

State of Florida



# Public Service Commission

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RECORDS AND  
REPORTING

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**DATE:** AUGUST 20, 1998

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

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

**RE:** DOCKET NO. 950495-WS - APPLICATION FOR RATE INCREASE AND INCREASE IN SERVICE AVAILABILITY CHARGES BY SOUTHERN STATES UTILITIES, INC. FOR ORANGE-OSCEOLA UTILITIES, INC. IN OSCEOLA COUNTY, AND IN BRADFORD, BREVARD, CHARLOTTE, CITRUS, CLAY, COLLIER, DUVAL, HIGHLANDS, LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND WASHINGTON COUNTIES.

**AGENDA:** SEPTEMBER 1, 1998 - REGULAR AGENDA - PARTIAL DECISION ON REMAND - PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 1

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\950495.RCM

### CASE BACKGROUND

On June 28, 1995, Southern States Utilities, Inc., now Florida Water Services Corporation (hereinafter Florida Water, SSU or utility) 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 367.082 and 367.081, 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).

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By Order No. PSC-96-0125-FOF-WS, issued January 25, 1996, the Commission granted the utility interim rate relief based upon the historical test year ended December 31, 1994. 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.

On October 30, 1996, the Commission issued Order No. PSC-96-1320-FOF-WS on the rate proceeding (Final Order). The Final Order is currently pending on appeal. SSU filed a notice of appeal in the First District Court of Appeal (First District) on November 1, 1996. OPC filed a notice of cross-appeal on November 26, 1996, and Citrus County filed a notice of cross-appeal on November 27, 1996.

By Order No. PSC-97-0099-FOF-WS, issued on January 27, 1997, the Commission, among other things, granted Florida Water's motion to stay the refund of interim rates relating to Lehigh and Marco Island and ordered the utility to renew its bond posted to secure potential refunds. Also, by Order No. PSC-97-0374-FOF-WS, issued on April 7, 1997, the Commission ruled on various motions for reconsideration of the Final Order and reconsidered and corrected certain errors on its own motion.

On November 25, 1997, the utility 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 the motion. By Order No. PSC-98-0231-FOF-WS, issued February 5, 1998, the Commission dismissed the Motion to Establish Mechanism for lack of jurisdiction and required the utility to file a pleading articulating its views on whether an automatic stay is in effect, resulting from the filing of cross-appeals by OPC and Citrus County, both public bodies.

In response to the Order, on March 12, 1998, the utility filed a Petition for Declaratory Statement or, in the Alternative, Motion to Vacate Automatic Stay and Motion to Establish Mechanism to Hold Florida Water Harmless Should the Commission Approved Rate Structure be Reversed. Order No. PSC-980770-PCO-WS, issued June 4, 1998, denied the petition for declaratory statement, but granted the alternative motion to vacate stay and required the filing of additional security.

Subsequently, the First District issued its opinion on June 10, 1998. In that opinion, among other things, the Court, acting En Banc, affirmed the Capband Rate Structure, overturned its prior decision in Citrus County v. Southern States Utilities, 656 So. 2d 1307 (Fla. 1st DCA 1995), but reversed the Commission on: 1. the

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use of annual average daily flows in the numerator of the used and useful equation; 2. the use of the lot count method in determining used and useful percentages for the water distribution and wastewater collection systems; and 3. that portion of the Order which would exclude a portion of the construction costs for reuse facilities from rate base. The court also acknowledged that the Commission had "confessed error in canceling the previously allowed AFPI charges," and that the Commission should revisit its decision to reduce the utility's investment in equity "in light of the status of ongoing litigation on that issue."

The Sugarmill Woods Civic Association petitioned for rehearing, clarification, and certification of the June 10, 1998 Opinion. However, on August 6, 1998, the First District denied the petition.

This recommendation addresses only what action the Commission should take on the Court's reversal and remand of the Commission's Final Order on the use of annual average daily flows in the numerator of the used and useful equation and the use of the lot count method in determining used and useful percentages for the water distribution and wastewater collection systems. The other points raised by the Court or to which the Commission confessed error will be addressed in a subsequent recommendation.

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### DISCUSSION OF ISSUES

**ISSUE 1:** Should parties be allowed to participate?

**RECOMMENDATION:** Yes. Participation should be limited to five minutes for each party. (JAEGER)

**STAFF ANALYSIS:** Typically, post-remand recommendations have been noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. However, in this case, staff believes that the Commission will be considering new matters related to but not addressed at hearing. In addition, given the nature of the issues which have been raised, staff believes that participation by the parties would be helpful to the Commission. Therefore, staff recommends that participation at the agenda conference be allowed, but limited to five minutes for each party.

**ISSUE 2:** In light of the decision and mandate of the First District Court of Appeal, what action should the Commission take regarding the Court's reversal of the Commission's calculation of used-and-useful percentage: 1. for the distribution and collection systems using the lot count methodology; and 2. for the wastewater treatment plant using annual average daily flows in the numerator when the Department of Environmental Protection permits the wastewater plant based on annual average daily flows?

**RECOMMENDATION:** The Commission should reopen the record for the very limited purpose of taking evidence on what methodology should be used in calculating the used-and-useful percentages for the water distribution and wastewater collection systems, and on what flows should be used in the numerator of the used-and-useful fraction when the Department of Environmental Protection states the denominator, the permitted capacity of the wastewater treatment plants, on the basis of annual average daily flows. If the Commission does reopen the record to take evidence on these issues, staff believes that the additional issue of rate case expense for reopening the record can be considered at that time. (JAEGER, WILLIS)

**STAFF ANALYSIS:** In its opinion, the First DCA reversed the portion of Order No. PSC-96-1320-FOF-SU, issued October 30, 1996, in this docket ("Final Order"), which calculated the used-and-useful percentage using annual average daily flows (AADF) in the numerator, citing the lack of sufficient record support and the prior decision in Florida Cities Water Company v. State, Public Service Commission, 705 So. 2d 620 (Fla. 1st DCA 1998). The use of AADF, as opposed to average daily flows for the maximum month (ADFMM), was precipitated because the Department of Environmental Protection (DEP) changed its method of permitting. Originally, the DEP had permitted wastewater treatment plants without designating whether the capacity was based on AADF or ADFMM, or some other flow. Staff generally found that the DEP permit was based upon ADFMM, and used that flow criteria in the numerator.

