asking the court "to temporarily relinquish jurisdiction of the case to the Florida Public Service Commission (for the) limited purpose of allowing it to hear motions for reconsideration of the Final Order published on October 30, 1996, but which order was appealed to this Court by Southern States Utilities, Inc. ("SSU") two days later on November 1, 1996."[3]

6. On November 26, Florida Water timely filed a Cross-Motion

---

[2]See, e.g., Order No. PSC-96-1231-FOF-TP issued October 1, 1996 in Docket No. 950985-TP.

[3]See Citrus County Motion to Relinquish Jurisdiction filed in First DCA Case No. 96-04227, at 1 (emphasis supplied).

for Reconsideration of the Final Order with the Commission.

7. On December 2, the Court issued an order granting Citrus County's Motion to Relinquish Jurisdiction. The Court ruled:

> [T]his appeal is abated pending disposition of the movants' pending motions for reconsideration by the lower tribunal. Time for filing notices of cross-appeal, briefs, and other matters pursuant to the rules of appellate procedure is tolled during the period of abatement.

8. On December 3, Florida Water filed a Motion for Clarification of the December 2 order requesting that the court clarify and confirm that the abatement of the appeal remain in effect pending disposition of both Citrus County's Motion for Reconsideration and Florida Water's Cross-Motion for Reconsideration.

9. On December 4, OPC filed a Motion for Reconsideration and Clarification of the December 2 order asking the court to enter an order authorizing OPC to file a motion for reconsideration with the Commission well beyond the 15 day period (following the date of issuance of the Final Order) set forth in Rule 25-22.060(3), Florida Administrative Code.

7. On December 31, the court issued an order amending the December 2 order to reflect that:

> ... the appeal is abated pending the lower tribunal's disposition of all motions or cross-motions for reconsideration of the order for which review is sought in this proceeding. The determination of the timeliness or propriety of any such motion or cross-motion shall be made by the lower tribunal.

11. Having failed to secure an order from the First DCA

authorizing an untimely motion for reconsideration, on January 9, 1997, OPC filed a motion asking the Commission to establish a schedule for the filing of an untimely motion for reconsideration.

12. On January 15, 1997, prior to receiving the authorization it sought from the Commission to file an untimely motion for reconsideration, OPC filed its Motion for Reconsideration. On January 20, 1997, the Citizens of Nassau County filed a motion adopting OPC's untimely Motion for Reconsideration.

C. ARGUMENT

OPC's Motion for Reconsideration Should be Denied as Untimely

13. OPC's Motion for Reconsideration should be denied as untimely. OPC asks the Commission to order what the First DCA refused to order, that is, authorization to file an untimely motion for reconsideration. The Commission should deny OPC's request.

14. In the December 2, 1996 order abating the appeal, the court did in fact toll the time for filing notices of cross-appeal, briefs and other matters pursuant to the Rules of Appellate Procedure. The court specifically excluded from the December 2 order any tolling of the time for filing a motion for reconsideration under Commission Rule 25-22.060(3), Florida Administrative Code.

15. The time parameters attached to a motion for reconsideration under Commission rules are **jurisdictional** and may not be extended by the Commission. In Citizens of the State of Florida v. North Fort Myers Utility, Inc., First DCA Case No. 95-1439, OPC requested and was granted an extension of time to file a

motion for reconsideration by the Prehearing Officer and subsequently filed an appeal of two Commission orders with the First District Court of Appeal. The court, on its own motion, required OPC to show cause why the appeal should not be dismissed as untimely filed in view of the decision in City of Hollywood v. Public Employees Relations Commission, 432 So.2d 79, 81-82 (Fla. 4th DCA 1983) (holding "that PERC does not have authority to grant an extension of time to file a motion for reconsideration of an order so as to suspend rendition of said order."). The court ultimately determined that OPC's appeal was untimely and should be dismissed for lack of jurisdiction. See Orders dated October 19, 1995 and November 16, 1995 issued in Citizens of the State of Florida v. North Fort Myers Utility, Inc., attached hereto as Composite Exhibit A.

