IN THE SUPREME COURT OF FLORIDA

GERALD LEWIS, as COMPTROLLER AND HEAD OF THE DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

CASE NO. 65,350

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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DESIGNATION OF PARTIES

Appellant, Gerald Lewis, Comptroller and Head of the Department of Banking & Finance, State of Florida will be referred to as "the Comptroller."

Appellee, Florida Public Service Commission, will be referred to as the "Commission."

References to documents in the record are designated by the appropriate page number. (R.-___).

STATEMENT OF THE CASE AND OF THE FACTS

The Comptroller has included in his brief several references to matters outside the record and has omitted material facts. The Commission, therefore, provides the following Statement of the Case and of the Facts.

The proceeding below was originally initiated by the Commission on September 3, 1980, by the issuance of an order to show cause to the City of Tallahassee as to why its 15% surcharge on out-of-City customers was not discriminatory. This is the fourth appeal arising from that case.

On October 4, 1982, the Commission issued Order No. 11221 requiring the City to eliminate its 15% surcharge. The City appealed Order No. 11221 and the Commission issued Order No. 11341, placing a refund condition on the automatic stay created by Florida Rule of Appellate Procedure 9.310(b)(2). (R-1). Order No. 11341 also required the City to file a refund plan within 30 days after the Court's decision upholding Order No. 11221 became final. Order No. 11221 was clarified in certain aspects by Order No. 11699 (R-3). The Court upheld Order No. 11221 in City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983).

Within 30 days after that decision became final, the City filed its refund plan (R-5). The refund plan basically provided that:

(1) The surcharge calculation on bills for out-of-city customers will be reduced from 15% to 8.5%, effective January 1, 1984.

(2) All bills rendered between November 4, 1982 and December 31, 1983 will be recalculated and the difference between the original billing and the recalculated billing will be refunded with interest.

(3) Interest on the refund will be calculated in accordance with Florida Administrative Code Rules 25-6.109 and 25-6.455, with interest accruing until the refund is posted to the customer's account. The City will use monthly interest calculation provided by the Commission Staff.

(4) Refunds will be by credits to active customers' accounts. Refunds will be paid by check to inactive accounts where the refund is one dollar or more, net of any delinquent bills outstanding.

(5) No refunds will be made to an inactive account when the refund amount is less than one dollar.

(6) Refunds will be made within ninety days of approval, with every attempt being made to make the refund as soon as practicable after approval.

(7) Refund checks for inactive accounts not claimed or cashed within twelve months from the date of the check will be voided and those amounts, along with refunds to inactive accounts of less than one dollar, will be refunded to all active customer accounts through the City's Energy Cost Adjustment clause. (R-7,8).

This last provision requires that refunds be claimed within a year. If this condition precedent is not met, the refunds vest in active customers.

Leon County filed a response to the refund plan (R-14). The Comptroller filed a Petition for Leave to Intervene and to Modify Refund Plan (R-16). The essence of the Comptroller's Petition was that the refund plan would redistribute unclaimed refunds a year after issuance in contravention of Section 717.05, Florida Statutes.

The City filed a response to the Comptroller's Motion and proposed to revise its refund plan as follows:

> Refund checks in active accounts not claimed or cashed within twelve (12) months from the date of the check will be voided, and those amounts shall be delivered to the custody of the Department, pursuant to Section 717.131, Florida Statutes, with proof that diligent search and inquiry has been made to locate the owner. Refunds to inactive accounts of less than $1.00 shall be refunded to all active customer accounts through the Energy Cost Adjustment Clause as described on Third Revised Sheet No. 14.0 of the City of Tallahassee Tariff Book on file with the Florida Public Service Commission. (R-20).

The City filed a further modification of its refund plan on February 1, 1984, providing that refund amounts of less than one dollar would be transferred to the Comptroller after one year (R-22). The City also filed a response to Leon County's response to its Petition (R-24).

On March 2, 1984, the Commission issued Order No. 13048 approving the City's refund plan as originally filed. Order No. 13048 concluded that the Commission possessed the authority to direct the disposition of utility refunds not claimed within a year and that Section 717.05, Florida Statutes, did not preclude the Commission from directing the redistribution of refunds not claimed within one year.

On March 9, 1984, the Comptroller filed a Motion for Reconsideration, Clarification and Oral Argument (R-33). The Motion stated that the Commission lacked authority to direct the disposition of unclaimed utility refunds and that Section 717.05(2), Florida Statutes, controlled. Oral argument on the

Comptroller's Motion for Reconsideration was heard on April 24, 1984. On May 25, 1984, the Commission issued Order No. 13328 denying the Comptroller's Motion (R-42).

The Comptroller filed a Notice of Appeal on May 23, 1984.

POINT I

THE COMMISSION'S ACTION WAS WITHIN THE DISCRETION DELEGATED TO IT BY THE LEGISLATURE AND COMPORTED WITH THE ESSENTIAL REQUIREMENTS OF LAW.

A. The Commission possesses authority to direct the disposition of refunds not claimed within a certain time.

1. The authority is within the Commission's authority to require A refund.

The Commission's authority to direct a refund by a municipal electric utility is not disputed. The City of Tallahassee, who must perform the refund, has not questioned the Commission's authority.[1] The Comptroller, while not expressly stating that the authority exists, apparently concedes that the Commission may order a municipal electric utility to make a refund.[2]

In Order No. 13048, the Commission determined that it could set the terms and conditions of a refund, including the time within which to claim a refund:

> ... Just as this Commission may require a utility to make a refund to its customers, it may determine the terms and conditions upon which the refund is to be made....

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[1]And this is after having pursued three separate appeals of the Commission's actions in Docket No. 800495-EU.

[2]If he did not concede it, he would have no case, as without a refund there are no unclaimed refunds.

