18
9 affs

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.

REPLY BRIEF OF APPELLANT LEON COUNTY

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

O. EARL BLACK, JR.
Assistant County Attorney
Leon County Courthouse
Room 213
Tallahassee, Florida 32301
(904) 487-1008

ATTORNEYS FOR LEON COUNTY

TABLE OF CONTENTS

TABLE OF CITATIONS

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.

PRELIMINARY STATEMENT

Appellant Leon County in this reply brief will employ the same references and designations as previously used in its initial brief filed herein.

ARGUMENT

REPLY POINT I

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

Appellees have either misunderstood or misinterpreted the position Leon County has taken in this proceeding and are attempting to convince this Court that the County is taking a position inconsistent with that taken by the County in earlier cases regarding the City of Tallahassee's surcharge. For instance, the City alludes to a separate PSC proceeding dealing with the City's equivalency surcharge and states that the County has not appealed the referenced order. The City fails to inform this Court that the Order referred to was an interim order, and that when the PSC did enter an order approving the City's equivalency surcharge, the County immediately requested a formal evidentiary hearing on the Order and such request for hearing has been granted. A copy of the orders and the County's request for hearing are set forth in the appendix to this brief.

In a similar vein, the PSC states on page 13 of its brief that the County's position in City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982) is inconsistent with the County's position in its initial brief regarding the jurisdiction of the PSC. To be sure, in City of Tallahassee v. Mann, supra, the County agreed that the PSC, pursuant to §366.04(2)(b), Fla. Stat. had jurisdiction over the rate structure of municipal electric utilities. Further, the County agreed that the City of Tallahassee's differential charges to its unincorporated users, designated as a surcharge, constituted a classification system and thus was within the rate structure

jurisdiction of the PSC. The County took a consistent position in City of Tallahassee v. Florida Public Service Commission, Case No. 62,833 decided December 1, 1983 in which the County never objected to the imposition of a surcharge, but only if there was a reasonable basis for the imposition of a surcharge other than the location of a residence or an agreement between the City and County for the provision of municipal services. In that case, this Court affirmed the order of the Public Service Commission which held that the City's extra-territorial surcharge was not justified on a cost-of-service basis or on the basis of the provision of municipal services, the only two bases upon which the City attempted to support its surcharge.

In another case decided by this Court dealing with the City of Tallahassee's surcharge, City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983), the County again agreed with the basic premise of the PSC that a formal rulemaking procedure was not required as a matter of law and that administrative agencies could develop policy by adjudication. In that case, the Court stated that the factors listed by the PSC as potential justifications for surcharges were appropriate, and the County agrees. However, conspicuous in its absence from this list of factors is the public service tax.

At no time in this case did Leon County argue that the PSC has no authority or jurisdiction over extra-municipal surcharges. What Leon County does urge is that, as promulgated, Rule 25-9.525, Florida Administrative Code is beyond the authority of the PSC to adopt.

No Appellee has disagreed with the ruling of this Court in

Florida Power and Light v. Florida Public Service Commission, Case 60,671 decided March 17, 1983 (rehearing pending). Simply stated, this Court therein held that rules must contain a specific reference to the statute from which they are derived. The rule in question authorizes a municipal surcharge on persons residing beyond its municipal limits in an amount equal to the public service tax charged by the municipality within its corporate limits. No other justification is required by the PSC for the imposition of such surcharge. Further, the proposed rule states that the authority for its adoption is §366.05(1), Fla. Stat. and the law implemented is §366.04(2)(b), Fla. Stat.

This Court has already determined in City of Tallahassee v. Mann, supra, that §366.04(2)(b), Fla. Stat. does grant the PSC jurisdiction over the rate structure of municipal utilities and, further, that a surcharge is a part of a classification or rate structure of a municipal utility. The Court further clearly stated that rate structure was the classification system used to justify different rates, but was not the dollar amount charged for a particular service. The rule promulgated has, as its only purpose, the regulation of the dollar amount to be charged a customer living outside the municipal boundary.

Nor does §366.05(1), Fla. Stat. authorize the rule in question. No Appellee has disputed the fact that §366.05(1), Fla. Stat. applies to public utilities and that public utilities are defined to exclude municipal utilities. Instead, Appellees attempt to support the rule by provisions of the Florida Statutes other than those stated in the promulgated rule. That attempt, however, at this stage of the proceeding, fails to comply with the requirements of §120.54(7), Fla. Stat.