16. OPC asserted in its January 9 Motion to Establish Schedule for Filing Motions for Reconsideration that its failure to timely file a motion for reconsideration should be legally excused because the Commission had no jurisdiction to consider any motions for reconsideration until the December 2 order. Under OPC's theory, OPC's Notice of Cross-Appeal of the Final Order filed on November 26th with the Commission must be dismissed on the ground that the Commission lacked jurisdiction. OPC's inconsistent positions undermine the credibility of its argument. Having failed to timely file a motion for reconsideration, and having failed to secure authority from the First DCA to file an untimely motion for reconsideration, the Commission should deny OPC's Motion for

Reconsideration.

The Commission Correctly Concluded that No Refunds of Interim Revenue Requirements Should Be Made to the Ratepayers Included in Docket No. 920199-WS

17. Having failed to address the manner in which interim revenues might be subject to refund in its Posthearing Brief[4], OPC now suggests in its Motion for Reconsideration that the Commission erred by combining the total interim revenue requirements approved by the Commission in its Order Granting Interim Rates[5] for the Docket No. 920199-WS ratepayers for purposes of determining potential refunds of interim revenues. OPC's Motion for Reconsideration on this issue should be denied.

18. OPC's contention on this issue seeks a one-sided remedy, contrary to the admonition of the Florida Supreme Court in GTE Florida Inc. v. Clark, 668 So.2d 971, 972 (Fla. 1996) ("We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner."). Here, OPC is arguing that the Commission should calculate a potential interim revenue refund for the Docket No. 920199-WS ratepayers on a separate water and wastewater facility basis. The effect of OPC's suggestion would be that customers who were placed on modified stand alone rates for interim revenue purposes would receive a refund due to the change to the cap band rate structure approved for final revenue requirements; on the other hand, Florida

[4]Under Issue 131, OPC's Posthearing Brief simply states "[s]ince SSU's rates should be reduced, all interim rate increase revenues should be refunded." OPC Posthearing Brief, at 145.

[5]Order No. PSC-96-0125-FOF-WS.

Water would be deprived of the opportunity to recover offsetting revenues from customers whose interim modified stand-alone rates were lower than the final rates approved under the cap-band rate structure. Such a one-sided remedy should be summarily rejected.

19. OPC was well aware in the earlier stages of this proceeding that interim revenues would be subject to refund only on a combined revenue requirements basis, that is by comparing Florida Water's combined interim revenue requirements to total combined final revenue requirements. This point was expressly stated by Commissioner Deason and confirmed by staff member Willis at the February 6, 1996 agenda conference in this docket:

> Commissioner Deason: Before we vote, Madam Chairman, I need to raise a question. And it's something that fits into the question of interim, and I think this is the appropriate time to do it. I hate to take the time given the hour, but obviously we can't talk about things outside of a forum like this.
>
> We have just concluded a number of public hearings and we have two more to go, and during this latest round of hearings one of the things that has been of great concern to the customers is the level of interim rates. And one of the responses that we give, and rightfully so, is that interim rates are subject to refund, which they are. But one thing that causes me some concern is that due to the court's decision and our interpretation of the court's decision and then our ultimate decision to implement a modified stand-alone rate structure for interim, there are a number of customers whose rates under that rate structure are much higher than they are under a different rate structure, under a uniform rate structure.
>
> My concern is that for those customers who do have extremely high rates that they may be taking false comfort in our assertion that

> those rates are subject to refund. **I think it's more accurate to say that the company's revenue requirement is subject to refund if the ultimate revenue requirement we determine in total company dollars is less than what was granted on an interim basis. But it's not the rates themselves that are subject to refund.** For example, if we determine a revenue requirement that is even greater than what we gave on interim, and we go to a different rate structure, it's very possible that some of these customers that have extremely high interim rates are going to see a rate reduction, but they are not going to see a refund of dollars. And I guess I'm pointing this out.
>
> I want to, first of all, confirm that with Staff, that that is the situation, and then make sure that all my fellow Commissioners understand that and that we are not taking false comfort in talking to these customers that if their final rate is less than their interim rate there is going to be a refund, because that may not be the case. And, first of all, am I correct on that?
>
> Mr. Willis: You're correct, Commissioner Deason, **it's the revenue requirement that's subject to refund, not rates themselves.**

See excerpt from transcript from February 6, 1996 agenda conference attached hereto as Exhibit B (emphasis supplied).

