

IN THE SUPREME COURT OF FLORIDA

THE CITIZENS OF THE STATE OF
FLORIDA,

Petitioners,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent,

and

JACKSONVILLE SUBURBAN UTILITIES
CORPORATION and SOUTHERN
UTILITIES COMPANY,

Respondent.

APPEAL FROM DECISION
RENDERED BY THE DISTRICT
COURT OF APPEAL FOR THE
FIRST DISTRICT OF
FLORIDA IN CASE NO.
AE-103

CASE NO. 64,680

FILED
SID J. WHITE
JAN 24 1968
CLERK, SUPREME COURT
[Signature]
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

William S. Bilenky
General Counsel

William H. Harrold
Associate General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

IN THE SUPREME COURT OF FLORIDA

THE CITIZENS OF THE STATE OF)
FLORIDA,)
)
Petitioners,)
)
v.)
)
FLORIDA PUBLIC SERVICE COMMISSION,)
)
Respondent,)
)
and)
)
JACKSONVILLE SUBURBAN UTILITIES)
CORPORATION and SOUTHERN)
UTILITIES COMPANY,)
)
Respondent.)
)
)
_____)

APPEAL FROM DECISION
RENDERED BY THE DISTRICT
COURT OF APPEAL FOR THE
FIRST DISTRICT OF
FLORIDA IN CASE NO.
AE-103

CASE NO. 64,680

RESPONDENT'S BRIEF ON JURISDICTION

William S. Bilenky
General Counsel

William H. Harrold
Associate General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

TABLE OF CONTENTS

PAGE NO.

CITATION OF AUTHORITIES ii

DESIGNATION OF PARTIES 1

ARGUMENT

POINT I

THIS COURT SHOULD DECLINE TO TAKE JURISDICTION
OVER THIS CASE BECAUSE THE DECISION OF THE
DISTRICT COURT OF APPEAL IS FACTUALLY
DISTINGUISHABLE AND THEREFORE DOES NOT CONFLICT
WITH A SUPREME COURT DECISION ON
THE SAME QUESTION OF LAW. 2

CONCLUSION 7

CERTIFICATE OF SERVICE 8

APPENDIX A-1

CITATIONS OF AUTHORITY

CASES

PAGE NO.

Butchikas v. Travelers Idemnity Company,
343 So.2d 816 (Fla. 1976) 6

Citizens of the State of Florida v. Florida Public
Service Commission, 399 So.2d 9 (Fla. 1st DCA 1981) 2,3,4

Citizens of the State of Florida v. Hawkins, 364 So.2d 723
(Fla. 1978) 2,3,4

Citizens of the State of Florida v. Public Service
Commission, 440 So.2d 371 (Fla. 1st DCA 1983) 2,4

FLORIDA STATUTES

Section 367.081, F.S. 4

COMMISSION ORDERS

Order No. 9443 3

Order No. 9533 2

Order No. 10007 2

OTHER

Rule 9.030(a)(2)(A)(IV), Rules of Appellate Procedure 2

Art. V, S. 3(b)(3), Fla. Const. 2

DESIGNATION OF PARTIES

Respondent, Florida Public Service Commission will be referred to as "the Commission."

Petitioner, Public Counsel will be referred to as "Citizens".

POINT I

THIS COURT SHOULD DECLINE TO TAKE JURISDICTION OVER THIS CASE BECAUSE THE DECISION OF THE DISTRICT COURT OF APPEAL IS FACTUALLY DISTINGUISHABLE AND THEREFORE DOES NOT CONFLICT WITH A SUPREME COURT DECISION ON THE SAME QUESTION OF LAW.

Article V, Section 3(b)(3) of the Florida Constitution, provides that this Court may review any decision of a district court of appeal that "... expressly and directly conflicts with a decision of ... the Supreme Court on the same question of law." (Also see Rule 9.030(a)(2)(A)(IV), Fla. R. App. P.). The Commission believes the decision by the First District Court of Appeal in this case, Citizens of the State of Florida v. Public Service Commission (Jacksonville Suburban), 440 So.2d 371 (Fla. 1st DCA 1983), is factually distinguishable from State of Florida v. Hawkins (Holiday Lake), 364 So.2d 723 (Fla. 1978).

In Jacksonville Suburban, Citizens appealed the Public Service Commission's decision (Order No. 9533 and Order No. 10007) contending that the PSC erred in permitting Jacksonville Suburban and Southern Utilities to "add-back" accumulated depreciation on contributions-in-aid-of-construction (CIAC) in rate base. Citizens argued this issue before the Commission and again in the First District Court citing the Holiday Lake decision.

The First District Court responded by stating, "This contention has no merit. A similar argument was rejected in Citizens of the State of Florida v. Florida Public Service Commission, 399 So.2d 9, 11 (Fla. 1st DCA 1981) (General Waterworks), wherein this Court distinguished the Holiday Lake case. ..."

