IN THE SUPREME COURT OF FLORIDA

THE CITIZENS OF THE STATE OF FLORIDA, Petitioners/Appellants, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent/Appellee, and JACKSONVILLE SUBURBAN UTILITIES CORPORATION and SOUTHERN UTILITIES COMPANY, Respondents/Appellees.	)	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

BRIEF ON JURISDICTION OF RESPONDENTS/APPELLEES, JACKSONVILLE SUBURBAN UTILITIES CORPORATION and SOUTHERN UTILITIES COMPANY

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STATEMENT OF THE CASE AND OF THE FACTS

Jacksonville Suburban Utilities Corporation and Southern Utilities Company (the "Utilities") hereby adopt the contents of the Statement of the Case and Facts contained in Appellants' Brief on Jurisdiction ("Appellants' Brief"), at page 1.

ARGUMENT

In his Notice to Invoke Discretionary Jurisdiction and in Appellants' Brief filed herein, Public Counsel has requested that this Court exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal (the "First District") in The Citizens of the State of Florida v. Florida Public Service Commission, 440 So.2d 371 (Fla. 1st DCA 1983) (the "present case"). As a basis for this Court's jurisdiction, Public Counsel alleges a conflict of decisions between the present case and The Citizens of the State of Florida v. Hawkins (Holiday Lake), 364 So.2d 723 (Fla. 1978), under Article V, Section 3(b)(3), of the Florida Constitution (1980) ("Section 3(b)(3)"), which provides that this Court may review a district court's decision that "expressly and directly conflicts with a decision . . . of the supreme court on the same question of law." There is no such decisional conflict here. Therefore, this Court has no jurisdiction to review the decision below.

I. THE FIRST DISTRICT'S DECISION IS NOT PROPERLY REVIEWABLE BY THIS COURT.

In the present case, Public Counsel is requesting that this Court extend its "conflict" jurisdictional reach in contravention of the 1980 "reform" amendment to Article V of the Florida Constitution and the Florida Rules of Appellate Procedure. The decision of the First District below, however, is

not one that this Court has conflict jurisdiction to review under Section 3(b)(3). The opinion below is the substantive equivalent of a "per curiam affirmed" opinion ("PCA") or a "citation no merit opinion," neither of which this Court has jurisdiction to review. In determining whether there exists the "express and direct conflict" necessary to support this Court's discretionary review jurisdiction, "the type of opinion or decision was of great significance even under the previous version of Art. V. § 3(b)(3), Fla. Const. (1972), . . . and is decisive under the present one." Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So.2d 911, 912-913, f.n. 1 (Fla. 3d DCA 1982) [citations omitted].

The purposes of the 1980 amendment of Section 3(b)(3) and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., were to reduce the case load of this Court and to create finality of decisions in the district courts of appeal. Jenkins v. State, 385 So.2d 1356, 1359, 1363 (Fla. 1980). The history of the 1980 jurisdictional amendment clearly evidences the intent of its framers to overrule the decisions in Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and similar cases, so that "only an opinion which 'articulates a rule of law . . .' should qualify for discretionary review." Jenkins, supra, at 1361 (concurring opinion of Chief Justice England).

Following the 1980 amendment, this Court rendered a series of decisions that acknowledged that the 1980 amendment significantly restricted the ability of this Court to review certain types of decisions rendered by the district courts. In this line of cases, this Court determined that it could not review decisions of the district courts under Section 3(b)(3) where the Court's opinions in question did not "articulate a rule of law." Consistent with this rationale, the Court established that it has no "conflict" jurisdiction to

review decisions of the district courts expressed as "per curiam affirmed" opinions ("PCAs"); PCAs with citations; PCAs accompanied by dissenting or concurring opinions; PCAs containing references denoted as "compare," "accord" or "contra"; certain non-PCA orders similar in effect to PCAs; and, particularly relevant to the present case, the decisions rendered in the final cases cited in such opinions. See, for example, Jenkins v. State, supra; Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Pena v. Tampa Fed. Sav. & Loan Ass'n, 385 So.2d 1370 (Fla. 1980); Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980); Jollie v. State, 405 So.2d 418, 419 (Fla. 1981).

