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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEON COUNTY,

Appellant,

vs. CASE NO. 63,8[illegible]

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

Appellees.

POLK COUNTY,

Appellant,

vs. CASE NO. 63,875

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

Appellees.

ANSWER BRIEF OF APPELLEES-- ORLANDO UTILITIES COMMISSION AND CITY OF LAKELAND

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STATEMENT OF THE CASE AND THE FACTS

Appellees, the City of Lakeland (hereafter Lakeland) and the Orlando Utilities Commission (hereafter OUC), accept the Statements of the Case and Facts contained in Appellants' Revised Briefs with the following supplement.

Although both Polk County and Leon County requested the rulemaking, information gathering hearing pursuant to section 120.54(3), neither of the Appellants produced any witnesses, testimony, or evidence at the hearing. Further, no formal, fact-finding or rule challenge procedures were invoked by Appellants pursuant to either section 120.54(4) or section 120.54(16).

ARGUMENT

I. THE STANDARD OF REVIEW IS WHETHER THE PSC ACTED REASONABLY IN PROMULGATING THE RULE AND NOT IN AN ARBITRARY AND CAPRICIOUS MANNER.

Appellant-Leon County erroneously argues that Rule 25-9.525 is invalid because it is not supported by competent, substantial evidence. (Amended Brief of Appellant-Leon County at pp. 15-17). Appellant ignores the true nature of the proceeding held in the lower tribunal. More specifically, the proceeding was neither a rule challenge pursuant to section 120.54(4) or section 120.56, nor was it an evidentiary, fact-finding, quasi-judicial hearing pursuant to section 120.57. The proceeding before the PSC was a section 120.54(3) rulemaking, quasi-legislative public hearing. This was not an adversary proceeding, but was simply a public hearing to allow interested individuals and groups an opportunity to participate in the rulemaking process and to assist the agency in its information-gathering function. Balino v. Department of Health and Rehabilitative Services, 362 So. 2d 21, 24 (Fla. 1st DCA 1978), cert. den., 370 So. 2d 458 (Fla. 1979), app. dism., 370 So. 2d 462 (Fla. 1979).

Pursuant to section 120.68(10), the competent, substantial evidence standard applies only to fact finding proceedings under section 120.57, and not to rulemaking proceedings under section 120.54(3). The only test for determining the validity of the PSC's order adopting Rule 25-9.525 is whether the PSC's action was arbitrary, capricious or not reasonably related to the enabling legislation. Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1979), cert. den., 376 So. 2d 74 (Fla. 1979).

Appellants had two options which they could have elected to pursue. They could have instituted a formal rule challenge proceeding pursuant to section 120.54(4), or they could have demonstrated that their substantial interests were not being protected and could have attempted to "draw out" to a formal proceeding pursuant to section 120.54(16). Appellants did not pursue either of these statutory opportunities. Furthermore, Appellants failed to present any evidence or witnesses at the legislative-type rulemaking hearing. Thus, the record is devoid of any testimony or evidence showing that the rule is either arbitrary or capricious.

II. RULE 25-9.525 CODIFIES A LONG-STANDING PRACTICE OF MUNICIPAL ELECTRIC UTILITIES AND IS NOT ARBITRARY OR CAPRICIOUS.

Municipal utilities in Florida have historically required surcharges to be paid by customers outside the city limits. In 1970, the Florida Legislature statutorily recognized this existing practice and enacted section 172.081, Florida Statutes. Ch. 70-997. The purpose of this enactment was to limit the amounts of the surcharges to 20%.[1] The statute stated:

> (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.

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[1]In 1970, the legislature also passed Chapter 70-997 which recognized the existing practice of imposing a similar surcharge on municipal water and sewer customers living outside the city limits, and which likewise limited the amount of these surcharges. § 180.191.

As this clear language indicates, the surcharge was restricted to, at the most, an amount equal to 20% of the rate, plus taxes, charged to city consumers. Conspicuously absent from the statute is any requirement that the surcharge must be justified on a cost of service basis. Obviously the Florida Legislature concluded as a matter of public policy that although the apparent additional costs associated with extra-municipal service justified surcharges, a limitation on the surcharges was necessary.

No Florida appellate courts had an opportunity to construe the language of section 172.081. In 1972, the Florida Legislature adopted the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes (1973); Chapter 73-129, Laws of Florida. The enactment of Chapter 166 was designed to implement the broad constitutional grant of municipal power contained in Article VIII, section 2(b), Florida Constitution (1968). See, section 166.021(4), Florida Statutes (1981).

