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November 5, 1997

Reply To: **Ocala**

Blanco Bayo'
Director of Records and Reporting
Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Re: Docket Number: **920199-WS**

Dear Ms. Bayo':

In connection with the above-referenced matter enclosed please find Intervenors, Joseph J. DeRouin, Victoria M. DeRouin, Peter H. Heeschen, Elizabeth A. Riordan, Carvell Simpson and Edward Slezak, Response to Florida Public Service Commission Request for Brief Pursuant to Order No. PCS-97-1290-PCO-WS, along with fifteen copies for filing with your office.

ACK
AFA 1
APP 1
CAF
CMU
CTR
EAG
LEG 1
MAS
OPC
RCH
SEC 1
WAS
OTH

Please feel free to contact me with any questions or comments. Thanking you in advance for your cooperation, I remain

Yours truly,

Charles R. Forman

CRF:jm
5 Enclosures

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washinton Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILTIES (Deltona)	DOCKET NO.: 920199-WS Filed: November 5,1997

INTERVENORS', JOSEPH J. DEROUIN, VICTORIA M. DEROUIN, PETER H. HEESCHEN, ELIZABETH A. RIORDAN, CARVELL SIMPSON AND EDWARD SLEZAK, RESPONSE TO FLORIDA PUBLIC SERVICE COMMISSION REQUEST FOR BRIEF PURSUANT TO ORDER NO. PSC-97-1290-PCO-WS

Intervenors, JOSEPH J. DEROUIN, VICTORIA M. DEROUIN, PETER H. HEESCHEN, ELIZABETH A. RIORDAN, CARVELL SIMPSON AND EDWARD SLEZAK, (hereinafter "Intervenors") hereby file their response to Order No. PSC-97-1290-PCO-WS, dated October 17, 1997. These Intervenors are Florida Water Services Corporation customers who may be subject to a surcharge as a result of the decision of the Florida Public Services Commission (hereinafter "PSC") in this matter. Intervenors oppose the implementation of any surcharges.

The PSC has requested all parties in this case to file briefs giving their opinion of the appropriate action the Commission should take as a result of Order No. PSC-97-0423-FOF-WS being reversed in part and affirmed in part by the First District Court of Appeal in Southern States Utilities, Inc. v. Florida Public

Service Commission, 22 F.L.W. D1492 (Fla. 1st DCA 1997). The PSC has identified the following potential options for the parties to argue in their briefs:

1. Require refunds with interest and allow surcharges with interest;

2. Do not require refunds and do not allow surcharges because the rates have been charged, prospectively;

3. Order refunds without interest and allow surcharges without interest;

4. Allow the utility to make refunds and collect surchages over an extended period of time to mitigate financial impacts;

5. Allow the utility to make refunds and collect surcharges over different periods of time.

With regard to the alternative issues that the PSC requested the parties to brief, it is Intervenors' contention that the only action that the PSC can take under the current state of the case, is to not require refunds and not to allow surcharges. Any other action taken by the PSC in regard to this matter would constitute appealable error because the PSC is without statutory or administrative authority to impose surcharges. The Legislature has enacted no statute to authorize surcharges. The PSC has enacted no rules pertaining to surcharges. The PSC has failed to protect the due process rights of substantially affected persons by failing to give potentially surcharged customers of FWSC reasonable notice and an opportunity to participate in an evidentiary hearing prior to the taking of the property. Finally, any attempt to collect

surcharges would constitute retroactive ratemaking.

A. STATEMENT OF FACTS:

This case arose out of a 1992 Application for Rate Increase by Southern States Utilities, Corp. now known as Florida Water Services Corporation (hereinafter referred to as "FWSC"). FWSC's application was filed on May 11, 1992 and involved 127 of its water and wastewater service areas regulated by the PSC. Between August 1992 and November 1992 the PSC held a total of ten (10) service hearings throughout the state for the purpose of receiving customer testimony as to the proposed rate increase. Beginning November 6, 1992, it conducted a five (5)-day hearing in Tallahassee on the same subject. Order No. PSC-0423-FOF-WS, PAGE 3. FWSC requested a modified stand alone rate structure. The Office of Public Counsel took no position on this rate strusture issue. Order No. PSC-93-0423-FOF-WS, PAGE 94. Other parties requested pure stand alone rates. By its Order No. PSC-93-0423-FOF-WS in Docket Number 920199-WS, the PSC approved a rate increase, but imposed a uniform, state-wide rate structure for all 127 service areas. Order No. PSC-93-0423-FOF-WS, PAGE 104.

