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APRIL 30, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF APPEALS (HELTON)
DIVISION OF LEGAL SERVICES (GERVASI)
DIVISION OF WATER AND WASTEWATER (RENDELL)

RE: DOCKET NO. 950495-WS - 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.

AGENDA: MAY 12, 1998 -- REGULAR AGENDA -- DECISION ON DECLARATORY STATEMENT AND POST-HEARING DECISION -- PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF CONCERNING DECISION ON DECLARATORY STATEMENT; BY ORDER NO. PSC-98-0231-FOF-FW, PARTIES MAY PARTICIPATE CONCERNING POST-HEARING DECISION RELATING TO EXISTENCE OF AUTOMATIC STAY

CRITICAL DATES: STATUTORY DEADLINE FOR FILING FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT -- 6/10/98

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

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CASE BACKGROUND

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 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).

By Order No. PSC-96-0125-FOF-WS, issued January 25, 1996, the Commission granted the utility interim rate relief based upon the historical test year ended December 31, 1994. The Commission required SSU to post security as a condition for collecting interim rates, and SSU did so by filing a bond in the amount of $5,864,375.

On October 30, 1996, the Commission issued Order No. PSC-96-1320-FOF-WS on the rate proceeding (Final Order). The Final Order is currently pending on appeal. SSU filed a notice of appeal in the First District Court of Appeal on November 1, 1996. OPC filed a notice of cross-appeal on November 26, 1996, and Citrus County filed a notice of cross-appeal on November 27, 1996.

By Order No. PSC-97-0099-FOF-WS, issued on January 27, 1997, the Commission, among other things, granted Florida Water's motion to stay the refund of interim rates relating to Lehigh and Marco Island and ordered the utility to renew its bond posted to secure potential refunds. Also, by Order No. PSC-97-0374-FOF-WS, issued on April 7, 1997, the Commission ruled on various motions for reconsideration of the Final Order and reconsidered and corrected certain errors on its own motion.

On November 25, 1997, the utility filed a Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed (Motion to Establish Mechanism). No responses were filed to the motion. By Order No. PSC-98-0231-FOF-WS, issued February 5, 1998, the Commission dismissed the Motion to Establish Mechanism for lack of jurisdiction and required the utility to file a pleading articulating its views on whether an automatic stay is in effect, resulting from the filing of cross-appeals by OPC and Citrus County, both public bodies. In response to the Order, on March 12, 1998, the utility filed a 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. No responses were filed to the motion. This recommendation addresses that pleading.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Water's petition for declaratory statement?

RECOMMENDATION: No, the petition should be denied. (HELTON)

STAFF ANALYSIS: Section 120.565, Florida Statutes, provides in pertinent part:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(Emphasis added).

Florida Water seeks a declaration concerning Rule 25-22.061(3)(a), Florida Administrative Code, and Rule 9.310(b)(2), Florida Rules of Appellate Procedure. Both of these provisions address the automatic stay that takes place when a public body or official appeals an order. The utility asks the Commission to declare whether these rules triggered an automatic stay when Citrus County filed a notice of cross-appeal in the pending appeal of this rate case. Thus, Florida Water seeks a declaration in an on-going case currently on appeal at the First District Court of Appeal.

The petition filed by Florida Water should be denied for several reasons. First, the petition involves more than Florida Water in its particular circumstances. The declaration requested here affects the lawful rates paid by Florida Water's customers since the Commission entered its Final Order on rates, Order No. PSC-96-1320-FOF-WS, on October 30, 1996, and its Order on Motions for Reconsideration, Order No. PSC-97-0374-FOF-WS, on April 7, 1997. Because the declaration sought here applies to more than "the petitioner's particular set of circumstances," the petition should be denied. Section 120.565(1), Florida Statutes.

