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1988

IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEON COUNTY,

Appellant,

v. CASE No. 63,892

FLORIDA PUBLIC SERVICE COMMISSION, etc., et al.,

Appellee.

POLK COUNTY,

Appellant,

v. CASE No. 63,875

FLORIDA PUBLIC SERVICE COMMISSION, etc., et al.,

Appellee.

ANSWER BRIEF OF APPELLEE CITY OF TALLAHASSEE

FREDERICK M. BRYANT
Moore, Williams & Bryant
and P. O. Box 1169
Tallahassee, Fla. 32302
DAVISSON F. DUNLAP, JR.
Pennington, Wilkinson
and Dunlap
Post Office Box 3985
Tallahassee, FL 32315-0985

Attorneys for City of
Tallahassee

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PRELIMINARY STATEMENT

The following abbreviations shall be used in this brief:

(R-) - References to record by page number

(TR-) - References to transcript of rule hearing by page number

(HEx-) - Rule Hearing exhibits as identified.

STATEMENT OF THE CASE AND FACTS

The City of Tallahassee (hereafter referred to as "City" or "Tallahassee") on May 7, 1980, filed with the Florida Public Service Commission (hereafter referred to as "Commission" or "PSC") its proposed revised tariff or rate sheets reflecting as a part of its revised electric utility rate structure, a continuation of a fifteen percent surcharge imposed on all electric utility customers residing outside its municipal corporate limits. The City is required by its charter to charge a higher rate to customers outside its city limits. Chapter 8374, Laws of Florida (1919). The surcharge has been in existence for at least twenty years. On January 3, 1979 the PSC issued Consent Order #8628, Docket No. 77081-EU, and pursuant to Commission Rule 25-9.52(1), Florida Administrative Code, the PSC "grandfathered" the City's then existing rate structures, including the 15% surcharge.

The PSC on September 3, 1980, issued its Order To Show Cause, No. 9516, requiring the City to justify its 15% surcharge. The City challenged the PSC's jurisdiction over the City's surcharge and this Court in City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982) ruled that surcharges were a part of rate structure and thus subject to the jurisdiction of the PSC.

The City then challenged the Commission's failure to initiate rulemaking on surcharges prior to its investigation of individual city surcharges. This Court on May 12, 1983 in City of Tallahassee v. Florida Public Service Commission, 433 So.2d

505 (Fla. 1983), denied the City's challenge to the Commission failure to initiate rulemaking and affirmed the right of the PSC to exercise its authority over surcharges on a case by case basis through the development of "incipient policy." City of Tallahassee, 433 So.2d at 507.

On October 4, 1982, the PSC issued Order No. 11221, ordering the elimination of the 15% surcharge. While acknowledging that it cost the City more per customer outside the city limits for distribution lines, poles, transformers, service and maintenance, the Commission rejected the City's incremental cost of service study as not compatible with the more traditional fully allocated cost of service study and thus not justifying a 15% surcharge. However, the Commission did rule that the City could continue to charge a surcharge equal to its utility tax and that such an "equivalency surcharge" would not be unjustly discriminatory. The City appealed that portion of the Commission's order eliminating the 15% surcharge to this Court, Case No. 62,833, and that appeal is still pending.

On March 10, 1983 in Order No. 11699 the PSC, pursuant to a motion for clarification filed by the City, entered an Order Granting Clarification authorizing the City to continue collecting the 15% surcharge with the amount of surcharge greater than the equivalency surcharge being subject to refund pending disposition of the appeal in Case No. 62,833. The Commission once again authorized the imposition of an equivalency surcharge by the City.

On March 11, 1983, the Commission approved the equivalency surcharges of two additional cities: The City of Moore Haven, Order No. 11702, Docket No. 810197-EU; The City of Wauchula, Order No. 11703, Docket No. 800498-EU. The Commission on March 15, 1983, approved the equivalency surcharge of the City of Blountstown, Order No. 11718, Docket No. 820035-EU.

The Commission has subsequently approved on August 25, 1983, the equivalency surcharges of the following cities: City of Alachua, Order No. 12423, Docket No. 820033-EU; City of Bushnell, Order No. 12422, Docket No. 800746-EU; City of Green Cove Springs, Order No. 12425, Docket No. 820038-EU; and City of Lakeland, Order No. 12426, Docket No. 820039-EU. The surcharges of the Cities of Alachua, Bushnell, Lakeland and Green Cove Springs were approved pursuant to Rule 25-9.525, Fla. Admin. Code, as promulgated by the P.S.C.

The P.S.C., on its own motion, on February 25, 1983, proposed adoption of Rule 25-9.525 pursuant to its Order No. 11652. The rule was advertised in the Florida Administrative Weekly and subsequent to such publication, the affected parties, Leon County and Polk County requested a rulemaking hearing. After the rulemaking hearing was held March 23, 1983 and all comments and testimony were considered, the rule was adopted by the Commission.

On May 26, 1983, the PSC issued Order No. 11975 adopting Rule 25-9.525 which is the codification of previous Commission incipient policy allowing an equivalency surcharge. Polk County

and Leon County are challenging the adoption of Rule 25-9.525. A copy of Rule 25-9.525 is attached hereto as Appendix A.

ARGUMENT

POINT I

UTILITY SURCHARGES ARE AUTHORIZED BY LAW

The Appellants argue that surcharges are unlawful in that they deprive outside city limits customers due process of law, deny outside city limits customers equal protection of the law and constitute the levy of a tax beyond the city corporate boundaries. All of these arguments are without merit.

The power of the City to own and operate municipal utilities both inside and outside the City limits is derived from: (1) Article VIII, Section 2, Florida Constitution; (2) the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes; (3) Chapter 180, Florida Statues; and (4) the Tallahassee City Charter.

