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March 12, 1998

HAND DELIVERY

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

Re: Docket No. 950495-WS

Dear Ms. Bayo:

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

1. Original and fifteen copies of Florida Water Services Corporation's Petition for Declaratory Statement or, in the Alternative, Motion to Vacate Automatic Stay and Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed; and

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

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 1
AFA 2
APP Letter
CAF
CMU
CTR
EAG
LEG 3
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OPC
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ORIGINAL

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: March 12, 1998

FLORIDA WATER SERVICES CORPORATION'S
PETITION FOR DECLARATORY STATEMENT
OR, IN THE ALTERNATIVE,
MOTION TO VACATE AUTOMATIC STAY
- - AND - -
MOTION TO ESTABLISH MECHANISM TO HOLD FLORIDA WATER HARMLESS SHOULD THE COMMISSION APPROVED RATE STRUCTURE BE REVERSED

Florida Water Services Corporation ("Florida Water"), formerly Southern States Utilities, Inc. ("SSU"),by and through its undersigned counsel, and pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, hereby respectfully requests that the Commission issue a declaratory statement determining whether an automatic stay was triggered by the notice of cross-appeal filed by Citrus County in the pending appeal of this rate case pursuant to Rule 25-22.061(3)(a), Florida Administrative Code, and Rule 9.310(b)(2), Florida Rules of Appellate Procedure. If the Commission determines that Citrus County's notice of cross-appeal triggered an automatic stay, Florida Water requests that such stay be vacated. Florida Water

also requests that the Commission establish a mechanism to hold Florida Water harmless in the event the Commission-approved modified stand-alone capband rate structure is reversed by the First District Court of Appeal. In support of this Petition and these Motions, Florida States as follows:

I. BACKGROUND

1. On October 30, 1996, the Commission entered Order No. PSC-96-1320-FOF-WS ("Final Order") in this proceeding.[1] The Final Order was modified, in part, on reconsideration. See Order No. PSC-97-0613-FOF-WS issued May 29,1997.[2]

2. The Commission determined that the appropriate annual revenue requirements are $33,389,617 for Florida Water's water facilities, and $24,701,470 for Florida Water's wastewater facilities. This final revenue requirement exceeded the previously authorized interim revenue requirement by approximately $3 million. The Commission also concluded that the final revenue requirements should be recovered from ratepayers under a so-called modified stand-alone "capband" rate structure. See Final Order, at 225-227.[3] Florida Water filed proposed final rate tariffs implementing its final revenue requirement under the Commission approved modified stand-alone capband rate structure which were approved effective for service rendered on or after September 20 1996.

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[1] 96 F.P.S.C. 10:386 (1996).

[2] 97 F.P.S.C. 5:609 (1997).

[3] 96 F.P.S.C. 10:386, 562-564 (1996).

3. On November 1, 1996, Florida Water filed a Notice of Appeal of the Final Order with the First District Court of Appeal. Subsequently, on November 27, Citrus County and other intervenors filed a notice of cross-appeal with the First DCA.[4] The appeals are lodged in First DCA Case No. 96-04227. None of the notices identified specific issues under appeal.

4. On August 21,1997, Citrus County filed its answer/initial cross-appeal brief which for the first time identified the Commission's modified stand-alone capband rate structure as the subject of its cross-appeal. All briefs have been filed in the appeal and the Commission is defending the rate structure which it imposed on Florida Water. Oral argument was held on February 10, 1998.

5. Florida Water is concerned by the apparent lack of competent substantial evidence which would support the Commission's modified stand-alone capband rate structure on appeal. Florida Water is aware of no testimony in the record which specifically addresses and/or supports the modified stand-alone capband rate structure approved by the Commission.

6. No party, including the Commission staff and the Commission, raised the prospect of an automatic stay after Citrus County filed its notice of cross-appeal. Florida Water, in an abundance of caution, filed a Motion on November 25, 1997 raising its concern that an automatic stay may have been triggered by the

[4]On November 26, 1996, a notice of cross-appeal also was filed by the Office of Public Counsel.

County's cross-appeal of the rate structure issue. Florida Water requested that the Commission enter an Order: (a) determining that Florida Water had lawfully implemented its final rates pursuant to the Final Order; and (b) establishing an appropriate mechanism to hold Florida Water harmless and decrease the magnitude of potential refunds and surcharges which might be required in the event the Commission approved modified stand-alone capband rate structure is reversed on appeal.

7. On February 5, 1998, the Commission issued Order No. PSC-98-0231-FOF-WS. In the February 5 order, the Commission concluded that it lacked jurisdiction to establish the mechanism to hold Florida Water harmless should the Commission approved rate structure be reversed. The Commission also required Florida Water to file an appropriate pleading addressing issues concerning any alleged automatic stay and authorized Florida Water to move to vacate any such stay with specific terms and conditions pursuant to Rule 25-22.061(3)(a), Florida Administrative Code.

8. This Petition for Declaratory Statement and Alternative Motion to Vacate any automatic stay is filed in response to the Commission's February 5, 1998 order.

II. PETITION FOR DECLARATORY STATEMENT

9. The pertinent rules at issue are Rule 25-22.061(3)(a), Florida Administrative Code and Rule 9.310(b)(2), Florida Rules of Appellate Procedure. Rule 25-22.061(3)(a) states, in pertinent part:

> When a public body or public official

> appeals an order involving an increase in a utility's or company's rates, which appeal operates as an automatic stay, the Commission shall vacate the stay upon motion by the utility or company and the posting of good and sufficient bond or corporate undertaking.

