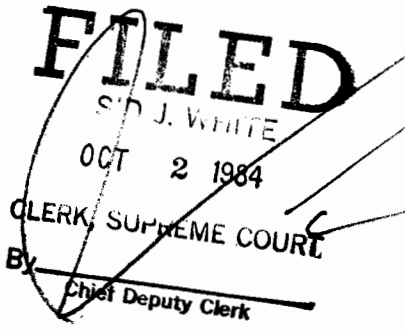
In The Supreme Court of Florida



Gerald Lewis, as Comptroller and
Head of the Department of Banking
and Finance, State of Florida,

Appellant,

vs. Case No. 65,350

Florida Public Service Commission,

Appellee.

_____/

Reply Brief of the Appellant
Gerald Lewis, as Comptroller and Head
of the Department of Banking and Finance
State of Florida

S. Craig Kiser
General Counsel

Charles L. Stutts
Deputy General Counsel
Department of Banking
and Finance
Suite 1302, Capitol
Tallahassee, Florida 32301
(904) 488-9896

Kenneth T. Muszynski
Assistant General Counsel
Department of Banking
and Finance
Suite 1302, Capitol
Tallahassee, Florida 32301
(904) 488-9896

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CASES

Argument

THE FLORIDA PUBLIC SERVICE COMMISSION ("PSC") LACKS EITHER THE STATUTORY OR INHERENT AUTHORITY TO IMPOSE A CONDITION UPON A REFUND ISSUED BY A MUNICIPAL UTILITY WHICH, BY DIRECTING THE DISPOSITION OF UNCLAIMED REFUNDS, EXTINGUISHES THE PROPERTY RIGHTS OF CERTAIN CUSTOMERS TO THE REFUND AND PREEMPTS THE OPERATION OF CHAPTER 717, FLORIDA STATUTES, THE FLORIDA DISPOSITION OF UNCLAIMED PROPERTY ACT.

In its Answer Brief the PSC has argued that Section 366.06(3). Florida Statutes, authorizes it to order the disposition of unclaimed refunds to electric power customers. It contends that this authority is absolute and that it derives either from an implicit repeal of the relevant portions of the Florida Disposition of Unclaimed Property Act, Chapter 717, Florida Statutes, or from an alleged "inherent" authority to condition customers' rights to such refunds so as to avoid operation of that Act. This Reply Brief is provided to show that, in the first place, Section 366.06(3), Florida Statutes, is not involved in this appeal and, moreover, that the PSC is not empowered to destroy utilities customers' rights to refunds by requiring that such rights be exercised within one year or lost.

The Appellant concedes that the PSC may require a municipal utility to make a refund of surcharge revenues collected by the municipality pending appellate review of the PSC's decision which initially determined the surcharge to be discriminatory; however, as is made absolutely clear by the history of this case and the underlying record, this authority is derived solely from the powers conferred upon the PSC by Rule 9.310(b)(2), Florida Rules of Appellate Procedure, and not by

any of the provisions of Chapter 366, Florida Statutes. It must be recalled that the subject of controversy in the instant appeal, a refund of surcharge revenues, was created not in Order No. 11221 of the PSC, which ordered the elimination of the 15% surcharge, but in Order No. 11341 which imposed the refund as a condition to the stay pending appeal. Order No. 11341, rendered November 1982, states in pertinent part:

> We initiated this proceeding on September 3, 1980 by the issuance of Order No. 9516, wherein we determined that the City's out-of-city surcharge may be discriminatory. On October 4, 1982, we determined that the surcharge was in fact discriminatory and required its elimination. The City has been applying what we have determined to be a discriminatory rate structure for over two years since we initiated this proceeding. Because the nature of our jurisdiction is prospective, the City's out-of-city customers have no recourse at this time against the application of the surcharge during that two-year period. By filing its Notice of Appeal, the City has obtained a stay of Order No. 11221 and may continue application of the surcharge until final disposition of its appeal. If the stay remains in effect without condition and Order No. 11221 is affirmed, the City's out-of-city customers will not see the effect of Order No. 11221 until the Supreme Court's decision is final.
>
> We are authorized by Rule 9.310(b)(2) to set aside the automatic stay or impose conditions Rule 9.310(b)(2) states:
>
> > Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the State, any public officer in an official capacity, board, commission or other public body seeks review; provided that on motion the lower tribunal or the court may impose any lawful conditions or vacate the stay.
>
> Our procedural rules address the matter as well. Rule 25.22.61(3)(b) states:
>
> > When a public body or public official appeals an order that does not involve an increase in rates, the Commission may vacate the stay or impose any lawful conditions.
>
> We find that the stay of Order No. 11221 should be subject to a condition: that all surcharge revenues