The City is required by its charter to charge a higher rate to customers outside its city limits (Chapter 8374, Laws of Florida [1919]), and has been maintaining a surcharge for over twenty years. Section 113 of the City Charter provides in relevant part:

> The City of Tallahassee shall have the power and authority to supply water, electricity, gas and sanitary sewerage service for domestic and other purposes to individuals and corporations outside of the corporate limits of said city, ...but the city shall charge a higher rate for such consumers than is charged for a like class of customers within the corporate limits of said city. (Emphasis supplied.)

Section 113, Chapter 8374, Laws of Fla. (1919).

In addition, the chronology of appropriate statutory and case law authorizing and sanctioning surcharges is as follows:

1. In 1944, the Supreme Court in Cooper v. Tampa Electric Co., 154 Fla.410, 17 So.2d 785 (1944), permitted Tampa Electric Co. to charge higher rates outside city limits.

2. In 1957, in State v. City of Melbourne, 93 So.2d 371 (Fla. 1957), the Supreme Court upheld higher water rates outside city limits.

3. In 1968, Article VIII of the Constitution was amended to provide for constitutional home rule for municipalities as follows:

Article VIII, Section 2.

. . . . .

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

4. In 1969, before there was a statute limiting higher rates to customers outside city limits, the First D.C.A. upheld a differential electric rate of the City of Jacksonville which assessed charges which were approximately 19% to 29% higher to customers outside the city limits than to similar customers inside the municipality. Clay Utility Company v. City of Jacksonville, 227 So.2d 516 (Fla. 1st D.C.A. 1969).

5. In 1970, the Florida Legislature adopted Ch. 70-997, Laws of Fla. (1970) which provided for certain differential utility rates. The provision for differential electric rates was codified as §172.081(1), Fla. Stat. (1970), as follows:

> 172.081 Limitation on rates charged consumer outside city limits.-(1) No municipality operating an electric or gas utility within the State shall charge consumers served outside of the boundaries of such municipality a rate of more than 20 percent in excess of the rate charged for such service, plus taxes applicable

> only to such service, to consumers served within such boundaries for corresponding service.

The provision for differential water and sewer rates was codified as §180.191, Fla. Stat., (1970).

6. In 1970, the Second D.C.A. decided Edris v. Sebring Utilities Commission, 237 So.2d 585, (Fla.2d DCA 1970) stating the law as to discrimination as follows:

> When a municipality provides services beyond its corporate limits it may fix the rates charged for such service by contract, in the absence of forbidding statute, and is under no obligation to service customers outside the city on the basis as those within its corporate limits. State v. City of Melbourne, Fla. 1957, 93 So.2d 371, and cases cited; Annotations in 4 A.L.R.2d 595; Town of Terrell Hills v. City of San Antonio, Tex. Civ.App. 1958, 318 S.W.2d 85; Faxe v. City of Grandview, 1956, 48 Wash.2d 342, 294 P.2d 402; Usher v. City of Pittsburg, 1966, 196 Kan. 86, 410 P.2d 419. See also Annotations in 48 A.L.R. 1222 p.1230; Village of Virginia Gardens V. City of Miami Springs, Fla.App. 1965, 171 So.2d 199.
>
> ***
>
> Discriminations are not forbidden but only unjust discriminations. 12 McQuillin, Municipal Corporations (3rd ed. 1950), §34.101, pp. 314, 315; Yardville Estates, Inc. v. City of Trenton, App.Div. 1961, 66 N.J.Super. 51, 168 A.2d 429; Rossi v. Garton, App.Div. 1965, 88 N.J. Super. 233, 211 A.2d 806.

Edris, 237 So.2d at 587.

7. In 1973, §172.081, and certain other statutes relating to municipalities were repealed by Ch. 73-129 known as the Municipal Home Rule Powers Act codified as Chapter 166, Florida Statutes. The legislature declared that:

> It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of Chapters . . . 172 . . . of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers . . . It is further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

§166.042, Fla. Stat.

The Municipal Home Rule Powers Act also granted Municipalities certain powers as follows:

> §166.021 Powers.-
>
> (1) As provided in §2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. (Emphasis added.)

Chapter 73-129, Laws of Florida (1973), Section 1.

8. In 1976, the Supreme Court of Florida decided Mohme v. City of Cocoa, 328 So.2d 422 (Fla. 1976) in which the City's differential water rate was challenged. The Court upheld the constitutionality of §180.191 citing the Clay case, supra. In addition, this Court observed the problems created by those on the urban fringe who enjoy but fail to pay their proportionate share of the cost of municipal services, and concluded that

> a differential in utility rates is justified to help defray the costs which "cannot be pinpointed even under sophisticated cost accounting techniques."
>
> Mohme, 328 So.2d at 425.
>
> 9. In 1980, City of Pompano Beach v. Oltman, 389 So.2d 283 (Fla. 4th DCA 1980) the Court upheld higher water and sewer rates to customers outside the city limits, stating that:
>
> > "The City has the clear right to charge higher rates to users of its utility system outside the City than to users inside the City." (Citations omitted)
>
> City of Pompano Beach, 389 So.2d at 286.

The above litany of cases and statutes demonstrates that the courts and the legislature have on numerous occasions addressed and upheld the propriety of surcharges. The Commission's review and modification of the City's surcharge was a further refinement of the case and statutory law sanctioning surcharges.

Appellant argues that the Commission's granting the authority to the City to charge a surcharge is beyond the jurisdiction of the Commission and that there is no authority for PSC to adopt Rule 25-9.525. Appellant's argument is circuitous.