Rule 9.310(b)(2), Florida Rules of Appellate Procedure, states:

> (2) *Public Bodies; Public Officers.* The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review.... On motion, the lower tribunal or the court may extend the stay , impose any lawful conditions or vacate the stay.

10. In Docket No. 920199-WS, as here, Citrus County appealed the Commission's final order after Florida Water had filed and received approval of the tariffs reflecting its Commission-approved final revenue requirement. The appeal of Citrus County ostensibly triggered an automatic stay under the above-cited rules. Florida Water moved to vacate the automatic stay and that request was granted.[5] Citrus County's appeal resulted in the reversal of the Commission-imposed uniform rate structure. Citrus County v. Southern States Utilities, 656 So.2d 1307 (Fla. 1st DCA 1995). The Commission unlawfully attempted to hold Florida Water accountable for moving to vacate the automatic stay by attempting to require Florida Water to make refunds to customers whose rates were higher under the uniform rate structure without also authorizing Florida Water to collect commensurate surcharges from customers who enjoyed

[5] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 93 F.P.S.C. 12:280 (1993).

lower rates under the uniform rate structure.[6] The Commission's Final Refund Order was reversed by the First District Court of Appeal in Southern States Utilities, Inc. v. Florida Public Service Commission, 22 Fla.L.Weekly D1492, Fla. 1st DCA, June 17, 1997 ("Southern States"). On remand from the Southern States decision, the Commission determined, with one limited exception[7], that the reversal of the Commission-approved rate structure on appeal shall result neither in refunds nor surcharges. See Order No. PSC-98-0143-FOF-WS issued January 26, 1998.

11. Florida Water maintains that the material facts and issues of law surrounding the potential refund/surcharge issue in Docket No. 920199-WS are the same as in the instant case. It would be unlawful for the Commission to impose refunds without commensurate surcharges if the Commission's rate structure is reversed by the First District Court of Appeal. However, the issue of whether an automatic stay was triggered in Docket No. 920199-WS and the prospect that a stay may have been triggered in the instant docket bear some similarities and yet are substantially different, as recited below:

a. First, in Docket No. 920199-WS, on or about the time

---

[6] In Re: Application for Rate Increase by SOUTHERN STATES UTILITIES, INC., 96 F.P.S.C. 8:198 (1996) ("Final Refund Order").

[7] The noted exception is that the Commission did require Florida Water to make refunds to Spring Hill customers who were charged the lawfully approved and effective uniform rates beyond the date when modified stand-alone rates were implemented for the other service areas in this rate case as a predicate to securing interim rate relief. The Spring Hill facilities were first included, and then removed from this rate case by the Commission.

Citrus County filed its appeal (as opposed to cross-appeal), Citrus County expressly advised counsel for Florida Water and the Commission that a stay had been triggered under the applicable rules.[8] No such action has occurred in this case. Apart from Florida Water's November 25, 1997 Motion to Establish Mechanism, no party has filed a pleading with or otherwise asserted to the Commission that Citrus County's notice of cross-appeal may have triggered an automatic stay. This is the case even though parties have appeared before the Commission on multiple occasions subsequent to Citrus County's notice of cross-appeal addressing stay issues as they related to interim refunds and AFPI charges. Moreover, neither Citrus County, the Office of Public Counsel nor any other party even filed a response to Florida Water's Motion to Establish Mechanism asserting that an automatic stay had been triggered by Citrus County's notice of cross appeal. To conclude that the Citrus County notice of cross appeal triggered an automatic stay, the Commission would also have to conclude that Citrus County, OPC and other intervenors were content to allow Florida Water to charge final rates which supposedly had been stayed for what now amounts to some 17 months. The vigilance and effort that Citrus County, OPC and other intervenors have displayed in this rate case in opposition to Florida Water's rate request belies such a notion. Moreover, by standing silent in connection with any supposed automatic stay, Citrus County, OPC and other

[8] See Citrus County's Response in Opposition to Southern States' Motion to Vacate Automatic Stay, etc., filed in Docket No. 920199-WS, copy attached hereto as Exhibit A, at ¶10.

intervenors should not now some 17 months after the filing of the final rate tariffs be heard to assert that an automatic stay was triggered. The doctrines of waiver and laches preclude such an inequitable result.

b. There is simply no authoritative rule to which any party could turn to conclude that an automatic stay was triggered by Citrus County's notice of cross-appeal. Commission Rule 25-22.061(3)(a) references only appeals - - not cross-appeals. Similarly, Rule 9.310(b)(2) refers to the timely filing of a "notice." In discussing Rule 9.310(b)(2), the Committee Notes to the rule state that the rule "provides for an automatic stay without bond as soon as a notice invoking jurisdiction is filed by the state or any other public body...." There is no question that the only notice invoking jurisdiction of an appellate court is a notice of appeal - - not a notice of cross-appeal. Indeed, as confirmed in Breakstone v. Baron's of Surfside, Inc., 528 So.2d 437, 439 (Fla. 3rd DCA 1988), a notice of cross-appeal does not invoke the jurisdiction of the appellate court. Moreover, Rule 9.020(g)(1) defines an "appellant" as "[a] party who seeks to invoke the appeal jurisdiction of a court." Citrus County is not an appellant in the pending appeal of this rate case. Citrus County is a cross-appellant that did not file a notice of appeal and did not invoke the jurisdiction of the appellate court. As such, the Committee Notes to Rule 9.310(b)(2) construed in pari materia with Rule 9.020(g)(1) support the conclusion that a notice of cross-appeal does not trigger an automatic stay.

