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IN THE SUPREME COURT OF THE STATE OF FLORIDA

GERALD LEWIS, as COMPTROLLER AND HEAD OF THE)
DEPARTMENT OF BANKING AND FINANCE, State of)
Florida,)
)
Appellant,)
)
vs.)
)
FLORIDA PUBLIC SERVICE COMMISSION,)
)
Appellee.)
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CASE NO. 65,350
PSC NO. 800495-EU

APPEAL FROM THE PUBLIC SERVICE COMMISSION
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT, GERALD LEWIS
AS COMPTROLLER AND HEAD OF THE
OF THE DEPARTMENT OF BANKING AND FINANCE
OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

This is an appeal from an order of the Florida Public Service Commission. In its Initial Brief, the Appellant refers to certain documents and orders which were not included in the record as transmitted to this Court. These documents and orders, however, are the subject of two motions which the Appellant has filed contemporaneously with this brief, to wit: Motion to Supplement Record; and, Motion For Judicial Notice. Accordingly, references to the original record are indicated by the symbol "R" followed by the appropriate page number. References to the documents which are subject to the Motion to Supplement the Record are indicated by the symbol "SR" followed by the appropriate page number. References to those orders which are subject to the Motion for Judicial Notice are not specifically designated; however, these references and citations are directed solely to prior, official actions of the PSC.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order of the Public Service Commission ("PSC") relating to rates for utility service and to the disposition of refunds from a utility rate adjustment which remain unclaimed by the consumer. This Court has jurisdiction under Article V, Section 3(b)(2) of the Florida Constitution, Section 350.128, Florida Statutes (1983), and Rule 9.030(a)(1)(B)(ii), Florida Rules of Appellate Procedure.

On October 4, 1982, by Order No. 11221, the PSC ordered the City of Tallahassee ("City") to eliminate the 15% surcharge applied to the bills of its electric utility customers receiving service outside of the city limits of the City. On November 4, 1982, the City appealed the order to this Court. Pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, the appeal by the City caused an automatic stay of Order No. 11221; however on November 19, 1982, the PSC issued another order, No. 11341, which imposed several conditions on the automatic stay. (R-1) The PSC, as conditions on the stay, ordered the City to collect all surcharge revenues subject to refund and, in the event the prior order was affirmed, to refund those amounts to the nonresident customers from whom they were collected. (R-2) The PSC's order further provided that the City file a refund plan with the PSC within 30 days. (R-2)

By opinion dated December 1, 1983, this Court affirmed the order of the PSC eliminating the 15% surcharge. City of Tallahassee v. Florida

Public Service Commission, 441 So.2d 620 (Fla. 1983) On January 6, 1984, the city filed a Petition For Approval of Refund Plan with the PSC and attached thereto, as Exhibit A, its proposed Surcharge Refund Plan. (R-5) The City's proposed refund plan stated that the refund would be paid by credit to active customers' accounts and by check to inactive customers' accounts. (R-7) Refund checks for inactive accounts would be mailed to the customers' last known addresses. (R-7) Refund checks for inactive accounts not claimed or cashed within twelve months would be voided and those amounts refunded to all active customer accounts through the Energy Cost Adjustment Clause. (R-8) Refunds to inactive accounts of less than \$1.00 would also be credited to active accounts through the Energy Cost Adjustment Clause. (R-8)

On January 20, 1984, the Office of the Comptroller, Department of Banking and Finance ("Appellant") filed a Petition For Leave To Intervene And To Modify Refund Plan with the PSC. (R-16) In its petition, the Appellant argued that the portion of the City's refund plan pertaining to unclaimed refund checks was in direct conflict with the provisions of Chapter 717, Florida Statutes, the Florida Disposition of Unclaimed Property Act ("Act") (R-17) Accordingly, the Appellant requested that the PSC modify the Surcharge Refund Plan to provide that the sum of all refund checks for inactive accounts which remain unclaimed or uncashed be delivered to the custody of the Appellant, pursuant to the express authority of Sections 717.05 and 717.131, Florida Statutes, (R-18) On January 24, 1984, the City filed a

response to the petition which concurred with the Appellant's interpretation of the Act. The City contemporaneously submitted a modified Surcharge Refund Plan to the PSC which required that unclaimed refund checks be delivered to the custody of the Appellant with proof that a diligent search and inquiry had been made to locate the owner. (R-20) Refunds to inactive accounts of less than \$1.00 would still be refunded to all active accounts through the Energy Cost Adjustment Clause.