FWSC did not apply for the uniform rate structure. Order No. PSC-95-1292-FOF-WS, 95 FPSC 10:371. Neither did any other party. No one was put on notice of the possibility of the implementation of the rate increase through the uniform rate structure. Further, the notice given by PSC in the original rate increase application gave no specifics concerning about what was at issue, except that

there was a rate increase request. The non-party, substantially affected persons, i.e., customers of FWSC, had no notice concerning what impact, if any, the PSC's unilateral decision to impose uniform statewide rates would have.

Pursuant to the PSC's order, FWSC implemented the uniform statewide rates on or about September 23, 1993 and continued to collect these rates until approximately January 1, 1996. The potential redistribution of the collected rate monies constitutes the subject matter of this brief.

On April 6, 1995, the order requiring uniform rates was reversed. Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995). On October 19, 1995, the PSC ordered that FWSC was required to refund with interest all excess sums collected pursuant to the improperly imposed uniform statewide rates. Order No. PSC-95-1292-FOF-WS, 95 FPSC 10:376. That order also authorized prospective final rates which were to be calculated based on the modified stand alone rate structure originally requested by FWSC. Order No. PSC-95-1292-FOF-WS, 95 FPSC 10:374.

FWSC moved for reconsideration on the basis that any decision concerning the impact of refunds and/or surcharges should be economically neutral as to FWSC. The Office of Public Counsel did not participate on this issue due to the inherent conflict between the potential refund customers and potential surcharge customers.

On August 14, 1996, the PSC affirmed its earlier determination that FWSC was required to implement the modified stand alone rate

structure and to make refunds to customers. The Commission, however, ruled that FWSC could not impose a surcharge on those customers who paid less under the uniform rate structure. Order No. PSC-96-1046-FOF-WS, 96 FPSC 8:207. This was the first time that the issue of a surcharge had ever been ruled on. Petitions to Intervene by potential surcharge customers were denied. Order No. PSC-96-1046-FOF-WS, 96 FPSC 8:201. Additionally, the PSC, on August 5, 1997, decided that a notice to FWSC customers regarding the surcharge issue was not required. See PAGE 3, Order No. PSC-97-1290-PCO-WS.

FWSC appealed this decision as did the potential surcharge customers who had been denied a right of intervention. On June 17, 1997, the First District Court of Appeal issued its opinion in Southern States Utilities, Inc. v. Florida Public Service Commission, 22 F.L.W. D1492 (Fla. 1st DCA, June 17, 1997), reversing the PSC's order implementing the remand ordered in Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995) and reversed the Commission's order denying intervention by potentially affected customers. Southern States Utilities, Inc. v. Florida Public Service Commission, 22 F.L.W. at D1493. As to the second issue the Court said,

> "Finally, although the Public Counsel did participate in the initial proceedings, Public Counsel did not file a brief on the surcharge issue during the remand proceeding because it could not represent the interest of some customer groups over the interests of another customer group. Although several of these customer groups, including Keystone Heights, Marion Oaks Civic

> Association, and Burnt Store Marina, had retained counsel and filed petitions to intervene, the PSC denied those petitions as untimely pursuant to Rule 25-22.039, Florida Administrative Code. We find that the PSC erred in denying these petitions as untimely in the circumstances of this case, where the issue of a potential surcharge and the applicability of the Clark case did not arise until the remand proceeding. Accordingly, on remand, we direct the PSC to reconsider its decision denying intervention by these groups and to consider any petitions for intervention that may be filed by other such groups subject to a potential surcharge in this case." Southern States Utilities, Inc. v. Florida Public Service Commission, 22 F.L.W. at D1493.

After receiving the decision of the First District Court of Appeal, the PSC required FWSC to provide an exact calculation by service area of the potential refund and surcharge amounts with and without interest as of June 30, 1997. Order No. PSC-97-1033-PCO-WS, PAGE 5. The Commission also allowed all parties to file briefs on the appropriate action the Commission should take in light of the Southern States Utilities, Inc. v. Florida Public Service Commission decision. Intervenors petitioned for intervention on behalf of certain customers subject to potential surcharge. These customers also moved, together with others, to require notice and a meaningful opportunity to be heard for all customers potentially affected by the refund/surcharge issue.