In addition, Section 120.565(1), Florida Statutes, authorizes agencies to give an opinion concerning only "the applicability of a statutory provision, or of any rule or order of the agency." Coastal Petroleum Company v. Department of Natural Resources, 608 So. 2d 110 (Fla. 1st DCA 1992)(agency was not authorized to give opinion as to policy adopted at a public meeting); Rector v. Department of Business Regulation, Division of Pari-Mutual Wagering, 592 So. 2d 797, 798-799 (Fla. 4th DCA 1992)(agency could not base declaratory statement on a memorandum issued by a division director); Myers v. Hawkins, 362 So. 2d 926, 928 (Fla. 1978)("Chapter 120, Florida Statutes, is not the appropriate mechanism by which to determine the meaning of ambiguous constitutional terms."). Because the Commission is not authorized to issue a declaratory statement concerning its opinion of a Rule of Appellate Procedure, Florida Water's request is improper and should be denied.

As recognized by Florida Water, neither a Commission or appellate rule "addresses whether a notice of cross-appeal triggers an automatic stay." (Petition at 12) Thus, any answer to Florida Water's question would amount to a policy statement by the agency. The Commission, however, cannot use a declaratory statement "as a vehicle for the adoption of broad agency policies." Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 937 (Fla. 1st DCA 1990); see also Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994)(an agency cannot use a declaratory statement for rule or statutory interpretations that apply to an entire class of persons). The pronouncement requested here would, in effect, be a rule not properly adopted under the rulemaking provisions contained in Section 120.54, Florida Statutes. Moreover, it is doubtful whether the Commission has authority to adopt such a rule. It seems the issue raised here falls more appropriately within the purview of the courts of Florida instead of its administrative agencies. For these reasons also, the declaration sought by Florida Water is improper and should be denied.

Finally, courts have frowned upon agencies issuing declaratory statements when there are ongoing proceedings in other tribunals. The First District Court of Appeal found it to be

> an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of

> obtaining, or attempting to obtain, administrative preemptions over legal issues then pending in a court proceeding involving the same parties.

Suntide Condominium Association, Inc. v. Division of Land Sales, Condominiums and Mobile Homes, Department of Business Regulations, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987).

For the reasons discussed above, staff recommends that Florida Water's petition for declaratory statement should be denied.

ISSUE 2: Did the notices of cross-appeal filed by OPC and Citrus County trigger the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, and, if so, should Florida Water's alternative motion to vacate the automatic stay be granted?

RECOMMENDATION: Yes, the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, were triggered on November 26, 1996, by the filing of the first notice of cross-appeal by a public body. Therefore, Florida Water's alternative motion to vacate the automatic stay should be granted. (GERVASI)

STAFF ANALYSIS: By its motion, Florida Water alteratively requests that if the Commission determines that an automatic stay was triggered by Citrus County's notice of cross-appeal, that such stay be vacated. Florida Water states that it is prepared to post adequate security as determined by the Commission as a predicate to vacation of the stay. No responses to the motion were filed by any of the other parties.

Florida Water argues, albeit in support of its petition for declaratory statement which is the subject of Issue 1 of this recommendation, that an automatic stay was not triggered by Citrus County's notice of cross-appeal. The utility argues that the Committee Notes to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, construed in pari materia with Rule 9.020(g)(1), Florida Rules of Appellate Procedure, support the conclusion that a notice of cross-appeal does not trigger the automatic stay. The Committee Notes to Rule 9.310(b)(2) 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." According to the utility, 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. Breakstone v. Baron's of Surfside, Inc., 528 So. 2d 437, 439 (Fla. 3d DCA 1988). And Rule 9.020(g)(1) defines an "appellant" as "[a] party who seeks to invoke the appeal jurisdiction of a court." The utility argues that Citrus County is not an appellant in the pending appeal of this rate case, but a cross-appellant that did not file a notice of appeal and did not invoke the jurisdiction of the appellate court.