(R-20) After further discussions with the Appellant, however, the City later agreed to also deliver those monies representing refunds of less than \$1.00 to the Appellant. (R-22) The City reasoned that it would be more cost effective to tabulate the inactive accounts of less than \$1.00, identify those customers, and turn the funds over to the Appellant than to press for an allocation of those funds to all customers through the fuel adjustment clause. (R-22)

In a telephone conversation with the PSC, the Appellant was informed that it would not be permitted to orally argue in support of the petition but that it would be notified of the date and time of the PSC's agenda conference when the matter would be considered. By memorandum dated February 21, 1984, the PSC issued to the Appellant a revised Case Assignment and Scheduling Record ("CASR") for the petition. (SR-1) The CASR indicated that the PSC's staff recommendation was due on February 23, 1984 and that the agenda conference would be held on March 6, 1984. (SR-1,2) Upon receipt of the CASR, the Appellant contacted the PSC and learned, in fact, that the staff recommendation

had been issued on February 9, that the PSC had considered the matter at an agenda conference on February 21, and that the petition had been denied despite the staff recommendation which concluded that Chapter 717, Florida Statutes, governed the disposition of the City's unclaimed refunds. (SR-3)

On March 2, 1984, the PSC issued a final order, No. 13048, which denied the Appellant's petition to modify the Surcharge Refund Plan and approved the City's original plan. (R-27) In this order, the PSC held that the original refund plan did not conflict with Chapter 717, Florida Statutes, and that the original plan more fully accomplished the purpose of the refund order (R-29) The PSC further noted that refund amounts of less than \$1.00 would also not fall under the provisions of Chapter 717, Florida Statutes, since the original plan did not entitle inactive accounts to said refunds but provided for the distribution of these monies to current rate payers through the fuel adjustment clause. (R-29)

On March 9, 1984, the Appellant filed a Motion For Reconsideration, Clarification And Oral Argument. (R-33) In its motion, the Appellant urged the PSC to reconsider Order No. 13048 on the grounds that (1) Section 366.06, Florida Statutes, and Rule 25-6.109(8), Florida Administrative Code, did not confer jurisdiction over the disposition of unclaimed utility refunds to the PSC, (2) the order conflicted with the provisions of Chapter 717, Florida Statutes, which expressly pertain to unclaimed utility refunds, (3) the disposition of the unclaimed utility refunds by the PSC was unconstitutional, and (4) the practical effect of

the original Surcharge Refund Plan did not accomplish the purpose of the refund order since the unclaimed amounts would be credited to all active accounts (both in-city and out-of-city) and result in a windfall to active utility customers. (R-33) Following oral argument on April 24, 1984, the PSC entered an order, No. 13328, denying the Appellant's motion. (R-42) On May 23, 1984, the Appellant filed a Notice of Administrative Appeal with the PSC. (R-45)

ARGUMENT I

Order No. 13048 of the PSC which pertains to the disposition of unclaimed utility refunds violates the essential requirements of law since (1) the order deprives the citizens of the State of Florida of their personal property without due process of law and (2) the PSC lacks jurisdiction over the disposition of unclaimed refunds issued by a municipal electric utility

An order of the PSC is presumed valid and will not be overturned by this Court unless it is not supported by competent substantial evidence of record or violates the essential requirements of law. Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981); Gulf Power Co. v. Florida Public Service Commission, et al, ___ So.2d. ___, Case No. 63,729, 9 FLW 286 (July 12, 1984). On January 3, 1979, the PSC, issued an order to all municipal electric utilities, including the City, to submit rate tariff sheets. Section 366.04(2), Florida Statutes, permits the PSC to prescribe a rate structure for all electric utilities. After this action was upheld by this Court in City of Tallahassee v. Mann, supra., the PSC, on October 4, 1982, ordered the City to eliminate a 15% surcharge applied to the bills of its customers receiving service outside the city limits. The PSC later ordered the City to file a plan which provided for a refund of those out-of-city surcharge revenues. (R-1,2) The City filed a proposed Refund Surcharge Plan which provided for the refund to be paid by credit to active customers' accounts and by check to inactive customers' accounts. (R-5)

Refund checks for inactive accounts would be mailed to the customers' last known addresses. (R-7,8) The proposed plan provided that refund checks for inactive accounts not claimed or cashed within twelve months would be voided and those amounts refunded to all active customer accounts. (R-8) Although the Appellant intervened and objected to the PSC's disposition of the unclaimed refunds on the grounds that such disposition was both unconstitutional and outside the PSC's jurisdiction (R-16), the PSC adopted the refund plan as originally proposed. (R-29) The PSC later declined to reconsider its position. (R-42) This Court should reverse the order of the PSC as it pertains to the disposition of unclaimed refunds by the City since the order violates the essential requirements of law.

1. The Order is Unconstitutional Since it Deprives the Citizens of the State of Florida of Their Personal Property Without Due Process of Law

It is a fundamental principle of jurisprudence that no person shall be deprived of life, liberty or property without due process of law.

