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IN THE SUPREME COURT OF FLORIDA

LEON COUNTY, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 63,892
POLK COUNTY Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 63,875

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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PRELIMINARY STATEMENT

Appellants, Polk and Leon County, have filed similar, but in some instances, overlapping points. In an effort to simplify answering and reduce duplication, Appellee, Florida Public Service Commission, has consolidated the issues presented in those two briefs as follows:

1. Polk's Point I, concerning the effect of an Economic Impact Statement, will be addressed as Appellee's Point I.

2. Polk's Point II and Point III and Leon's Point I concerning due process, equal protection and rulemaking authority, will be addressed in Appellee's Point II.

3. Polk's Point IV and Leon's Point II, dealing with the Commission's jurisdiction, will be addressed in Appellee's Point III.

4. Finally, Leon's Point III dealing with substantial and competent evidence in a rule proceeding, will be addressed in Appellee's Point IV.

STATEMENT OF CASE

On February 25, 1983, the Commission issued Order 11652, proposing adoption of Rule 25-9.525, Florida Administrative Code. (Vol I, p. 2). On March 4, 1983, notice of rulemaking was published in the Florida Administrative Weekly. (Vol II, Ex. 1). The notice provided that a public hearing on the rule would be held on March 23, 1983, if requested within 14 days of the notice.

On March 16, 1983, Leon County filed a request for hearing. (Vol. I, p. 4). On March 16, 1983, Polk County filed its request for hearing. (Vol I, p. 6). On March 17, 1983, the City of Tallahassee filed written comments pursuant to Section 120.54(12)(b), Florida Statutes, proposing that Rule 25-9.525 be further expanded. (Vol I. p. 8).

A public hearing was held on March 23, 1983 before a Commission staff member. (Tr. 1-58). Representatives of Polk and Leon Counties and the Commission staff attended the hearing. Testimony regarding the rule was presented by two staff members. Representatives for Polk and Leon Counties cross-examined the staff members and presented argument against the rule. (Tr. 9-18, 23-54). Polk County presented a memorandum at hearing. (Vol II, Ex. 2).

Polk County filed post-hearing memoranda. (Vol II, p. 12). On April 18, 1983, the presiding officer issued a memorandum stating that he intended to recommend that the rule be withdrawn. (Vol I, p. 14a). Exceptions to the presiding officer's recommendation were filed by the City of Tallahassee, and Orlando

Utilities Commission. (Vol. I, pp. 15, 18).

At its regularly scheduled agenda conference of May 17, 1983 the Commission voted to adopt the rule. (Vol. I, p. 20). On May 26, 1983 the Commission issued Order 11975 reflecting the decision to adopt the rule. (Vol. I, p. 21). Rule 25-9.525 was filed with the Secretary of State on May 25, 1983.

Polk County filed a Notice of Appeal on June 24, 1983, (Vol. I, p. 23) and Leon County filed its Petition for Review on June 24, 1983. (Vol. I, p. 24). On August 2, 1983, the Commission on its own motion at its regularly scheduled agenda conference, voted to vacate the stay under Rule 9.310(b), Fla. R. App. P., caused by the appeals of Polk and Leon County. On August 18, 1983, the Commission issued Order 12370 reflecting that decision.

STATEMENT OF THE FACTS

The adoption of Rule 25-9.525 followed three-years of Commission consideration of extra-territorial surcharges by municipal electric utilities. On September 3, 1980 the Commission directed the City of Tallahassee to justify its 15% extra-territorial surcharge. (Vol. II, Ex. 3). The City of Tallahassee appealed the Commission decision to this Court, challenging the Commission's jurisdiction. This Court thereafter upheld the Commission's authority and, on October 4, 1982, the Commission issued Order 11221 eliminating the City's surcharge. (Vol. II, Ex. 4). That Order stated, in part:

> . . . 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. . . .

(at 6).

