o/a 6-3-85

IN THE SUPREME COURT OF FLORIDA

FLORIDIANS UNITED FOR SAFE ENERGY, INC.,
Appellant,

-vs-

FLORIDA PUBLIC SERVICE COMMISSION AND FLORIDA POWER AND LIGHT COMPANY,
Appellees.

METROPOLITAN DADE COUNTY CONSUMER ADVOCATE, WALTER T. DARTLAND,
Appellant,

-vs-

FLORIDA PUBLIC SERVICE COMMISSION AND FLORIDA POWER AND LIGHT COMPANY,
Appellees.

CASE NO. 66,380

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CASE NO. 66,444

INITIAL BRIEF OF

METROPOLITAN DADE COUNTY CONSUMER ADVOCATE

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-vs-	CASE NO. 66,444
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INTRODUCTION

This brief is filed on behalf of Metropolitan Dade County Consumer Advocate, Walter T. Dartland. By his appeal, the Consumer Advocate challenges a $120,447,000 "subsequent year" rate adjustment, for 1985, granted to Florida Power and Light Company (FPL) by the Florida Public Service Commission (Commission). Unless otherwise indicated, all emphasis in this brief is added.

STATEMENT OF THE CASE AND FACTS

On November 23, 1983, FPL filed its petition for a rate increase designed to produce $335,274,000 in additional annual revenues in 1984. (R4-117) In the same petition, FPL sought a "subsequent year adjustment" for 1985 producing still more revenues of $120,279,000. (Id.) The utility in late 1983 claimed the "adjustment" would be "reflective of 1985 conditions", would permit "phased in" 1985 rates and would "minimize regulatory lag". (Id.) In its petition, FPL used a "projected 1985 average rate base" ($6,725,149,000) and "projected adjusted net operating income" to arrive at its conclusion concerning additional revenues needed to earn an overall rate of return it alleged was "fair and reasonable under prevailing conditions". (Id.)

The Commission denied an interim rate increase to FPL, and held extensive public hearings. (R124) On July 24, 1984, the Commission issued order number 13537 awarding FPL a rate increase designed to produce additional gross revenues of $81,464,000 for the "test year 1984" and $114,984,000 for the 1985 "subsequent year" adjustment. (R263) In its order, under the heading "THE TEST YEAR", the Commission stated:

> The function of a test year in a rate case is to provide a set period of utility operations that may be analyzed so as to allow the commission to set reasonable rates for the period the rates will be in effect. A test period may be based upon an historic test year with such adjustments as will make it reflect typical conditions in the immediate future, and make it reasonably representative of expected future operations. Alternatively, a test period may be based upon a projected test year which, if appropriately developed and adjusted, may reasonably represent expected future operations. (R269)

Dissatisifed with the Commission's initial determination, FPL filed a Petition for Reconsideration resulting in order number 13948 on December 28, 1984 in which the Commission increased FPL's "1984 test year" gross revenues by $84,103,000 and gross revenues for the "1985 subsequent year adjustment" to $120,447,000. (R347,851) Thereafter, this appeal was filed.

POINTS ON APPEAL

ARGUMENT

POINT I

WHETHER SECTION 366.076, FLORIDA STATUTES (1983), PURPORTING TO PERMIT THE COMMISSION TO AUTHORIZE "SUBSEQUENT YEAR" ADJUSTMENTS IN RATES, IS UNCONSTITUTIONAL, BECAUSE IT WAS ENACTED IN VIOLATION OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

In its July 24, 1984 order, the Commission said:

> As in other recent major electric utility rate cases, this case is predicated upon projected test years. (R269)

The Commission gave FPL preliminary approval at the outset of the proceeding to use test years, to wit: the 1984 calendar year as its "base test year" and 1985 as its "'subsequent year' test year". (Id.)

In its order, the Commission did not refer expressly to a recent enactment, Section 366.076, Florida statutes, passed as part of a lengthy bill, Chapter 83-222, Laws of Florida, amending an act bearing the short title the "Transmission Line Siting Act". See, Sections 403.52-403.536, Florida Statutes (1983).