U.S. Constitution, Amendment V and XIV; Art. I, Section 9, Fla.

Constitution; Rowland v. State, 129 Fla. 662, 176 So. 545 (Fla. 1937);

Heller v.

Abess, 134 Fla. 610, 184 So. 122 (Fla. 1938); Ex parte Wise, 141 Fla.

222, 192 So. 872 (Fla. 1940); Cash v. Culver, 122 So.2d 179 (Fla. 1960).

The constitutional safeguards of due process extend to the owners of unclaimed personal property. Anderson National Bank v. J. E. Lockett, 321 U.S. 233 (1944); Standard Oil Co. v. State of New Jersey, ex rel.

Parsons, 341 U.S. 428 (1951); Texas v. New Jersey, 379 U.S. 674 (1965); State v. Northwestern Nat. Bank of Minneapolis, 18 N.W. 2d 569 (Minn. 1945); Connecticut Mut. Life Ins. Co., et al., v. Moore, 74 N.E. 2d 24 (N.Y. 1947); In re: Certain Moneys in Possession And Custody of Union Trust Co. of Pittsburgh, PA., 59 A.2d 154 (Pa. 1948); State v. Otis Elevator Co., 95 A.2d 715 (N.J. 1953); Clovis National Bank v. Callaway, 364 P.2d 748 (N.M. 1961). In the Anderson National Bank decision, which involved the disposition of unclaimed state bank deposits, the United States Supreme Court held:

What is due process in a procedure affecting property interests must be determined by taking into account the purpose of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. (Citations omitted) The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.

Anderson National Bank, *supra.* at 246.

These fundamental due process rights of notice and hearing are recognized in the State of Florida. McDaniel v. McElvy, 91 Fla. 770, 108 So.2d 820 (Fla. 1920); Cavalier v. Ignas, 290 So.2d 20 (Fla. 1974).

The Surcharge Refund Plan as adopted by the PSC fails to provide any due process protection to the owners of the unclaimed utility refunds prior to the severance of their rights and interests in the monies after 12 months. Even those customers who simply had not cashed the refund check within 12 months would have their right to the money voided. The plan, as ordered by the PSC, contains no requirement for

notice prior to the elimination of the property rights, no time period within which to make a claim against the unclaimed refunds, and no provision for hearing or judicial review. The disposition of those unclaimed utility refunds would, instead, be processed as follows:

Refund checks for inactive accounts not claimed or cashed within twelve months from the date of the check will be voided, and those amounts refunded to all active customer accounts through the Energy Cost Adjustment Clause . . . Refunds to inactive accounts of less than One dollar (\$1.00) will also be refunded in this manner.

(R-8)

In short, the PSC's order, as it adopts the Surcharge Refund Plan and pertains to the disposition of unclaimed utility refunds, not only deprives certain inactive utility customers of their personal property without due process of law but also results in a windfall to active utility customers. Consequently, this order violates the essential requirements of law and should be reversed by Court.

2. The Public Service Commission Lacks Jurisdiction Over the Disposition of Unclaimed Refunds Issued by a Municipal Electric Utility.

The PSC ordered the City to eliminate the 15% surcharge applied to the bills of its nonresident utility customers under the authority granted it by Section 366.04(2), Florida Statutes, which specifically refers to municipal electric utilities. This action was upheld by this Court. City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981); City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983). In upholding the PSC's decision, however, this Court was

extremely careful to distinguish the related concepts of "rates" and "rate structure."

The dispute here is over the meaning of "rate structure." Section 366.04(2)(b) clearly grants the commission jurisdiction "To prescribe a rate structure for all electric utilities." The city urges us to construe "rate structure" so that it does not include surcharges, arguing that otherwise the commission would be allowed to exert its jurisdiction over municipal electric utilities' rates. We agree that the commission does not have jurisdiction over a municipal electric utility's rates. See Amerson v. Jacksonville Electric Authority, 362 So.2d 433 (Fla. 1st DCA 1978). However, there is a clear distinction between "rates" and "rate structure" though the two concepts are related. "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates. Cf. Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977) (evidence to support the commission's decision to retain the basic structure was adequate even though there were a few unexplained reclassifications of customers.)

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

City of Tallahassee v. Mann, supra. at 163.

It is clear, therefore, pursuant to this Court's decision above, that while the PSC has the authority over the "rate structure" of all electric utilities in the state, it has no jurisdiction to set "rates" for a municipal utility like that of the City.

The jurisdictional distinction is crucial in the case sub judice since the PSC expressly conditioned its disposition of the unclaimed

utility refunds upon the authority of Section 366.06(3), Florida Statutes, to wit:

The Comptroller asserts that Section 366.06(3) does not grant the Commission authority to determine the disposition of a refund already issued to a customer that remains unclaimed. That section provides that the Commission shall:

. . . 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 . . .