> collected by the City pending appeal shall be subject to refund and, should Order No. 11221 be affirmed by the Supreme Court, the City must refund those revenues to the out-of-city customers from whom they were collected. In the event that Order No. 11221 is affirmed, the City's out-of-city customers will receive a refund of the surcharge revenues collected pending review. If Order No. 11221 is reversed, the City may retain the surcharge revenues.
>
> (R-1,2). [Emphasis supplied]

Accordingly, only after the City appealed Order No. 11221 to this Court on November 4, 1982, did the PSC order that the surcharge revenues collected thereafter by the City were subject to refund. Presumably, had the City not appealed Order No. 11221 there would have been no refund order since it was expressly imposed as a condition to the stay pending appeal under Rule 9.310(b)(2), Florida Rules of Appellate Procedure. In effect, the PSC by Order No. 11341, rather than requiring the City to post supersedeas bond, ordered it to undertake collection of the disputed surcharge subject to refund should Order No. 11221 be affirmed in order that out-of-city customers would be reimbursed for damages sustained during the appeal proceeding.

The power of the PSC to direct the refund in the instant case cannot be expressly or inherently conferred by any of the provisions in chapter 366, Florida Statutes, a point which the Appellee expressly concedes in Order No. 11341:

> "On October 4, 1982, we determined that the surcharge was, in fact, discriminatory and required its elimination. The City has been applying what we have determined to be discriminatory rate structure for over two years since we initiated this proceeding. Because the nature of our jurisdiction is prospective, the City's out-of-city customers have no recourse at this time against the application of the surcharge during that two year period. By filing its Notice of Appeal, the City has obtained a stay of Order No. 11221 and may continue application of the surcharge until final disposition of its appeal. If the stay remains in

> effect without condition and Order No. 11221 is affirmed, the City's out-of-city customers will not see the effect of Order No. 11221 until the Supreme Court's decision is final."
>
> (R-1)

In its Answer Brief, the Appellee has ignored both the above-cited acknowledgment of jurisdictional limitation and the factual and legal basis upon which the refund order was issued; instead, the Appellee has based its arguments upon the misconceived and totally incorrect assumption that the PSC's refund order and its disposition of unclaimed amounts in Order No. 13048 are governed by the provisions of Section 366.06(3), Florida Statutes.

A. The PSC lacks any authority under Chapter 366, Florida Statutes, to direct the disposition of unclaimed refunds issued by the City.

A review of the provisions of Chapter 366, Florida Statutes, which pertain to municipal utilities, and the decisions of this Court interpreting these provisions, conclusively prove that the PSC has no jurisdiction thereunder to either compel the refund or dispose of unclaimed amounts. This Court upheld the authority of the PSC to test the validity of the 15% surcharge imposed by the City of Tallahassee ("City") upon all electric utility customers residing outside the municipal corporate limits on the grounds that:

> "The City's differential charges to customers within and without its corporate limits constitute a classification system and, thus, are a matter of "rate structure" subject to jurisdiction of the Public Service Commission."
>
> City of Tallahassee v. Mann, 411 So.2d 162, 163-164 (Fla. 1981)

The power of the PSC to direct the refund in the instant case cannot be expressly or inherently conferred by any provisions of Chapter 366 which

pertain to rates and the procedures for changing or adjusting these rates since in the City of Tallahassee decision, this Court acknowledged that:

> "We agree that the commission does not have jurisdiction over a municipal utility's rates . . . 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."
>
> City of Tallahassee v. Mann, 411 So.2d 162, 163 (Fla. 1981)

