IN THE SUPREME COURT OF FLORIDA

SARASOTA COUNTY, a political subdivision of the State of Florida, Petitioner, vs. TAMARON UTILITIES, INC., Respondent.	Appeal No. 63,690 2d DCA Case Nos: 82-1594 and 82-1744

JURISDICTIONAL BRIEF OF PETITIONER, SARASOTA COUNTY

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND OF THE FACTS

This case arose out of an application for rate adjustment filed with the Board of County Commissioners of Sarasota County by TAMARON UTILITIES, INC., a public utility regulated by Sarasota County under the provisions of Ordinance 80-62. On October 24, 1981, a rate order (Resolution 81-344) was adopted which granted an increase in rates but excluded from the rates Twenty Three Thousand Five Hundred Thirty Dollars ($23,530.00) claimed by the utility as an operating expense attributable to depreciation of contributed property and designated as a "reserve contingency account" by the utility.

The utility sought review of the rate order in the Circuit Court and on April 23, 1982, an order was entered declaring a portion of Section 8(e) of Sarasota County Ordinance 80-62 unconstitutional per se on the basis that exclusion of depreciation of contributed property from allowable operating expenses resulted in confiscation of the utility's property without due process. On May 3, 1982, a homeowners association intervened in the review and sought a rehearing. The motion for rehearing was denied and certiorari was sought in the Second District Court of Appeal by Sarasota County and by the homeowners.

In an opinion dated February 23, 1983, the Second District Court of Appeal ruled Ordinance 80-62 unconstitutional in its entirety, expanding upon the ruling of the Circuit Court. Upon motion for rehearing, the Court altered its opinion, ruling that only Section 8(e) of Ordinance 80-62 was unconstitutional. This was still an expansion on the Circuit Court's ruling, which merely struck one phrase of Section 8(e) which it had found unconstitutionally offensive. The pertinent portion of the Second District Court's final decision is as follows:

> The Circuit Court struck only certain words of Section 8(e) of the Ordinance. We, however, conclude that that is not sufficient and accordingly hold the entire Section 8(e)

> confiscatory and **violative of the due process clauses of both the Florida and the United States Constitutions** and accordingly strike the entire section. (Emphasis added.)

This broad ruling of the Second District Court of Appeals would eliminate all ratemaking guidelines and standards from Ordinance 80-62.

This petition for review by the Supreme Court followed. A petition has also been filed by the homeowners.

JURISDICTIONAL GROUNDS

I. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUED THE REQUIREMENTS OF THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OF ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION, BY ITS RULING THAT A PUBLIC UTILITY IS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW WHEN A COUNTY ORDINANCE PROHIBITS INCLUSION OF CONTRIBUTED PROPERTY IN THE RATE BASE AND ALSO PROHIBITS DEPRECIATION OF CONTRIBUTED PROPERTY AS AN OPERATING EXPENSE.

Article V, Section 3(b)(3), Florida Constitution (1980) and Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, provide that the Supreme Court may review decisions of district courts of appeal that expressly construe a provision of the state or federal constitution. The decision of the Second District Court of Appeal in this case expressly held that Section 8(e) of Sarasota County Ordinance 80-62 was violative of the due process clauses of both the Florida and the United States constitutions. (See revised page 14 of the opinion.)

Section 8(e) of Ordinance 80-62 contains the specific ratemaking standards by which SARASOTA COUNTY exercises its authority to regulate the rates of public utilities in Sarasota County.

II. THE DECISION OF THE SECOND DISTRICT COURT CONFLICTS WITH PRIOR DECISIONS OF THE FLORIDA SUPREME COURT AND WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL BY RULING THAT CERTAIN RATEMAKING PROVISIONS OF SARASOTA COUNTY ORDINANCE 80-62 ARE UNCONSTITUTIONALLY CONFISCATORY WITHOUT DETERMINING THE ECONOMIC RESULT PRODUCED.