Lest there be any doubt regarding the County's perception of the PSC's authority over municipal surcharges, the County does not question the ability of the PSC, following the procedural requirements of Chapter 120, Fla. Stat., to adopt a rule relating to extra-territorial surcharges of municipal utilities. Indeed, the County has participated in the very development of the recent case law dealing with such surcharges. This issue of "equivalency surcharges," however, arose as an afterthought in the latest case of City of Tallahassee v. Florida Public Service Commission, supra. A review of the order striking the City of Tallahassee surcharge, PSC Order No. 11221 issued October 4, 1982 clearly shows that the PSC could not address that issue because, as it stated and as this Court quoted in its opinion,

> "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." (emphasis supplied)

A review of the transcript of that proceeding clearly shows that the issue of the municipal public service tax or an equivalency surcharge was never addressed. Indeed, the then Chairman of the PSC, Mr. Cresse, at page 983 of the transcript of that proceeding, actually questioned the authority of the PSC to approve the dollar amount of a surcharge on extra-municipal customers. The County had hoped that in the rule proceeding dealing with the surcharge, such issue would be addressed. Unfortunately that has not been the case and no authority has yet been presented to this Court to sustain the authority of the PSC to regulate the dollar amount of an extra-territorial municipal surcharge.

Certainly the list of authority cited by the City of Tallahassee in its brief does not serve as authority for the instant rule.

Surcharges in those cases were authorized by law or otherwise justified by competent substantial evidence in a judicial or quasi-judicial proceeding. Again, Leon County has never argued that additional cost was not a justification for a surcharge. Nor, has Leon County ever argued that other factors could not justify, in the appropriate case, the imposition of a surcharge. The rule as promulgated, however, ignores any basis for a surcharge other than the existence of a public service tax authorized by §166.231, Fla. Stat.

REPLY POINT II

THE PROPOSED RULE AUTHORIZES A MUNICIPALITY TO TAX 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.

Appellees present several novel arguments to convince this Court that the rule in question is not merely an attempt by the PSC to expand the scope of §166.231, Fla. Stat. The Orlando Utilities Commission and the City of Lakeland suggest that the rule is justified because cities have been charging surcharges for a number of years. The PSC acknowledges on page 11 of its brief that the PSC has no jurisdiction over the amount of the surcharge, but suggests that Article VIII, §2(B), Fla. Const. (1968) grants authority to a municipality to impose such a charge. The City of Tallahassee in its brief states that the County argues that the surcharge is a tax only because the surcharge approved by the rule was equal in dollar amount to the municipal tax and therefore, must be a tax. It then provides another list of cases for this Court's review which hold that user charges collected by a municipal utility are not considered taxes.

First, the County agrees with the PSC that the PSC does not have jurisdiction to regulate the dollar amount of the surcharge. Additionally, even a cursory review of the rule demands the conclusion that the rule is naked authority for a municipality to charge a surcharge on customers beyond its municipal limits if the municipality has in place a public service tax authorized by §166.231, Fla. Stat. Further, the County does not disagree that municipal utilities may charge reasonable rates for their utility services and that the payments for such utility services are generally not taxes. The County does not disagree that municipal utilities may utilize revenues generated therefrom to fund municipal services other than the provision of the utility, and, in fact, the County has never argued that the City of Tallahassee or any other municipal utility should be required to charge a rate which would be limited to the cost of providing the service. That is not the case, however, with surcharges.

None of these points bear any relationship to the rule promulgated by the PSC. Proposed Rule 25-9.525 states merely that if a municipality imposes a public service tax, then that municipality, for no other reason, is authorized to charge an equal amount to all customers located beyond its corporate limits. There is no requirement that any factors contained in §366.06(1), Fla. Stat. nor any factors contained in the PSC's Show Cause Order to the City of Tallahassee be considered.

This rule was the subject of an evidentiary hearing in accordance with Chapter 120, Fla. Stat. and resulted in a recommendation of the Hearing Officer that the rule be withdrawn. It has been held, and no Appellee herein disagrees, that the public service tax

authorized by §166.231, Fla. Stat. may not be levied on a municipal utility's customer located beyond its corporate limits. City of Ocoee v. Bell, 108 So.2d 766 (Fla. 2nd DCA 1959). The rule as proposed attempts to grant such authority.