The PSC heard all of these motions at its agenda hearing on Tuesday, October 7, 1997. At the conclusion of the meeting, the Commission voted that it would take final action in this case on December 15, 1997. Order No. PSC-97-1290-PCO-WS, PAGE 9. All parties and intervenors then in the case, had to file briefs by

November 5, 1997. Order No. PSC-97-1290-PCO-WS, PAGE 5. FWSC must send notice to all customers on or before October 22, 1997. Order No. PSC-97-1290-PCO-WS, PAGE 5. All customers not presently represented will have the opportunity to file written comments, letters, petitions to intervene, or briefs on or before the December 15, 1997 final hearing. Over counsel's objection, the PSC decided that it will not take any evidence before making its ruling. Order No. PSC-97-1290-PCO-WS, PAGE 4.

B. THE FLORIDA PUBLIC SERVICE COMMISSION LACKS AUTHORITY TO IMPOSE SURCHARGES OR REFUNDS:

There is no statutory authority or rules enacted by the Commission for the implementation of surcharges. And, under the facts of this case, there is no authority to impose a refund.

The PSC is an administrative body created by the Legislature. Chapter 350, Florida Statutes (1997). All administrative bodies created by the Legislature are not constitutional bodies, but are merely creatures of statute. This, of course, includes the PSC and as such, the Commission's powers, duties, and authority are those and only those that are conferred expressly or impliedly by statute. Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the PSC must be resolved against the exercise thereof. City of Cape Coral v. GAC Utilities, 281 So. 2d 493 (Fla. 1973). This proposition of law was again reaffirmed by the First District Court of Appeal in Citrus County v. Southern States Utilities, Inc., 656 So. 2d at 1311.

> "The Commission's order must be reversed based on our finding that chapter 367, Florida Statutes, did not give the Commission authority to approve uniform statewide rates for these utility systems which are operationally unrelated in their delivery of utility service. As an administrative agency created by the legislature, 'the Commission's power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.' *Rolling Oaks Utilities v. Florida PSC*, 533 So.2d 770, 773 (Fla. 1st DCA 1988). 'Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested.' *City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, 496 (Fla. 1973) (citations omitted)."

There is no statutory authority for surcharges. The enabling legislation for the PSC water and wastewater regulatory authority is Chapter 367, Florida Statutes. Section 367.081 and section 367.082, Florida Statutes, are the statutes pertaining to rate proceedings. These sections are silent as to surcharges. Thus, the Legislature has not provided the PSC the authority to impose surcharges.

Title 25 of the Florida Administrative Code pertains to the Florida Public Service Commission. Rules 25-22.0407, 25-22.0408, 25-30.135, 25-30.140, 25-30.335 through 25-30.475 are the rules pertaining to rate adjustments and the calculation thereof. These rules are also silent as to surcharges. Thus, there is no provision under the PSC's rules for surcharges for water/wastewater utilities.

The law requires that all reasonable doubt as to the PSC's authority be resolved against the exercise thereof. In this instance there can be no doubt as to the PSC's authority, as there are no provisions, expressly or impliedly, for the imposition of surcharges. Therefore, the PSC is without authority to impose them.

Furthermore, Intervenors would also assert that the PSC is without authority to issue a refund in a case such as this. If no refund is required then no surcharge is necessary. Statutes 367.081 and 367.082 and rule 25-30.360 provide for refunds only where there is an error in the revenue requirement of the utility requesting the rate. In this case, the PSC's findings regarding FWSC's revenue requirements were upheld on appeal. Citrus County v. Southern States Utilites, Inc., 656 So. 2d at 1311. It was not FWSC's revenue requirements which resulted in reversal of the PSC's order but rather, the uniform statewide rate structure erroneously imposed. There is no provision in the statutes or administrative rules for the implementation of a refund in this situation.

