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IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 PUBLIC SERVICE COMMISSION, ET AL.,)
)
 Respondents.)

Case No. 64,680

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SEP 18 1984

CLERK, SUPREME COURT

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

Chief Deputy Clerk

FILED

SID J. WHITE

SEP 18 1984

CLERK, SUPREME COURT

REPLY BRIEF OF
 THE FLORIDA PUBLIC SERVICE COMMISSION
 TO THE ANSWER BRIEF OF
 JACKSONVILLE SUBURBAN UTILITIES CORPORATION
 AND SOUTHERN UTILITIES COMPANY,
 IN RESPONSE TO POINT II

By

Chief Deputy Clerk

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REPLY TO UTILITIES' ANSWER TO POINT II

THE COMMISSION PROPERLY DENIED THE UTILITIES' REQUEST FOR AN "INFLATION - ATTRITION ALLOWANCE" WHEN THE UTILITIES FAILED TO ESTABLISH THE IMPACT OF INFLATION ON THEIR ABILITY TO EARN THEIR AUTHORIZED RATE OF RETURN.

Throughout their Answer Brief, the Utilities' persist in attempting to differentiate between an attrition allowance and an inflation allowance. However, the Utilities' concede that the purpose of their "inflation allowance" was to offset attrition. They therefore agree that it is not the existence of inflation that requires an inflation or attrition allowance, but the impact of inflation on a utility's ability to earn a fair rate of return.

Because the Commission is setting rates for the future, in times of significant inflation the Commission must determine the impact of rising costs on a utility's ability to earn a fair and reasonable rate of return, or, using regulatory terminology, the Commission somehow must measure "attrition."

Utilities' Answer Brief at 10.

In this case, the Utilities' did not present competent, substantial evidence of the impact of inflation on their ability to earn a fair rate of return. Therefore, they did not establish the need for an inflation allowance and the Commission properly denied their request for such an allowance.

A. Evidence Of Future Inflation Does Not Establish Future Attrition.

This Court has previously held that evidence must be produced to show the effect of inflation on a utility's operation.

Predictions of future inflation are not sufficient to establish the need for increased rates.

In Broward County Traffic Association v. Mayo, 340 So.2d 1152 (Fla. 1976), this Court reversed a Commission rate increase decision that gave recognition to predictions of future inflationary conditions. The issue raised by the Petitioners in Broward County was that evidence had not been produced to show the dollar effect of inflation on the carriers seeking the rate increase. In this case the issue is the same. The Utilities failed to establish the effect of inflation on the Utilities' rate of return.

In addition to case law, experience has shown it is improper to rely on evidence of inflation to establish the need for an attrition allowance. Experience has shown that in inflationary times, attrition may not occur. At the same time the Utilities in this case were petitioning for rate increases, the Commission was conducting proceedings to reduce the rates of various telephone companies. See United Telephone Company of Florida v. Mann, 403 So.2d 962 (Fla. 1981) and Florida Telephone Corporation v. Cresse, 407 So.2d 915 (Fla. 1981). These companies were earning in excess of their authorized rates of return, despite the existence of inflation.

Obviously, the presence of inflation alone does not support a finding that a utility is also experiencing attrition. Attrition may be a by-product of inflation, but evidence of that effect must be presented.

B. Judicial Notice Cannot Be Taken Of The Effect Of Inflation On A Utility's Rate of Return.

Case law and the experience of telephone companies in the late 1970's supports the Commission's position that judicial notice cannot be taken of the effect of inflation on a particular utility's rate of return.

The analysis to the contrary the Utilities try to make using this Court's decision in Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) is without merit. In Bould v. Touchette the Court was commenting on the likelihood that members of a jury take inflation into account when arriving at an award for compensatory damages. That case does not stand for, or even suggest, that judicial notice can be taken of the effect of inflation on the operation of a utility and it's rate of return.

C. A Comparison Of The Utilities' Evidence On The "Inflation Allowance" To The Requirements of § 367.081(4), Fla. Stat., For Implementing A Price Index Increase Further Illustrates The Insufficiency Of The Utilities Evidence.

On pages 15 and 16 of their Answer Brief, the Utilities characterize their methodology for computing an inflation allowance as the same as that authorized by the 1980 Florida Legislature in § 367.081(4), Fla. Stat. A comparison of the provisions of that section and the evidence presented by the Utilities in this case demonstrates that the Commission was correct in denying the inflation allowance.