The new statute (Section 366.076) was included as an exception to a statutory amendment in Section 13 of Chapter 83-222, Laws of Florida amending Section 403.531, Florida Statutes, entitled "Effect of Certification". The certification referred to in the "Transmission Line Citing Act" is the procedure for obtaining government approval of transmission line construction. It has nothing at all to do with ratemaking, and Subsection (4) of Section 403.531 spells that fact out:

> This part shall not in any way affect ratemaking powers of the Commission under Chapter 366 ...

The legislature, however, tacked on a further purported "amendment" to Subsection (4) of Section 403.531, supra, reading: "... except that Section 366.076, Florida Statutes, is created to read: ..." Thereafter, the new Section 366.076 entitled "Limited proceedings" is interlineated between the statutory language of

Subsection (4) of Section 403.531, supra, appearing in Section 13 of Chapter 83-222.

Statutory revision personnel removed this creation from Chapter 403 and placed it in Chapter 366, expanded its title to include the words "rules on subsequent adjustments" and separated the new statute into two subsections.

Subsection (1) of the new Section 366.076 authorizes the Commission to conduct "limited proceedings to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist with the provisions of this Chapter ..."

Subsection (2) of the new statute provides:

> The Commission may adopt Rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods.

The subject of Chapter 83-222, supra, is set forth in the very first clause of the Bill:

> An act relating to siting of electrical transmission lines, ...

For many years, the Florida Constitution has had a provision, now included in Article III, Section 6, which reads:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title ...

The provision has been interpreted in a vast number of different cases, and some recognized precepts surrounding its application have been developed by the courts. Essentially, the

constitutional provision has two requirements which applies to every law passed by the legislature: (1) the law must embrace but one subject which must be briefly expressed in the title, and (2) it must include only matter properly connected therewith. See D'Alemberte's Commentary, 25A F.S.A., Florida Constitution, Article III, Section 6, page 594.

An eloquent statement of purpose underlying Article III, Section 6 appears in Colonial Inv. Co. vs. Nolan, 100 Fla. 1349, 131 So. 178 (1930), wherein this court said:

> The object of this constitutional provision, which in substance has been placed in practically all of the constitutions of the several states, was to prevent hodgepodge, logrolling, and omnibus legislation. It has become quite common for legislative bodies to embrace in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which means measures were often adopted without attracting attention. And frequently such distinct subjects, affecting diverse interests, were combined in order to unite the members who favored either in support of all. And the failure to indicate in the title the object of a bill often resulted in members voting ignorantly for measures which they would not knowingly have approved. And not only were members thus misled, but the public also; and legislative provisions were sometimes pushed through which would have been made odious by popular discussion and remonstrance if their pendency had been seasonably demonstrated by the title of the bill. Thus it was long since decided that these evils should be corrected by constitutional provisions preventing such aggregations of incongruous measures by confining each act to one subject and matter properly connected therewith, which subject should be briefly expressed in the title. (Citation omitted)

In Colonial Inv. Co., this court found that a law whose subject dealt with filing sworn tax returns could not include an "additional independent and disconnected subject" regarding the recording of deeds and bills of sale. It follows that an enactment whose lengthy provisions deal exclusively with "siting

of electrical transmission lines" cannot constitutionally include another subject matter, buried in the small print, drastically altering ratemaking of public utilities in this state. Indeed, the very enactment included in Chapter 83-222 demonstrates ratemaking "in no way" is affected by the "Transmission Line Siting Act."

In United Gas Pipe Line Co. vs. Bevis, 336 So. 2d 560, 564-565 (Fla. 1976) this court ruled that Chapter 73-289, Laws of Florida violated Article III, Sec. 6. The act gave the Public Service Commission regulatory authority only over certain practices of natural gas distributors in the state who as the result of the energy crisis were obtaining unreasonable profits and were engaged in discriminatory pricing practices. The court found the enactment could not "operate independently of the general regulatory authority ..." in Chapter 366, generally exempting natural gas distributors. This court found the law failed to give "... adequate notice to legislators and to the public with respect to impending legislation." See also, Smith vs. Davis, 231 So. 2d 517 (Fla. 1970), quashing Davis vs. Smith, 227 So. 2d 342 (Fla. 4th D.C.A. 1969).

