

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

MAY 7, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MS* *JP* *R*
DIVISION OF WATER AND WASTEWATER (CHASE, RENDELL) *g* *LP* *AK*

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 950495-WS
CASE: SOUTHERN STATES UTILITIES, INC. APPLICATION 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, HERNANDO, HIGHLANDS, HILLSBOROUGH,
LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA,
PASCO, POLK, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE,
VOLUSIA, AND WASHINGTON COUNTIES.
COUNTY: SEE ABOVE

AGENDA: MAY 19, 1997 -- POST HEARING DECISION -- PARTICIPATION IS
LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-T.RCM

CASE BACKGROUND

Southern States Utilities, Inc., is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. In 1994, the utility recorded total company operating revenues of \$23,498,289 and \$16,985,104 for water and wastewater, respectively. The resulting total company net operating income for that same period was \$3,445,315 for water and \$2,690,791 for wastewater. The utility reported that in 1994 it had 102,514 and 43,131 respective water and wastewater customers for the total utility. By Order No. PSC-97-0427-FOF-WS, issued April 16, 1997, in Docket No. 970028-WS, the Commission acknowledged the utility's January 2, 1997, change in name to Florida Water Services Corporation. Staff will refer to the utility as "SSU", "Florida Water" or "the utility" in this recommendation.

On June 28, 1995, SSU filed an application for approval of uniform interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes, respectively. The utility also

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requested a uniform increase in service availability charges, approval of an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested (AFPI). August 2, 1995, was established as the official date of filing. SSU filed its supplemental petition for interim revenue relief on November 13, 1995 which was granted by Order No. PSC-96-0125-FOF-WS, issued January 25, 1996, based upon the historical test year ended December 31, 1994.

The Commission held 24 customer service hearings throughout the state during the pendency of this rate proceeding, and a ten-day technical hearing from April 29 through May 10, 1996. The Commission also held an additional day of hearing on May 31, 1996, to consider rate case expense.

By Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, (Final Order) the Commission set forth its final determination as to SSU's rates and charges, and all other matters raised during the proceedings. On November 1, 1996, SSU filed a notice with the Commission indicating its appeal of the Final Order to the First District Court of Appeal (the Court). On November 14, 1996, the group of homeowners associations known as Marco, et al. filed a motion for reconsideration of the final order with the Commission, and a motion with the First District Court of Appeal to remand jurisdiction back to the Commission. SSU filed a cross-motion for reconsideration on November 26, 1996. On December 31, 1996, the Court issued an order amending a prior order to indicate that the appeal was abated pending the Commission's disposition of all motions or cross-motions for reconsideration. On January 17, 1997, the Office of Public Counsel (OPC) filed a motion for reconsideration of the Final Order. By Order No. PSC-97-0190-PCO-WS, issued April 7, 1997, the Commission ruled upon the motions for reconsideration.

As noted in the Final Order, the utility provides residential wastewater only (RWO) service in nine service areas. Because Florida Water does not supply water to these nine service areas and has no water usage data on which to base a metered wastewater rate, the utility charges its RWO customers a flat rate. Tropical Isles is the only one of these nine service areas that is metered for water service, which is provided by the Ft. Pierce Utilities Authority (Ft. Pierce). During a customer hearing in this docket, customers of Tropical Isles questioned the validity of flat wastewater rates when they have metered water rates. Further, customers questioned why a vacation rate could not be established for the months they are not in residence in Florida.

In its Final Order, the Commission required the utility to investigate the feasibility of obtaining water meter consumption

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data for the Tropical Isles service area and to explore the feasibility of a vacation rate for Tropical Isles. The order directed the utility to file a report of the results of this investigation within 120 days of the issuance of the order. The order provided that a docket would then be initiated so that the Commission can address this issue. The order also required the utility to notify the customers of Tropical Isles that the issue is being explored and that the results will be presented to the Commission. (Final Order, p. 238-240)

The utility submitted the report required by the order with Staff counsel on February 28, 1997, but did not file the report with the Commission's Division of Records and Reporting. According to this report, the utility was unable to obtain information on water consumption of the Tropical Isles customers from Ft. Pierce in order to calculate metered wastewater rates. In the report, Florida Water stated that it would make further attempts to obtain the pertinent information and report back to the Commission in another 120 days.

Consistent with Order No. PSC-96-1320-FOF-WS, on April 1, 1997, Staff opened Docket No. 970409-SU to address the report filed by the utility and the issues of a metered wastewater rate and/or vacation rate for Tropical Isles. On April 10, 1997, the utility filed a supplement to its initial letter, indicating further discussion with Ft. Pierce regarding the consumption data.

