O/a 11-7-84

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Petitioner, V. PUBLIC SERVICE COMMISSION, ET AL., Respondents.	)	Case No. 64,680

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

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RESPONDENT'S BRIEF ON THE MERITS

Susan F. Clark
Deputy General Counsel

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

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CITATIONS OF AUTHORITY

COMMISSION ORDERS

SYMBOLS AND DESIGNATION OF PARTIES

Jacksonville Suburban Utilities Corporation and Southern Utilities Company are referred to as "the Utilities."

The Florida Public Service Commission is referred to by that name or as "the Commission" or "Respondents."

Public Counsel is referred to by that name or as "Petitioner."

References to the record of the administrative proceeding below are designated by the letter "R" in brackets followed by the appropriate number, e.g. [R-39].

References to the transcript of the administrative proceeding below are designated by the letter "T" in brackets followed by the appropriate number, e.g. [T-41].

Contributions-in-aid-of-construction will be referred to by that name or as "CIAC".

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

The Respondent does not dispute the Statement of the Case and of the Facts made by Petitioner, Public Counsel, in his Initial Brief. However, further facts are relevant to the issue raised by Public Counsel and to the issue on attrition raised by the Respondent in this brief. In the interest of continuity, a full Statement of the Case and of the Facts follows which includes items already presented in the Petitioner's Statement.

Respondent's Statement

Jacksonville Utilities Corporation and Southern Utilities Company, two water and sewer utilities, petitioned the Public Service Commission for rate relief on April 5, 1979. [R-1, 65]. Since both Utilities provide service in Duval County and both are subsidiaries of General Waterworks Corporation, the cases were consolidated for resolution.

Public Counsel intervened to represent the Utilities' customers on May 21, 1979. [R-140, 141]. Hearings were held before a Hearing Examiner on December 3-6, 1979, in Jacksonville, Florida. The Utilities requested a rate base for their water and sewer operations that included a deduction for contributions-in-aid-of-construction (CIAC) and a deduction for depreciation on invested assets. The utilities did not request depreciation on CIAC as an operating expense and none was allowed by the

Commission. Public Counsel opposed this calculation of rate base in his Proposed Findings of Fact and Conclusions of Law to the Hearing Examiner [R-548] and in his exceptions to the Examiner's Recommended Order. [R-688]. The Commission rejected those arguments in its Final Order, Order No. 9533, issued September 12, 1980, relying upon its earlier decision in Order No. 9443, dated July 9, 1980. (Order No. 9533, p. 11) [R-831].

As part of the rate cases, the Utilities also requested additional operating expenses to include an attrition allowance. In his Recommended Order filed on March 26, 1980 [R-659], the Hearing Examiner rejected the request for the attrition allowance because the Utilities failed to prove the necessity for the allowance. [R-686]. The Utilities took exception to the Recommended Order on the issue of the attrition allowance. In its Final Order, the Commission denied the request for an attrition allowance because the Utilities failed to present competent, substantial evidence to support the allowance. [R-842].

The Utilities moved for reconsideration of specific matters in Order No. 9533, including the denial of the attrition allowance [R-883]. Order No. 10007, issued May 12, 1981, denied the Petition for Reconsideration with respect to the attrition allowance. [R-945].

Notice of Appeal was filed by Public Counsel on June 11, 1981. Notice of Cross Appeal was filed by the Utilities on June 17, 1981.

On January 14, 1983, the First District Court of Appeal affirmed that portion of Order No. 9533 which had been appealed by Public Counsel. It reversed that part of the Order denying the requested attrition allowance.

On January 31, 1983, Public Counsel filed a Motion for Clarification and Rehearing on the issue he appealed. Also on January 31, 1983, the Commission filed its Motion for Rehearing. The Commission's Motion was on the grounds that the District Court misapprehended the facts on the relationship of inflation and attrition and misapprehended the law on burden of proof and judicial notice. On November 23, 1983, the District Court issued an Order denying Rehearing and Clarification.

On December 27, 1983, Public Counsel filed a Notice to Invoke Discretionary Jurisdiction of this Court and filed a Brief on Jurisdiction on January 6, 1984. The Commission and Utilities filed their responses on January 31, 1984. In its response the Commission specifically requested that the Court also review the attrition allowance issue if it accepted jurisdiction.