However, the DEP permits issued for some of the wastewater plants of Florida Water stated the permitted capacity of the wastewater plant in terms of AADF. Based on this change, staff recommended, and the Commission approved, the use of AADF in the numerator. Other than the permit itself, there was no evidence as to what flows should be used in the numerator of the used-and-useful fraction when the permit was issued based on AADF.

The First DCA saw this as a Commission policy shift which, like the Florida Cities case, "was essentially unsupported 'by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved'". (p. 7 of Slip Opinion) The First DCA, citing Section 120.68(7), Florida Statutes, then concluded that the Commission had departed "from the essential requirements of law", and that the Commission "must, on remand, give a reasonable explanation, if it can, supported by record evidence (which all parties must have an opportunity to address) as to why average daily flow in the peak month was ignored." (pp. 7-8 of Slip Opinion) Section 120.68(7), Florida Statutes, provides in pertinent part:

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

. . .

(e) The agency's exercise of discretion was:

. . .

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the Agency . . .

The Court went on to say, "While we do not rule out the possibility that evidence can be adduced on remand to show that calculating a used and use fraction by comparing average annual daily flows to plant capacity as stated on operating permits is preferable to use the PSC's prior practice, we nevertheless conclude that remand for the taking of such evidence (if it exists) is necessary." (p. 8 of Slip Opinion)

Similarly, the Court noted that, in prior cases, the Commission had rejected arguments that the lot count method was appropriate for determining used and useful percentages of investment in distribution and collection systems serving mixed use areas. As it did for the change to AADFs in the numerator, the Court found that the "Evidence of record in the present case does not support or explain the PSC's switch to the lot count method for evaluating systems serving mixed use areas." It concluded that, "For this policy shift, too, the PSC must give a reasonable explanation on remand and adduce supporting evidence, if it can, to justify a change in policy required by no rule or statute. That failing, the PSC should adhere to its prior practices in calculating used and useful percentages. . . ." (p. 9 of Slip Opinion)

Remand of the First DCA

In the case of Florida Cities Water Company v. State, Florida Public Service Commission, 711 So. 2d 644 (Fla. 1st DCA 1998), the First District Court of Appeal, Per Curiam, affirmed the Commission's decision to reopen the record. Staff believes that the language cited in the current opinion even more clearly gives the Commission the option to reopen the record on these two issues. The First DCA specifically makes references to the need for additional justification for this apparent change in Commission policy and has, again, essentially invited the Commission to take additional evidence.

Therefore, staff believes that the opinion of the First DCA allows for the reopening of the record. Even though this recommendation supports the notion that the record can be reopened for a very limited purpose, it is important to note here that the Commission also has the discretion to decide not to reopen the record even though the Commission recognizes its ability to do so.

Options Available To The Commission

In regards to the question of what flows should be used in the numerator, the panel of Commissioners in the Florida Cities case decided to reopen the record -- but the decision was made on a 2-1 vote. Therefore, staff believes that the full Commission should be aware of the two main options available to the Commission: (1) it may decline to reopen the record and use ADFMM in the numerator; or (2) it may reopen the record and have the parties put on testimony as to which flows should be used in the numerator.

Option 1 has the advantage that it would be quicker and would almost certainly be upheld by the First DCA. However, staff believes that it is wrong to calculate used and useful with this mismatch. Also, staff is afraid that in subsequent rate cases, utilities may cite this case as precedent that the correct flows to use in the numerator would be ADFMM even when evidence to the contrary is put on. Staff does not believe that the Commission should accept ADFMM in the numerator if it believes that another flow might be correct. Therefore, staff recommends that the Commission reject this option.

Staff believes that the Commission should adopt Option 2. It has the disadvantage of having to reopen the record and conduct a further evidentiary proceeding. However, it has the advantage of allowing the Commission to consider the evidence regarding the

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matching of flows in the used-and-useful fraction so as to correctly calculate the used-and-useful percentage.

Therefore, staff recommends that the Commission reopen the record for the very limited purpose of taking testimony on what flows should be used in the numerator of the used-and-useful fraction when the DEP states the denominator, the permitted capacity of the wastewater plant, based on annual average daily flows.

In regards to calculating the used and useful percentages for the water distribution and wastewater collection systems, staff believes the same basic options apply. The Court has made it clear that the Commission must either "give a reasonable explanation on remand and adduce supporting evidence, if it can, to justify a change in policy," or it should "adhere to its prior practices in calculating used and useful percentages for water transmission and distribution systems and wastewater collection systems serving mixed use areas." (p. 9 of Slip Opinion) Again, staff believes that the Commission should reopen the record to allow all parties, and staff, to present evidence on what is the best methodology for calculating the used and useful percentages for the water distribution and wastewater collection systems.

If the Commission does reopen the record to take evidence on these issues, staff believes that the additional issue of rate case expense for reopening the record can be considered at that time. Also, it should be noted that the resulting rate bases, operating and maintenance expenses, revenue requirements, rates, and interim refunds are fall out issues dependent upon the resolution of the used-and-useful issues.



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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, the docket should remain open pending final disposition of the remand.

**STAFF ANALYSIS:** Pending the final disposition of the remand, the docket should remain open.