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STATEMENT OF THE CASE AND FACTS

Jacksonville Suburban Utilities Corporation and Southern Utilities Company filed for a rate increase on April 5, 1979 in a consolidated case. The Public Counsel intervened on May 21, 1979. The Commission rendered Order No. 9533 on September 12, 1980, granting a rate increase based on a rate base which included an "add-back" of the accumulated depreciation on contributions-in-aid-of-construction (CIAC) which had accumulated during a period in which the Commission allowed CIAC depreciation expense. The Public Counsel appealed Order No. 9533 and Order No. 10007 (resolving a petition for reconsideration) on June 11, 1981, specifically raising the "add-back". On January 14, 1983, the District Court of Appeal, First District, affirmed Order No. 9533, as that order pertained to the issue raised by Public Counsel. On November 23, 1983, the First District Court of Appeals denied a motion for clarification and rehearing filed by the Public Counsel. The Public Counsel filed Notice to Invoke Discretionary Jurisdiction on December 27, 1983. During the entire pendency of these proceedings, the utility companies have been collecting the full rates granted in Order No. 9533, subject to refund.

THIS COURT SHOULD TAKE JURISDICTION BECAUSE THIS DECISION
OF THE DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY
CONFLICTS 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 a district court's decision "that expressly and directly conflicts with a decision ... of the Supreme Court on the same question of law." In an effort to establish a consistent precednet, this Court has employed its discretionary jurisdiction on numerour occastions. See, City of Miami v. Jafra Steel Corp. 184 So.2d 178(Fla. 1966); Butchikas v. Travelers Indemnification Co., 343 So.2d 816 (Fla. 1976); Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). The Citizens are seeking this Court to engage its discretionary jurisdiction over the instant case because the decision of the First District Court expressly and directly conflicts with a decision of the Supreme Court.

In the instant case, The Citizens of the State of Florida v. Florida Public Service Commission, 440 So.2d 371 (Fla. 1st DCA 1983), the District Court's decision directly conflicts with The Citizens of the State of Florida v. Public Service Commission (Holiday Lake), 364 So.2d 723 (Fla. 1978). Both cases involved the exact same question of law, namely, the "add-back" of accumulated depreciation on contributed assets. In Holiday Lake, this Court expressly prohibited the add-back; in the instant case, however, the First District Court expressly approved the add-back.

In Holiday Lake, the Commission had added CIAC accumulated depreciation back into the rate base. The Citizens petitioned this Court to review the

Commission's practice of adding back accumulated depreciation on CIAC. The issue was squarely before the Court:

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

Id. at 724

It is equally clear that this Court reached the conclusion that CIAC accumulated depreciation could not be added back into the rate base:

Petitioners assert that the Public Service Commission's accounting practice in determining rate base is inequitable [W]e accept petitioner's contentions.

Id., at 725

and

We believe the Commission exceeds its authority under Section 367.081(2) and contravenes its own policy by adding back the accumulated depreciation of CIAC into the rate base calculation.

Id.,

and

The Commission errs in allowing the accumulated depreciation on CIAC to be added into this calculation.

Id., at 726

Beyond question, this Court dealt directly with the issue of adding back CIAC accumulated depreciation and reached the conclusion that the add-back is improper.

In the instant case, the First District Court had before it precisely the same question of law as that considered in Holiday Lake:

On appeal, Citizens contend that PSC erred in permitting Utilities to include in their rate base an "add-back" of accumulated depreciation on contributions-in-aid-of-construction (CIAC), citing Citizens of the State of Florida v. Hawkins (Holiday Lakes), [sic] 364 So.2d 723 (Fla. 1978).

440 So.2d at 371, 372

and reached the diametrically opposite result:

This contention has no merit.

Id., at 372

Both in the instant case and in Holiday Lake the same question of law was clearly stated. Yet the position adopted by the Supreme Court in Holiday Lake was said to have no merit by the First District Court in the instant case.

The court below went on to contend that Holiday Lake had been distinguished in a previous case, from which it quoted the apparent rationale for its distinction. The opinion below states:

[The Citizens'] 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 Lakes [sic] case and held:

440 So.2d at 371, 372

The court then quotes twelve lines from General Waterworks. From its language leading into the quote, the court appears to have believed that the factual distinction from Holiday Lake was explained in the passage quoted from General Waterworks. Yet there is nothing in that quoted passage which

can be construed as even an attempt to distinguish Holiday Lake. In fact, far from being a distinction, the quoted material actually illustrates more completely the conflict with Holiday Lake. In quoting with favor the language from General Waterworks, the court below concluded:

The formula [1] allows the utility to receive a fair return on its investment and [2] in no way penalizes the ratepayers [3] who are paying for the cost of using the equipment which provides them service.