This Court accepted jurisdiction through its Order issued June 15, 1984.

POINT I

THE DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE IS FACTUALLY DISTINGUISHABLE AND THEREFORE DOES NOT CONFLICT WITH THIS COURT'S DECISION IN HOLIDAY LAKE.

The Case now before this Court is factually distinguishable from this Court's decision in Citizens v. Hawkins (Holiday Lake), 364 So.2d 723 (Fla. 1978), and, therefore, there is no conflict.

The controversy in this case, in Citizens v. Public Service Commission (General Waterworks) 399 So.2d 9 (Fla. 1st DCA 1981), and in Holiday Lake centers upon the ratemaking treatment of depreciation on CIAC. There are two issues regarding the ratemaking treatment of depreciation of CIAC that arose in these cases: (1) Whether it is appropriate to include an allowance for depreciation on CIAC in the expenses to be recovered from ratepayers; and (2) Whether rate base should be reduced by the accumulated depreciation on CIAC when such depreciation was previously authorized as an expense.

The Commission has determined that rates of a utility should not include an allowance for depreciation on CIAC. Rates of a utility are a combination of return on investment and operating expenses. Operating expenses include a return of utility investment, measured through depreciation. The theory is that ratepayers should pay for utility investment property as it is used up. Since a utility has no investment in CIAC, there is no investment to return.

In the order in General Waterworks, the Commission articulated this determination:

> Depreciation is the method of recognizing the cost of using an asset over a number of years. When the value is reduced to zero, the asset is used up and cannot be further depreciated. Therefore, there can be no such thing as depreciation on CIAC, since the utility's total investment in CIAC is zero.

Commission Order 9443, Sheet 3.

Depreciation on CIAC was not allowed as an operating expense in General Waterworks and in this case. On a prospective basis, the rates of the Utilities would not include amounts to cover this expense. This is the fact that distinguishes this case from Holiday Lake:

> The Commission also allowed respondent to claim as an operating expense depreciation upon facilities purchased from investment Capital and CIAC funds. Neither of these practices is at issue in this case. What is contested by petitioners is the Commission's further practice of allowing the utility to add back into the computation of rate base a figure which represents that portion of a previously deducted depreciation attributable to CIAC property. (emphasis supplied) Holiday Lake At 724.

The allowance of depreciation on CIAC as an expense was not at issue in Holiday Lake but it was nonetheless the foundation for the Court's decision on the add-back issue. Implicit in the Court's decision to further reduce rate base by accumulated depreciation on CIAC is a finding that depreciation on CIAC was not an expense which should have been recovered from ratepayers.

Because it was an expense that should not have been allowed, the Court applied the amounts previously collected to further depreciate the utility-owned property and reduce rate base. If depreciation on CIAC was an expense properly recoverable from the ratepayers, there would have been no need to characterize the amounts collected as representing something else, such as further depreciation on utility owned property.

However, in Holiday Lake the new rates continued to provide for a return of property other than the utility's through allowance of depreciation on CIAC as an operating expense. Even though the Court found this practice to be unfair to the ratepayers, it did not squarely address the practice since it was not at issue. To offset the continuation of an inappropriate expense in the new rates, the Court reduced the rate base by the amount of accumulated depreciation on CIAC. A reduction of rate base had the effect of reducing the new rates and thus neutralizing the practice of continuing to allow depreciation on CIAC as an operating expense.

In Holiday Lake the concern of the Court was that the new rates be just and reasonable. The Court's purpose was not to make an adjustment in the new rates to compensate for a past error. The applicability of Holiday Lake is limited to the factual circumstances of that case. That is, when a utility is allowed to claim as an operating expense depreciation on facilities purchased with CIAC funds, that utility is prohibited from adding back into rate base accumulated depreciation on CIAC. Holiday Lake is not

applicable when the new rates of a utility exclude depreciation on CIAC as an operating expense and is therefore not applicable to this case and General Waterworks.