No party has contended that the Commission is without authority to determine the terms and conditions of a refund. The Comptroller's argument is actually based on his view that Chapter 717, Florida Statutes, supercedes the ability of the Commission to place a condition precedent on refunds and to deal with unclaimed refunds. The Comptroller's approach ignores the fact that the Commission can set the terms and conditions of a refund. The Commission has been setting the terms and conditions of refunds for many years. It has determined who must make a refund, what amount is to be refunded, who is entitled to a refund and how the refund is to be distributed. Inherent in the authority to direct a refund is the authority to place conditions on a claim to a refund and to dispose of unrefunded amounts.

The Comptroller has acknowledged that the Commission could direct a "customer of record" refund, which would have the effect of denying any refund to customers who have left the system. Yet, he argues that the Commission cannot condition a refund to off-system customers by requiring that it be claimed within a year. The legislature intended that the Commission have the discretion to grant a refund to off-system customers or deny it outright, and further intended that the Commission grant a refund with a condition precedent. To ignore the ability to grant a refund conditionally is senseless. If the Commission may grant a refund in full or deny it in total it can grant a conditional refund.

2. The authority is granted by statute.

The Commission has been granted the authority to condition a refund and dispose of unclaimed amounts by statute. In Order No. 13048, the Commission cited to the provisions of Section 366.06(3), Florida Statutes, as providing the authority to direct the disposition of unclaimed refunds by municipal electric utilities. This conclusion is supported by a review of provisions of Chapter 366, as well as provisions of Chapters 364 and 367, Florida Statutes.

First, the provisions of Section 366.04 show a legislative intent that certain portions of Section 366.06 govern the regulation of municipal electric utilities.

Section 366.04(2) provides authority over municipal electric utilities rates structure:

> In the exercise of its jurisdiction, the Commission shall have the power over rural electric cooperatives and municipal electric utilities for the following purposes:
>
> * * *
>
> (b) to prescribe a rate structure for all electric utilities.

The language of Section 366.04(2), Florida Statutes, is significant in two aspects. First, it refers to "the exercise of its jurisdiction", implying that the jurisdiction previously conferred over investor-owned utilities was extended to municipal and cooperative utilities for certain specific purposes. Second, one of the purposes of that authority was to "prescribe a rate

structure for all electric utilities," implying that the exercise of jurisdiction was to be consistent between types of electric utilities.

The regulation of "rate structure" is not the regulation of "rates," as has been recognized by the Commission and pronounced by this Court in City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981). What that does mean is that in regulating the rate structure[3] of municipal electric cooperatives the Commission exercises the same powers as in regulating the rate structure of investor-owned electric utilities. Thus, the rate structure authority the legislature has granted to the Commission for investor-owned utilities was simply extended to municipal and cooperative electric utilities.

Embodied within Chapter 366 are provisions addressing both portions of ratemaking. For instance, Section 366.06(1) states criteria for establishing rate base (an aspect of rate of return) and rate structure. The applicability of Section 366.06(1), Florida Statutes, to municipal electric utility rate structures was recognized by this Court in City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983):

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[3]Rate structure is but one aspect of setting rates. Setting rates is a two-step process. It involves: 1) establishing the overall revenue requirements of a utility (based upon rate of return); and 2) establishing the rate structure of the utility (that is: the relationship of rates charged to different classes of customers). Rate structure, therefore, is a portion of rates.

> ... Rather than setting out strict standards by which to justify the surcharge, the Public Service Commission relied on the mandates of Section 366.06(1), Florida Statutes (1981), as well as the proposed factors suggested in show cause Order No. 9516.... (At 507).
>
> * * *
>
> Currently, by its own actions and admissions, the Public Service Commission has shown that in the surcharge area, it is in a formulative stage regarding policy. As such, no greater restraints should be imposed on the exercise of the Public Service Commission's authority other than those already found in Section 366.06(1) as well as those factors it has, and subsequently will, expressly raise either in its orders or through adversary proceedings in this Court.... (At 508).
>
> * * *
>
> In conclusion we find that the Public Service Commission did not abuse its discretion or authority when it declined to initiate rulemaking pursuant to the City's petition. We further find that Section 366.06(1), in conjunction with the other factors referred to in this opinion provide adequate general standards under which the City's surcharge may be tested....[4] (At 508).

As the Court stated in the City of Tallahassee case, Section 366.06(1) governs the prescription of municipal rate structures by

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[4]The "other factors" identified by the Court, though separately stated, were actually a subset of the criteria set out in Section 366.06(1), Florida Statutes. For instance, the ten factors cited by the Court at 508, are actually factors used to measure cost of service, the first criterion stated in Section 366.06(1).

the Commission. Logic dictates that Section 366.06(3), Florida Statutes, governs refunds by municipal electric utilities pursuant to Commission directive.

The Commission's authority to require investor-owned electric utilities to make refunds is in Section 366.06(3), Florida Statutes (1983), which provides:

> ... [The Commission] shall by further order require such utility to refund with interest at a fair rate, to be determined by the Commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the utility shall be refunded or disposed of by the utility as the Commission may direct; however, no such funds shall accrue to the benefit of the utility.

This language authorized a range of possible refunds. The Commission relied upon identical language in Section 364.05(4), Florida Statutes, to place existing rates subject to refund and later refund a portion of those rates. This Court upheld the Commission's construction in United Telephone Company of Florida v. Mann, 403 So.2d 962 (Fla. 1981).