c. Third, underlying this issue as with every ratemaking issue addressed by the Commission are principles of equity and fairness for the utility and its ratepayers. GTE Florida Inc. v. Clark, 668 So.2d 971 (Fla. 1996) ("GTE Florida"). To hold Florida Water accountable for not moving to vacate a supposed automatic stay which Florida Water did not believe to exist and which has never been raised by any other party to this proceeding would violate principles of equity and fairness. Had Citrus County suggested the application of an automatic stay in a prompt fashion as it did in Docket No. 920199-WS, Florida Water would have subjected itself to substantial financial risk by moving to vacate any such automatic stay. This is because at the time Citrus County filed its notice of cross-appeal, the Commission's Final Refund Order had not yet been reversed by the First District Court of Appeal in the Southern States decision. The Commission had ruled in its Final Refund Order that by moving to vacate an automatic stay, Florida Water had assumed an obligation to make refunds, without commensurate surcharges, as a result of the appellate court's reversal of the Commission-approved uniform rate structure. While Florida Water obviously disagreed with the Commission's conclusion and had expressed such disagreement dating back to November, 1993, the rule of law pronounced by the Commission at the time Citrus County filed its notice of cross-appeal was that a request to vacate an automatic stay would subject Florida Water to a one-sided refund requirement. Accordingly, in this case, any suggestion that Florida Water should have filed a motion to vacate

any automatic stay resulting from Citrus County's notice of cross-appeal is ludicrous as such a motion would have subjected Florida Water to another one-sided refund requirement based on the law as it existed at the time Citrus County filed its notice of cross-appeal.

d. Finally, with the issuance of the Southern States decision, the Commission and all parties are aware that the absence or presence of a stay cannot and does not impair the right of a utility to recover its Commission-approved final revenue requirement. Quoting the Southern States decision:

> Following the principles set forth by the supreme court in *Clark*, we find that the PSC erroneously relied on the notion that SSU "assumed the risk" of providing refunds when it sought to have the automatic stay lifted and therefore should not be allowed to impose surcharges. Just as GTE's failure to request a stay in *Clark* was not dispositive of the surcharge issue, neither is SSU's action in asking the PSC to lift the automatic stay. The stay itself was little more than a happenstance, in effect only because a governmental entity, Citrus County, appealed the original PSC order in this matter. *See* Fla.R.App.P. 9.310(b)(2); Fla.Admin.Code R. 25-22.061(3).

Southern States, 22 Fla.L.Weekly D1492, 1493 (Fla. 1st DCA, June 17, 1997) (emphasis supplied).

12. In light of the Southern States decision, it is inconceivable that the First District Court of Appeal would be persuaded by yet another fabricated assumption of the risk theory as a means to plunge a hole in Florida Water's Commission-approved final revenue requirement. Yet, at the February 3, 1998 Agenda

Conference, two commissioners appeared ready to ignore the court's rejection of this theory despite the admonition of one of the two staff attorneys:

> CHAIRMAN JACOBS: ... Is it not unreasonable that by implementing this decision, which reasonable minds could argue should not have been done, that some risk of loss should be passed back to the company?
>
> MR. JAEGER: There is a whole assumption of the risk argument in that 920199 docket. And we actually tried to nail them down at the agenda conference saying, well, you realize that if you do this you assume the risk.... but the court said the company did not assume the risk by vacating the stay.
>
> * * *
>
> CHAIRMAN JOHNSON: Why couldn't we just -- because these facts are different, if we were faced with an issue of surcharge, again, raise the assumption of the risk argument at that point, in the same way we tried to argue it last time? To me this seems a better case for that kind of an argument. Because they will raise the revenue requirement argument that they are to be made whole, and then we say, "But in this instance we didn't lift the stay, you just unilaterally acted; therefore you assumed the risk."
>
> MS. JABER: It's a stronger argument. I can't guess the court anymore.

See transcript from February 3, 1998 Agenda Conference, copy attached hereto as Exhibit B, at pp. 18-21.

13. Based on the foregoing, Florida Water maintains that an automatic stay was not triggered by Citrus County's notice of cross-appeal. To attempt to impose a refund penalty for a stay which could apply only due to "happenstance" would clearly be inequitable and would subject the Commission to yet another

reversal. Further, based upon the material facts and applicable law, Florida Water maintains that any action on the part of the Commission to hold Florida Water accountable, under the assumption of the risk theory already rejected by the court or otherwise for not moving to vacate an alleged automatic stay, would violate the principles of equity and fairness applicable in ratemaking proceedings under GTE Florida and the opinion of the Southern States court that the absence or presence of a stay shall not impair Florida Water's Commission-approved final revenue requirement. However, since there is no rule contained within the Florida Rules of Appellate Procedure nor in Chapter 25-22, Florida Administrative Code, which addresses whether a notice of cross-appeal triggers an automatic stay, Florida Water requests the Commission to issue a declaratory statement determining whether an automatic stay was triggered by Citrus County's notice of cross-appeal.

III. ALTERNATIVE MOTION TO VACATE AUTOMATIC STAY

14. If the Commission determines that an automatic stay was triggered by Citrus County's notice of cross-appeal, Florida Water requests that such stay be vacated.