The thrust of Public Counsel's argument that Holiday lake is applicable to this case is that the new rates of a utility must compensate for past errors. In this case the new rates are not unjust and reasonable because of the inclusion of an inappropriate operating expense (depreciation on CIAC). Therefore, the only reason to reduce rate base would be to adjust for the past allowance of the expense. The logical extension of this argument is that any time a utility is allowed to recover an expense which should not have been allowed, the Commission can correct for this error by reducing rate base by an amount equivalent to the total amount received. The dollars recovered are simply reclassified as a return of investment (depreciation), which reduces rate base which in turn reduces rates. Just as a utility cannot recover for past expenses which were not included in rates or for past deficiencies in its rate of return, customers are unable to recover for expenses that were improperly allowed. To allow recovery would constitute retroactive ratemaking; an adjustment in rates for past occurrences. See City of Miami v. Public Service Commission, 208 So.2d 249 (Fla. 1968)

Returning to the issues outlined at the beginning of the argument on this point, depreciation on CIAC should not be allowed as an operating expense to be recovered from ratepayers. This conclusion is consistent with the Commission's action in this case,

General Waterworks and with Florida Statute 367.081(2), as amended in 1980. It is also consistent with this Court's decision Holiday Lake. Rate base should be reduced by accumulated depreciation on CIAC only if the new rates include depreciation on CIAC as an expense. The rate base reduction would be appropriate because it would offset the inclusion of an improper expense in the new rates. However, a more direct method of ensuring the new rates are just and reasonable is simply to not allow depreciation as on CIAC as an expense. To broaden the applicability of the Holiday Lake decision to the facts in this case would be violative of the prohibition against retroactive ratemaking.

After the Holiday Lake decision and while the case now under consideration and General Waterworks were pending, the legislature amended Section 367.081, Fla. Stat., in a manner consistent with the Commission's action in this case. Depreciation on CIAC cannot be allowed as an expense and accumulated depreciation on CIAC cannot be used to reduce rate base:

> **367.081 Rates; procedure for fixing and changing.--**
> (1) Except as provided in subsection (4) rates and charges being charged and collected by a utility 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 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 offset the acquisition, improvement, or construction costs 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 authority to be constructed in the public interest within a reasonable time in the future, not to exceed 24 months.

The Commission recognized that the present case and General Waterworks had to be decided upon the law prior to the legislative change. However, it did recognize that the stated policy of the legislature for cases after July 1, 1980 was that accumulated depreciation on CIAC could not be used to reduce rate base. In this case, the facts were such that the Holiday Lake decision did not require reducing rate base. Therefore, it was reasonable to follow the stated legislative policy absent compelling reasons to do otherwise.

POINT II

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE COMMISSION'S ORDER DENYING AN ATTRITION ALLOWANCE AND REQUIRING THE COMMISSION TO TAKE ADDITIONAL TESTIMONY TO DETERMINE AN APPROPRIATE ALLOWANCE.

Introduction

The issue on cross-appeal before the District Court in this case involved the Commission's denial of the Utilities' requests for an attrition allowance. The Commission found there was no competent substantial evidence to support the granting of an attrition allowance and therefore denied the requests.

The District Court reversed the part of the order denying the attrition allowance and directed the Commission to take additional testimony to determine an appropriate attrition allowance.

In it's brief on jurisdiction, the Commission requested this Court to review the District Court's decision on the attrition allowance. The Commission hereby renews that request and refers this Court to its decision in Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976), as precedent for such review. The Butchikas decision shows the Court reviewed all the issues in the case, not just the issue on which discretionary jurisdiction of the court was invoked.

A review of the District Court's decision on the attrition allowance is more crucial to future regulatory practices than the Petitioner's issue on the addback of CIAC. The decision on the addback will have limited effect because of the 1980 change in

the Florida Statutes which prohibits decreasing a utility's rate base by the amount of accumulated depreciation on CIAC. However, attrition allowances will remain as potential issues in future rate cases not only for water and sewer utilities, but also for electric utilities and telephone companies. Therefore, the effect of the precedent set by District Court's opinion on the attrition allowance is far more significant than precedent set on the issue on the addback of CIAC.

A. The District Court erred in its Decision on the Attrition Allowance

The District Court erred in its decision to reverse the Commission's denial of an attrition allowance. The Court's decision is in error because the Court found that inflation and attrition are equivalent, that the Commission had the burden of providing an appropriate figure for an inflation factor and that the Commission could take judicial notice of the effect of inflation on a utility company.