Section 366.06(3), Florida Statutes, authorized refunds involving rate structure issues for investor-owned utilities. In Order No. 10162 (Appendix F at A-59, 60), the Commission directed that a refund be made to a particular rate class. Also, by Order No. 8511 (Appendix G at A-67, 68), the Commission placed a refund condition on Tampa Electric Company pending appeal. Excess amounts were to be refunded to out-of-city customers under Order

9173 (Appendix G at 1).[5] Section 366.06(3), Florida Statutes, just like Section 366.06(1), governs rate structure issues for municipal electric utilities. The provisions of Section 366.06(3), Florida Statutes, expressly confer the authority to direct the disposition of unclaimed refunds, and the refund required by Order No. 13048 falls squarely within the language of Section 366.06(3), Florida Statutes. The order required the City to refund a portion of a rate that was not justified--a portion of its out-of-city surcharge.

The legislature intended that the Commission exercise like refund powers over all utilities under its jurisdiction. Identical refund language appears in Sections 364.05(4), 366.06(3) and 367.081(6), Florida Statutes. This clearly shows the legislative intent.

B. Order No. 13048 comports with the essential requirements of law.

1. Ample due process preceded the issuance of Order No. 13048.

This proceeding was initiated by the Commission on September 3, 1980, on its own motion and concluded on May 25, 1984, with the issuance of Order No. 13328 denying the

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[5]Florida Rule of Appellate Procedure 9.310(b)(2) does not stand as a basis for the power to require a refund as a condition of a stay. It allows the imposition of any lawful condition, but it does not itself confer authority to impose any particular condition. The rule relies, instead, on organic law to confer the power to impose the condition.

Comptroller's motion for reconsideration. The Commission initiated this proceeding for the express purpose of determining whether the City was discriminating against its out-of-city electric utility customers. This order was issued on the Commission's own motion and not in response to a formal request by any customer. During the entire proceeding and the three appeals that ensued, one utility customer, Leon County, intervened in the case.

A prehearing conference was held, notice of hearing was published and a public hearing was held in Tallahassee. Thereafter, the Commission issued Order No. 11221 requiring the City to eliminate its out-of-city surcharge. The City appealed that order to this Court, creating an automatic stay of Order No. 11221 under Florida Rule of Appellate Procedure 9.310(b)(2).

No request was made to lift the stay or impose a refund condition. The Commission, on its own motion, issued Order No. 11341 placing the City's surcharge revenues subject to refund as a condition of the stay pending appeal. Order No. 11341 stated clearly that the City of Tallahassee was to file a refund plan with the Commission if Order No. 11221 was upheld. On December 1, 1983, this Court issued its opinion in City of Tallahassee v. Public Service Commission, supra, and upheld Order No. 11221. The plan was to be filed within 30 days after the Court's order became final, consistent with Order No. 11341.

Leon County, objected to the refund plan and sought to participate in the approval process. The Comptroller was permitted to intervene in objection to the City's refund plan.

The entire proceeding, from its inception to its completion, fully comported with the requirements of Chapter 120, Florida Statutes, and the obligation to provide due process. The City's electric utility customers had ample opportunity to participate at any time during the proceeding. Each customer had constructive notice of each significant aspect of the case by the orders issued by the Commission and the decisions handed down by this Court.

Not only did the entire proceeding fully comport with all due process requirements, but it received great notoriety throughout its course. Accounts of Commission actions, motions, appeals, orders, etc., were published in local newspapers, televised locally and broadcast by local radio. Each and every out-of-city customer of the City of Tallahassee's electric department knew that the Commission was in a hotly contested controversy with the City of Tallahassee over the City's surcharge. The fact that the out-of-city customers did not participate in this well known local event was not the result of their lack of knowledge. It was the result of a conscious decision to allow the Commission to protect their interests and decide their rights.

2. Order No. 13048 took no one's property.

The right to a particular refund was not vested in any particular utility customer prior to entry of Order No. 13048 on March 2, 1984. Prior to the issuance of Order No. 13048, a refund could be anticipated, but its nature, extent and conditions were indeterminate. The approval of redistribution of uncollected refunds by Order No. 13048 occurred simultaneously with approval

of the refund itself. From a constitutional standpoint, Order No. 13048 did not impair any vested rights. No property was taken, none existed.

In order for a person to be entitled to due process under the United States or Florida Constitutions he must have a property which is being taken. The United States Supreme Court has defined "property" as follows:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (Emphasis supplied).

Texaco, Inc. v. Short, 454 U.S. 516, 70 L.Ed.2d 738, 102 S.Ct. 781 (1982).

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. (Emphasis supplied).

Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

This Court has referred to "vested rights" in applying the due process provisions of the Florida Constitution:

> ... [R]etrospective statutes are only constitutionally defective... in those cases where vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability

> is established, in connection with transactions or considerations previously had or expiated.[6] (Emphasis supplied).

Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978).

These and other cases dealing with due process consistently state the principle that the "property" or "vested right" must precede the "taking." That is, the right must be vested before the legislature diminishes it. The transactions must occur before the legislature creates new duties or obligations. Village of El Portal v. City of Miami Shores, supra; State v. City of Miami, supra. Property interests must be created and defined by existing rules. Texaco, Inc. v. Short, supra. They must be already acquired. Board of Regents v. Roth, supra. A state action that simultaneously creates a right and then conditions its retention does not deprive the recipient of due process. Texaco, Inc. v. Short, supra.

In this case, whether viewed from the federal or state perspective, Order No. 13048 deprived no one of their property. No statute, rule or order issued prior to Order No. 13048 created a "property" or "vested right" in a particular customer to receive a particular refund. Order No. 11341, which placed the refund condition on the City of Tallahassee, made a refund contingent on the outcome of the City's appeal of Order No. 11221. Although the

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[6]See also, State v. City of Miami, 15 So.2d 449 (Fla. 1943); Mahood v. Bessemer Properties, Inc., 18 So.2d 775 (Fla. 1944); Hamilton v. Williams, 200 So.2d 80 (Fla. 1941).

