FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JANUARY 22, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER, GERVASI)
DIVISION OF WATER AND WASTEWATER (WILLIS, CHASE, RENDELL)

RE: UTILITY: SOUTHERN STATES UTILITIES, INC.
DOCKET NO. 950495-WS
CASE: APPLICATION 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.
COUNTY: SEE ABOVE

AGENDA: FEBRUARY 3, 1998 -- REGULAR AGENDA -- POST-HEARING DECISION -- PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

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

CASE BACKGROUND

Southern States Utilities, Inc., now Florida Water Services Corporation (hereinafter Florida Water, SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. In 1994, the utility recorded total company operating revenues of $23,498,289 and $16,985,104 for water and wastewater, respectively. The resulting total utility net operating income for that same period was $3,445,315 for water and $2,690,791 for wastewater. SSU reported that in 1994 it had 102,514 and 43,131 respective water and wastewater customers for the total utility.

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). August 2, 1995, was established as the official date of filing. The utility's application for increased final water and wastewater rates was based on the projected twelve-month period ending December 31, 1996. The utility requested a rate of return of 10.32 percent, which would have resulted in additional annual operating revenues of $18,137,502 for the utility's combined water and wastewater operations.

By Order No. PSC-95-1327-FOF-WS, issued November 1, 1995, the Commission denied SSU's initial request for interim rate relief based on a projected test year, suspended the proposed final rates, and allowed the utility to file another petition for interim rates. SSU filed its supplemental petition for interim revenue relief on November 13, 1995, which was granted by Order No. PSC-96-0125-FOF-WS (Interim Order), issued January 25, 1996, based upon the historical test year ended December 31, 1994. By the Interim Order, 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.

The Commission held 24 customer service hearings throughout the state during the pendency of this rate proceeding, and a ten-day technical hearing from April 29 through May 10, 1996. The Commission also held an additional day of hearing on May 31, 1996, to consider rate case expense.

On October 30, 1996, the Commission issued Order No. PSC-96-1320-FOF-WS (Final Order on Appeal) on the rate proceeding. On November 1, 1996, SSU filed a notice of appeal of the Final Order with the First District Court of Appeal. On November 14, 1996, several intervening parties (designated as Marco, et al.) filed a joint motion for reconsideration with the Commission. On that same date, those parties filed a motion for relinquishment of jurisdiction with the First District Court of Appeal so that the Commission could consider the motion for reconsideration. SSU did not object to the motion to relinquish jurisdiction, and on November 26, 1996, filed a cross-motion for reconsideration with the Commission.

On November 26, 1996, the Office of Public Counsel (OPC) filed its Notice of Cross-Appeal. Also, on November 27, 1997, Citrus County filed its Notice of Cross-Appeal.

On December 2, 1996, and December 31, 1996, the First District Court of Appeal issued orders abating the appeal pending the PSC's disposition of all motions or cross-motions for reconsideration. On December 3, 1996, SSU filed a Motion to Stay Refund of Interim Rates and Reduction to AFPI Charges Pending Appeal and Motion to Release/Modify Bond Securing Refund of Interim Rates (Motion). In that Motion, SSU requested a stay of the provisions of the Final Order relating to the refund of a portion of the interim rates and the imposition of new charges for AFPI. SSU requested expedited review of the Motion because of the pending expiration of the bond on January 8, 1997. OPC filed a response in opposition to SSU's Motion.

On January 15, 1997, OPC filed a Motion for Reconsideration of the Final Order. Also, on March 3, 1997, OPC filed a motion requesting that the full Commission reconsider the prehearing officer's denial of its request for the prehearing officer to establish a schedule for filing motions for reconsideration.

By Order No. PSC-97-0099-FOF-WS (Stay Order), issued on January 27, 1997, the Commission acknowledged that, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, there was a mandatory stay as to the refund of interim rates relating to Lehigh and Marco Island. However, by that same Order, the Commission denied SSU's request to stay the reduction to AFPI charges. On February 11, 1997, SSU filed a motion for reconsideration of the Stay Order related to the partial stay of AFPI charges. This motion was accompanied by a request for oral argument.

By Order No. PSC-97-0374-FOF-WS, issued on April 7, 1997, the Commission ruled on: Marco, et al.'s November 14, 1996 Motion for Reconsideration; SSU's November 26, 1996 Cross-Motion for Reconsideration; and OPC's January 15, 1997 Motion for Reconsideration. Also, on its own motion, the Commission reconsidered and corrected certain errors in regard to AFPI charges, private fire protection charges, and plant capacity charges/main extension charges.