The PSC is not granting to the City the authority to charge a surcharge, it is regulating the surcharge as part of its rate structure jurisdiction. The issue before this Court in City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982) was not the legality of the City's 15% surcharge but whether or not the PSC could regulate the City's 15% surcharge as part of the Commission's rate structure jurisdiction pursuant to Section

366.04(2), Fla. Stat. (1979). This Court upheld the Commission's exercise of such jurisdiction.

In exercising its rate structure jurisdiction in the Tallahassee case and those of other cities, the Commission reviewed and considered the rate relationship between various members of a customer class (inside City limits customers and outside City limits customers) and determined that the rate relationship should be equivalent. Equivalent has been defined as meaning "equal in amount or value; corresponding or virtually identical especially in effect or function." Webster's New Collegiate Dictionary, p.383 (1979). This is the policy decision the Commission made in Order No. 11221 when it ruled that "A city could establish what appeared to be, as a practical matter, equal charges on utility bills inside and outside the city by adopting a utilities tax within the city and an equal surcharge outside the city." P.S.C. Order No. 11221, pp. 6-7.

Appellants are absolutely correct in their observation that the PSC's "...purpose with the proposed rule is with the amount of the customer's bill." Brief of Leon County, p. 8. The Commission's determination in Order No. 11221 and in Rule 25-9.525 was that the amount (bottom line) of a customer's bill inside the City limits and a customer's bill outside the City limits must be equal.

Appellants did not challenge the legality of the City's surcharge in PSC Docket No. 800495-EU (SC), which was the Commission investigation of the City's 15% surcharge, nor have

Appellants appealed the Commission decision in that docket reducing the City's 15% surcharge to a surcharge equal to the City's utility tax ("equivalency surcharge"). In Order No. 11221 issued by the Commission on October 4, 1982, the PSC rejected the City's continued application of the 15% surcharge and instructed the City that it would approve a reduced surcharge or equivalency surcharge. The City has appealed to this Court (Case No. 62,833) the portion of the Commission's decision reducing the 15% surcharge but Appellants have failed to challenge Commission Order No. 11221.

In Order No. 11221, the Commission as a matter of developing "incipient policy" established as a rule the propriety of an equivalency surcharge:

> "The City did not rely upon the existence of its in-city utilities tax as a justification for imposing the surcharge, and no evidence was received in support of that approach. We are therefore unable to consider that justification in rendering our decision herein. Nevertheless, should the City, at a later date, file a tariff providing for an out-of-city surcharge equal to the in-city utilities tax rate, we would not consider that as unjustly discriminatory rate structure as found herein. The Public Service Commission did not regulate municipal electric rate structures at the time that many cities had the option to adopt a utilities tax. A city could establish what appeared to be, as a practical matter, equal charges on utility bills inside and outside the city by adopting a utilities tax within the city and an equal surcharge outside the city. Alternatively, a city could, in fact, establish equal charges on electrical use simply by raising all rates equally inside and outside the city. With no constraint on the choice of options, some cities chose to adopt a utilities tax and an equal surcharge.
>
> Where a municipality charges an out-of-city surcharge equal to its in-city utilities tax, a rate differential still exists. The surcharge is a charge for electric utility service, while the utilities tax

> is simply a tax. In such a case, a municipality could eliminate the rate differential simply by eliminating the tax and the surcharge and charging equally inside and outside the city. However, certain municipalities, who may have pledged their utility tax revenues to pay bond indebtedness, may not have this option. We find that, as a matter of policy, we should not require cities to go through this exercise, when the net cost to the ratepayer would be the same."

P.S.C. Order No. 11221, pp. 6-7.

The procedure for development of the above rule or "incipient policy" was upheld by this Court in City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505, (Fla. 1983) where this Court stated:

> "We would further recognize that the factual situations under which particular surcharge issues arise will be quite diverse, and for this reason, the PSC should not be compelled to promulgate restrictive rules in an area demanding flexibility. The statutes outlining the PSC's jurisdiction and duties are necessarily general in nature, providing for flexibility in the exercise of its power.
>
> To the extent the PSC solidifies its position on policy in a particular area, we believe such established policy should be codified by rule. However, as in the instant case, if the PSC seeks to exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adversary proceedings, then we hold that there should be erected no impediment to the PSC's election of such course. We feel that the ad hoc pronouncements either through orders of the PSC or through decisions made after adversary proceedings should be viewed as de facto rules, or as expressed in McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), "incipient policy."

City of Tallahassee v. P.S.C., 433 So. 2d at 507.

In addition, Appellants had another opportunity to challenge the Commissions ruling authorizing the City to maintain an equivalency surcharge. The Commission entered Order No. 11699 on

March 10, 1983, clarifying the Conditions of Stay imposed upon the City by Order No. 11341. This Order Granting Clarification (Order No. 11699) provides that only the surcharge revenues over and above the equivalency surcharge would be subject to refund pending the outcome of Case No. 62,833. This Order Granting Clarification was a further recognition by the PSC of its previously adopted rule allowing the City to maintain a surcharge equal to its utility tax. Appellants could have, but did not, appeal that order.

Rule 25-9.525 as adopted by the PSC is merely the codification of previously adopted Commission policy approving an equivalency surcharge, such approval having been previously granted by the PSC to the City of Tallahassee, the City of Moore Haven, the City of Wauchula and the City of Green Cove Springs. Thus, the Appellants cannot in this appeal challenge the incipient policy of the Commission allowing an equivalency surcharge, but they are limited solely to challenging whether or not Rule 25-9.525 adequately and correctly sets forth the previously adopted incipient policy. Appellant's challenge must be as to format not substance. This they have not done.

