IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEON COUNTY,

Appellant,

vs. CASE NO. 63,892

FLORIDA PUBLIC SERVICE COMMISSION, etc., et al.

Appellee.

POLK COUNTY,

Appellant,

vs. CASE NO. 63,875

FLORIDA PUBLIC SERVICE COMMISSION, etc., et al.

Appellee.

AMENDED BRIEF OF APPELLANT POLK COUNTY

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SYMBOLS AND DESIGNATION OF PARTIES

The Counties of Polk and Leon will be referred to as Polk County, Leon County, or Appellant.

The City of Tallahassee, the City of Lakeland, the City of Gainesville and the Orlando Utilities Commission will be referred to by name or as Appellees. The Florida Public Service Commission will be referred to by name, as the Commission, or Appellee. Fla. Admin. Code Rule 25-9.525 may be referred to as the Rule.

References to pages in Volumes I and II of the record in this proceeding will be designated (Vol. I) or (Vol. II) as the case may be. Reference to exhibits contained in Volume II will be designated (Exh). Reference to pages in the official reporter's transcribed testimony will be designated (TR).

Reference is also made to a recommendation of the hearing officer which has not yet been officially transmitted as part of the record, however, counsel for the Appellee Florida Public Service Commission has agreed with counsel for Appellant Polk County that the same should have been transmitted as part of the Record and will be so transmitted and designated by the Clerk of the Commission.

STATEMENT OF THE CASE AND FACTS

This proceeding deals with the validity and constitutionality of Fla. Admin. Code Rule 25-9.525 adopted by the Florida Public Service Commission on May 26, 1983 which relates to surcharges imposed by municipally operated electric utilities on customers located beyond municipal limits. (Vol. II, 21)

On February 25, 1983, the Commission issued an Order proposing the adoption of Fla. Admin. Code Rule 25-9.525 (Vol. I, 2)

On March 4, 1983, Notice of Proposed Fla. Admin. Code Rule 25-9.525 was published in the Florida Administrative Weekly. (Exh 1B) Both Polk and Leon Counties, pursuant to Section 120.54, Florida Statutes, requested a hearing on the proposed rule on March 16, 1982. (Vol.I, 6)

The Rule provides in substance that a municipally operated electric utility may impose on those customers located beyond its corporate limits a surcharge equal to the public service tax imposed by a municipality upon persons located within its corporate limits.

The stated purpose of the rule is to preclude the possibility of price discrimination among municipal electric customers by use of a surcharge or public service tax within a specified service class. (Exh 1B)

In connection with the proposed rule an Economic Impact Statement was prepared by the Commission staff. (Exh 1C) Prior to the adoption of the Rule, the Commission had issued a series of Orders to Show Cause to various municipalities which operate electric utilities why they should be allowed to retain the surcharge in that it appeared to result in a discriminatory rate structure. Orders to Show Cause were issued to the Cities of St. Cloud, Moore Haven, Green Cove Springs, Quincy, Vero Beach, Wauchula, Newberry, Blountstown, Ft. Meade, Bushnell, Alachua, Bartow, Lakeland, as well as The Lake Worth Utilities Commission, Gainesville/Alachua County Regional Utilities and the Orlando Utilities Commission. (Exh 2)

The City of Tallahassee challenged the Public Service Commission's jurisdiction to inquire into the validity of the surcharge imposed by that city. The Florida Supreme Court in the case of City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981) held that while the Public Service Commission had no jurisdiction to set rates for a municipally operated utility, it had authority over the "rate structure" of all electric utilities in the State, since the differential charges to customers within and without its corporate limits constitute a classification

system and thus are a matter of "rate structure" and therefore subject to the jurisdiction of the Florida Public Service Commission.

A hearing was held by the Commission on the surcharge imposed by the City of Tallahassee on July 28 and 29, 1982, and on October 4, 1982 the Commission issued an order determining that the 15% surcharge imposed by the City of Tallahassee on its extramunicipal customers should be eliminated. The Commission concluded that the City's classification of customers by location within or without its city limits is unduly discriminatory. (Exh 4)

In its Order of October 4, 1982, regarding the City of Tallahassee's surcharge, the Commission noted under the heading of "additional matters", as follows:

> 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, we would not consider that as unjustly discriminatory rate structure as found herein. (Exh 4)

The Commission reasoned in its Order of October 4, 1982 that some municipalities might experience difficulties in refinancing debts secured by a pledge of utility taxes. (Exh 4) The Rule appears to be predicated

upon the reasoning contained in the Commission's Order of October 4, 1982 although there is no reference to this concept in either the Rule nor the Economic Impact Statement which accompanied the Rule.

