BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of the Board of Commissioners of Collier County, Florida, for Declaratory Statement Regarding the Florida Public Service Commission's Entitlement to Regulatory Assessment Fees Collected By Southern States Utilities in Collier County, Florida, After February 27, 1996	Docket No. 960806-WS Filed: 7-29-96

SOUTHERN STATES UTILITIES, INC.'S PETITION TO INTERVENE

AND

SOUTHERN STATES UTILITIES, INC.'S RESPONSE AND ANSWER TO THE COLLIER COUNTY COMMISSIONERS' PETITION FOR DECLARATORY STATEMENT

Southern States Utilities, Inc. ("SSU"), by and through its undersigned attorneys hereby files this Petition to Intervene pursuant to Rule 25-22.039, Florida Administrative Code, and this Response and Answer to the Board of Collier County Commissioners' Petition for Declaratory Statement[1] pursuant to Rule 25-22.037, Florida Administrative Code.

As explained in detail hereinbelow, SSU is entitled to intervene in this matter because the action the Public Service Commission ("Commission") is asked to take, i.e. to determine the amount of regulatory assessment fees ("RAFs") SSU may owe the

[1] The Petition for Declaratory Statement is entitled, "Petition of the Board of County Commissioners for Collier County, Florida, for Declaratory Statement Regarding the Florida Public Service Commission's Entitlement to Regulatory Assessment Fees Collected by Southern States Utilities Inc. in Collier County, Florida, After February 27, 1996." Hereinafter, SSU will refer to said pleading as "the Petition for Declaratory Statement" or simply "the Petition."

Commission, is based on an alleged jurisdictional status which SSU disputes and which affects SSU's substantial interests. As also explained hereinbelow, the Petition for Declaratory Statement must be denied because: (1) the Petition improperly seeks interpretation of Florida Rule of Appellate Procedure 9.310 (concerning stays pending judicial review) as that rule impacts the Commission's regulatory authority; (2) the Petition incorrectly assumes that while the automatic stay of the Commission's order in Docket No. 930945-WS is in place, the stay divests the Commission of regulatory authority; (3) the status quo on the effective date of the stay, when the Commission had complete regulatory authority over SSU in the county, should be preserved lest the stay be used as a weapon and not a shield; (4) the Petition improperly seeks resolution of a matter not ripe for determination as a declaratory statement; (5) the Petition and the supporting information attached to it are incomplete, flawed and erroneous; (6) the Petition improperly seeks the determination of the substantial interests of another, namely SSU; and (7) because disposition of the Petition impacts SSU's substantial interests, SSU is entitled to a hearing pursuant to § 120.57, Florida Statutes, on the issues of fact and law raised herein, including the issue of whether the Commission's regulatory authority over SSU in Collier County is exclusive.

In support of its Petition to Intervene and its Response and Answer, SSU states as follows:

BACKGROUND

1. On July 7, 1996, the Board of County Commissioners of Collier County (the "Collier Board") served SSU by mail with a copy of its Petition for Declaratory Statement.

2. The stated prayer for relief in the Petition is for the Commission to declare (1) "it has no entitlement to, nor will make any claim against, regulatory assessment fees collected by Southern States Utilities, Inc. from its customers located in Collier County, Florida, for the period **from February 28, 1996 until the date of any appellate decision in Docket No. 930945-WS favoring the resumption of Commission jurisdiction in Collier County**" and (2) "the Commission's entitlement to . . . [said fees] as the result of a favorable appellate decision in Docket No. 930945-WS will only be owing [to the Commission] pro rata during the appropriate 6-month regulatory assessment period beginning on the date the issue of the Commission's jurisdiction . . . in Collier County is finally resolved." (Petition, pp. 8-9.) (Emphasis added.) Although cast in terms of what RAFs the Commission is entitled to, the question is equally and inseparably aimed at SSU and the RAFs SSU must pay the Commission.

3. Previously, by Order No. PSC-95-0894-FOF-WS, issued July 21, 1995, in Docket No. 930945-WS (hereinafter "Order Determining Jurisdiction Over SSU"), the Commission ruled, in pertinent part, that SSU's land and facilities throughout Florida constituted a single, functionally related utility "system," as defined by §

367.021(11), Florida Statutes, and that the Commission had exclusive regulatory authority over SSU pursuant to § 367.171(7), Florida Statutes. Section 367.171(7), Florida Statutes, provides, in pertinent part, as follows:

> Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . . .

4. The county parties to Docket No. 930945-WS filed separate notices of appeal to the Order Determining Jurisdiction Over SSU with the First District Court of Appeal. The Collier Board's Notice of Appeal was filed August 18, 1995.

5. Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure provides for an "automatic" stay as follows:

> 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 a stay, impose any lawful conditions, or vacate the stay.

Fla. R. App. P. 9.310(e) provides a stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

6. On February 27, 1996, the Collier Board alleges to have passed Resolution No. 96-104, which purports to vest the Collier Board with regulatory authority over water and wastewater utilities located in Collier County pursuant to § 367.171(1), Florida

Statutes. The resolution came some six months after the Collier Board's appeal and imposition of the stay.

7. By Order No. PSC-96-0582-FOF-WS, issued May 3, 1996, in Docket No. 960272-WS (hereinafter "Order Acknowledging Recision of Jurisdiction"), the Commission acknowledged Resolution No. 96-104 and pronounced the disposition of various utilities' certificates of authorization, including SSU's certificates to operate in Collier County issued long before the Order Determining Jurisdiction Over SSU, Certificates Nos. 452-W and 386-S. In that Order, the Commission quoted the "pending cases" provision of § 367.171(5), Florida Statutes, which states as follows:

> When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the commission, or in any court by appeal from any order of the commission, shall remain within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed by any party with the commission or initiated by the commission, whether or not the parties or the subject of any case relates to a utility in a county wherein this chapter no longer applies.

The Commission then identified the cases affecting SSU's Collier County operations which were pending as of the date of Resolution No. 96-104.

8. Section 350.113, Florida Statutes, addresses the fees, charges, penalties and interest which the Commission collects. Said section establishes a special fund in the State Treasury designated the Florida Public Service Regulatory Trust Fund ("the Trust Fund") in which all "fees . . . collected by the commission"

must be deposited. § 350.113(1) and (2), Florida Statutes. Money in the Trust Fund may be used by the Commission in the performance of its duties and is subject to Legislative appropriations. §§ 350.113, 215.31, 215.32, Florida Statutes; see generally chap. 216, Florida Statutes.

9. Subsection (3) of § 350.113, Florida Statutes, provides, in pertinent part, as follows:

> Each regulated company under the jurisdiction of the commission, which company was in operation for the preceding 6-month period, shall pay to the commission within 30 days following the end of each 6-month period, commencing June 30, 1977, a fee based upon the gross operating revenues for such period subject to the limitations of this subsection. The fees . . . shall in no event be greater than:
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> . . . . . .
>
> (e) For each regulated company licensed under chapter 367, 2.5 percent of its gross revenues derived from intrastate business.
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> . . . . Each regulated company which is subject to the jurisdiction of the commission, but which did not operate under the commission's jurisdiction during the entire preceding 6-month period, shall within 30 days after the close of the first 6-month period during which it commenced operations under, or became subject to, the jurisdiction of the commission, pay to the commission the prescribed fee based upon its gross operating revenues derived from intrastate business during those months or parts of months in which the regulated company did operate during such 6-month period. . . . .

Section 350.111, Florida Statutes, defines "regulated company" for purposes of § 350.113, Florida Statutes, as "any person holding a valid and current certificate from the commission under . . . chapter 367."

10. Section 367.145(1), Florida Statutes, provides:

> The commission shall set by a rule a regulatory assessment fee that each utility must pay **once a year** in conjunction with filing its annual financial report required by commission rule. Notwithstanding any provision of law to the contrary, the amount of the regulatory assessment fee shall not exceed 4.5 percent of the gross revenues of the utility derived from intrastate business, excluding sales for resale made to a regulated company.

(Emphasis added.) It should be noted that § 350.113(3) and § 367.145(1) conflict in two respects pertinent to this matter. First, § 350.113(3) imposes RAFs to be collected every 6-months, whereas § 367.145(1) imposes RAFs once each year. Also, § 350.113(3) provides specifically for proration of fees in the event of the non-jurisdictional status of a regulated company during the six-month assessment period, whereas § 367.145(1) is utterly silent on the proration question.