It is clear on the face on the statute that the Commission is authorized to direct the disposition of unclaimed refunds. The Commission is first directed by the statute to cause a refund, then it is authorized to direct a refund or other disposition of any portion of that refund not thus refunded. 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."

(R-42)

Section 366.06, Florida Statutes, however, pertains solely to "Rates; procedure for fixing and changing--" and refers specifically to the "rates" of a "public utility." Under this Court's decision in City of Tallahassee v. Mann, the PSC clearly has no jurisdiction over the "rates" of a municipal utility like the City. Furthermore, municipal electric utilities are expressly excluded from the definition of a "public utility." Section 366.02, Florida Statute. Consequently, since Section 366.06(3), Florida Statutes, pertains only to public or

investor-owned utilities, it simply cannot provide a jurisdictional basis upon which the PSC may determine the disposition of unclaimed refunds issued by a municipal utility. Significantly, the PSC's legal staff reached the identical conclusion in its memorandum, dated February 9, 1984, which states in pertinent part:

Section 366.06(3) allows the Commission to dispose of unclaimed refund amounts and overrides the provisions of Section 717.05(2). However, Section 366.06 applies only to investor-owned utilities. Therefore, Section 717.05(2) prevails in this case.

(SR-3)

One final argument regarding the PSC's lack of jurisdiction over unclaimed utility refunds must be presented. The Florida Legislature does not make a single reference to abandoned or unclaimed property in either the title or the body of the law which enacted the provision in Section 366.06, Florida Statutes, regarding refunds. Ch. 74-195, Section 4, Laws of Florida (1974). This deliberate omission is clear evidence of the legislature's intent not to repeal or overturn the Uniform Disposition of Unclaimed Property Act or to create an exception to it. The general rule of statutory construction expressio unius est exclusio alterius is applicable: 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 not expressly mentioned. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); Taylor, et al., v. Dorsey, 19 So.2d 876 (Fla. 1944). Accordingly, since

Section 366.06(3), Florida Statutes, is silent as to the disposition of unclaimed refunds, the legislature intended that jurisdiction lie, not with the PSC, but elsewhere.

The order of the PSC in the instant case as it pertains to the disposition of unclaimed refunds issued by the City violates the essential requirements of law since the PSC is without jurisdiction. This Court should reverse.

ARGUMENT II

Order No. 13048 of the PSC as it pertains to the disposition of unclaimed utility refunds is void since the PSC lacks the authority to direct the disposition of any unclaimed property and since the order directly conflicts with the provisions of Chapter 717, Florida Statute, the Florida Disposition of Unclaimed Property Act.

The power of the PSC to determine whether a public utility should be required to make a refund of unjustified or discriminatory charges is not at issue before this Court; indeed, Section 366.06, Florida Statute clearly empowers the PSC to review the rates charged by a public utility, to determine if those rates charged by a public utility are unjust, unreasonable, unjustly discriminatory, or in violation of law, to prescribe just and reasonable rates to be charged thereafter, to require a refund of any portion of a rate or charge which is not justified and to fix the amount of interest to accrue to the refund. Section 366.06(3), Florida Statute, specifically empowers the PSC by order 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. . .

Although Section 366.06(3), Florida Statute, is limited expressly to "public utilities" and contains no reference whatsoever to the disposition of any portion of a refund that is unclaimed by its rightful owner, the PSC has expressly interpreted this statutory language as its

authorization to to direct the disposition of unclaimed refunds. In Order No. 13328, the PSC states:

It is clear on the face of the statute that the Commission is authorized to direct the disposition of unclaimed refunds. The Commission is first directed by the statute to cause a refund, then it is authorized to direct a refund or other disposition of any portion of that refund not thus refunded. 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."

(R-42)

This interpretation merely expands upon the prior holding of the PSC in Order No. 13048 which states, in pertinent part:

We do not agree with the Comptroller that the original refund plan conflicts with Chapter 717. 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.

(R-29)

Not surprisingly, the PSC has attempted to codify this alleged authorization to direct the disposition of unclaimed utility refunds by its promulgation of Rule 25-6.109(8), Florida Administrative Code, which states:

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 efforts by the PSC to confer itself with the authority to dispose of unclaimed utility refunds through the application of convoluted reasoning, as evidenced by Order Nos. 13328 and 13048, and through the

promulgation of the above-referenced rule, should not be permitted to stand.