As stated by Ms. Jabar, in the June 11, 1996, Agenda Conference:

> " MS. JABAR: ... it is staff's view that the rate structure in this case is revenue neutral. When the court overturned the Commission's decision on rate structure, it didn't generate the refund. It's the changes in the revenue requirement that generate a refund. The answer to your question in this case is its not the change in the rate structure that gets a refund." Agenda

Conference, June 11, 1996, Page 59, lines 8 through 15.

This point distinguishes our situation from GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). In GTE, the court ruled that where there is a mechanism for a refund there is a mechanism for a surcharge. In the instant action, there is no mechanism for a refund. Furthermore, no party in GTE argued that there was no statutory or rule authority for a surcharge. Apparently, the parties assumed that such authority existed.

Without statutory authority or rules the PSC has no authority to implement surcharges in this matter. Furthermore, because a refund is not authorized in this case, any decision by the PSC to require refunds or surcharges would constitute reversable error.

C. THE INITIAL ORDER OF THE PSC IMPOSING THE UNIFORM RATE STRUCTURE IS VOID AND IT WAS ERROR FOR THE PSC TO CONTINUE TO PROCEED WHERE NO AUTHORITY EXISTED.

No one in this proceeding received proper notice or opportunity to be heard on the issue of a uniform statewide rate structure. In this case, the constitutional due process requirements were not met. As a result that portion of Order No. PSC-93-0423-FOF-WS regarding uniform rates was void.

Even before the First District Court of Appeal reversed in part Order No. PSC-93-0423-FOF-WS, in Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), that part of the order was void. The PSC should have further been guided by the District Court's directive that "the cause is

remanded for disposition consistent herewith." Id. at 1311. The case should not have been considered merely an implementation of a remand. The PSC should have realized, as it has stated many times throughout this proceeding that "this is a unique situation". The uniqueness of these proceedings should have been a red flag not to proceed until due process requirements had been met.

The PSC was without authority to act under the portion of Order No. PSC-93-0423-FOF-WS regarding the uniform rate structure because it was void. No party applied for the uniform rate structure, no hearing was held on the uniform rate structure, and no notice was given regarding the uniform rate structure. An order entered under these circumstances, has been declared void by the Supreme Court. Southern Armored Service, Inc. v. Mason, 167 So. 2d 848 (Fla. 1964).

In Southern Armored Services, the Public Utilities Commission granted a certificate of public convenience and necessity authorizing a carrier to operate an armored car service in certain territory. The Supreme Court held that where order of the Commission directing emergency armored car service was not issued pursuant to any application, and no hearing was held and no notice given as required by statute such order was void. It stated:

> "The Commission is a statutory body with special and limited powers. It can only exercise the power expressly or impliedly grated to it and any reasonable doubt of existence of power must be resolved against the exercise thereof. *Atlantic Coast Line Ry.*

Co. v. State, 1917, 73 Fla. 609, 74 So. 595.

> While we find no statutory provision for issuance of temporary or emergency certificates or authority, this Court has u[p]held action of the Commission in which it granted temporary operating authority, but we specifically required that it be on application after notice and hearing.
>
> This Court has always held that no change or modification could be made in any existing operation except upon affirmative finding by the Commission, after due notice and hearing, that public convenience and necessity required the change. *Central Truck Lines v. Railroad Commission*, 1935, 118 Fla. 555, 160 So. 26.
>
> We are forced to the conclusion that Order No. 5397 was issued in violation of the applicable statutes, that the Commission did not have the authority to issue it under these circumstances, and therefore it was void when issued." Southern Armored Service, Inc. v. Mason, 167 So. 2d at 850, (Citations omitted.)

While the instant case did have notice and hearings on FWSC's application for a rate increase, there was no application, notice or hearings held on the statewide uniform rate structure imposed by the PSC which was subsequently reversed by the First District Court of Appeal.

D. SUBSTANTIALLY AFFECTED PERSONS HAVE NOT BEEN PROPERLY NOTICED THROUGHOUT THE ENTIRE PROCEEDING AND THE PSC IS ATTEMPTING TO DEPRIVE THESE PERSONS OF DUE PROCESS BY NOT AFFORDING THEM THE OPPORTUNITY TO BE HEARD OR PRESENT EVIDENCE.

Once again, the PSC is proposing to enter an order that fails to provide procedural due process to the parties and substantially affected person in this action. The PSC will not allow evidence to be presented at its hearing and the notice to substantially

affected persons who were not parties is legally insufficient. Any order entered under these circumstances will be void.

