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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

ORLANDO UTILITIES COMMISSION,

Appellant,

vs. Case No. 66,959

STATE OF FLORIDA, et al.,

Appellees.

APPELLEE'S BRIEF

On Appeal from the Ninth Judicial Circuit
of Florida in and for Orange County
(Case No. CI 85-3765)

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Statement of the Case

The State does not dispute Appellant's statement of the case, but would add that the objection to validaation was withdrawn on the condition that the validating decree would limit the bond issues to those within the OUC's authority. The OUC's proposed order was strenuously objected to.

Statement of the Facts

Testimony was presented at the validation hearing that long term debt service could be reduced by refunding. (A:346) Unrefuted testimony also was presented that long term debt service could be increased by refunding. (A:355).

Testimony was presented that the OUC's long term debt may increase from around 580 to 585 million dollars to around 600 to 650 million dollars as a result of refunding its existing bonds. (A:351, 387).

At the time of the hearing the OUC had not yet made its business judgement as to whether the bonds should be issued. (A:356, 361)

Savings were projected based on assumpsions of 9.25 and 8.50% average coupon rates. (A:305, 306) Eighty-six per cent of the nearly $100 million dollars in savings at 9.25% would occur in the years 2013 and 2014--when the value of a dollar would be about 6 or 7 cents at present. (A:306) The present value of savings was projected to be $11.9 million (A:306). Savings at 9.25% would not amount to as much as 1% of current debt service in any year until 2004. (A:306)

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE OUC HAS THE AUTHORITY TO ISSUE LONG TERM BONDS, DESPITE THE ABSENCES OF BOTH EXPRESS STATUTORY AUTHORITY AND ANY SUPREME COURT DECISION UPHOLDING THE BOND ISSUING AUTHORITY FOR A SIMILAR GOVERNMENTAL ENTITY.

II. WHETHER A PLAINTIFF SEEKING TO VALIDATE BONDS UPON AUTHORITY IMPLIED BY ITS POWER TO "DO EVERYTHING NECESSARY OR REQUIRED" TO SUPPLY POWER TO ITS CUSTOMERS MUST PROVE AT THE VALIDATION HEARING THAT THE BOND ISSUE IS IN FACT NECESSARY OR REQUIRED.

III. WHETHER THE CIRCUIT COURT WAS CORRECT IN REFUSING TO VALIDATE A PROPOSED BOND ISSUE THAT MIGHT BE WITHIN THE ISSUER'S AUTHORITY, THUS REQUIRING THE BOND ISSUE TO IN FACT BE VALID.

SUMMARY OF ARGUMENT

The Special Acts conferring authority upon the OUC grant it only the power to incur short term debt. When long term debt is specifically mentioned in the Acts relating to the OUC, the issuer is always the City of Orlando--not the OUC. This court has found that municipalities having bond issuing authority under the Constitution and General Laws of Florida also have revenue bond issuing authority under their charters, based on the power to do what is necessary or required to carry into effect their enumerated powers. This court has never ruled that an entity like the OUC, having no power to incur long term debt under general law, has such power implied by the "necessary or required" authority in its charter.

This is a case of first impression. The court may decide the OUC's bond issuing authority either way without being inconsistent with prior decisions. This court should exercise the judicial restraint exercised at the trial level. It should be left to the Legislature to decide whether to expand the OUC's bond issuing power, and what controls on that power are necessary. The Legislature is better equiped to study the many public policy considerations relating to the OUC's accountability and the expanded use of revenue bonds in the 1980's.

If the Court should find that the OUC has bond issuing authority, the next issue is whether the proposed bond issues are within that authority. The OUC argues that the business judgement rule controls that issue.

There is a long line of cases handed down by this court holding that if the bond issuer has the authority and lawfully exercises that authority, the business judgements of the issuer will not be reviewed at the bond validation hearing. This business judgement rule prevents the addressing of issues not within the scope of Chapter 75 at the bond validation hearing. Whether refunding existing bonds is within the Orlando Utilities Commission's authority is the primary issue for determination at the validation hearing. The business judgement rule is not a substitute for authority. The rule is never dispositive of the issue of whether an issuer has the authority for a proposed bond issue.