This decision clearly recognizes that the jurisdiction of the PSC to establish and adjust particular utility rates is limited in scope to situations which involve a "public utility." The electric rates of a municipal utility are established by a board of elected officials who must answer to the citizen-ratepayers. If the rates are too high, the citizen-ratepayers have the means to effectuate a change by virtue of their vote. The electric rates of a public or investor-owned utility, however, are established by a corporate board of directors who must answer only to the corporation's stockholders and not to the ratepayers. Consequently, ratepayers in an area served by a public utility lack the recourse naturally afforded to ratepayers in an area served by a municipal utility. This crucial distinction was also recognized by the Florida Legislature when it enacted Chapter 366, Florida Statutes. First, the legislature specifically excluded a municipal utility from the definition of "public utility." Section 366.02, Florida Statutes. Second, the legislature, in order to protect ratepayers served by a public utility, expressly conferred the PSC with the authority to determine fair and equitable rates and make adjustments

thereto pursuant to Sections 366.05, 366.06, 366.07, and 366.071, Florida Statutes. This authority is expressly limited, however, in each of the aforementioned provisions of Chapter 366 to situations which involve a public utility. Accordingly, the authority of the PSC to order the elimination of the fifteen percent surcharge must be founded solely with the provisions of Section 366.04(2)(b), Florida Statutes, which enable the PSC to prescribe a rate structure for all electric utilities.

The Appellee contends that Section 366.06(3), Florida Statutes, "expressly confers the authority to direct the disposition of unclaimed refunds" since it pertains to utility refunds and contains vague language that enables the PSC to direct the disposition of "any portion of such refund not thus refunded to patrons or customers of the utility." By its express terms, however, Section 366.06(3) is limited to a rate proceeding initiated by a public utility. In the case sub judice, the PSC initiated review of the City's rate structure specifically under the authority of Section 366.04(2)(b). Indeed, none of the proceedings below were initiated by the PSC or upheld by the Court pursuant to the powers enumerated in Section 366.06(3). For the Appellee to now argue that Section 366.06(3) is in any way applicable to this case ignores the underlying proceedings and is inconsistent with the PSC's prior assertions. Furthermore, Section 366.06(3), Florida Statutes, specifically provides that any refunds issued to a PSC directive shall not "accrue to the benefit of the utility." Assuming, arguendo, the applicability of Section 366.06(3) in this case, Order No. 13048 of the PSC, which approved the City's original plan, would be in violation of this legislative mandate. A municipal utility is

nothing more than a corporate form which embodies the citizens of the municipality. Since Order No. 13048 requires that unclaimed or uncashed refund amounts be refunded to all active customer accounts, the benefits from the unclaimed refunds in reality accrue to the utility through its active customers. Such a windfall is specifically precluded by Section 366.06(3), Florida Statutes.

The Appellee argues that this Court's decision in City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983), supports its contention that Section 366.06(3), Florida Statutes, governs refunds by municipal utilities pursuant to PSC orders. In that case, this Court upheld the refusal of the PSC to initiate rulemaking, holding that the standards for review of a public utility's rate structure set forth in Section 366.06(1), Florida Statutes, as well as other standards enumerated by the PSC in its comment letter provided "adequate general standards" against which City or any municipal utility could attempt to justify the surcharge. This Court simply recognized that since the PSC was in a "formulative stage regarding policy" in the surcharge area, it would be unwise to require the PSC to establish strict standards by which to justify surcharges. This decision does not, however, confer any additional authority or jurisdiction to the PSC over municipal utilities in general and specifically over refunds issued by municipal utilities. The sole authority of the PSC to regulate the rate structure of a municipal utility remains pursuant to Section 366.04(2)(b), Florida Statutes.

Section 366.04(2)(b), Florida Statutes, enables the PSC to prescribe a rate structure for all electric utilities and permits the

elimination of an unjustly discriminatory rate structure such as the City's 15% surcharge. City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983). However, unlike those other provisions of Chapter 366, Florida Statutes, which specifically permit the PSC order a refund of any new or interim rate increases subsequently determine to be unjustified, such as Sections 366.06 and 366.071, Florida Statutes, Section 366.04(2)(b), Florida Statutes, is silent on the issue of refunds pursuant to a rate structure determination by the PSC for a municipal utility. Without express statutory authorization providing for a retroactive application of the rate structure or surcharge which is found to be justified, the jurisdiction of the PSC over unjustly discriminatory rate structure such as the City's surcharge upon out-of-city customers is strictly prospective and enables the PSC only to prescribe a rate structure to the thereafter observed. Consequently, Section 366.04(2)(b), Florida Statutes, does not inherently or expressly authorize the PSC to order a refund of the surcharge revenues collected by the City prior to the elimination of the surcharge and, similarly, does not confer it with the power to compel a refund of surcharge revenues collected pending appeal. As shown by Order 11341, the authority of the PSC to compel the City to make a refund of surcharge revenues in the instant cases is derived solely from Rule 9.310(b)(2), Florida Rules Appellate Procedure. This rule, however, is expressly limited to the imposition of "any lawful condition" upon an automatic stay pending appeal. In the instant case, at the point in time when the PSC issued Order No. 13048 and imposed the additional condition upon the refund pertaining to the disposition of