On March 24, 1997, the Tropical Isles Homeowners Association (TIHA) filed a Petition for Intervention in this docket. In addition, on that same date, TIHA filed a Petition to Levy Fine for Failure to Comply with Commission Order, Petition to Establish Wastewater Rates Based Upon Water Consumption Data, and Offer to Take Over Facilities. TIHA's motion relates to the portion of the Final Order which required the utility to provide a report regarding water consumption data and the potential adjustment of the residential wastewater-only rate for the Tropical Isles service area. On April 7, 1997, Florida Water filed a Response in Opposition to TIHA's Petition for Intervention and Motion to Dismiss Petitions and Offer to Take Over Facilities. Florida Water filed a correction to its response on April 9, 1997. TIHA filed a Response to the Motion to Dismiss on April 15, 1997.

This recommendation discusses the Petition for Intervention of the Tropical Isles Homeowners Association in Issue 1. Issue 2 addresses TIHA's combined motions, and Issue 3 addresses Florida Water's motion to dismiss.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Petition for Intervention filed by TIHA be granted?

RECOMMENDATION: No, the petition should be dismissed. (O'SULLIVAN)

STAFF ANALYSIS: In its March 24, 1997, petition for intervention, TIHA asserts that it is entitled to intervene in these proceedings because its members were the intended beneficiaries of the requirements placed upon SSU in the Final Order regarding water consumption data and the potential adjustment of the RWO rate for the Tropical Isles service area. The intervention petition further alleges that TIHA's members are substantially interested in that the accuracy of the members' recurring monthly wastewater bills would be affected by the utility's compliance or noncompliance with the requirements of the Final Order.

SSU timely filed a response in opposition to TIHA's petition for intervention on April 7, 1997. In its response, SSU asserts that TIHA has failed to timely seek intervention in this docket, pursuant to Rule 25-22.039, Florida Administrative Code. SSU's response also notes that the Final Order provides for the initiation of a separate docket to address the RWO rates at issue for the Tropical Isles customers, and that TIHA may exercise its right to timely seek intervention in that docket once it is initiated.

By its December 31, 1996, order, the Court abated the appellate proceedings "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." While the Commission had authority to consider and rule upon motions for reconsideration and its own reconsideration of the Final Order, Staff does not believe that the order contemplated the consideration of other motions such as the ones filed by TIHA. Therefore, on this point alone, TIHA's motion should be denied.

Even without the limitation imposed by the Court, TIHA's motion would fail. The Commission's rule regarding intervention, Rule 25-22.039, Florida Administrative Code, is clear: it 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.

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The final hearing in this docket commenced on April 29, 1996, and concluded in May 1996. TIHA filed its petition for intervention on March 24, 1997, approximately nine months after the final hearing concluded. The members of the Tropical Isles Homeowners Association received all of the notices sent in the instant docket and were afforded all opportunities to participate in the proceeding. In fact, the customers of Tropical Isles testified at a customer meeting regarding this matter, RWO rates were an issue in the proceeding, and Staff cross-examined utility witnesses regarding Tropical Isles' consumption data. While the Commission ordered the utility to investigate the rates further in the Final Order, the matter was raised and addressed during the course of the hearing.

Pursuant to Rule 25-22.039, Florida Administrative Code, the petitioner's request for intervention is untimely and in contravention to applicable law. See City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976). Staff notes that in the previous SSU rate case (Docket No. 920199-WS), a similar situation occurred where a number of individuals requested intervention five months or more after the final hearing. The Commission found the petitioners' requests to be untimely pursuant to Rule 25-22.039, and intervention was denied.

Pursuant to the Final Order, on April 1, 1997, Staff opened Docket No. 970409-SU to address the adequacy and accuracy of Florida Water's report and whether metered wastewater rates and/or a vacation rate should be established for the Tropical Isles service area. Staff believes this new docket is the proper vehicle for TIHA to address its concerns with Florida Water's report on the availability of metered water consumption data and the feasibility of metered wastewater rates. In fact, in that docket Staff intends to conduct a customer meeting in the service area to discuss the feasibility of metered wastewater rates and the impact it might have on customers' bills.

Finally, Staff would note that the petition for intervention appears to have been signed by two different persons, neither of whom has appeared as a Class A practitioner nor applied for admission as a Class B practitioner, pursuant to Rule 25-22.008, Florida Administrative Code.

Because of the limited scope of the Court's abatement of the appeal in this docket, and consistent with Rule 25-22.039, Florida Administrative Code, and the reasons outlined herein, Staff recommends that the petitioner's petition for intervention be dismissed.

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ISSUE 2: Should TIHA's Petition to Levy Fine for Failure to Comply with Commission Order, Petition to Establish Wastewater Rates Based Upon Water Consumption Data and Offer to Take Over Facilities be granted?

RECOMMENDATION: No, the petition should be dismissed. If the Commission dismisses TIHA's petition to intervene, as recommended in Issue 1, TIHA lacks standing to file the motion. Furthermore, the Commission cannot address matters which exceed the scope of matters specifically authorized by the Court in its relinquishment of jurisdiction to the Commission. (O'SULLIVAN, CHASE, RENDELL)

STAFF ANALYSIS: In its petition, TIHA (1) argues that the utility should be fined for failing to comply with the requirements of the Final Order with respect filing its report and the feasibility of initiating metered wastewater rates for the Tropical Isles service area; (2) requests that the Commission establish new wastewater rates based on consumption, with a refund calculated from the date that interim rates were established; and (3) states that the former owner of the system has offered to purchase the system back from the utility.