A hearing on the Proposed Rule (Exh 1B,C) was held before a hearing officer on March 23, 1983. Thereafter, on April 18, 1983, the hearing officer issued a recommendation that the Proposed Rule be withdrawn. (Recommendation of Hearing Officer, April 18, 1983) The only parties other than Commission staff who appeared at the hearing were representatives of Polk County and Leon County. (Tr 2) The Commission issued an Order adopting the Rule on May 26, 1983 (Vol.II, 21) despite the recommendation of the hearing officer.

Polk County filed its Notice of Appeal on June 24, 1983. (Vol.II, 23). On that same date Leon County filed a Petiton for Review of Final Agency Action. (Vol.II, 24) On July 1, 1983, this Court consolidated these cases for all appellate purposes.

On July 25, 1983, this Court entered separate Orders affirming the party status as Appellees of the Cities of Tallahassee and Lakeland and the Orlando Utilities Commission. On September 27, 1983, this Court entered an Order affirming the party status as Appellee of the City

of Gainesville and on September 26, 1983 the Court entered an order allowing the City of Moore Haven, the City of Wauchula, the Lake Worth Utilities Authority, the City of Blountstown, the City of Alachua, and the City of Bushnell to file briefs as amicus curiae.

ARGUMENT

I.

THE ORDER OF THE COMMISSION ADOPTING FLA. ADMIN. CODE RULE 25-9.525 SHOULD BE REVERSED BECAUSE THE ECONOMIC IMPACT STATEMENT PREPARED IN CONNECTION THEREWITH IS PATENTLY ERRONEOUS.

The Economic Impact Statement prepared in connection with the Rule is erroneous on its face. The Economic Impact Statement provides in its summary the following:

> Since municipalities would be required (under the rule) to charge the same rates to all customers within the same class, specific price discrimination is prohibited by the rule. (Exh 1C)

The Rule provides essentially that a municipality may impose on those customers outside of its corporate limits a surcharge equal to the public service tax, also called a Utility Tax, imposed by a municipality within its corporate limits.

A surcharge is an element of a rate, but a utility

tax is not in any way a component of a rate. The Commission recognized this in its Order of October 4, 1982 in the City of Tallahassee surcharge proceeding and stated:

> 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. (Exh 4)

Since the surcharge is an element of the electric rate and a public service tax, levied by a municipality pursuant to Chapter 166, Florida Statutes, is a tax levied by a municipality to raise revenues, it cannot be said that the Rule operates to require a municipality to charge the same rates to all customers within the same class, thereby prohibiting specific price discrimination. To the contrary, the Rule operates to perpetuate and sanction discriminatory rates being charged by many municipalities as a result of the imposition by those municipalities of a surcharge, and to that extent, the Economic Impact Statement prepared in connection with the Rule is not only erroneous, but misleading.

The Economic Impact Statement is also erroneous in the following respect: The Economic Impact Statement assumes a situation whereby a municipality has imposed a

surcharge on extra-municipal customers which is higher than the rate of a public service tax imposed upon municipal customers. (Exh 1C) The Impact Statement then goes on to explore three options available to the municipality were the Rule adopted. They are:

1. The within-city tax can be increased to equal the rate of the out-of-city surcharge.

2. The out-of-city surcharge can be lowered to equal the within-city tax.

3. The surcharge can be reduced and the tax can be raised to equal some aggregate rate in between the two original rates. (Exh 1C)

The Economic Impact Statement goes on to provide "Option (2) would tend to reduce overall tax revenues." (Exh 1C)

This statement is incorrect on its face in that a surcharge, as noted earlier by the Commission itself, is not a tax, therefore a reduction in the surcharge would not result in a loss of tax revenues. Furthermore, a municipality is forbidden by law from imposing a tax upon those lying beyond its municipal boundaries. City of Ocoee v. Bell, 108 So. 2d 766 (2 DCA, 1959); 1975 Op Atty. Gen. Fla. 075-20 (Feb. 4, 1975). The Economic Impact Statement further provides as it relates to Option (2): "In addition, depending on which services are reduced for lack of funds either out-of-city and/or within

city residents will suffer a corresponding loss in benefits." (Exh 1C) This statement is erroneous in its assumption that municipalities routinely provide a variety of services beyond their municipal boundaries. Absent an agreement between local governments or legislative authority to the contrary, municipalities are prohibited by law from providing services to those who live beyond their municipal boundaries. North Bay Village v. Isle of Dreams Broadcasting Corporation, 46 So. 2d 496 (Fla. 1950)