The notice requirements for administrative hearings are set out in section 120.57, Florida Statutes (1997) and Chapter 25-22.0407, Florida Adminisrative Code. The notices sent out by the PSC for the rate increase hearings were not adequate to statutorily and constitutionally put the customers, who are substantially affected persons, on notice that their property was at risk from uniform rates.

In Guerra v. State Department of Labor and Employment, 425 So. 2d 1098 (Fla. 3d DCA 1983), the court found the notice provisions of section 120.57, Florida Statutes, to be mandatory, notwithstanding the agency's claim that the notice element was impractical, burdensome, and unwise. Despite a standard "issue" statement on the notice form, the Guerra court found that it gave lay claimants no useful notice of the real matters with which the hearings were to be concerned. "Neither the agency nor this court is impowered to challenge the wisdom of, much less to ignore a legislative policy decision such as this." Guerra v. State Dept. of Labor and Employment, 425 So. 2d at 1101.

In the Guerra decision, the appellant had notice of and attended her compensation hearing but had no prior notice of one of the matters her employer would assert as grounds for her discharge. Because of her attendance, the agency argued that any defect in the

notice was harmless error. The court addressed harmless error saying:

> "The determination of whether a particular procedural defect may be disregarded as merely harmless must be based in large measure on the nature and significance of the error and its relationship to the rights of the affected party ... A case shall be remanded if the court finds that the fairness of the proceedings or the correctness of the action may have been impaired by a materal error in procedure or a failure to follow prescribed procedure." Guerra v. State Dept. of Labor and Employment, 425 So. 2d at 1103.

The PSC's notice to the initial hearings on FWSC's rate request gives no specificity of any consequence about what is at issue, except that there is a rate increase request and the PSC will listen to customer testimony. Non-party, substantially affected persons had no notice that a statewide uniform rate structure was being considered. In Southern States Utilities, Inc. v. Florida Public Service Commission 22 F.L.W. at D1493, the PSC, itself, noted the predicament of the potentially surcharged customers when it is quoted by the court as follows:

> "The utility wishes to recover, via a surcharge on these unrepresented customers, millions of dollars and the costs of making the required refunds. We find that the lack of representation, coupled with the lack of notice and the assumption of the risk in early implementation of the uniform rate structure violates our sense of fundamental fairness and equity." Id. at D1493. [Emphasis added]

It was not until October 22, 1997, that substantially interested parties were given any notice about the possible

surcharge. In Order No. PSC-97-1290-PCO-WS, dated October 17, 1997, the PSC decided it was time to finally give potential surcharge customers notice that the PSC was considering surcharging them. Order No. PSC-97-1290-PCO-WS, PAGE 5. However, in that same order, the PSC determined that since this was an implementation of a remand that these substantially affected persons may not present any evidence at the hearing. Order No. PSC-97-1290-PCO-WS, PAGE 4. Before a surcharge can be implemented to take private funds from a citizen, fundamental fairness dictates that the substantially affected persons have a meaningful opportunity to appear and be heard in the proceeding. Article X, Section 6 of the Florida Constitution. However, any intervenors to this proceeding "take the case as they find it" without an opportunity to present any evidence in defense of the taking of their property or the ability to cross-examine the manner or method of their surcharge calculation. 25-22.039 F.A.C.; PSC Order No. PSC-97-1290-PCO-WS, PAGE 4.

By the PSC's own admission, the customers subject to the surcharge have unique interests that have never been represented. Southern States Utilities v. Public Service Commission, 22 F.L.W. at D1493. The Office of Public Counsel has properly refused to represent either side in this conflict. To further aggravate this situation, the PSC refused notice to and intervention by potentially surcharged customers until it was reversed by the First

District Court of Appeal in June of this year. Southern States Utilities, Inc. v. Florida Public Service Commission, 22 F.L.W. at D1492. As a result, there has been no one advocating their position during the nearly five-years of litigation.