Commission viewed Order No. 11221 as proper and expected it to be upheld, no customer could claim anything more than a mere anticipation or expectation of a refund. This is not a "property" in the constitutional sense. Perry v. Sinderman, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972); Board of Regents v. Roth, supra.

Even after this Court upheld Order No. 11221 in City of Tallahassee v. Florida Public Service Commission, supra, no individual customer could claim a property in, or vested right to a particular refund. Order No. 11341 simply set a refund condition. It did not set the terms and conditions of a refund but directed the City of Tallahassee to submit a refund plan for Commission approval. The determination of the total amount to be refunded, the persons entitled thereto and the conditions of the refund, was deferred until after the City filed a refund plan.

The Commission, having originally exercised its discretion in imposing the refund condition on the City, was likewise authorized to exercise its discretion in approving the amount and manner of the refund. The Commission was required to act reasonably in setting the conditions of the refund.

The Comptroller has not asserted that the Commission was bound to approve the City's refund plan as filed, nor has he asserted that the Commission lacked the discretion to choose who would receive a refund or the terms and conditions of the refund.

In fact, the Commission had many alternatives available to it at the time the City filed its refund plan. It could have had the City make a refund to its out-of-city "customers of record," that is, it could have required the City to make a refund only to its

current customers. This was done for Florida Telephone Corporation (Order No. 9551 at A-17-19, Appendix A); General Telephone Company of Florida (Order No. 10101 at A-21, Appendix B); Southern Bell Telephone and Telegraph Company (Order No. 9564 at A-29, Appendix C); and, Reedy Creek Utilities Company (Order No. 9456-A at A-35, and Order No. 8624 at A-37, Appendix D). In each of these cases, the Commission either required or approved a refund to active customers, leaving no refund to customers who paid for telephone service but left the system before the refund took place. "Customer of record" refunds are also effectively accomplished through the Commission's fuel adjustment proceedings, as the over-recoveries for past periods are rolled into future rates. (Order No. 9273 at A-44, 45, Appendix E). Since the refund is accomplished by crediting current customers' bills, there are no unclaimed refunds to be dealt with.

The Commission could have authorized a refund to a particular group of customers receiving service under a particular rate schedule as was done for Florida Power Corporation (Order No. 10162 at A-59, 60, Appendix F).

Given the range of refund options available, the Commission chose to have the City make a refund to all out-of-city customers who paid the surcharge during the November, 1982 - May, 1984 period, provided that customers who had left the system claim their refunds within a year of issuance.[7]

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[7]Notably, Order No. 13048 does not require a refund to customers who have left the system and would (cont'd next page)

Since the Commission approved the redistribution of unclaimed refunds simultaneously with the choice of the refund method, no vested right preceded the "taking" and due process was not denied. Village of El Portal v. City of Miami Shores, supra; Texaco, Inc. v. Short, supra; Board of Regents v. Roth, supra.

3. The constitutional issue is not properly before the Court.

The Comptroller argues in his brief that the Commission's order contravenes the due process requirements of the Florida and United States Constitutions. The Comptroller had an opportunity to raise it below, but did not. An appellate court will not entertain a question not raised below. Doser v. Worrell, 401 So.2d 1322 (Fla. 1981); Sanford v. Rublin, 237 So.2d 134 (Fla. 1970).

The refund scheme ultimately approved by the Commission was the same one originally proposed by the City of Tallahassee. In filing its written objection to the City's original refund plan, the Comptroller objected to the proposal to redistribute refunds after one year, but raised statutory, not due process, grounds for the objection.[8] The Comptroller could have raised the due

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[7](cont'd) receive less than one dollar. These customers get no refund at all. The Comptroller initially asserted that these amounts, too, were unclaimed refunds but later withdrew the claims.

[8]The Comptroller actually did raise a "constitutional" issue of sorts. He asserted that the Commission could not constitutionally expand its jurisdiction beyond that established by the legislature.

process issue and could have requested that the Commission conform the exercise of its discretion to his view of constitutional requirements, but failed to do so. After the issuance of Order No. 13048, which approved the City's original refund proposal, the Comptroller filed a motion for reconsideration, which again made no mention of the due process question raised in this appeal.

An administrative agency may not pass on the constitutionality of a statute or rule. City of Pensacola v. King, 475 So.2d 317 (Fla. 1950); State v. Atkinson, 188 So. 834 (Fla. 1938); Adams Packing Association, Inc. v. Florida Department of Citrus, 352 So.2d 569 (Fla. 2nd DCA 1977). However, an administrative agency may consider constitutional questions in determining how it will exercise its discretion. Florida Education Association/United v. Public Employees Relations Commission, 346 So.2d 551 (Fla. 1st DCA 1977); Department of Environmental Regulation v. Leon County, 344 So.2d 297 (Fla. 1st DCA 1977); State Department of Health and Rehabilitative Services v. Lewis, 367 So.2d 1042 (Fla. 4th DCA 1979). Since the Comptroller's constitutional argument challenges the permissibility of a discretionary act, the Commission could have considered the question had it been raised in determining how it would exercise its discretion.

The Comptroller had an opportunity to raise the constitutional question before the Commission and failed to do so. The due process question is, therefore, not properly before the Court and should not be considered.

4. The Comptroller lacks standing to raise the constitutional issue.

The Comptroller asserts that Order No. 13048 denies certain utility customers their property without due process. As such, the Comptroller's argument improperly raises the rights of third parties rather than his own. It is settled in both Florida and Federal Courts that constitutional rights are personal and that a party may not assert the constitutional rights of third parties.