During the pendency of the City of Tallahassee Case, the Commission had requested other municipal electric utilities to justify their surcharges. Subsequent to the issuance of Order 11221, the Commission began to approve out-of-city surcharges equal to in-city public service tax rates. (Appendix A). Except for some refinements in language, Rule 25-9.525 embodies the policy decisions made by the Commission in those proceedings.

The economic impact statement (EIS) used in this rulemaking

proceeding was developed by Barry Payne, a planning and research economist employed in the Commission's Research Department. (Tr. 22). Mr. Payne was cross-examined extensively on the EIS by counsel for Polk County (Tr. 23-35) and by the presiding officer as well (Tr. 35-42). Every aspect of Mr. Payne's assumptions and economic logic was reviewed. In addition, counsel for Polk and Leon Counties and the presiding officer engaged in a discussion of the economic analysis. (Tr. 43-48). Neither Polk or Leon County presented any evidence to demonstrate that Mr. Payne's economic logic or economic assumptions were flawed in any manner.

POINT I

THE COMMISSION WAS COMPLETELY INFORMED OF THE ECONOMIC IMPACT OF THE PROPOSED RULE AND IF THERE WAS ANY DEFECT IN THE ECONOMIC IMPACT STATEMENT IT WAS HARMLESS ERROR.

The purpose of an EIS is to promote agency introspection during its rulemaking process. Introspection directs agency attention to certain key considerations and thereby facilitates informed decision making. Florida-Texas Freight, Inc., v. Hawkins, 379 So.2d 944, 946 (Fla. 1979). In addition to having a prepared EIS, the Commission had the benefit of further information gathered at the public hearing.

At hearing, the Polk County attorney extensively cross examined the staff member who had prepared the statement. In fact, the record in this rule proceeding constituted fifty-seven pages, of which, twenty-six pages[1] were directly concerned with the EIS. Counsel for Polk County cross examined the staff witness from every conceivable angle, exploring all facets of the economic impact of the proposed rule. Through cross examination, any defect in the EIS that may have existed was explored and explained. The Commission had the benefit of this information for the introspection mandated by the statute.

There exists a valid objective in this process. The purpose of an EIS is not to meet some procedural nicety but rather to

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[1]Pp. 22-42, 46-48 & 50-51.

ensure that an agency, in promulgating policy statements in rules, is aware of the economic consequences of its decisions. By looking at the statute, it is clear that the agency should consider the economic consequences that the decision will have on the agency (§120.54(2)(a)1.), the cost or benefit to all persons directly affected by the rule (§120.54(2)(a)2.) and the impact on competition and the market (§120.54(2)(a)3.).

In evaluating the agency's fulfillment of the requirement that the economic impact be considered, the Court must look to all the facts considered, not just the written statement. In Plantation Residents' Ass'n. v. School Board of Broward County, 424 So.2d 879, 881 (Fla. 1st DCA, 1982), the school board adopted a policy of maintaining a racial mixture, which policy was based in part upon a statement that "appear[ed] to be facially deficient." The Court held that "if the proceedings were not rendered unfair, or if the action was not found to be incorrect, then minimal deficiencies in the economic impact statement will not constitute reversible error." The Court was concerned that, had the economic impact statement been facially deficient, but that during hearing that deficiency was explored, to overturn the proceeding on that deficiency "would add a transparent technicality to the rulemaking process and would exalt form over substance."

In a similar case, the School Board of Palm Beach County decided upon closing a school after discussing the economic impact but without preparing an economic impact statement at all. Cortese v. School Board of Palm Beach County, 425 So.2d 554 (Fla.

4th DCA 1982. The economic impact of the board's decision had been discussed during the public meeting and the board was fully aware of the cost and savings associated with the decision. The Court held that absent a flagrant abuse of discretion it would not substitute its judgment for that of the Board. The Court stated that "the absence of an economic impact statement [was] harmless error." The Court went on to iterate the rule that "its absence [must be shown to have] either harmed the board's decision making process or adversely affected its decision." (Note at 558).[2] In Division of Workers' Compensation v. McKee, 413 So.2d 805, 806 (Fla. 1st DCA 1982), the Court stated:

> . . . The absence of such an economic impact statement may be harmless error if it is established that the proposed action will have no economic impact, or that the agency fully considered the asserted economic factors and impact. . . .

