RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
KENNETH A. HOFFMAN
THOMAS W. KONRAD
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE
R. MICHAEL UNDERWOOD
WILLIAM B. WILLINGHAM

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (904) 681-6788
TELECOPIER (904) 681-6515

GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

May 30, 1996

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 920199-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 SSU's Response in Opposition to Motion to File Memorandum Out of Time Filed by the City of Keystone Heights, Marion Oaks Homeowners Association and Burnt Store Marina; and

2. A disk in Word Perfect 6.0 containing a copy of the document entitled "GIGA.2Leave."

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

ACK 1
AFA 3
APP
CAF
CMU
CTR
EAG
LEG Faber
LIN 5
OPC KAH/rl
RCH
SEC 1
WAS Willis
OTH

cc: All Parties of Record

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
05969 MAY 30 96
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	)	Docket No. 920199-WS Filed: May 30, 1996

SOUTHERN STATES UTILITIES, INC.'S RESPONSE IN OPPOSITION TO MOTION TO FILE MEMORANDUM OUT OF TIME FILED BY THE CITY OF KEYSTONE HEIGHTS, MARION OAKS HOMEOWNERS ASSOCIATION AND BURNT STORE MARINA

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, respectfully submits this Response in Opposition to the Motion to File Memorandum Out of Time filed by putative intervenors City of Keystone Heights, Marion Oaks Homeowners Association and Burnt Store Marina (the "Customers").[1]

1. Counsel for the Customers suggests that the Customers should be permitted to file a late Memorandum of Law in this docket simply because the Customers neglected to hire counsel to represent their interests during the four year period in which this proceeding has elapsed. There is no legal or equitable justification for the Commission to grant intervention or consider the Memorandum of Law submitted by the Customers.

[1]The Motion for File Memorandum Out of Time and accompanying Memorandum of Law was served on counsel for SSU by hand delivery on May 24, 1996. Accordingly, this response is timely filed.

2. SSU, among others, has filed a response opposing Customers' Petition for Leave to Intervene. All previous post-hearing attempts to intervene, including petitions filed following the Court's decision in Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA 1995) and the mandate and remand arising therefrom, have been denied by the Commission. Customers' Petition for Leave to Intervene should likewise be denied. However, if granted, the Customers take the case as they find it with the April 1, 1996 deadline for filing briefs on the refund issue long since past.

3. Further, in taking the case as they find it, the Customers take the record as they find it. Customers' Memorandum of Law misstates the facts in the record. A repeated theme in the Memorandum of Law is that by moving to vacate the automatic stay SSU allegedly assumed a purported risk that it would be required to refund money which was a part of the Commission approved and court affirmed revenue requirement. SSU has never assumed such risk and has informed the Commission repeatedly that it did not believe such a risk even existed. The Customers' state that "SSU indicated that it was aware of and accepted the risk that its request could lead to an economic loss for the utility."[2] The truth is in the transcript from the November 23, 1993 hearing on SSU's Motion to Vacate Automatic Stay where the following exchange took place between then Chairman Deason, counsel for SSU and Staff:

---

[2]Customers' Proposed Memorandum of Law, at 8.

CHAIRMAN DEASON: Let me ask you this. If the stay is vacated, do you agree that Southern States is putting itself at risk to make those customers whole whose rates are higher under statewide rates?

MR. HOFFMAN: No, I don't. But I don't think that the Commission needs to resolve that issue today. Because in our opinion, Mr. Chairman, we believe that on a rate structure appeal, where we are implementing the rates authorized by the Commission, in an appeal which would be strictly revenue neutral, that the Company does not place itself at risk.

* * *

CHAIRMAN DEASON: And if the stay is vacated and the appeal is successful on COVA and Citrus County's part, you're saying there is not going to be a refund to those customers who are paying more?