The constitutionality of a statute may be challenged only by one whose rights are, or will be, adversely affected by it. Acme Moving and Storage Co. of Jacksonville v. Mason, 156 So.2d 555 (Fla. 1964). For one to assert the invalidity of a statute he must show that his rights are invaded. One who himself is not denied some constitutional right or privilege cannot raise constitutional questions on behalf of some other person. Steele v. Freele, 25 So.2d 501 (Fla. 1946).[9] A litigant may only assert his own constitutional rights or immunities. McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 110 (1961); New York v. Ferber, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982). A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. He does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Ulster County Court v. Allen, 442 U.S. 140, 60

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[9]See also Zarsky v. State, 281 So.2d 553 (Fla 3rd DCA 1973); County of Pasco v. DICO, Inc., 343 So.2d 83 (Fla. 2nd DCA 1977).

L.Ed.2d 777, 99 S.Ct. 2213 (1979).

The due process rights of the City's customers are personal to them. Clearly, the Comptroller is not the proper party to raise the due process issue before this Court.

Summary

The Commission possesses the authority to direct the disposition of unclaimed refunds by municipal electric utilities, first, as an inherent aspect of requiring a refund and, second, as a power conferred both directly and indirectly by statute.

The constitutional due process question is not properly before the Court and, if it were, the Comptroller lacks standing to raise it. Nevertheless, no one's property was taken and, if it were, due process was fully provided.

POINT II

SECTION 366.06 EXPRESSLY AUTHORIZES THE COMMISSION TO DIRECT THE DISPOSITION OF UNCLAIMED REFUNDS AND, IN THE EVENT THAT SECTIONS 366.06(3) AND 717.05(2), FLORIDA STATUTES, ARE IRRECONCILABLE, SECTION 366.06(3), FLORIDA STATUTES, CONTROLS.

A. The Provisions of Section 366.06(3) clearly and unmistakably authorize the Commission to direct the disposition of unclaimed refunds.

Section 366.06(3) confers authority to order the disposition of unclaimed refunds. This interpretation is based upon clear and unmistakable language providing such authority. The Comptroller has failed to show any flaw in this interpretation.

Section 366.06(3) empowers the Commission to:

> ... require such utility to refund with interest at a fair rate, to be determined by the commission in such a manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the utility shall be refunded or disposed of by the utility as the commission may direct....

Section 366.06(3) first requires a utility to refund, at the Commission's direction, the portion of its rates not justified. To "refund" means to give or put back; to return money; to repay, reimburse.[10] Thus, to refund a portion of rates is to give it back to the customers, to return money to the customers.

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[10] Webster's Third New International Dictionary, (Unabridged), G. & C. Merriam Company, Principle Copyright 1961.

Clearly, under Section 366.06(3) the utility must make a refund of unjustified amounts to its customers.

Next, after requiring a refund by a utility to its customers, Section 366.06(3) requires the utility to refund or dispose of any portion of such refund not thus refunded, as directed by the Commission. Since the utility was already directed by the statute to refund all unjustified amounts to its customers, the second directive must impose another requirement, otherwise it is redundant and superfluous. The Commission has construed this language as requiring the utility to refund or dispose of undelivered or unclaimed refunds and authorizing the Commission to direct their disposition:

> A refund not claimed by a customer is a "portion of such refund not thus refunded." Indeed, it is difficult to envision any other way that a portion of a refund could be "not thus refunded." (Order No. 13328, R-42).

The Commission's interpretation is manifestly correct. Since the utility must refund the money in the first instance, money unsuccessfully refunded, or unclaimed, is money "not thus refunded." The statute expressly authorizes the Commission to direct the disposition of those amounts.

The construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight and a court will not depart therefrom except for the most cogent reasons and unless the construction is clearly erroneous. Daniel v. Florida State Turnpike Authority, 213 So.2d 585 (Fla. 1968); State ex. rel. Biscayne Kennel Club v. Board of

Business Regulation, 276 So.2d 823 (Fla. 1973); ABC Liquors, Inc. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 397 So.2d 696 (Fla. 1st DCA 1981); Bureau of Crimes Compensation, Florida Department of Labor and Employment Security v. Reynolds, 443 So.2d 501 (Fla. 3rd DCA, 1981). In this case the Commission has made a reasoned interpretation of Section 366.06(3), Florida Statutes, based upon the plain language of the statute. The Comptroller has failed to demonstrate why the Commission's interpretation is erroneous. The Comptroller's rather lame rejoinder that the statute does not contain the precise words "unclaimed refunds" does not show the Commission's interpretation to be incorrect.

The language at issue in Section 366.06(3), Florida Statutes, is identical to language in Sections 364.05(4) and 367.081(6), Florida Statutes. The Commission has by rule construed each of these statutes to authorize it to direct the disposition of unclaimed refunds. Florida Administrative Code Rules 25-4.114, 25-6.109, 25-7.91 and 25-10.76, were adopted in 1983 and each contain the following language:

> (8) With the last report under subsection (7) of this Rule, the Company shall suggest a method for disposing of any unclaimed amounts. The Commission shall then order a method of disposing of the unclaimed funds.

These rules were adopted by the Commission as part of the development of policies within its discretion and in response to the preference of rulemaking over ad hoc policy making. City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505

(Fla. 1983). Where an agency has responded to the Administrative Procedure Act's call to codify its policies by rule and, in so doing, has interpreted a statute which it administers, the agency's interpretation of the statute should be sustained if it is a permissible interpretation, even if other interpretations are possible or even preferable. Department of Professional Regulation, Board of Medical Examiners v. Durrani, Case No. AX-329 (Fla. 1st DCA, August 16, 1984); Palm Beach Junior College v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (Fla. 1st DCA 1983); State Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981). The Commission's interpretation of Section 366.06(3), Florida Statutes, is not only permissible, but it is supported clearly by the language of the statute.