As indicated by the Court's decision, the First District Court had addressed the issue of "add-back" of depreciation on CIAC in General Waterworks. The Commission's decision on the "add-back" issue in the General Waterworks case was completely explained in its Order No. 9443, pages 4 through 9 issued July 9, 1980. Citizens appealed urging the Court to disallow a rate base which includes an "add-back" of accumulated depreciation on CIAC citing the Holiday Lake case. In the decision in the General Waterworks case the Court distinguished Holiday Lake as follows:

First, and most importantly, Holiday Lakes is factually distinguishable because there the PSC in addition to allowing the add-back into the rate base, also allowed the utility to treat that depreciation on CIAC as an operating expense. In this case, however, the PSC did not allow depreciation on CIAC as an operating expense. This difference in treatment is important. The practice of allowing CIAC depreciation as an operating expense instead of allowing the add-back in the rate base would lead to a greater revenue requirement for the utility and, consequently, higher rates for the utilities customers because a utility receives a dollar for dollar return on operating expenses but only a percentage on its rate base. Further, while the practice of allowing depreciation on CIAC as an operating expense was not an issue in Holiday Lakes, the end result of that case disallowed the add-back in the rate base so as to prevent the utility from double dipping. Accordingly, we think that the PSC's present practice of disallowing depreciation on CIAC as an operating expense constitutes an off-setting factor 'which would neutralize this practice (adding back accumulated depreciation on CIAC in the rate base) and the harmful affects that ensue from allowing utilities to earn a return on contributed capital.' Id. at 727.

Review of the General Waterworks decision pursuant to Article V, Section (3)(b)(3) of the Florida Constitution was not sought by Citizens.

The issue presented in Holiday Lake:

...is whether the Commission departed from the essential requirements of law in utilizing an accounting method to determine rate base which adds back accumulated depreciation attributable to contributions-in-aid-of-construction (CIAC).

In finding that the Commission's accounting procedures resulted in the inclusion of CIAC property in rate base contrary to the requirements of Section 367.081(2), F.S., the Court indicated that evidence of off-setting factors which would neutralize this accounting practice and the harmful effects that ensue would require a different result. (Holiday Lake Id. at 727). In the decisions in General Waterworks and Jacksonville Suburban the First District Court found the Commission's method of computing rate base regarding the "add-back" of accumulated depreciation on contributed property was factually distinguishable from this Court's decision in Holiday Lake.

The Florida Legislature concurs with the accounting methodology and has amended the ratemaking procedure which the Commission follows. Section 367.081 was amended, (coding indicates changes) effective July 1, 1980, and provides as follows:

Section 367.081 Rates; Procedure for fixing and changing -- (1) Except as provided in subsection (4) rates and charges being charged and collected by utilities shall be changed only by approval of the Commission. (2) The Commission shall, either upon request or upon its own motion, fix rates which are just,

reasonable, compensatory, and not unfairly unjustly discriminatory. In all such proceedings, the Commission shall consider the value and quality of the service and the cost of providing the service, which shall include, but not be limited to, debt interest, the utility's requirements for working capital, maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service, and a fair return on the utility's investment in property used and useful in the public service. However, the Commission shall not allow the inclusion of contributions in aid of construction in the rate base of any utility during a rate proceeding, and accumulated depreciation on such contributions-in-aid-of construction shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered a cost of providing utility service. Contributions-in-aid-of-construction shall include any amount or item of money, services, or property received by a utility, from any person or governmental agency, any portion of which is provided at no cost to the utility and which represents a donation or contribution to the capital of the utility and which is utilized to off-set the acquisition, improvement, or construction cost of the utility's property, facilities, or equipment used to provide utility services to the public. The Commission shall also consider the utility's investment in property required by duly authorized governmental agencies to be constructed in the public interest within a reasonable time in the future, not to exceed 24 months."

The Commission believes the First District Court's decision is factual distinguishable and therefore does not expressly and directly conflict with this Court's decision on the same question of law ("add-back"). Therefore jurisdiction of the case with this Court does not lie. However, in the event the Court does take jurisdiction of the case, the Commission requests review of the First District Court's decision on the attrition allowance issue.

We note that the Court reviewed all the issues in Butchikas v. Travelers Idemnity Company, 343 So.2d 816 at 817 (Fla. 1976), rather than restricting the review to the issue on which conflict jurisdiction was requested.

CONCLUSION

Because the decisions are factually distinguishable there is no express and direct conflict between the District Court of Appeal's decision in this case and this Court's decision on the "add-back" issue. Jurisdiction does not lie. In the event the Court does take jurisdiction, the attrition allowance issue should also be reviewed.

William H. Harrold

William H. Harrold
Associate General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31st day of January, 1984 to the following:

Stephen C. Burgess, Esquire
Office of Public Counsel
Room 4, Holland Building
Tallahassee, FL 32301

James L. Ade, Esquire
William A. Van Nortwick, Jr.
3000 Independent Square
Post Office Box 59
Jacksonville, FL 32201



William H. Harrold