IN THE
SUPREME COURT OF FLORIDA

SOUTH FLORIDA NATURAL GAS COMPANY, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 71,035

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Table of Citations
Continued

PRELIMINARY STATEMENT

The Statement of Facts and Case submitted by the Appellant is factually accurate and will not be challanged by the Commission. However, the inference in those statements that the delay in processing the request for a rate increase was somehow the fault of the Commission is totally inaccurate. Had it not been for the assistance offerred by the Commission staff during the preparation of the Company's filings, the Petitioner would not have even met the minimum filing requirements.

SUMMARY OF ARGUMENT

The Commission has the authority to investigate the rate filings of a utility and determine if the company has demonstrated by a preponderance of the evidence that it is entitled to the relief sought. The Commission is under no obligation to advocate any position but if it elects to do so, the staff member supporting that position appears as any other party in the proceeding, unavailable to the Commission as an advisor or during deliberation.

The Petitioner is not entitled as a matter of law to have an adversary in order to satisfy its due process rights. It is entitled to notice, a hearing and a decision based on the record which it has a burden to develop. Material issues of fact are developed when the Company files for a rate change, putting at issue the lawful rates then in effect and the supporting elements used to set those lawful rates.

The burden of proof, or the ultimate burden of persuasion, always rests with the party seeking an affirmative ruling. Here the utility sought a change in rates but refused in its hearing to demonstrate that it had acted prudently in incurring additional expenses. It argued that the completing of the minimum filing requirements shifted the burden to the Commission to demonstrate that the Company had acted imprudently. Such is clearly not the law in Florida.

The Commission had instituted a policy of using benchmark indicators to eliminate the need for proving the reasonableness of

expense items. The benchmark procedure uses the amount of expense the company proved reasonable in the last case increased by a compound multiplier using among other factors, the consumer price index. The Company had to establish the reasonableness of only those expenses which exceeded the benchmark, and not all expenses.

The Company objected to the procedure claiming that the Commission must carry the burden of showing that the benchmark is reasonable. The benchmark is not a demonstration that some costs are unreasonable. It merely identifies those costs which appear to be unreasonable, lessening the burden of the utility to justify all expenses.

The Company refused to demonstrate to the Commission that it had been experiencing attrition, instead opting to rely upon its completed minimum filing requirements, arguing that the burden had somehow shifted. It opined that the Commission should demonstrate that the Company had failed to experience attrition. Again, it is not the Commission that bears the ultimate burden of persuasion as to the unreasonableness of the company's alleged expenditures.

The Company refused to present half of its case, that of establishing the reasonableness of its claim. It insisted that it be compensated for its entire rate case expense without regard to the unreasonableness of the prosecution of its rate case. The Commission set the rate case expense at the level found to be reasonable for a gas company which acted prudently in justifying an increase in rates.

Finally, the Appellant seeks to have this Court engage in rate making. The act of setting rates is a legislative function. The courts do not have the authority to substitute their judgment for the Commission nor reweigh the evidence and find in favor of the Company. The Company asks this Court to determine that the Company had acted prudently in increasing its expenses after precipitously refusing to tender any evidence in support of that position to the Commission.

The Company failed to establish by a preponderance of the evidence an entitlement to rate relief except to the limited extent that it demonstrated known changes for some expense items.

POINT

THE COMMISSION MAY DENY A REQUEST FOR RATE INCREASE WHERE THE UTILITY REFUSES TO ESTABLISH THE PRUDENCE OF ITS INVESTMENTS AND EXPENSES.

1. The Appellant confuses the distinction between sections 120.57(1) and 120.57(2), Florida Statutes.

Proceedings before the Public Service Commission take many forms. The Commission utilizes the informal proceeding found in section 120.57(2), Florida Statutes, when it is expected that most issues will be resolved without resort to the necessity of a formal hearing. In those proceedings where it is anticipated that the requirements for a more formal setting is necessary, such as major rate cases, the Commission foregoes the informal proceeding and initially institutes a formal, section 120.57(1), Florida Statutes, proceeding. In an informal proceeding, under section 120.57(2), the petitioner presents a prima facie case for agency action. The agency then makes a "preliminary" determination in which it proposes the action it will take in the event that no hearing is requested. This has been declared to be "free-form" agency action which becomes final if no one requests a hearing. In the event of a request for a hearing within a specified period, the agency's initial proposed action evaporates. The initial action is not reviewed. The petitioner is given a hearing de novo under section 120.57(1), Florida Statutes. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 786 (Fla. 1st DCA 1981).

