BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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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

RESPONSE OF SENATOR GINNY BROWN-WAITE AND MORTY MILLER TO SSU'S MOTION TO COMPEL AND MOTION FOR FEES AND COSTS

Senator Ginny Brown-Waite and Mr. Morty Miller, by their undersigned attorney, respond to Florida Water Service Corporation's ("SSU") August 22, 1997 Motion to Compel and state:

Summary of Response

ACK
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1. The Motion to Compel is totally without merit and is clearly made to harass. The Commission's jurisdiction in the instant docket is limited to the appellate court's order on remand. Motions to compel are limited to forcing a party to comply with legitimate discovery requests. There is no discovery request in the instant case. Even were the Motion to Compel legitimate, it is now moot by virtue of the proffered documents having been delivered to SSU. The Commission has no generic authority to compel parties, especially non-utility parties, to do anything. Respondents, Senator Brown-Waite and Mr. Morty Miller, are, pursuant to the Florida Rules of Civil Procedure, entitled to their fees and costs in connection with responding to SSU's

6774

Rules of Civil Procedure, entitled to their fees and costs in connection with responding to SSU's unauthorized Motion to Compel. The Commission should guard against being goaded into incurring liability for fees and costs as the result of entering clearly improvident orders.

2. At the August 5, 1997 Agenda Conference, the undersigned committed to provide SSU with copies of the two photographs presented to the Commission. In response to Mr. Armstrong's request for copies of the photographs and "location and addresses for the pictures", the undersigned stated:

> MR. TWOMEY: I will make sure they get copies. I'm not sure if I had the addresses.

The photographs in question were not entered into the "record", were not, to the knowledge of the undersigned, retained by any of the Commissioners, and could not have played any role in the decision to allow Senator Brown-Waite or Mr. Miller to intervene as parties. To the extent the photographs were intended to influence the Commission to reject Staff's recommendation and immediately order refunds financed by customer surcharges, that goal failed as evidenced by the Commission's decision to have the parties brief the various "alternatives" Commission Staff considers available on remand. The clear extent of the undersigned's commitment was to provide copies of the two phonographs.

3. Although not as timely as presumably preferred by SSU, copies of the subject photographs were provided to SSU as an attachment to the undersigned's letter to Chairman Johnson of August 29, 1997, which letter suggested that the Commission confess error to the First District Court of Appeal for having ordered "capband" rates in Docket No. 950495-WS. The letter also requested that the Commission investigate how SSU came to purchase the water

facilities at Palm Valley, make massive capital improvements there and then convince this Commission to take jurisdiction of the high-cost system from St. Johns County. In addition to the two photographs, the letter to Chairman Johnson included the address of the federally subsidized housing project served by SSU's Spring Gardens system in Citrus County. Copies of the letter to Chairman Johnson were provided to the rest of the Commissioners and all parties to Docket No. 920199-WS. The undersigned's voluntary commitment to provide copies of the photographs to SSU has been met. To the extent that there once existed any legitimate basis for SSU to complain to this Commission that the utility had not received what had been committed to, the matter is now moot. Importantly, however, there is no legitimacy attached to SSU's motion and, therefore, no legal basis for the Commission to grant the motion, even if it wanted to.

4. This Commission is arguably without jurisdiction to entertain discovery demands and motions to compel for failure to comply with the same for the reason that only limited jurisdiction has been returned to the Commission by the First District Court of Appeal following the reversal of the most recent "final order" in this docket. That limited purpose is to follow the Court's directions in relation to its determination that SSU could not be forced to finance the customer refunds ordered by this Commission. Even were "discovery" by parties theoretically appropriate, the Commission's schedule within which parties were allowed to conduct discovery expired several years ago. Arguably, the Commission should seek leave of the First District Court of Appeal to engage in discovery and sanction procedures that are clearly beyond the scope of the Court's directions on remand.

5. SSU's Motion to Compel cites not one statute, appellate case or Commission rule to support this Commission's jurisdiction or authority to compel Senator Brown-Waite, Mr. Morty

Miller, or the undersigned, to provide the items demanded. Even if discovery were appropriate in the instant case, which it appears not to be, there is no pending discovery request by SSU that Senator Brown-Waite and Mr. Miller could either comply with or ignore. There must be an instrument and obligation to provide discovery before one can legitimately be compelled to produce for the failure to comply.

6. Discovery at the Commission is governed by Commission Rule, which states; 25-22.034 Discovery.

> Parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay and may impose appropriate sanctions under Rule 1.380, Florida Rules of Civil Procedure, except that such sanctions may not include contempt or the award of expenses unless specifically authorized by statute. Sanctions may also include dismissal under Rule 25-22.042.

In the instant case, SSU has no legally recognizable discovery pending to any party in the case, let alone Senator Brown-Waite or Mr. Miller. Mr. Hoffman's August 6, 1997 letter to the undersigned demanding the photographs, as well as the names and addresses of the customers whose homes are depicted in the photographs and his deadline for providing the same does not rise to the level of "discovery" that must be complied with despite any fanciful thinking that may have accompanied its drafting.

7. Even if there were a legitimate discovery request, which there is not, there is no general basis for a court, let alone this Commission, to order parties to construct or compile

information that is not otherwise in their possession. This is especially true when it is just as easy for the moving party to obtain the desired information. Here, neither Senator Brown-Waite nor Mr. Miller took the photographs. They are not aware of the circumstances under which the photographs were taken, the addresses of the structures shown, or the names of the residents of the structures shown. The undersigned made clear at the August 5, 1997 Agenda Conference that he might not have the addresses of the structures. The undersigned was, however, able to obtain the address of the structure in Citrus County, which has been provided, but not of the clearly expensive home in St. Johns County. Furthermore, neither the undersigned nor his clients know the names of the persons who reside at the residences shown or are in a position of obtaining that information without traveling to the locations and inquiring of the individuals residing there. Neither the undersigned nor his clients had any interest in obtaining the customer names and addresses and, accordingly, did not attempt to obtain that information. The undersigned and his clients are still not interested in either the names or addresses of SSU's customers residing at the facilities shown in the two photographs. If SSU sees some value to that information, it can seek it on its own through the services of its meter readers or other service personnel. This Commission is without any jurisdiction to compel either the undersigned or his clients to produce or obtain the gratuitous information sought by SSU and Mr. Hoffman, especially when they are not in possession of that information.

8. Rule 1.380(4), Florida Rules of Civil Procedure, provides,

> If the motion [to compel] is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include

Senator Brown-Waite and Mr. Miller have had to incur expenses and fees in responding to this motion and request that this Commission award them reasonable fees and expenses after the Motion to Compel is denied and after a hearing has been held to determine the level of fees and expenses incurred.

9. SSU's Motion to Compel is devoid of merit in any sense of the word and is clearly intended to harass a public official whose efforts to protect her constituents from excessive charges, both at this Commission and the Legislature, have clearly foiled the utility's efforts to foist the excessive costs of its imprudent acquisition policy off on all its customers through "uniform" rates and "capband" rates. This Commission should be wary of SSU's attempts to goad the agency into entering an improvident order that could subject the State to the payment of fees and costs pursuant to Chapter 120, Florida Statutes.

IN VIEW OF THE ABOVE, Senator Ginny Brown-Waite and Mr. Morty Miller request that this Commission summarily deny SSU's Motion to Compel.

Respectfully submitted,

Michael B. Twomey
Attorney for Senator Ginny Brown-Waite
And Mr. Morty Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response was served by U.S. Mail on September 3, 1997, to:

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