SUMMARY OF ANALYSIS

11. The Petition asks the Commission to determine by a declaratory statement whether SSU will owe the Commission RAFs on SSU's gross revenues collected in Collier County from February 27, 1996, until the time the Order Determining Jurisdiction Over SSU is upheld if said Order is upheld. Aside from the indicated unknown (the result on appeal), the Petition is also premised on a number of additional assumptions and arguments, many not explicated in the Petition, including: (1) the automatic stay precludes the Commission from exercising the regulatory authority asserted in the order stayed; (2) the intent of the stay is not violated when used

by a party to change the status quo which existed at the time of appeal; (3) the stay cannot or will not be lifted prior to a final decision on appeal and, whenever lifted, the County's assertion of preemptive regulatory authority[2] as of February 27 is undisturbed; (4) a declaratory statement is the proper mechanism for the Collier Board to have its question answered; (5) Commission RAFs are not due when preemptive regulatory authority is asserted by a county pursuant to § 367.171(1) notwithstanding the Commission's continued jurisdiction over pending cases and the lack of clear legislative authority on the point; and (6) the Commission is foreclosed from asserting regulatory authority over SSU in Collier County pursuant to § 367.171(7) independent of the Commission's prior determination now on appeal. SSU disputes each of these premises.

PETITION TO INTERVENE

12. The name and mailing address of the Intervenor/Respondent are as follows:

SOUTHERN STATES UTILITIES, INC.
1000 Color Place
Apopka, Florida 32703

13. An explanation of how SSU's substantial interests are affected by the Commission's decision in this matter is as follows:

a. The Petition places at issue whether SSU owes the Commission RAFs under the circumstances cited, and particularly in

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[2] SSU's use of the phrase "preemptive regulatory authority" is meant to refer to regulatory authority over all matters but those which the Commission or courts have jurisdiction over pursuant to the pending cases provision of § 367.171(5), Florida Statutes.

consideration of the Collier Board's alleged preemptive regulatory authority over SSU.

b. The Commission may reach one of three alternative results: (i) the Commission does not have complete regulatory authority over SSU in Collier County, only jurisdiction over pending cases, so SSU owes no RAFs as of February 27; (ii) the Commission is owed RAFs until the cancellation, if any, of SSU's Collier County certificates by virtue of continuing jurisdiction over pending cases alone; or (iii) the Commission has complete regulatory authority over SSU in Collier County and is owed RAFs until the court(s) rule differently.

c. Depending on the result reached, and the consequential disposition of any or all of the disputed premises listed in the Summary of Analysis above, SSU will face injury in fact of sufficient immediacy to justify a hearing because: (i) SSU's state-wide system will be subject to the authority of more than one regulator, contrary to the Legislative intent of § 367.171(7), Commission precedent, and the prior ruling of the Commission concerning SSU in the Order Determing Jurisdiction Over SSU; (ii) SSU will be subject to the authority of more than one regulator as to matters impacting SSU's Collier County operations alone; and/or (iii) SSU will owe RAFs to the Commission and fees to the Collier Board when both the RAFs and the Collier Board fees are designed to cover the same costs for the same period of time, but due on

different dates.[3]

d. The foregoing injuries are the type which § 367.171, Florida Statutes, is designed to address and protect.

14. Based on the foregoing, SSU asserts it is entitled to intervene in this proceeding. See e.g. Florida Optometric Ass'n v. Dept. of Pro. Reg., 567 So.2d 928 (Fla. 1st DCA 1990) (test for standing to intervene in agency declaratory statement proceeding is the same as the test for standing in all other proceedings involving agency action affecting substantial interests).[4]

15. A statement of all known disputed issues of material fact and disputed issues of law and policy are discussed further below.

RESPONSE AND ANSWER

16. Declaratory statements are reserved for agency determinations of "the applicability of a specified statutory provision or of any rule or order **of the agency** as it applies **to the petitioner in his particular set of circumstances only.**" § 120.565, Florida Statues (emphasis added); Rule 25-22.021, Florida Administrative Code. By its Petition, the Collier Board asks the Commission to ignore a number of declaratory statement

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[3] According to the ordinance attached to the Petition, the Collier Board's utility fees are due quarterly.

[4] In Florida Optometric, the court held that where the Department of Professional Regulation's declaratory statement had effect of allowing a group of persons to engage in an activity exclusively reserved by a different law to another group, the latter was entitled to intervention in the agency proceeding as substantially affected persons and to a § 120.57 hearing.

prerequisites.

17. The first such prerequisite is that the agency can only determine by a declaratory statement the applicability of a statute which the agency has the jurisdiction to interpret or a rule or order of the agency. In this case, the cornerstone of the Petition is the Collier Board's interpretation of Fla. R. App. P. 9.310(b)(2) as an annulment of the Commission's Order Determining Jurisdiction Over SSU. The Collier Board cannot avoid this fatal flaw by diverting attention from this cornerstone to the other questions built on it.[5] But for the Collier Board's interpretation of the stay, the Petition makes little sense; and there would likely be no Petition without it.