Here, the Commission initiated a formal hearing under section 120.57(1), Florida Statutes, without going through the alternative procedure of an informal proceeding. Appellant claims erroneously that the Commission's election of proceeding with a formal hearing under section 120.57(1), Florida Statutes, is flawed for several reasons. Each will be addressed in turn.

Appellant first contends that since the Commission did not take a position on all issues, sponsor testimony nor present tangible evidence, there were no issues of material fact in the proceeding. The contention does not comport with the law in Florida. Petitioners seeking a change in rates, by the act of filing, create issues of material fact as to all elements comprising the justification for new rates. The reason for this is obvious. Rates previously approved by the Commission are lawful rates carrying with them the imprimatur of state action and the presumption of validity. By petitioning for a change in rates, a party is challenging the legality of those rates, putting at issue the elements justifying those rates. Therefore each element supporting the proposed new rates is at issue with those elements used to establish the presumptively valid lawful rates.

Under the Commission's rate setting authority, a petitioner seeking to change lawful rates must establish that the existing rates are unfair, unreasonable or unjustly discriminatory. §366.06(1), Fla. Stat. The method used to meet this standard is to show by a preponderance of evidence that the rates presently in effect fail to compensate the utility for its prudently incurred

expenses and fail to produce a reasonable return on the company's investment in property used and useful in the public service. Gulf Power Co. v. Public Service Commission, 453 So.2d 799 (Fla. 1984). Until the utility has sustained the burden of proof of these statutory criteria, facts are disputed by the filing of a petition for rate relief.

In a situation analogous to the filing of a petition for rate relief, this Court had the opportunity to consider whether the filing for a bank charter, in itself, raised material issues of fact. In Peoples Bank of Indian River County v. State Department of Banking and Finance, 395 So.2d 521, 524 (Fla. 1981), it held that "[i]ndeed, in a sense the statutory criteria listed in section 659.03(2), Florida Statutes, are, until established, 'disputed' facts since the applicant for a license has the burden of showing that he has satisfied them and is therefore entitled to a bank charter."

The Commission has gone beyond the statutory criteria and by rule has fleshed out the statutory criteria. It has promulgated rules defining the minimum filing requirements for gas utilities seeking rate increases. Rule 25-7.039, Fla. Admin. Code. By enacting rules, the Commission has enumerated those elements of expenses and investment which it has learned through other rate proceedings should be proven in order to support a change in rates. In doing so, the Commission has "closed the gap" between what it knows and what the petitioner should file and defend in its request. McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977). These minimum filing

requirements, or MFR's, must be proven by a preponderance of the evidence before the Commission can make a finding that the rates are justified and are in the public interest. Therefore the utility is confronted with material issues of fact in justifying all elements of the proposed rates. In the event that the utility fails to sustain its burden, the existing rates remain in effect having the full force and effect of law.

In an analogous situation, when a party failed to demonstrate that the existing rate structures in effect were discriminatory or unjust, this Court found that the lawful rate structures then in effect were still valid. In Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla. 1977) this Court held:

> ... An examination of the relevant portions of Order No. 6794 discloses that, except for a few unexplained reclassifications of customers, the Commission retained the basic rate structure previously approved for Florida Power as being fair and reasonable. It is difficult for us to overturn a rate structure previously found to be fair and reasonable, absent a clear showing in the record that the earlier structure was arbitrary or that changed circumstances have made it unreasonable. (Emphasis supplied)

Therefore, absent a clear showing here that the rates currently on file for South Florida Natural Gas, and previously approved by the Commission, are arbitrary or unreasonable, the Petitioner fails in its burden of establishing a need for new rates.