Finally, by Order No. PSC-97-0613-FOF-WS, issued on May 29, 1997, the Commission ruled on SSU's February 11, 1997 motion for reconsideration of the Stay Order and OPC's March 3, 1997 motion requesting the full Commission to reconsider the prehearing officer's denial of its request for the prehearing officer to establish a schedule for filing motions for reconsideration. In this last Order, the Commission reconsidered its previous decisions on stays of AFPI charges and allowed SSU to implement its alternate stay proposal, to continue charging, subject to refund, the higher of any AFPI charges. Through this mechanism, the Commission

recognized that AFPI charges were severable and the potential for backbilling was minimized.

With the issuance of this last Order, the Commission disposed of all motions for reconsideration and any requests for stays, and briefs were filed with the First District Court of Appeal. However, on November 25, 1997, SSU 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 this motion. This recommendation addresses that motion.

DISCUSSION OF ISSUES

ISSUE 1: Did the Notices of Cross-Appeal of the Final Order filed by Citrus County and the Office of Public Counsel trigger the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, and, if so, should the Commission order Florida Water Services Corporation to show cause, in writing within twenty days, why it should not be fined for its apparent violation of that rule?

RECOMMENDATION: The automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, were triggered by the filing of the Notices of Cross-Appeal, but show cause proceedings should not be initiated. (JAEGER, GERVASI)

STAFF ANALYSIS: As noted above, the Office of Public Counsel (OPC) and Citrus County filed their Notices Of Cross-Appeal of Order No. PSC-96-1320-FOF-WS (Final Order on Appeal) on November 26, 1996, and November 27, 1996, respectively. Rule 25-22.061(3)(a), Florida Administrative Code, provides in pertinent part:

> When 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. (emphasis supplied)

The above-noted Commission rule appears to be based in part on Rule 9.310(b)(2), Florida Rules of Appellate Procedure. This latter rule provides that the timely filing of a notice by a Public Body or Public Officer shall automatically operate as a stay pending review. The rule does not specify the type of notice which triggers the automatic stay. Therefore, staff did research a potential question regarding whether a Notice of Cross-Appeal also results in an automatic stay.

In the Committee Notes to this appellate rule, the committee states this 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 . . . ." (emphasis supplied) Pursuant to the case of Breakstone v. Baron's of Surfside, Inc., 528 So. 2d 437, 439 (Fla. 3d DCA 1988), a notice of cross-appeal does not invoke the jurisdiction of the appellate court. Therefore, it could be argued that the provisions of Rule 9.310(b)(2), Florida Rules of Appellate Procedure, for an automatic stay are not applicable. However, it is important to note that while the Committee notes are offered to summarize the intent of the rule drafters, they are only commentary, not authority, because they were not drafted or adopted

by the enacting court. For the reasons listed below, staff is of the opinion that once jurisdiction is invoked by filing an appeal, the Florida Supreme Court intended that there be an automatic stay when a public body files either a timely Notice of Appeal or Notice of Cross-Appeal.

First, the rule itself only refers to a Notice -- it does not specifically say Notice of Appeal. Second, pursuant to Rules 9.110(g) and 9.350(b), Florida Rules of Appellate Procedure, a Cross-Appellant has at least 10 days after the filing of a Notice of Appeal to file its Notice of Cross-Appeal, and the Cross-Appeal can be maintained, if timely filed, even if the Appellant withdraws the main appeal (i.e., the Notice of Cross-Appeal is enough to maintain jurisdiction).

Finally, in interpreting statutes or rules that provide for an automatic stay, the courts have routinely determined the purpose of the stay and whether that purpose existed in the case at hand. See, Florida Eastern Development Company, Inc. of Hollywood v. Len-Hal Realty, Inc., 636 So. 2d 756 (Fla. 4th DCA 1994). In the Len-Hal Realty case, 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 in a Chapter 11 proceeding for an automatic stay of all legal proceedings "against the debtor", 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. 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 purposes 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 on the second day after the order was issued, and OPC then subsequently filed a Notice of Cross-Appeal and not a Notice of Appeal. The issues are still the same, and OPC is designated as a cross-appellant for the purposes of those issues.

Therefore, staff believes that with the two Notices of Cross-Appeal, there should have been an automatic stay of the rates set forth in the Final Order on Appeal which was issued on October 30, 1996. However, Florida Water had already implemented the rates contained in that order as of September 20, 1996, and neither

ceased to collect those rates nor filed a motion to vacate the stay. 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.