One of the bond issues is for the purpose of refunding $280,000,000 in bond anticipation notes. These notes must be paid or refunded in the near future. This bond issue appears necessary and thus within the OUC's authority to do what is necessary or required.

The second purpose of the proposed bond issue is for refunding about $580 million in existing bonds. The facts are undisputed that refunding these bonds could potentially result in savings in annual debt service, but savings are not guaranteed. The bond resolution does not require that savings result, or that the bond issue be necessary or required. The OUC's proposed final validation order does not remedy the defect. If the proposed order were signed, it would permit the issuance of bonds outside the Orlando Utilities Commission's authority. City of Miami v State does not permit validation of bonds that might be valid. The bonds must in fact be valid when the authorizing resolution is complied with and conformed to.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT TO RULE THAT THE OUC LACKED AUTHORITY TO ISSUE LONG TERM BONDS, BECAUSE IT DID NOT HAVE EXPRESS STATUTORY AUTHORITY AND THERE ARE NO STATE SUPREME COURT DECISIONS UPHOLDING THE BOND ISSUING AUTHORITY FOR A SIMILAR GOVERNMENTAL ENTITY.

The OUC was created and made a part of the government of the City of Orlando by a special act of the Florida legislature in 1923. The OUC was given "full authority over the management and control of the electric light and water works plants in the City of Orlando." Chapter 9861, Laws of Florida (1923). In Section 7 of The Act the OUC was granted the authority to borrow up to 10% of the book value of its plants for up to 6 months. It was not authorized to pay over 8% interest and borrowing had to be approved by the Orlando City Council.

Chapter 9862, Laws of Florida (1923) authorized the Utilities Commission to borrow $250,000 for up to 2 years.

In 1923 the OUC's borrowing authority was clear: $250,000 for up to 2 years, and 10% of the plant's book value for up to 6 months. If more money was needed it could be borrowed by the City of Orlando pursuant to Section 3 of Chapter 9862, Laws of Florida (1923):

> If at any time within 2 years after the passage of the Act the City of Orlando should under proper authority issue bonds of said City for the improvement or further extension of the electric light and water works plants of said City the promissory notes authorized to be issued under Section 1 of this Act shall be out of and from the proceeds derived of the said bonds." [Emphasis added]

The 1923 Acts were amended and supplemented by Chapter 10968, Laws of Florida (1925), Chapter 13198, Laws of Florida (1927), Chapter 24758, Laws of Florida (1947), Chapters 31075 through 31080 and 31012, Laws of Florida (1955), Chapter 61-2589, Laws of Florida (1961), Chapter 80-560 (1980) and Chapters 82-415 and 82-343, Laws of Florida (1982).

The 1925, 1927 and 1955 amendments did not affect the OUC's borrowing authority. Chapter 24758, Laws of Florida (1947) allowed the OUC to pledge sewer revenues to repay bonds issued by the City of Orlando for sewer improvement. Chapter 61-2589, Laws of Florida (1961) provided for the OUC to acquire, construct and operate electric generating plants and "to do all things necessary or required to carry into effect" those provisions. Chapter 82-415, Laws of Florida (1982) extends the short term borrowing power from 6 months to 3 years, increases the debt limitation from 10% of book value to 50% of total assets and does away with the requirement of City Council approval for short term borrowing.

To summarize the 1923 Act and its amendments, short term financing is specifically provided for, but no mention is made of long term borrowing by the Orlando Utilites Commission. Long term financing is mentioned in the Special Acts twice, in 1923 and again in 1947. Both times the City of Orlando was the issuer, not the OUC.

Although there is no specific authority for the OUC to incur long term debt, the Appellant argues that the authority is present because municipalities have issued revenue bonds with authority quite similar to the "necessary or required" authority granted to the OUC in 1961. Appellant cites: Trudnak v City of Ft. Pierce, 135 Fla. 573, 185 So. 353 (1938), State v City of Daytona Beach, 118 Fla. 29, 158 So. 300 (1934),

State v. City of Key West, 153 Fla. 226, 14 So.2d 707 (1934), City of New Smyrna Beach v. State, 132 So.2d 145 (Fla. 1960).