15. Rule 25-22.061(3)(a), Florida Administrative Code, clearly states that any automatic stay must be vacated upon motion by the utility and the posting of good and sufficient bond or corporate undertaking. Under the Rule, if the Commission determines that an automatic stay was triggered by Citrus County's notice of cross-appeal, then the Commission must vacate the stay

and confirm Florida Water's right to continue collecting final rates pursuant to the Final Order under the current approved and effective tariffs. Florida Water is prepared to post adequate security as determined by the Commission as a predicate to vacation of the stay and reminds the Commission that Florida Water already has posted an appeal bond in the amount of $5,864,375. However, since any refunds must be accompanied by surcharges, Florida Water does not believe any bond should be required. Florida Water is prepared to provide a corporate undertaking to carry out any refund and surcharge mechanism subsequently ordered by the Commission.

IV. MOTION TO ESTABLISH MECHANISM TO HOLD FLORIDA WATER HARMLESS IN THE EVENT THE MODIFIED STAND-ALONE CAPBAND RATE STRUCTURE IS REVERSED ON APPEAL

16. Florida Water requests that the Commission address the stay issue as it impacts rate structure and establish a mechanism, consistent with the Southern States decision, to hold Florida Water harmless and minimize adverse impacts on customers should the Commission-approved modified stand-alone capband rate structure be reversed on appeal.

17. The simplest and most consistent action for the Commission to take is to confirm that in the event the modified stand-alone capband rate structure is reversed on appeal, the Commission will follow the precedent followed by every other regulatory commission that Florida Water is aware of and now established by this Commission in Order No. PSC-98-0143-FOF-WS issued January 26, 1998 in Docket No. 920199-WS that there be no refunds and no surcharges. If the rate structure is reversed on

appeal, the Commission would be faced with the same dilemma it experienced in Docket No. 920199-WS. As the Court has now instructed the Commission, the absence or presence of stay has no effect on Florida Water's right to collect its Commission-approved final revenue requirement. The Commission should put all parties on notice that it will follow its precedent established in Docket No. 920199-WS in the event the modified stand-alone capband rate structure is reversed on appeal by ordering that such a reversal will result in neither refunds nor surcharges.

18. Alternatively, in ruling on the automatic stay issues raised in its February 5 order and in this pleading, the Commission is authorized to establish appropriate safeguards to protect Florida Water and its ratepayers in connection with ruling on the stay issues. Precedent exists for such action. In Order No. 8511 issued October 6, 1978, in Docket No. 770937-EU (MT), the Commission granted a request by Tampa Electric Company to vacate an automatic stay and allow the utility to collect the higher of the amounts due for franchise fees under the direct versus spread method pending appeal and subject to refund. Admittedly, the situation in the Tampa Electric Company was less complex because the amounts due for franchise fees under the direct and spread methods were clearly at issue and easily ascertained. Here, as acknowledged by Commissioner Deason at the February 3, 1998 Agenda, the highest amount chargeable to a customer under any one rate structure is not easily ascertained but certainly ripe with

controversy.[9] This, of course, would be the case had the Commission attempted to address such scenarios at the time Citrus County filed its notice of cross-appeal or should it attempt to do so in the near future. Clearly, this is just another reason why the precedent established by the Commission of no refunds and no surcharges in Docket No. 920199-WS remains sound policy.

WHEREFORE, for the foregoing reasons, Florida Water respectfully requests that the Commission:

A. Grant Florida Water's Petition for Declaratory Statement and issue a declaratory statement determining whether an automatic stay was triggered by Citrus County's notice of cross-appeal and, if so, determining that any such stay shall have no impact on Florida Water's Commission approved final revenue requirement consistent with the Southern States decision;

B. Vacate any automatic stay determined by the Commission to have been activated by Citrus County's notice of cross-appeal and determining that Florida Water has lawfully implemented its final rates pursuant to the Final Order;

C. Establish a mechanism to hold Florida Water harmless in the event the modified stand-alone capband rate structure is reversed on appeal; and

---

[9] See transcript from February 3, 1998 Agenda Conference, copy attached hereto as Exhibit B, at pp. 9-10.

D. Grant Florida Water such further relief as deemed to be just, reasonable and proper.

Respectfully submitted,

KENNETH A. HOFFMAN, ESQ.
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(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 12th day of March, 1998:

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KENNETH A. HOFFMAN, ESQ.

1995/declar

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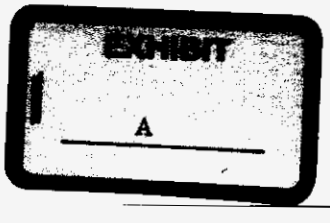
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and Wastewater Rates in Citrus, Nassau, Seminole, Osceola Duval, Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	Docket No. 920199-WS Filed: October 26, 1993

CITRUS COUNTY'S RESPONSE IN OPPOSITION TO SOUTHERN STATES' MOTION TO VACATE AUTOMATIC STAY AND MOTION FOR REDUCED INTERIM RATES PENDING JUDICIAL REVIEW, FOR RECALCULATED CUSTOMER BILLS, REFUNDS AND IMPOSITION OF PENALTIES FOR VIOLATING AUTOMATIC STAY

The Board of County Commissioners of Citrus County ("Citrus County"), by and through its undersigned attorneys, respectfully moves this Commission to deny Southern States Utilities, Inc.'s ("Southern States" or the "Utility") Motion to Vacate Automatic Stay, filed October 19, 1993, and, instead, to enter its order requiring Southern States to obey the automatic stay pending judicial review of this docket by the First District Court of Appeals. Furthermore, Citrus County requests that the Commission order Southern States to submit for approval tariff sheets with the interim rates previously approved in this docket, reduced across-the-board to a level that will allow it to recover only the annual revenue requirement approved by the Commission panel in Order No. PSC-93-0423-FOF-WS. Citrus County also requests that this Commission order Southern States to recalculate and rebill all customer bills issued since September