20. OPC was aware or should have been aware that interim refunds would be addressed on a combined revenue requirements basis consistent with Commission practice. OPC raised no objection to the Commission's directive that potential interim revenue refunds would be made only on a combined revenue requirements basis. In fact, OPC did not even address the issue in its Posthearing Brief. Florida Water, on the other hand, argued that no interim revenue should be refunded unless the Commission determines that Florida

Water (as opposed to a specific facility) was earning outside the range of returns authorized in the final order during the pendency of the proceeding consistent with Section 367.082(4), Florida Statutes (1995).[6]

21. The Commission reaffirmed the prior statements of Commissioner Deason and staff member Willis by concluding in the Final Order that for purposes of "determining whether an interim refund is necessary, the revenue requirements for the plants in Docket No. 920199-WS were combined."[7] It would be inequitable and unjust to require interim refunds on any other basis. There can be no logical dispute that a modified stand-alone rate structure as well as a cap-band rate structure are designed to produce the total company revenue requirements -- individual revenue requirements for services areas are inextricably meshed one with another.

22. Nor should the Commission neglect the fact that on January 21, 1997, at an agenda conference oral argument in Docket No. 920199-WS, OPC argued to the Commission that Florida Water should not be granted a stay of that portion of Order No. PSC-96-1046-FOF-WS requiring Florida Water to implement modified stand-alone rates for the Spring Hill customers (a rate reduction when compared with the present uniform rates)[8] on the basis that Florida

---

[6]Florida Water Posthearing Brief, at 140.

[7]Final Order, at 244.

[8]Rule 25-22.061(1)(a), F.A.C., provides that the Commission shall grant a stay of an order being appealed which involves a decrease in rates charged to customers so long as the stay is conditioned upon the posting by the utility of adequate security.

Water's revenues should be considered on a total company combined basis. OPC's willingness to argue conflicting positions on this issue, i.e., that Florida Water's revenues should be viewed by the Commission on a combined basis for one purpose but not for another purpose renders its Motion for Reconsideration on this issue disingenuous at best.

The Commission Properly Rejected OPC's Request for Negative Acquisition Adjustments

23. OPC once again drums up its claim that negative acquisition adjustments should be imposed for Florida Water's purchase of the Lehigh Utilities, Inc. ("LUI") and Deltona Utilities, Inc. ("DUI") facilities. As the Commission stated in its Final Order, OPC's request for negative acquisition adjustments have been repeatedly raised and rejected by the Commission:

> [W]e find it important to recognize that the issue of acquisition adjustments for all of SSU's facilities have previously been addressed by this Commission in other proceedings. We do not find that, with respect to either the Lehigh or the Deltona purchases, circumstances have changed sufficient to warrant making a change in this docket.
>
> In Docket No. 911188-WS, we reviewed the issue of a negative acquisition adjustment for LUI for the second and third times. (The first time was in the transfer docket in Order No. 25391, issued on November 25, 1991). Order No. PSC-93-1023-FOF-WS, issued on July 12, 1993, described in detail the procedures on reconsideration that we undertook to make sure that the decision should be maintained.
>
> * * *
>
> The acquisition adjustment issue for all of SSU facilities has previously been addressed by this Commission in other

> proceedings. No new evidence has been presented in this case which demonstrated that we erred in those proceedings. Even if the issue were to be re-addressed, negative acquisition adjustments for Lehigh and Deltona would not be appropriate. The Lehigh and Deltona transactions were sales of stock, not assets; thus no acquisition adjustment would be warranted.

Final Order, at 101-102.

24. In its Motion for Reconsideration, OPC takes issue with the Commission's detailed findings affirming its non-rule acquisition adjustment policy outlined in Order No. 25729 issued February 17, 1992. In its Posthearing Brief, OPC suggested that "[t]his case presents the perfect opportunity for the Commission to address the issue of negative acquisitions for Southern States on a comprehensive basis."[9] The Commission acted on OPC's suggestion and conducted a detailed consideration of its acquisition adjustment policy and the application of said policy to the evidence in the record, most notably the testimony of OPC witness Larkin and Florida Water witness Vierima. The Commission duly concluded, as it has on numerous occasions in the past, that its existing acquisition policy should be maintained and that negative acquisition adjustments are not supported by the evidence for LUI and DUI. OPC's disagreement with the Commission's determinations provides no basis for reconsideration.