POINT II

A UTILITY SURCHARGE IS NOT A TAX

Appellants argue that a surcharge, because it is equal to the utility tax or public service tax, is thus a tax and, therefore, unlawfully applied to consumers outside city limits. Appellants' argument is thus: if x = utility tax and y = surcharge and x = y, then y must be a tax. Following Appellants' logic then if x is greater than y, then the surcharge is not a tax. Similarly, if y is greater than x then the surcharge is not a tax. Appellants' arguments fail first grade math.

Obviously, just because a surcharge is equal to the utility tax does not make it a tax. A surcharge, as found by this Court in City of Tallahassee v. Mann, supra, is a component of the City's rate structure, the same as the customer charge, energy charge and other rate structure components, all of which when added together constitute the rates or dollar amount charged for electric service.

In Florida, §166.201, Florida Statutes (1981), specifically authorizes municipalities to raise money for the conduct of municipal government through user charges as follows:

> 166.201 Taxes and charges. - A municipality may raise, by taxation and licenses authorized by the Constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law. (Emphasis added.)

The rates paid for utility services are user charges or debts of utility customers for the services rendered by the City under a contractual arrangement. User charges collected by a utility are not considered taxes. The following is a list of states with case law holding that various utility charges are not taxes:

Alabama - Oliver v. Waterworks, 73 So.2d 552 (Ala. 1954); Benson v. City of Andalusia, 195 So. 443 (Ala. 1940)

Arizona - Arizona v. Bartos, 423 P.2d 713 (Ariz. 1967)

Colorado - Western Heights Land Corp. v. City of Ft. Collins, 362 P.2d 155 (Colo. 1961)

Florida - State v. City of Miami, 27 So.2d 118, 124 (Fla. 1946) (the Supreme Court specifically stated that "the imposition of fees for the use of the sewage disposal system is not an exercise of the taxing power...) City of Dunedin v. Contractors & Builders Ass'n., 312 So.2d 763 (Fla.2d DCA 1975) quashed on other grounds; and Contractors & Builders Ass'n. v. City of Dunedin, 329 So.2d 314 (Fla. 1976); Plant City v. Mayo, 337 So.2d 966, 973 (Fla. 1976) (franchise fees are not taxes)

Georgia - Collier v. City of Atlanta, 173 S.E. 853 (Ga. 1934)

Idaho - Schmidt v. Village of Kimberly, 256 P.2d 515 (Idaho 1953)

Illinois - Town of Cicero v. Township High School District, 20 N.E.2d 114 (App.Ct. 1939)

Kentucky - City of Lexington v. Jones, 160 S.W.2d 19 (Ky. 1942); Veail v. Louisville, 197 S.W.2d 413 (Ct. App.1946)

Louisiana - McLavy, et al. v. American Legion Housing Corp., et al., 79 So.2d 316 (La. 1955)

Maryland - Home Owner's Loan Corp. of Washington, D.C. v. Mayor and City Council of Baltimore, et al., 3 A.2d 747 (Md. 1939)

Michigan - Ripperger v. City of Grand Rapids, 62 N.W. 2d 585 (Mich. 1954)

Missouri - St. Louis Brewing Ass'n. v. City of St. Louis, 37 S.W. 525 (Mo. 1896)

Montana - Weber v. City of Helena, 297 P. 455 (Mont. 1931)

Nevada - Harris v. City of Reno, 401 P.2d 678 (Nev. 1965)

New Hampshire - Opinion of Justices, 39 A.2d 765 (N.H. 1944)

New York - Battista v. Bd. of Estimate of City of N.Y., 274 N.Y.S.2d (App.Div. 1966); Town Bd. of Town of Poughkeepsie v. Poughkeepsie, 255 N.Y.S.2d 549 (App.Div. 1964); L.X. Corp. v. City of New York, 115 N.Y.S.2d 120 (App.Div. 1952); Robertson v. Zimmerman, 268 N.Y. 52, 196 N.E. 740 (N.Y. 1935)

North Carolina - Covington v. City of Rockingham, 146 S.E.2d 420 (N.C. 1966)

Ohio - City of Niles v. Union Ice Corp., 12 N.E.2d 483 (Ohio 1938); Mead-Richer v. City of Toledo, 182 N.E.2d 846 (Ct. of Appeals 1961)

Oregon - City of Stanfield v. Burnett, 353 P.2d 242 (Or. 1960)

Pennsylvania - In Re Petition of City of Philadelphia, 16 A.2d 32 (Pa. 1940)

South Carolina - Simons v. City Council of Charleston, 187 S.E. 545 (S.C. 1936)

Tennessee - Patterson v. City of Chattanooga, 241 S.W.2d 291 (Tenn. 1951)

Texas - City of Wichita Falls v. Landers, 291 S.W. 696 (Ct. of Civil Appeals 1927)

Utah - Murray City v. Bd. of Education of Murray City School District, 396 P.2d 628 (Utah 1964)

Washington - Twitchell v. City of Spokane, 104 P.150 (Sup.Ct. Wash. 1909).

