

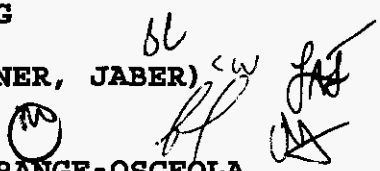
FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

October 26, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CULPEPPER, WAGNER, JABER) ^{bc}
DIVISION OF WATER AND WASTEWATER (WILLIS) ^{cw} 

RE: UTILITY: SOUTHERN STATES UTILITIES, INC. (ORANGE-OSCEOLA UTILITIES, INC.)
DOCKET NO. 950495-WS
COUNTY: 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

CASE: APPLICATION FOR RATE INCREASE 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 BY SOUTHERN STATES UTILITIES, INC.

AGENDA: NOVEMBER 7, 1995 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

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

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility that provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 service areas, pursuant to Section 367.081, Florida Statutes. SSU also requested an increase in service availability charges,

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pursuant to Section 367.101, Florida Statutes. On August 2, 1995, SSU completed the minimum filing requirements for a general rate increase, and that date was established as the official filing date for this proceeding.

On July 26, 1995, the Commission issued Order No. PSC-95-0901-PCO-WS that acknowledged the intervention of the Office of the Public Counsel (OPC). The Sugarmill Woods Civic Association, Inc., the Spring Hill Civic Association, Inc., and the Marco Island Civic Association, Inc., were also granted intervenor status by Order No. PSC-95-1034-PCO-WS, issued August 21, 1995 and Order No. PSC-95-1143-PCO-WS, issued on September 14, 1995, respectively. A technical hearing has been scheduled for January 29-31, February 1, 2, 5, and 7-9, 1996.

The Commission recently reviewed the jurisdictional status of SSU's facilities throughout the state in Docket No. 930945-WS. In Order No. PSC-95-0894-FOF-WS, issued on July 21, 1995 (now on appeal), the Commission determined that SSU's facilities and land constituted a single system and that the Commission had jurisdiction over all of SSU's facilities and land throughout the state pursuant to Section 367.171, Florida Statutes.

OPC filed four motions to dismiss the rate case: on August 29, 1995, September 8, 1995, September 14, 1995 and September 22, 1995. At the October 10, 1995, Agenda Conference, the Commission considered OPC's First Motion to Dismiss. On September 20 and 22, 1995, Sugarmill Woods Civic Association, Inc., Spring Hill Civic Association, Inc., and Marco Island Civic Association, hereinafter referred to as the "Associations", filed a joinder with and adoption of the Citizen's motions to dismiss, Citizen's Second Motion to Dismiss, and Citizen's Third Motion to Dismiss. The Associations' Notice of Joinder does not raise additional argument. This recommendation addresses OPC's Second, Third and Fourth Motions to Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant OPC's Request for Oral Argument on its Second Motion to Dismiss?

RECOMMENDATION: Yes. Oral argument should be permitted on OPC's Second, Third, and Fourth Motions to Dismiss since these matters have not been to hearing. Oral argument, however, should be limited to five minutes for each side. (WAGNER, CULPEPPER)

STAFF ANALYSIS: On September 8, 1995, OPC filed one request for oral argument regarding its Second Motion to Dismiss.

Rule 25-22.058(1), Florida Administrative Code, requires a request for oral argument to accompany the pleading and to "...state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." Staff believes that OPC has substantially complied with Rule 25-22.058(1), Florida Administrative Code, and, therefore, recommends that OPC be granted oral argument on its Second Motion to Dismiss.

OPC did not file a motion for oral argument with either its Third Motion to Dismiss or its Fourth Motion to Dismiss. OPC did, however, file a motion requesting oral argument on all motions pending before the Commission. By Order No. PSC-95-1259-PCO-WS, issued October 13, 1995, OPC's motion requesting oral argument on all motions pending before the Commission was denied by the Prehearing Officer. Because this matter has not yet been to hearing, parties may participate at the Agenda Conference where the Commission considers the Motions to Dismiss. Therefore, the Commission should also allow the parties the opportunity to address OPC's Third and Fourth Motions to Dismiss. Staff recommends that all oral argument should be limited to five minutes per side.

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ISSUE 2: Should the Commission grant OPC's Second Motion to Dismiss Southern States Utilities, Inc.'s application for a rate increase?

RECOMMENDATION: No. The Commission should deny OPC's Second Motion to Dismiss. SSU's petition adequately states a cause of action upon which the Commission can grant relief. (WAGNER, CULPEPPER)

STAFF ANALYSIS: On September 8, 1995, OPC filed its Second Motion to Dismiss SSU's application for a rate increase. SSU responded to OPC's Second Motion to Dismiss on September 15, 1995.

Rule 25-22.0407, Florida Administrative Code, requires a company to provide a copy of its petition, minimum filing requirements (MFRs) and rate case synopsis to the chief executive officer of the governing body of each municipality and county within the service areas included in the rate request. In addition, a copy must be made available at the company headquarters, business offices and county libraries, or community centers when the company does not have an office in the service territory.

In its Motion, OPC argues that SSU did not provide proper notice of the rate case to the public. According to OPC, the rate case synopsis and other materials are not clear; therefore, it is impossible for customers or other interested individuals to tell what SSU is requesting.