However, staff does not believe that show cause proceedings should be initiated in this case. First, the utility implemented the rates (on September 20, 1996) and had tariffs approved prior to any notice of cross-appeal. Further, on at least three separate occasions, the Commission considered motions in regards to stays and no party or staff, despite ample opportunity, ever mentioned that they thought the automatic stay provisions were applicable or should be implemented.

Based on all the above, staff recommends that the Commission find that the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, are applicable when a governmental body files a Notice of Cross-Appeal. However, staff further recommends that Florida Water Services Corporation, should not be made to show cause, in writing within twenty days, why it should not be fined for its apparent violation of that rule.

ISSUE 2: Should the Commission interpret paragraphs 10 through 12 of Florida Water's Motion as a request to vacate the automatic stay and grant Florida Water's request that it be allowed to continue collecting final rates pursuant to the Final Order?

RECOMMENDATION: Yes, the Commission should interpret paragraphs 10 through 12 of Florida Water's Motion as a request to vacate the automatic stay and grant its request that it be allowed to continue collecting final rates pursuant to the Final Order. However, the Commission should deny Florida Water's request that the bond for interim rates be converted to a general appeal bond, and require Florida Water to supply a corporate undertaking within 10 days of the date of the Order in the amount of $967,560 in the event that the issues raised by the Office of Public Counsel in its Cross-Appeal are affirmed by the First District Court of Appeal. (JAEGER, RENDELL)

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1 above, then there should have been an automatic stay of the final rates set forth in the Final Order on Appeal. By that order, which was issued on October 30, 1996, the Commission approved what is known as the Capband Rate Structure. However, the vote approving these final rates and rate structure was taken at the August 15, 1996 Special Agenda, and Florida Water actually implemented the final rates as of September 20, 1996.

It was not until November 26 and 27, 1996, that the Notices of Cross-Appeals were filed by the governmental bodies -- some two months after Florida Water had implemented the final rates. Now, almost exactly a year later, Florida Water has filed its motion, by which it requests in paragraphs 10 through 12 as follows:

> 10. Florida Water believes that an automatic stay may have been triggered by Citrus County's Notice of Cross-Appeal. However, as confirmed by the Southern States decision and the decision of the Florida Supreme Court in GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), the absence or presence of a stay cannot and does not impair the right of the utility to recover its Commission approved final revenue requirement.
> 11. If the Commission determines that an automatic stay was triggered by Citrus County's Notice of Cross-Appeal, then it would appear appropriate for the Commission to confirm Florida Water's right to continue collecting final rates pursuant to the Final Order under the current approved and effective tariffs.
> 12. Florida Water requests that the Commission address the stay issue as it impacts rate structure and establish a mechanism, consistent with the Southern States decision

to hold Florida Water harmless and minimize adverse impacts on customers should the Commission approved modified stand-alone capband rate structure be reversed.

In order for the Commission to "confirm Florida Water's right to continue collecting final rates pursuant to the Final Order", staff believes that, of necessity, the automatic stay provisions of Rule 25-22.061(3)(a), Florida Administrative Code, would have to be vacated. Therefore, staff recommends that these three paragraphs be treated as a motion to vacate the automatic stay. Further, staff believes that, pursuant to that same rule, the Commission should vacate the stay upon Florida Water posting a good and sufficient bond or corporate undertaking.

Pursuant to Rule 25-22.061(3)(a), F.A.C., the Commission shall vacate the stay upon motion by the utility and the posting of good and sufficient bond or corporate undertaking. It should be noted that there is not a way to fashion security to protect customers against a potential refund due to a 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 the amount of revenue requirement on appeal. To this end, staff has analyzed the issues on appeal by the Office of Public Counsel. The issues on appeal by Citrus County do not affect revenue requirement, and, therefore, do not affect the security requirement.

Florida Water has informally requested that its existing "interim" bond be converted to a general appeal bond. Based upon an analysis of the issues on appeal by the Office of Public Counsel, staff has determined that the effect on the annual revenue requirement would equate to $534,597. Oral Argument at the First District Court of Appeal is currently scheduled for February 10, 1998. Assuming a decision by the First District Court of Appeal by May 1998, the period of time to provide security would be 20 months. Therefore, staff has calculated the potential amount of refund to be $967,560.

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, at page 7, the Commission stated, "we find the final potential interim refund to be $5,157,887. . . . [I]n order to adequately protect the customers of SSU, the bond securing any potential interim refund shall not be released or modified." Florida Water filed its twenty-fourth report of rates subject to refund on January 16, 1998. According to this report, the revenues subject to an interim

refund amount to $5,333,891. Based upon this analysis, Florida Water's request should be denied.