In addition, the U.S. Tax Court and other courts interpreting the Revenue Act of 1934, 26 U.S.C.A. Int. Rev. Acts have long taken the view that payments for utility services are payments for benefits received and thus, are not taxes. See, e.g. Mahler v. Commissioner of Internal Revenue, 119 F.2d 869 (2d Cir. 1941) and Wolf v. United States, 64-1 U.S.T.C. ¶9211 (p. 91,468) (D. Ct., W.D. Mo. 1964). In Wolf, the U. S. District Court, at page 91,474, specifically concluded as follows:

> The sewerage service charges paid by taxpayers to the City of Kansas City, Missouri, under sections 66.080-66.130 Revised Ordinances of Kansas City are not taxes but are service charges for water and sewerage services rendered by the City. City of Maryville v. Cushman (Mo. Sup.) 249 S.W. 2d 347. Therefore the sewerage service charges are not deductible. Roth v. Commissioner [CCH dec. 18,824], 17 T.C. 1450. There is much logic in the taxpayers' argument that this is but a tax under another name created as a result of the exigencies and intricacies of municipal finance. If this were a new question, it would be examined de novo, but the Commissioner's position is so well established by the decisions of the Missouri Supreme Court and of the Tax Court that it will be accepted. (emphasis added)

Appellants argue that "...by giving the municipalities the right to impose the surcharge, the PSC was allowing the cities to require the unincorporated area utility user to subsidize the City's ad valorem tax base." (Brief of Appellant Leon County at p. 12). The following authorities have held that user charges are not converted into taxes regardless of the use which is made of the revenues. McQuillin Municipal Corporation, 3d Ed.,

§§35.38 and 44.02; 64 C.J.S., Municipal Corporations, §1805, p. 273; Twitchell v. City of Spokane, 104 p. at 151; Simons v. City Council of Charleston, 187 S.C. at 547. In City of Niles v. Union Ice Corporation, 12 N.E.2d 483 (Ohio 1938), the Supreme Court of Ohio was faced with the exact contention that is here made:

> [T]hat if a municipal utility is permitted to charge a rate in excess of the cost of furnishing the service or product, and if such excess were used to finance the cost of municipal government, that such excess, so used, would assume the nature and be used in lieu of taxes and the municipality would thereby be enabled to evade the constitutional limitations upon its power of taxation, and that municipalities would be free to impose the cost of municipal government upon the consumers of light and power. Id. at 488.

At pages 488 and 489 the Court rejected that contention and specifically found as follows:

1) In the operation of a public utility, a municipality acts, not in a governmental capacity as an arm or agency of the sovereignty of the state, but in a proprietary or business capacity.

2) In its proprietary capacity it occupies the same "posture" as that occupied by a private corporation engaged in business and as such is entitled to a reasonable profit.

3) So long as the rate is reasonable, the courts cannot prohibit a municipality from making a profit on the operation of its electric light and power system in the absence of any restriction in the statute which enables it to operate.

4) The rate charged in excess of cost is not a tax or in the nature of a tax, regardless of how the fund derived therefrom is ultimately used.

5) A rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or product is sold.

6) Since the rate charged is not a tax in its inception, ultimate use of surplus funds derived therefrom for the support or municipal government will not convert it into taxes or cause it to assume the nature of taxes.

7) By permitting this transfer, a municipality is not thereby released from the firm grip of the constitutional limitations imposed upon its taxing power, nor are the consumers thereby subjected to a tax for the support of municipal government.

Niles v. Union Ice, 12 N.E. 2d at 488-489 (Citations omitted.)

Appellants battle cry of "taxation without representation" is unfounded and ignores the cases and statutes previously cited. A surcharge is not a tax but is part of the overall rate structure which this Court has found is under the jurisdiction of the PSC.

POINT III

SURCHARGES ARE NOT UNJUSTLY DISCRIMINATORY

Appellants argued, but failed to introduce any evidence at the rulemaking hearing that surcharges are not cost justified and therefore discriminatory. Discriminations are not forbidden but only unjust discriminations. Edris v. Sebring Utilities Commission, 237 So.2d 585, 587 (Fla. 2d DCA 1970).

Appellants argue that surcharges are an abandonment by the PSC of its cost of service criteria. While the PSC staff witness Blondin admits that equivalency surcharges do not necessarily meet a traditional cost of service analysis, Mr. Blondin recognizes that when viewed against the measuring stick of the "bottom line," surcharges are justified:

> "Also, I would like to say that inherent assumptions being that all customers within the class bear equal degrees of cost causality, if you take the bottom line approach, there is some logic to -- if everybody pays the same bottom line bill for a service that is rendered, I think it's not inconsistent that they bear the same cost casualty relationship." (TR-11-12)

The Hearing Examiner himself recognized this when he stated:

> "Okay. But there is a distinction between using a cost of service study to determine how rates are going to be apportioned and determining what the total amount will be to a customer on his bill. In other words, I could use a cost of service study and determine that the cost of service would indicate a bill of 7¢ per kilowatt hour, but the total cost might in fact be 10¢ because there are other things being plugged in there. But the concern of this rule is to make sure that if the people outside the City are being billed 10¢ so are the people inside the City?" (TR-13-14)

> Witness Blondin: "Yes, I think that, if I can paraphrase .... The cost of service is a primary determinant, but not the only determinant of the final rates." (TR 14)

Appellants apparently erroneously believe that "cost of service" is the sole criteria that PSC must utilize in establishing rate structures. This assertion has been repeatedly rejected by this Court. In Occidental Chemical Company v. Mayo, 351 So.2d 336 (Fla. 1977), Occidental challenged the Commission's grant of a rate increase to Florida Power Corp. claiming "that the Commission rejected a predominant cost of service basis for allocating the company's new rates among customers, and chose instead to allocate the additional revenues among Florida Powers customers mainly by proportional increase of rates previously paid by Florida Power's several classes of customers." Occidental, 351 So.2d at 339.

In the Order of the Commission under review the Commission found:

> "12. That there is no legal requirement that rates for different classes of service must be either uniform or equal or that they generate an equal amount of return.
>
> 13. That in designing rates many factors must be considered, including but not limited to such factors as history of the tariff, rate continuity, public acceptance, value of service, cost of service, conservation, competition, and consumption and load characteristics; and that no single factor is controlling and susceptible of precise quantification but rather each must be viewed collectively in designing said rates."