The holding of these cases grant implied powers to municipalities having similar "necessary or required" language in their charters.

> "It is well settled that under such charter provisions municipalities may issue revenue certificates, payable solely from revenues of the involved utilities, to produce necessary funds to make necessary improvements and betterments of municipally owned utility plants. [Emphasis supplied] Trudnak v. City of Ft. Pierce, supra at 356.

There is an important distinction between the instant case and these cases involving municipalities. The cities of Daytona Beach, Fort Pierce, Key West and New Smyrna Beach had authority under general law and the Florida Constitution to issue bonds. Ch. 169, Fla. Stat. (1933), Art. IX, § 6, Fla. Const. These municipalities did not issue bonds under the authority of Chapter 169 because it required approval of a majority of the voters and placed strict limitations on the amount of bonds issued. § 169.01, § 169.04, Fla. Stat. (1933). The municipalities thus sought to issue bonds under the implied authority of their municipal charters to get around these restrictions. The Supreme Court, aware that the municipalities had bond issuing authority under general law, allowed these cities to issue revenue bonds under the less restrictive implied authority of their charters. This Court appreciated the difference between self-liquidating revenue bonds and bonds repaid through ad valorem taxation. Eventually the legislature recognized that revenue bonds did not need the same protections for the taxpayers as did bonds repaid through ad valorem taxation, and the Revenue Bond Act of 1953[1] was enacted.

1. Ch. 28045, Laws of Florida (1953)

The OUC enjoys neither the powers granted to municipalities by the Revenue Bond Act of 1953 nor the Municipalities Home Rule Powers Act of 1973, because it is not a municipality. The Fifth District Court of Appeals described the OUC's relationship with Orlando as follows:

> "The City/OUC tandem is a unique and strange one. The City and its electors have no control over the OUC; but neither does the OUC have control over the City. The OUC is answerable to no taxpayer or voter group, although it is a public utility. This situation is created by State Law and it can only be changed by State Law." Gaines v. City of Orlando, 450 So.2d 1174 at 1182 (Fla.5thDCA,1984)

The Appellant contends that City of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938) granted the OUC power to issue bonds. In Evans the City of Orlando sought to enjoin Mr. Evans and the other OUC members from purchasing a generator. The generator was to be purchased on a retain title contract with one-third down and the balance to be paid over a long term. The OUC planned to use $100,000 of their customers' deposits as part of the down payment. The City alleged that the OUC was without authority to dispose of its customers' deposits, that the purchase was unnecessary, that the purchase would result in a long term debt and pledge of credit without the City Council's approval, and that the purchase was arbitrary and unreasonable.

The court phrased the issue in Evans as:

> "Has the Utilities Commission of the City of Orlando, under Chapter 9861, Special Acts of 1923, as amended by Chapter 10968, Special Acts of 1925, the power or authority to make expenditures and obligations jointly approximating $645,000, partly in cash and evidenced by retain title contract therefor for the sole and only purpose of making extensions and enlargements of the electric light plant of the City of Orlando without the approval of the City Council or a vote of the people of said City?" Id at 226.

The Court answered the question in the affirmative, based on its decision in State v. City of Daytona Beach, supra, and several other cases which did away with the nuisance of holding an election for revenue bond issues.

Evans was not a bond validation case and the OUC's power to borrow money over a long term was not specifically challenged by the City. The Court, taking a very narrow approach, did not address that issue. The issue of whether the OUC could spend customers' deposits was specifically raised and the court still did not address it.

The OUC purchased the generator on a retain title contract because it could not have validated bonds in 1938 for the purpose of purchasing the generator, having only the authority to borrow for up to six months. The OUC felt it had effectively "bootstrapped" authority to issue bonds after Evans was decided, and by pleading its authority with studied vagueness was able to issue bonds for decades based on assumed authority.

The Evans case did not create authority where none previously existed. If Evans conferred the power upon the OUC to issue bonds, it also granted trustees in Florida the power to spend trust funds for their own purposes.