Polk argues that the EIS is erroneous on its face because it states that rates for utility service are equal when the surcharge is equal to the municipality's public service tax. Unfortunately for the County, the gross rates for electric service charged to customers within and outside the City are in fact equal when the surcharge is equal to the municipality's public service tax. That clearly was the intent of the rule.

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[2]School Board of Broward County v. Gramith, 375 So.2d 340 (Fla. 1st DCA 1979); Polk v. School Board of Polk County, 373 So.2d 960 (Fla. 2d DCA 1979).

What the County really objects to is the imposition of the surcharge at all. It would prefer the elimination of the surcharge in its entirety. That was an option that the Commission had before it for consideration when it proposed the rule. It was precisely that option which the Commission rejected in adopting the rule. The County is asking that this Court substitute its judgment for that of the Commission and change the rule to the extent that the surcharge is eliminated. The Court has been reluctant to do that in the past Cortese, supra. And in fact, in State Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238, 241 (Fla. 1st DCA 1981), the Court stated:

> ...Whether the Department's interpretation of section 381.272(7) is the only possible interpretation of the statute, or the most desirable one, we need not say. It is within the range of permissible interpretation of the statute, and that interpretation has acquired legitimacy through rulemaking processes in which those challenging the rule fully participated or had an opportunity to participate. We must remember here one prime goal of the 1974 Administrative Procedure Act: to encourage agencies of the executive branch to interpret statutes in their regulatory care deliberately, decisively, prospectively, and after consideration of comments from the general public and affected parties--that is, to interpret their statutes by rulemaking.

The issue of the comparison of utility taxes and municipal surcharges was amply discussed by Mr. Carpanini and the staff author of the EIS during cross examination. (Tr. 23-30). The Commission therefore had the benefit of the discussion of any

possible confusion on the issue, if in fact any confusion ever existed.

Next, Polk County claims that the EIS is somehow deficient in that municipal service provided to extra-municipal customers were considered. The Commission ultimately sets policy. It should have the benefit of all information if it is to set policy in a particular proceeding. This is especially true in rulemaking proceedings, where, as here, the issue has been debated for some time. It has been the subject of three appeals to this Court.[3] The Commission has set a policy after the culmination of three years of development. This Court expressly ruled upon and gave direction to Commission's procedures for developing policy first in a case-by-case approach and ultimately the initiation of formal rulemaking. In City of Tallahassee v. Public Service Comm., 433 So.2d 505 (Fla. 1983) this Court stated:

> 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.

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[3]City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981); City of Tallahassee v. Public Service Comm., 433 So.2d 505 (Fla. 1983); City of Tallahassee v. Public Service Comm., Sup. Ct. Case No. 62,833, awaiting decision.

Such policy, now adopted by rule although not preferred by the counties, is a legitimate exercise of Commission authority.

The Appellant's contention that the economic impact statement is invalid is without merit. Moreover, if there had been any defect in the statement, it was a harmless error because the record shows the Commission was otherwise fully informed of the economic impact of the rule.

POINT II

THE COMMISSION DID NOT ERR IN CONSIDERING FACTORS OTHER THAN COST AND THAT RATES WHICH ARE EQUAL ARE NOT DISCRIMINATORY.

It was admitted in the record that both the surcharge and the public service tax are both sources of revenue to the municipality. Both are a rate applied to the consumption of electric service. The public service tax is a tax imposed on customers residing within the corporate limits of the city. The municipal surcharge is a charge imposed on customers of the utility who reside outside the city limits. The Commission has no jurisdiction over the imposition nor over the level of the public service tax. Nor does the Commission have jurisdiction over the amount of the surcharge. However, the Commission does have jurisdiction over the relative levels of rates inside and outside the city and between and within customer classes.