MR. HOFFMAN: Our position that we have taken, Mr. Chairman, is that there is not a refund. And I think I have already explained to you why. But what I'm saying to you is that we do not dispute, particularly now that Public Counsel has filed an appeal and they are going to put revenue requirements at issue, we do not dispute the need for corporate undertaking or bond at this point of this proceeding and we are willing to make sure that it's posted.

CHAIRMAN DEASON: But that is a question of overall revenue requirements, not customer-specific rates?

MR. HOFFMAN: That's correct.

CHAIRMAN DEASON: Does Staff agree with that?

MS. BEDELL: Yes.[3]

---

[3]November 23, 1993 Transcript in Docket No. 920199-WS, at 52-54.

Customers fail to acknowledge that it would not be lawful for the Commission to require a utility to refund money to which it had been determined to be lawfully entitled solely because the Commission imposed a rate structure on the utility which subsequently was determined to be faulty.

4. Customers repeatedly assert that SSU would have been in a hold-harmless situation if it had not moved to vacate the automatic stay.[4] Customers purport to be the sole arbiter of what portion of Order No. PSC-93-0423-FOF-WS (the Final Order) was impacted by the automatic stay. The record contains no basis for the suggestion that the automatic stay did not apply to the Final Order in its entirety, including the $6.7 million of additional revenue awarded to SSU.

5. Customers suggest that it would be inequitable for the Customers to be required to pay a surcharge to SSU to "keep the utility whole." Customers ignore the fact that as a result of the Commission authorized uniform rate structure in the Final Order, Customers enjoyed lower rates during the period in which the appeal was pending. The surcharge simply would recover from Customers any current refund expense incurred by SSU to reimburse other SSU customers who paid more under the uniform rate structure while Customers were paying less than they would have under a stand-alone or modified stand-alone rate structure. There is no windfall to SSU from this equitable result. If the requirements of law were

---

[4] See, e.g., Customers' Proposed Memorandum of Law, at 4 ("Critical Difference No. 3").

disregarded by the Commission and a surcharge were not permitted, the Customers would the recipients of an unjustified windfall.

6. Customers state that "Public Counsel announced early in the proceeding that his office could not represent all of the divergent interests created by the utility because of rate design."[5] This is not true. SSU requested a modified stand-alone rate design. Alternative designs were not even proposed until long after the proceedings had been initiated. Despite this fact, Citrus County intervened in 1992 in opposition to SSU's requested rate design. Customers had every right and opportunity to intervene in the proceedings in the same manner in which Citrus County chose to intervene and participate. Customers did not exercise their right to do so.

7. Customers also suggest that the facts upon which the Florida Supreme Court reversed the Commission's denial of recovery of certain affiliated transaction costs in the GTE Florida Inc. v. Clark decision[6] ("GTE Florida") were somehow more appropriate for recovery through a surcharge mechanism than the situation facing SSU.[7] This is an untenable position. Obviously, it would be a more grievous and unconscionable act for the Commission in this case to have approved a utility's revenue requirement, ordered a rate structure under which the revenue requirements would be

---

[5]Customers' Proposed Memorandum of Law, at 3 ("Critical Difference No. 1").

[6]GTE Florida Inc. v. Clark, 668 So.2d 971 (Fla. 1996).

[7]Customers' Proposed Memorandum of Law, at 3 ("Critical Difference No. 2").

collected and then, upon reversal solely of the Commission rate structure, require the utility to refund a portion of the revenue requirement which has been upheld by the appellate court.

8. In their third attempt to distinguish the GTE Florida decision, Customers suggest that SSU perhaps should have done nothing upon issuance of the automatic stay.[8] As indicated previously, to do nothing would have deprived SSU of $6.7 million of revenue which the Commission determined SSU should lawfully be permitted an opportunity to collect from its customers.

9. In yet another attempt to differentiate the GTE Florida decision, Customers distort the sequence of events concerning staff recommendations in the GTE Florida case and this one.[9] Customers ignore the fact that the primary staff recommendation on remand in this case was that no refund should issue as a result of the reversal of rate structure by the appellate court.