The order of the PSC directing the disposition of the unclaimed utility refunds issued by the City upon the elimination of the 15% surcharge is void for many of the same reasons outlined in the Appellant's first argument on appeal which pertain to lack of jurisdiction, to wit: Section 366.06(3), Florida Statute, upon which the PSC expressly justifies its disposition of the unclaimed refunds, makes no reference whatsoever to unclaimed property or its disposition and, similarly, nothing in the statute's enacting legislation indicates the intent of the legislature to repeal or supercede any portion of Chapter 717, Florida Statute; and, the PSC, while having jurisdiction over the City's "rate structure" pursuant to Section 366.04, Florida Statute, does not have jurisdiction over the City's "rates" under the file and suspend procedures set forth in Section 366.06, Florida Statute, and consequently could not use this statute as a jurisdictional basis upon which to determine the disposition of unclaimed refunds issued by a municipal utility. Chapter 74-195, Section 4, Laws of Florida (1974); Thayer v. State 335 So.2d 815 (Fla. 1976); City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981). Even assuming, arguendo, that the PSC has jurisdiction over the refunds of a municipal utility, the order as it pertains to unclaimed refunds is still void, however, since it fatally conflicts with the express provisions of Chapter 717, Florida Statute. Since Section 717.05, Florida Statute,

specifically refers to "any sum" which a utility has been ordered to refund that "remains unclaimed", this provision must take precedence over Section 366.06(3), Florida Statute, which refers generally to utility refunds.

It is a fundamental principle of statutory construction that statutes on the same subject should be harmonized when possible, but that a statute dealing specifically with a subject takes precedence over another statute covering the subject in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959); Marston v. Gainesville Sun Publishing Co., 341 So.2d 783 (Fla. 1st DCA 1970); Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc., 382 So.2d 1280 (Fla. 1st DCA 1980); State v. Young, 357 So.2d 416 (Fla. 2d DCA 1978). In the event of conflict, the special statute will prevail in the absence of a clear legislative intent to the contrary. St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949); Department of Health and Rehabilitative Services v. Florida Psychiatric Society Inc., supra. at 1286. Furthermore, the rules and regulations promulgated by administrative agencies must be consistent with the statutes under which they are promulgated and they may not amend and add to the statute, or make legal that which the agency had no authority to do in the first place. Seitz v. Duval County School Board, 366 So.2d 119, 121 (Fla. 1st DCA 1979); Department of Health and Rehabilitative Services v. Florida Psychiatric Society, 382 So.2d 1280, 1285 (Fla. 1st

DCA 1980); Great American Banks, Inc., v. Division of Administrative Hearings, Department of Administration, 412 So.2d 373, 375-370 (Fla. 1st DCA 1981); Florida Commission On Human Relations v. Human Development Center, 413 So.2d 1251, 1254 (Fla. 1st DCA 1982).

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. Chapter 61-10, Laws of Florida (1961). To the present date, thirty-one states and the District of Columbia have enacted either the original 1954 version of the Act or the 1966 revision of the Act. Of the remaining 19 states, all but 2 have enacted some form of unclaimed property legislation. A. Andreoli. "Guide to Unclaimed Property and Escheat Laws," Section IV (1982). The Prefatory Note to the 1954 Act sets forth its nature and purpose:

The Uniform Act is custodial in nature--that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time no matter how remote . . . The Uniform Disposition of Unclaimed Property Act if adopted by the states, will serve to protect the interests of owners, to relieve the holders from annoyance, expense and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise, in effect, would become a windfall to the holders thereof.

A. Andreoli, "Guide to Unclaimed Property and Escheat Laws", Appendix (1982)

The Florida Legislature has revised the Act several times, with the latest revision taking place in 1981. Chapter 81-259, Laws of Florida (1981). The current version of the Act refers specifically to deposits and refunds held by utilities and, in pertinent part, states:

The following funds held or owing by any utility are presumed abandoned:

(1) Any deposit made by a subscriber with a utility to secure payment for, or any sum paid in advance for, utility services to be furnished in this state, less any lawful deductions, together with any interest thereon, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than 7 years after the termination of the services for which the deposit or advance payment was made.

(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.

(3) Any sum paid to a utility for a utility service, which service has not, within 7 years of such payment, been rendered.

Section 717.05, Fla. Stat. (1983)

The ultimate disposition of any such unclaimed utility refunds is also specifically directed within the Act through the requirement of annual reports, the delivery of the unclaimed funds to the Appellant, the deposition of the funds into the State School Fund, the determination of all claims, and the opportunity for judicial review of any claim determination. Section 717.01, Florida Statute (1983), through Section 717.30, Florida Statute (1983)