18. Notwithstanding the above point that the Commission cannot interpret Fla. R. App. P. 9.310(2)(b) by declaratory statement, SSU further asserts that the Petition incorrectly assumes the stay divests the Commission of regulatory authority over SSU (in all but pending cases) and that lifting the stay before or at the conclusion of the appeal has no effect on the

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[5] The Collier Board should not be heard to argue that it asks the Commission only to interpret the Order Acknowledging Recision of Jurisdiction when that Order too is clearly premised on the perceived import of the automatic stay. Moreover, as addressed below, any reliance on the Order Acknowledging Recision of Jurisdiction is improper since that Order was entered without a clear point of entry for affected persons to dispute issues of fact or law.

Commission's regulatory authority during pendency of the stay.[6]

a. In a case involving General Development Utilities, Inc.'s West Coast Division ("GDU-West Coast"), the Commission determined by declaratory statement that it had jurisdiction over all of GDU-West Coast's land and facilities in Charlotte, DeSoto, and Sarasota Counties pursuant to § 367.171(7), Florida Statutes.[7] The City of North Port appealed the declaratory statement. Both prior to and after the appeal, the Commission entered various orders in further exercise of the jurisdiction it had declared, including issuing GDU-West Coast multi-county certificates, amending its territory, and so forth. In its response to North Port's motion to enforce the automatic stay filed with the Second District Court of Appeal, the Commission argued that the automatic stay did not bar "other independent, separately appealable orders issued under the authority of Section 367.171(7), Florida Statutes (1989), either before or after this appeal was filed." ("Attachment A" hereto, at p. 5.) The Commission then asserted, "An appeal of the declaratory statement order does not divest the Commission of jurisdiction to issue the other orders, and therefore the stay would have no effect

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[6] The discussion herein is not intended to be a complete brief of SSU's position on the stay issues. At this point, SSU does not believe it is required to brief these issues, only to raise them as a proper basis for denying the Collier Board's declaratory statement and as disputed issues which would entitle affected persons to a hearing.

[7] Order No. 22459, issued January 24, 1990; reconsideration denied by Order No. 22787, issued April 9, 1990.

on those orders." (Attachment A at p. 5.) (Citation omitted.)[8] Therefore, by ruling in this case that the Commission is without jurisdiction over SSU's regulatory affairs in Collier County while the stay is in effect, the Commission would rule completely contradictory to its conduct and position in the GDU-West Coast situation.

b. The County suggests that the automatic stay be interpreted in a way contrary to its purpose. At a minimum, the stay should serve to protect the integrity of the status quo which existed prior to the appeal. In this case, the status quo which existed nearly ten years before and for some six months after the automatic stay was invoked in August 1995 was that the Commission had complete and exclusive jurisdiction over SSU in Collier County. Now, the Collier Board uses the stay as a club to bludgeon the pre-February status quo over the head with, rather than as a shield to protect it. In Plant City v. Mann, 400 So.2d 952 (Fla. 1981), where the appealed utility rates were lawfully implemented prior to imposition of a stay, the stay then vacated on certain conditions, and the appealed order upheld, the court stated,

> A supersedeas on appeal from a final judgment stays the execution but does not undo the performance of the judgment. Being preventative in its effect, the stay does not undo or set aside what the trial court has adjudicated, it merely suspends the order.

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[8] The Second District Court of Appeal never ruled on North Port's motion to enforce the automatic stay, and the appeal was withdrawn.

> . . . . Our responsibility is to restore the situation as equitably as practically possible to the same status as would have existed if the stay order had not been ordered.

400 So.2d at 953-954 (citations omitted). In the present case, the only way that the Commission can follow the Plant City v. Mann holding after the Order Determining Jurisdiction Over SSU is upheld on appeal, is to preserve the pre-February status quo by continuing its exclusive jurisdiction over SSU in Collier County. In contrast, the result the Collier Board seeks is a model of jurisdictional vicissitude.

c. Pursuant to Fla. R. App. P. 9.310(b)(2), either the Commission or the court reviewing the order appealed can extend, impose lawful conditions on or vacate the stay. It has been held that such action on the stay is within the sound discretion of the lower court (here the Commission) or appellate court, unless the order appealed directly invalidates or modifies a "planning-level" decision of the appealing governmental entity. See e.g. St. Lucie County v. North Palm Development Corp., 444 So.2d 1133 (Fla. 4th DCA 1984). The Collier Board's Petition takes no account of the right of any party to the subject appeal to move for and be granted a modification or vacation of the stay. Again, the Petition assumes that the stay has an irreversible nullifying effect upon the order appealed while the stay is in place, regardless of when the stay is lifted. In consideration of the Plant City v. Mann language quoted above and the Commission's own position in the GDU-

West Coast matter, this assumption by the Collier Board appears unfounded.