Certainly the same reasoning applies, with even greater urgency, to the circumstances of this case. The law under scrutiny here, Section 366.076, even contained a misleading title in Chapter 83-222, to wit: "Limited proceedings". Subsection (2) of the law provides with clarion clarity that this sweeping change in ratemaking procedures applies with equal force to "... full revenue requirement proceedings". With utter lack of any attempt to give notice of the interrelationship of the statute with ratemaking authority conferred in Chapter 366, the

camouflaged provisions of Section 366.076 authorize the Commission to "... provide for incremental adjustments in rates for subsequent periods" in full ratemaking proceedings.

The enactment makes no attempt to define "subsequent periods", i.e. whether it could be five, ten, twenty, even fifty years. Public utility experts now might be free in ratemaking cases to "project" whatever time period into the future the Commission in its undefined discretion allows. The manner in which the statute was passed made the lack of statutory definition and the denial of due process of law to the public in ratemaking proceedings an inevitable result.

It is clear that Chapter 83-222, Laws of Florida unconstitutionally includes at least two separate and distinct laws: one dealing generally with the siting of electrical transmission lines, and another with ratemaking. The notice requirement of Article III, Section 6 was designed "... to obviate fraud or surprise from hidden provisions not indicated in the title." State vs. Cummings, 382 So. 2d 683 (Fla. 1980). The evil sought to be avoided is "logrolling" legislation. In light of the recent utility cases in which the Commission has permitted "projected test years", public utilities have cause to applaud the "logrolling" accomplished in the Florida Legislature, at the public's expense.

Even if FPL could stretch the meaning of the "one subject" language of Article III, Section 6, Chapter 83-222 must fall on the second prong of the constitutional test: Section 366.076 does not "properly" connect itself to sitings of electrical transmission lines.

Time and again this court has held that the matter within a statutory enactment, to pass muster under Article III, Section 6,

must be "... fairly and naturally germane to the subject recited in the title." Town of Monticello vs. Finlayson, 156 Fla. 568,23 So. 2d 843,847 (1945); State vs. Tindell, 88 So. 2d 123 (Fla. 1956); Boyer vs. Black, 154 Fla. 723, 18 So. 2d 886 (1944); Smith vs. Chase, 91 Fla. 1044, 109 So. 94 (1926). Stated another way, the several provisions of a legislative enactment all must be necessary to achieve the purpose of the legislation and all must be naturally and logically connected to one another. State vs. Petruzzelli, 374 So. 2d 13, 15 (Fla. 1979); Board of Public Instr. vs. Doran, 224 So. 2d 693 (Fla. 1969).

The only "connection" between the subject of Chapter 83-222 and Section 366.076 is that electrical utilities both own and construct transmission lines and also happen to participate in ratemaking proceedings. Section 366.076, however, in no sense was necessary to acheive the purpose of Chapter 83-222, its inclusion was not "logically", nor "properly", connected.

The passage of Section 366.076, disguised by the provisions of the "Transmission Line Siting Act", violates the salutary purpose and object of Article III, Section 6. This court should vindicate the public interest by declaring Section 366.076 unconstitutional and determining FPL's 1985 "subsequent year" adjustment is a nullity.

POINT II

WHETHER THE COMMISSION ARBITRARILY EXCEEDED ITS AUTHORITY BY ALLOWING FPL A RATE INCREASE PREDICATED ON A "PROJECTED SUBSEQUENT YEAR."

The Commission was created and exists through legislative enactment, and being a statutory creature its powers and duties are only those conferred by statute, expressly or impliedly.

State Dept. of Transportation vs. Mayo, 354 So. 2d 359 (Fla. 1977); City of West Palm Beach vs. Florida Public Service Commission, 224 So. 2d 322 (Fla. 1969). Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. City of Cape Coral vs. GAC Utilities Inc. of Florida, 281 So. 2d 493 (Fla. 1973). This court will not affirm Commission orders which are arbitrary and unsupported by substantial competent evidence, or made in violation of a statute or a constitutionally guaranteed right. Citizens of State vs. Public Service Commission, 425 So. 2d 534,538 (Fla. 1982); Citizens of Florida vs. Mayo, 333 So. 2d 1,7 (Fla. 1976).

