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.

BRIEF OF APPELLANT LEON COUNTY

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ATTORNEYS FOR LEON COUNTY

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PRELIMINARY STATEMENT

In this brief the Appellant, Leon County, a political subdivision of the State of Florida, will be referred to as "Leon". Appellant Polk County, a political subdivision of the State of Florida, will be referred to as "Polk". The City of Tallahassee, the City of Lakeland and the Orlando Utilities Commission will be referred to by their respective names or as Appellees. The Florida Public Service Commission will be referred to as "PSC". References to the record will be by page number (R-), except for the transcript of hearing held on March 23, 1983, which will be referred to by page number (T-). Exhibits will be referred to by exhibit numbers (Ex. No.).

STATEMENT OF THE CASE

On February 25, 1983, the PSC entered its Order No. 11652 proposing Rule 25-9.525 of the Florida Administrative Code relating to municipal surcharge on customers living outside municipal limits (R-2). Leon, on March 16, 1983, and Polk, on March 14, 1983, requested hearings on the proposed rule (R-4, R-6) pursuant to §120.54(3) Fla. Stat. (1981) and on March 17, 1983, Tallahassee filed its Comments to the Proposed Rule (R-8).

The requested hearing was held on March 23, 1983 (T-1-57). Following the hearing, the PSC Hearing Officer, as required by Rule 25-22.16(5) Florida Administrative Code, submitted his findings and recommendations to the PSC for final action. Unlike a normal staff recommendation, the Hearing Officer's findings follow an evidentiary public hearing authorized by statute and are required by PSC rule. Further, Rule 25-22.17 Florida Administrative Code requires the PSC to consider the Hearing Officer's recommendation. The subject document, however, has been omitted from the record by the PSC Clerk and is the subject of a pending Motion to Supplement Record. The document is contained in the appendix to this brief.

The matter was addressed by the PSC on May 17, 1983 and resulted in the issuance of PSC Order No. 11975 adopting the proposed rule (R-21). Polk filed its Notice of Appeal of the PSC action on June 24, 1983 (R-23) and Leon filed its Petition for Review of Final Agency Action on June 24, 1983 (R-24). The PSC has on its own motion, lifted the automatic stay imposed by Rule 9.310(b)(2), Florida Rules of Appellate Procedure by Order No. 12370 dated

August 18, 1983. Leon has been granted an extension of time until September 20, 1983 within which to file its initial brief.

STATEMENT OF THE FACTS

On October 4, 1982, the PSC issued Order No. 11221 in Docket No. 800495-EU relating to the extra-municipal surcharge being imposed by the City of Tallahassee on its electric customers residing within the unincorporated areas of Leon County (Ex. No. 4). This order is currently the subject of review by this Court in an appeal filed by the City of Tallahassee styled City of Tallahassee v. Florida Public Service Commission, Case No. 62-833. That order is not the subject of this appeal. However, the language contained within that order precipitated the proposed rule which is the subject of this appeal. Although in Order No. 11221, the PSC concluded that Tallahassee's surcharge was not justified on a cost-of-service basis and ordered the elimination of such surcharge, page 7 of such order (Ex. No. 4) contained the following provisions:

> "Where a municipality charges an out-of-city surcharge equal to its in-city utilities tax, a rate differental 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 cost to the rate payer would be the same." (Emphasis Supplied)

Following publication of the PSC's order proposing the rule (R-2), Leon and Polk requested hearings on the proposed rule and no other pleadings appear in the record prior to the hearing, other than the comments to the proposed rule filed by Tallahassee (R-8).

The hearing on the proposed rule was held at the PSC offices by Deputy General Counsel and Hearing Officer Patrick K. Wiggins on March 23, 1983. The only parties present at the hearing were the PSC, Leon and Polk counties and the only witnesses who testified before the Hearing Officer were Jim Blondin and Barry Payne, both PSC staff personnel (T-1-57). Such witnesses testified that the only reason for the proposed rule was their perception of the PSC's intent as expressed in the above referenced City of Tallahassee Order No. 11221 (Ex. No. 4).