The Commission has requested justification for differences in rates within customer classes where the only distinction within a class was the existence of a municipal boundary. In City of Tallahassee v. Mann, supra, the city was unable to justify the distinction between residential customers residing in the city and residential customers served by the city who resided outside the city. The Commission ordered the elimination of the differential in rates but suggested to the city that it would look favorably upon a rate structure that equated the gross rates charged for

electric service within and without the City.[4] Later, the Commission proposed this rule, equating surcharges to public service taxes.

The counties suggest that the surcharge should be set at zero without regard to the level of public service tax. That is a conceivable and legal level for the surcharge. The cities on the other hand have fought any change mandated by any state entity to the surcharge which they imposed. In fact, the City of Tallahassee challenged the jurisdiction of the Commission to review the level of the surcharge claiming, among other things, that the surcharge was not an element of "rate structure." The Commission's jurisdiction was acknowledged by this Court in the City of Tallahassee v. Mann, supra, at 163-64, wherein the Court stated:

> "...The City's differential charges to customers within and without its corporate limits constitute a classification system and thus are a matter of 'rate structure' subject to the jurisdiction of the Public Service Commission."

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[4]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

The Commission has now addressed the issue of the "differential" between the rates "within and without" the corporate limits of the city in a rule. The Commission's definition of differential was the end result, that is the gross level of charge. It is fundamentally fair to the two groups of consumers within a customer class to be charged the same gross rate by the utility regardless of their street address.

Interestingly, Leon County was a party to that proceeding and argued that the Commission did have jurisdiction over the issue of the imposition of a surcharge. Now it seems that since the Commission has exercised that authority in a manner inconsistent with the desires of the County, the Commission has mysteriously lost that jurisdiction. What the County is really concerned with is the definition of "equality" that the Commission used in determining the appropriate rate structure for the city. The

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[4](Cont'd) 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.

staff hearing officer, in his discussions on the record indicated that the use of an "end result" test to establish "equality" would be reasonable. By "end-result" he meant looking at the final rates charged, that is: the rate plus public service tax and rate plus surcharge. It is just this "end result" test which has been acknowledged by this Court as a valid test where certain conditions or restraints have been exercised by the Commission.

In Citizens v. Hawkins, 364 So.2d 723, 727 (Fla. 1978), the Court reiterated the earlier pronouncement of the Court on the "end result" test. The Court stated:

> ". . . but upon further study we became convinced that the 'end result' is to be weighed in terms of justness and reasonableness, having consideration for all circumstances that in the sphere of finances affect and influence investments of this sort."

The Court recognized that the "end result" test did have limitations but that the ultimate test was whether the final rates and charges were fair and reasonable. In Maule Industires, Inc., v. Mayo, 342 So.2d 63, 67 (Fla. 1976), the Court acknowledged the applicability of the "end result" test in Florida stating that the test was applicable where the "final ruling is not unreasonable (regardless of the method of computation used) on the basis of the entire record."

In Shevin v. Yarborough, 274 So.2d 505, 508 (Fla. 1973), the Court stated:

> In General Telephone Company of Florida v. Carter, supra, this Court also pointed out that the orders of the Commission are considered in

> light of the end-result rather than the particular methods adopted,
>
> > "[S]o long as such methods do not go so far astray that they violate our statutes or run afoul of constitutional guarantees." (114 So.2d) 554, 559)
>
> However, this Court will not give effect to the "end-result" doctrine to justify improper or erroneous methods or to discourage use of proper yardsticks in determining rate base. City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968).

It has alleged that the level of the surcharge should be determined by the cost of providing the service to extra municipal customers exclusive of any other considerations. However, as has been argued before this court, rate structures may be established using criteria other than cost.