Occidental Chemical Co., 351 So.2d at 340.

This Court upheld the Commission order noting that "no statute mandates a pure 'cost of service' rate structure. In the

past we have recognized that other criteria may be used by the Commission in setting fair and reasonable rates." Occidental Chemical Co., 351 So.2d at 340.(citations omitted).

In an earlier case, Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (Fla. 1976), this Court acknowledged that it would not impose rate structure policies on the PSC:

> It is our view, based upon the authorities cited herein with respect to our function in reviewing an order of the Commission, that petitioner has not met the burden incumbent upon it of showing that such order is "invalid, arbitrary, or unsupported by the evidence." Obviously, there is a divergence of expert opinion as to the policy of including "cost of service" as an essential element in designing a rate structure. Even were we persuaded to one policy or the other ("cost of service" or "value of service" as the essential element) it is not our prerogative to impose that policy upon the Commission. So long as the policy adopted by the Commission comports with the essential requirements of law we may not meddle. The Legislature has reposed in the Commission the responsibility to make just the kind of choice between competing policies in its area of expertise as it has done here. Shevin v. Yarborough, supra." Fla. Retail Federation, 331 at 312-313.

Again in Intern. Minerals & Chemical Corp. v. Mayo, 336 So.2d 548 (Fla. 1976) this Court rejected the cost of service arguments set forth by Appellants:

> In the present case differential costs were taken into consideration when rates were set, but petitioners insist, urging both constitutional and statutory grounds, that differential costs must be the only factor taken into consideration in setting differential rates. After our decision in Florida Retail Fed'n, Inc. v. Mayo, supra, to the effect that the PSC legally is not compelled to apply the "cost of service" criterion, this position is clearly untenable. Although the statutes governing regulation of telephone and telegraph companies are not the same statutes as those providing for the regulation of gas and electricity

companies, both chapters contain substantially similar criteria for setting rates.[2]

* * *

> Practical considerations also militate against making cost of service the exclusive criterion in rate setting. Virtually every court considering the matter has rejected out of hand a rule that would reduce rate-making to an exercise in cost accounting. E.g., Apartment House Council of Metropolitan Washington, Inc. v. Public Serv. Comm'n, 332 A.2d 53 (D.C.App. 1975); Apartment House Council of Metropolitan Washington Inc., v. Potomac Elec. Power Co., 215 Va. 291, 208 S.E.2d 764 (1974); Globe Metallurgical Div. of Interlake, Inc. v. Public Util. Comm'n, 40 Ohio St.2d 40, 319 N.E.2d 360 (1974).

Intern. Minerals & Chemical Corp., 336 So.2d at 551.

This Court again recognized in the recent case of City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983) that Section 366.06(1), Florida Statutes, requires that, in fixing fair, just and reasonable rates for a customer class, the PSC:

> shall to the extent possible, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the utility; consumption and local characteristics of various classes of customers; and public acceptance of rate structures. City of Tallahassee v. P.S.C., 433 So.2d at 507. (emphasis supplied)

In the City of Tallahassee surcharge case (P.S.C. Docket No. 800495-EU[SC]), the PSC was presented with uncontraverted evidence that on a per customer basis it costs more for distribution lines, poles, transformers, service and maintenance for outside city limits customers. The Commission found that as to distribution facilities the cost per equivalent customer was greater outside the City than it was inside the City. However, in

issuing Order No. 11221 eliminating the 15% surcharge, the PSC ruled that pursuant to traditional fully allocated cost of service studies, which include generation and transmission costs, the City had failed to sufficiently justify a 15% surcharge. There was no Commission finding that a surcharge equal to the utility tax was not cost justified. (P.S.C. Order 11221, Hearing Exhibit 4).

In an analogous situation, this Court has in several cases reviewed and upheld the policy decision of the Commission to require utility companies to collect franchise fees pursuant to the "direct method" as opposed to the "spread method." See City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976); City of Plant City v. Hawkins, 375 So.2d 1072 (Fla. 1979). The "direct method" requires the City residents to pay a "surcharge" (franchise fee) regardless of the actual cost of service. Even if it cost less to serve the customers inside the City than it does those outside the City, the utility must collect the surcharge. The only criteria for the imposition of the surcharge is whether the customer lives within the City. The Commission's decision to change from a spread method to the direct method of collection of franchise fees was a policy decision not founded upon cost of service considerations and not as a result of a fully allocated cost of service study.

Appellant's assertion that there is a "rate differential" between inside city limits customers and outside city limits customers is an exercise in semantics. The bottom line is the

figure that consumers concentrate on. When one is asked what his utility bill was last month he doesn't respond "x dollars, not including taxes or surcharges." As far as the consumer is concerned his utility bill is the total amount.

