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, Hernando, Highlands, Hillsborough, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Polk, Putnam, Seminole, St. Johns, St. Lucie Volusia and Washington Counties.	)	Docket No. 950495-WS
	)	Filed: September 22, 1995

SSU'S RESPONSE TO OFFICE OF PUBLIC COUNSEL'S MOTION TO CAP SSU'S MAXIMUM INTERIM AND FINAL RATES TO THE RATES REQUESTED BY SSU

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, hereby files its Response to the Office of Public Counsel's ("OPC") Motion to Cap SSU's Maximum Interim and Final Rates in this Proceeding to the Rates Requested by SSU. In support of its Response, SSU states as follows:

1. As set forth in SSU's September 6, 1995 Response to OPC's Motion to Dismiss Request for Interim Rate Increase, the Commission should strike the instant OPC motion because OPC lacks standing to participate in the Commission's interim rate determination. Apparently, OPC believes that it has some sort of independent right to participate in interim rate determinations because customers are affected by interim rates. As with its prior motion concerning interim rates, OPC cites no authority for this proposition. SSU maintains that there is no such authority -- in Chapter 120, in Chapter 367 or elsewhere. Under Chapter 120, substantially

affected persons are entitled to notice and a hearing only in response to proposed agency action. The Legislature clearly expressed its intent in Section 367.082 that interim rates are not proposed agency action. Interim rates are temporary rates held subject to refund; the refund provision protects the interests of affected persons. As confirmed by the Supreme Court of Florida, the interim rate process is intended to be an expedited process, without a hearing, based on the parameters set forth in the interim rate statute designed to ensure that the utility's earnings are increased to the minimum of the previously authorized range.

> [I]nterim rates are granted upon an expedited basis with the possibility of additional hearings to follow. At the subsequent hearing elements of the award of interim relief may be addressed and further adjustments may be made at the conclusion of the hearing. §366.071(4). Such is clearly not the case for permanent relief. Once a permanent rate award becomes final, those rates are collected free of the encumbrance of possible refund. Permanent rates may be subsequently challenged, but such challenge affects revenues prospectively collected and has no effect on revenues previously collected.
>
> Interim awards attempt to make a utility whole during the pendency of a proceeding without the interjection of any opinion testimony. The statute removes most of the Commission's discretion in such areas as cost-of-equity capital. Interim relief is prescribed by a formula that locks the authorized rate of return to the previously authorized rate of return and mandates that any adjustment may be made consistent with those authorized in the last rate case. §§366.071(2)(a) and 366.071(5)(a). The statute requires a grant of interim relief, if one is to be made, within sixty days of the filing for such relief. This limits the number of issues which may be initially

> considered in granting interim relief. §366.071(2). The Commission is, however, given twelve months to deliberate and grant a permanent award. §366.06(3). After eight months, if the Commission has not concluded its work, the utility is required to put requested rates into effect under bond.
>
> It is clear from a reading of the entire statute that the granting of interim relief should be done so that earnings are increased to the minimum of the previously authorized range.

Citizens v. Public Service Commission, 435 So.2d 784, 786-787 (Fla. 1983).[1] Indeed, OPC has conceded before the Supreme Court of Florida that the Commission is authorized to allow interim rates to go into effect without the necessity of a hearing. Citizens of State of Florida v. Wilson, 568 So.2d 904, 906 (Fla. 1990).

2. The Legislature established only one avenue for party participation in an interim rate determination pursuant to Section 367.082(3). OPC has not sought to avail itself of the sole opportunity afforded parties by the statute. The instant motion is a plea for participation in the interim rate determination. That plea is best directed to the Legislature, not this Commission. In consideration of the foregoing, the Commission should strike OPC's motion for lack of standing. If however, the Commission considers the substance of OPC's motion, the Commission should also consider SSU's arguments set forth below and deny the motion.

---

[1]The Supreme Court of Florida's interpretations of Florida's file and suspend laws apply equally to Sections 364.05(5) (telecommunications companies), 366.06(4) (investor-owned electric utilities) and 367.081(6) (investor-owned water and wastewater utilities) of the Florida Statutes.

3. The Commission should reject OPC's suggestion that interim rates for SSU customers in individual service areas are limited to the interim rates proposed by SSU for such customers. OPC again cites no authority for the proposition that potentially affected persons must be notified of the precise and exact extent by which its interest may be affected by final agency action, let alone interim action pursuant to Section 367.082. As explained in SSU's September 15, 1995, Response to OPC's Second Motion to Dismiss, the law with respect to noticing for rate proceedings is the complete opposite of what OPC would have the Commission believe it is. City of Plant City v. Mann, 337 So.2d 966 (Fla. 1976). OPC filed the instant motion in anticipation of the Commission's changing the rate structure for many of SSU's service areas included in this filing from uniform rates to something else. That anticipated intervening rate change has not yet occurred, and at the time SSU filed the instant rate case, SSU had no way of knowing when, if ever, that intervening rate change would occur. The anticipated change which OPC now identifies is just the type of event which the court in Plant City v. Mann recognized would make sculpting the perfect notice impossible and, therefore, unnecessary. Additionally, since the notice to customers in Docket No. 920199-WS met the requirements of Plant City v. Mann and the anticipated intervening rate change will be based on evidence produced in that docket, customers have already been provided legally sufficient notice of potential rate changes arising from that docket and should not be heard to complain of a lack of

noticing regarding rates which directly result therefrom.