15, 1993, which bills include charges at the so-called "uniform rate" levels approved by the above order, but stayed by Citrus County's filing of a Notice of Appeal in the First District Court of Appeal. Citrus County further requests that this Commission require Southern States to refund to all customers, so charged, the difference between the interim rates and the uniform rates, with interest at an appropriate and reasonable rate. Lastly, Citrus County requests that this Commission penalize Southern States for willfully violating the automatic stay, imposed by operation of the Florida Rules of Appellate Procedure, by fining it an amount equal to the overcharges it billed its customers in excess of the currently approved interim rates and by requiring its shareholders to bear all the costs of the rebillings, refunds and fines. In support of its response and request, Citrus County states:

1. Citrus County, a "public body" as defined by Rule 9.310, Florida Rules of Appellate Procedure ("Fla.R.App.P."), is a party to Commission Docket No. 920119-WS, which was a Section 120.57(1), F.S proceeding held to set the customer rates for some 127 geographically distinct water and wastewater systems owned by the Utility. The Commission approved the collection of interim rates designed to collect annual revenues, which, ultimately, exceeded the annual revenue requirement approved in the final order.

2. On March 22, 1993 the Commission panel assigned to the case issued Order No. PSC-93-0423-FOF-WS, which was the final

order in Docket No. 920119-WS. The final order approved, among other things, the implementation of uniform statewide water and wastewater rates, whose purpose is to charge the customers of each of the 127 systems the same base facility and gallonage charges without regard to either the costs of operating the separate systems, the level of property contributed by the customers of each system, or the legal return on investment due Southern States on each of the separate systems. As shown on Attachment A to this pleading, the uniform rates can only be obtained by requiring the customers of certain systems to subsidize the costs and return on investment of other systems. For example, Line 1, Page 1 of Attachment A shows that the customers of Spring Hill Utilities must pay an annual water subsidy ("Statewide Rates (Over) Under") of $1,164,814 (Column 5). Spring Hill Utilities' water subsidy is the difference between the normal revenue requirement to support the operating costs and return on investment of Spring Hills Utilities' water plant on a "stand-alone" basis of $3,749,228 (Column 4) and the annual "System Revenue Requirement Statewide" of $4,914,042 (Column 6), which is the revenue to be collected through the uniform rates. The customers of Spring Hill Utilities are also required to pay a comparable wastewater subsidy of $700,505 annually, which brings the total annual subsidy imposed on them to $1,865,319 above the rates they would normally be required to pay if Spring Hill Utilities was regulated as a stand-alone water and wastewater utility.

3. Motions for Reconsideration were filed with this Commission by a number of parties, including Citrus County. Citrus County's primary issue on reconsideration questioned the legality of the uniform statewide water and wastewater rates. The Commission panel assigned to the docket considered and denied the motions for reconsideration at agenda conferences held on July 20 and August 3, 1993. The Commission panel also voted, on its own motion, to adjust Southern States' interim rate refund liability and to incorporate that decision in the order disposing of the other Motions for Reconsideration. As of October 26, 1993, no written Order on Reconsideration has been rendered by the Commission.

4. Pursuant to Rule 9.020(g)(1), Fla.R.App.P, the final order in this docket should not be considered "rendered" until the filing of a signed, written order disposing of the motions for reconsideration. Accordingly, the time for seeking judicial review of the final order is normally tolled pending the filing of a signed, written order disposing of the motions for reconsideration.

5. Citrus County and certain other persons affected by the uniform rates jointly petitioned the full Commission for a review of the legality and appropriateness of uniform rates for Southern States in Docket No. 930647-WS. The Commission denied the Joint Petition, but, on its on motion, opened Docket No. 930880-WS ("Uniform Rates Investigatory Docket"), for substantially the same purposes. See, Order No. PSC-93-1422-FOF-WS.

6. Notwithstanding the absence of a signed, written order disposing of the motions for reconsideration, Southern States filed, and the Commission staff "administratively approved", rate tariff sheets implementing the uniform rates. Dated September 15, 1993, the Commission staff approval authorized Southern States to charge the uniform rates for consumption on or after September 15, 1993. (Attachment B, PSC staff letter dated September 15, 1993.)

7. Commission Rule 25-22.060(1)(c), F.A.C. contributes to the apparent difficulty of a party facing the implementation of adverse agency action, but having no signed, written order on reconsideration to seek judicial review of. The rule provides:

> (c) A final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order. The time period for filing a motion for reconsideration is not tolled by the filing of any other motion for reconsideration.

On the surface, this rule would appear to allow the Commission to limit a party's ability to seek judicial review of imminently pending adverse agency action by delaying "disposition" of pending motions and cross-motions for reconsideration.

8. Citrus County disputes the legal authority for Commission staff to "administratively" authorize a utility to charge rates for which a final order has not been rendered. However, irrespective of whether Commission staff possesses such legal authority, it undertook to approve the uniform rate tariffs submitted by the Utility, as well as approve a letter intended to

inform the customers of the rate changes.