The PSC staff further stated that the rule was a departure from the PSC's established policy of cost-based pricing (T-10), that the equivalency surcharge was tantamount to a tax which was outside of the jurisdictional purview of the PSC (T-12), that the rule would allow municipalities to tax out-of-city residents who had no voting power in the governmental entity imposing the tax (T-14,15), and that the revenues generated by the proposed surcharge would be used to support non-utility services within the city (T-38,40). Perhaps, the role of the Hearing Officer is best put into perspective by a quotation from the Hearing Officer found at page 33 of the transcript: "Now, I can recommend to them they don't adopt the rule, but I have a feeling what they're going to do with that recommendation." Although there was no evidence or testimony giving any factual or evidentiary support to the proposed rule, and although the Hearing Officer recommended that the rule be withdrawn (Appendix 1), the PSC, nevertheless, on May 26, 1983, in Order No. 11975 adopted the proposed rule (R-21). Both the order proposing the rule (R-2) and the order adopting the rule (R-21) cite §366.05(1) Fla. Stat. (1981) as the specific authority

for the rule and §366.04(2)(b) Fla. Stat. (1981) as the law implemented.

ARGUMENT

POINT I.

THERE IS NO AUTHORITY FOR THE FLORIDA PUBLIC SERVICE COMMISSION TO ADOPT RULE 25-9.525 FLORIDA ADMINISTRATIVE CODE AS PROMULGATED.

It is elemental administrative law that an administrative body or commission, unless constitutionally created, derives only the power specified by general law. Fiat Motors of North America, Inc. v. Calvin, 356 So.2d 908 (Fla. 1st DCA), cert. denied, 360 So.2d 1247 (Fla. 1978); Florida Power and Light Co. v. Florida Public Service Commission, Case No. 60,671, March 17, 1983, pending rehearing. No agency has inherent rule-making authority, §120.54(14) Fla. Stat. (1981). Each rule must state the statute from which the adoptive authority is derived, and the statute being implemented. §120.54(7) Fla. Stat. (1981). Absent such authority a rule must fail.

This Court has ruled in City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982) that the surcharge being imposed by Tallahassee is part of a classification system, is a matter of rate structure rather than rate, and is subject to the jurisdiction of the PSC pursuant to §366.04(2)(b) Fla. Stat.

> (2) In the exercise of its jurisdiction, the commission shall have power over...municipal electric utilities for the following purposes:
>
> (a) ...
> (b) To prescribe a rate structure for all electric utilities.
> (c) ...
> (d) ...
> (e) ...
> (f) ...
>
> §366.04(2) Fla. Stat.

This Court has differentated between "rate" and "rate structure" as follows:

> "'Rates' refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates." City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982) at p. 163.

A reading of the rule in question and the Economic Impact Statement thereto (Ex. 1(c)) clearly shows that the PSC has exceeded its authority in attempting to regulate the amount of a surcharge.

The Mann decision, supra, clearly told the City of Tallahassee and the PSC that §366.04(2)(b) Fla. Stat. gave the PSC no authority to regulate dollar amounts charged by municipal utilities. Rule 25-9.525 clearly states that its sole purpose is to regulate the amount of dollars to be charged to municipal users living beyond the municipal boundaries. The only purpose of the rule is to allow municipalities to collect from extra-municipal users a charge equivalent to the municipal public service tax so that the amount of the bill will be the same (R-2). The rule does not require that the surcharge bear any relation to any cost-of-service or level-of-service differential.

The only testimony before the PSC Hearing Officer supports the argument that the PSC's only purpose with the proposed rule is with the amount of the customer's bill. Witness Blondin stated that "the object of it (the proposed rule) is to ensure that the bottom line bills after taxes have been applied are equal inside and outside of the city...." (T-8). This view is supported by Witness Payne (T-22) and in the Economic Impact Statement prepared for the proposed rule and prepared by Witness

Payne (T-22) and (Ex. 1(c)) of the transcript.

The PSC staff perceived its direction as coming from Order No. 11221 issued by the PSC when it found Tallahassee's surcharge to be unduly discriminatory and ruled it discontinued. The PSC was concerned, however, that some municipalities may have pledged utility tax revenues and would not have the option to eliminate the utility tax, thereby creating the possibility of extra-municipal users paying less for a given usage than municipal users. Since no evidence was received on this issue in the Tallahassee case, the PSC initiated the instant rulemaking proceeding. The PSC did state, however, that:

> 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.
> PSC Order No. 11221, page 7. Ex. No. 4.