Since no other requirement exists in the rule for the imposition of the surcharge other than the public service tax, one cannot help but agree with the PSC's statement, on page 21 of its brief, that the issue is whether the surcharge as authorized by the rule in question is an indirect form of taxation over which the PSC would not have jurisdiction. It is clear, however, from the above analysis that the surcharge can be considered nothing other than a tax. No authority has been presented that grants to the PSC the authority to adopt a rule allowing a municipality to tax through its utility charges unincorporated area residents. Certainly no such authority can be found in the Constitution of the State of Florida, nor, can any legislative authority be found. The only authority given to a municipality to tax in conjunction with its utility services is §166.231, Fla. Stat. The rule as promulgated is a blatant attempt by an administrative agency to exceed the power granted by the legislative act.

That, on its face, the rule may look equitable and non-discriminatory, is not justification for its approval. The argument that the "bottom line" or "end result" is reason enough to justify the rule was just as appropriate when the PSC dealt with the issue of franchise fees. There is a difference in bottom lines of electric bills where a franchise is involved. Those living in a municipality pay the franchise fee while those customers living outside the city limits do not. Thus mere equivalency, although

perhaps non-discriminatory, is not, in and of itself, authority for the PSC's adoption of the rule. To do so gives credence to the philosophy that the end justifies the means and, in this case, the means finds no justification in law.

REPLY 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.

With regard to the issue in Point III of Leon County's initial brief, the Appellees have either rephrased the issue so that the result barely resembles the issue raised by the County, or, in the alternative, have ignored the issue completely. The City of Tallahassee in Point III of its brief completely ignores the argument presented by the County and rephrases the issue as to whether or not a surcharge is unjustly discriminatory. The PSC in Point IV of its brief restates the County's Point III by stating that the County is arguing that the PSC must develop policy by adjudication rather than through the rulemaking procedure and, further, that the hearing requested by the County was merely for the purpose of receiving information. The implication being that the PSC is under no duty to either consider the matters contained in the record of the hearing or to issue a rule which is supported by the record. The Orlando Utilities Commission states merely that the County is applying the wrong burden of proof.

Contrary to the interpretation of the Orlando Utilities Commission, §120.68(10), Fla. Stat. does not apply the "competent substantial evidence" standard only to fact finding proceedings under §120.57, Fla. Stat. The statute clearly states that the competent substantial evidence standard is applicable "... in a

proceeding meeting the requirements of §120.57 of the act, ..." This proceeding clearly met the requirements of §120.57 in that all witnesses were sworn, all parties were given the opportunity to present oral testimony and documentary evidence. All parties were given the chance to cross examine witnesses and to present evidence as they felt appropriate. A verbatim transcript of the proceeding was made and a Hearing Officer assigned to preside over the proceeding. The proceeding resulted in a recommendation of the Hearing Officer. Clearly, therefore, the competent substantial evidence standard applies to this proceeding.

Even, however, if this argument is not persuasive, this Court need look no further than its Order on the Petition for Rehearing in its earlier decision of City of Tallahassee v. Mann, supra. There, Justice Boyd speaking for the Court, clearly set forth the standard of review for a rate making proceeding or a rate structure proceeding for a municipal electric utility. At page 164 Justice Boyd stated:

> "If the Commission orders that the City's rate structure be uniform, the question on review of that order will be whether the findings are based upon competent substantial evidence, (citation omitted) and not whether the City's imposition of a surcharge on non-residents is reasonable or unreasonable." (emphasis supplied)

In the proceedings before this Court where the PSC changed its policy regarding billing of franchise fees, this Court clearly set forth the standard of review. In City of Plant City v. Hawkins, 375 So.2d 1072 (Fla. 1979) the actions of the PSC were upheld when this Court found competent substantial evidence in the record to support the PSC's order. In that proceeding, a Hearing Officer conducted

an evidentiary hearing and had determined the direct method most equitable for billing fees. Unlike this proceeding, however, the PSC adopted the findings of the Hearing Officer and addressed the factual circumstances brought forth during the hearing. The PSC had considered the record before it. The order under review contained factual findings which were supported by the record. In City of St. Petersburg v. Hawkins, 366 So.2d 429 (Fla. 1978) this Court also addressed the issue of the spread versus direct method for billing franchise fees, and the Court upheld the PSC's findings when they found that such findings were supported by competent substantial evidence.

Clearly in the instant proceeding, the order of the PSC adopting the proposed rule falls pitifully short of meeting that standard. The PSC's order contains absolutely no findings of fact and states only in passing that there was a recommendation of the Hearing Officer. The order fails to state, however, that the Hearing Officer recommended that the rule be withdrawn. Indeed, the Commission made no effort in its order to address any of the Hearing Officer's findings.