Chapter 166 repealed section 172.081. Ch. 73-129, § 5. However, Chapter 166 did not in any way affect the ability of municipalities to impose surcharges, for as the legislature expressly stated:

> It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above ... [including Chapter 172]. § 166.042, Fla. Stat. (1981).

Thus, the municipalities continued the existing practice of imposing surcharges on customers outside the city limits.

In 1974, the legislature enacted Chapter 74-196, Laws of Florida, which granted the PSC jurisdiction over rate structures for municipal electric utilities. Municipal utilities that had historically included surcharges in their rate structures became subject to the scrutiny of the PSC. PSC Rule 25-9.525 simply codifies the well-established municipal policy of imposing a surcharge and codifies the legislative policy of placing a limitation on the surcharge.

The Appellants argue that such a rate structure element is invalid unless predicated solely upon the increased cost of service for extra-municipal customers. Appellants rely primarily on Clay Utility Company v. City of Jacksonville, 227 So. 2d 516 (Fla. 1st DCA 1969), and Cooper v. Tampa Electric Company, 17 So. 2d 785 (Fla. 1944) for this proposition. However, both Clay and Cooper were decided prior to the 1970 enactment of Chapter 172 which legislatively recognized that surcharges were utilized, which restricted the surcharges, but which did not mention or require a cost of service predicate for the imposition of the surcharges.

Appellants also argue that the surcharge limitation rule is unconstitutional. In Mohme v. City of Cocoa, 328 So. 2d 422, 425 (Fla. 1976), this Court upheld the constitutionality of the municipal water and sewer surcharge limitation statute and stated:

> We believe that the Legislature reasonably concluded that there are additional costs attendant to the providing of these services by a municipal utility system and that these costs cannot be pinpointed even under sophisticated cost accounting techniques. ... We believe further that it was in

> response to this problem that the legislature enacted Section 180.191, Florida Statutes ... .

Thus, the court concluded that the statute was not unreasonable or discriminatory and was constitutional. Id.

In the present case, the Orlando Utilities Commission imposes an equivalency surcharge of less than 5%. OUC's consultants advised that a cost of service study on the costs of providing services to customers outside the city limits would inherently involve a margin of error at least equal to, if not greater than, the surcharge itself. The legislature recognized these problems with cost accounting techniques and passed section 180.191, the constitutionality of which was upheld in Mohme. The PSC likewise recognized these problems when it opted to use criteria other than cost of service as a predicate for the municipal surcharges. The Mohme decision is directly applicable to the present case and the surcharge limitation rule easily passes constitutional muster.

Appellants also argue that the municipal equivalency surcharge under Rule 25-9.525 unjustly discriminates against customers outside the city limits, absent a cost of service basis. However, as the court stated in Cooper:

> The mere fact that customers outside the city are charged different rates for service from those inside the city is no showing of discrimination. 17 So. 2d at 786.

In fact, the whole purpose of Rule 25-9.525 is to avoid unjust discrimination against customers inside the city by equalizing the total amounts paid by the two groups of customers.

This Court has never held that the difference in the costs of servicing various customers is the only justification for establishing different rate structures for different classes of customers. In fact, in both International Minerals and Chemical Corporation v. Mayo, 336 So. 2d 548 (Fla. 1976) and Florida Retail Federation, Inc. v. Mayo, 331 So. 2d 308 (Fla. 1976), this Court expressly rejected the Appellants' argument that different rate structures must be predicated solely upon different costs of service. See also, Occidental Chemical Company v. Mayo, 351 So. 2d 336 (Fla. 1977). In International Minerals, this Court stated that it was completely proper to consider factors other than cost of service, including, but not limited to, rate history and experience of the utility, consumption and load characteristics of various classes of customers, value of service, public acceptance of rate structures which have been in effect in the past without serious dissatisfaction, conservation of energy, and rate continuity. Id. at 552.

As this Court recognized in City of Tallahassee v. Florida Public Service Commission, 433 So. 2d 505 (Fla. 1983), the PSC is statutorily authorized to consider a number of factors in addition to cost of service in establishing fair and reasonable rate structures. Section 366.06(1) authorizes the PSC to consider:

> 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.

Both the City of Lakeland and the Orlando Utilities Commission, like many other cities, have historically utilized the

equivalency surcharge to eliminate diversity in the "end-result" amounts charged to municipal and non-municipal customers. The use of the surcharge has been publicly accepted and no public dissatisfaction with the surcharge has been expressed in either locale. The PSC's use of factors other than cost of service as a predicate for the surcharge rule was not arbitrary or capricious, but was based upon the legislative and judicial recognition of other equally important factors, such as public acceptance of the rate structure.