unclaimed refunds, the automatic stay was no longer in effect since the appeal had been resolved three months earlier. Consequently, not even the provisions of Rule 9.310(b)(2), Florida Rules of Appellate Procedures, may authorize the PSC to place subsequent material revisions upon the refund order.

B. Order No. 13048 deprives certain out-of-city customers of their rights to the refund.

Without any express or inherent authority upon which to base the PSC's disposition of unclaimed refunds in Order 13048, it is well established that the order will be overturned unless it comports with the essential requirements of law. City of Tallahassee v. Mann, 411 So.2d 505 (Fla. 1973). It its Answer Brief, the Appellee asserts that Order No. 13048 comports with the essential requirements of law since (1) ample due process preceded the issuance of Order No. 13048 and (2) Order No. 13048 took no one's property.

The Appellant does not dispute that elimination of the City's surcharge involved many public hearings over an extended period of time; however, the crucial factor is the degree of due process afforded to those out-of-city customers whose rights to the refunds would be severed by the March 2, 1984 order. Until the issuance of this order, No. 13048, the previous decisions and orders of the PSC indicated that all out-of-city customers would receive refunds. Indeed, Order No. 11341, dated November 19, 1982, clearly indicated that "the City's out-of-city customers will receive a refund" in the event that Order No. 11221 was affirmed. (E.S.) In other words, prior to the issuance of Order 13048, no out-of-city customer had notice that the PSC would attempt to sever their right to the refund if it was not claimed or the check cashed

within one year. Furthermore, since the order affected only inactive customers, who probably had changed their residence to another city, even upon the issuance of Order No. 13048 these customers would lack notice of the PSC's action.

It was precisely for the protection of these unidentified and hard-to-locate inactive customers that the Appellant intervened in this action. The Appellant's rights under Chapter 717, Florida Statutes, the Florida Disposition of Unclaimed Property Act ("Act"), are derivative. It succeeds, subject to the provisions of the Act, to whatever rights the owners of the abandoned property may have. Standard Oil Co. v. State of New Jersey, ex rel. Parsons, 341 U.S. 428 (1981). The constitutional safeguards of due process extend to the owners of unclaimed personal property. Standard Oil Co., supra; Anderson National Bank v. J.E. Luckett, 321 U.S. 233 (1944). Consequently, the Appellant was clearly authorized to intervene in this action and has standing to seek the protection of the rightful owners of the unclaimed property and to assert their rights to due process of law under the Florida and United States Constitutions.

The Appellee asserts that Order No. 13048 took no one's property and, accordingly, comports with the essential requirements of law. As grounds for this contention, the Appellee argues that since Order No. 13048 did not impair any "vested rights" no property existed and none was taken. Even a cursory review of the record in this case shows this argument to be without merit. On November 19, 1982, the PSC issued Order No. 11341 which stated:

> ". . . that all surcharge revenues collected by the City pending appeal shall be subject to refund and, should Order

> No. 11221 be affirmed by the Supreme Court, the City must refund those revenues to the out-of-city customers from whom they were collected. In the event that Order No. 11221 is affirmed, the City's out-of-city customers will receive a refund of the surcharge revenues collected pending review . . .
>
> Based on the foregoing, it is
>
> ORDERED . . . that . . . out-of-city surcharge revenues collected by the City of Tallahassee pending appeal of Order No. 11221 shall be collected subject to refund and, in the event that Order No. 11221 is affirmed, the City of Tallahassee shall refund those revenues to the out-of-city customers from whom they were collected . . .
>
> (R-1,2).