4. The Commission will violate Section 367.082 if it accepts OPC's argument to cap interim rates for each SSU service area at the interim rates proposed in SSU's filing. OPC incorrectly assumes that a utility's proposed interim rates confine the lawful authority of the Commission. Specifically, with respect to interim rates, Section 367.082(2)(a) directs as follows:

> In a proceeding for an interim increase in rates, the Commission **shall authorize**, within sixty days of the filing for such relief, the **collection of rates sufficient** to earn the minimum of the range of rate of return calculated in accordance with subparagraph (5)(b)(2). The difference between the interim rates and the previously authorized rates shall be collected under bond, escrow, letter of credit, or corporate undertaking subject to refund within interest at a rate ordered by the Commission.

Thus, the statute imposes on the Commission the duty to authorize rates sufficient to allow the utility to collect the minimum of its last authorized range of returns. The rates the utility proposes as the vehicle for recovering those revenues are not dispositive, and in fact the Commission routinely rejects utility proposed alterations to rate structure for interim rates.[2] Granting OPC's motion would cause the Commission to violate its statutory obligation stated in Section 367.082(2)(a).

5. In Utilities Operating Co. v. King, 143 So.2d 854 (Fla. 1962), the Florida Supreme Court resolved an analogous situation

[2]The uniform rate structure proposed by SSU for interim rates was the rate structure in existence at the time the request was made.

concerning final rates. In that case, the utility proposed final rates which the Commission acknowledged would generate revenues less than those necessary to allow the utility to recover a fair rate of return. The Commission authorized rates lower than those the utility proposed. The court held that the Commission was without authority to do this.

> [I]n exercising the power to establish rates under the statute here involved, the Commission must give consideration to all the standards prescribed by the legislature and [] the mere fact that a utility requests rates which will provide less than a fair return does not relieve the Commission from observance of such standards.

143 So.2d at 858. Similarly in this case, the Commission is without authority to shirk its duty under the interim rate statute. The Commission must determine whether SSU has made a prima facie showing of a revenue deficiency pursuant to the statute and must authorize rates sufficient to allow SSU to recover that deficiency notwithstanding any intervening rate change anticipated to occur either prior to or after the interim rate determination. The statute places no duty of prescience on the Commission or on the utility for predicting intervening rate changes. Further, aside from being contrary to the plain language of Section 367.082, OPC's motion suggests action contrary to the clear legislative intent of the interim rate statute as recognized by the Florida Supreme Court in Citizens of Florida v. Mayo, 316 So.2d 262 (Fla. 1975) and Florida Power Corp. v. Hawkins, 367 So.2d 1011 (Fla. 1979).

6. As previously discussed, Section 367.082 is designed to provide a utility a rapid mechanism for earning its last authorized

rate of return while a rate case is pending. Interim revenues are held subject to refund so ratepayers are protected if the utility recovers revenues in excess of its newly authorized rate of return during the interim collection period. Granting OPC's motion would thwart the Legislature's intent. OPC requests that the Commission deny SSU of any meaningful opportunity to earn its last authorized rate of return. Not allowing a utility to collect its fair rate of return is confiscatory and deprives the utility of its due process rights. E.g. Keystone Water Co. v. Bevis, 278 So.2d 606 (Fla. 1973) and Gulf Power Co. v. Bevis, 289 So.2d 401 (Fla. 1974). It makes no difference whether confiscation occurs in the establishment of final rates or interim rates. Insufficient interim revenues, once lost, can never be recovered.

WHEREFORE, SSU respectfully requests that OPC's Motion to Cap SSU's Maximum and Interim Final Rates in this Proceeding to the Rates Requested by SSU be denied.

Respectfully submitted,

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

and

BRIAN P. ARMSTRONG, ESQ.
MATTHEW FEIL, ESQ.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 22nd day of September, 1995:

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

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

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

Joseph Coriaci, Pres.
Marco Island Civic Asso.
413 S. Barfield Drive
Marco Island, FL 33937

Mr. Morty Miller
President
Spring Hill Civic Asso., Inc.
P. O. Box 3092
Spring Hill, FL 34606

Mr. W. Allen Case
President
Sugarmill Woods Civic Asso.
91 Cypress Blvd., West
Homosassa, FL 34446

KENNETH A. HOFFMAN, ESQ.