Moreover, the utility points out that neither Citrus County, OPC, nor any other party filed a response to its previous Motion to Establish Mechanism, filed November 25, 1997, to assert that an automatic stay had been triggered. According to the utility, to conclude that an automatic stay had been triggered by the filing of a notice of cross-appeal, the Commission would also have to

conclude that Citrus County, OPC and other intervenors were content to allow the utility to charge final rates which supposedly had been stayed for what now amounts to some seventeen months.

Rule 25-22.061(3)(a), Florida Administrative Code, provides, in pertinent part, that:

> [w]hen 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.

This rule appears to be based, in part, on Rule 9.310(b)(2), Florida Rules of Appellate Procedure, which provides that the timely filing of a notice by a public body or public officer shall automatically operate as a stay pending review. However, because Rule 9.310(b)(2) does not specify the type of notice which triggers the automatic stay, staff researched the issue of whether a notice of cross-appeal filed by a public body or public official also results in an automatic stay.

Staff agrees that based on the language of the Committee Notes to Rule 9.310(b)(2), it could be argued that the provisions of the rule for automatic stay are not applicable when a public body or public officer files a notice of cross-appeal because such notice does not invoke the jurisdiction of the appellate court in the first instance. "[The appellate] court's jurisdiction to entertain an appeal is invoked solely by the notice of appeal which must timely seek review of an appealable trial court order or orders." Breakstone v. Baron's of Surfside, Inc., 528 So. 2d at 439.

However, Breakstone is distinguishable from the facts of the matter before the Commission. The issue faced by the Breakstone court was whether the court had jurisdiction to entertain a cross-appeal from a trial court order which had not been appealed by any party, when the notice of cross-appeal was evidently filed within 10 days of service of the appellants' notice of appeal of two separate and distinct orders in the cause, but more than 30 days after the rendition of the order from which the cross-appeal was being sought. Id. at 438. Rule 9.110(g), Florida Rules of Appellate Procedure, provides that an appellee may cross-appeal by serving a notice within 10 days of service of the appellant's notice or within 30 days of rendition of the order to be reviewed, whichever is later.

The court determined that "a cross[-]appeal is not a separate appeal in itself but 'rides along' with the main appeal -- that is, the cross[-]appeal contemplates, jurisdictionally speaking, an appeal from the same judgment from which the original appeal is taken." Id. at 439. Moreover, the court determined that it could not treat the notice of cross-appeal as a notice of appeal because the notice was untimely filed more than 30 days after the rendition of the order below. Thus, the court found that because it had no jurisdiction under the main appeal, it had no jurisdiction under the cross-appeal to review a separately appealable final order. Id. at 440.

In the instant case, the cross-appeals filed by OPC and by Citrus County indeed constitute appeals filed from the same final order from which the original appeal was taken. And the notices of cross-appeal could have been treated as notices of appeal because they were both filed within 30 days after the rendition of the final order. Therefore, it should be concluded that OPC and Citrus County did invoke the jurisdiction of the appellate court by the filing of their respective notices cross-appeal, as the Committee Note to Rule 9.310(2)(b) indicates that the rule requires, and thus the automatic stay provisions of the rule were indeed triggered by the filing of a notice of cross-appeal by a public official or public body.

The case of Premier Industries v. Mead, 595 So. 2d 122 (Fla. 1st DCA 1992), supports staff's conclusion that a notice of cross-appeal by a public body or public official does operate to trigger the automatic stay provisions of Rule 9.310(2)(b). In that case, Northbrook, a party to the cause below, filed an "answer brief" which was actually aligned with the appellants initial brief, without having filed a notice of joinder in the appellants' appeal. In striking the "answer brief," the 1st DCA found that "[b]ecause Northbrook failed to invoke the appellate jurisdiction of this court by filing a notice of appeal, notice of cross[-]appeal, or notice of joinder in the [main] appeal, it has remained an appellee and is not authorized to use its status as such to argue positions as an aggrieved party in derogation of the appealed order." Id. at 124. Thus the court has articulated that jurisdiction of the court may be invoked by the filing of a notice of cross-appeal.