Consequently, under the aforementioned principles of statutory construction, the specific language of Section 717.05, Florida Statute, must take precedence over the general language of Section 366.06(3), Florida Statutes when determining the disposition of unclaimed utility refunds. Likewise, Rule 25-6.109(8), Florida Administrative Code, provides no authority to the PSC since it has the effect of both repealing the specific language of Section 717.05, Florida Statute, and adding to the power conferred by Section 366.06(3), Florida Statute. Indeed the comprehensive nature of Chapter 717, Florida Statute, and the exactness of the language therein clearly evidences the legislature's intent that all unclaimed utility refunds be processed in accordance with the Act. In this regard, it is significant to note that the PSC has recognized the applicability of Chapter 717, Florida Statute, to unclaimed utility refunds in numerous, prior orders. As recently as April 8, 1983, the PSC, in a matter entitled In re: Application of Park Manor Waterworks, Inc., for increased water and sewer rates in Orange County, Florida, Docket No.810020-WS, Order No. 11846, Fla. Pub. Ser. Comm. Rptr. p. 158 (April 8, 1983), issued a final order which directed the utility to refund approximately \$7,782 in water revenues and approximately \$6,406 in sewer revenues to the utility's customers with interest. The exact method of of the refund was set forth in the order as follows:

The refund to the customers shall be reflected as a credit on each existing customer's bill. For customers who have left the system and are entitled to a refund, the utility shall mail a refund check to the last mailing address

on record. A special checking account shall be used for six months for the express purpose for issuing refund checks. In the event checks are returned to the utility for whatever reason, the refund money shall revert back to the special checking account. Monies remaining in the account after six months shall be transferred to the company's general operating account, marked as unclaimed refunds, and the checking account then closed. Any monies not claimed by customers within seven years shall be disposed of in accordance with s. 717.05, Florida Statutes, relating to the disposition of unclaimed refunds held by utilities.

In Re: Application of Park Manor Waterworks, Inc., supra.
at 164.

Similarly, in a matter entitled In re: Petition of Gulf Power Company for an increase in its rates and charges, Docket No. 800001-EU(MC), Order No. 11123, Fla. Pub. Ser. Comm. Rptr. p. 249 (Aug. 30, 1982), the PSC issued an Order Requiring Refund on August 30, 1982, which expressly pertained to a \$2,205,000 refund of electricity revenues. The PSC issued this refund order after this Court affirmed the PSC's prior action in applying new electric rates to bills 30 days after expiration of the file and suspend period Gulf Power Co. v. Cressee, et al., 410 So.2d 492 (Fla. 1982). The PSC set the terms and conditions of the refund as follows:

* * * * *
ORDERED that such refund will be reflected as a credit on each existing customer's bill. For those customers who have left the system and are entitled to a refund, the company shall mail refund checks of one dollar or more to the last mailing address on record. It is further

ORDERED that a special checking account should be used for one year for the express purpose of issuing refund checks. In the event checks are returned because of no forwarding address, the refund will revert back to the special checking account for the remainder of the year. It is further

ORDERED that any money remaining in the account after one year should then be placed in the company's general operating account and so marked, and the checking account then closed. It is further

ORDERED that any moneys not claimed from the issuance of checks within seven years shall escheat to the state as provided for by law. . .

* * * * *

In re: Petition of Gulf Power, supra. at 250.

Thus, in a case clearly involving the file and suspend procedures of Section 366.06, Florida Statute, the PSC recognized and ordered that the unclaimed utility refunds must be disposed of in accordance with Chapter 717, Florida Statute.

From 1978 through 1983, in at least 10 other matters involving refunds of utility revenues, the PSC acknowledged that all utility refunds not claimed by the utility's customers should be delivered to the state pursuant to Chapter 717, Florida Statute.

In re: Petition of Florida Power Corp., etc., Docket No. 770316-EU(CR), Order 8160, Fla. Pub. Ser. Comm. Rptr. p. 162 (Feb. 2, 1978);

In re: Petition of General Waterworks Corp., etc., Docket No. 780022-WS(CR), Order No. 0443, Fla. Pub. Ser. Comm. Rptr. p. 12 (July 9, 1980); In re: Application of Southern Utilities

Co., etc., Docket No. 790317-WS(CR), Order 9533, Fla. Pub. Ser. Comm. Rptr. p. 96 (Sept. 12, 1980); In re: Application of Rolling Oaks

Utilities, Inc., etc., Docket No. 800364-WS(CR), Order No. 10298, Fla. Pub. Ser. Comm. Rptr. p. 201 (Sept. 17, 1981); In re: Application of

