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 POLK COUNTY

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

ARGUMENT

I

BARE ALLEGATIONS UNSUPPORTED BY THE RECORD THAT DEFICIENCIES IN THE ECONOMIC IMPACT STATEMENT WERE EXPLAINED BY STAFF OR CONSIDERED BY THE COMMISSION WILL NOT CURE AN INADEQUATE AND ERRONEOUS ECONOMIC IMPACT STATEMENT.

Counsel for the Commission argues that the Commission was completely informed of the economic impact of the proposed rule and if there was any defect in the Economic Impact Statement (EIS) it was harmless error. (Commission Brief 5-10)

The Appellees note that the author of the EIS was extensively cross examined and that any defect contained in the Statement was explored and explained and therefore, since the Commission had the benefit of this information, the validity of the Rule is insulated from attack on the ground that the EIS is invalid.

Polk County agrees with the Appellees that many aspects of the EIS were explored before the hearing officer, but fails to see how these defects were "explained". The Commission's Answer Brief is devoid of any reference to the transcript of the hearing of March 23, 1983 at which the author of the EIS was examined which indicate where these defects were explained (aside from some being acknowledged), and no reference is made to the

record to indicate that the Commission itself considered or discussed the problems and deficiences raised by Polk County with regard to the substantive content of the EIS.

It should be noted by this Court that the defects in the EIS perceived by Polk County were transmitted to the Commission prior to the hearing at which the Rule was adopted. (Exh. 2) Polk County has not conjured up these deficiencies after the Rule was adopted. The Commission, however, seems to be taking the position that since Polk County made an effort to make its problems with the EIS known to the Commission prior to agency action adopting the Rule, that it may insulate the EIS from attack by simply claiming it considered the defects and was completely informed of the economic impact of the Rule, without any reference to the record to support such an assertion.

If the Court were to hold that the EIS prepared in connection with this Rule was adequate, or that such defects as were raised by the Appellants were obviated by the mere allegation that the Commission was "fully informed" of them, it would seem to indicate that an administrative agency might cure an inadequate or defective EIS by the bare assertion that it was "fully informed" of the defects contained therein. Further, there would be the necessary implication that it would be

in the interests of a party attacking an EIS to "hold back" his concerns to avoid the argument that they were "considered" before adoption of a rule.

The Commission states that Polk County's argument that the EIS is erroneous on its face in that it provides for discriminatory rates is negated by its assertion that the Rule provides for the imposition of non-discriminatory "gross-rates" both within and without municipalities. A utility tax collected by a city under its power of taxation is not a rate for electric service, and no other basis has been demonstrated by the Appellees which supports the disparate treatment of similarly situated customers. Therefore, this argument by the Commission is without foundation.

Next the Commission argues that since the different character of public service taxes and municipal surcharges was amply discussed at the hearing held on the Rule before the hearing examiner, and since the Commission had the benefit of such discussion, the Statement's gross error in the characterization of these charges is somehow cured. Counsel for the Commission, however, does not point to the Record in order to demonstrate that this deficiency was discussed or considered by the Commission in any way prior to the adoption of the Rule.

Finally, the Commission argues that Polk County's

claim that the EIS improperly considered as a usual practice the provision by a municipality of non-utility services to unincorporated customers is obviated by a cavalier claim that the Commission utlimately sets policy, and apparently it is of no concern to the Commission if that "policy" involves the consideration of factors which fly in the face of the respective positions of municipalities and counties established by the Constitution of the State of Florida and general law.

Finally, the Commission inexplicably argues under this point that "What the County really objects to is the imposition of the surcharge at all" and "The County is asking that this Court substitute its judgment for that of the Commission and change the rule to the extent that the surcharge is eliminated." (Commission's Answer Brief p 8) This assertion is unsupported by the record, and is erroneous. (Tr p 45, Polk County's Brief p 15)

II.

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

The Appellee, Florida Public Service Commission, argues that the Commission did not err in considering factors other than cost and that rates which are equal are not discriminatory. Polk County shall address each of these points separately.

It is argued that the Commission did not err in considering factors other than cost. The Appellee goes on to describe all the factors which the Commission may by law consider in determining rate structure. However, the Rule in question does not direct the Commission to any inquiry concerning any of these criteria save and except the existence of a Public Service Tax levied upon those who reside within a municipality. Furthermore, the Record is totally devoid of any evidence supporting the discriminatory rate structure afforded by the Rule which might warrant its adoption in the first place such as a problem with the refinance of bonded indebtedness.