19. The Petition improperly seeks resolution of a matter not ripe for determination as a declaratory statement, and therefore the Petition must be denied. In sum, the Petition asks the Commission what RAFs SSU will owe if the Order Determining Jurisdiction Over SSU is upheld on appeal, assuming that the Collier Board's interpretation of the stay rule is correct. A party seeking a declaratory statement must show "a bona fide, actual, present, and practical need for the declaration . . . [and that] the declaration deals with a . . . present controversy as to a state of facts." Sutton v. Dept. of Env. Pro., 654 So.2d 1047, 1049 (Fla. 5th DCA 1995) (quotes and citation omitted); see also Couch v. State Dept. of Health and Rehab. Serv., 377 So.2d 32 (Fla. 1st DCA 1979) (declaratory statement denied for lack of bona fide controversy where legal issues could be resolved in concurrent civil lawsuit). The Collier Board's Petition does not seek resolution of a present controversy as to a present state of facts -- it asks a hypothetical. The stated contingency, a particular disposition of the appeal to the Order Determining Jurisdiction Over SSU, has not yet occurred and is in the capable hands of the First District Court of Appeal. Further, as provided in § 367.145(1) and Rule 25-30.110, Florida Administrative Code, RAFs are not due the Commission for 1996 until March 1997. Accordingly, the Collier Board's Petition must be denied as not stating a

present case or controversy.

20. The Petition and the supporting information attached to it are incomplete, flawed and erroneous in several respects. Therefore, the Petition as framed must be denied.

a. The Petition places apparent reliance on certain communications of Commission personnel attached to the Petition as Attachments C and F. To the extent those communications are intended to prove anything other than points of fact, they are irrelevant to the subject determination, see Rector v. Dept. of Bus. Reg., 592 So.2d 797 (Fla. 4th DCA 1992) (agency division director's memo cannot support rendition of declaratory statement), and cannot, of themselves, be considered agency action absent a clear point of entry into the agency proceedings for affected persons.

b. The Petition text assumes the Commission collects RAFs every six months. On the other hand, the Collier Board's ordinance, attached to the Petition, assumes the Commission collects RAFs quarterly. Neither is correct. The Collier Board makes no attempt to resolve, and apparently was not even aware of, the conflicts between § 350.113(3) and § 367.145(1), Florida Statutes,[9] conflicts which are central to the requested ruling.

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[9] The former section's express provision for proration of fees for utilities assessed over six-month periods must be considered in light of the latter's noticeable lack of such a provision, particularly when (i) RAFs are assessed upon a "regulated company" and a "utility" as defined in § 350.111 and 367.021(12), Florida Statutes, not on service areas; (ii) SSU still holds Collier County

e. The affidavit attached to the Petition is not properly notarized, and the copies of the resolution and ordinances attached are not certified.

21. As stated above, a declaratory statement is designed to resolve controversies as to the petitioner in his particular set of circumstances only. Manasota-88, Inc. v. Gardinier, Inc., 481 So.2d 948 (Fla. 1st DCA 1986) (petition for declaratory statement should be denied where question of applicability of rule pertained to the activity of one not the petitioner); see also Florida Optometric Ass'n v. Dept. of Pro. Reg., supra (declaratory statement inappropriate for agency action affecting another's substantial interests). In this case, it is questionable whether and to what degree the Petition even involves the Collier Board; but in any event, the Petition clearly impacts SSU, as stated above, and the Commission. Because the Petition impermissably seeks the determination of the applicability of statutes, rules, and/or an order to one other than the petitioner, the Petition must be denied.

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certificates; and (iii) § 367.171(5) provides for continued jurisdiction over pending cases when regulatory authority is transferred to a county, but provides for no such jurisdiction when the reverse occurs and regulatory authority is transferred from a county to the Commission. In consideration of Petition's silence on these important points pertinent to the Commission's ability to collect RAFs from SSU in Collier County, the Petition is insufficient to constitute a basis for issuance of a declaratory statement.