2. The absence of an adversary does not deprive the Appellant of due process of law.

The Appellant next maintains that the absence of an adversary presenting an adversarial position, deprived it of due process in that the Commission did not have evidence in the record to support any other position than that advocated by the Petitioner. Such a position is hopelessly insupportable. It is not the role of the Commission nor its staff to present a contrary position on all issues presented by a petitioner. As conceded by the Appellant, the petitioner seeking a change in rates must sustain the burden of proof as to all issues supporting that request.

The usual role of staff in a rate request proceeding is to test the validity, credibility and competency of the evidence presented to the Commission in support of a rate increase. It is the investigatory arm of the Commission. Section 366.06(1), Florida Statutes, provides the standard by which the Commission is to act during a request for a rate adjustment. It provides that:

> ... The commission shall investigate and determine the actual and legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for rate making purposes and shall be money honestly and prudently invested ... in serving the public.

At the conclusion of a rate proceeding, the staff of the Commission then evaluates the evidence presented and makes a recommendation to the Commission. Appellant would have the staff and the Commission abandon this function and undertake to present a contrary case on the company's entitlement.

The Commission staff has no affirmative burden in a proceeding unless it wishes to advocate a position. In the event that a staff member wishes to advocate a position, that member will not be available to advise the Commission during its deliberations. §120.66(1)(b), Fla. Stat. When the staff seeks to advocate a position, it has the status of any other party. Its position is prefiled and the staff member is available for cross examination. This role serves the purpose of placing before the Commission affirmative positions on issues that the Commission may wish to consider. This testimony may not necessarily be adverse to the petitioner, but in all events the position of staff will either represent a departure from previous elements of rate making used in the company's last rate case, or it may represent a position considering changed circumstances advocated by staff.

In this proceeding, the staff member who prefiled testimony was advocating a level for a return on equity reflecting changed circumstances in the money markets. It was later stipulated to by the parties. Because of this participation in the case, the witness was not available to the Commission during its deliberating session nor as an advisor.

Whereas the Commission may institute a proceeding where it finds that rates are unjust, unreasonable, insufficient or unjustly discriminatory, it is under no obligation to advocate any rate increase for a utility.

> ... [T]he commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications ... to be ... followed in the future. §366.07, Fla. Stat.

What the Appellant has ignored is the role of the Commission. It is authorized to investigate rate change requests and determine whether the proposed rate changes are in the public interest. Inherent in this procedure is a silent party, the public.

3. The record demonstrates that the Company obstructed an attempt to investigate its rate filing.

A review of the record demonstrates that the Company undertook a course of conduct which directly conflicted with the statutes and the holdings of this Court. It did so at its own peril and "failed."

At every opportunity, the Company attempted to obstruct the staff's performance of its statutory obligation to aid the Commission in "investigating" the rate filing of South Florida Natural Gas. When the only Company witness, Robert J. Morgan, Vice President, was tendered as a witness, Counsel for the Company objected to any inquiry into Company operations.

The Company objected to the first question propounded by staff of the witness. The staff was inquiring into the Company's compliance with the Commission's "gas emergency" rules. (Tr. 19.) Next the Company objected to inquiry into the Company's maintenance of "continuing property records." (Tr. 25.) When the objection was overruled and inquiry permitted, it was learned that the Company had been maintaining on its books and records, for rate making purposes, gas lines which were no

longer in existence. (Tr. 29.) The Company next objected to a question propounded to the witness whether he was familiar with "accounting." (Tr. 32.) The next question asked shed some light on the Company's obstructionist policy.

> Q (By Mr. Smith) Mr. Morgan, is it true that in the course of this case, in your investigations of the retired and abandoned plant that you found that there were 170 lines that had been abandoned but which were not retired off the books?
>
> A Yes.

(Tr. 33.)

The very next line of questioning attempted by the staff concerned the allocation of physical plant between regulated and non-regulation operations. The Company again objected. (Tr. 34.) When the staff tried to inquire into the allocation of an employee's time between regulated and non-regulated activities of the Company the following exchange occurred.