Section 367.081(4), Fla. Stat., requires a utility seeking to increase its rates pursuant to a price increase index to examine the impact of such an increase on its rate of return. A utility is required to file an affirmation that the utility will not

over-earn as a result of implementing an index increase. In other words, the utility must do an analysis to determine if the index is necessary to offset attrition. That is the same analysis the Commission found was necessary in this case and which was not presented.

Paragraph (4)(a) of Section 367.081, Fla. Stat., provides in pertinent part:

On or before March 31 of each year, the commission by order shall establish a price increase or decrease index for major categories of operating costs incurred by utilities subject to its jurisdiction reflecting the percentage of increase or decrease in such costs from the most recent 12-month historical data available. The commission by rule shall establish the procedure to be used in determining such indices and a procedure by which a utility, without further action by the commission, or the commission on its own motion, may implement an increase or decrease in its rates based upon the application of the indices....

Pursuant to this statute, the Commission has, since 1981, annually established an index which can be used by a jurisdictional utility to increase its rates without further action by the Commission. However, prior to implementing such an increase the utility must do an analysis of the impact of utilizing the index on its rate of return. Paragraph 367.081(4)(c) provides:

(c) Before implementing a change in rates under this subsection, the utility shall file an affirmation under oath as to the accuracy of the figures and calculations upon which the change in rates is based, stating that the change will not cause the utility to exceed the range of its last authorized rate of return.

Whoever makes a false statement on the affirmation required hereunder, which he does not believe to be true in regard to any material matter, is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. (Emphasis supplied).

In this case, the Utilities never did an analysis of the impact of inflation on their rate of return thus justifying the necessity of the requested "inflation allowance." This critical element of proof was not presented and therefore the utilities did not establish a prima facie case for the inflation allowance.

The analysis of the impact of inflation on the Utilities' rate of return is more critical in this case than in the implementation of an increase pursuant to a Commission established index. The Commission was establishing permanent rates rather than indexed revenues subject to refund. If the Commission had authorized an inflation allowance, the Utilities' rates would have been increased. If these increased rates caused the Utilities to exceed their authorized rate of return, there would be no opportunity to refund excessive rates to the Utilities' customers. Permanent rates are not subject to refund. However, if an index increase is implemented and the authorized rate of return is exceeded, the excessive rates can be refunded to customers:

(d) If, within 24 months of an adjustment in the rates as authorized by this subsection, the commission finds that a utility did thereby exceed the range of its last authorized rate of return, it may order the utility to refund the difference to the rate payers. This provision shall not be construed to require a bond or corporate undertaking not otherwise required.

Because the Utilities failed to analyze and present evidence of the impact of inflation on its rate of return, it did not establish the need for an inflation allowance and the Commission properly denied the request. The Utilities failed to do the same analysis required in Section 367.081(4), Fla. Stat., for implementation of a change in rates pursuant to a price increase index.

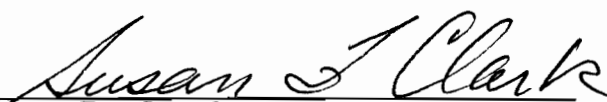
D. Utilities Failed To Meet Their Burden Of Proof.

The Utilities have suggested that the Commission or Public Counsel had the burden of establishing that inflation would not erode their rate of return. (Utilities' Answer Brief, pages 25-29). However, the burden of proof in this case never shifted because the Utilities did not present competent substantial evidence establishing a prima facie case that inflation had eroded the rate of return in the past and could be expected to continue to erode their rate of return. Failing such proof, the Utilities did not carry the initial burden of proof and there was no reason to go forward with contradictory proof. The inflation allowance was properly denied. It was not a matter of failing to present a traditional analysis of attrition. It was a failure to analyze attrition at all.

CONCLUSION

The Utilities failed to present competent substantial evidence to support the granting of an "inflation-attrition" allowance. No evidence was presented establishing the impact of inflation on the Utilities' ability to earn their authorized rate of return. Therefore, the Commission properly denied the Utilities' request for an inflation-attrition allowance.

Respectfully submitted,


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September 18, 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of September, 1984 to the following:

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