22. The Petition requests a determination affecting SSU's substantial interests.[10] Therefore, in addition to reasserting the above paragraphs, SSU hereby specifically answers the numbered and lettered allegations of the Petition as follows:

a. Paragraphs 1 through 3 are admitted.

b. Paragraph 4 is denied as an incomplete representation of the statutes, rules, and orders involved in a determination of the Petition.

c. All legal arguments and conclusions in Paragraph 5, and all lettered subparagraphs thereafter, are denied, with the exception of the assertion in subparagraph K that "regulatory jurisdiction over SSU's operations in Collier County can only be exercised by one regulatory authority at a time." (Petition at p. 6.) SSU maintains that its sole regulatory authority is the Commission. SSU denies each and every factual averment scattered throughout the remainder of the Petition under the rubric of paragraph 5, including, but not limited to: (i) each and every factual averment predicate to a determination that the Commission does not have complete jurisdiction over SSU in Collier County; (ii) the communications and activities of the Commission and its staff relative to the exercise of regulatory authority over SSU in Collier County; (iii) the activities of the Collier Board relative

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[10] Although Rule 25-22.037, Florida Administrative Code, permits the filing of answers, no Commission rule mandates the content of answers.

to the exercise of regulatory authority over SSU in Collier County.

23. In addition to the above, SSU asserts the following affirmative defenses to the Petition: (1) no reliance on the Order Acknowledging Rescission of Jurisdiction is appropriate since said Order failed to provide affected persons a clear point of entry into agency proceedings; (2) the Commission has jurisdiction over SSU in Collier County pursuant to § 367.171(7), Florida Statutes, notwithstanding the stayed order; and (3) the Petition affects the substantial interests of others who should be noticed of the proceeding. In support of these defenses, SSU states as follows.

24. Neither the Collier Board nor the Commission can place reliance on the Order Acknowledging Rescission of Jurisdiction as an Order dispositive of any issues concerning SSU. Said Order would otherwise constitute agency action affecting SSU's substantial interests (just as the instant Petition) and for which insufficient notice to affected persons was provided. E.g. Henry v. State Dept. of Admin., 431 So.2d 677 (Fla. 1st DCA 1983).[11] Specifically, the rule of law is stated as follows: "Notice of agency action which does not inform the affected party of his right to request a hearing, and the time limits for doing so, is inadequate to 'trigger' the administrative process." 431 So.2d 680. The Order Acknowledging Rescission of Jurisdiction does not

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[11] To the extent deemed necessary, SSU asks the Commission treat this pleading as a protest to and request for hearing on said Order.

meet the Henry standard because the "Notice of Further Proceedings or Judicial Review" at the end of said Order, allows only for reconsideration or appeal, not a § 120.57 hearing. Therefore, the Order is of no legal affect as to the rights of affected parties.

25. SSU alleges that the Commission has jurisdiction over SSU in Collier County pursuant to § 367.171(7), Florida Statutes, notwithstanding the stayed order. SSU's land and facilities in located in Collier County and in other counties throughout Florida are functionally related so as to constitute a single utility system as defined by § 367.021(11), Florida Statutes. SSU's land and facilities in Collier County are part of a system whose service transverses county boundaries. Therefore, SSU's Collier County operations are subject to Commission jurisdiction pursuant to § 367.171(7), Florida Statutes.

26. The Commission cannot properly dispose of the Petition absent allowing other affected persons a clear point of entry into the proceeding. Although SSU cannot assert the interests of those persons, SSU has an interest in the lawful disposition of the Petition.

a. Because the Collier Board has placed the automatic stay at issue, the other county-parties to Docket No. 930945-WS must be given the opportunity to enter the administrative process before final agency action is taken.

b. The Petition places at issue both statutory provisions within the Commission's authority to interpret **and** the automatic

stay rule. Unlike its interpretation of its own statutes, the Commission's interpretation of the automatic stay will not be subject to a lesser standard (presumption of correctness) on appeal. As stated in the "Background" above, the Commission only collects RAFs and uses the funds for its purposes, subject to Legislative appropriation. If the Commission misinterprets the stay rule, it may erroneously fail to collect RAFs it is required to collect by law, thereby depriving the State of those funds temporarily or permanently. Therefore, the State of Florida may need to be given the opportunity to enter the administrative process before final agency action is taken.

WHEREFORE, in consideration of the foregoing, Southern States Utilities, Inc. requests that the Commission grant its Petition to Intervene, deny the Collier Board's Petition for Declaratory Statement, preserve the status quo which existed at the time of the aforementioned appeal, and set this matter for hearing pursuant to Section 120.57, Florida Statutes.