Staff additionally notes that in the case of Florida Eastern Dev. Co. v. Len-Hal Realty, Inc., 636 So. 2d 756 (Fla. 4th DCA 1994), the Fourth District Court of Appeal was asked to determine whether the automatic stay provisions of 11 U.S.C. Sec. 362(a)(1), Bankruptcy Code, which provide for an automatic stay of all legal proceedings "against the debtor" in a Chapter 11 proceeding were

applicable when it was the debtor who filed the appeal. The Fourth District Court of Appeal determined that the purpose of the automatic stay was still present, and that even though the debtor was the appellant, he was still entitled to the automatic stay.[1] In dicta in that case, the Fourth District Court of Appeal stated that it could not "believe that Congress intended that the applicability of the automatic stay should depend upon 'which party is ahead at a particular stage in the litigation.'" Id. at 758.

Staff believes that the same reasoning is applicable in this case. The purpose of the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, and Rule 9.310(b)(2), Florida Rules of Appellate Procedure, are not negated just because Florida Water filed its notice of appeal first, on the second day after the Final Order was issued, thereby invoking the jurisdiction of the appellate court in the first instance. With the filing of their notices, OPC and Citrus County have raised issues on appeal just as they would have had either of them filed their notice first, before Florida water did. Which party files its notice of appeal first is merely happenstance. Therefore, staff is of the opinion that the Florida Supreme Court intended for Rule 9.310(2)(b) to apply when a public body or public officer files either a notice of appeal or a notice of cross-appeal.

Finally, staff is not persuaded by the utility's argument that because the other parties did not file responses to its previous Motion to Establish Mechanism, the Commission should conclude that they must not believe that an automatic stay was triggered by the cross-appeals filed by OPC and Citrus County. As mentioned previously, neither have any of the parties filed a response to the pleading at issue herein. Parties are not required to file responses to pleadings. Nothing can be gained from speculating as to why the other parties did not choose to file responses on this issue.

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[1]The First District Court of Appeal has explained that the purpose of the automatic stay provisions of Rule 9.310(2)(b) is based upon a policy rationale and "involves the fact that planning-level decisions [made by public bodies or public officers] are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally." FDEP v. Pringle, 23 Fla. L. Weekly D655b (Fla. 1st DCA Feb. 26, 1998) (quoting St. Lucie County v. North Palm Beach Dev. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA), review denied, 453 So. 2d 45 (Fla. 1984).

For the foregoing reasons, staff recommends that the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, were triggered by the filing of the first notice of cross-appeal by a public body or public officer. Pursuant to this rule, the automatic stay was placed into effect on November 26, 1996, when OPC filed its notice of cross-appeal. By its pleading, the utility apparently assumes that if triggered at all, the automatic stay provisions were triggered by Citrus County's notice of cross-appeal. However, when Citrus County filed its notice of cross-appeal the day after OPC filed its notice, the automatic stay was already in effect.

Staff notes that Rule 25-22.061(3)(a), Florida Administrative Code, states that an automatic stay must be vacated upon motion by the utility and the posting of good and sufficient bond or corporate undertaking. Because Florida Water has indicated that it is prepared to post adequate security, as determined by the Commission, as a predicate to vacation of the stay, staff further recommends that the utility's alternative motion to vacate the automatic stay should be granted. The amount of security which should be posted by the utility is the subject of Issue 3 of this recommendation.

ISSUE 3: If staff's recommendation on Issue 2 is approved, what is the appropriate security for Florida Water to post for the purpose of the vacation of the automatic stay?