Because there is no general or special law granting the OUC specific authority to issue bonds and no Supreme Court case conferring bond issuing authority on a non-municipality, the trial judge was

correct to exercise judicial restraint and refuse to validate the bonds.

Public policy dictates that this Court exercise similar restraint and leave to the legislature expansion of revenue bond issuing authority.

News reports have disclosed that revenue bonds have defaulted at an alarming rate recently. The rate of default is a problem resulting from the increased use of revenue bonds and should be considered before any decision increasing implied powers of bond issuers is rendered.

The federal budget deficit is believed by many to threaten the economic well being of this nation. Tax free local government bonds contribute to the deficit problem. Refunding issues contribute doubly because the refunded bonds are not immediately retired, but usually continue earning tax free interest until maturity. Bond covenants allow defeasance once U.S. Treasury instruments adequate to retire the refunded bonds at maturity are deposited in trust for the benefit of holders of refunded bonds. Refunding of refunding bonds permits the Treasury to be denied taxation on interest income on three generations of bonds at the same time.

Close scrutiny and healthy skepticism is necessary when multi-million dollar profits are involved in a business transaction. Refunding is such a situation. Testimony reveals that the underwriting spread is about 2.7%, (A:380-381) which on a $950,000,000 bond issue translates to about 25.6 million dollars in income to various underwriters, attorneys and consultants. The profit involved in bond issues invites abuse if adequate controls are not in place.

We recognize that the likelihood of default, the growing federal budget deficit and the enormous income to be earned by those involved in a bond issue are issues not within the scope of a bond validation hearing. If the issuer has the authority and has complied with the law, a proposed refunding bond issue should be validated even if the underwriters, attorneys and consultants receive $10 for every $1 saved by the issuer.

Nonetheless, this court, faced with the decision of whether to expand the implied powers to issue bonds or to refuse to do so, may find that these factors warrant leaving any expansion of the OUC's power to the Legislature where it can attach any strings deemed necessary to make the OUC accountable to the people of Orlando or the City.

II. A PLAINTIFF SEEKING TO VALIDATE A PROPOSED BOND ISSUE UNDER CHAPTER 75 MUST ALLEGE IN ITS COMPLAINT AND PROVE THE AUTHORITY TO ISSUE THE BONDS, AND IF THAT AUTHORITY IS BASED ON THE ISSUER'S AUTHORITY TO "DO EVERYTHING NECESSARY OR REQUIRED" TO CARRY OUT THE POWERS SPECIFFICALLY GRANTED IN ITS CHARTER THEN IT MUST PROVE AT THE VALIDATION HEARING THAT THE BOND ISSUE IS IN FACT NECESSARY OR REQUIRED.

The purpose of a bond validation proceeding is so that the issuer "may deteremine its authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith." § 75.02, Fla. Stat. (1983).

The OUC's authority to incur bonded indebtedness is based on its authority "to do all things necessary or required" to carry into effect its power to construct electric plants and supply power. Clearly a refunding issue that is not necessary or required is beyond the authority of the OUC. Whether the refunding of existing bonds is

necessary or required is a proper subject for a bond validation hearing.

In the typical bond validation proceeding the authority of the issuer is specifically provided for by general or special law. When the authority to incur bonded indebtedness is present and the legality of all proceedings connected with the bond issue is proven, then the bonds will be validated without inquiry into the issuer's business judgement regarding the necessity of the issue.

In Town of Medley v. State, 162 So.2d 257 (Fla. 1964) this Court reversed the trial court who refused to validate the proposed bond issue because it "was unreasonable and not financially and economically feasible." The Court found that the town had the authority to issue the revenue bonds and that it exercised that authority in accordance with the law. These were the only issues properly presented in a bond validation hearing and this Court was correct in reversing the trial court, even though it agreed with some of its findings. The Medley decision was followed in State v. Manatee County Port Authority, 171 So.2d 169 (Fla. 1965). This Court refused to consider whether the port facilities project, built and financed pursuant to Chapter 315, Florida Statutes (1963), was fiscally sound.