The language of this order is overwhelmingly explicit and free from ambiguity: when the Supreme Court affirmed Order No. 11221, out-of-city customers would receive a refund of the amount of the surcharge revenues collected by the City during the appeal. This order absolutely entitled a specific class of customers to a definite refund of certain revenues which was contingent only upon the action of this Court. Consequently, when the contingency was satisfied by the order of this Court in December of 1983, the right of out-of-city customers to a refund of the surcharge revenues collected by the City pending appeal vested as a chose in action. A chose in action is a right to personal things of which the owner has not the possession, but merely a right of action for their possession. Spears v. West Coast Builders' Supply Co., 133 So. 97, 101 Fla. 980 (Fla. 1931); Boswell v. Whatley, 345 So.2d 1324, 1328 (Ala. 1977). Choses in action constitute "property." Standard Oil Co. v. State of New Jersey, ex rel. Parsons, 341 U.S. 428 (1951). Rights in property are basic civil rights in Florida. Corn v. State, 332 So.2d 4 (Fla. 1976). Since this property right of out-of-city

customers to the surcharge refund vested on December 1, 1983, when this Court affirmed Order No. 11221, the subsequent action of the PSC on March 1, 1984, in Order No. 13048 had the effect of extinguishing this right without due process of law. Indeed, the PSC's order not only eliminates the rights of certain customers who sustained damages due to the discriminatory surcharge but actually provides a windfall to all active customers since (1) active out-of-city customers receive more in the way of refunds than they paid due to the surcharge and (2) active in-city customers receive refunds on a surcharge they never paid.

In Cory v. Public Service Commission, 658 P.2d 749 (Cal. 1983), the Supreme Court of California considered a utility refund matter nearly identical to the case before this Court. In Cory, the California Public Utilities Commission ordered a telephone company to refund to customers over-collections of approximately $380 million. The refunds were calculated on the basis of prior usage from August 1974 to February 1980 with current customers receiving credits against current bills and former customers receiving checks. After issuance of the refund, the telephone company reported that about $5 million was unclaimed either because checks had been returned undelivered or checks had not been cashed. The commission then directed the telephone company to credit the $5 million to the accounts of current customers on a pro rata basis. As grounds for the redistribution, the commission cited a provision of the public utilities code which authorized the commission to compel a rate refund. The Comptroller of the State of California appealed, claiming that the unpaid funds should be delivered to the state pursuant to the state's unclaimed property laws.

The court first addressed the issue of the commission's authority to direct the disposition of the unclaimed refunds under the provisions of the public utilities code and held:

> "Section 453.5 does not authorize the commission's order to pay the unclaimed refunds to current customers. The section authorizes refund orders; it does not deal with unclaimed property . . . There is nothing in the section indicating that the commission having ordered the refunds is authorized to subsequently repudiate the property rights of unlocated former customers, declare a forfeiture, and provide a windfall for current customers who have already received the full refund to which they are entitled . . ."
>
> Cory v. Public Utilities Commission, 658 P.2d 749, 752 (Cal. 1983).

Accordingly, the court annulled the commission's order and directed that the unclaimed refunds be delivered to the state.

> "The Commission is not authorized to forfeit the refunds of the unlocated customers, and the property should be held for the benefit of the unlocated customers and for the use of the state in accordance with the Unclaimed Property Law. There is no more reason to allocate the unclaimed rate refunds to current telephone customers than there would be for a bank to allocate unclaimed property to its customers."
>
> Cory v. Public Utilities Commission, supra., at 753.

Accordingly, Order No. 13048 does not comport with the essential requirements of law and should be overturned by this Court.

C. Order No. 13048 conflicts with the provisions of Chapter 717, Florida Statutes, the Florida Disposition of Unclaimed Property Act.

The Appellee contends that Section 717.05, Florida Statutes, authorizes it to impose "conditions precedent to ownership" upon the City's surcharge refund which, if not satisfied, preclude the unclaimed refunds from ever becoming "held or owing by (the) utility" for the statutory period and, thus, abandoned. The Appellee claims that this

power is recognized ty the express terms of Section 717.05, Florida Statutes, since the refunds are not presumed "abandoned" until they have "remained unclaimed by the person appearing on the records of the utility entltled thereto for more than seven years after the date it becomes payable, in accordance with the final determination or order providing for the refund." (E.S.) The PSC argues that the language emphasized above grants it the express authority to preclude the abandonment of unclaimed utility refunds and thus circumvent the operation of Chapter 717, Florida Statutes, so long as the refund order provides for the redistribution of all unclaimed amounts at any time prior to the expiration of the seven year holding period. In other words, the Appellee asks this Court to construe Section 717.05, Florida Statutes, as conferring the PSC with the power to preempt the operation of Chapter 717, Florida Statutes, and to dispose of unclaimed utility refunds in a manner totally inconsistent with the act itself.