25. OPC also asserts that the Commission's decision fails to meet the criteria for a de novo challenge of a non-rule policy by an administrative law judge under Section 120.57(1)(e), Florida

[9]OPC Posthearing Brief, at 79.

Statutes (1996 Supp.). This argument must be rejected for a number of reasons.

a. First, OPC's reliance on Section 120.57(1)(e), Florida Statutes (1996 Supp.) is a new argument not previously raised by OPC (or any other party) in its Posthearing Brief. New arguments may not be raised through a motion for reconsideration. See fn. 1.

b. Second, the provisions of Section 120.57(1)(e)1., Florida Statutes (1996 Supp.) were taken from and mirror those found in Section 120.57(1)(b)15., Florida Statutes (1995).[10] While OPC offers no authority for its implicit assertion that the 1996 revisions to the Administrative Procedure Act, which became effective October 1, 1996[11], would apply in this proceeding, the Commission need not resolve that issue. OPC had the opportunity to challenge the Commission's non-rule acquisition adjustment policy before the Division of Administrative Hearings. It chose not to do so. OPC's belated reliance on a statutory remedy which it chose not to pursue does not provide a basis for reconsideration.

---

[10]Sec. 120.57(1)(e)1., Florida Statutes (1996 Supp.) states "any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge." Section 120.57(1)(b)15., Florida Statutes (1995) states, in pertinent part, "Each agency statement defined as a rule under s. 120.52 and not adopted by the rulemaking procedure provided by s. 120.54 which is relied upon by an agency to determine the substantial interests of a party shall be subject to de novo review by a hearing officer."

[11]See Ch. 96-159, Sec. 44, Laws of Florida.

c. Third, even if it were appropriate to import the criteria of a Section 120.57(1)(e), Florida Statutes (1996 Supp.) rule challenge into the reconsideration phase of this proceeding, the application of such criteria only further solidifies the Commission's decision. The Commission's detailed consideration of the evidence in the Final Order confirms that its application of its repeatedly confirmed acquisition adjustment policy is not vague, employs adequate standards for its decision, does not vest unbridled discretion and is supported by competent and substantial evidence.

26. OPC offers nothing in its Motion for Reconsideration which even addresses the fact that the Commission weighed the evidence and once again accepted Florida Water's evidence and rejected OPC's evidence concerning the value of the purchased utilities which confirm that the LUI and DUI utilities were not purchased at a discount:

> Ms. Dismukes' argument that the Commission's decision in the Lehigh rate case was factually inaccurate or that the facts have dramatically changed is not convincing. Ms. Dismukes contended that the fact that the fair market value of the non-utility assets was not what the utility purported it to be at the time of the our decision was substantial and extraordinary. However, the record reflects that the RJA report indicated that SSU's utility assets should not be discounted by 60 percent. Regardless of the reason why the change occurred, the fair market value of non-utility assets is irrelevant to the decision of making an acquisition adjustment.
>
> * * *
>
> With respect to the Deltona sale, we are persuaded by Mr. Vierima's argument that the

> purchase price should not be reduced by the non-cash items. The dividends payable were real obligations that either had to be adjusted in the purchase price or paid after the sale. The $7 million settlement was a real cost which had to be paid before the sale could be completed. To disallow non-cash items in the determination of purchase price would be illogical. To force an unnecessary cash transaction would most likely increase the ultimate cost for both buyer and seller for no gain. Further, Mr. Larkin agreed that if the dividends payable were added to his calculation of purchase price, no negative acquisition would result. Accordingly, the utility's calculation of the purchase price is accepted, resulting in no negative acquisition adjustment if one were to be calculated.

Final Order, at 101-102.

27. The Commission's acquisition adjustment policy provides that no acquisition adjustment shall be imposed, positive or negative, in the absence of extraordinary circumstances, and in no event in the case of a stock transaction. OPC failed once again in this proceeding to establish the existence of extraordinary circumstances in the case of the LUI and DUI purchases and offered no evidence which would justify a deviation from the Commission's long-established policy to not recognize negative acquisition adjustments when a stock transfer occurs. Further, OPC's contention that a failure to impose negative acquisition adjustments will result in a windfall to Florida Water is the same archaic argument repeatedly offered by OPC, offered again on page 80 of its Posthearing Brief and once again rejected by the Commission in the Final Order.[12]

[12]Final Order, at 101.