It should be noted that the author of the Economic Impact Statement was of the opinion that municipalities provide not just utility services beyond their corporate boundaries, but a broad spectrum of services, as the following testimony before the hearing officer indicates:

> Q. Now, the Economic Impact Statement goes on to further discuss the consequences of reduction in tax revenues, and the statement is made, "In addition, depending on which services are reduced for lack of funds, either out-of-city and/or within city residents will suffer a corresponding loss in benefits."
>
> Q. What benefits were you referring to in the Economic Impact Statement?
>
> A. Whatever benefits the municipality may have been supplying to within-city residents and out-of-city residents--police services, fire services, parks, anything else that they may have been funding with those revenues. (TR 29-30)

In addition, aside from the obvious problem of the lack of authority for a municipality to provide services beyond its corporate limits, the Commission noted in the City of Tallahassee surcharge proceeding "We find no rational basis in regulatory theory to base a rate structure on the cost of non-utility services". (Exh 4)

If the impacts associated with Option (2) are misperceived, the impacts associated with Option (3) are misapprehended as well. Option (3) provides that the surcharge can be reduced and the tax can be raised to equal some aggregate rate in between the two original rates. Due to the difference in character between a surcharge and a public service tax, the only way the rate can be equalized is to eliminate the surcharge and charge a uniform rate across corporate boundaries.

The Economic Impact Statement further provides:

> In adopting the rule, the Commission would be following a long standing practice that customers of a given class of service are always charged the same rate, the inherent assumption being that all customers within the class bear equal degrees of cost causality as well as deserve to receive the same basic quality of service. (Exh 1C)

In actuality, for reasons previously explained, in adopting the Rule the Commission sanctioned the imposition of a higher rate on extra-municipal customers which may or

may not bear any relationship at all to the cost of service received.

Not only does the Rule not provide for a uniform rate, as represented in the Economic Impact Statement, it does not proceed under the inherent assumption that all customers within a class bear equal degrees of cost causality. (Exh 1C) At the hearing on the proposed rule, a staff member of the Commission testified in response to a question from the Hearing Officer as follows:

> Q. I think, if I understand what Mr. Steinmeyer is getting at, it's that the imposition of a surcharge to bring about equality with respect to taxes is an abandonment of the cost of service of cost based pricing. And I think he's basically asking did the staff in devising this rule give any thought to the fact that this is in fact a departure from that, and do you have any justification for that? (Dialogue omitted)
>
> A. It is correct that cost was not considered. It is an abandonment of the cost of service. It is an attempt to comply with the perceived direction of the Commission established in the Tallahassee surcharge case. (TR 9-10)

In addition, the Commission stated in its Order of October 4, 1982:

> Changes in city limits appear to bear little, if any, relation to changes in cost. An area will remain outside the city limits in the absence of an affirmative vote. Thus, customers in the City's electric utility service area will have their rate classification

> determined, not by the cost of service to the area within which they live, but by the ballot. We cannot reconcile this fact with the need to avoid undue discrimination in establishing rate structure. (Exh 4)

Based upon the foregoing evidence, not only does the Rule provide for a discriminatory rate as opposed to a uniform rate, but the upset rate imposed upon the extramunicipal customer does not depend upon any evidence of an increased cost to serve and to that extent is in direct conflict with the rationale contained in the Economic Impact Statement.

The methodology used in developing the Economic Impact Statement is defined as: "Cost and benefits were specified as changes in tax burdens and public services as distributed across the service population of the municipalities in question". (Exh 1C) Municipalities may not tax extra-municipal customers, nor may they provide services to extra-municipal customers absent an agreement or legislative authority to do so, therefore, the methodology used in formulating the Economic Impact Statement is in and of itself invalid.

The First District Court of Appeal stated in the case of Department of Environmental Regulation v. Leon County, 344 So. 2d 297 (1 DCA, 1977) that a hearing officer may inquire into the validity of an economic impact statement.

The hearing officer issued a recommendation that the proposed rule be withdrawn (Recommendation of Hearing Officer). However, the Commission adopted the Rule in reliance upon the Economic Impact Statement prepared in connection therewith which was patently erroneous and misleading.