In its response, SSU states that it has disseminated sufficient information pursuant to Rule 25-22.0407, Florida Administrative Code. SSU argues that it has complied with the Order Finding Deficiency and Requiring Revised Filing, Order No. PSC-95-1043-FOF-WS, issued in this docket on August 21, 1995. In addition, SSU argues that OPC's Second Motion to Dismiss is inappropriate. SSU states that if the information disseminated is deficient in some way, any harm to the customers is not irreparable and does not warrant the dismissal of SSU's entire petition.

Staff believes that OPC's motion to dismiss should be denied. The standard used in considering OPC's motion to dismiss is to view the facts set forth in the petition in the light most favorable to SSU in order to determine if SSU's claim is cognizable under the provisions of Section 367.081, Florida Statutes.

In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side." See also Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2nd DCA 1994) (stating that it is improper to consider information extrinsic of the complaint).

In considering this motion to dismiss, the Commission should not look beyond the four corners of the complaint, and make a determination on evidence that amounts to a granting of summary judgment. OPC is seeking a sanction based upon a perceived failure to fulfill the notice requirement, as set forth in Rule 25-22.0407, Florida Administrative Code. Staff, however, believes that SSU has adequately complied with Rule 25-22.0407, Florida Administrative Code. Dismissal based upon a perceived failure to fulfill the notice requirement would be an inappropriate and "drastic remedy," that goes beyond the four corners of the complaint. See Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993). See also Neal v. Neal, 363 So. 2d 810 (Fla. 1st DCA 1994) (stating that the severity of the sanction should match the violation); and Shahid v. Campbell, 552 So. 2d 321 (Fla. 1st DCA 1989). Furthermore, OPC has not cited any legal justification to dismiss the rate case based upon a perceived deficiency in the notice. Staff, therefore, recommends that OPC's Second Motion to Dismiss SSU's petition should be denied.

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ISSUE 3: Should the Commission grant OPC's Third Motion to Dismiss?

RECOMMENDATION: No. Based upon the legal analysis in Issue 2, staff recommends that the Commission deny OPC's Third Motion to Dismiss SSU's petition. (WAGNER, CULPEPPER)

STAFF ANALYSIS: On September 14, 1995, OPC filed a Third Motion to Dismiss SSU's petition. In its Third Motion, OPC argues that "the Citizens have no notice of and have no means to discover whether and/or to what extent their interests are affected by SSU's filing."

OPC argues that four and one-half months have passed since SSU's filing and that SSU did not properly notice its customers. OPC contends the notice that SSU provided misleads its customers, because it does not inform them to what extent their rates may be raised. Rule 25-22.0407(4)(c)1, Florida Administrative Code, requires a company to provide a summary of the MFRs showing a comparison of the present and proposed rates and charges. OPC argues that since the present or proposed rates are not known and the rates identified in the notice and rate case synopsis are incorrect, there is no way to determine the extent to which customers' interests will be affected.

In its response filed on September 21, 1995, SSU argues that OPC's allegations do not form the basis for a motion to dismiss. SSU states that OPC has not addressed the sufficiency of SSU's Amended and Restated Application for Increased Water and Wastewater Rates, Allowance for Funds Prudently Invested and Service Availability Charges, nor its MFRs. Thus, SSU argues that OPC's motion lacks specificity. In addition, SSU argues that OPC's assertion that SSU has not met the notice requirement is an affirmative defense that does not form the basis for dismissal of SSU's petition.

Staff recommends that the Commission deny OPC's Third Motion to Dismiss SSU's petition based upon the same analysis found in Issue 2.

ISSUE 4: Should the Commission grant OPC's Fourth Motion to Dismiss?

RECOMMENDATION: No. Based upon the legal analysis in Issue 2, staff recommends that the Commission deny OPC's Fourth Motion to Dismiss SSU's petition. (WAGNER, CULPEPPER)

STAFF ANALYSIS: On September 22, 1995, OPC filed its Fourth Motion to Dismiss. In its Motion, OPC argues that SSU's filing should be dismissed because the MFRs filed with the application no longer support or show any alleged revenue deficiency.

OPC argues that SSU's MFRs contain incorrect information resulting from the Commission's implementation of a stand-alone, system-specific rate structure, rather than the uniform rate structure relied upon by SSU. As such, OPC argues that SSU's calculations of alleged revenue deficiencies are no longer correct. OPC asserts that the Commission should, therefore, dismiss SSU's petition.

In its response filed on September 29, 1995, SSU argues that OPC's motion is "precipitous" because the Commission's decision to implement the stand-alone rate structure is not final, has not been reduced to writing, is subject to motions for reconsideration and appeal, and is subject to stay of implementation. In addition, SSU argues that the motion is unnecessary and remarkable in that interim rates are collected subject to refund.

Staff agrees with SSU that OPC has provided no legal basis justifying this motion to dismiss. Staff also notes that OPC's motion goes to the quality of the evidence in SSU's MFRs which is inappropriate for a motion to dismiss. Staff, therefore, recommends denial of OPC's Fourth Motion to Dismiss SSU's petition based upon the analysis in Issue 2.

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ISSUE 5: Should this docket be closed?

STAFF RECOMMENDATION: No. This docket should remain open pending the final hearing in this docket scheduled for January 29-31, February 1,2,5, and 7-9, 1996. (WAGNER, CULPEPPER)

STAFF ANALYSIS: A final hearing is scheduled in this docket for January 29-31, February 1,2,5, and 7-9, 1996. This docket should, therefore, remain open pending resolution of the issues in this docket.