This Court has determined that the Commission is not bound to rely on a cost-of-service standard in developing rate structures. Occidental Petroleum Company v. Mayo, 351 So.2d 336 (Fla. 1977); Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (Fla. 1976). Other states share similar rules. Granite State Alarm, Inc. v. New England Telephone and Telegraph Company, 279 A.2d 595 (N.H., 1971); Philadelphia Suburban Transportation Company v. Pennsylvania Public Utility Commission, 381 A.2d 179 (Pa. Cm. Ct. 1971).

The authority that the Commission has over rate structures is governed by and limited by the language in the statutes. In Section 366.06(2), Florida Statutes, rates may not be "unjustly discriminatory". This theme is again repeated in Section 366.07, Florida Statutes. What is justification for rate discrimination

has not been mandated by the legislature to be based exclusively on costs. In Section 366.06(1), Florida Statutes, the legislature enumerated some of the varying consideration that may be applied in determining rate structures:

> . . . In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

The use of these statutory standards by the Commission in determining the fairness or justness of a rate structure has been approved by this Court in the case of City of Tallahassee v. Public Service Comm., supra. In addition, the Commission amended Rule 25-9.52 to include the criteria the Commission may consider in prescribing on a case-by-case basis rate structures for municipal and cooperative electric utilities. Section (4) of the rule now provides:

> (4) In the event the Commission determines that the rate structure of a utility may not be fair, just and reasonable, the Commission may initiate appropriate proceedings to prescribe a rate structure that is fair, just and reasonable. In so doing the Commission may among other things, consider the cost of providing service to each customer class, as well as the rate history, value of service and experience of the utility, the consumption and load characteristics of the various classes of customers and the public acceptance of rate structures. The following principles may also be considered: simplicity, freedom from controversy, rate stability,

> fairness in apportioning costs, avoidance of undue discrimination and encouragement of efficiency. (Amended May 3, 1983) (Emphasis supplied)

Rule 25-9.52 clearly shows that the Commission does not adhere solely to cost-of-service in prescribing rate structures, but relies, instead, on many criteria.

The County cites to Clay Utility Co. v. City of Jacksonville, 227 So.2d 516 (Fla. 1st DCA 1979) for the proposition that rate differentials may only be based upon cost differentials in provision of the service. That case not controlling precedent. First, the case deals with rate levels charged by a municipality, an area where the Commission has no statutory authority. Second, in setting rate levels, the City of Jacksonville was not bound by the criteria for rate structures established for the Commission by the legislature. And third, the case pre-dates the language found in Section 366.06(1), Florida Statutes.[5]

It is further interesting to note that even assuming the case has some relevancy to the issue present, the Court did rule that cost was not the exclusive determinate of rate differentials. In fact the Court found that the evidence did not show what the rate differential should be, only that it did cost more to serve customers outside the municipal boundaries. Since the customer

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[5]The language found in this subsection was passed during the 1980 legislative session and can be found in Chapter 80-35, Laws of Florida.

residing outside the City had the burden of showing that discrimination had existed and had failed in that burden the Court upheld the rate differential.

> Based upon the evidence hereinabove summarized, the trial court found that there existed a true and substantial difference in the cost of supplying electricity through larger lines over longer distances to customers outside of the old city limits. Just what such difference in cost amounted to is not shown by the evidence in the record, and the trial court so held. By its final judgment the court opined that while the difference in cost of supplying electricity to appellants as compared to the cost of furnishing customers inside the city limits may not in fact justify the substantial difference in the rates actually charged appellants, that there was no evidence adduced at the trial from which the court could reasonably conclude what the cost difference amounted to and therefore whether the rates charged were discriminatory and illegal. With this observation and conclusion we are inclined to agree. (Emphasis supplied).

(at 519).

The statute authorizes the Commission to approve rate differentials justified on basis other than costs. This Court has sanctioned this practice by the Commission recently in the case of Pan American World Airways, Inc. v. Public Service Commission, 427 So.2d 716 (Fla. 1983). The Court found that discrimination based upon other economic considerations after notice and hearing was neither a denial of equal protection nor a denial of due process.