Section 120.54(2)(c), Florida Statutes, provides in pertinent part:

> (c) Failure to provide an adequate statement of economic impact is grounds for holding the rule invalid; . . .

In the case of Florida-Texas Freight, Inc. v. Hawkins, 379 So. 2d 944 (Fla. 1980) this Court held that irregularities in an economic impact statement are not fatal to the validity of a rule which it supports, absent a showing by a party of prejudice or evidence which contravenes the assertion of no impact contained in a statement.

As Justice Sundberg stated in his dissenting opinion in that case:

> This (economic impact) statement is a procedural device designed to further the integrity of decision-making in agency rulemaking. It ensures a fair and comprehensive process by requiring a systematic review of essential economic factors. Id. at 947

In this case, the Economic Impact Statement prepared in connection with the Rule is so patently erroneous and misleading that it must be concluded that the customer who lives in an unincorporated area served by a municipally operated electric utility which imposes a surcharge pursuant to the Rule would be adversely prejudiced in that he would, in fact, be subjected to the payment of a discriminatory rate not justified by an increased cost to serve or any other factor.

For the reasons shown, it is the position of Appellant Polk County that the Rule should be declared invalid on the grounds that the Economic Impact Statement prepared in connection therewith is invalid with respect to both its substance and methodology and as a result, the unincorporated customers of municipally operated electric utilities across the state have been adversely prejudiced in that they have been completely misled and misinformed as to the purpose and effects of this Rule.

II.

FLA. ADMIN. CODE RULE 25-9.525 OPERATES TO DENY EXTRA-MUNICIPAL CUSTOMERS THE EQUAL PROTECTION OF THE LAW.

The proposed Rule is violative of the guarantee of the equal protection of the law provided by Article I, Section 2, Constitution of the State of Florida.

The Rule purports to equalize rates, but it would in fact operate in such a manner as to sanction the imposition of discriminatory rates. It is not disputed by Polk County that a municipality may impose a surcharge if there is a higher cost associated with serving extra-municipal customers. City of Tampa vs. Cooper, 17 So. 2d 785 (Fla. 1944); Clay Utility Company vs. City of Jacksonville, 227 So. 2d 516 (1 DCA, 1969). However, as was noted by the First District Court of Appeals in the case of Clay Utility Co. vs. City of Jacksonville, 227 So. 2d 516 (1 DCA, 1969) wherein a surcharge imposed by the City of Jacksonville was considered:

> A review of the decisions rendered by the courts of other jurisdictions establishes the weight of authority to be that a municipality may not lawfully charge customers outside of its geographical limits more for electricity than that charged similar customers within its limits merely because the former group is outside and the latter group inside the geographical boundaries of the municipality. Id. at 517-518

In recognizing that cost is a factor of paramount concern for any rate making body, the Commission stated in its Order of October 4, 1982: "Regulatory economic theory dictates that the price of a product should reflect its costs." (Exh 4) The Commission also stated in that same Order:

> We consider the principle of avoidance of undue discrimination to be of particular relevance to this case. The general purpose of establishing rate classifications is to have a generally homogeneous group of customers so that rates can be designed to track their cost causation pattern. Unless a classification is based upon cost factors with a fairly high correlation to membership in the class, a fairly homogeneous group of customers is not obtained and undue discrimination may result. (Exh 4)

In adopting this Rule, however, the Commission appears to have abandoned a cost causality approach to economic regulatory theory. Therefore, in order for the Commission to adopt a rule which on its face discriminates between similarly situated classes of customers a distinction must be drawn between the two classes in question, namely municipal and extra-municipal customers, in order for there to be some basis for dissimilar treatment.

As was noted by the U. S. Fourth Circuit Court of Appeals in the case of St. Michaels Utilities Commission v. Federal Power Commission, 377 F. 2d 912 (4th Cir. 1967) construing a provision of the Federal Power Act:

> Discrimination in rates is prohibited by Section 205(b) of the Federal Power Act 16 U. S. C. A. Section 824 d(b). This provision is closely modeled on the Interstate Commerce Acts, 47 U. S. C. A. Section 1 et seq. The purpose of the latter "... is to prevent favoritism by insuring equality of treatment on rates for substantially similar services. (Cites omitted) Thus it has been held that differences in rates are justified where they are predicated upon difference in facts - costs of services or otherwise - and where there exists a difference in rates which is attacked as illegally discriminatory, judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classifications among customers and differences among the rates charged them. Id. at 915