However, the Division of Auditing and Financial Analysis has reviewed Florida Water's financial statements and has determined that the utility can support a corporate undertaking. This determination is based on the fact that Florida Water's financial ratios are adequate for the amount of the corporate undertaking, and the 1996 net income is three times the amount of the corporate undertaking. Therefore, Florida Water should be required to supply a corporate undertaking in the amount of $967,560.

Based on the above, staff recommends the Commission interpret paragraphs 10 through 12 of Florida Water's Motion as a request to vacate the automatic stay and grant Florida Water's request that it be allowed to continue collecting final rates pursuant to the Final Order. However, the Commission should require Florida Water to provide, within 10 days of the issuance date of the order, a corporate undertaking in the amount of $967,560 in the event that the issues raised by the OPC in its Cross-Appeal are affirmed by the First District Court of Appeal (the issues raised by Citrus County do not affect the revenue requirement and do not affect the security requirement).

Staff realizes that this puts the Commission (and the utility and customers) in much the same position in which it found itself in Docket No. 920199-WS. However, staff believes that this is the optimal equitable solution to allow the utility to collect the revenue requirement authorized by the Final Order on Appeal. Florida Water's request that the Commission establish a mechanism, consistent with the Southern States decision, to hold Florida Water harmless and minimize adverse impacts on customers should the Commission approved modified stand-alone capband rate structure be reversed is addressed in the next issue.

ISSUE 3: What action should the Commission take on Florida Water's Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed?

RECOMMENDATION: Because Order No. PSC-96-1320-FOF-WS is on appeal, the Commission has no jurisdiction to modify it substantively. The Commission does have jurisdiction, pursuant to Rule 9.310, Florida Rules of Appellate Procedure, to vacate the automatic stay or to impose any lawful conditions such as requiring a bond or corporate undertaking. However, to fashion a remedy as requested by Florida Water, would require more than a system of stays. Therefore, the Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure Be Reversed should be dismissed for lack of jurisdiction. (JAEGER, GERVASI)

STAFF ANALYSIS: Florida Water expresses concern over whether there is competent substantial evidence in the record to support the capband rate structure on appeal. Citing the two orders of the First District Court of Appeal which arose from Docket No. 920199-WS (Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995); and Southern States Utilities, Inc. v. Florida Public Service Commission, 22 Fla. Law Weekly D1492 (Fla. 1st DCA 1997)), Florida Water requests that the Commission address the stay issue as it impacts rate structure and establish a mechanism, consistent with those decisions, to hold Florida Water harmless and minimize adverse impacts on customers should the Commission-approved modified stand-alone capband rate structure be reversed.

Rule 9.600(b), Florida Rules of Appellate Procedure, entitled Jurisdiction of Lower Tribunal Pending Review, provides in pertinent part that"[if] the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal." As noted in the Case Background, the two December, 1996 orders of the First District Court of Appeal abated the appeal to allow the Commission to dispose of all motions or cross-motions for reconsideration. By Order No. PSC-97-0613-FOF-WS, issued on May 29, 1997, the Commission disposed of the last of the motions on reconsideration. Therefore, the matters on which the First District Court of Appeal allowed the Commission to proceed have all been resolved.

Also, Rule 9.600(a), Florida Rules of Appellate Procedure, provides, in relevant part, that "[b]efore . . . the record is transmitted, the lower tribunal shall have concurrent jurisdiction with the [appellate] court to render orders on any other procedural matter relating to the cause, subject to control of the court." In this case, the record was transmitted on June 26, 1997. Therefore,

the question becomes what actions may the Commission take while the First District Court of Appeal has jurisdiction of the Final Order.

In the case of Gillman v. Nemeroff, 423 So. 2d 961 (Fla. 4th DCA 1983), the trial court attempted to enter a post-judgment order directing the return of a deposit. The Fourth District Court of Appeal ruled that this was actually a modification of the previously entered final judgment and such a modification was not permitted while the merits of the action were in issue on appeal. Also, in the case of Ponzoli v. Hawkesworth, 390 So. 2d 784 (Fla. 3d DCA 1980), the Third District Court of Appeal considered an appeal of the correctness of an order apportioning costs during the pendency of an appeal. The court ruled in that case that the order under appeal had the effect of modifying the original final judgment while the appeal in the cited cause was pending, and was thus improper. See also, Blum v. Blum, 382 So. 2d 52 (Fla. 3d DCA 1980). Therefore, staff believes that it is clear that the Commission can take no action which would modify the Final Order in this case pending final resolution of the appeal.