[Enumerations added]

440 So.2d at 372

The language above should be compared to the following passage from Holiday Lake, which addresses the same points made by the court below:

This procedure reintroduces CIAC property into the rate base structure and [1] results in a windfall to the utility, which earns a return on property other than its own, [2] and unfairness to the ratepayers, [3] who must pay higher rates in spite of their contributed capital.

[Enumerations added]

364 So.2d at 725

A juxtaposition of the language from the two opinions reveals that in both cases, three points were being made.

First, while the court below found that the add-back "allows the utility to receive a fair return", this Court found that the add-back "results in a windfall to the utility".

Second, while the court below found that the add-back "in no way penalizes the ratepayers", this Court found that the add-back results in "unfairness to the ratepayers".

Third, while the court below found that the ratepayers were simply "paying for the cost of using up the equipment which provides them service", this Court found that the ratepayers "must pay higher rates in spite of their contributed capital".

The preceding examination reveals that the District Court addressed three specific results of the add-back which had previously been addressed in the same sequence by this Court in Holiday Lake. That the court below reached the opposite conclusion on each of the three points is emphatic evidence that the District Court has simply failed to apply the controlling law established by this Court's holding in Holiday Lake.

The fact that the lower court does not itself agree that a conflict exists does ^{not} mean that an "express" conflict is lacking. As this Court explained in defining "expressly":

The first issue - the meaning of the expressly requirement - arises from the fact that the district court below did not identify a direct conflict of its decision with any other Florida appellate decisions. The court's opinion discusses, however, the basis upon which it reversed the trial court's entry of a directed verdict for Ford. This discussion, of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3).

Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981)

Similarly, in the instant case, the legal principles applied by the lower court demonstrate a direct conflict with Holiday Lake. Notwithstanding the court's refusal to recognize this conflict, it is

nevertheless "express" within the meaning of that term as used in Article V, Section 3(b)3.

Despite the District Court's claim of a distinction, there is absolutely nothing in either the text of the opinion below or the language quoted from General Waterworks which even attempts to distinguish Holiday Lake. There is absolutely no factual distinction presented on the face of the opinion below. Without any underlying explanation, the unsupported claim that a distinction exists cannot mitigate what is clear from the face of the two opinions, namely, that Holiday Lake and the instant case dealt with the same question of law, and arrived at directly opposite results.

It is possible that the court below believed that a factual distinction was explained elsewhere in General Waterworks and that the court simply chose not to include that explanation as part of the quoted language. If such is the case, the following points must be raised.

First, there is absolutely nothing anywhere in General Waterworks which can distinguish Holiday Lake from the instant case. The relevant factors in the instant case are absolutely identical to those of Holiday Lake. The issue in the instant case is the proper treatment of only that portion of CIAC accumulated depreciation that accumulated during the time in which the Commission authorized the collection of depreciation expense on CIAC. The Citizens agree that the accumulated depreciation that has accumulated since the Commission began disallowing depreciation expense on CIAC should be added back. The Commission's treatment of the CIAC accumulated depreciation which accumulated during a period in which CIAC depreciation expense was disallowed is simply not an issue because all parties agree on the proper treatment. Since there is no issue involving that period of time, the facts

which apply to that particular period are, of course, irrelevant because they have no bearing on any issue in the case.

As stated, the issue in both the instant case and in Holiday Lake was how to treat that portion of CIAC accumulated depreciation which accumulated during the period for which the Commission allowed CIAC depreciation expense. For that period of time, the treatment of depreciation expense in the instant case is identical to that in Holiday Lake. Contrary to the unsupported assertion of the court below, Holiday Lake is not distinguishable from the instant case.

It is clear that the opinion below, on its face, directly and expressly conflicts with Holiday Lake, a Supreme Court case with identical factual considerations. The Court should take jurisdiction of this case to ensure the proper precedential application of Holiday Lake. If the decision below is allowed to stand, the precedential effect could be substantial. Hundreds of water and sewer companies are regulated by the PSC. All appeals from these utilities are taken to the District Court of Appeals for the First District. Unless the proper treatment of CIAC accumulated depreciation is applied, a vast portion of the state's population could be paying excessive rates as a windfall to utility companies. Although the statutory provision for the treatment of CIAC was changed in 1980 [Chapter 367.081(2), Florida Statutes (1982)], the interpretation of the new provision can nevertheless be affected by the proper application of the principles set forth in Holiday Lake.

In order to clarify this potentially far-reaching precedent, therefore, this Court should take jurisdiction of the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or by hand-delivery to the following parties of record this 6th day of January, 1984.

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