Finally, Appellant, Leon County makes much ado about the definitions of "public utilities" and the lack of "inherent rulemaking authority". What the County has overlooked is the

existence of specific rulemaking authority under the powers and duties of the Commission, Chapter 350, Florida Statutes. Section 350.127(2) provides:

> The Commission is authorized to adopt, by affirmative vote of a majority of the Commission, rules reasonably necessary to implement any law which it administers.

The Commission's "rate structure" jurisdiction can be found in Section 366.04(2), Florida Statutes. Therefore, in promulgating Rule 25-9.525, Fla. Admin. Code, the Commission was exercising valid legislative authorization under its general rulemaking authority found in Section 350.127(2), Florida Statutes.

The Commission did not err in considering factors other than cost in determining the appropriate relationship between rates charged inside and outside city limits and in requiring that the gross rates for such service be equal.

POINT III

THE COMMISSION HAS PROPERLY EXERCISED ITS RATE STRUCTURE JURISDICTION AND HAS ADOPTED A RULE THAT WHEN A CITY HAS BOTH A MUNICIPAL UTILITY TAX AND AN EXTRA MUNICIPAL SURCHARGE, THE ULTIMATE RATES CHARGED BY THE UTILITY FOR SERVICE MUST BE THE SAME.

On September 3, 1980, the Commission entered Order 9516 in effect seeking a justification from the City of Tallahassee for its extra-territorial surcharge. Thereupon, the City sought review of that "show cause" order by this Court. City of Tallahassee v. Mann, supra. As part of its appeal, the City alleged that the Commission lacked jurisdiction over the surcharge and that the surcharge was not part of the Commission's "rate structure" jurisdiction. In that case, Leon County moved to and was permitted to appear as an amicus curiae by this Court. In the "Response of Leon County to Order to Show Cause," at page 3, the County stated:

> . . . Surely the PSC has jurisdiction to review a structure which places a surcharge on one class of customers which is totally without foundation and cannot be supported by available data.
>
> . . . A review of the PSC's Order to Show Cause clearly shows that the information sought from the City was for the purpose of considering the rate structure rather than an attempt to set rates. Indeed, the only information sought by the PSC in its Order to Show Cause was information upon which the PSC could make a determination of the appropriateness of the amount of the structural difference between the two classes of City utility customers, as well as the structure itself.

In its opinions, this Court acknowledged the Commission's authority over a city's rate structure and concluded that municipal surcharges were part of that jurisdiction. Anticipating that the Commission would completely eliminate the surcharge, the county concurred in the Commission's jurisdiction. Once the Commission approved a policy of setting the level above zero and in fact equal to the public service tax, the County's concurrence in jurisdiction evaporated.

The issue here is whether the setting of the surcharge at the level of the municipal utility tax is an indirect form of taxation over which the Commission would not have jurisdiction. Of pivotal importance is the fact that the Commission does not have jurisdiction to impose a surcharge. Only municipalities have authority either through special legislation or through municipal ordinance to exercise extra-territorial jurisdiction. The legislature has recognized the rights of cities to impose surcharges on customers residing outside the city limits. [Article VIII, Section 2(B), Florida Constitution (1968)]. In fact prior to the passage of legislation in 1973, municipalities had the statutory right to impose surcharges on electrical service with no oversight authority of any type. §180.13(2), Fla. Stat. (1973). In 1973, the legislature took away the prima facie right of cities to impose surcharges and in 1974 gave the Commission the authority to review levels of surcharges as compared to other rates. §366.04(2), Fla. Stat. This rate structure jurisdiction confers upon the Commission the right to determine if the relative

rate levels, that is whether rates compare to other rates for the same or similar classes of customers, are justified.

The Commission's rule gives the City the option to have a surcharge. It does not mandate a surcharge nor does it establish the level of that surcharge. It does establish the level relative to other charges (in this case, the Commission equated the surcharge to the public service tax, if one exists).

