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April 1, 1996

IN REPLY REFER TO:
Tampa Office

Public Service Commission
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2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Application of Southern States Utilities, Inc., et al.
Docket No. 920199-WS

Gentlemen:

ACK ✓
AFA ~~above~~-captioned case:
APP
CAF
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Enclosed please find the following for proper filing in the

SUGARMILL WOODS' BRIEF CONCERNING
IMPACT OF GTE CASE ON RECONSIDERATION
(Original plus 15 copies, plus diskette)

Would you please be so kind as to stamp the enclosed copy of this transmittal letter when received and return same to this office in the enclosed stamped self-addressed envelope. Thank you.

Very truly yours,

Susan W. Fox

Susan W. Fox
(Signed for attorney to avoid delay)

SWF/ce

Enclosures

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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

SUGARMILL WOODS' BRIEF CONCERNING
IMPACT OF GTE CASE ON RECONSIDERATION

INTRODUCTION

The Commission has authority on its own motion to correct clerical errors and errors arising from mistake or inadvertence. Taylor v. Department of Professional Regulation, 527 So.2d 557 (Fla. 1988). It does not have authority to entertain the present motion for reconsideration on its own motion. This motion violates the principles of administrative finality, is unauthorized and unwarranted.

At the March 5, 1996 Agenda Conference, the Commission apparently felt that any member of the majority could move for reconsideration of the order on remand. This is a concept that arises out of Roberts Rules of Order and does not apply here. The Commission has made a final decision in this case, and nothing was

overlooked. The law applicable to the order on remand has not changed since the order was issued.

For the foregoing reasons, Sugarmill Woods objects to the current proceedings on the Commission's own motion for reconsideration, and files this brief under protest.

I. WHETHER THE RECORD SHOULD BE REOPENED

The Supreme Court's opinion in GTE Florida, Inc. v. Clark, No. 85, 776 (Fla. February 29, 1996) does not address the question whether the record should be reopened, and thus provides no basis for reopening the record here. In fact, the PSC's underlying GTE opinion (the portion not set aside on appeal) discussed the possibility of reopening the record, but decided reopening the record is inappropriate. This PSC decision strongly supports the Commission's decision not to reopen the record here.

> "The Commission's rate orders are not often reversed by the Appellate Courts, but generally, the Commission has not found it necessary to conduct further evidentiary proceedings to implement remands....
>
> We note that the court's decision was to '... reverse the PSC's determination of this question.' Given the Commission's general practice of not conducting further evidentiary proceedings on remand unless the record is insufficient or incomplete, we believe no further hearing ... is appropriate." Order No. PSC 95-0512-FOF-TL, Order implementing remand issued April 26, 1995 and Docket No. 92-0188 after the remand of GTE Florida, Inc. v. Deason, 642 So.2d 545 (Fla. 1994). (Emphasis added).

As the Commission pointed out in the GTE order, the Commission may sometimes make more explicit factual findings if the findings

are supported by the existing record and the Court's order calls for further findings. See Village of North Palm Beach v. Mason, 188 So.2d 778 (Fla. 1966). Here, however, the court expressly found that there was no competent substantial evidence to support the "functional relationship" standard in this case. The Commission's own analysis of the North Palm Beach case in the GTE order demonstrates that additional findings cannot be made on an insufficient record. Instead, the party who had the burden of proof on the issue had to present adequate evidence to support the findings during the initial hearing. See Vistaco., Inc. v. Prestige Properties, Inc., 597 So.2d 356 (Fla. 1st DCA 1992) (Court reversed order on remand which considered new evidence that was known and available to the parties but not presented at initial hearing).

Functional relatedness of SSU's land and facilities was not an issue in the rate case. Obviously, it would be highly inappropriate to reopen the record now to take evidence on a matter that was not even an issue in the initial case.

When an appellate court disposes of an entire appeal by ruling on one dispositive issue, then it does not have to address subordinate issues. There were six issues on appeal in Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA 1995, most of which would still be relevant if the court had contemplated a further hearing before the PSC. Instead, the court said that it did not have to consider all of those issues because it was disposing of the case on the ground that the Commission

lacked statutory authority to award uniform rates. The issues not reach by the court included issues regarding adequacy of notice and point of entry to the proceedings for parties that were denied intervention. These issues obviously would have to be dealt with if another evidentiary hearing were to be held. The statutory authority issue was dispositive: "We decline to address each issue separately because we reverse on the ground that the PSC exceeded its statutory authority when it approved uniform statewide rates." 656 So.2d at 1309 (emphasis added).