It was that language and its departure from prior PSC precedent which placed the PSC staff in a quandry during the hearing on the proposed rule where the only evidence regarding the "equivalency" surcharge was even taken. Witness Blondin stated that the rule was a codification of his preception of the PSC's pronouncement in the Tallahassee case (T-8). Blondin further testified that the rule was prepared knowing that it was an abandonment of cost-based pricing and would be automatic without regard to the cost of service (T-10), that the proposed rule was a tax and beyond the jurisdiction of the PSC (T-12), and that the rule would allow municipalities to tax beyond their boundaries (T-12). The rule was proposed in spite of staff's concern that the

rule would allow imposition of a surcharge on users who had no direct control over the persons imposing the tax (T-15). Blondin testified that the appropriate method is a case-by-case review to determine if a surcharge is supported by a cost-of-service analysis.

Further, Blondin was concerned that the proposed rule was a departure from the PSC's recent rules relating to franchise fees. For many years, the PSC had allowed utilities to treat franchise fees as a general operating expense paid equally by all users of the system. In City of Plant City v. Hawkins, 375 So.2d 1072 (Fla. 1979), this Court approved the PSC's change of policy which now requires that franchise fees be billed only to those persons within a municipality charging the fee. With regard to franchise fee, at least, the PSC feels that such costs must be born by the resident customers of the municipality imposing the fee and not by the other users. The PSC staff in the instant case presented no evidence as to why utility tax/surcharges should be treated differently.

Witness Payne was also concerned that the rule may expressly allow price discrimination. The PSC in Order 11221 stated that the utility tax was exactly that - a tax. A surcharge is, however, a charge for electric utility service. The rule, therefore, expressly approves rate discrimination and allows as a part of the base rate to out-of-city users, an element totally unassociated with the cost of providing the service (T-25-27). Finally, the Hearing Officer and Witness Payne concluded that the only purpose of a non-cost of service equivalency surcharge which is used to finance other municipal services is to subsidize the municipality's ad valorem tax levy (T-40).

It can thus be seen that neither §366.04(2)(b) Fla. Stat. nor PSC Order 11221 gives any authority to the PSC to adopt the proposed rule. Any authority, therefore, must come from the other statute cited in the proposed rule, §366.05(1) Fla. Stat. This statute states:

> (1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; and to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.

This provision grants the PSC broad powers over public utilities, but public utilities are defined in §366.02(1) Fla. Stat. to exclude municipal utilities. §366.05(1) Fla. Stat. grants no authority to the PSC, therefore, to adopt the proposed rule, even though being cited in the rule as the specific authority.

POINT II.

THE PROPOSED RULE AUTHORIZES A MUNICIPALITY TO EXACT A TAX ON PERSONS BEYOND ITS CORPORATE LIMITS CONTRARY TO SECTION 166.231 FLORIDA STATUTES AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

Section 166.231, Fla. Stat. grants authority to municipalities to levy up to a ten percent (10%) tax on purchases of electricity within the municipality. The levy of this tax is entirely discretion with the municipality, Belcher Oil Co. v. Dade County, 271 So.2d 118 (Fla. 1972) and may not be levied on customers located beyond the imposing municipality's corporate limits. City of Ocoee v. Bell, 108 So.2d 766 (Fla. 2nd DCA); Opinion of Attorney General 075-20. The proposed rule allows any municipality which charges a public service tax pursuant to Section 166.231 to charge an equal amount, designated a surcharge, on its users beyond its municipal limits. A city desiring to avail itself of this rule would need do no more than file a written document with the Commission showing that the "surcharge" is no more than the public service tax. There is no requirement that such surcharge be related to the cost of providing the electric service, there is no requirement that the municipality provide these services to the unincorporated area of the County upon which the surcharge is to be imposed, nor is there any requirement that the question of whether or not the surcharge is to be imposed be voted on by those persons who would be subjected to the surcharge. There is not even a requirement that the persons paying the surcharge receive any benefit whatsoever from the levy!