> Q (By Mr. Smith) Okay. And let me ask you about one other person. Is Mr. Walker, is he a salesman who also is involved in regulated and non-regulated sales? Does he sell appliances and promote the use of gas?
>
> Mr. Bentley: Objection to relevance, Your Honor.
>
> COMMISSIONER WILSON: I'm going to allow the question.

(Tr. 36.)

The Company took the position throughout that, unless the Commission staff presented witnesses, testimony and engaged in an

adversarial role with the Company, it could not investigate the Company's filing. The Company apparently believed that once it had complied with the filing requirements it was entitled to a rate increase if the staff did not make an affirmative case to the contrary.

4. The Appellant erroneously interprets the concept of "Burden of Proof".

The Appellant bases its argument concerning the burden of proof on the fallacious assumption that the burden of proof shifts from the Company to the Commission upon the presentation of completed MFR's. In fact, the Appellant admits in the record that it will not show that its expenses were prudently incurred based upon the mistaken assumption that it does not have the burden of establishing that its expenses and investments were "prudently" incurred. This is contrary to the law.

The record establishes that the Commission carefully and accurately instructed the Company on its burden.

> COMMISSIONER WILSON: I would agree with you that a statement of issue does not impose a burden. The burden lies, and always does, with the company to demonstrate the prudency (sic) of its actions. The Company always carries the burden in the case.
>
> MR. ROSE: My only perception of wrong is the word "prudent" like the word "justify." I think our burden is a more definitive burden than justify or prudent. Prudent, I think, is a judgment which one places on facts after having received those facts. The Company did spend these things, it did these things. And to ask it to produce self-serving testimony that says, "Oh, yes, we were smart, we were wise," I think is somehow doing violence to the standard.

...

[T]he basic proposition as I understand the Commission's accounting and MFRs rules is what did you do, what did it cost?

At that point, I think the burden needs to shift to someone, if someone wishes to come forward to say, "No, you're not -- this is not prudent expenditure for these reasons." (Emphasis supplied)

(Tr. 98)

Appellant is contending that once it satisfies the minimum filing requirements and avers that it has incurred expenses and made investments that the burden of demonstrating that those expenses were imprudent shift to the Commission. This erroneous proposition is clearly indicated later in the record:

COMMISSIONER WILSON: ... -- I've never seen any statement that indicated that the Company did not always retain the burden of proof in a case.

MR. ROSE: Yes sir, the question is, what burden?

COMMISSIONER WILSON: Well, it's the burden of demonstrating by the preponderance of the evidence, the factual issues of the cost and the prudence issue.

...

MR. ROSE: Thank you, Commissioner Wilson. I know we want to get on with it. I'm sorry, I disagree with you, but I think that's for briefs.[1]

(Tr. 101.)

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[1]There is further discussion in this exchange concerning variance from benchmark numbers. However, within that discussion as well, Commissioner Wilson asserts that the Company has to establish the prudence of the expenditures which deviate from the benchmark. Counsel for the company clearly is at odds with the Company's burden of establishing the prudence of its actions.

The Company is clearly confused on the meaning of the term "burden of proof". The term itself has taken on more than one meaning through misuse. As clarified by this Court, the "burden of ultimate persuasion" always rests upon the person asserting the affirmative of the issue. The burden of ultimate persuasion that the Company prudently incurred expenses always rests with the Company. The Company has confused the burden of going forward with the evidence with the burden of ultimate persuasion.

In Florida Department of Transportation v. J.W.C. Company, Inc., supra, in citing from this Court's decision in In Re Estate of Ziy, 223 So.2d 42, (Fla. 1969), the Court distinguished the confusion in the use of the term.

> The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. (Emphasis supplied)

(at 787.)

Appellant is contending that once it has filled out the data requested in the MFR's it has raised a prima facie presumption that it acted prudently in incurring the enumerated expenses. It would then be the staff's burden, under Appellant's theory, to

show that the expenses were in fact imprudently incurred. The Commission and this Court have been confronted with just this erroneous proposition in the past.

In Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982), the utility filed for a change in rates in the fuel adjustment proceeding and alleged that it had incurred increased costs in fuel due to an outage in its nuclear power plant. It was contended that the outage was extended by a week because the utility had failed to keep a spare decay heat pump in its parts inventory. The utility raised three points on appeal but the third point is most relevant.

> As its final point on appeal, FPC argues that the PSC, in refusing to permit recovery of the disputed amount, imposed upon it an improper burden of proof. According to the utility, legitimately incurred operating expenses such as fuel costs are presumed reasonable, and evidence that such operating costs were incurred satisfies the utility's burden of production. At this point, it reasons, the PSC must establish by substantial and competent evidence that the amounts paid were imprudently or unnecessarily incurred. ... We do not agree.
>
> The requirement that utilities demonstrate the reasonableness of their fuel costs is not improper or unusual. "Burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates." (Emphasis supplied)

(at 1191.)

It is the Appellant, South Florida Natural Gas, that is seeking to change the lawful rates on file with the Commission. Therefore, it has the affirmative duty to establish not only that it did make

expenditures but that the action in making those expenditures was prudent and in the public interest.

The Petitioner in this proceeding before the Commission, elected to pursue a reckless course of conduct not supported by the law in this State. It filed completed MFR's indicating what it had spent on particular items of traditional rate making. It chose to present these matters without any intention of demonstrating that they were "prudently" incurred. It wrongly assumed that the act of spending rate payer generated funds somehow raised a prima facie presumption that the expenditures were prudent. Even after being repeatedly informed by the Commission and the Commission staff, the Petitioner plowed forward presenting half of a case. It did so at its own peril and failed to sustain its burden of proof.

5. The Appellant misconstrues the applicability of the Deel case.

The Appellant places great reliance upon the case of Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971). In Deel, a petition was filed seeking to require employee members of a self-insurer group to pay assessments levied against them. The members filed written responses denying the allegations contained in the petition. A hearing was called at which time the attorney for the petitioner made an informal presentation without being sworn as a witness. No proof was offered as to the correctness of underlying records. The self-insured group challenged the sufficiency of the hearing since no evidence was presented against the group. The hearing was

adjourned and the Department rendered a decision in favor of the assessment against the self-insurer group.

The Court held in Deel that the proceeding was flawed in that no evidence was presented to support a finding of liability against the self-insurer group. The Court correctly ruled that the self-insurer group was deprived of due process in not being afforded the opportunity to confront the evidence against it. However, the Deel case, as applied by the Appellant, is factually distinguishable from these proceedings. In Deel, the petitioner was seeking the imposition of assessments against the self-insurer group. It bore the burden of establishing that assessments were due. In this case, the analogous party would be the utility seeking to demonstrate that the rates in effect were insufficient to compensate the utility for prudently incurred expenses and provide a reasonable return on its investment. Here, as in the Deel case, the Petitioner failed to sustain its burden. In Deel, the party who would have been affected ultimately by the Department's decision presented no evidence, merely challenging the decision after it was rendered. In this case, the public, the party who would have been ultimately affected by the decision of the Commission was more fortunate. The Commission carried out its statutory duty finding that the Petitioner, South Florida Natural Gas, had failed to present evidence showing an entitlement to a rate increase.

6. The use of the benchmark test does not shift the burden to the Commission to establish prudent expenses.

The Commission employs a device to reduce the regulatory burden on applicants for rate increases. The Commission has established that any expense which is within the range of the expenses of the last rate case, compounded by the Consumer Price Index, is presumed reasonable and prudent, requiring no further proof by the utility. Apparently the Company was aware of this concept because the witness for the Company testified that he introduced the concept to the Commission. (Tr. 94.)

Once again, the Commission reiterated the Company's burden and the purpose of the benchmark:

> COMMISSIONER WILSON: But I think part of the purpose of the benchmark is to raise a red flag to the Commission as well as the Company to indicate those items which may require to be -- may need to be specifically addressed in terms of the magnitude of that expenditure and its prudence.

(Tr. 94.)

At this point, the Company again objected to carrying the burden of establishing the prudence of those expenses identified by the benchmark test. The Company asserted that the screening of expenses using the benchmark somehow shifted the ultimate burden of persuasion to the staff. Once again the Company erred.