First, the language of Section 717.05, Florida Statutes, which the Appellee emphasizes and contends grants this authority (". . . in accordance with the final determination or order providing for the refund"), is nothing more than the mechanism for determining when the seven year abandonment period begins to run. The provision merely indicates that the order providing for the refund will evidence the date at which the abandonment period began to run and when the other, conjunctive requirements within Chapter 717, Florida Statutes, such as the initial reporting requirement of Section 717.12, Florida Statutes, will be triggered. This language is certainly not a grant of power to the PSC over unclaimed utility refunds; instead, it is purely a mechanical device for use in the determination

of the exact time when the refund became payable to the owner and when the seven year holding period began.

Second, the Appellee urges a construction of Section 717.05, Florida Statutes, which completely contradicts the very purpose behind the legislative enactment of Chapter 717, Florida Statutes. The Appellee in its Answer Brief asks that this Court construe Section 717.05, Florida Statutes, in such a manner as to enable the PSC, in Order No. 13048, to direct the disposition of unclaimed utility refunds, to sever the property rights of customers to the refund after one year and to provide a windfall to the utility. The Florida Legislature intended for Chapter 717, Florida Statutes, to provide a comprehensive mechanism for the collection, management and disposal of <u>all types</u> of unclaimed property through its adoption of the Uniform Disposition of Unclaimed Property Act. Chapter 61-10, Laws of Florida (1961). The specific purpose and nature of the Act is set forth in its Prefatory Note:

> "The Uniform Disposition of Unclaimed Property Act . . . will serve to protect the interests of owners . . . and give the adopting state the use of some considerable sums of money that otherwise, in effect, would become a windfall to the holders . . ."
>
> A. Andreoli, "Guide to Unclaimed Property and Eschent Laws," Appendix (1982).

The Appellee asks this Court to so construe Section 717.05, Florida Statutes, as to permit the PSC to issue orders pertaining to unclaimed utility refunds which directly contradict this legislative intent. Order No. 13048 of the PSC (1) not only fails to protect the owners of unclaimed property but actually severs their rights thereto after one year, and (2) provides a windfall to the utility and its active customers. Surely,

the Florida Legislature did not intend for the final phrase in Section 717.05, Florida Statutes, to operate as a grant of authority to the PSC which would enable it to issue orders in direct contravention on the act. The interpretation of Section 717.05, Florida Statutes, urged by the Appellee is contrary to the legislative intent which underlies Chapter 717, Florida Statutes. Order No. 13048 as it attempts to direct the disposition of unclaimed refunds in a manner inconsistent with Chapter 717, Florida Statutes, should be annulled.

The effort in the instant case by the PSC to construct an order which is intended to preempt the operation of this state's abandoned property laws through its disposition of unclaimed utility refunds is identical to the unsuccessful effort by the Alabama Public Service Commission in Boswell v. Whatley, 345 So.2d 1324 (Ala. 1977). In Boswell, the Alabama Public Service Commission attempted to direct the disposition of unclaimed utility refunds in a manner which would preclude the operation of that state's unclaimed property laws:

> "It is the intent of this Commission that all funds received by the utility . . . from any refund . . . shall be under the control of this Commission and shall be distributed to customers of the utility in accordance with this and future orders of the Commission and no portion 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, 345 So.2d 1324, 1327 (Ala. 1977).

The Supreme Court of Alabama correctly determined that such an order is void since it attempts to circumscribe, if not abrogate, the effect of

the state's unclaimed property laws.

> "In view of (a) 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."
>
> Boswell v. Whatley, 345 So.2d 1324, 1328 (Ala. 1977).