9. Still without a signed, written order disposing of the Motions for Reconsideration, but facing the accomplished "agency action" of the September 15, 1993 staff approval of the uniform rates and their imminent billing to customer consumption, Citrus County and Cypress and Oak Villages Association ("COVA") filed their Notice of Appeal on October 8, 1993 naming Southern States as an appellee. An Amended Notice of Appeal, adding the Commission as an appellee, was filed on October 11, 1993. On October 5, 1993, Counsel for Citrus County wrote Southern States requesting that the Utility voluntarily refrain from implementing the uniform rates and, instead, continue charging the interim rates at an appropriately lower level. Southern States declined.

10. On October 8, 1993 Counsel for Citrus County verbally advised Counsel for Southern States that a Notice of Appeal was being filed that day, while attending a Commission staff-sponsored meeting regarding the Uniform Rates Investigatory Docket. Also on October 8, 1993, Counsel for Citrus County advised Counsel for Southern States that an automatic stay would result from the filing of the Notice of Appeal and later reiterated that position in a letter.

11. Despite the existence of the Automatic Stay and, apparently without giving its customers notice that their rates for consumption were changed effective September 15, 1993, Southern States began charging its customers for consumption at the uniform rates on September 15, 1993. Southern States has, in

fact, begun billing its customers for the uniform rates.

12. Pursuant to Rule 9.020(g)(3), Fla.R.App.P., the filing of a Notice of Appeal by Citrus County and COVA, before the filing of a signed, written order disposing of the Motions for Reconsideration, caused those motions to be abandoned and established that "the final order shall be deemed rendered by the filing of the notice of appeal as to all claims between parties who then have no such motions pending between them". See, In re: Forfeiture of $104,591 in U.S. Currency, 578 So.2d 727 (Fla. 3d DCA 1991).

13. The effect of Rule 9.020(g)(3), Fla.R.App.P., is not only logical, but essential, given the facts of this case. Faced with the September 15, 1993 Commission staff approval of the uniform rates and Southern States' actual billing of those rates, Citrus County and COVA could not, and should not, be precluded from effectively challenging the imminent implementation of adverse agency action because of the Commission's failure to issue its Order on Reconsideration. The filing of a Notice of Appeal by Citrus County and COVA on October 8, 1993, rendered Order No. PSC-93-0423-FOF-WS final on that day by operation of Rule 9.020g)(3), Fla.R.App.P. Given these facts and law, any other construction would leave utility customers vulnerable to adverse agency action without an adequate remedy for its challenge. In any event, the Administrative Procedures Act (Section 120.68(1), F.S.) does not require "final agency action" before judicial review, if review after such final agency action

would provide an inadequate remedy.

14. Rule 9.310(b)(2), Fla.R.App.P., provides:

> (2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

Citrus County is a "public body" within the meaning of Rule 9.310(b)(2), Fla.R.App.P., and its filing of a Notice of Appeal with the First District Court of Appeal on October 8, 1993 automatically operated as a stay of Order No. PSC-93-0423-FOF-WS, and, among other provisions of that order, stayed the implementation of the uniform rates, pending that Court's judicial review.

15. Had Southern States wished to lawfully implement the uniform rates pending judicial review, it should have, as provided by Rule 9.310(b)(2), Fla.R.App.P., filed a motion to vacate, or otherwise impose lawful conditions on, the stay with either the First District Court of Appeal or this Commission prior to charging the rates on customers' bills. Initially, Southern States did not do so, electing instead, and in violation of the automatic stay, to unilaterally bill its customers for the uniform rates.

16. On October 19, 1993, eleven (11) days after the filing of Citrus County's Notice of Appeal with the First District Court

of Appeal, Southern States filed with this Commission its Motion to Vacate Automatic Stay. Having already willfully violated the Automatic Stay, Southern States now comes to the Commission and asks its permission to continue its charging of the uniform rates. Although it is ignoring the Automatic Stay, Southern States presumably recognizes its existence by asking the Commission to vacate the stay.

17. Rule 25-22..061(3), F.A.C. provides:

> When a public body or public official appeals an order involving an increase in a utility's or company's rates which appeal operates as an automatic stay, the commission shall vacate the stay upon motion by the utility or company and the posting of good and sufficient bond or corporate undertaking. (Emphasis supplied.)

While Southern States would have the Commission believe that vacating the automatic stay is mandatory, the rule is clear and unambiguous that lifting the stay is dependent upon the posting of good and sufficient security.

18. As the Commission should recognize, the clear intent of vacating a stay pending appeal in a case involving an increase in rates, is to allow the final (presumably higher) rates authorized by the appealed order to be collected pending the outcome of the appeal. The difference between those final rates and the interim rates is collected under appropriate security and subject to refund if the Court does not uphold the final rates. Absent this procedure, the prohibition against retroactive ratemaking would prevent the utility's recovery of the revenues not collected during the pendency of the appeal, but subsequently approved as

reasonable on judicial review. Because this case involves the unusual situation where the status quo, represented by the interim rates, provides the Utility with greater revenues than it is entitled to under the Final Order, Citrus County submits that Southern States has no economic standing to justify the stay being vacated. Since the Utility is not harmed by the maintenance of the status quo, the Commission must consider whether any customers will be harmed by the disruption of the status quo and, if so, if their interests can adequately be protected by a bond or other security.