7. The Commission may deny an attrition allowance where the Company fails to establish that attrition occurred.

Attrition is a phenomenon sometimes experienced by utilities when their level of earnings is eroded by an increase in expenses without a concomitant increase in revenues. This erosion in

earnings will be considered in a rate case upon a showing that the utility has in fact experienced an erosion in earnings and that the utility has acted prudently in incurring the increased expenses. Citizens of the State of Florida v. Public Service Commission, 345 So.2d 784, 787 (Fla. 1983). The Commission has prepared a formula for the calculation of an attrition allowance consistent with the provision of Rule 25-7.039(27), Fla. Admin. Code. It merely quantifies how certain expenses have increased. The filing of the completed formula is not proof that attrition has occurred -- it proves that if you plug numbers into a formula you get an answer.

The utility contends that by submitting the information used by the Commission in past awards of attrition, it had satisfied its burden of proof. Once again the Appellant has merely produced half of the necessary information necessary to sustain an award of attrition. It failed to demonstrate that it had acted prudently or that it had actually sustained attrition. The utility must submit a contemporaneous demonstration that the utility has experienced attrition, that it is reasonable to expect that the utility will continue to experience attrition and that the utility acted prudently in minimizing the effects of attrition. Without this demonstration, the utility will fail in its burden of establishing by a preponderance of the evidence that it is entitled to an award of an attrition allowance in its rate increase.

This is not a means of penalizing the utility. It is required to prevent the rate payers from paying through increased rates,

expenditures not found to be reasonable or prudently incurred. The utility failed to demonstrate attrition. It had, however, proved that certain expense items had increased and would continue at the increased level. Despite its reluctance to do so, the utility inadvertently proved that it acted prudently in that it could not reasonably reduce those expenses. The Commission therefore awarded increased rates to cover those "known" changes in expenses.

In Gulf Power v. Bevis, 289 So.2d 401, 405 (Fla. 1974), the Commission had been confronted with the elimination of a corporate privilege tax and the imposition of a new corporate income tax during Gulf Power's test year. This Court stated:

> The recognized rule then is that the test year must be adjusted for known and imminent changes in order to be representative of the conditions which will prevail in the immediate future when the rates will become effective. Inapplicable factors must be removed from test-year considerations, while appropriate new ones must be added.

This is precisely what the Commission undertook to do. It determined that the Company had failed to prove attrition but through its filings and cross examination by staff, it had demonstrated that certain expense items had increased. The Commission awarded an increase in rates to compensate the Company for increases in property insurances, long-term debt and rate case expenses.

Once again, the Company asserts in its brief that it proved attrition by completing the MFR's but again fails to demonstrate where in the record it tendered a preponderance of the evidence

to, in fact, establish that attrition had occurred, is occurring and will continue to occur. It demonstrated that certain expenses would increase and the Commission awarded an increase in rates based upon the evidence it had before it.

8. The rate case expenses were reasonable.

The Commission awarded the Company $94,000 in rate case expenses at the conclusion of the proceeding. The Company had originally projected an expenditure of $63,000. It contended at hearing that it had incurred $142,093. The Company had unsuccessfully sought a rate increase of $343,414 on an annual basis. The Company was only able to justify a permanent rate increase of $49,542 which includes a three year amortization of the rate case expenses awarded.

In the non-final case of Meadowbrook Utility System v. Public Service Commission, Case No. BT-217, Opinion filed December 10, 1987, the Commission had initiated an inquiry into the Company's over-earnings. The Company responded by filing for a rate increase. The Commission found that the Company had been over-earning and it ordered a rate reduction. However, as a consequence of awarding rate case expenses, the rates in fact increased.

The Court found that an automatic award of rate case expenses in every case would constitute an abuse of discretion "without reference to the prudence of the costs incurred in the rate case proceeding." Citing to Florida Crown Utilities, Inc. v. Utility Regulatory Board of the City of Jacksonville, 274 So.2d 597 (Fla. 1st DCA 1973).