Park Manor Waterworks, Inc., etc., Docket No. 810020-WS(CR), Order 10720, Fla. Pub. Ser. Comm. Rptr. p. 165 (April 19, 1982); In re: Application of Jacksonville Suburban Utilities Corp., etc., Docket No. 810071-WS(MC), Order No. 10791, Fla. Pub. Ser. Comm. Rptr. p. 96 (May 19, 1982); In re: Central V. Utilities Corp., etc., Docket No. 800718-WS(CR), Order No. 10851, Fla. Pub. Ser. Comm. p. 88 (June 3, 1982); In re: Application of Century Utilities Inc., etc., Docket No. 80017-WS(CR), Order No. 11215, Fla. Pub. Ser. Comm. Rptr. p. 235 (Sept. 30, 1982); In re: Application of Rolling Oaks Utilities, Inc., etc., Docket No. 800364-WS(CR), Order No. 11396, Fla. Pub. Ser. Comm. Rptr. p. 65 (Dec. 8, 1982); In re: Application of North Hutchinson Services, etc., Docket No. 810219-W and 810220-S, Order No. 11422, Fla. Pub. Ser. Comm. Rptr. p. 147 (Dec. 15, 1982). Accordingly, the PSC's order before this Court, as it pertains to the disposition of unclaimed property, is not only void since it lacks any jurisdictional basis in Section 366.06(3), Florida Statute, and directly conflicts with Section 717.05, Florida Statute, but also arbitrary and capricious since it is totally inconsistent with the PSC's prior orders.

The Supreme Court of Alabama recently faced issues identical to those before this Court and reversed the lower court's denial of injunctive relief against enforcement of an order of the Alabama Public Service Commission which directed the disposition of unclaimed utility refunds in a manner inconsistent with the Uniform Disposition of Unclaimed Property Act. In Boswell v. Whatley, 345 So.2d 1324 (Ala.

1977), the Alabama Public Service Commission had ordered a natural gas supply company directing the company to follow a certain procedure in making a refund to its customers of approximately \$800,000.00, plus interest. Specifically, the order stated:

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.

Refunds made to existing customers shall be based upon the test period consumption hereinabove directed in Paragraph 3 and shall exhaust the funds received from United from refunds. Any refunds made to former customers not covered under the test period shall be paid out of the contingency funds, by check. If such refunds by check exceed the contingency fund, such excess shall be treated as a current operating expense of the Petitioner. If there is any excess in said contingency fund, it shall be handled as set out in Paragraph 8 of this Order.

* * * * *

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.

Boswell v. Whatley, supra. at 1326-1327.

The Alabama Public Service Commission later amended its earlier order and made the following statement:

. . . No portion thereof shall accrue to the benefit of the Petitioner, nor shall any funds be allowed to escheat to the State of Alabama whereby customers of Petitioner are deprived of the benefits of the refunds thereby directed.

. . . If is the intent of this Commission that all funds received by utility from United from any refunds, present or past, after allowable expenses, shall be under the control of this Commission and shall be distributed to customers of the utility in accordance with this and with future orders of the Commission and no portion thereof shall accrue to the benefit of the utility, nor shall the orders of the Commission be so construed as to provide for any "unclaimed" funds which could escheat to the State of Alabama.

Boswell v. Whatley, supra. at 1327.

The Alabama Commissioner of Revenue contended that the order of the Public Service contravened the terms of the Uniform Disposition of Unclaimed Property Act which Alabama had adopted. Ala. Code, Title 47, Sections 314-342.

Specifically, he maintains that the portions of the order not allowing the funds to escheat, and not allowing the orders to be "so construed as to provide for "unclaimed" funds which could escheat" is void as beyond the power of that body to declare, and because those portions of the order attempt to repeal the express provisions of Title 47, § 317, Alabama Code.

Boswell Whatley, supra. at 1327.

The Supreme Court of Alabama agreed with the Commissioner of Revenue and held:

The statutes empowering the Commission with authority to regulate utilities, to fix their rate charges, and to determine their fair net return do not authorize the Commission to extinguish the property rights of those who are served by those regulating utilities. In particular,

the legislature has chosen to eliminate from the language of the statutes containing the Commission's powers any reference to unclaimed or abandoned property. That specific subject is encompassed in the Uniform Disposition of Unclaimed Property Act . . . which, inter alia, expressly provides in Section 317:

The following funds held or owing [owing] by any utility are presumed abandoned:

* * * * *

(b) Any sum 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 two years after the date it became payable in accordance with the final determination or order providing for the refund.

From the literal terms of this statute it is clear that the legislature has recognized the existence of a property right in sums "held or owing" by a utility. These become "abandoned" (after applying interest earned and deductions) at the expiration of two years following the refund order in which they are applicable, and as such their dispositions are governed by directions contained in Section 324 and those sections which follow it. In view of this plain legislative declaration, it is legally impossible for the Commission to declare, as it has attempted in its amended order, that its order shall not be "so construed as to provide for any 'unclaimed' funds," for this would arrogate to the Commission a legislative power not only outside its authority but one plainly having been exercised by the legislature itself.