The PSC staff witness, Jim Blondin, in the rulemaking proceeding recognized this concept:

> "Q. Would you go through that rule, describing each of the sections and basically what the rule does?
> A. Yes. Basically, the purpose of the rule was to codify the Commission's relatively recent decision in the Tallahassee surcharge case. The object of it is to ensure that the bottom line bills after taxes have been applied are equal inside and outside of the city for those customers who are served by municipally owned and operated utilities.
> The rule simply tries to define two things. It tries to define what they mean by equal, and that is to achieve a bottom line that is equal, one of the simplest ways, straightforward ways, is to compute the charges the same way. So the wording is in there that the tax or the surcharge should be applied to the same base rates, should be computed in the same manner as the tax.
> The second part of the rule is simply a means of the city demonstrating to the Commission the compliance with the rule. The intent is for the city to supply to the staff an exhibit or some evidence which shows that the proposed rates, including surcharges, taxes and whatnot, will in fact result in the same bottom line." (TR-8)

And this "bottom line" practical approach is the basis for the PSC establishing the rule allowing an equivalency surcharge. The PSC made this policy announcement in the City of Tallahassee surcharge case stating:

> The City did not rely upon the existence of its in-city utilities tax as a justification for imposing the surcharge, and no evidence was received in support of that approach. We are therefore unable to consider that justification in rendering our decision herein. Nevertheless, should the City, at a later date, file a

> tariff providing for an out-of-city surcharge equal to the in-city utilities tax rate, we would not consider that as unjustly discriminatory rate structure as found herein. The Public Service Commission did not regulate municipal electric rate structures at the time that many cities had the option to adopt a utilities tax. A city could establish what appeared to be, as a practical matter, equal charges on utility bills inside and outside the city by adopting a utilities tax within the city and an equal surcharge by adopting a utilities tax within the city and an equal surcharge outside the city. Alternatively, a city could, in fact, establish equal charges on electrical use simply by raising all rates equally inside and outside the city. With no constraint on the choice of options, some cities chose to adopt a utilities tax and an equal surcharge.
>
> Where a municipality charges an out-of-city surcharge equal to its in-city utilities tax, a rate differential still exists. The surcharge is a charge for electric utility service, while the utilities tax is simply a tax. In such a case, a municipality could eliminate the rate differential simply by eliminating the tax and the surcharge and charging equally inside and outside the city. However, certain municipalities, who may not have pledged their utility tax revenues to pay bond indebtedness, may not have this option. <u>We find that, as a matter of policy, we should not require cities to go through this exercise, when the net cost to the ratepayer would be the same</u>. (emphasis supplied)

P.S.C. Order No. 11221, pp. 6-7.

Thus, Appellants have failed to demonstrate that equivalency surcharges are unjustly discriminatory.

POINT IV

THE ECONOMIC IMPACT STATEMENT IS SUFFICIENT ON ITS FACE AND AS A MATTER OF LAW

The Administrative Procedures Act requires that an agency must provide with proposed rules, a detailed statement of the economic impact of a Rule. Section 120.54(2), Florida Statutes (1981). The Economic Impact Statement (E.I.S.) must include an estimate of cost to the agency of the Rule including paper work, an estimate of the cost or benefit to persons directly affected by the Rule, an estimate of the impact of the Rule on competition and employment, and a detailed statement of the data and method used in making the above estimates. See, Section 120.54(2)(a), Florida Statutes (1981).

In the instant proceeding, Appellant Polk County would assert that the adoption of Rule 25-9.525 by the PSC is deficient in that the Economic Impact Statement is deficient on its face. (Brief of Polk County at page 6). However, Appellant Polk County has failed to demonstrate any evidence to contradict the statements of the Economic Impact Statement or to demonstrate any prejudice if the Economic Impact Statement was indeed, deficient or improper. Since Appellant has not been denied a fair hearing in this cause, the Order of the Commission adopting the Rule should be upheld. Florida-Texas Freight, v. Hawkins, 379 So.2d 944 (Fla. 1979).

The purpose of the APA's requirements that an Economic Impact Statement be prepared for each Rule to be adopted by an

agency is to encourage "agency introspection in administrative rulemaking ... (to direct) agency attention to certain key considerations and thereby facilitate informed decision making." Florida-Texas Freight v. Hawkins, 379 So.2d at 946.

A decision of a collegial body need not be reversed "solely on the basis that the attendant economic impact study appears to be facially deficient. Such a standard would add a transparent technicality to the rulemaking process and would exalt form over substance." Plantation Residents Association v. School Board of Broward County, 424 So.2d 879 (Fla. 1st DCA 1982). While any agency Economic Impact Statement should have thoughtful and detailed preparation, Department of HRS v. Framat Regalty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981), if proceedings are not rendered unfair or if the action is not incorrect, then minimal deficiencies in the Economic Impact Statement will not constitute reversible error. See, Florida-Texas Freight, supra; School Board of Broward County v. Gramith, 375 So.2d 340 (Fla. 1st DCA 1979); and see, Plantation Residents Association v. School Board of Broward County, 424 So.2d at 881.

Here, Appellant Polk County has failed to adduce any economic evidence to contravene the findings of the Economic Impact Statement prepared by staff and introduced as Hearing Exhibit 1C. Appellant would attempt to assert that the Economic Impact Statement is erroneous and misleading in that a customer who lives in an unincorporated area would be prejudiced and subjected to the payment of a discriminatory rate. No such finding nor

evidence appears in the record. (Brief of Appellant Polk County at page 14).

The PSC by its adoption of the Surcharge Rule which is challenged in this case, has acknowledged that a so-called "equivalency surcharge" is not a discriminatory rate structure. The Commission, as staff has stated, has taken a holistic view of rates and as such, has found that where the bottom line bills of an out-of-city resident and an in-city resident are equal, then no surcharge discrimination is present. Staff repeated this position under questioning by Polk County and Leon County and stated that the Rule was basically an implementation of the Commission's policy announced in the City of Tallahassee case eliminating the surcharge. (PSC Order No. 11221, issued 10/4/82, HEx-4, and see, TR-8,10,12).