The lack of prior representation is compounded by the fact that no one knew the potential for a surcharge existed during the rate making hearings. First, no one could have anticipated that uniform statewide rates would be improperly exacted by the PSC since none of the parties applied for them. Further, there has never been a surcharge before in water/wastewater ratemaking. Nor has there ever been a surcharge when there was a rate structure reversal for any regulated utility. As a result, no one could anticipate that statewide uniform rates would lead to excess charges and undercharges. There is no statutory authority, nor administrative authority enacted by the PSC pertaining to surcharges. Likewise, there is no statutory authority, nor administrative authority enacted by the PSC pertaining to how surcharges are calculated. There is no provision for redistribution of improperly imposed rate structures, especially where the rate increase collected by the water/wastewater utility was approved by both the PSC and the appellate court.

To further prejudice these customers, the PSC has imposed an unrealistic time frame for them to obtain counsel and respond. Assuming five (5) days for mail time, the earliest a customer would

receive a notice is October 27, 1997, which leaves insufficient time before the final hearing in which to review nearly five (5) years of trial and appellate records and make an informed response. These customers will be denied their right to meaningful due process.

On December 15, 1997, the PSC proposes to redistribute overpayments and underpayments pursuant to an improper rate structure which it crafted and imposed without application of the parties involved. This rate structure was based on hearings held in November 1992. At that time, no refund or surcharge issue was before the Commission. None could have been contemplated. As a result, no evidence was offered on this issue.

The Commission's decision was reversed by the First District Court of Appeal in 1995, Citrus County v. Southern States Utilities, Inc., 656 So. 2d 2307. For the very first time, issues relating to the potential of retroactive equalization between customers came before the Commission. How much money had been overpaid? Who had overpaid? Are they still customers? If not, where have they gone? Who had underpaid? By how much? Are they still customers? If not, where have they gone? What is the total amount of money to be redistributed? What is the utility's roll in this redistribution? Should refunds and surcharges be made commensurately? For the first time, the PSC was faced with all these issues and many others. For the first time, participants in

the controversy would have the opportunity to offer evidence and brief these issues. However, the PSC has limited participation to legal argument. No evidentiary hearing will occur. No customer can challenge the amount of his or her proposed surcharge. No customer can offer evidence on the potential effect of the surcharge. No one can even challenge the methodology for calculating these surcharges by offering conflicting evidence or opinion testimony regarding the propriety of the formula and method in calculating the amount of surcharges and refunds due these customers.

As early as the June 11, 1996, Agenda Conference, several of the Commissioners recognized that there was a problem in this procedure:

> "COMMISSIONER JOHNSON: Just adding to that, I don't think we are in a position to -- not that I would agree to a surcharge anyway, but if we were to do that, given the information that we have in this recommendation, I would feel uncomfortable imposing a surcharge. We don't even know what it is. We don't even know how much these customers would be assessed. We don't even know what kind of impact we would be having on customers. With respect to making a vote on surcharging folks today, to me, would just be almost unthinkable not having the facts before us and the ability to analyze and determine exactly what we need to do." Agenda Conference, June 11, 1996, Pages 62 line 18 through Page 63, line 5.

However, the PSC is proposing to do the unthinkable. By making a decision affecting property rights of substantially affected persons without giving them an opportunity to be heard, to

present evidence, and to test the propriety, much less the manner in which the surcharge is calculated, in the words of Commissioner Johnson, "is unthinkable".

The public policy of this state favors traditional due process rights in rate hearings whether permanent or interim. Citizens of Florida v. Mayo, 333 So. 2d 1 (Fla. 1976). Nor can there be any compromise or the shorting for convenience or expediency when the minimal requirement of fair hearing has been neglected or ignored. United Telephone Company of Florida v. Beard, 611 So. 2d 1240 (Fla. 1993). When factual matters affecting the fairness of utility rates are being considered by a regulatory commission, the rudiments of fair play and due process require that the company must be afforded a fair hearing and an opportunity to explain or rebut those matters. Florida Gas Company v. Hawkins, 372 So. 2d 1118 (Fla. 1979). Certainly, substantially affected persons such as the customers who face a potential surcharge have the same rights to be afforded a fair hearing and an opportunity to explain or rebut those matters which may result in their losing property.