Respectfully submitted,

KENNETH A. HOFFMAN, ESQ.
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and

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition to Intervene and Response and Answer to Collier County's Petition for Declaratory Statement was furnished by U.S. Mail to the following this 29th day of July, 1996:

Ms. Christiana Moore
Division of Appeals
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Room 370
Tallahassee, FL 32399-0850

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

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CITY OF NORTH PORT, FLORIDA

Appellant,

CASE NO.: 90-1274

v.

10/22

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.
_____/

BOARD OF COUNTY COMMISSIONERS OF CHARLOTTE COUNTY, FLORIDA

CASE NO.: 90-1335

Appellant,

v.

THE FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.
_____/

THE FLORIDA PUBLIC SERVICE COMMISSION'S RESPONSE TO MOTION TO ENFORCE AUTOMATIC STAY

Appellee, The Florida Public Service Commission (Commission), in response to this Court's order of October 10, 1990, and pursuant to Rule 9.300, Florida Rules of Appellace Procedure, submits this response to the Motion to Enforce Automatic Stay filed by the Appellant, City of North Port, Florida (North Port).

Concurrently with this response, the Commission is filing a Motion to Strike certain portions of North Port's statement of the facts and argument in its Motion to Enforce Automatic Stay. The Commission is also filing a Motion to Stay Further Proceedings in this appeal, pending a preliminary determination by the Florida

Supreme Court of the merits of the Commission's August 27, 1990 Petition for Writ of Prohibition. That petition asks the Supreme Court to determine whether this Court or the First District Court of Appeal has jurisdiction to consider the appeal.

The Commission has not submitted a response to North Port's Petition for Writ of Prohibition, being of the understanding that this Court's order of October 10, 1990 only requires a response to the Motion to Enforce Automatic Stay, and does not require a response to the Petition for Writ of Prohibition at this time.

BACKGROUND

1. On January 24, 1990, The Commission issued Order No. 22459, a Declaratory Statement that interpreted the jurisdictional effect of the Legislature's 1989 amendment to Section 367.171, Florida Statutes. (R-189). In that amendment, the Legislature had added subsection (7) to the statute, which provided the following:

> (7) Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, inter-local utility agreements in effect as of October 1, 1989.

2. In its Declaratory statement, the Commission held that the new language of Section 367.171 vested the Commission with jurisdiction over the water and wastewater system of General Development Utilities (GDU) in Charlotte County, DeSoto County, and the City of North Port in Sarasota County. (Prior to the passage of the 1989 amendment to Section 367.171, Florida Statutes, GDU's

system had been regulated by three different entities: The Board of County Commissioners in Charlotte County; the Florida Public Service Commission in DeSoto County; and the City Commission of the City of North Port in Sarasota County, R-4, 5).

3. In its Declaratory Statement, the Commission also held that the inter-local agreement the counties and city had executed after the amendment to the statute, but before the October 1, 1989 deadline, (R-5), did not remove GDU's system from the jurisdiction of the Commission. The Commission found that the agreement only attempted to preserve the status quo that existed before the amendment was passed. It did not correct the problem the Legislature intended to address by passage of the 1989 amendment. The Commission said;

> We do not believe that the Legislature intended the exemption for utility systems subject to inter-local agreements to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate the regulatory problem that arises when utility systems provide service across political boundaries and are subject to economic regulation by two or more regulatory agencies (i.e., Counties, Cities, or Commission). This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers. Order No. 22459, p. 4.

3. The City of North Port filed a motion for reconsideration and stay of Order No. 22459 on February 6, 1990. (R-193). That motion was denied by the Commission in Order No. 22787 on April 9, 1990. (R-300).

4. North Port filed notices of appeal of the Commission's orders in the Second District Court of Appeal and the First District Court of Appeal on May 8 and 9, 1990. (R-304, 305).

5. Effective June 23, 1990, the Legislature amended Section 367.171, Florida Statutes, again. The 1990 amendment added a clause to subsection (7) which clarified the inter-local agreement exception to Commission jurisdiction over multi-county water and wastewater utility systems. The amendment provided:

> (7) Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, inter-local utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such inter-local agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to commission jurisdiction under s. 367.171.