The suggestion that "statutory authority" was a new issue or that "functional relatedness" was a new legal standard that couldn't have been foreseen by the parties was, as the Primary Staff Recommendation on remand pointed out, rejected by the court on rehearing. Furthermore, the finding had previously been made in Board of County Commissioners v. Beard, 601 So.2d 590 (Fla. 1st DCA 1992) and thus was not anything new.

The First District also refused the argument that "functional relatedness" was a new standard in Docket No. 93-0880 presently on appeal as Sugarmill Woods Civic Association, Inc. v. Southern States Utilities, Appellate Case No. 95-425. The Commission had filed a Motion to Relinquish Jurisdiction to make supplemental findings and/or reopen the record on "functional relatedness", but the court denied this motion.

Reopening the record would violate the law of the case doctrine. The law of the present case is that "[SSU's] systems are not functionally related as required by Section 367.021(11), their

relationship being apparently confined to fiscal functions relating from common ownership." 656 So.2d 1310 (Emphasis supplied).

To reopen the record and make contradictory findings would require the Commission to contradict the court's ruling in violation of the law of the case.

> "Lower courts cannot change the law of the case as decided by this court, or, alternatively, by the highest court hearing the case. We are the only court that has the power to change the law of the case established by this Court. Additionally, it is a well settled rule of law that 'the judgment of an Appellate Court, where it issues a mandate, is a final judgment in the cause and compliance therewith by the lower court is a purely ministerial act." [Citations omitted.] Burner Enterprise, Inc. v. Department of Revenue, 452 So.2d 550 (Fla. 1984).

The law of the case doctrine applies to any question that could have been raised in the prior appeal of the case as well as any question decided by the court by implication. Valsecchi v. Proprietor's Insurance Co., 502 So. 1310 (Fla. 3rd DCA 1987). Administrative agencies are treated the same as lower courts and are equally obliged to adhere to the law of the case. Wood v. Department of Professional Regulations, 480 So.2d 1079 (Fla. 1st DCA 1986). The law of the case means that questions that have been decided on appeal to a court of ultimate resort govern the case through all subsequent stages of the proceedings. Wood, supra at 1081. Law of the case is like res judicata in that the court's judgment on a particular issue is conclusive as to the parties and the issues decided in the same or any other controversy. Id.

For the same reason, any subsequent efforts to make findings concerning functional relatedness (for example, in the jurisdictional docket presently on appeal as Hernando County v. Southern States Utilities, Appellate Case #95-2935,) are barred under the doctrine of administrative res judicata. Wood, supra at 1081. ("The judgment of a court of competent jurisdiction rendered on a particular issue is conclusive as to the parties and the issues decided in the same or any other controversy.")

In sum, there is nothing in the GTE opinion that would indicate the Commission has made a mistake of fact or had overlooked or misapprehended any matter relating to the reopening of the record. The GTE opinion deals with the right to refunds and surcharges after remands, a matter that has nothing to do with whether or not the record should be reopened. Sugarmill Woods objects to the reconsideration of this issue, and submits that the Commission has no authority for reconsideration.

II. WHETHER THE REFUND ORDER SHOULD BE RECONSIDERED.

The GTE Opinion strongly confirms the propriety of making refunds to the customers who overpaid for water and sewer rates during the pendency of this appeal. Just as GTE could not be deprived of revenue under an erroneous order of the Public Service Commission, the customers cannot be permanently deprived either. The GTE Opinion supports what Sugarmill Woods has argued throughout these remand proceedings: since money changed hands under the terms of an erroneous judgment of the Commission, restitution to the parties who lost funds under the terms of the order is

necessary. Here, this means that the parties who overpaid are entitled to refunds.

The First District's opinion reversing uniform rates holds that SSU's 127 systems cannot be combined for rate making purposes. There was no combined "revenue requirement" for SSU. Instead, there was a revenue requirement for each of the 127 systems on a stand alone basis that could be calculated by the standard ratemaking formula:

Revenue Requirement	=	Expenses + (Rate Base minus Depreciation)	X	Multiplied by the allowed rate of return

There was also a rate design in effect that could be increased proportionately to arrive at new rates. Any amounts paid in excess of this maximum allowable rate must be refunded because the Commission exceeded its authority in demanding payment.

This is a matter of restitution to restore the parties to their original positions before the entry of the erroneous judgment. See, e.g., Sheriff of Alachua County v. Hardie, 433 So.2d 15 (Fla. 1st DCA 1983); Mann v. Thompson, 118 So.2d 112 (Fla. 1st DCA 1960). The refunds have already been too long delayed, and should be required immediately. As Budd Hansen has been often heard to say, the senior citizens who reside in Sugarmill Woods "don't even buy green bananas anymore". It has now been one year since the court reversed the uniform rate order. These customers should not wait any longer for their refunds.