10. Moreover, Customers suggest that SSU was "on notice" of the possibility of a refund without an opportunity to surcharge and "elected to fight the stay anyway."[10] Customers could not possibly have reviewed the record in this case and still have made such assertions. The record is clear that SSU always has maintained that it would be unlawful for the Commission to require SSU to refund money in such manner as to deny SSU its revenue requirement. SSU has never accepted a risk because no such risk ever existed

---

[8] Id., at 4 ("Critical Difference No. 3").

[9] Id. ("Critical Difference No. 4").

[10] Id.

under the law of utility rate making. Customers' suggestion that SSU assumed the risk that the Commission would act in an unlawful manner by requiring a refund without permitting a commensurate surcharge is ludicrous.

11. In its fifth attempt to distinguish the GTE Florida decision, Customers once again inaccurately assert that the automatic stay would have operated to assure SSU full revenue recovery.[11] This assertion is not true.

12. Customers' sixth attempt to differentiate the GTE Florida decision simply reiterates previous arguments that SSU assumed a risk by moving to vacate the stay.[12] To the contrary, the GTE Florida decision confirms that the absence or presence of a stay is not "... a prerequisite to the recovery of an overcharge or imposition of a surcharge." 668 So.2d at 973.

13. Customers would have the Commission ignore the fact that they are the only ones who would have benefited from an affirmance of the Commission's uniform rate design. While the appeal was pending, Customers enjoyed lower rates than they otherwise would have paid under a stand-alone rate structure or the modified stand-alone rate structure proposed by SSU. If the Commission were to order SSU to refund money in this proceeding, which SSU continues to suggest would not be a proper result, and the Commission were to deny SSU's recovery of its lawfully established revenue requirement through a surcharge, it is only the Customers who would obtain a

[11] Id., at 5 ("Critical Difference No. 5").

[12] Id., at 5 ("Critical Difference No. 6").

windfall. The characterization of Customers as "unwilling guarantors"[13] has no basis in fact and no premise in utility rate making. Finally, the suggestion that SSU took the risk that the Commission might act unlawfully in the future by requiring a refund without a commensurate surcharge is ludicrous. Customers cite no precedent or statutory authority which suggests that the Commission can absolve itself of an unlawful act simply by notifying the utility in advance that it might act unlawfully in the future.

14. To conclude, Customers present no valid basis upon which Customers should be permitted to intervene or have the Commission consider their Memorandum of Law. Customers' Memorandum of Law is rife with factual inaccuracies and improper characterizations of the record in a manner consistent with Customers' unfamiliarity with this case. These inaccuracies and mischaracterizations present glaring examples of why the Commission and the parties to this proceeding should not be prejudiced by the time and expense of even considering them.

WHEREFORE, SSU respectfully requests that Customers' Motion to File Memorandum Out of Time be denied.

Respectfully submitted,

KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551
(904) 681-6788

[13] Id., at 6.

and

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the following on May 30, 1996:

John R. Howe, Esq.
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Lila Jaber, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Mr. Harry C. Jones, P.E.
President
Cypress and Oak Villages Association
91 Cypress Boulevard West
Homasassa, Florida 32646

Michael S. Mullin, Esq.
P. O. Box 1563
Fernandina Beach, Florida 32034

Larry M. Haag, Esq.
County Attorney
111 West Main Street #B
Inverness, Florida 34450-4852

Susan W. Fox, Esq.
MacFarlane, Ferguson
P. O. Box 1531
Tampa, Florida 33601

Michael B. Twomey, Esq.
Route 28, Box 1264
Tallahassee, Florida 31310

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 S. Gadsden Street
Tallahassee, FL 32301

Darol H.N. Carr, Esq.
David Holmes, Esq.
P. O. Drawer 159
Port Charlotte, FL 33949

Michael A. Gross, Esq.
Assistant Attorney General
Department of Legal Affairs
Room PL-01, The Capitol
Tallahassee, FL 32399-1050

By: _____
KENNETH A. HOFFMAN, ESQ.
Giga.2LEAVE