E. THE IMPOSITION OF SURCHARGES UPON CERTAIN CUSTOMERS OF FWSC WILL RESULT IN RETROACTIVE RATEMAKING BY THE PSC.

This case involves the setting of rates by an administrative agency, not the award of a judgment by a court. As the Florida Supreme Court and others have enunciated countless times, ratemaking is prospective in nature, not retroactive. Westlake Inc. v. Dade County, 264 So. 2d 7 (Fla. 1972). That simple fact

has broad implications to this case. The simple fact is the PSC, as well as the District Court of Appeal, have determined that the revenue requirements of FWSC are appropriate and necessary. The overcharging or undercharging of customers in this case results exclusively from the PSC's decision to impose uniform statewide rates.

Unless the Commission takes some action to capture funds associated with rate increases or decreases on a going forward basis, it loses control of the final disposition of these funds. It cannot arbitrarily go back and adjust rates to the beginning of the rate case or to any other point in the past. See: United States Telephone Company v. Mann, 403 So. 2d 962 (Fla. 1981). This is a reflection of the fundamental principle that ratemaking is prospective in nature. The Commission cannot simply set rates at a level which it thinks ought to have been charged in the past. Rates must be set on a going forward basis to be charged in the future. As the Supreme Court noted in the City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 260 (Fla. 1968), "the new rates are prospective as of the day they are fixed." In a normal rate setting proceeding such as FWSC's rate case, the only way that the Commission can adjust rates retrospectively is to have established the rates as conditional from some point in the past. This is accomplished by making the effective revenue subject to refund guaranteed by bond or corporate undertaking. Section 367.081(8) and 367.082(3), Florida Statutes (1995).

The fundamental legal principle embodied in this process is the prohibition against retroactive ratemaking. Retroactive ratemaking basically is an attempt to set rates on a going forward bases to recoup past losses or to refund passed over earnings. City of Miami v. Florida Public Service Commission, 208 So. 2d at 260; Citizens v. Public Service Commission, 448 So. 2d 1024 (Fla. 1984); Gulf Power Company v. Cresse, 410 So. 2d 492 (Fla. 1982).

The same prohibition against retroactive ratemaking applies as a result of the PSC's approval of FSWC's revenue requirement but implementing those rates through a uniform rate structure. At the point the PSC issued its final order establishing FWSC's rates, those were the lawful permanent rates to be charged thereafter. The PSC required the utility to post a bond subject to refund pending the outcome of an earnings review. However, the revenue requirement was determined to be proper. No bond was required of FWSC to protect against reversal of the rate structure. Thus, the PSC was without any mechanism to control the future disposition of revenues associated with the rate structure during the pendency of the appeal and remand proceedings in this matter. The PSC cannot go back after the appeal and retroactively adjust rates now as there are no funds either owing or in the PSC's control. To do so would violate the prohibition against retroactive ratemaking.

The instant action is distinguishable from GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996) because the revenue requirement in this case was not specifically in dispute, but rather the

revenue recovery methodology. A refund or surcharge without appropriate recovery for the revenue will force the utility to give up revenues, thereby taking from FWSC the opportunity to earn a fair rate of return. This would be contrary to law because the Court affirmed the PSC's decision on the utility's rate requirement. Points of law adjudicated by appeal become the "law of the case" and those points are no longer open for discussion or consideration in subsequent proceedings. Strazzulla v. Hendri, 177 So.2d 1, 2, 3 (Fla. 1965).

The Commission is in the position of making an adjustment to existing permanent rates after the remand. That adjustment has to be prospective to be consistent with the Commission's statutory authority and the prohibition against retroactive ratemaking. Thus, any decision to impose surcharges would constitute retroactive ratemaking, which the PSC is without authority to impose.

G. CONCLUSION:

Once again the PSC is on the brink of issuing an illegal order. The courts of this state have been called upon to correct the PSC when it entered orders which it lacked statutory authority to enter. The PSC staff and attorneys are well aware of the lack of authority to issue surcharges or, for that matter, refunds in the situation such as that presented in this case. The record is replete with staff analysis and appellate briefs, presumably written on behalf of the PSC, indicating that the PSC is without

authority to issue surcharges in a case such as this. Of the options outlined in the order which the PSC has requested parties to address, the only option for which the PSC has authority to enter, is an order which does not require refunds and does not require surcharges.

I HEREBY CERTIFY that a true copy of the forgoing has been furnished by U.S. Mail to the attached list of addressees, this 5 day of November, 1997.

Respectfully submitted,

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