In all of the above cases, the opinions that this Court was being asked to review failed to "articulate" or to treat "expressly" any point of law and therefore provide an inadequate basis for conflict jurisdiction. Thus, the requirement for an "express and direct conflict" prevents this Court from looking beyond the articulated ruling and reasoning contained within the four corners of a district court's opinion. Accordingly, the Court will not delve into the record, as had been the post-Foley practice, or, as sought in the present case, re-examine cases cited to find conflict. As this Court stated in Dodi, where it determined that it had no jurisdiction to review a PCA decision even though it included a citation:

> We reject the assertion that we should re-examine a case cited in a per curiam decision to determine if the contents of that cited case now conflict with other appellate decisions. The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority. [Id. at 1369; emphasis added.]

The Dodi decision was followed by this Court in Robles, supra, where, as in the present case, the district court's PCA-type opinion cited a prior opinion of the same district court. This Court dismissed the Robles petition on the

basis of Dodi and declined to re-examine the cited case, observing that the cited case was "a final decision of the district court." 385 So.2d at 1371.

In similar fashion, the so-called "no merit opinion" or "citation no merit opinion," which a leading scholarly article has equated in lack of precedential value to the PCA and PCA with citations, provides no jurisdictional basis for discretionary review by this Court:

> So-called "no merit opinions," which merely state that the court has reviewed the record and found no merit in the points presented and no reversible error in the record, should be similarly treated [i.e., denied review]. Being of no real precedential value, and failing to treat "expressly" any point of law, these classes of opinions should form no basis for supreme court review. [England, Hunter and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 180 (1980) (hereinafter cited as "Constitutional Jurisdiction"); emphasis added; footnote omitted.]

Following this reasoning, this Court has denied review to a district court's order that was accompanied by citation of a final decision of that court. See, Pena, supra.

Public Counsel attempts to present the illusion of a decisional conflict in the present case by comparing language quoted from General Waterworks with language in Holiday Lake (Appellants' Brief, at pp. 5-6). No basis for conflict jurisdiction is evident from Public Counsel's argument, however, since it is merely a re-argument before this Court of his position in General Waterworks. General Waterworks, a "final" decision of the First District in the sense referred to in Jollie and Robles, supra, is a case in which Public Counsel made an appearance and which Public Counsel could have appealed to this Court in 1981, had he chosen to do so. Conflict between Holiday Lake and the First District's decision in General Waterworks, even if such conflict were shown to exist, cannot be the basis for this Court's jurisdiction in the present case.

In the present case, the relevant portion of the opinion consists of a single long paragraph (440 So.2d at 371-372) that does not "articulate a rule of law" and that is "effectually an affirmance without opinion with which express and direct conflict cannot be established." Davis v. Mandau, 410 So.2d 915 (Fla. 1981) [citation omitted]. The opinion below is equivalent in effect to a "PCA with citations" or a "citation no merit opinion." With the exception of a three-sentence quotation from and citation to a prior final opinion of the same district court, Citizens of the State of Florida v. Florida Public Service Commission, 399 So.2d 9 (Fla. 1st DCA 1981) (the General Waterworks opinion), each of the elements of the present "short-form" opinion without discussion is typical of the standard "citation no merit opinion" that the Court lacks jurisdiction to review. See, for example, the discussion of the proper treatment of a "citation no merit opinion" in Constitutional Jurisdiction, supra, at 180.

The quotation from General Waterworks is, in fact, the only feature of the opinion below that differs from the typical "citation no merit opinion." After diligent research, the Utilities have discovered no case, and Public Counsel has cited none, in which this Court has predicated its grant of review of a district court's decision on the basis of whether or not a "citation no merit opinion" or the equivalent was accompanied by a short quotation from one of the cited opinions embodying a final decision of a district court, without either amplifying commentary or an "articulation of a rule of law" by the district court. In any event, the addition of a quotation from, rather than simply a citation of, a prior final decision does not substantively distinguish the present opinion from a "citation no merit opinion." The First District did not comment on the General Waterworks quotation, nor did it

"articulate a rule of law"; it merely quoted three sentences from the earlier case for the information of counsel. The relevant portion of the opinion below provides no more information by including the quotation than would the bare citation of the quoted page of the General Waterworks opinion. Both the citation and the quotation serve only to draw the reader's attention to the General Waterworks opinion and its contents, so that the opinion in the present case is one of those "opinions which merely cite counsel-advising cases" identified in Jollie, supra, as not being subject to review. Id. at 420. Therefore, the opinion below is, in substance, equivalent to a "citation no merit opinion," and, as such, presents no jurisdictional basis for this Court's review.