19. Citrus County believes that customer interests cannot be adequately protected by a bond or corporate undertaking and, therefore, requests that the Commission maintain the automatic stay. Citrus County's position is based on the fact that the uniform rates will require a large number of customers to pay a rate subsidy in excess of the stand-alone rates required for their respective systems. If the First District Court of Appeal determines that the rate subsidy is illegal, as alleged by Citrus County and others, where will the money for refunds come from? Since the transition from interim to uniform rates is to be "revenue neutral", the rate subsidies cannot be held by Southern States "subject to refund" because they will be used to reduce the uniform rates of the customers receiving the subsidies. If the uniform rates are later reversed on judicial review, the Commission cannot, then, authorize the Utility to recover the subsidies from the receiving customers through prohibited,

retroactive ratemaking. It should be clear that obtaining a bond guaranteeing the payment of refunds under these circumstances would be prohibitively expensive, if such a bond was available at all. Even if such a bond were obtainable, could the Commission expect the customers to support the premiums? Presumably Southern States would object to its shareholders being forced to support the bond premiums with their own money.

20. Even if such a bond could be obtained, it could not overcome the fundamental unfairness of requiring the subsidy-paying customers to currently obtain and transfer to the Utility the excess between the stand-alone rates and the uniform rates. It is well-established that most of the customers who will be forced to pay uniform rate subsidies are retirees living on fixed incomes. Interest rates are at record lows, which results in a significantly reduced cash flow to those customers dependent upon interest income for their existence. It is both presumptuous and unfair in the extreme to suggest that the elderly customers of this Utility should be forced to modify their ever-shrinking budgets to finance a highly questionable revenue transfer scheme. This is especially true while that scheme's legality is being challenged on judicial review and concurrently investigated by the full Commission in Docket No. 930647-WS.

21. The Commission should seriously consider who is driving this headlong and expensive rush to uniform rates pending judicial review and the outcome of the Commission's own investigation. The Commission should recall that Southern States

neither petitioned for, nor testified in favor of, uniform rates at the evidentiary hearing. Under the status quo, as represented by the interim rates, a large number of customers are already paying subsidies in excess of their stand-alone rates. Many of the remaining customers are receiving interim rate subsidies they are arguably not legally entitled to, and which they never requested. The decision to impose uniform rates on 127 utility systems is without precedent in this state, notwithstanding arguments that this Commission has previously imposed uniform rates in isolated and smaller instances. The status quo should be maintained both during judicial review and the Commission's investigation and the status quo in this case is most closely represented by the interim rates. The Commission should deny the motion to vacate the automatic stay and order the Utility to file interim rate tariffs modified so as to only allow it to collect its approved revenue requirement.

22. Southern States argues at great length that Rule 25-22.061(1)(b), F.A.C. contains factors which suggest that it should not have to post a bond in return for having the automatic stay vacated. The weakness of Southern States' argument would have been more obvious had it quoted the relevant text of the full Rule, which states, in part:

> (1)(a) When the order being appealed involves the refund of monies to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds

appropriate. (Emphasis supplied).

Clearly, this language addresses itself to cases involving decreases in rates or the refund of monies to customers. The obvious intent is to discourage utilities from seeking stays merely for the purpose of retaining their customers monies pending appeal. Accordingly, the "terms that will discourage appeals when there is little possibility of success" language Southern States addresses at length, is intended to reduce the availability of stays to utilities when they are ordered to make customer refunds or reduce customer rates. The instant case, of course, involves a substantial increase in rates!

23. The Commission should appropriately consider whether Citrus County and the other customers of Southern States will suffer irreparable harm if the stay is not maintained. As argued above, Citrus County believes that the customers forced to pay uniform rate subsidies will be irreparably harmed if the stay is vacated. Citrus County further believes that the posting of a bond cannot mitigate the damage to the affected customers.

24. Southern States intentionally violated the Automatic Stay and charged its customers rates rendered void by the Florida Supreme Court's rules. The Commission should order Southern States to recalculate its customers' bills and refund, with interest, the inappropriate charges. The Commission should also require Southern States to bear all costs associated with it violating the Automatic Stay. Lastly, so that it and other utilities are deterred from intentionally violating Automatic

Stays in the future, the Commission should penalize Southern States in an amount equal to the excess charges it billed its customers.

WHEREFORE, Citrus County respectfully requests that this Commission: (1) Deny Southern States' Motion to Vacate Automatic Stay; (2) Order Southern States to obey the automatic stay pending judicial review of this docket by the First District Court of Appeals; (3) Order Southern States to submit for approval tariff sheets with the interim rates previously approved in this docket, reduced across-the-board to a level that will allow it to recover only the annual revenue requirement approved by the Commission panel in Order No. PSC-93-0423-FOF-WS; (4) Order Southern States to recalculate and rebill all customer bills issued since September 15, 1993, which bills include charges at the so-called "uniform rate" levels approved by the above order, but stayed by Citrus County's filing of a Notice of Appeal in the First District Court of Appeal; (5) Order Southern States to refund to all customers, so charged, the difference between the interim rates and the uniform rates, with interest at an appropriate and reasonable rate; and (6) Sanction Southern for willfully violating the automatic stay, imposed by operation of the Florida Rules of Appellate Procedure, by fining it an amount equal to the overcharges it billed its customers in excess of the currently approved interim rates and by requiring its shareholders to bear all the costs of the rebillings, refunds and

fines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 26th day of October, 1993 to the following persons:

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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 JULIA A. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER JOE GARCIA COMMISSIONER E. LEON JACOBS
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	28
DATE:	February 3, 1998
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida

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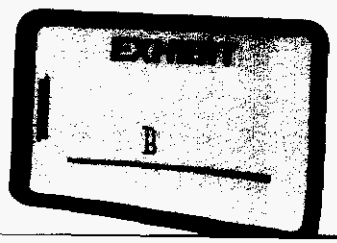

MR. JAEGER: Yes. The interim modified stand-alone did not give them their revenue requirement, so they would have been collecting less than they were entitled to, and --

COMMISSIONER DEASON: But could we have increased the revenue requirement using that same rate structure? Would that have alleviated the possibility of having a refund and surcharge not based upon revenue requirements, but based upon rate structure, that is, different customers paying different rates and being the subsidy between customers?