Furthermore, the PSC's use of a "bottom-line" or "end-result" method of arriving at a rate structure has historically been approved by this Court. The "end-result" method was first recognized by this Court in Jacksonville Gas Corporation v. Florida Railroad and Public Utilities Commission, 50 So. 2d 887 (Fla. 1951), and was reaffirmed by this Court in General Telephone Company of Florida v. Carter, 115 So. 2d 554 (Fla. 1959). Thus, the PSC's action in proposing Rule 25-9.525 is equally valid, whether based upon the various factors set forth in the case law and in section 366.06(1), or upon the "end-result" theory.

The Appellants' argument that the surcharge is actually an "extra-municipal" tax, is without merit. The surcharge for municipal water and sewer companies was legislatively approved by the passage of section 180.191, Florida Statutes. The statute itself was judicially upheld in Mohme v. City of Cocoa, 328 So. 2d 422 (Fla. 1976) against a constitutional attack. The same result is warranted in the present case. The only difference between the Mohme case and the instant rule is the amount of the limitation

on the surcharge. In section 180.191 the legislature authorized a maximum surcharge of 25%. In the instant case, the PSC rule authorized a surcharge equal to the public service tax charged by the municipality to customers within the corporate city limits. If the 25% surcharge approved in Mohme was not a tax and was not arbitrary and capricious, then certainly the same result should be reached in this case, where the whole purpose of the surcharge is to promote equality and fairness among rate-payers.

Furthermore, both sections 172.081 and 180.191 recognized the inclusion of the public service tax in the base amount on which surcharges were permitted to be calculated.[2] If the calculation itself, pursuant to the legislature's mandate included the public service tax, then certainly the surcharge is not an extra-municipal tax simply because the public service tax serves as the measurement for the limitation on the amount of the surcharge.

Also, in City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1982), this Court concluded that municipal surcharges were elements of rate structure and thus, the PSC had jurisdiction over such charges. Clearly, if the surcharges were extra-municipal taxes as Appellants assert, this Court would not have held that the PSC had jurisdiction over the surcharge issue.

Appellants also attack the lack of political accountability

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[2]Section 172.081(1) provided that the surcharge was limited to 20% of the rate charged municipal customers, "plus taxes applicable ... ." Section 180.191 provides that the surcharge is to be calculated based upon all of the "rates, fees, and charges" paid by city customers.

of municipal governing bodies to county residents. This argument totally ignores the fact that the surcharge has legislative approval, and that the legislators are directly accountable to voting county residents. Further, as an element of rate structure, the surcharge is subject to PSC approval. The PSC is an appointed, but publicly responsive body. The nominating council for PSC members is composed of legislators and persons directly appointed by legislators. § 350.031(1), Fla. Stat. (1981). All of the members of the PSC are thus politically accountable to all citizens of Florida, county and city residents alike.

Appellants' argument that this rule is not authorized by statute is also unmeritorious. Section 350.127(2), Florida Statutes (1981), expressly authorizes the PSC to adopt rules "reasonably necessary to implement any law which it administers." In City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1982), this Court held that municipal surcharges were a matter of rate structure and were subject to the PSC's jurisdiction. The PSC is statutorily compelled to approve a rate structure for all electric utilities. § 366.04(2)(b), Fla. Stat. (1981). Furthermore, this Court encouraged (but did not require) the PSC to adopt a rule on the surcharge issue in City of Tallahassee v. Florida Public Service Commission, 433 So. 2d 505, 508 (Fla. 1983). Therefore, the rule has both statutory authorization and a judicial predicate and cannot be challenged as exceeding the scope of the PSC's authority.

Appellants also contend that the PSC has improperly restricted the amount of the surcharge which constitutes impermissible ratemaking. However, the PSC simply established a ceiling for this component of the rate structure, just as the legislature had established a ceiling by enacting section 172.081. The dollar amount of the surcharge is not established by this rule; it is simply limited.

In summary, Rule 25-9.525 is a mere codification of the surcharge as a possible element in municipal rate structures. It is not arbitrary or capricious, is not an extra-municipal tax, is reasonably related to the PSC's exercise of its rate structure jurisdiction, and is constitutional. The PSC's order establishing the Rule should be affirmed.