Inflation and attrition are not the same thing. Attrition is the erosion of a utility's earnings which affects the utility's ability to earn its allowed rate of return. As pointed out by this Court in its decision in Citizens of Florida v. Hawkins, 356 So.2d 254 (Fla. 1978), attrition is a by-product of inflation. Although attrition is a by-product of inflation, it is not equivalent to inflation.

The rate of inflation for the economy in general is largely determined by increases in the price of grocery items, housing,

and other consumer goods, and by the cost of financing for housing and consumer goods. Thus, inflation is measured using many elements clearly not applicable to a water and sewer utility. Therefore, the rate of inflation cannot be equated to the rate of attrition for a particular utility.

Moreover, it is possible for a general economic condition of inflation to exist and yet a particular utility will not experience attrition. A water utility that does not treat water but simply purchases treated water and distributes it to customers may experience little or no attrition in inflationary times if the supplier of the water does not increase its price.

Conversely, it is also possible for a utility to experience attrition without the existence of inflation. A utility may have had to make a large investment in plant, and the cost of the new debt to finance that plant may exceed the cost of the utility's existing debt, thereby causing attrition. Although there is little or no inflation, the attrition suffered by this utility may be great because it had to borrow a large amount of money and the cost of that money exceeds the cost of its existing debt. The expense of the new debt causes an erosion of earnings on existing investment.

Although it is more likely that inflation will have some effect on the various utilities, the level of attrition suffered will vary widely. However, to find that inflation and attrition are the same thing is clearly erroneous.

The District Court was also in error when it stated that the Commission had the burden of providing an appropriate figure for an inflation factor to be used in granting an attrition allowance:

> Utilities met their burden of proving the necessity for an inflation - attrition allowance by establishing (1) the existence of inflation, a fact which is not contradicted, and (2) a reasonable inflation factor of seven percent. At that point, the burden was on the Commission to provide an appropriate figure for the inflation factor. This burden was not met by the Commission. (Jacksonville Suburban). (emphasis supplied)

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

Not only does this quote demonstrate that the District Court wrongly equated inflation with attrition, it also shows a misapprehension of the Commission's function in the case and the law with respect to the burden of proof. The opinion intimates that the burden of proving the appropriate attrition allowance was on the Commission. This is incorrect. The Commission is the fact-finder. It has no burden of proof, only the responsibility of evaluating the evidence to decide if the utility has presented evidence to support its request for an attrition allowance. To hold that the Commission has the burden of determining an appropriate attrition allowance without evidence in the record to support such a finding, requires the Commission, in effect, to also take on the burden of proof. In order to support an attrition allowance, the Commission would have to present evidence on how inflation had affected the earnings of the Utilities in the

past and how inflation may cause an erosion of earnings in the future. The District Court misapprehended the law to hold that the fact-finder, in this case the Commission, had the burden of proof with regard to the appropriate attrition allowance.

The Utilities did not meet their burden of proof on the need for an attrition allowance. Evidence was presented on the existence of inflation and on a reasonable inflation factor. However, such evidence is not sufficient to prove attrition. The establishment of the fact of inflation did not raise a presumption of fact with regard to the need for an attrition allowance. To establish the likelihood of future attrition and therefore, the need for an allowance, the Utilities' should have presented evidence on how past inflation had affected their ability to earn their authorized rate of return and that further inflation could be expected to affect their ability to earn. Absent the establishment of the causal relationship between inflation and the attrition the Utilities may suffer because of inflation, the Commission could not have allowed an attrition allowance. See Broward County Traffic Association v. Mayo, 340 So.2d 1152, (Fla. 1977) p. 1153, note 3.

It appears that the District Court may have been peripherally aware of the Utilities' failure to meet their burden of proof. In the concluding paragraph of the opinion, a remand is ordered for determination of an attrition allowance and "the taking of such additional testimony as is required for that determination." If

the Utilities had met their burden of proof, there would be no need for additional testimony.

Finally, the District Court's opinion is in error because it suggests that the evidence lacking on the effect of inflation on a utility could be made up through the use of judicial notice:

> Both commissions and courts can take judicial notice of the existence of inflation and its effect on a utility company.

Jacksonville Suburban, supra, p. 372, note 1.

