BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of SOUTHERN STATES UTILITIES, INC. for a rate increase in Marion County	DOCKET NO. 880520-WS ORDER NO. 21907 ISSUED: 9-19-89

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
GERALD L. GUNTER

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

On July 12, 1988, Southern States Utilities, Inc. (Southern States or utility) filed an application for increased water and sewer rates in Marion County. The application did not meet the minimum filing requirements and Southern States was so notified. On September 1, 1988, Southern States completed its application and that date was established as the official filing date.

On December 14, 1988, the Office of Public Counsel (OPC) filed notice of its intervention in this proceeding pursuant to the provisions of Section 350.0611, Florida Statutes. By Order No. 20486, issued December 20, 1988, we acknowledged OPC's intervention in this matter.

A formal hearing regarding Southern States' application for increased rates was held on February 23, 1989, in Ocala, Florida. At the hearing, OPC sponsored the testimony of Terry Deason. Mr. Deason testified that it should be Southern States' burden to justify any amount of rate base in excess of the purchase price. Southern States, on the other hand, sponsored the testimony of John Guastella, who testified regarding the policy reasons why the Commission should not recognize a negative acquisition adjustment.

By Order No. 21322, issued June 5, 1989, we rejected the arguments of OPC witness Deason, disregarded a negative acquisition adjustment for regulatory purposes and granted increased rates for both water and sewer service.

On June 20, 1989, OPC timely filed a motion for reconsideration of Order No. 21322. On June 29, 1989, Southern States timely filed a response to OPC's motion for reconsideration.

Motion for Reconsideration

OPC raised three points in its motion for reconsideration. First, OPC argues that we improperly placed the burden on the ratepayers to prove that a negative acquisition adjustment is appropriate. Second, OPC argues that, by not recognizing a negative acquisition adjustment, we have violated Section 367.081(2), Florida Statutes. Third, OPC argues that we erred in rejecting the testimony of witness Deason because he was the only witness that presented evidence as to the proper ratemaking treatment for the negative acquisition adjustment.

In its response to OPC's motion, Southern States argues that OPC's proposed departure from established Commission practice was thoroughly considered and rejected, and that OPC had pointed out no error or omission of fact or law in our decision regarding this matter.

Each of OPC's arguments is addressed separately below.

Burden on Ratepayers

By Order No. 16108, issued May 13, 1986, this Commission approved the transfer of the Marion County systems to Southern States and proposed to disregard a negative acquisition adjustment and establish rate base. OPC originally protested that portion of Order No. 16108 which proposed to establish rate base; however, it subsequently withdrew its protest, based upon an agreement with Southern States to address the issue of rate base in the utility's next rate proceeding. By Order No. 17148, issued February 4, 1987, this Commission acknowledged OPC's withdrawal of its protest and ordered that the provisions of Order No. 16108 had become final and effective.

OPC argues that we improperly relied on Order No. 16108 in this case, that Order No. 16108 has no force and that it is entitled to no presumptive validity. We disagree. OPC's argument ignores the fact that, by Order No. 17148, this

Commission declared the proposed agency action provisions of Order No. 16108, or those establishing rate base, had become final. We, therefore, believe that those provisions are entitled to a presumption of validity. Citing Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982), OPC further contends that, since this is the first opportunity for Southern States to justify its rate base, there can be no shift of the burden of proof to OPC. We do not believe that Florida Power, a case involving who had the burden to establish that increased operating costs were reasonable, controls in this instance.

In this case, it is OPC that is seeking to change a Commission-established rate base. In an administrative proceeding, the burden of proof is on the party seeking the affirmative of an issue. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981). Accordingly, we reject OPC's first argument.

Decision in Violation of Section 367.081(2), Florida Statutes

OPC next argues that our decision to disregard the negative acquisition adjustment is in violation of Section 367.081(2), Florida Statutes. That section states that, when setting rates, this Commission shall consider "the cost of providing the service, which shall include, but not be limited to . . . a fair return on the investment of the utility in property used and useful in the public service." OPC contends that the language of that section "clearly limits the Commission's discretion" to include in rate base only those costs actually invested by Southern States. Finally, citing Florida Bridge Company v. Hawkins, 363 So. 2d 799, 802 (Fla. 1978), OPC argues that "any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested."

We do not believe that Section 367.081(2), Florida Statutes, "clearly limits" what may be included in plant-in-service to what has actually been invested by Southern States. The language relied on by OPC states that we shall consider " . . . the investment of the utility." (Emphasis supplied.) We have consistently construed that language to mean the original cost of property when dedicated to public service.

As for OPC's argument regarding the lawful existence of a power and the exercise thereof, we note that in the Florida Bridge case, the Court was addressing the Commission's exercise of a power which, the Court found, was outside of its statutory authority. In the present case, we did not attempt to reach outside of our statutory authority. We merely construed Section 367.081(2), Florida Statutes, in a manner consistent with our past decisions. Finally, we note that the construction of a statute by the agency responsible for administering it is entitled to great weight and should not be overturned unless clearly erroneous. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1989).

Based upon the discussion above, we hereby reject OPC's argument that our decision is in violation of Section 367.081(2), Florida Statutes.

Rejection of Testimony

Lastly, OPC argues that we erred by rejecting the testimony of witness Deason. At the hearing, Mr. Deason argued that Southern States should not be allowed both the rate base amount in excess of its investment and a recovery, through depreciation expense, of plant in excess of its investment, without a corresponding amortization of the acquisition adjustment above the line. Citing Bahm v. Division of Administration, 336 So. 2d 579, 582 (Fla. 1976), OPC argues that, since Mr. Deason was the only witness to address this issue, we cannot ignore his testimony and "choose a course of action which is not supported by evidence in the record."

We do not agree. As discussed above, we did not find Mr. Deason's argument regarding the rate base treatment of the negative acquisition adjustment persuasive. Accordingly, in keeping with the treatment already afforded it, we rejected OPC's suggestion that the acquisition adjustment should be amortized above the line. The fact that we rejected the testimony of Mr. Deason as unpersuasive to change our treatment of rate base does not mean that our decision is not based upon competent substantial evidence. The Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 388-389 (Fla. 5th DCA 1983); Collier Medical Center, Inc. v. State, Department of Health & Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). We, therefore, reject OPC's argument that we erred by rejecting Mr. Deason's argument.

Conclusion

Based upon our discussions above, we find that OPC has failed to point out any error or omission of fact or law in our decision as reflected by Order No. 21322. OPC's motion is, therefore, denied.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of the Public Counsel's motion for reconsideration of Order No. 21322 is denied.

By ORDER of the Florida Public Service Commission this 19th day of SEPTEMBER, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

RJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.