COMMISSION STAFF: There would still be the problem because all of the service areas under interim were not under the modified stand-alone. There were some stand-alone rates. And if the final rate ultimately was cap band, you would still see a refund/surcharge situation so that there is a mixture under interim.

COMMISSIONER DEASON: See, it seems to me, and this goes to the difficulty of this court's decision about having refunds on a rate structure issue. It seems to me that it's not only for water and wastewater, but for any company we regulate, electric or whatever. What we have to do is say what are all the conceivable rate structures out there? All right,

if there is going to be a rate structure issue, charge everybody the highest rate under their rate structure to avoid surcharges. That is the only way to eliminate it.

COMMISSION STAFF: The concern with that is --

COMMISSIONER CLARK: And that is compounded by the fact that even if it isn't a rate structure issue, if you have an appeal you have to find out what they have appealed and allow the maximum of that issue.

COMMISSIONER DEASON: I mean, if we are in an electric case, there are different cost of service studies, and industrial may have one rate and residential another in this cost of service study and in another one it could be just the opposite. We would have to go, like, what is the highest rate under any conceivable cost of service study that is out there and have those be the interim rates to avoid surcharging one customer class to give money to another customer class. I mean -- exactly. I think Mr. Talbott said bizarre, I would agree with that terminology. It's just frustrating. Extremely frustrating.

COMMISSIONER CLARK: But I think at this point, even if we wanted to invoke that remedy, I don't think we can.

new cases filed under new law, that we would not face this dilemma. Just a suggestion.

COMMISSIONER DEASON: I'm sure Doctor Bain can handle that one.

COMMISSIONER JACOBS: A couple of questions. One is kind of a help me to understand. The company chose to implement these rates. And from what I'm understanding is it is arguable whether they should have adhered to a stay. Certainly a reasonable interpretation is that they could have adhered to a stay when the appeal was filed, correct?

MR. JAEGER: That's correct.

COMMISSIONER JACOBS: As a result of proceeding, there is now some risk of loss. To whom is the question that will be resolved by the outcome of the appeal? Is it not unreasonable that by implementing this decision, which reasonable minds could argue should not have been done, that some risk of loss should be passed back to the company?

MR. JAEGER: There is a whole assumption of the risk argument in that 920199 docket. And we actually tried to nail them down at the agenda conference saying, well, you realize that if you do this you assume the risk. And I think the court -- and I need help in that from Lila, I think, on exactly what did

happen in 920199, but the court said the company did not assume the risk by vacating the stay. Of course, in this case they did not do it --

(Simultaneous conversation.)

COMMISSIONER DEASON: -- we did not vacate the stay.

MR. JAEGER: They did not do it promptly, that is correct.

COMMISSIONER DEASON: That's the distinction. In the previous case there was a request to vacate the stay. The Commission considered that, the Commission vacated the stay. And the court said that there was no assumption of risk by the company to make all the customers whole just because their request to have the stay vacated was granted. The facts are a little bit different here. We never even were confronted with the question of vacating the stay. And whether that would have any bearing on the court's final decision, I don't know. But the situation, the circumstances are different this time.

MS. JABER: That is correct.

COMMISSIONER JACOBS: And I don't know if we can resolve that. Really we can't do anything about that until such time as we are faced with the decision about what to do about the court decision. But I pose

that as a -- I think you're right, I think there is a distinction here.

COMMISSIONER DEASON: That's what I thought of. You know, I started thinking about well maybe we should fine the company and suspend it waiting the outcome. But fines go to the state, they can't go from one customer class to another customer class. So, I mean, even though the company did something that potentially they perhaps could be fined for, it wouldn't help the individuals we are trying to help by taking that action.

MS. JABER: Commissioner, Mr. Jaeger identified the show cause issue as a potential issue and then decided against it because we recognize there is an apparent rule violation, but we don't know what show causing the utility would accomplish.

COMMISSIONER GARCIA: Well, in theory, couldn't we fine the company, and then if they reimburse the citizens we remove the fine?

MS. JABER: You could show cause them. They will have 20 days to respond. And then we could come back and recommend a fine if the response wasn't persuasive against a show cause.

CHAIRMAN JOHNSON: Why couldn't we just -- because these facts are different, if we were faced

with an issue of surcharge, again, raise the assumption of the risk argument at that point, in the same way that we tried to argue it last time? To me this seems a better case for that kind of an argument. Because they will raise the revenue requirement argument that they are to be made whole, and then we say, "But in this instance we didn't lift the stay, you just unilaterally acted; therefore, you assumed the risk."

MS. JABER: It's a stronger argument. I can't guess the court anymore.

CHAIRMAN JOHNSON: That's true.

COMMISSIONER CLARK: Yes, but it will depend on what the interim rates -- if their alternative was leaving the interim rates into effect, if they would have by doing that not recovered what they needed to, there would be some balancing here.

COMMISSIONER DEASON: But I think if we had been confronted with that issue we could have debated those things, and perhaps we could have done something -- could have taken the interim structure and allowed -- and increased the interim structure, keeping the same basic structure relationship between customer classes and increased it enough to generate the revenues to meet their revenue requirement. But we were not given