28. Finally, OPC's recitation to the fact that the agenda conference transcript contains only 17 lines for the disposition of this issue only underscores the fact that the Commission has heard OPC's arguments on this issue on numerous occasions and needed little time to once again reject them.

The Commission Appropriately Rejected OPC's Claim That a Gain on Sale of the VGU System Should be Recognized for Ratemaking Purposes

29. Here again, the fact that Commission disposition of this issue occupied only 9 lines of the agenda conference transcript, as noted by OPC,[13] only confirms the Commission's familiarity with OPC's arguments on this issue which have been repeatedly rejected in the past.

30. As testified to by Florida Water witness Sandbulte and confirmed by the Commission in the Final Order, the relevant facts and circumstances underlying the sale of the Venice Gardens Utilities ("VGU") facilities were essentially the same as those underlying the condemnation of the St. Augustine Shores ("SAS") facilities in Docket No. 920199-WS. Thus, after meticulously considering the evidence of all witnesses on this issue[14], and consistent with its treatment of the condemnation of the SAS system in Docket No. 920199-WS, affirmed in *Citrus County v. Southern States Utilities*, 656 So.2d 1307, 1311 (Fla. 1st DCA 1995), the Commission appropriately rejected OPC's claim that the gain on sale of the VGU facilities should be recognized for ratemaking purposes:

[13]OPC Motion for Reconsideration, at paragraph 15.

[14]Final Order, at 196-200.

> We first observe that the sale of VGU and SAS were similar in many respects: they were involuntarily made by condemnation or under threat of condemnation; SSU lost the ability to serve the customers in both service areas, which were both regulated by non-FPSC counties; and the facilities served customers who were never included in a uniform rate structure. By Order No. PSC-93-0423-FOF-WS, issued on March 22, 1993, we found that the gain on the sale of the SAS facilities should not be allocated to the ratepayers. Pages 58-59 contain our conclusion:
>
> > We agree with Mr. Sandbulte that customers that did not reside in the SAS service area did not contribute to any return on investment in the SAS system. Further, when this system was acquired by St. Johns County, SSU's investment in the SAS system and its future contributions to profit were forever lost. Thus, the gain on sale serves to compensate the utility's shareholders for the loss of future earnings. Arguably, if the sale of the system had been accompanied by a loss, any suggestions that the loss be absorbed by the remaining customers would be met with great opposition. However, the rationale for sharing a loss is basically the same as the rationale for sharing a gain.
>
> This part of Order No. PSC-93-0423-FOF-WS was affirmed by the First District Court of Appeal in the *Citrus County* decision.

Final Order, at 200.

31. In its Motion for Reconsideration, OPC argues that "[t]he Commission routinely amortizes gains and losses on sales of systems above the line."[15] That is a false statement as evidenced by prior Commission orders refusing to recognize gains for ratemaking

[15]OPC Motion for Reconsideration, at paragraph 17.

purposes where the sale involved non-rate base assets.[16] OPC does cite one example where Florida Water sold its Skyline Hills water facilities and the Commission recognized the loss on that sale. The Skyline Hills order was offered as authority by OPC in support of recognizing the gain on the condemnation of the SAS facilities in Docket No. 920199-WS and rejected as such by the Commission.[17] OPC again pointed to the Skyline Hills order in its Posthearing Brief in this proceeding[18], and the Commission again rejected OPC's argument:

> Although OPC argued that the ratepayers have benefited from the gains on the sale of property devoted to public service in previous dockets and absorbed a loss on the sale of the Skyline facility, we do not find the circumstances to be the same. Had either the SAS and VGU facilities been regulated by the FPSC at the time of the sale or previously included in a uniform rate structure, the situation would be different. However, we concluded that similar treatment should be afforded based on the previous decision in Docket No. 920199-WS. The record lacks sufficient evidence to support the contrary. Therefore, we shall not allocate either the VGU or SAS gains to the ratepayers.