Rule 9.310(b)(2), Florida Rules of Appellate Procedure, does provide that the lower tribunal has continuing jurisdiction, pending appellate review, to vacate or impose any lawful conditions upon an automatic stay. However, any action taken cannot modify the final judgement and cannot impinge on the jurisdiction of the appellate court.

By Order No. PSC-97-0099-FOF-WS, issued on January 27, 1997, the Commission granted in part and denied in part SSU's Motion for Stay. Finally, by Order No. PSC-97-0613-FOF-WS, issued on May 29, 1997, the Commission reconsidered its denial of SSU's request for a partial stay of AFPI charges. By this latter Order, the Commission adopted SSU's alternate proposal for AFPI charges as discussed in the Case Background portion of this recommendation.

Staff notes that in Order No. PSC-97-0613-FOF-WS, the Commission did fashion a stay which minimized the possibility of backbilling for AFPI charges. However, in that same Order, the Commission went on to say:

> It is impossible to put a utility in the position while on appeal of charging the maximum charge possible, so that backbilling is never an issue. This Commission's rules on stay, and the legal concept of a stay, do not contemplate creating a situation of "minimum exposure", but rather, permit a utility to request that the Commission not implement its order. We initially reviewed the motion for partial stay with this in mind. While a stay should not be employed to permit a utility

to collect its maximum potential rates, the utility has demonstrated in this case, the severability of the AFPI charges, and the propriety of its proposal in order to prevent unnecessary backbilling.

In regards to rates, the utility has not suggested how any stay or partial stay in regards to rates should be fashioned. The utility has now been charging the final rates since September 20, 1996, and is just now requesting that some sort of stay mechanism be implemented. Also, the utility has not demonstrated how any relief could be fashioned without modifying the Final Order or affecting the jurisdiction of the First District Court of Appeal. Indeed, the utility makes no statement concerning the Commission's jurisdiction to entertain the motion at all.

However, staff recalls the situation the Commission experienced at the Special Agenda on December 15, 1997, in Docket No. 920199-WS. At that agenda, after the First District Court of Appeal had rejected the Commission's decision to require refunds but no surcharge, the Commission was confronted with the question of whether it should: (1) order refunds and allow surcharges; or (2) order no refunds and no surcharges.

After much discussion, the Commission chose the latter option. The attorneys for the customers who assert that they paid too much under the uniform rates have indicated that they will appeal this decision. Therefore, there is still a chance that the First District Court of Appeal will again reverse the Commission in this case, and, pursuant to the holding in GTE Florida Incorporated v. Clark, 668 So. 2d 971 (Fla. 1996), require surcharges if refunds are otherwise required.

In this docket, the Commission has ordered a capband rate structure. Staff believes the Commission has corrected the deficiencies noted by the court in Docket No. 920199-WS. However, the appeal of the Final Order in this docket also questions the rate structure. Therefore, the Commission could again be faced with the similar problem that it faced in Docket No. 920199-WS. However, staff believes that a remedy cannot be fashioned at this point in time.

Because the utility has collected revenues using the capband rate structure for the past year, staff believes it is too late to fashion a remedy which would protect all customer classes for this time period. Further, even if it were possible to fashion a remedy, staff believes that the Commission would have to modify Order No. PSC-96-1320-FOF-WS to the extent that it would require the approval and permission of the First District Court of Appeal.

Therefore, staff believes that the best action for the Commission to take at this time is to stand by its Final Order which it issued in this docket. The order is presumed to be correct, and if it is reversed, then that would be the time to consider any further actions.

Therefore, staff recommends that pursuant to Rule 9.600, Florida Rules of Appellate Procedure, the Commission has no jurisdiction to substantively change Order No. PSC-96-1320-FOF-WS. Also, staff believes that, as noted in Order No. PSC-97-0613-FOF-WS, the Commission's rules on stay and the legal concept of a stay do not contemplate creating a situation of minimum exposure. Finally, Florida Water has been charging the capband rate structure for over one year, and if the capband rate structure is reversed on appeal, the Commission would still have to determine an appropriate remedy for this period, even if it could develop a mechanism that would protect all customers and the utility on a going forward basis. Based on the foregoing, the Commission should dismiss Florida Water's Motion to Establish Mechanism for lack of jurisdiction.

ISSUE 4: Should the docket be closed?

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

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