Here, the Company continued to follow its policy of refusing to show that it acted prudently in incurring expense items. The Commission set the rate case expenses at the level found to be prudent in the last gas rate case it considered. This surrogate for a reasonable level of rate case expense is within the range of zero to that alleged by the Company but not shown to be "prudent."

9. The remedy sought by the Appellant is inappropriate.

The Appellant seeks to have this Court substitute its judgment for that of the Commission and impose the increase in rates to be charged customers of South Florida Natural Gas. In support of its request, the Company cites no authority for the Court's jurisdiction to grant such relief. Section 120.68(9), Florida Statutes, authorizes the Court to modify agency action only when he agency has "erroneously interpreted a provision of law." To the contrary, it seems that the Appellant is contending that the Commission somehow deprived the Company of procedural due process by not affirmatively advocating an opposite result to that offered by the Company.

The Appellant asks that this Court engage in rate setting. As with the other contentions of the Appellant, this too does not comport with the law.

As early as 1888, in McWhorter v. Pensacola & A. R. Co., 5 So. 129, 137; 24 Fla. 417 (Fla. 1888), this Court held that rate setting was a legislative function which could be properly delegated to a Commission with supervisory powers. Later in State ex rel. Swearington v. Railroad Commissioners of Fla., 84 So. 444, 446 (Fla. 1920), this Court held:

> In fixing rates to be charged by railroad common carriers for transporting persons and property, the railroad commissioners exercise a quasi-legislative function sometimes regarded as being administrative, but not judicial in its nature.

More recently, this Court emphasized the legislative nature of rate setting. In Myers v. Hawkins, 362 So.2d 926, 932 (Fla. 1978), this Court stated:

> ... [T]he statutory range of the Commission's responsibility is so vast that the agency in fact exercises judicial-like powers in performing only a fraction (albeit a highly visible and significant fraction) of its duties.[20]

> [20] The many non-judicial functions of the Public Service Commission prescribed in the Florida Statutes include ... rate making and regulatory authority ... over ... public utilities supplying electric and gas (ch. 366).

Not only is the Appellant asking this Court to prescribe rates which is not within the judicial function of this Court, but the Appellant is asking that the Court substitute its judgment for the finder of fact and determine that the Company had demonstrated that its rate increase was based on actual expenses prudently incurred. This is especially ironic in view of the fact that the Company admitted that it would not tender evidence that its expenses were in fact prudent.

This Court may not substitute its judgment for that of the trier of fact. §120.68(12), Fla. Stat.; Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983). It is the burden of the Court to determine whether the

PSC's action comports with the essential requirements of law and is supported by competent substantial evidence in the record. Florida Telephone Corp. v. Mayo, 350 So.2d 775 (Fla. 1977). By its own admissions, the Appellant refused to sustain its burden before the Commission. It has failed to sustain a claim that the Commission's decision is somehow invalid, arbitrary or unsupported by the evidence. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534, 539 (Fla. 1982). Therefore, the Appellant's case must fail.

CONCLUSION

The Appellant undertook a precipitous course of conduct before the Commission, advocating a procedure clearly contrary to established law, precedent and practice. The law provides that a person seeking to change existing rates bears the ultimate burden of persuasion that the rates in effect are somehow unfair, unjust or unreasonable.

The utility was content -- no, adamant, that all it had to demonstrate was that it incurred additional expenses. It refused to try to demonstrate that it had acted prudently, instead opting to insist that the Commission demonstrate that the Company had acted imprudently. It did so after being advised that it was in error. It proceeded at its own peril.

Wherefore, the Order of the Commission complies with the essential requirements of law and must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Florida Public Service Commission has been furnished by U.S. Mail this 24th day of December, 1987 to the following:

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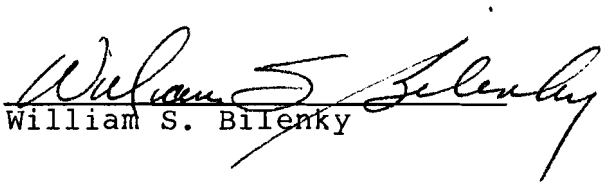

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