RECOMMENDATION: If staff's recommendation on Issue 2 is approved, Florida Water should be required to post a bond in the amount of $3,553,766 as security for vacation of the automatic stay. The current interim appeal bond may be reduced to this amount. The bond should state that it will remain in effect during the pendency of the appeal and will be released or terminated upon subsequent order of the Commission addressing the potential refund. (RENDELL)

STAFF ANALYSIS: As stated in Issue 2, Florida Water requests that if the Commission determines that an automatic stay is in place, that such stay be vacated. Pursuant to Rule 25-22.061(3)(a), Florida Administrative Code, an automatic stay must be vacated upon motion by the utility and the posting of good and sufficient bond or corporate undertaking. Florida Water states that it is prepared to post adequate security as determined by the Commission as a predicate to vacation of the stay. However, Florida Water believes any refunds must be accompanied by surcharges; therefore, Florida Water does not believe that any bond should be required.

Florida Water currently has a bond in the amount of $5,864,375 securing potential interim refunds. Pursuant to Order No. PSC-97-0099-FOF-WS, issued January 27, 1997, the Commission denied Florida Water's request to modify or release this bond. In the order, the Commission found the final potential interim refund to be $5,157,887 and determined that in order to adequately protect the customers of Florida Water, the bond securing any potential interim refund shall not be released or modified. The Commission found that due to pending motions for reconsideration and the pending appeals, it would be inappropriate to release or modify the utility's current bond securing interim revenues. However, that decision was made prior to the time that briefs were filed with the First DCA. We are now in a position to be able to analyze the issues on appeal contained in the parties' briefs and argued during oral argument at the First DCA, which was held on February 10, 1998, for the purposes of calculating the appropriate amount of security which should be in place for the utility to vacate the automatic stay.

Since the issues raised on appeal by Citrus County concern rate structure and do not affect revenue requirement, they do not affect the security requirement. Therefore, staff recommends that no security be required resulting from the issues raised by Citrus

County. Moreover, it should be noted that there is not an adequate way to fashion security to protect customers against a potential refund/surcharge situation arising from a revenue neutral rate structure change. Staff does not believe that there is an adequate way to calculate or provide security to protect one group of customers from another.

However, security should be provided for both the interim refund calculation and the amount of revenue requirement on appeal. To this end, staff has analyzed the issues raised on appeal by OPC. Based upon an analysis of those issues, staff has determined that the effect on the annual revenue requirement equates to $1,687,209. This amount includes both the interim refund calculation methodology and the Lehigh acquisition adjustment, which are both on appeal. Assuming a decision by the First DCA by August, 1998, the period of time to provide security would be 23 months. Therefore, staff has calculated the potential amount of refund to be $3,553,766, including interest.

Staff has analyzed whether the utility can support a corporate undertaking in the amount of $3,553,766. Following a review of Florida Water's financial statements by the Division of Auditing and Financial Analysis, it has been determined that the utility cannot support a corporate undertaking in this amount. Although the utility has adequate liquidity both as a trend and for the most recent 12-month period, its equity ratio has trended downward and is low for 1996. In addition, the interest coverage is weak compared to the S&P benchmark for water companies. For these reasons, Florida Water's request to provide a corporate undertaking should be denied.

If the Commission approves staff's recommendation in Issue 2 of this recommendation, staff recommends that Florida Water's current appeal bond in the amount of $5,864,375 may be reduced to $3,553,766, as security for vacation of the automatic stay. This should result in a savings to Florida Water in the annual renewal amount of the appeal bond. Further, the bond should state that it will remain in effect during the pendency of the appeal and will be released or terminated upon subsequent order of the Commission addressing the potential refund.

ISSUE 4: Should the Commission order Florida Water to show cause, in writing within twenty days, why it should not be fined for its apparent violation of Rule 25-22.061(3)(a), Florida Administrative Code?

RECOMMENDATION: No, show cause proceedings should not be initiated. (GERVASI)

STAFF ANALYSIS: As noted in the case background, OPC filed its notice of cross-appeal on November 26, 1996, and Citrus County filed its notice of cross-appeal on November 27, 1997. If the Commission approves Issue 2 of this recommendation, OPC's notice of cross-appeal will have been determined to have triggered the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code.