The Comptroller's assertion that the language of Section 366.06(3) does not refer to disposition of a refund not claimed by its rightful owner begs the question. While the Comptroller insists that the Commission has given the wrong meaning to the language in question, he offers no alternative meaning. The language must mean something. A statute should be so construed as to give a meaning to every word and phrase in it. Vocelle v. Knight Brothers Paper Company, 1185 So.2d 664 (Fla. 1960); State ex rel City of Casselberry v. Mager, 356 So.2d 267 (Fla. 1978). Statutory language is not to be assumed superfluous. Terrinoni v. Westward Ho!, 4185 So.2d 1143 (Fla. 1st DCA 1982). Courts are obligated to give meaning to all words chosen by the legislature. Atlantic Coast Line Railroad Company v. Boyd, 102 So.2d 709 (Fla. 1958).

In this case the Commission has given meaning to the quoted language and the Comptroller has not. The Commission has construed the statute and has given meaning to the whole and to each of its parts, as is proper. Wilensky v. Fields, 267 So.2d 1 (Fla. 1972). The Comptroller has done nothing to demonstrate any error in the Commission's construction of Section 366.06(3), Florida Statutes, and hasn't even proposed an alternate interpretation of the language in question.

B. The Commission's construction of Sections 366.06(3) and 717.05 as harmonious rather than conflicting was reasonable and consistent with the rules of statutory construction.

The Commission construed Section 717.05, Florida Statutes, as making abandonment dependent upon the final determination or order providing for the refund. In so doing, it relied upon the express provisions of Section 717.05(2), which provide:

> Any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deductions, that was remained unclaimed by the person appearing on the records of the utility entitled thereto for more than 7 years after the date it became payable in accordance with the final determination or order providing for the refund. (Emphasis supplied).

Statutes should be construed in harmony with each other, if possible. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981); State ex. rel School Board of Martin County v. Department of Education, 317 So.2d 68 (Fla. 1975). A law should be construed together with any other statute relating

to the same subject matter or having the same purpose, though the statutes were not enacted at the same time. Mann v. Goodyear Tire and Rubber Company, 300 So.2d 666 (Fla. 1974). The Commission has done exactly this. Order No. 13328 concluded:

> On its face, abandonment under Section 717.05(2), Florida Statutes, depends upon the final determination or order providing for the refund. At oral argument, the Comptroller acknowledged that if we directed a refund to customers of record, that is, all currently active customers, there would be no conflict with Section 717.05(2), F. S. Since the Commission is authorized by Section 366.06(3), F.S., to direct the disposition of unclaimed refunds, unclaimed refunds redistributed according to a Commission order are not abandoned under Section 717.05(2), F.S. Where the Commission fails to direct the disposition of unclaimed refunds, Section 717.05(2), F.S., applies. Construction of the two statutes in this manner avoids a conflict and gives them each full affect according to their own terms.

The Commission's interpretation of Section 717.05, Florida Statutes, as accommodating its authority to direct the disposition of unclaimed refunds under Section 366.06(3), Florida Statutes, reads the two sections in harmony, preserved the terms of each and gave full effect to the operation of both.

Rather than attempting to reconcile apparently conflicting provisions, the Comptroller proposed that the provisions of Section 717.05, Florida Statutes, supercede those of Section 366.06(3), Florida Statutes. This approach assumes a conflict between the two statutes, which is improper. Villery v. Florida Parole and Probation Commission, supra.

The Comptroller's argument presupposes that all utility refunds unclaimed by customers are abandoned property. However,

under Chapter 717, Florida Statutes, utility refunds are not "abandoned" unless they are owing and unclaimed for seven years after they became payable. Refunds that are redistributed pursuant to an order of a utilities Commission prior to the expiration of seven years are not held or owing by a utility after seven years have passed.

Section 717.05, Florida Statutes, itself recognizes that the right to a refund arises out of and is dependent upon the order providing for the refund.

> The following funds held or owing by any utility are presumed abandoned:
>
> * * *
>
> (2) Any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than 7 years after the date it became payable, in accordance with the final determination or order providing for the refund. (Emphasis supplied).

Not only must the refund be held or owing, but it must be unclaimed by the person entitled thereto for more than seven years after it became payable in accordance with the order providing for the refund. The statute itself recognizes that the right to the refund arises from and is dependent upon the order providing for the refund. Unlike Section 717.04, Florida Statutes, Section 717.05, Florida Statutes, does not dispense with conditions precedent to ownership but instead recognizes that the right to

the refund is controlled by the order directing the refund.

In 1974, the Alabama Supreme Court was faced with a question quite similar to that raised in this appeal. The Alabama Public Service Commission had directed South Central Bell Telephone Company to expend unclaimed utility refunds on construction. After the utility invested the money, the Commissioner of Revenue sought possession. In Boswell v. South Central Bell Telephone Company, 301 So.2d 65 (Ala. 1974), the Court held that such unclaimed refunds were neither held nor owing by the company and there was no duty to report them as abandoned property.

This holding is essentially the same as that made by the Commission in Order No. 13048, which stated:

> On its face, abandonment under Section 717.05(2), Fla. Stat., depends upon the final determination or order providing for the refund.

Refund amounts redistributed after one year "in accordance with the final order providing for the refund" are not "held or owing" and not subject to Chapter 717, Florida Statutes.

The Comptroller's claim that Section 717.05(2), Florida Statutes, supercedes the Commission's authority to order disposition of "any portion of such refund not thus refunded" assumes that the legislature, in enacting Chapter 717, intended to change the manner in which property rights are created and to preclude the creation of conditions precedent to ownership. A careful review of Chapter 717 in general, and Section 717.05 in particular, shows this assumption to be false.