As in Florida-Texas Freight, supra, the Commission's staff here is drafting rules to implement already established Commission procedures which have economic impact. As the Commission has already recognized in announcing its policy through the City of Tallahassee case there will be an economic impact in equivalency surcharge cases. That, indeed, is the reason for the Commission's statement that equivalency surcharges would be allowed by the Commission. This would avoid the undue expense and necessity of a city accomplishing through different means what it can accomplish through an equivalency surcharge. See, PSC Order No. 11221 (HEx-4, page 6-7). Thus, the Commission clearly considered in announcing the incipient policy the

economic impact of such a policy and clearly considered the Economic Impact Statement and the advantages and disadvantages of the Rule in its Order adopting the Rule. See, PSC Order No. 11975, adopting Rule 25-9.525 (R-21).

Appellant Polk County is unable to demonstrate any serious deficiencies with the Economic Impact Statement. Attempts to make conclusions of law with regard to the Economic Impact Statement is not a valid method of attacking the validity of such a statement. The Appellant's statement that absent any agreement between local governments or legislative authority, municipalities may not extend services to those outside its municipal boundaries while legally correct, has no bearing on the Economic Impact Statement. (TR-9). The fact is, the Economic Impact Statement recognizes that such services are being delivered and that the reduction of any outside surcharge may have an effect by causing less revenues to be available for the extension of those services. (See, HEx-1C, p. 2).

The semantic errors contained in the Economic Impact Statement as pointed out by Polk County, were corrected in the record by Witness Payne who promulgated the Economic Impact Statement. His mistaken statement that overall tax revenues would decline upon a lowering of the surcharge was corrected by his statement that he should have said surcharge revenues will decline. (See, TR-28-29). Such a statement when corrected in the record, obviously does not prejudice Appellant nor impair the fairness of the Hearing in this matter.

Polk County further objects to the Economic Impact Statement assuming a situation whereby a municipality has imposed a surcharge which is higher than the Public Service Tax and which then explores the options available under the Rule as promulgated.

Simply because an Economic Impact Statement does not delve into futuristic predictions of all possible options, is not a further reason to hold an Economic Impact Statement invalid. Again, the objections expressed here to the Economic Impact Statement are merely adherence to form over substance and would be a technicality in the rulemaking process.

As the First District Court of Appeal has recently stated in State Department of Insurance v. Insurance Service Offices, 434 So.2d 908 (Fla. 1st DCA, 1983), the PSC could not reasonably "speculate on the amount of decreased or increased cost" each city will incur in its Economic Impact Statement. State Department of Insurance v. Insurance Service Offices, 434 So.2d at 929. The Public Service Commission's intention is to eliminate surcharges which are discriminatory but approve equivalency surcharges as being nondiscriminatory. (See, HEx-4, page 6-7).

Appellant has quite simply failed to demonstrate that either there are economic impacts which were available for consideration and were not considered, or that the Economic Impact Statement is so deficient as to materially prejudice Polk County or impair the correctness of the findings and proceedings. The statements of Appellant Polk County are nothing more than a semantic exercise in intense scrutiny of a document in an attempt to find fault.

Appellant has failed to produce any errors of substance in the document and has failed to point out any apparent economic benefits or impact which were not fully considered by the Public Service Commission in its consideration of the adoption of the Rule. Accordingly, any errors are harmless and the Rule should be upheld with the agency having complied substantially with the Economic Impact Statement requirement of the Administrative Procedures Act. Florida-Texas Freight v. Hawkins, 379 So.2d 944 (Fla. 1979); State Department of Insurance v. Insurance Services Office, 434 So.2d 908 (Fla. 1st DCA 1983); Division of Workers Compensation v. McKee, 413 So.2d 805 (Fla. 1st DCA 1982); Plantation Residents Association v. School Board of Broward County, 424 So.2d 879 (Fla. 1st DCA 1982). Appellants have failed to establish any deficiencies in the Economic Impact Statement and accordingly, the adoption of the Rule should be affirmed.

CONCLUSION

The Public Service Commission in adopting Rule 25-9.525, Fla. Admin. Code, regarding surcharges has exercised its powers to regulate rate structure of electric utilities. The exercise of this regulatory power in adoption of a rule is not arbitrary and capricious nor outside the authority of the Commission.

Surcharges are not taxes as this court and many others have found. The equivalency surcharges allowed by the Rule are further not discriminatory under existing precedent and law and are not discriminatory to customers within or outside city limits.

There have been no demonstrated economic consequences of the rule which were not considered by the Economic Impact Statement and no material error was demonstrated in the statement. Since no prejudice or material deficiencies have been shown in the statement which would impair the proceedings, the adoption of the Rule should be upheld and the Economic Impact Statement also upheld as to its validity.

Accordingly, the Appellants having failed to demonstrate error, the Order of the Florida Public Service Commission adopting Rule 25-9.525 regarding municipal surcharges should be affirmed in all respects.

FMB1r
11-10-83

Respectfully submitted this 14th day of November, 1983.

Frederick M. Bryant
FREDERICK M. BRYANT

and

DAVISSON F. DUNLAP, JR., of
Pennington, Wilkinson & Dunlap
Post Office Box 3985
Tallahassee, FL 32315-0985
(904) ~~385-1103~~ 222-5510

ATTORNEYS FOR CITY OF
TALLAHASSEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing ANSWER BRIEF OF APPELLEE CITY OF TALLAHASSEE has been furnished this 14th day of November, 1983, by U. S. Mail, to the following:

Patrick K. Wiggins
Deputy General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

William S. Bilenky
General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

F. E. Steinmeyer, III, Esquire
County Attorney
122 South Calhoun Street
Tallahassee, Florida 32301

Roy C. Young, Esquire
Claire A. Duchemin
Post Office Box 1833
Tallahassee, Florida 32302

Mark F. Carpanini, Esquire
Office of County Attorney
Post Office Box 60
Bartow, Florida 33830

Frederick M. Bryant
Attorney