The powers of the Commission to determine whether refunds should be made and to identify those customers to whom they should be made, are not in issue here; indeed, the appellant in brief concedes this much. But once the Commission makes a "final determination or order providing for a refund," to use the statutory language, those customers, known or unknown, easily identified or difficult to locate, are entitled to their share which constitutes a chose in action. Peavy Lumber Company v. Murchison, 272 Ala. 251, 130 So.2d 338 (1961). Should these remain

unclaimed for more than two years, the provisions of the Unclaimed Property Act control them.

If follows, therefore, that the portion of the Public Service Commission's order of April 8, 1976 which attempts to circumscribe, if not abrogate, the effect of Title 47, § 317, is void. . .

Boswell v. Whatley, supra., at 1328.

The Florida Public Service Commission in the instant case has attempted to apply exactly the same convoluted logic as its Alabama counterpart to the disposition of the City's unclaimed utility refunds. In its Order Denying Motion for Reconsideration, the PSC stated:

The Comptroller asserts that Section 366.06(3) does not grant the Commission authority to determine the disposition of a refund already issued to a customer that remains unclaimed. That section provides that the Commission shall:

. . . 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. . . .

It is clear on the face of the statute that the Commission is authorized to direct the disposition of unclaimed refunds. The Commission is first directed by the statute to cause a refund, than it is authorized to direct a refund or other disposition of any portion of that refund not thus refunded. 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."

During oral argument the Comptroller asserted that Section 717.05(2), F.S., supercedes Section 366.06(3), F.S. We disagree. To begin with, the Comptroller's argument assumes a conflict between two statutes. The two statutes, however, can be read in harmony. Section 717.05(2), F.S.,

provides that the following funds held by a utility are presumed abandoned:

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.

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

(R-42, 43).

Under the PSC's interpretation of Section 717.05, Florida Statute in the instant case, since their order redistributed the unclaimed refunds to the accounts of active customers after 12 months, the monies could not be construed as having been "abandoned" or "unclaimed." Only where the PSC's order fails to direct the disposition of the unclaimed refunds would Section 717.05, Florida Statute apply. Just as in Boswell, however, the PSC's position is untenable and must be rejected by this Court.

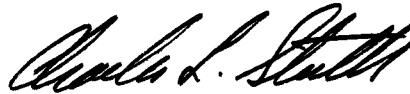
In conclusion, Section 366.06(3), Florida Statute, as it sets forth the PSC's authority to require a refund, omits any reference to

unclaimed refunds or abandoned property. Conversely, Section 717.05(2), Florida Statute, specifically encompasses "any sum which a utility has been ordered to refund. . . that has remained unclaimed . . ." (E.A.). The PSC's order severs the property rights of those customers who either cannot be located or fail to cash the check within one year and provides a windfall to the City's active utility customers. On the other hand, disposition of the unclaimed refunds pursuant to Section 717.05(2), Florida Statute, safeguards the rights of all utility customers to whom the refunds were originally owed and provides a residual benefit to the State of Florida through the monies' inclusion in the State School Fund.

This Court should give effect to the Florida Legislature's intent concerning unclaimed utility refunds. The legislature chose to eliminate from the language of the statutes which delineate the PSC's powers any reference to unclaimed or abandoned property. Instead, the legislature chose to deal with the subject of unclaimed utility refunds through the adoption of the Uniform Unclaimed Property Act and specifically through the enactment of Section 717.05, Florida Statute. The order of the PSC, as it pertains to the disposition of unclaimed utility refunds by the City, is void as both outside its authority and in hopeless conflict with Chapter 717, Florida Statute. This attempt to circumvent the spirit and intent of the laws of this state, as well as the exact language of the statutes, must not be permitted to stand. This Honorable Court should reverse.


CONCLUSION

Based upon the foregoing authorities and arguments, the Appellant respectfully requests that this Honorable Court vacate that portion of the PSC which pertains to the disposition of unclaimed utility refunds issued by the City and direct that all such amounts be delivered to the custody of the Appellant pursuant to the provisions of Chapter 717, Florida Statutes, the Florida Disposition of Unclaimed Property Act.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by hand to:

Clerk of the Supreme Court, State of Florida
Supreme Court Building
Tallahassee, Florida 32301

and by mail to the following this 1st day of August, 1984:

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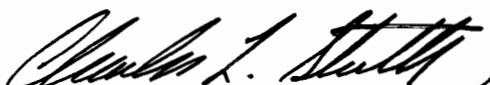
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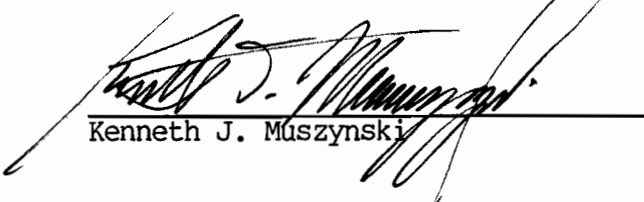
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