III. THE ECONOMIC IMPACT STATEMENT WAS SUFFICIENT AS A MATTER OF LAW AND DOES NOT RENDER THE RULE INVALID.

The economic impact statement (EIS) (Composite Exhibit No. 1, Tr. Vol. II), expressly complies with section 120.54(2)(a) and includes each of the items required to be contained within such a statement. The Appellants argue that the statement is erroneous for the following reasons:

1. Option 2 characterizes the surcharge as giving rise to tax revenues and option 3 is likewise erroneous.
2. The EIS states that the surcharge will equalize rates when in fact the in-city utility tax is not part of the rate base.
3. The methodology used in formulating the EIS is invalid.

All of these objections are semantic only and stem from the confusion of the term "rate" as it refers to the total amount paid by a utility customer with the use of the term "rate" as it represents the sum paid for services rendered before taxes, fuel adjustment charges, etc. are added to the bill. The plain language of the EIS indicates that the surcharge is intended to equalize the "end-result" amount paid by municipal utility customers inside and outside the city limits. This was discussed fully at the public hearing. (Tr. at p. 8; pp. 22-42). In fact, the author of the EIS specifically stated during the public hearing:

> [W]hat I'm saying is that when you reduce the surcharge and you don't offset it any other way, your overall revenues are going down. And I was calling that tax revenues. That may have been a mistake. (Tr. at p. 29).

The Appellants were clearly informed of the actual meaning of the language used in the EIS and were not prejudiced by the semantics of the EIS.

Likewise, the methodology used in formulating the EIS was adequately discussed and explored at the public hearing. (Tr. at pp. 22-23). The author of the EIS forthrightly stated that the EIS was theoretical in nature. As the EIS itself states, the economic impact of Rule 25-9.525 is wholly dependent upon how the cities react to the rule once it is implemented. The EIS adequately discusses the potential impacts based upon various possible reactions by municipalities. Thus, the methodology is theoretical only, as mentioned during the public hearing, and was adequate to conform to the requirements of section 120.54(2).

This Court examined the purposes behind the statutory requirements for an EIS in Florida-Texas Freight, Inc. v. Hawkins, 379 So. 2d 944, 946 (Fla. 1980), and stated:

> Such a procedure directs agency attention to certain key considerations and thereby facilitates informed decision making. It also serves the salutory purpose of opening up the administrative process to public scrutiny.

This Court concluded in Florida-Texas that because the agency had substantially complied with section 120.54(2) and because the challengers had ample opportunity to challenge the EIS at a public hearing, the rule would not be deemed invalid due to the absence of a formalized EIS. Id. See Division of Workers' Compensation, Department of Labor and Employment Security v. McKee, 413 So. 2d 805, 806 (Fla. 1st DCA 1982).

More recently, in Plantation Residents' Association, Inc. v. School Board of Broward County, 424 So. 2d 879 (Fla. 1st DCA 1983), the court stated that if deficiencies in the EIS did not impair the fairness of the proceedings, then harmless error has occurred and the rule should not be deemed invalid. The court stated that even though the Board's EIS was less than thorough and possibly facially deficient, declaring the Board's decision invalid where no prejudicial error occurred "would add a transparent technicality to the rule-making process and would exalt form over substance." Id. at 881.

In the present case, assuming for purposes of argument that the EIS was somehow deficient or substantively inaccurate, the rule still should not be invalidated on that basis unless the

fairness of the proceedings was impaired. In view of Appellants' opportunity to question the author of the EIS and to comment on the EIS, Appellants suffered no prejudice from the technical deficiencies, if any, in the EIS. The rule should not be invalidated.

Furthermore, Appellants proffered no witnesses or testimony of any type at the public hearing to affirmatively rebut the statements in the EIS. Therefore, there is no evidence or testimony in the record supporting Appellants' claim that the EIS is inaccurate.

It is clear that the economic impacts of the surcharge were considered by the PSC, both in the EIS and at the public hearing. This substantially complies with the requirements of section 120.54(2), the Appellants were not prejudiced by the statements contained in the EIS, and the rule is valid.

CONCLUSION

The Appellants incorrectly challenge the evidentiary basis for Rule 25-9.525 using the competent, substantial evidence standard. The rule is valid as determined by the "arbitrary or capricious" standard. The rule is also constitutional, though not predicated solely upon cost of service and the surcharge is not an extra-municipal tax. The Rule simply codifies the existing, legislatively recognized limitations on surcharges.

The economic impact statement prepared by the PSC staff completely conformed to statutory requirements. Any semantical distinctions constituted harmless error and the rule is valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Appellees--Orlando Utilities Commission and City of Lakeland has been furnished by U. S. Mail this 8th day of November, 1983, to the following:

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