As pointed out in Appellant's brief, the business judgement rule is applicable for refunding issues when the issuer has the authority and exercises that authority within the law. State v. Florida State Turnpike Authority. 134 So.2d 12 (Fla. 1961).

The Turnpike Authority cases are somewhat analagous to this case. In the first of the three Turnpike cases[2] the location of the southern terminus was challenged; in the second case[3] the northern terminus was challenged. The Court ruled that the route of the turnpike was a proper question to raise at a bond validation hearing.

The distinction between the cited business judgement cases and the instant case is that the Town of Medley, the Manatee County Port Authority and the Florida State Turnpike Authority all had specific authority to issue bonds. The issuers did not attempt to use the business judgment rule as authority.

The Authority could not have merely stated that in its judgement the proposed route was in compliance with the Legislature's mandate which fixes the route generally. In the instant case the OUC cannot merely state that the refunding issue is within its "necessary or required" authority, but like the Turnpike Authority it must satisfy the Court that the proposed issue is within its authority.

The distinction between the instant case and the business judgement cases discussed is clarified by the Court's wording in the second Turnpike Authority case. "[T]he power delegated to the Authority is ministerial or administrative; it is in no sense legislative and the Legislature defined limitations within which it must be exercised. So long as the Authority acts within the ambit defined for it, courts will not interfere." 89 So.2d 653,656 (Fla. 1956) The limitation imposed by the Legislature upon any action by the OUC not otherwise authorized is that it be "necessary or required" to carry into effect its enumerated powers. For it to have any meaning this limitation can not be

[2]State v. Florida State Turnpike Authority, 80 So.2d 337 (Fla. 1955)
[3]State v. Florida State Turnpike Authority, 89 So.2d 653 (Fla. 1956)

dispensed with by the business judgement rule. Like the Turnpike Authority, the OUC's power, "is in no sense legislative." It cannot legislate what is necessary or required.

A hypothetical example illustrates why the business judgement rule cannot be substituted for the Chapter 75 requirement that the proposed bond issue be shown to be within the issuer's authority. Suppose the OUC had passed a bond resolution to finance the construction of a 60,000 seat baseball park, which in the their business judgement was necessary to attract to Orlando the National League baseball franchise in Pittsburg, thus hastening the growth of the city, increasing the sale of power, and lowering through economies of scale the cost per kilowatt hour of electricity. The Appellant's position is that the court cannot question the issuer's business judgement. Based on that reasoning the Stadium Revenue Bond Issue must be validated. Of course no Circuit Judge would validate such a bond issue, because the business judgement rule is not a substitute for authority.

Although the instant case is easily distinguishable from the Medley, Manatee County Port Authority and Florida State Turnpike cases it is in some respects similar to State v. City of Daytona Beach, 118 Fla. 29, 158 So.300 (1934). Daytona relied on its power "to do such other things as may be necessary, essential or convenient" for providing water and fire protection as its authority to issue revenue bonds. Id at 301. Despite the "necessary, essential or convenient" language of its authority, the Court refused to entertain questions about the city's business judgement.

There are two important distinctions between the OUC and Daytona Beach cases. First, the question which the Court refused to look into in Daytona Beach was "whether or not it is expedient or wise as a business policy for the city to thus anticipate and borrow against the future earnings of its water supply system in order to enlarge and improve the facilities forming a part of it so as to extend and increase its capacity and ability for service." Id at 305. Stated another way, the question was whether it was wise to enlarge the water system if the result was that the city would have to borrow against future earnings. The decision to enlarge the water system was within the city's authority to "construct, establish and maintain waterworks and to bore and dig wells, construct reservoirs [and] lay pipes." Id at 301. The court was correct to refuse to question its business judgement.

The rationale behind the Daytona Beach decision on the business judgement issue was that "[s]uch utilities must be considered as a purely business enterprise of which the city is the owner. Whatever municipal officers may be placed in charge of same become responsible to the city as a board of directors for the properties and business represented by such utilities. And as such they have full power to act as would an ordinary board of directors of a privately operated utility." [Emphasis added] Id at 305. As pointed out in Gaines vs the City of Orlando, supra, "the City and its electors have no control over the OUC." The accountability of the Daytona Beach waterworks officers to the city was instrumental in the Court's decision in

Daytona Beach; that accountability is completely lacking in the relationship between the OUC and the city of Orlando.