Nothing in Chapter 717, Florida Statutes, reflects a

legislative intent to change property rights in general. The Comptroller's description of Florida's Disposition of Unclaimed Property Act shows that it is merely custodial in nature.[11] The mere establishment of a custodian does not create property nor enlarge the rights of the owner. Except for two provisions, no attempt is made to change any substantive property rights or any conditions precedent to ownership.[12] These specific, limited statutory changes of the conditions precedent to property ownership (§717.04, F.S.) and the rights of the ownership (§717.16, F.S.) show a legislative intent to leave the vast majority of property rights, and the terms and conditions under which they arise, unchanged.

It is a general principle of statutory construction that the mention of one thing implies the exclusion of another. Where a statute enumerates the things on which it is to operate it is ordinarily to be construed as excluding from its operation all those things not expressly mentioned. Thayer v. State, 335 So.2d 815 (Fla. 1976); Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944); Cook v. State, 381 So.2d 1368(Fla. 1980). In enacting Chapter 717, Florida Statutes, the legislature expressly acted to change the conditions precedent to recovery of

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[11]Appellant's Initial Brief at 18.

[12]Section 717.04(1)(b) creates a presumption of maturity in a life insurance policy under circumstances not necessarily reflected in the policy and §717.04(3) eliminates the requirement to surrender an insurance policy as a condition of payment. Section 717.16 eliminates the owners right to income from cash property after the Comptroller obtains custody.

insurance policy deposits or proceeds via Section 717.04, Florida Statutes. No other condition precedent to property ownership was changed in that Chapter. This limited amendment of conditions precedent to property ownership implies an intent to leave unchanged all other conditions precedent to ownership, such as the obligation to claim property within a time certain, that may arise during the creation of the property.

The fact that conditions precedent to ownership are unchanged under Chapter 717, Florida Statutes, and that failure to fulfill such conditions will preclude a claim by the Comptroller is illustrated by a construction of Pennsylvania's unclaimed property statute. In Kane v. Insurance Company of North America, 392 A.2d 325 (Pa. 1978), the Commonwealth Court of Pennsylvania held that deposits made on perpetual fire insurance policies not claimed within the time provided by the policies were vested in the insurance company and would not "escheat" to the State.[13] According to the Court, a fundamental prerequisite to escheat is property subject to escheat. Finding that the depositors had failed to fulfill a condition precedent to entitlement, the Court held that the deposits vested in the insurer and that there was no unclaimed property to escheat.

Order No. 13048 created a condition precedent to the right to a refund by a customer who had left the utility system: the

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[13]Though the Court used the word "escheat", it acknowledged that the statute was custodial in nature and that title to the property did not actually pass to the State.

refund must be claimed and the check cashed within a year after issuance. Failure to fulfill the condition precedent prevents the property from arising in an off-system customer and rests it, instead, in current customers. Nothing in Chapter 717, Florida Statutes, purports to change this.

The Comptroller's citation to Boswell v. Whatley, 345 So.2d 1324 (Ala. 1977), is inapposite. The State of Alabama had an unclaimed property statute that caused custody of unclaimed utility refunds to vest in the State within two years. As is plain from the opinion of the Court, the Alabama Public Service Commission attempted to keep custody in the utility after two years had passed and to keep the State from taking custody:

> The Commission desires that all of the net refunds, after the expenses hereinabove allowed, shall be paid to customers of the utility and no portion thereof shall be allowed to remain in any special account or be otherwise retained by Petitioner, nor shall any such funds be allowed to escheat to the State of Alabama whereby customers of Petitioner are deprived of the benefits of the refunds hereby directed. (At 1326).

The purpose of the Alabama Commission's order was clearly to perpetuate custody in the utility instead of the State, in violation of the unclaimed property statute. In addition, the Commission sought to create a general pool of dollars to pay future unspecified refund obligations.

> All funds now remaining from the refunds ordered by the Commission on January 15, 1965, Informal Docket U-2127 and on July 26, 1972, Informal Docket U-2504, together with the sum of $2,500.00 from this refund, shall be held by Petitioner as a contingency fund from which to

> pay refunds claimed by prior customers or other claims not covered by this Order which Petitioner is found to be legally obligated to pay. In the event that such fund is insufficient to pay claims, further amounts paid by Petitioner shall be treated as a current operating expense of the Petitioner. In the event that such fund is not completely expended, any remaining funds shall be held by Petitioner for distribution to its customers in accordance with future refund orders of this Commission. (Emphasis supplied). (At 1327).

The Alabama unclaimed property statute was a custodial statute, just like Chapter 717, Florida Statutes, and did not purport to change the property rights of any claimant. The Alabama Public Service Commission created a right to a refund in each utility customer without precondition and the amounts owed by the utility to its customers, if unclaimed, remained due and owing well beyond the two-year period necessary to vest custody in the State. The Alabama Public Service Commission violated the State's Unclaimed Property Act by attempting to control who got custody, not who was the owner.

C. Even if Section 366.06(3) and 717.05 are irreconcilable, the former prevails because it is more specific and because it was enacted later in time.

The Commission considered the Comptroller's claim that Section 717.05, Florida Statutes, conflicted with Section 366.06(3), Florida Statutes, and determined, instead, that the statutes could be harmonized. Nevertheless, the Commission also addressed the Comptroller's claim that Section 717.05 controlled in the event of a conflict and rejected it as well. It did so on two grounds: First, because Section 366.05(3) was specific in its application

while Section 717.05 was general and, second, because Section 366.06(3) was enacted later in time.

According to the Comptroller's brief:

> In 1961, the Florida Legislature enacted a comprehensive mechanism for the collection, management and disposal of all types of unclaimed property through its adoption of the Uniform Disposition of Unclaimed Property Act. (At 18).