The decision of the Second District Court of Appeal conflicts with the Supreme Court's ruling in Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972). In that case the Supreme Court dealt with the issue of the proper method by which rates for a utility should be set with particular regard to contributed property and depreciation on such property. The Court stated that if an unfair return would result from absence of consideration of a depreciation reserve, such consideration must be given, based on a factual showing justifying such a reserve. At page 11. The Second District Court of Appeal disregarded the requirement of a factual showing justifying the reserve. (See page 10 of opinion.)

With no findings of fact before it, the Second District Curt of Appeal was only in a position to evaluate the **theoretical** impact of the ordinance and could not determine the actual resulting rate of return, as required in Westwood Lake, Inc. v. Dade County, supra.

The opinion of the Second District Court of Appeal also conflicts with the 1965 opinion of the Third District Court of Appeal in Southern Gulf Utilities, Inc. v. Metro Dade County Water & Sewer Board, 180 So.2d 481, on the same grounds as pertain to Westwood Lake, Inc. v. Dade County, supra.

III. THE DECISION OF THE SECOND DISTRICT COURT CONFLICTS WITH PRIOR DECISIONS OF THE FLORIDA SUPREME COURT AND WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL BY REJECTING THE APPLICATION OF THE "END RESULT" DOCTRINE IN DETERMINING WHETHER UNCONSTITUTIONAL CONFISCATION OF PROPERTY OCCURS BY THE ENFORCEMENT OF SARASOTA COUNTY ORDINANCE 80-62.

The Second District Court of Appeal rejected application of the "end result" doctrine, long accepted in Florida as the standard by which the fairness of utility rates are to be ultimately measured. The Florida Supreme Court adopted this doctrine in Jacksonville Gas Corp. v. Florida R.R. & Public Utilities Commission, 50 So.2d 887 (Fla. 1951). In that case the utility was disputing one aspect of the ratemaking methodology used by the City of Jacksonville, contending that valuation of utility property for purposes of rate base calculation should be based on present fair value rather than on actual original cost.

The Court refused to mandate the use of one methodology over the other, stating that so long as the return to the utility is just and reasonable, there is no unconstitutional confiscation of property without due process. The Court supported the commission's position that it should be allowed the flexibility to use the ratemaking methodology of its choice as long as the end result is fair and reasonable rates. Jacksonville Gas, at 892. The District Court refused to apply this standard in Tamaron and rendered a decision which conflicts with the opinion of the Supreme Court. The essence of the District Court's opinion is that Section 8(e) of Ordinance 80-62 must always produce confiscatory rates as a matter of law, without regard to the end result actually obtained.

CONCLUSION

The Supreme Court has authority under Article V, Section 3(b)(3) of the Florida Constitution (1980) to accept jurisdiction in this case because the decision of the Second District Court of Appeal construes provisions of both the Florida and the federal constitutions, and because the decision expressly conflicts with decisions of the Supreme Court and other district courts. The Court should accept jurisdiction in this matter because of the importance of the issues raised regarding constititonal requirements for utility ratemaking in Sarasota County and throughout the state.

The decision of the Second District Court in this matter has created serious confusion with regard to the constitutional requirements for ratemaking treatment of contributed property. Section 367.081(2), Florida Statutes, contains provisions regarding contributed property which are essentially the same as those in Ordinance 80-62. It is this statute under which the Public Service Commission sets utility rates for many Florida counties. The viability of this statute is placed in doubt by the Second District Court's decision in Tamaron.

A great deal of future litigation regarding the constitutional issues raised in this case could be averted by this Court accepting jurisdiction in this matter.

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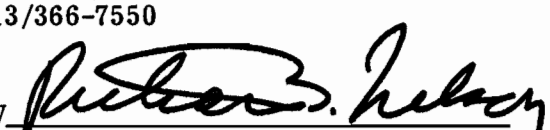
By 
Richard E. Nelson

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Jurisdictional Brief has been furnished by U.S. Mail this 13th day of May, 1983, to Daniel Joy, Esq., 2055 Wood Street, Suite 200, Sarasota, Florida 33577, and M. Joseph Lieb, Jr., Esq. 1900 Ringling Boulevard, Sarasota, Florida 33577.

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