When this Commission lifted the automatic stay, and then defended the lifting of the stay before the First District, representations were made that the customers would be protected in

the event of reversal of the Commission's order. The representations were confirmed by the Commissioners themselves at the prior hearing on remand, and a reversal of the refund order now would amount to nothing less than a disavowal of those earlier representations, and be severely damaging to the credibility of the Commission.

III. WHETHER A SURCHARGE SHOULD BE ADOPTED AS TO CUSTOMERS WHO WERE SUBSIDIZED UNDER UNIFORM RATES

The Supreme Court's opinion in GTE holds that a failure to request a stay during the pendency of an appeal does not result in a waiver of the right to recover underearnings through a surcharge after reversal of an erroneous Commission order resulting in underearnings. The present situation, however, is completely different. In the present case, there was a stay, and there were rates in effect that would have allowed SSU to recover its full aggregate revenue requirements. As pointed out at the Agenda Conference on March 5, 1995, the interim rate actually exceeded the final rates, resulting in an interim rate refund of a fairly insignificant amount. However, those rates could have remained in effect with no risk to the utility by simply not challenging the automatic stay. However, SSU did request lifting of the automatic stay, and the issue then was raised before the Commission as to what would happen if the stay were lifted. First, the staff recommendation raised this issue, but stressed:

> "Since the utility has asked to have the stay lifted, staff believes the utility has made the choice to bear the particular loss that may be associated with implementing the final rates pending the resolution of the appeal. In its motion, the utility asserts that it

> does not believe it will suffer any losses based on its position that it will prevail on appeal." See Appendix "D" to Joint Petition of Sugarmill Woods Civic Association, et al. on remand.

At Oral Argument on November 23, 1993, SSU's attorney, Ken Hoffman, supported the staff recommendation and urged the lifting of the stay, stressing that SSU's bond "would cover any obligation of Southern State to make refunds to customers should the appellate court reverse the Commission."

At the Agenda Conference, the result of a reversal was discussed at some length between the Commissioners and Chuck Hill, on behalf of the Commission Staff, stating,

> (Mr. Hill)
> "The customers are going to be protected. There is not a doubt about that.
>
> ***
>
> And if the courts say you cannot do what you have done, then you have got to go back to a system specific rate and revenue requirements. That's where you have to go, there is no other place to go. And we may end up arguing with the utility over refunds, but there isn't a doubt in my mind that if we are reversed on that and have to redo it, they have collected money they should not have collected and it will have to be refunded. And the company will end up on the short end of it."
>
> Commissioner Clark: "Well they have collected money they should have recovered from the wrong people."
>
> Mr. Hill: "Absolutely, and they will have no way to go back to the right people and collect those funds."
>
> * * *
>
> Mr. Hill: "And while that's an interesting argument, I think that if indeed we are

> overturned by the courts, then the revenue requirements fall out on a system-specific basis and I think the company will be on shaky ground with that argument and will lose money. Ibid, Exhibit "E".

The order vacating the automatic stay directly addressed the potential financial impact on SSU saying:

> "We are concerned that the utility may not be afforded its statutory opportunity to earn a fair rate of return, whether it implements the final rates and loses the appeal or does not implement final rates and prevails on appeal. Since the utility has implemented the final rates and has asked to have the stay lifted, we find that the utility has made the choice to bear the risk of loss that may be associated with implementing the final rates pending the resolution of the appeal." Ibid. Appendix "F".

Sugarmill Woods and Citrus County then sought review in the First District and requested to have the automatic stay reinstated, however, SSU and the Commission Staff supported the correctness of the Commission's order lifting the stay. In other words, SSU not only did not appeal the order finding that it had "made the choice to bear the risk of loss", but supported that order in the appellate court as protecting the customers from all harm pending the appeal.

In summary, the present case presents a clear cut case for waiver that was not present in the GTE case.

At the present time, the customers who might be surcharged are unrepresented. The Office of the Public Counsel has found itself unable to argue their side of the case because of the manner in which the Commission has framed these issues (i.e., whether the record should be reopened as the first issue, which continues to

pit one customer group against another). If this Commission feels that SSU has not waived its right to seek surcharges, then special counsel should be appointed to represent the customers to be surcharged.

> "[T]he rate setting function of the Commission is best performed when those who will pay utility rates are represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company." Citizens of Florida v. Mayo, 333 So.2d 1, 6 (Fla. 1976).

There are many arguments that can be made against the surcharge. Among them is the fact that the utility never asked for compensatory rates on many of the subsidized utility systems, and was under no obligation to do so.

CONCLUSION

The Commission should once and for all deny reconsideration, reinstate its order on remand, and move forward with the refunds immediately.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail, postage prepaid, this 1st day of April, 1996 to the following persons:

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