Polk County misstates in its brief that the Commission rule grants to municipalities the jurisdiction to impose a surcharge on extra-territorial customers. The rule provides:

> 25-9.525 Municipal Surcharge on Customers Outside Municipal Limits.
> (1) The provisions of Rule 25-9.52 notwithstanding, a municipal electric utility may impose on those customers outside of its corporate limits a surcharge equal to the public service tax charged by the municipality within its corporate limits. To be equal to the tax, the surcharge shall apply to the same base, at the same rate, in the same manner and to the same types of customers as the tax. The surcharge shall not result in a payment by any customer for services received outside of the city limits in excess of that charged a customer in the same class within the city limits, including the public service tax.
> (2) Each municipal electric utility seeking to impose a surcharge on customers outside of its municipal limits shall provide written documentation to the Commission demonstrating compliance with the terms of this rule.

Clearly the rule does not mandate a surcharge nor does it grant any authority to the cities to impose a surcharge. It simply states that if a city desires to impose a surcharge on customers residing outside the city, the level of that surcharge must be the same as the public service tax. The rule, of course

implies that if the city does not have a public service tax the only permissive level of extra-territorial surcharge is zero.

The authority of cities to impose surcharges is not a delegation of Commission authority, but rather it emanates from specific legislative and Constitutional authority. For example, the City of Tallahassee has a provision from a Special Act, Chapter 8374 (1919), authorizing the imposition of an extra-territorial assessment.

> 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 it charged for a like class of consumers within the corporate limits of said city.

In 1974, the Legislature passed 74-196 Laws of Florida, giving the Commission authority to regulate the relative level of those extra-territorial charges which the legislature had previously authorized the cities to impose. See: §180.13(2), Fla. Stat. (1973). As was argued in the original City of Tallahassee v. Mann, supra, "a construction which will allow two (arguably) conflicting acts to co-exist should always be selected." City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

This Court clearly accepted such a construction. The Court harmonized the effects of the City's Special Act and the Commission's authority under its General Act, stating:

> While the Public Service Commission has no jurisdiction to set rates for a municipal utility, it has authority over the "rate structure" of all electric utilities in the state. The city's differential charges to customers within and without its corporate limits constitute a classification system and thus are a matter of "rate structure" subject to the jurisdiction of the Public Service Commission.

City of Tallahassee v. Mann, supra, at 163-164.

The Counties would now ask that this Court accept another construction which does violence to the statutes. They would have this Court overturn the rule on a ground that it authorizes a city to impose a surcharge where the city may not have statutory authority. The plain meaning of the rule must control. There is no ambiguity in the rule, it is clear on its face. It grants no authority to the cities. It does not set rates nor does it mandate the imposition of any surcharge.

The Commission's decision to require that an extra-municipal surcharge, if imposed, be equal to its municipal utility tax is within its authority over rate structure. The rule does not in itself authorize the imposition of a surcharge, but merely establishes the relationship of the surcharge to other charges.

POINT IV

THE COMMISSION COMPLIED WITH ALL THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT (CHAPTER 120) IN ADOPTING THIS RULE.

A. Introduction.

The Appellants attack the adoption of this rule on procedural grounds. The term "procedure" is used here in its broader sense. The Appellants do not contend that the Commission failed to comply with the narrow, technical requirements of Section 120.54, Florida Statutes, but that the procedure used was somehow deficient. Specifically, Appellants argue that the Commission erred by departing from the development of policy on this issue on a case-by-case basis, and that the procedure used to adopt the policy failed to produce "competent, substantial evidence" to support the rule. These procedural attacks on the adoption of the rule are without merit.

B. Appellants' contention that the Commission must develop policy on these matters through adjudication conflict with the Administrative Procedure Act (APA), interpretive case law, and the entire thrust of modern administrative law.