Procedural Considerations

According to Rule 9.600(b), Florida Rules of Appellate Procedure, if jurisdiction has been divested by an appeal, the appellate court may permit the lower tribunal to address "specifically stated matters." Decisions of lower tribunals which exceed the authorized scope of the appellate court's directive are invalid. Palma Sola Harbour Condominium, Inc. v. Huber, 374 So.2d 1135 (Fla. 2nd DCA, 1979). See also Bailey v. Bailey, 392 So.2d 49 (Fla 3rd DCA, 1981).

As stated in Issue 1, the Court abated the appeal of the Final Order for the limited purpose of reconsideration. Therefore, neither TIHA's petition to intervene nor substantive motions can be considered in this docket. In fact, Florida Water has recently notified the Court that the Commission has concluded its reconsideration of the Final Order.

If the Commission denies TIHA's petition to intervene in Issue 1, then TIHA lacks standing to file motions in this docket. Even if the merits of the petition for intervention could be considered, TIHA's petition was untimely. To the extent that the petitions address the decision already made by the Commission in the Final Order, the time for filing for reconsideration of the Final Order has long passed. See Rule 25-22.060(3), Florida Administrative Code.

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Moreover, in accordance with the requirements of the Final Order, Docket No. 970409-SU has been opened for the initiation of a limited proceeding to restructure wastewater rates for the Tropical Isles Service area. This new docket provides TIHA a point of entry to voice its concerns with the information provided by Florida Water. Accordingly, for all of the foregoing reasons, Staff recommends that the petitions filed by TIHA be denied.

Informational Review of TIHA's Petitions

Even though Staff recommends that, based on the above grounds, the Commission should deny TIHA's motions in this docket, Staff reviewed their merits and provides them below for informational purposes only:

TIHA is correct in its assertion that Florida Water should have filed the report with the Division of Records and Reporting. Instead, the report was provided to staff counsel who, upon learning that the report had not been formally filed, provided a copy to the docket file. However, Docket No. 970409-SU will address the adequacy and accuracy of Florida Water's report and whether metered wastewater rates and/or a vacation rate should be established for the Tropical Isles service area. Further, Staff has approved a notice to be sent by the utility to the customers of Tropical Isles informing them of this new docket and its purpose.

In its petition, TIHA states that its members are entitled to have fair and new rates established based upon their water consumption, and they are entitled to a refund, calculated from the date of the establishment of interim rates, to which they would be entitled had the appropriate water consumption rates been in effect since that time. As mentioned previously, the issue of whether metered wastewater rates should be established in the Tropical Isles service area on a going forward basis is the subject of a new docket. Since rates will be established in that docket, the Petition to set metered wastewater rates in this docket is unnecessary and should be denied.

However, the movant also alleges that it is entitled to an interim refund based upon the requested water consumption rates compared to the Commission approved flat rates. Staff disagrees. The Commission approved interim revenues for Tropical Isles of \$99,793. (Final Order, p. 1160) To determine if an interim refund is required, a revised revenue requirement was calculated for the 1996 interim period using the same data used to establish final rates. (Final Order, p. 244) Based upon this calculation, the revised revenue requirement for this interim period was \$115,615. (Final Order, p. 1160) Because the revised interim revenue requirement was greater than the interim revenue requirement

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approved by the Commission, no interim refund was required for the Tropical Isles service area. Further, the Final Order, at page 245, indicates, "that even though individual final rates may be less than interim rates due to rate structure changes, no interim refund is warranted unless the newly authorized final rate of return exceeds the rate authorized on an interim basis." Therefore, even if the merits of this argument were considered, based upon the Commission's decision on interim refunds in the Final Order, no refund would be required to the Tropical Isles service area.

The offer to take over the facilities would require no action, as the offer does not request relief from the Commission, but only states a proposal made by the facility's former owner.

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ISSUE 3: Should Florida Water's motion to dismiss TIHA's petition be granted?

RECOMMENDATION: If the Commission dismisses TIHA's petition to intervene and its related motions, a ruling upon Florida Water's motion to dismiss is not necessary. (O'SULLIVAN)

STAFF ANALYSIS: Included in its April 7, 1997, response to TIHA's petition, Florida Water moves to dismiss TIHA's motion for relief on the grounds that TIHA's petition for intervention must be dismissed as untimely. The utility contends that by filing its motion in this docket, it does not intend to waive its right to move for dismissal of TIHA's motion if it is filed in the new docket. In the response to the motion to dismiss, TIHA raises further argument regarding the proper filing of the report and the effective point of entry into the proceedings.

If the Commission dismisses TIHA's petition to intervene in Issue 1, and the petitions regarding the report and rate structure in Issue 2, a ruling upon Florida Water's motion to dismiss is not necessary. As detailed herein, concerns over the report filed by the utility and the appropriate wastewater rate structure will be addressed in Docket No. 970407-SU.