Prior to the enactment of Section 366.076, which Appellant asks this court to hold unconstitutional, the concept of a "test year" was embedded as the traditional method used in judicial review of ratemaking orders of the Commission. Southern Bell vs. Florida Public Service Commission, 444 So. 2d 92,95 (Fla. 1983); Gulf Power Corp. vs. Bevis, 289 So. 2d 401 (Fla. 1974). The touchstone, of course, was that rates set by the Commission conform to the statutory requirement that they are just and reasonable.

In Gulf Power Corp. vs. Bevis, supra, this court determined the Commission should have taken into account the known future impact of the new state corporate income tax on a utility's fair rate of return. The court discussed the "test year" concept at length:

> Rates are fixed for the future rather than for the past and for this reason a pre-fixed earlier period cannot be arbitrarily applied, as the Commission has now done at the urging of the Governor and Attorney General. A ratemaking body such as Florida's PSC cannot ignore an existing fact that admittedly will affect the future rates, such

as the corporate tax here. This question has been settled by the U.S. Supreme Court in McCardle vs. Indianapolis Water Co., 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316 (1926). There, the U.S. Supreme Court said that the fixing of utility rates must of necessity be related to matters which are reasonably predictable as being involved, for the process is one of making a rule for the future. This is really the principle which the Commission correctly applied when it entered its original order and said:

> "In regulatory ratemaking, it is customary to select a test year or period for the purpose of testing the revenue requirements of the utility under consideration. The judicial decisions on the subject of the appropriate test year in a utility rate case uniformly adhere to the rule that the test period should be based on the utility's most recent actual experience with such adjustments as will make the test period reflect typical conditions in the immediate future (Court's emphasis). The propriety or impropriety of a test year depends upon how well it accomplishes the objective of determining a fair rate of return in the future. Thus, the realistic approach to this issue, since rates are fixed for the future and not for the past, is to use the most recently available data for a 12-months' period, adjusted for known changes which will occur within a reasonable time after the end of said period so as to fairly represent the future period for which the rates are being fixed." (Emphasis added) (Courts emphasis)

Just as no "pre-fixed earlier period" can be applied arbitrarily by the Commission, no pre-fixed later period, or "subsequent year" or "projected" period can be used arbitrarily to support unjustified revenue increases at ratepayer expense. The Commission in its July 24, 1984 order articulated an alternative test period (obviously relying on Section 366.076, supra) which it defined as:

> ... a test period ... based upon a projected test year which, if appropriately developed and adjusted, may reasonably represent expected future operations.

Nowhere in Gulf Power Corp. vs. Bevis, supra, did this court indicate the Commission may take a projected future year and add it on to a 12-month test year already selected. This court said the "realistic approach" was to use the historical data most recently available, then apply adjustments for known or expected future changes. By using a "subsequent year" rate base, FPL seeks merely to broaden substantially the traditional test period and to stretch the requirements for known future expectancy or change. Inherent in the use of a "subsequent year" as part of the defined "test period" is an "unrealistic and arbitrary" approach to ratemaking to the detriment of the public.

The proponents of Section 366.076, supra, would not have quietly pushed the statute through, if they did not believe the Commission lacked the statutory authority to include "subsequent periods" in the ratemaking formula. This court should determine the 1985 "subsequent year" rate increase is legally unsupported by any statutory authority prior to passage of the unconstitutional Chapter 83-222, Laws of Florida, and hence is null and void.

CONCLUSION

For the reasons stated, the Consumer Advocate urges this court to hold Section 366.076, supra, unconstitutional, and to

determine the 1985 "subsequent year" rate increase authorized for FPL by the Commission is null and void.

Respectfully submitted,

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March 25, 1985

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I HEREBY CERTIFY that a true and correct copy of the attached Brief has been furnished by U.S. Mail to the following parties on this 25th day of March, 1985.

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