II. THE ELEMENTS OF "EXPRESS AND DIRECT CONFLICT" ARE LACKING IN THE PRESENT CASE.

Even if the form of the opinion below were not such that the Court lacks jurisdiction to review the decision under the Jenkins and Dodi doctrine, it is clear that the decision lacks the elements of "express and direct conflict" necessary to invoke this Court's jurisdiction. This is true because, as the First District noted in its opinion, the present case is both factually and legally distinguishable from the supposedly conflicting Holiday Lake case dissected at length by Public Counsel, and therefore does not create the conflict requisite to vest this Court with jurisdiction.

As the First District stated in its opinion, the present case is in complete accord with both its General Waterworks opinion and this Court's Westwood Lake opinion (Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972)), and it is distinguishable from--and therefore does not "expressly and directly conflict" with--Holiday Lake. The First District's decision merely held that the "add-back" was proper in the present case, as in General

Waterworks, because there was no concurrent allowance of depreciation on CIAC, whereas Holiday Lake was different because depreciation on CIAC had been allowed by the Commission concurrently with an "add-back," under the Commission's former accounting procedure. This is not a decisional conflict, but a factual difference. Since the required elements of "express and direct conflict" are lacking, there is no predicate here for the exercise of this Court's discretionary jurisdiction.

In Public Counsel's view, apparently, the mere act of distinguishing a Supreme Court precedent on factual grounds always would provide an opportunity for this Court to discern an "express and direct conflict"--clearly an absurd result, since it is the very distinction that determines the lack of conflict and thus the absence of this Court's discretionary jurisdiction.

If the First District had followed the course advocated by Public Counsel and blindly had applied the rule in Holiday Lake either in the instant case or in General Waterworks, both of which are factually and legally distinguishable, that court would have committed the basic error identified in the case of Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980), cited by Public Counsel, in which this Court stated that "[t]he court below relied on a case with facts materially distinguishable from those of the case at bar and thus misapplied the law." Id. at 521.

III. THE ISSUE INVOLVED IN THIS CASE WILL NOT SUBSTANTIALLY AFFECT THE LAW OF THE STATE AND IS NOT OF GREAT PUBLIC IMPORTANCE.

Even if there were a conflict between the present case and Holiday Lake, the Court should not exercise its discretion to review the present decision because the resolution of the issues presented in the instant case is of little public importance or precedential value. A ruling by the Court will not substantially affect the law of the State of Florida.

Since the entry of order of the Public Service Commission appealed in this case, the Legislature has modified the rate-making scheme for water and sewer utility companies especially as it relates to the treatment of CIAC and depreciation on CIAC. The amendment to Section 367.081(2), Florida Statutes (1980 Supp.), effective on July 1, 1980, provides, in pertinent part, as follows:

> . . . 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-constuction shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered a cost of providing utility service. . . . [Ch. 80-99, § 10, Laws of Fla.]

Since the proper treatment of CIAC has been governed since mid-1980 by a statute that prescribes the precise treatment to be accorded CIAC in computing rate base and in setting rates, the decision of the First District below or of this Court can have little precedential value and limited, if any, future application to rate cases involving water and sewer utilities filed during or after 1980. Despite Public Counsel's speculation to the contrary (Appellants' Brief, at p. 8), it is unlikely that the decision or opinion in the instant case will or even "can" have any deleterious effect on the statutory interpretation to be accorded to Section 367.081(2), since it is of slight precedential value. If interpretation of the new statutory section is needed, resolution of such issues can best be served by waiting until they are presented to this Court in a case involving the revised statute.

As Justice Thornal cautioned in Neilsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), "[i]n order to assert [its] power to set aside the decision of a Court of Appeal on the conflict theory [this Court] must find in that decision a real, live and vital conflict. . . ." Id. at 734-735. No such "real, live and vital conflict" is present here.

CONCLUSION

With each of these factors in mind--the inappropriateness for review of the opinion below, the lack of an "express and direct conflict" involving "the same point of law," the lack of precedential effect of the issues involved--the Court should conserve its limited judicial resources by declining to exercise its discretionary jurisdiction to review the decision in the present case. Therefore, Public Counsel's request for review should be denied for lack of jurisdiction.

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CERTIFICATE OF SERVICE

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

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