Rules 25-22.16 and 25-22.17, F.A.C. are the PSC's rules regarding the type of rulemaking proceeding here under review. These rules require the Hearing Officer to preside at the hearing, provide a detailed statement of any changes which will be recommended in the proposed rule and prepare a summary of the hearing and recommendations for changes in the proposed rule to the PSC for final action. While this part of their procedure was met, the actual document containing such findings was not a part of this record. The rule (Rule 25-22.17, F.A.C.) requires that the PSC shall consider

the record, the proposed rule and the recommendation of the person presiding at the hearing. If, in fact, the PSC ever considered the recommendation or the record of the public hearing, there is no evidence of such consideration in the record.

The PSC suggests that the County would require the PSC to abandon the rule adoption proceeding and to decide each matter on a case-by-case adjudicatory basis. This is not the case. Leon County has no objection to either procedure. Leon County does, however, state to this Court that, whichever procedure is used by the PSC, the resultant rule must be based on competent substantial evidence in the record. This Court has ruled that the City failed to support its surcharge in the adjudicatory proceeding. The PSC, by this rule, seeks to do what the City could not in the earlier proceeding - find a way to justify an extra-territorial surcharge.

In any event, it appears that the PSC is proceeding on a case-by-case adjudication basis. The Appendix to the PSC's brief contains orders of the PSC's approval of extra-territorial surcharges for the City of Blountstown, the City of Moore Haven and the City of Wauchula. Additionally, there is pending before the PSC a rule granting to the City of Tallahassee an equivalency surcharge. No order attached to the PSC's brief in the Appendix states that the approval of the extra-territorial surcharge was based on the rule under review in this proceeding.

The PSC finally, on pages 27 and 28 of its brief, states that it does not require that there be any competent substantial evidence in the record of a rule adoption proceeding in order for the PSC to adopt a rule. As can be seen in this proceeding, the PSC does not even deem it appropriate to comment on the recommendations of the

Hearing Officer. Instead, the PSC states that it has had three years of practical adjudicatory experience with this allocation problem. If the referenced three years of adjudicatory experience is the experience that the PSC has received regarding the City of Tallahassee's surcharge, it is clear that none of the experience found its way into the rule. The PSC's concern, as expressed in Order 11221, was that some municipalities who may have pledged their utility tax revenues to pay bonded indebtedness may not be able to eliminate the public service tax. A review of the record before this Court, and the order adopting the rule, do not even address this issue. The PSC suggests that this "experience" is a sufficient basis upon which it may ignore: the facts contained in the record of this proceeding; the recommendation of the Hearing Officer; and the motive originally given by the PSC as a reason for an "equivalency surcharge."

This callous indifference of an administrative agency to the rule adoption process envisioned by the Legislature in Chapter 120, Fla. Stat. and, indeed, envisioned by the agency's own rules, must not go unchecked. A rule must find some basis in the record generated in the rule adoption process, else the process itself becomes a sham. Leon County has never argued, and does not state in this brief, that a proper rule cannot be adopted regarding extra-territorial surcharges. Such a rule must, however, be based on competent substantial evidence in the record, so that the PSC's action will have a yardstick against which it may be measured.

CONCLUSION

For the reasons set forth herein and in Leon County's initial brief, this Court should reverse the action taken by the PSC in adopting Order No. 11975, which adopted Rule 25-9.525.

RESPECTFULLY submitted this 9th day of December, 1983.

O. Earl Black

O. EARL BLACK, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 9th day of December, 1983 to the following:

ROY C. YOUNG
Young, Van Assenderp, Varnadoe & Benton, P.A.
Post Office Box 1833
Tallahassee, Florida 32301

WILLIAM S. BILENKY, GENERAL COUNSEL
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

PATRICK K. WIGGINS, DEPUTY GENERAL COUNSEL
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

FREDERICK M. BRYANT
Pennington, Wilkinson & Dunlap
Post Office Box 3985
Tallahassee, Florida 32315

DAVISSON F. DUNLAP, JR.
Pennington, Wilkinson & Dunlap
Post Office Box 3985
Tallahassee, Florida 32315

MARK F. CARPANINI
Office of County Attorney
Post Office Box 60
Bartow, Florida 33830

ANN CARLIN
Assistant County Attorney
313 East University Avenue
Post Office Box 490
Gainesville, Florida 32602

O. EARL BLACK, JR.