The effect of inflation on a utility is not a matter which may be judicially noticed. Section 90.202, Florida Statutes, enumerates the matters which may be judicially noticed. Only subsections (11) and (12) could possibly pertain to judicial notice of inflation and its effect. Those subsections provide:

> **90.202 Matters which may be judicially noticed.--** A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201:
> (11) Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.
> (12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.

The Commission could not have taken judicial notice on how current inflation affected the utility's ability to earn its allowed rate of return; what inflation will be in the future (the time the new rates will be in effect); and what effect inflation

will have on a utility's future ability to earn its allowed rate of return.

This point is perhaps best illustrated by thinking of the effect of inflation on different individuals. If judicial notice can be taken of the existence of inflation, the inflation factor of an individual living in Miami, Florida may be vastly different from that of the individual living in Quincy, Florida. Even if the inflation factor is the same, the effect of inflation on an individual may be different. If inflation has been largely caused by an increase in housing costs, inflation would have a greater impact on the individual who is interested in buying a home than on one who is already a homeowner.

The inapplicability of the statute on judicial notice to these matters is clear. The effect of inflation on a utility's ability to earn its authorized rate of return would not be a matter generally known within the territorial jurisdiction of the Commission or the District Court. Additionally, it would not be an undisputed matter because there is no source whose accuracy is beyond question on the issue of attrition. Judicial notice cannot be taken of this effect because it depends largely on the economic and operational uniqueness of that utility.

Because the Commission could not have taken judicial notice of the effect of current inflation on these Utilities' ability to earn their authorized rate of return, what inflation will be in the future, and the effect of future inflation on these Utilities,

the Commission had no competent, substantial evidence before it to determine an appropriate attrition allowance.

B. The Commission's denial of the Utilities' requested attrition allowance was in compliance with the essential requirement of law.

As pointed out by Judge Ervin in his dissent, orders of the Commission come to the courts clothed with the presumption of validity. Quoting from Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982), Judge Ervin reiterated:

> Orders of the Commission come before this Court clothed with the presumption of validity. On review this presumption of validity can only be overcome where the Commission's error either appears plainly on the face of the order or is shown by clear and convincing evidence.

Jacksonville Suburban, supra, at 373.

In concluding his dissent, Judge Ervin found there had been no showing of error by the Utilities:

> A review of the PSC's order, in my opinion, reveals that Utilities has failed to demonstrate any asserted error by clear and satisfactory evidence. It is not the task of this Court to overturn orders of the PSC simply because we may have arrived at a different result had we made the initial decision.

Jacksonville Suburban, supra, at 373.

The Commission believes that Judge Ervin is absolutely correct. The Commission did not err in its denial of the attrition allowance.

In the proceedings below the Hearing Examiner, as the trier of fact, found the Utilities' had not carried their burden of proof on the need for an attrition allowance. The Commission concurred in that assessment. The Utilities failed to present competent, substantial evidence to support their request. Competent, substantial evidence is evidence that is:

> "Sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601, 608 (Fla. 1959).

The evidence presented by the Utilities simply was not adequate to support the conclusion that a seven percent attrition allowance was just and reasonable. In order to support an award to offset future attrition, at least two factors must be proved: First, that attrition had occurred in the past and was likely to occur in the future, and second, that the amount of the allowance was based on informed judgment after projecting future economic conditions and other factors affecting attrition.

The Utilities attempted to support their request for an attrition allowance through the evidence and testimony presented by Mr. John F. Guastella and Mr. Leo J. Mullen, Jr. Mr. Guastella testified that the approach taken by the companies in this case was to compensate for attrition through separate adjustments to each individual operation and maintenance expense account. The actual calculations were done by Mr. Mullen [T-239]. Where increases after the test year were known, the adjustment was made

on the basis of the known change. [T-240]. Otherwise, Mr. Mullen adjusted the expense by an inflation factor of seven percent. [T-239-240]. The inflation rate was arbitrarily chosen. Mr. Mullen testified that seven percent was correct and accurate because it was conservative. [T-270]. Mr. Guastella testified that compared to the assumption that there would be a zero increase in expenses, the seven percent inflation factor adjustment to expenses was more reasonable. The Utilities' judgment or opinion standing alone is not competent and substantial evidence upon which to grant the attrition allowances requested by the Utilities. See Westwood Lake, Inc. v. Dade County, 203 So.2d 363 (Fla. 1967), and Florida Crown Utility Service, Inc. v. Utility Regulatory Board of the City of Jacksonville, 274 So.2d 597 (Fla. 1st D.C.A. 1973). [T-262].