The Hearing Officer, in questioning Witness Payne (T-38-40), recognized that the revenues generated by the surcharge and being non-cost related were merely revenues generated by the utility service which were being used to fund other municipal services within the municipality and, further, that by giving the num-icipalities the right to impose the surcharge, the PSC was allow-ing the cities to require the unincorporated area utility user to subsidize the City's ad valorem tax base. In other words, a municipality, pursuant to the proposed rule, can generate revenues which would otherwise have to be generated by city imposed ad valorem taxes.

"A tax is a charge on persons or property to raise money for public purposes, or the payment of public expenses in support of government activities." 50 Fla.Jur.2d Taxation §1.2 page 18. "Any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their per-formance merged in the general benefit, is a tax." 71 Am.Jur. 2d State and Local Taxation §2 page 344. "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). A review of the above-cited authority and the proposed rule in question makes it obvious that the proposed rule would allow a municipality to tax persons living beyond the corporate boundaries of the municipality and utilize the funds for general governmental purposes. It is further clear that this proposed rule is directly contradictory to §166.231 Fla. Stat., which

authorizes a municipal public utility tax, but only within the boundaries of the municipality. There is no constitutional or statutory authority which gives the authority to either a municipality to tax beyond its corporate boundaries, or to the Public Service Commission to authorize such a tax. This specific issue was an evil addressed by this Court in its earlier pronouncement dealing with the jurisdiction of the PSC over the City surcharge. In City of Tallahassee v. Mann, supra, this Court stated at page 163 as follows:

> "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 the ballot over their City Commissioners."
> (Emphasis Supplied)

This Court has already recognized the injustice of a municipally imposed surcharge on unincorporated residents and agreed that the PSC had jurisdiction over such a surcharge. The rule, however, being proposed by the PSC appears to give back to municipalities exactly what the PSC attempted to remedy when it exercised jurisdiction over surcharges. That is, that the PSC now seems willing to allow municipal utilities to charge an additional ten percent (10%) on the utility bills of unincorporated users, which charge need bear no relationship whatsoever to the cost of providing the service.

The power of a municipality to tax must be derived from the Constitution of the State of Florida or from a general law promulgated pursuant thereto. No authority has been found which would authorize the municipality to charge such tax, nor has any

authority been found granting to the PSC the power to authorize such a tax. "Taxation is an attribute of sovereignty and requires the consent of the governed through duly accredited representatives. It can be exercised only pursuant to a valid statute containing definite limitations." Kathleen Citrus Land Co. v. City of Lakeland, supra.

To attempt to impose such a tax on an unincorporated area user who has no voice whatsoever in the imposition of such tax is a gross violation of such users' rights of due process and equal protection guaranteed by the Constitutions of the State of Florida and the United States. The imposition of such tax would be solely at the whim of the governing body of a municipality, which in no way is answerable to an unincorporated area user.

POINT III.

THE ACTION OF THE FLORIDA PUBLIC SERVICE COMMISSION IN ADOPTING RULE 25-9.525 IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND, THEREFORE, SHOULD BE REVERSED.

The order of the PSC adopting the rule in question, can be upheld by this Court only if the order complies with the essential requirements of law and is supported by competent and substantial evidence in the record of this proceeding. State v. Hawkins, 364 So.2d 723 (Fla. 1978). Where the record contains no competent and substantial evidence to support an order of the PSC, the PSC's action will be quashed or set aside. City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976), State v. Hawkins, 364 So.2d 723 (Fla. 1978). We now turn to a review of the record in the instant proceeding to see if there is any competent and substantial evidence to support the action of the PSC in its order adopting the proposed rule. As earlier stated, only two witnesses gave testimony before the Hearing Officer in this matter. Their testimony can best be summarized by saying that they drafted the rule only because they were directed to do so by the PSC and could find no jusitification for the proposed rule. Indeed, Witness Blondin testified that the rule was a departure from prior PSC policy regarding cost-base pricing, a tax, beyond the jurisdiction of the PSC, and was a departure from the philosophy of the PSC as expressed in City of Plant City v. Hawkins, 375 So.2d 1072 (Fla. 1979) with regard to the allocation of franchise fees. Further, because of the designation of a surcharge as part of the rate base by the PSC in the City of Tallahassee Order, the proposed

rule would allow an explicit price discrimination. The staff also indicated that while the PSC's concern was with surcharges only where municipal taxes were pledged against bonded indebtedness, the proposed rule places no restrictions on a municipality's imposition of an extra-territorial surcharge. Thus, while it may have been the PSC's intent to authorize an equivalency surcharge only when a municipality had pledged its utility tax revenues against bonded indebtedness, the rule is carte blanche authorization for any municipality which imposes a utility tax pursuant to Section 166.231, Fla. Stat. to also impose a surcharge of an equal amount without regard to a pledge of the utility taxes or any relationship the surcharge bears to the cost of providing the utility to the unincorporated area users.