Next, the Commission argues that rates which are equal are not discriminatory, and; "It is fundamentally fair to the two groups of customers within a customer class to be charged the same gross rate by the utility regardless of their street address." (Commission's Brief P 13) The Rule provides for discriminatory rates, not uniform rates. As recognized by the Commission itself, a utility tax is a tax and a surcharge is a charge for electric service and when a surcharge is imposed a discriminatory rate exists. (Exh 4)

A municipality acts in its governmental capacity when it levies a utility tax. It is completely unnecesary for a municipality to be possessed of an electric utility in

order to levy such a tax, and when it does, the tax reaches many more commodities than just electricity. (See Section 166.231, Florida Statutes)

Utility taxes collected by the utility are not revenue to the utility but general revenues of the city and are accounted for appropriately.

Polk County does not see how the utility tax can be considered an element of an electric rate; therefore, the imposition of a surcharge and a public service tax cannot result in a uniform gross rate as argued by the Commission. Apparently the Commission has abandoned its theory that the Rule, although discriminatory, is not unduly discriminatory. Polk County is interested in how far the Commission is willing to extend this notion of uniform gross rates. Investor owned electric utilities serve the residents of many muncipalities which do or may levy a utility tax. Will the Commission entertain requests by such utilities for the authority to impose a surcharge on unincorporated customers on the ground that it is "fundamentally fair to the two groups of customers within a customer class to be charged the same gross rate by the utility regardless of their street address"? Polk County thinks not, and rightly so, for the Commission would correctly point out that since it was the governing body of that particular municipality which imposed the

utility tax, and not the utility itself, and further that the unincorporated customer should not be expected to bear that financial burden. It is no wonder that the proponents of tax cap measures attempt to limit not only ad valorem taxes, but also the revenues received by local governments acting in proprietary capacities when, as is evidenced by this case, municipalities, with the apparent sanction of the Florida Public Service Commission, hopelessly confuse and commingle tax revenues with revenues received from proprietary enterprise.

The Appellees seem to rely upon now repealed Section 172.081, Florida Statutes (1971) as indicative of the validity of the Rule which authorizes the imposition by municipalities of a surcharge not based upon cost or any other factor.

This statute did not in and of itself authorize the imposition of surcharges. That authority has existed for many years and was recognized by this Court in the case of Cooper v. Tampa Electric Co., 17 So. 2d 785 (Fla. 1944). The sole purpose of Chapter 70-997, Laws of Florida (Section 172.081, Florida Statutes, 1971) was to limit the amount of such surcharge.

As the preamble to Chapter 70-997, Laws of Florida, states:

> Whereas, it is the legislative finding that there are consumers of electric and gas utilities who live outside of

> municipalities that own, operate, manage, or control plants or other facilities supplying electricity, gas or water and sewer services to or for them within the state who should be protected from excess charges for such utilities by said municipality in view of the exclusive privilege that the municipality enjoys, ...

Therefore, it appears that Chapter 70-997, Laws of Florida was an attempt by the legislature to limit surcharges and did not in and of itself authorize surcharges.

The Appellees then argue that Chapter 73-129, Laws of Florida, although repealing Chapter 172, Florida Statutes, still left the municipalities with the authority to impose a surcharge. It is the position of Polk County that the Courts have recognized the authority to impose a surcharge as early as the 1944 decision of Cooper v. Tampa Electric Co., id. and therefore the enactment of Chapter 73-129, Laws of Florida, is irrelevant to this appeal in that its effect was to repeal the statutory limitation on the amount of the surcharge imposed by the legislature. In the absence of any statutory limitation on the amount of a surcharge, the matter is governed by the judicial pronouncements on the subject contained in Cooper v. Tampa Electric Co., id. and Clay Utility Co. v. City of Jacksonville, 227 So. 2d 516 (Fla. 1 DCA, 1969). As argued by Polk County at the hearing before the hearing

officer (Tr 45) and in its brief (Polk County's Brief p 15), Polk County does not dispute the ability of a municipality to impose a surcharge. What is being complained of is a Rule adopted by the Commission which authorizes the imposition of a surcharge without any inquiry into cost or any other factor. Not only is this Rule unconstitutional, but it represents a total abandonment by the Commission of its responsibility imposed by Section 366.04(2), Florida Statutes, to oversee the reasonableness of rate structures adopted by municipally operated electric utilities at the expense of unincorported customers who have no meaningful right of recourse other than the Commission.

Polk County is not unmindful of this Court's recent decision in the case of City of Tallahassee v. Florida Public Service Commission, Florida Supreme Court, No. 62,833, decided December 1, 1983, wherein this Court quoted a portion of the Order rendered by the Commission in the City of Tallahassee surcharge proceeding and indicated that it agreed with the Commission that a surcharge equal to public service tax would not be unduly discriminatory. Polk County respectfully suggests that since that issue was never before the Courts in that case, such language is dicta and therefore not controlling here.

It should be noted by the Court that not one appellee

or amicus curiae has advanced the argument that the language from the Commission's Order of October 4, 1982 in the City of Tallahassee supplies an adequate basis for the disparate treatment of otherwise similarly situated customers afforded by the Rule.

In fact, as previously noted, the Commission appears unwilling to admit that the rate structure authorized by the Rule is discriminatory at all.