The Final Order was issued on October 30, 1996. However, SSU had already implemented the rates contained in that order as of September 20, 1996. The utility neither ceased to collect those rates nor filed a motion to vacate the stay after the notices of cross-appeal were filed by OPC and Citrus County. Therefore, by continuing to charge these rates, it would appear that Florida Water violated the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code.

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's continuing to charge the final rates and failing to file a motion to vacate the stay, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

As support for its petition for declaratory statement, Florida Water argues that to hold it accountable for not moving to vacate a supposed automatic stay which it 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. The utility points out that there is no rule contained within the Florida Rules of Appellate Procedure or in Chapter 25-22, Florida Administrative Code, which addresses whether a notice of cross-appeal triggers an automatic stay. Moreover, the utility argues that at the time the cross-appeals were filed in this case, Order No. PSC-96-0146-FOF-WS, filed August 14, 1996, in Docket No. 920199-WS, had not yet been reversed by the First DCA. And according to that order, 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. Thus, the rule of law pronounced by the Commission at the time Citrus County filed its notice of cross-appeal in this case was that a request to vacate an automatic stay would subject the utility to a one-sided refund requirement. The utility argues that for this reason, the suggestion that the utility should have filed a motion to vacate any automatic stay which may have resulted for the filing of a cross-appeal in this case is ludicrous.

Staff is not persuaded by Florida Water's argument that it should not have been expected to file a motion to vacate the automatic stay, if one was triggered, because it would have subjected the utility to another one-sided refund requirement based on the law as it existed at the time the cross-appeals were filed. If the Commission approves Issue 2 of this recommendation, once OPC filed its notice of cross-appeal, the utility was obliged by law to either file a motion to vacate the automatic stay regardless of what type of refund may have resulted from the filing of such motion, or, alternatively, cease to charge the rates approved by the final order rendered in this docket.

Nevertheless, staff agrees that show cause proceedings should not be initiated in this instance. As pointed out by the utility, and as described in Issue 2 of this recommendation, it is arguable that an automatic stay is not triggered by the cross-appeal of a public body or public official, and the utility argues just that. The law on the matter is not crystal clear. For this reason, staff recommends that Florida Water should not be made to show cause, in writing within twenty days, why it should not be fined for its apparent violation of Rule 25-22.061(3)(a), Florida Administrative Code.

ISSUE 5: Should Florida Water's motion to establish mechanism to hold it harmless in the event the modified stand-alone capband rate structure is reversed on appeal be granted?

RECOMMENDATION: No. Because the motion is moot, it need not be ruled upon. (GERVASI)

STAFF ANALYSIS: As noted in the case background, the utility previously filed a motion to establish mechanism to hold it harmless should the Commission-approved rate structure be reversed. By Final Order No. PSC-98-0231-FOF-WS, issued February 5, 1998, the Commission dismissed the motion for lack of jurisdiction. Yet again, by the instant pleading, Florida Water requests the same relief, that the Commission fashion some sort of mechanism to protect both the utility and the customers in the event the capband rate structure is overturned on appeal. The utility advocates a mechanism whereby no refunds and no surcharges would be required should the capband rate structure be reversed.

No adversely affected party moved for reconsideration or filed an appeal of Order No. PSC-98-0231-FOF-WS. Staff notes that Florida Water does not argue in the instant motion that the Commission erred by finding that it lacked jurisdiction to rule upon its previous motion whereby it requested the same relief. Of course, the time for filing a motion for reconsideration of Order No. PSC-98-0231-FOF-WS has expired. Staff recommends that because Order No. PSC-98-0231-FOF-WS renders the instant motion moot, it need not be ruled upon.

ISSUE 6: Should the docket be closed?

RECOMMENDATION: No, the docket should remain open pending the outcome of the appeal. (GERVASI)

STAFF ANALYSIS: The docket should remain open pending the outcome of the appeal.