The Hearing Officer having heard and observed the witnesses, argument of all interested parties who appeared during the hearing and having reviewed the documentary evidence produced at the hearing, recommended that the rule be withdrawn. The Hearing Officer based his conclusion on the fact that the rule was an abandonment of the PSC's policy of cost-base pricing, which is the preferred approach to setting rates. The Hearing Officer also determined that the surcharge was a tax placed on non-residents by the municipality. The PSC,with no additional evidence,issued Order No. 11975 adopting the proposed rule in spite of the Hearing Officer's recommendation. The order adopting the rule (R-21) ignores the memorandum filed by the Hearing Officer and thus ignores the entire public hearing process utilized to review the proposed rule. Indeed, it appears that the Hearing Officer's concern was well founded that the PSC was going to do whatever

it wanted to do anyway when he stated "Now, I can recommend to them that they don't adopt the rule, but I have a feeling what they are going to do with that recommendation." (T-33) Contrary to the PSC's adoption of the rule changing its policy regarding the spread v. direct method of billing franchise fees in City of Plant City v. Hawkins, supra, the Order on appeal is devoid of any findings of fact and no attempt is made to address the issues raised by the parties who appeared at the public hearing or the direct findings of the Hearing Officer.

As a matter of fact, the order adopting the proposed rule does not even address the issue with which the PSC had expressed concern regarding the inability of municipalities to eliminate utility taxes because of bonded indebtedness. The PSC in the earlier City of Tallahassee order (Ex. No. 4) had expressed concern that utility tax revenues may have been pledged to pay bonded indebtedness. No evidence was generated regarding this issue, hence the current rule proceeding. The rule, as proposed, also fails to address the issue of bonded indebtedness, although such issue should be of no concern to either the PSC or this Court. Although this issue may be somewhat of a problem, it is certainly not without solution by means other than the proposed rule. Municipalities have numerous ways of generating replacement revenues, whether it be from taxes, utility profits or any of a number of other funding sources.

Indeed, throughout this proceeding, the PSC has blatantly violated the entire concept of the Administrative Procedures Act of Chapter 120, which was intended to require administrative agencies to respond meaningfully to the results of a public hearing

process. The PSC has done no more than pay lip service to the requirements of Chapter 120 by holding a hearing and then ignoring the results of such hearing. It is this heavyhanded action of administrative agencies that the Administrative Procedures Act is designed to prevent. Not only is there no competent and substantial evidence upon which the proposed rule can be supported, there is no evidence whatsoever.

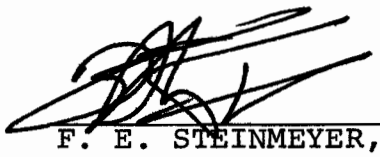
CONCLUSION

The statutes cited by the PSC in its proposed rule 25-9.525 contain no authority for the PSC to adopt the rule as promulgated. Because the PSC has no inherent rulemaking power the rule must be invalidated.

The proposed rule is no more than a tax by a municipality on persons residing beyond the municipality's corporate limits. As proposed the rule is contrary to the Constitution of the State of Florida and the United States.

The PSC, in Order No.11975 adopting the proposed rule has failed to comply with the essential requirements of law. The order adopting the rule is not based on competent substantial evidence and must be invalidated.

Respectfully submitted this 20th day of September, 1983.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and copy of the foregoing has been furnished by U. S. Mail this 19th day of September, 1983 to the following:

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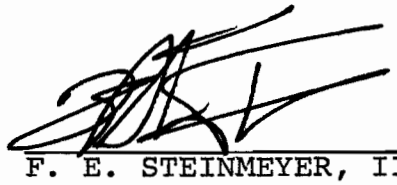

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