III

THE END RESULT TEST IS NOT APPLICABLE TO THE ADOPTION OF FLA. ADMIN. CODE RULE 25-9.525 BY THE PUBLIC SERVICE COMMISSION.

The Appellees apparently rely upon the "end result" doctrine as adopted by this Court in the case of Jacksonville Gas Corp. v. Florida Railroad and Public Utilities Commission, 50 So. 2d 887 (Fla. 1951) in support of the Rule. The "end result" doctrine provides essentially that the Commission in rate cases is free to follow such methods as it may choose so long as the "end result" of such methods is the establishment of just and reasonable rates. General Telephone Co. of Florida v. Carter, 115 So. 2d 554 (Fla. 1959).

Polk County makes two observations concerning this doctrine. First, it seems that the Court has always applied this doctrine in connection with a Commission

order which dealt with the manner in which the Commission arrived at a particular rate, i.e., the valuation of the rate base, the appropriateness of a rate of return, the proper method of depreciation, etc. The doctrine seems to indicate that the Court will not invalidate a rate setting proceeding merely because there is disagreement among experts concerning the method of arriving at a rate. The doctrine dictates that a Court acting in its appellate capacity will concern itself primarily with, after all factors are taken into consideration, whether or not the Commission or other regulatory agency has arrived at a just and reasonable rate.

The end result doctrine is not applicable to every action taken by the Commission. This Court noted in the case of Maule Industries, Inc. v. Mayo, 342 So. 2d 63 (Fla. 1977):

> The "end result" test has, of course, been expressly adopted in Florida. We note, however, that this rate-reviewing test was judicially developed for procedures vastly different from those available under the file and suspend statute, and we decline to extend its applicability to the confirmation orders which, under Florida's new statutory scheme, approve earlier interim rate awards. (Emphasis supplied) Id. at 67

This language indicates the "end-result" doctrine is limited in scope and is not applicable to every action of the Commission.

The Commission in this appeal argues the "end result" doctrine is impliedly applicable to issues of rate structure by virtue of its erroneous assertion that the Rule results in equal "gross rates" being charged to both municipal and extra-municipal customers.

The Rule which is the subject of this appeal does not involve esoteric or sophisticated methods of valuation or accounting over which experts might disagree; nor is the dollar amount of a rate at issue. In fact, the Rule does not even produce a result which is "reasonable and just" when one takes into account that the Rule in actuality provides for unduly discriminatory rates. Based upon the foregoing, it is the position of Polk County that the end result doctrine is not applicable to the issues raised by the present appeal.

Even if this court found the "end-result" doctrine applicable to this appeal, the Rule must still fall as being unconstitutional.

As the Court noted in the case of General Telephone Company of Florida v. Carter, 115 So. 2d 554 (Fla., 1959):

> ...The Commission in rate cases is free to follow such methods as it may choose so long as the "end result" of such methods is the establishment of just and reasonable rates and so long as such methods do not go so far astray that they violate the statutes or run afoul of constitional guarantees.
>
> Id. at 559

To the extent that the Court agrees with Polk County that the Rule is unconstitutional as either depriving the extra-municipal customer of the due process or equal protection of law or as an unconstitutional delegation of the power to tax, the end result doctrine is inapplicable.

IV

THE SURCHARGE APPARENTLY AUTHORIZED BY FLA. ADMIN. CODE RULE 25-9.525 IS A TAX BEYOND THE JURISDICTION OF THE COMMISSION.

The Appellee, City of Tallahassee cites a plethora of cases all of which seem to stand for the proposition that as a rule, a utility charge or fee is not a tax, but is a payment exacted in return for a benefit conferred.

The surcharge complained of in this appeal is not a part of the rate per se, but an additional charge only applicable to extra-municipal customers, which charge is not rationally related to cost or any other factor and is certainly not related to the announced purpose of the Rule, namely, to equalize rates.

Polk County is of the opinion that the surcharge has all the indicia of a tax as outlined in its initial brief. Furthermore, the State and its agencies and subdivisions are immune from taxation, specifically the public service tax. Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975). The Rule provides that a municipality may impose a surcharge on extra-municipal

customers equal to the public service tax and further in subsection (1): "To be equal to the tax, the surcharge shall apply to the same base, at the same rate, in the same manner, and to the same types of customers as the tax..."

Apparently, since Polk County is immune from taxation it is therefore exempted from the payment of the surcharge. The Rule authorizes not only a surcharge which is dependent upon a utility tax for its existence, which must be equal in rate to the utility tax, which is not dependent upon cost to serve, but which also grants exemptions which are equivalent to immunities from taxation.

If local governments expect to credibly resist efforts to slash their ability to raise revenue through taxation and proprietary enterprise, they must first learn the difference between the two.

The Rule is invalid as an unlawful delegation of the authority to tax.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by first class U. S. mail this 9 day of December, 1983 to the following:

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