6. Since January of 1990, the Commission has entered a number of orders and undertaken a variety of activities with respect to GDU's multi-county utility system consistent with the exercise of its authority under the provisions of Section 367.171, Florida Statutes. Some of those orders became final before the notices of appeal were filed in this case and have not been appealed themselves. (Order Nos. 22783, 22784, issued April 9, 1990. Appellant's Exhibits "C" and "D" to their Motion to Enforce Automatic Stay). Some of the orders became final after the notices of appeal were filed, but also have not been appealed. (Amendatory Order Nos. 22783-A and 22784-A, issued May 10, 1990; Order No. 22998, issued May 29, 1990; and Order No. 23060, issued June 11, 1990. Appellant's Exhibits "E", "f", "G", and "H"). Several regulatory matters involving GDU's system are presently before the

Commission in various stages of completion.

7. On October 10, 1990, North Port filed its motion asking the Court to enforce an automatic stay that became effective in May of 1990. In that motion North Port asks this Court to void or stay any orders or actions taken by the Commission pursuant to its assumption of jurisdiction over GDU's multi-county water and wastewater system.

ARGUMENT

8. This Court should deny North Port's motion, because the automatic stay triggered by this appeal only applies to the declaratory statement issued in Commission Order No. 22459. It does not apply to other independent, separately appealable orders issued under the authority of Section 367.171 (7), Florida Statutes (1989) either before or after this appeal was filed. Neither does it apply to any orders or other regulatory action taken by the Commission under the authority of the amendment to Section 367.171 (7) that became effective on June 23, 1990. The declaratory statement order on appeal and the other orders relating to GDU's multi-county water and wastewater system are all separately appealable as final orders. An appeal of the declaratory statement order does not divest the Commission of jurisdiction to issue the other orders, and therefore the stay would have no effect on those orders. Bernstein v. Berrin, 516 So.2d 1042 (Fla. 2d DCA 1987).

9. This Court should also deny North Port's motion, because the Appellant has no reasonable probability of success on the merits of this appeal. The Legislature's 1990 amendment to Section 367.171 (7), Florida Statutes, clarified the extent of the

Commission's jurisdiction over multi-county utility systems, and cured any ambiguities that existed regarding the type of inter-local agreement which would exempt multi-county systems from Commission jurisdiction. The amendment ratified the Commission's prior determination that an inter-local agreement that preserved the status quo of multiple regulatory bodies would not be sufficient to exempt the system from Commission regulation. Also, the 1990 amendment specifically provided that an inter-local agreement could not operate to divest the Commission of jurisdiction of a multi-county system, any part of which was regulated by the Commission. DeSoto County's water and wastewater utilities, including GDU, are regulated by the Commission. Therefore, North Port's appeal has been rendered moot by the intervening act of the Legislature, and no practical result can be obtained by deciding the issues raised in this appeal. Dehoff v. Imeson, 15 So. 2d 258 (Fla. 1943); Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014 (Fla. 1st DCA 1985); Coursen v. City of South Daytona, 127 So. 2d 905 (Fla. 1st DCA 1961); Town of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974).

10. No practical result can be obtained by granting this motion, either, because even if this Court determines that the automatic stay attached to the Commission's other orders, the stay only operated for a total of one and one-half months before the 1990 amendment became effective.

11. North Port cannot return to the status quo that existed in the regulation of GDU's multi-county utility system before the

Florida Legislature adopted the 1989 amendment to section 367.171. The Commission now regulates GDU's water and wastewater system under the 1990 legislation. No present or future action relating to GDU's utility system taken by the Commission under the 1990 legislation is, or can be, the subject of this appeal. North Port may not bootstrap a de facto attack on the 1990 legislation to its appeal of a Declaratory statement that interpreted the jurisdictional effect of a previous statute.

Wherefore, Appellee, the Florida Public Service Commission respectfully requests that this Court enter an order denying the motion to enforce automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 22nd day of October, 1990, to:

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July 26, 1996

HAND DELIVERY

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Re: Docket No. 960806-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. ("SSU") are the following documents:

1. Original and fifteen copies of Southern States Utilities, Inc.'s Petition to Intervene and Southern States Utilities, Inc.'s Response and Answer to the Collier County Commissioners' Petition For Declaratory Statement; 07909-96

2. Original and fifteen copies of Southern States Utilities, Inc.'s Request for Oral Argument; and 07908-96

3. A disk in Word Perfect 6.0 containing a copy of the Petition to Intervene.

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG
LIN
OPC
RCH
SEC
WAS
OTH

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

KAH/rl
cc: All Parties of Record
T:\b.3