This decision is fully applicable to the case sub judice. Chapter 366, Florida Statutes, which empowers the PSC with the authority to regulate the rate structure of municipal utilities like the City does not contain any reference to unclaimed or abandoned property. Indeed, a review of the record in this case conclusively proves that the City's refund of the discriminatory surcharge did not even arise pursuant to the PSC's regulatory authority under Chapter 366, Florida Statutes. Notwithstanding this lack of authority, however, the PSC has attempted to issue an order pertaining to unclaimed utility refunds which the Appellee contends should be so construed as to circumscribe the effects of Chapter 717, Florida Statutes. Just as in the Boswell decision, this declaration of the PSC that it may determine the disposition of unclaimed refunds, as set forth in Order No. 13048, arrogates to the PSC a power not only outside its authority but one having been exercised by the legislature through the enactment of Chapter 717, Florida Statutes.

Finally, the Appellee cites this Court to the decision of the Supreme Court of Alabama in Boswell v. South Central Bell Telephone Company, 301 So.2d 62 (Ala. 1974) for the proposition that any unclaimed utility refunds which are expended under order of a regulatory commission are neither "held nor owing" and, thus, cannot be presumed "abandoned." In this case, the Alabama Public Service Commission ordered a telephone company in a 1954 rate case to collect the disputed charges subject to refund pending appeal. The

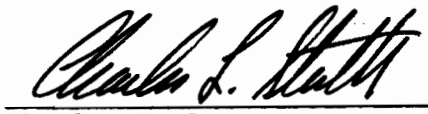
telephone company collected the charges until 1963 when the proceeding was finally resolved. In 1968, the Alabama Public Service Commission issued an order which directed that any unclaimed funds which were initially collected under the supersedeas from 1954 to 1963 be expended on a rural construction program. The appeal to the Supreme Court of Alabama followed four years later and only after the telephone company had sought a declaratory judgment against the Commissioner of Revenue to determine the disposition of these unclaimed refunds at one time due certain customers of the company. In 1974, eleven years after the initial rate case had been resolved and six years after the commission's order directing the expenditure of the unclaimed refunds, the court stated merely that the funds were no longer "held or owing" by the utility and there existed no concommitant duty to report them as abandoned property. This decision does not decide whether the Commissioner of Revenue could have compelled the telephone company to deliver the unclaimed refunds to the state pursuant to the abandoned property laws at any time between 1963, when the supersedeas was lifted, and 1968 when the disbursement order was issued. Consequently, this decision is distinguishable from the instant case by virtue of its factual basis.

CONCLUSION

The Appellee lacks either the express or inherent authority under Chapter 366, Florida Statutes, to direct the disposition of unclaimed utility refunds in Order No. 13048. The authority of the Appellee to compel the City to issue a refund of the discriminatory surcharge collected from out-of-city customers pending appeal is derived, instead, from the provisions of Rule 9.310(b)(2), Florida Rules of Appellate Procedure which enables the Appellee to place conditions upon the automatic stay.

Rule 9.310(b)(2), Florida Rules of Appellate Procedure, does not expressly or inherently authorize the Appellee to direct the disposition of any unclaimed amounts which remain from the refund. Since the Appellee lacks any authority whatsoever to direct the disposition of the unclaimed refunds held by the City in the instant case, Order No. 13048 is void and violates the essential requirements of law since it (1) deprives out-of-city customers of their property right to the refund and (2) provides a windfall to active out-of-city and active in-city customers, in direct conflict with the language and intent of Chapter 717, Florida Statutes, and specifically, Section 717.05, Florida Statutes. The Appellant urges that this Honorable Court give effect to the spirit and intent of Chapter 717, Florida Statutes, and require that the unclaimed utility refunds in dispute be delivered to the custody of the Appellant for the protection of their rightful owners and for the general benefit of the State of Florida.

Respectfully submitted,



Charles L. Stutts
Deputy General Counsel
Department of Banking and Finance
Suite 1302, Capitol
Tallahassee, Florida 32301
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply 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 2nd day of October, 1984:

Steve Tribble, Clerk
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Clerk for the Appellee

Frederick M. Bryant
Moore, Williams & Bryant
306 East College Avenue
Post Office Box 1169
Tallahassee, Florida 32301

Attorney for the City

William S. Bilenky
Paul Sexton
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Attorneys for Appellee

O. Earl Black Jr.
Leon County Courthouse
Room 213
Tallahassee, Florida 32301

Attorney for Leon County

Charles L. Stutts

Kenneth J. Muszynski