In summary, the Medley, Manatee County Port Authority, Florida Turnpike and Daytona Beach cases are distinguishable from the instant case. None of those cases relied upon by the Appellant require that the business judgement rule be substituted for the Chapter 75 requirement that an issuer must have the authority to issue bonds.

III. THE CIRCUIT COURT WAS CORRECT IN REFUSING TO VALIDATE A BOND ISSUE THAT MIGHT RESULT IN VALIDITY.

In City of Miami v State, Fla. 190 So. 774 (1939), this court affirmed the trial court which refused to validate the city of Miami's proposed issue of refunding bonds. The authorizing resolutions allowed the new bonds to be exchanged for the refunded bonds or to be sold with the proceeds to be used to retire the refunded bonds. The resolutions did not insure that both the refunded issue and the refunding issue would not be outstanding at the same time. Either issue reaches the debt limitation of the city's charter and both issues would exceed it. The court affirmed the trial court's order, which read: "the court is not supposed to validate that which might result in validity; it is required to validate that which is to be valid when the authorizing resolutions are complied with and conformed to. Such resolutions in this instance would permit, even when complied with, a violation of the charter limitations." Id at 779.

The City of Miami v State case is out of date as it relates to advance refunding. The point of law concerning the requirement that a

bond issue must in fact be valid and not just possibly valid will never be out of date. Common sense dictates that the authorizing resolution and final validation order must limit proposed bond issues to those that are within the issuer's authority.

The March 25, 1985 bond resolution does not require the $950,000,000 Water and Electric Revenue Refunding Bond Issue to be necessary or required. The proposed final validation order submitted by the OUC does not require the bond issue to be necessary or required. If the bonds were validated and subsequently issued they might be issued for a necessary or required purpose; on the other hand, the bond issue might be unnecessary and not required.

Interestly enough, although there is no requirement in the March 25, 1985 resolution that this issue be necessary, the resolution does require that any subsequent pari passu refunding bonds be necessary. The OUC covenants in Article III, Section 4, Paragraph I, Subparagraph (3)(A:284-285), that pari passu refunding bonds will not be issued unless the OUC general manager delivers a certificate setting forth the existing annual debt service requirement and the annual service requirement immediatley after refunding . The debt certificate must also state that the annual debt service requirement for each fiscal year is not greater after the refunding than before.

The covenant recognizes that the purpose of a refunding bond issue is to save money. It protects against unnecessary pari passu refunding issues that do not further that purpose. Unfortunately the resolution does not insure that the subject Water and Electric Revenue Refunding Bond issue saves money.

A refunding bond issue that might save money, might be necessary and might be within the issuer's authority cannot be validated.

The stare decisis argument raised by the OUC is obviously of no merit and will not be addressed in this brief. However, Lipford v Harris, 212 So.2d 766 (Fla. 1968), which the Appellant misread as authority for that argument, is of relevance in this case. This court held in Lipford: "[A] validation decree once it becomes final puts to rest all questions which were raised in the validation as well as all questions which could have been raised." Id at 768. If the refunding bonds are validated and issued and annual debt service expenditures are increased as a result, there would be no recourse for those harmed. Regardless of whether the refunding issue was within the OUC's authority to do what is necessary and required to construct electric plants and furnish power, Lipford v Harris would require the dismissal of any suit by angry ratepayers challenging that authority. The time to stop a bond issue that may not be within the issuer's authority, even when the authorizing resolution is complied with, is at the bond validation hearing.

CONCLUSION

The trial court was correct in finding that the OUC had no authority under existing law to issue bonds. Public policy would require that this court not create that authority, but defer the decision to the legislature.

Even if this court finds that the OUC has the authority to issue bonds, in this particular case the proposed issue may or may not be within that authority. The State of Florida requests that this court affirm the Circuit Court's decision denying validation of the proposed bonds.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been furnished by hand delivery this 10th day of June, 1985, to : CAROLYN J. THOMAS, Esq.
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