This Court stated in the case of Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978):

> The pole star for judging the validity of a particular classification is whether that classification "rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (cites omitted) Id. at 1349

It has previously been demonstrated that the disparate treatment afforded the two otherwise similarly situated classes of customers is not grounded in the relative costs incurred to serve each class. Further, there does not appear any assertion in either the Rule, the Economic Impact Statement, or the record which

indicates there is any difference between municipal or extra-municipal customers which would justify such disparate treatment. To the contrary, at least one Florida Court has stated that such difference in and of itself does not justify dissimilar treatment Clay Utility Co. v. City of Jacksonville, 227 So. 2d 516 (1 DCA, 1969).

In addition, there was no evidence whatever before the Commission that a municipality might experience difficulty in refinancing debt secured by a public service tax as may be asserted by the Appellees as a ground for the discriminatory treatment of customers by the Rule. Even if there were evidence before the Commission that a municipality might experience difficulty in refinancing debt secured by a pledge of utility tax revenues, such evidence would not afford a basis for the Rule's dissimilar treatment of otherwise similarly situated customers. If a surcharge were disallowed by the Commission as not being supported on a cost to serve basis, there would be absolutely no requirement that a city refinance its debt served by utility tax revenues.

If the governing body of such a city, however, felt uncomfortable about its municipal customers paying a higher amount for electricity as a result of the imposition of a utility tax than unincorporated customers,

it might well choose to eliminate the tax and raise rates both within and without the city to recover lost revenue and in so doing might incur a certain amount of expense. Political expediency, however, cannot and should not provide a basis for the sanction by the Commission of the imposition by a municipality of patently discriminatory rates. Therefore, based upon the foregoing argument and authority, the Rule would, in its operation, constitute a denial to the extra-municipal customer of equal protection of the law as guaranteed by the Constitution of the State of Florida.

III.

FLA. ADMIN. CODE RULE 25-9.525 OPERATES TO DEPRIVE EXTRA-MUNICIPAL CUSTOMERS OF PROCEDURAL DUE PROCESS OF LAW.

The proposed Rule in its application would result in a denial of due process of law as guaranteed by Article I, Section 9 of the Constitution of the State of Florida.

There are many municipalities in Florida currently operating electric utilities which do not impose a surcharge on their extra-municipal customers. (Exh 2)

Operating under the Rule, these cities might, if they already imposed a utility tax, simply file a tariff imposing a surcharge thereby subjecting the

extra-municipal customer to the payment of a discriminatory rate. In such a case the extra-municipal customer would not be afforded any meaningful due process rights. The essence of procedural due process is an opportunity to be heard. In confirming that the Florida Public Service Commission had jurisdiction to examine the City of Tallahassee's differential charges to customers within and without its corporate limits, the Florida Supreme Court observed in the case of City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981):

> The rates for service supplied by the city's utility are set by the Tallahassee City Commission. That body is charged with the duty of setting reasonable rates. The Public Service Commission has no authority over those rates. If the rates are unreasonable, the ratepayers have recourse to the city commission. Only citizens of Tallahassee, however, have the power of ballot over their city commissioners. Id. at 163.

This language indicates that the Commission, in the opinion of this Court, is the only agency which might serve to protect the interests of the extra-municipal customer. This concern was also felt by Commission staff. (Tr 14-15) Since the adoption of the Rule, it seems that even that level of protection afforded the extra-municipal customer has disappeared, and the extra-municipal customer is expected to bear the burden of a surcharge which

results in a discriminatory rate without recourse regardless of the justification for the surcharge on the basis of cost or any other factor.

IV.

THE ADOPTION OF FLA. ADMIN. CODE RULE 25-9.525 IS BEYOND THE JURISDICTION AND AUTHORITY OF THE COMMISSION INASMUCH AS IT WOULD GRANT MUNICIPALTIES WHICH OPERATE AN ELECTRIC UTILITY THE APPARENT AUTHORITY TO LEVY A TAX BEYOND THEIR CORPORATE BOUNDARIES IN VIOLATION OF THE CONSTITUTION OF THE STATE OF FLORIDA.