Final Order, at 200. Needless to say, the continued rehashing of

---

[16]See *GTE Florida, Inc.*, 90 F.P.S.C. 7:73, 74 (Order No. 23143 issued July 3, 1990), consummated by 90 F.P.S.C. xvii (Order No. 23261 issued July 27, 1990) (no ratemaking adjustment for sale of non-rate base property); see also *Florida Power Corporation*, 83 F.P.S.C. 2:148 (Order No. 11628 issued February 17, 1983) (gain on sale of property allocated in part to shareholders based on ratio of number of years property not in rate base over the total years the company owned the property).

[17]*In Re: Application for rate increase by Southern States Utilities, Inc.*, 93 F.P.S.C. 11:38, 50-52 (1993).

[18]OPC Posthearing Brief, at 136-137.

arguments based on the Skyline Hills order provides no basis for reconsideration.

32. OPC also reargues another point raised in its Posthearing Brief and rejected by the Commission. In its Posthearing Brief, OPC argued that since some $14,000 of administrative and general costs incurred for the VGU system had been allocated to all Florida Water ratepayers and since Florida Water considered all of its service areas to be part of one system, the Commission should permit the FPSC-regulated ratepayers to share in the gain on the VGU system. OPC fails to allege that the Commission overlooked this argument and clearly it did not as the Final Order expressly covers the foregoing argument offered by OPC witness Kim Dismukes.[19] The Final Order also addresses Florida Water witness Ludsen's rebuttal to Ms. Dismukes' contention, namely that: (a) OPC took the contrary position that Florida Water was not "one system" in the Docket No. 920199-WS remand proceeding; (b) that the Commission's "one system" finding in the Docket No. 930945-WS jurisdictional docket was made after the sale of the VGU system[20]; and (c) that OPC sought retroactive application of the "one system" finding without presenting any evidence in support thereof.[21] The Commission clearly and expressly considered OPC's argument and rejected it. OPC's Motion for Reconsideration is an inappropriate

---

[19]Final Order, at 196.

[20]*In Re: Investigation into Florida Public Service Commission Jurisdiction Over SOUTHERN STATES UTILITIES, INC. in Florida*, 95 F.P.S.C. 7:256 (July 21, 1995).

[21]Final Order, at 199-200.

vehicle to reargue prior contentions rejected by the Commission in the Final Order.

D. CONCLUSION

33. For the reasons stated in this Response, OPC's Motion for Reconsideration, adopted by the Citizens of Nassau County, should be denied.

Respectfully submitted,

KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Florida Water Services Corporation
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following on this 27th day of January, 1997:

Lila Jaber, Esq.
Division of Legal Services
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

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

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

Mr. Kjell Pettersen
P. O. Box 712
Marco Island, FL 33969

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

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

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

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

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

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

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

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

KENNETH A. HOFFMAN, ESQ.

1995/2response

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399-1850

Telephone (904) 488-6151

DATE: October 19, 1995

CASE NO.: 95-1439

RECEIVED

OCT 20 1995

Rose, Sundstrom & Bentley

CITIZENS OF THE STATE OF FLORIDA

Appellant.

vs.

NORTH FORT MYERS UTILITY, INC. and THE FLORIDA PUBLIC SERVICE COMMISSION

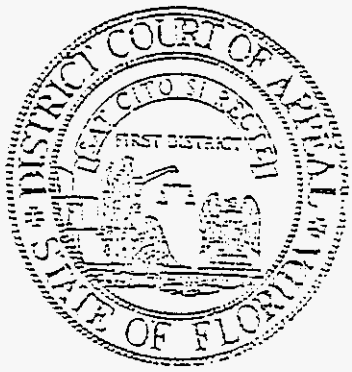
Appellees.

BY ORDER OF THE COURT:

Upon review of the file in this case, it appears to the court that the Appellants' motion for reconsideration of the final order of the Florida Public Service Commission issued on December 13, 1994, was not timely filed within fifteen (15) days after issuance of that order as required by Fla. Admin. Code R. 25-22.060(3)(a). Appellants are therefore ordered to show cause, within seven (7) days from the date of this order, why the appeal of the final orders of the Florida Public Service Commission issued on December 13, 1994, and March 27, 1995, should not be dismissed for lack of jurisdiction. See City of Hollywood v. Public Employees Relations Comm'n, 432 So. 2d 79 (Fla. 4th DCA 1983); Fla. R. App. P. 9.020(g). Appellees responses shall be filed within seven (7) days thereafter.