The Utilities presented no study of past attrition or other evidence that they had experienced attrition in the past. In fact, Mr. Guastella testified that he had not analyzed the extent the company had experienced attrition in the past. [T-262]. No evidence was presented that the Utilities were likely to experience attrition in the future. Mr. Guastella's testimony did not include any analysis of any other factors which may cause attrition. He did not make a study of events or circumstances which may occur in the future to offset attrition such as future economies, decreased expenses, customer growth, and managerial efficiency. [T-260].

The approach used to support a request for an attrition allowance by the Utilities in this case is similar to the approach used by the Commission in Broward County Traffic Association v. Mayo, 350 So.2d 1152 (Fla. 1977). In that case the Court held that the Commission departed from the essential requirements of law when it granted out-of-period adjustments to include undocumented conclusions as to general economic conditions. In Broward County, as in this case, no evidence was introduced which showed that inflation had produced a specific dollar effect on the Utilities.

The Commission also rejected the Utilities requests because the approach used to support the request for an attrition allowance did not conform to the directions of this Court. In Citizens v. Hawkins (Gentel), 356 So.2d 254 (Fla. 1978), the Court directed that in future rate cases all adjustments for attrition be encompassed within a separate allowance. The Utilities did not use that method. Instead they made individual adjustments to operating expenses. The reason for a single attrition allowance is not simply a preference for that method. As pointed out in Public Counsel's Response to Appellee's Motion for Rehearing, there are a number of factors which affect a utility's ability to earn its authorized rate of return. Generally, inflation can be expected to negatively affect earnings. Often customer growth would affect earnings positively by increasing revenues. In his Response, Public Counsel demonstrated how customer growth can enhance earnings. The Utilities' method isolated a single factor,

inflation, and made individual adjustments to expenses for that factor. This method is incorrect. It is the overall effect of these factors on earnings which must be evaluated. To do this it is necessary to aggregate all these factors and assess their cumulative effect on earnings. Thus a single attrition (or accretion) allowance is required.

The burden of proof in an administrative hearing lies with the party asserting the affirmative of an issue. Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412 (Fla. 1st D.C.A. 1974). In this case the Utilities were requesting rate increases for providing water and sewer service, and included within that increase was a request for an attrition allowance. The Utilities had the burden of proving the necessity for their request for an attrition allowances through the presentation of competent substantial evidence. In order to be awarded money to compensate for attrition, they needed to show that attrition would occur in the future, and that the amount of the allowance requested was reasonable.

On review, the burden is again on the Utilities. The Commission's order is presumed to be correct and the Utilities must prove the incorrectness of the order. Blocker's Transfer and Storage v. Yarborough, 277 So.2d 9, 11 (Fla. 1973). The Utilities did not carry their burden of proof in the proceeding below, and have not carried their burden of proof in this appeal. There was no competent, substantial evidence to support the Utilities'

requested attrition allowances and, therefore, the Hearing Examiner and the Commission were correct when they denied the attrition allowances requested by the Utilities.

CONCLUSION

This Court should reverse in part and affirm in part the Decision of the First District Court of Appeal in this case.

The facts in this case are distinguishable from the facts in Holiday Lake and therefore no conflict on the issue of the add back of CIAC exists between the two cases. To broaden the applicability of the Holiday Lake decision to the facts in this case would violate the prohibition against retroactive ratemaking. The decision of the District Court on this point should be affirmed.

However, this Court should reverse that part of the District Court's order reversing the Commission's denial of the requested attrition allowance. There was no competent substantial evidence in the record to support the requested allowances and therefore the Commission's denial of the allowances was proper.

Respectfully submitted,

Susan F. Clark
Deputy 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 30th day of July, 1984 to the following:

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

James L. Ade, Esquire
William A. Van Nortwick, Jr., Esquire
Post Office Box 59
Jacksonville, Florida 32201

Susan F. Clark