Contained within that "comprehensive mechanism" is Section 717.05(2) which deals with unclaimed utility refunds. By its own terms, that subsection applies to all unclaimed utility refunds, including refunds by order of a court or local regulatory body, and refunds by utilities not subject to Commission regulation at all.[14] Section 366.06(3) deals only with refunds by electric or gas utilities by order of the Commission, a much narrower and more specific subject. A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959); Florida Department of Health and Rehabilitative Services v. Gross, 421 So.2d 44 (Fla. 3rd DCA 1982); Tallahassee Democrat, Inc. v. Florida Board of Regents, 314 So.2d 164 (Fla. 1st DCA 1975). If, as the Comptroller seems

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[14]Section 717.02(b) defines a utility as: any person who owns or operates within the state, for public use, any plant, equipment, property, franchise, or license for the transmission of communications; for the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas; or for the transportation of persons or property.

to assert, the two statutory sections cannot be reconciled, then Section 366.06(3) must prevail as the specific provision. Section 366.06(3), Florida Statutes, covers only unclaimed refunds of electric and gas utilities subject to Commission jurisdiction, while section 717.05(2), Florida Statutes, covers unclaimed refunds of utilities in general.

Not only does Section 366.06(3), Florida Statutes, control over Section 717.05(2), Florida Statutes, as more specific, but it controls as a later enactment. Where statutes are inconsistent, the last expression of the legislative will prevails. Askew v. Schuster, 331 So.2d 297 (Fla. 1976); State v. Board of Public Instruction, 113 So.2d 368 (Fla. 1959). Section 717.05, Florida Statutes (1983), was enacted in 1961, with minor amendments made in 1977. Section 366.06(3), Florida Statutes (1983), was originally enacted in 1974 as subsection (4) of Section 366.06, Florida Statutes. It was renumbered as subsection (3), amended and reenacted in 1980. Whether viewed from the original date of enactment or from the most recent date of amendment, Section 366.06(3), Florida Statutes (1983), is the later expression of legislative intent and prevails over Section 717.05(2), Florida Statutes (1983), in the event of a conflict.

D. Other Commission orders.

The Commission's determinations of the terms and conditions of refunds vary according to the situation and according to the evolution of its policies. The Commission has the discretion to vary the terms and conditions of a refund. It has ordered

customer of record refunds in the past (Appendices A, B & C). In such cases, there were no unclaimed refunds and thus no need to direct further disposition. Earlier electric utility orders, such as those cited by the Comptroller, provided for disposition of unclaimed refunds pursuant to Chapter 717, Florida Statutes. Nowhere in those orders, however, did the Commission conclude that it lacked authority to do otherwise. Beginning in late 1980, the Commission began to require electric utilities to redistribute unclaimed amounts via their fuel adjustment clauses. This was done for Tampa Electric Company in Order No. 9599 (Appendix H at A-91-93). The usefulness of the fuel adjustment clause as a refund mechanism was again recognized for Florida Power Corporation in Order No. 10162 (Appendix F at A-59, 60). Even Order No. 11123, which the Comptroller cites as showing the applicability of Chapter 717, utilized the fuel adjustment clause to redistribute a portion of the unclaimed refunds. While the Order provided for "escheat" via Chapter 717 for the majority of the unclaimed refunds, it also provided that unclaimed refunds of less than a dollar were to be redistributed via the utility's fuel adjustment clause (Appendix I at A-96).

Unclaimed water and sewer utility refunds are not redistributed, simply because there is no convenient mechanism to accomplish the redistribution. Unlike electric utilities, water and sewer utilities do not have fuel adjustment clauses which may be easily adjusted to accomplish a redistribution of unclaimed refunds. This distinction explains the divergence of treatment between unclaimed electric utility refunds and unclaimed water and sewer refunds.

Summary

Section 366.06(3), Florida Statutes, expressly confers authority on the Commission to direct the disposition of unclaimed refunds. This interpretation has been codified by rule. The Comptroller has failed to show, in any manner, why this interpretation is incorrect.

The Commission interpreted Sections 366.06 and 717.05, Florida Statutes, as being harmonious, which is appropriate. The provisions of Chapter 717, Florida Statutes, contain no general statement of intent, express or implied, that conditions precedent to property ownership are changed by its provisions. While Section 717.04 expressly changes certain conditions precedent, Section 717.05 does not. The Commission's authority to establish conditions precedent to receipt of a refund are thus preserved.

Even if the two statutes cannot be harmonized, Section 366.06 prevails over Section 717.05, as the former is more specific and was enacted later in time.

CONCLUSION

The Commission possesses the power to place conditions on a refund by a municipal electric utility and may direct the disposition of unclaimed amounts. This power is part of the authority to require a refund and was granted to the Commission by statute.

The Commission provided ample due process prior to the issuance of Order No. 13048 and, even so, no one's property was taken as none yet existed. The Comptroller lacks standing to raise the issue on appeal and the Court should not consider it, since the Comptroller failed to raise it below.

The Commission determined that Section 366.06(3), Florida Statutes, granted it authority to direct the disposition of unclaimed refunds. This interpretation was based on the clear language of the statute and has been codified by rule. The Comptroller has failed to demonstrate why the interpretation is in error. The Commission's interpretation was based on a harmonious reading of Sections 366.06(3) and 717.05, Florida Statutes. Even if the two statutes cannot be harmonized, Section 366.06(3), Florida Statutes, prevails as more specific in nature and as the later enactment.

Respectfully submitted,

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September 7, 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, Answer Brief of Appellee, Florida Public Service Commission, has been furnished by U.S. Mail, this 7th day of September, 1984 to the following parties:

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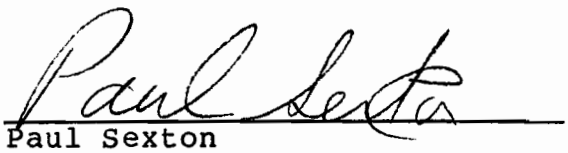

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