COMPOSITE EXHIBIT A

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.



JON S. WHEELER, CLERK

BY: _____
Deputy Clerk

copies:

Stephen C. Reilly
Margaret O'Sullivan
Robert Vandiver

Martin S. Friedman
Diana W. Caldwell

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399-1850

Telephone (904) 488-6151

DATE: November 16, 1995

CASE NO.: 95-1439

LT# 930373-SU

CITIZENS OF THE STATE OF FLORIDA	vs. NORTH FORT MYERS UTILITY, INC. and THE FLORIDA PUBLIC SERVICE COMMISSION
Appellant.	Appellees.

BY ORDER OF THE COURT:

The court has reviewed appellant's and appellees' responses to the court's order to show cause why the appeal should not be dismissed for lack of jurisdiction. Having reviewed the parties' responses, and appellant not having shown good cause, the appeal is hereby dismissed.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

COURT OF APPEAL ... STATE OF FLORIDA

JON S. WHEELER, CLERK

By: _____ Deputy Clerk

Copies:
Stephen C. Reilly
Margaret O'Sullivan
Robert Vandiver
Martin S. Friedman
Diana W. Caldwell
Blanca Bayo

13623

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.

DOCKET NO. 950495-WS

BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	50**
DATE:	February 6, 1996
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Notary Public in and for the State of Florida at Large

JANE FAUROT, RPR
P.O. BOX 10751
TALLAHASSEE, FLORIDA 32302
(904) 379-8669

EXHIBIT B

COMMISSIONER DEASON: You're saying that additional information had nothing to do with the calculation of revenue requirements?

MR. HOFFMAN: It in no manner changed the total requested revenue requirement.

COMMISSIONER DEASON: I'm not talking about changing it, bolstered your calculations, what you claimed the revenue requirements to be.

MR. HOFFMAN: No. No, I don't think it did.

CHAIRMAN CLARK: Okay. Any further questions on Item 50?

COMMISSIONER DEASON: Before we vote, Madam Chairman, I need to raise a question. And it's something that fits into the question of interim, and I think this is the appropriate time to do it. I hate to take the time given the hour, but obviously we can't talk about things outside of a forum like this.

We have just concluded a number of public hearings and we have two more to go, and during this latest round of hearings one of the things that has been of great concern to the customers is the level of interim rates. And one of the responses that we give, and rightfully so, is that interim rates are subject to refund, which they are. But one thing that causes me some concern is that due to the court's decision and

our interpretation of the court's decision and then our ultimate decision to implement a modified stand-alone rate structure for interim, there are a number of customers whose rates under that rate structure are much higher than they are under a different rate structure, under a uniform rate structure.

My concern is that for those customers who do have extremely high rates that they may be taking false comfort in our assertion that those rates are subject to refund. I think it's more accurate to say that the company's revenue requirement is subject to refund if the ultimate revenue requirement we determine in total company dollars is less than what was granted on an interim basis. But it's not the rates themselves that are subject to refund. For example, if we determine a revenue requirement that is even greater than what we gave on interim, and we go to a different rate structure, it's very possible that some of these customers that have extremely high interim rates are going to see a rate reduction, but they are not going to see a refund of dollars. And I guess I'm pointing this out.

I want to, first of all, confirm that with Staff, that that is the situation, and then make sure that all my fellow Commissioners understand that and that we are

not taking false comfort in talking to these customers that if their final rate is less than their interim rate there is going to be a refund, because that may not be the case. And, first of all, am I correct on that?

MR. WILLIS: You're correct, Commissioner Deason, it's the revenue requirement that's subject to refund, not rates themselves.

COMMISSIONER DEASON: And I'm not so sure there is anything we can do about it. In fact, I can't. I can't move to reconsider our interim decision, because I voted against it on that rate structure issue concerning the notice to customers of what the potential rate would be and what the final rate was. But I just wanted to make sure that we are all understanding what the framework is that we are working under, and I just felt compelled to bring that out.

COMMISSIONER GARCIA: Let me then ask Staff, what would happen if, let's say, we approved no rate increase, how would that revenue be returned to the customers?

MR. WILLIS: That's simple. If you approve no revenue increase then all revenue would be refunded in excess of what should have been collected, and that would mean that you would refund back to the level of