Under the APA, an agency may develop policy in either of two ways: through case-by-case adjudication or through rulemaking. Of the two, rulemaking is by far the preferred. As the First District Court of Appeal noted in McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 580 (Fla. 1st DCA 1977), rules allow an agency to close the gap between what it knows about its policies

and what those affected by agency action know about its policies. Moreover, as Kenneth Culp Davis demonstrated in his seminal work, Discretionary Justice, A Preliminary Inquiry (1971), rules are the single best mechanism by which agencies can delimit broad legislative grants of authority and discretion. For this reason, Professor Davis was adamant that agencies by encouraged to engage in rulemaking:

> The hope lies in administrative clarification of vague statutory standards. The typical failure in our system that is correctible is not legislative delegation of broad discretionary power with vague standards; it is the procrastination of administrators in resorting to the rule-making power to replace vagueness with clarity. All concerned should push administrators toward earlier and more diligent use of the rulemaking power: Affected parties should push, legislators and legislative committees should push, appropriations committees should push, bar groups should push, and reviewing courts should push. (emphasis supplied).

Id. at 56-7.

In this case, however, Appellants would push the Commission backwards. They would push the Commission back to policy development through slow and costly case-by-case adjudication under the unique theory that policy decisions made in applying public interest statutes governing rate structures for utilities must be made in the context of formal adjudicatory hearing, i.e., under Section 120.57, Florida Statutes. This is an aberrational view of how the Commission ought to develop policy and should be rejected. Moreover, the Commission has just emerged from three

years of incipient policy development, and it is appropriate that the policy it has distilled be reflected in rules.

Before 1980, the Commission did not attempt to exercise its rate-structure jurisdiction over municipal utilities, but has since that time exercised its jurisdiction in the City of Tallahassee v. Mann, supra.

C. The rule hearing held pursuant to Section 120.54(3), Florida Statutes, was to receive information, not to adjudicate.

The APA prescribes the requirements to be followed by agencies in the exercise of their rulemaking authority. §120.54, Fla. Stat. In adopting Rule 25-9.525, the Commission complied with all the requirements of Section 120.54, Florida Statutes.

Both Leon and Polk County base their arguments attacking the validity of the rule on the lack of evidence in the record supporting the rule. The APA, however, places no duty on an agency to have competent, substantial evidence in support of its proposed rules in the absence of an adjudicatory hearing under Section 120.57, Florida Statutes. Thus, the Commission did not require competent, substantial evidence for the rule at the rule hearing held in this proceeding.

As requested, a hearing was held to "give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform [the agency] of their contention." §120.54(3), Fla. Stat. The purpose of a rulemaking hearing under Section 120.54(3), Florida Statutes, is two-fold:

> (1) To allow the agency to inform itself of matters bearing on the proposed rules or modifications thereof, and
>
> (2) To allow the public, and specifically individuals and groups having particular interest and/or information, to participate in the rulemaking process. The hearing is of a quasi-legislative, information-gathering type, which in theory at least, does not adjudicate the rights of any particular individual. (Footnote omitted).

Balino v. Dept. of Health & Rehabilitation, 362 So.2d 21, 24 (Fla. 1st DCA 1978); Accord, State v. Professional Firefighters, 366 So.2d 1276, 1277 (Fla. 1st DCA 1979).

The presence or absence in the record of the rule hearing of competent, substantial evidence supporting the rule is not the basis for deciding this case. In adopting the rule the Commission had the benefit of three years practical, adjudicatory experience with this allocation problem. This experience, as well as the contributions of the counties at the rule hearing, constituted the informed basis upon which the Commission decided to adopt the rule.

Thus, the arguments of the Appellants on this issue are without merit.

CONCLUSION

The Commission has complied with the essential requirements of law in adopting Rule 25-9.525. The Commission had before it an adequate economic impact statement when it adopted the rules. Moreover, had there been any defect in the statement, it was harmless error since the Commission was otherwise apprised of the economic consequences of the rule. The rule is within the Commission's rate structure jurisdiction as it governs only rate structure and the Commission's exercise of that authority was not shown to be an abuse of discretion. Therefore, the Commission's adoption of Rule 25-9.525 should be upheld by this court and the appeals of Leon County and Polk County should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via U.S. Mail to the following parties of record this 8th day of November, 1983:

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