A public service tax levied by a municipality pursuant to Chapter 166, Florida Statutes, is a tax levied upon a person who purchases a designated commodity enumerated in Section 166.231, Florida Statutes. This Court noted in the case of City of Orlando v. Natural Gas and Appliance Co., Inc., 57 So. 2d 853 (Fla. 1952):

> The (public service) tax is upon the purchaser of the commodity and is upon the person who makes the purchase. It makes no difference whether the commodity is purchased from a public utility.... The tax is not upon the person or the public utility selling the commodity, the tax is upon the person purchasing the commodity. Id. at 855

In addition, the levy by a municipality of a public service tax is entirely within the discretion of the governing body of the municipality. Belcher Oil Co. v. Dade Co., 271 So. 2d 118 (Fla. 1972). Furthermore, a municipality may not levy a utility tax on customers located beyond their corporate limits. City of Ocoee v. Bell, 108 So. 2d 766 (2 DCA, 1959); 1975 Op. Atty. Gen. Fla. 075-20 (Feb. 4, 1975).

The surcharge as contemplated by Fla. Admin. Code Rule 25-9.525 is an additional amount charged extra-municipal customers purportedly to equalize the electric rates charged both inside and outside a municipality which operates an electric utility. In reality, the surcharge as allowed by Fla. Admin. Code Rule 25-9.525 would constitute a tax upon the extra-municipal customer.

It is stated in 71 Fla. Jur 2d 352:

> The name or designation given a particular financial burden by the legislature or other public body authorized to impose it is not conclusive in determining whether or not it is a tax.

The courts of this State have in the past inquired into the nature of a charge or fee in order to determine whether or not it constitutes an illegal tax. Flood

v. State, 95 Fla. 1003, 117 So. 385 (1928). Broward Co. v. Janis Development Corp., 311 So. 2d 371 (4 DCA, 1975)

As noted earlier, the Rule represents an abandonment by the Commission of a cost causality approach to regulatory economic theory, (Tr 9-10). Therefore, it cannot be said that revenues received by a municipality which impose a surcharge are necessary to offset a greater cost to serve the extra-municipal customer. In addition, the surcharge allowed by the Rule is identical in rate to the public service tax levied by a particular municipality. Indeed, according to the Rule, the existence of a utility tax is a condition precedent to the imposition of a surcharge. Finally, there is no restriction on the manner in which revenues received as a result of a surcharge may be spent by a municipality. In fact, revenues received by a municipality from a municipally operated electric utility are used to finance the cost of government unrelated to the provision of utility services. (Tr 14, 38)

As a general rule, a burden directly or indirectly imposed upon persons or property for the support of governmental activities is an exercise of the taxing power. Kathleen Citrus Land Co. v. City of Lakeland, 169

So. 356 (Fla. 1936). It cannot be disputed, however, that a state or one of its subdivisions frequently receives income from sources other than taxation, so all forms of public revenues are not taxes. In this case though, the Commission has authorized a municipality by rule to impose a charge completely unrelated to the cost of service which has exactly the same characteristics of a public service tax which a municipality has voluntarily imposed upon its municipal customers and is dependent for its very existence upon the existence of a public service tax within the municipality.

The surcharge, in other words, has all the indicia of a tax, and is in all respects relevant to this case identical with the public service tax imposed upon those who reside within municipal limits. In fact, a member of the Commission staff testified he felt the surcharge was under the circumstances of the Rule a tax. (Tr 12) Taxation is an attribute of the sovereign and requires the consent of the governed through duly accredited representatives. Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936).

It can be exercised only pursuant to a valid statute containing definite limitations. Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936).

Article VII, Section 9 of the Constitution of the State of Florida provides that municipalities may be authorized by general law to levy taxes other than ad valorem taxes. Only the legislature, and not the Florida Public Service Commission, is empowered to authorize a municipality to levy such tax. Based upon the foregoing argument and authority, Fla. Admin. Code Rule 25- 9.525 is invalid because it would authorize a municipality to impose a tax on customers beyond its corporate limits in violation of Article VII, Sections 1 and 9 of the Constitution of the State of Florida.

SUMMARY

In summary, based upon the foregoing argument and authority, Fla. Admin. Code Rule 25-9.525 should be declared invalid and unconstitutional on the grounds that the Economic Impact Statement prepared in connection with the Rule is invalid, the Rule would in its application constitute a denial of equal protection of the law to the extra-municipal customer, the Rule in its application would deprive the extra-municipal customer of property without due process of law; and the Rule would grant a municipality the authority to levy a tax beyond its corporate limits; all in violation of the Constitution of the State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by first class U. S. mail this 19 day of October, 1983 to the following:

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