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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.

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# APPELLEE'S, P.O.W.E.R. NOW, INC., REPLY BRIEF

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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 FACTS

The Appellee generally accepts the Statement of Facts of the Appellee with some clarification or corrections which are set out here.

P.O.W.E.R. NOW, INC. (PNI) is a public interest non-profit corporation, whose purpose is to oversee its public utility with emphasis on rate-setting. Its membership is comprised largely of concerned senior citizens who are long time residents of College Park, an old Orlando neighborhood. The Appellant's designation of PNI as a "politically activist corporation" is inaccurate and misleading. If anything, PNI is apolitical.

The purpose of the instant bond validation is to refinance via the sale of Federal Individual Income tax exempt bonds, OUC's outstanding debt.

**FACTS:**

It is important to note that this re-issue of debt does not involve a compelling purpose. OUC is correctly not arguing necessity. This bond issue does not presently affect the construction of any OUC project.

From the evidence, OUC ratepayers (and owners in the public utility sense) will not even benefit directly from such re-issue.

A number of long-time Orlando citizens appeared at the hearing below, were allowed to intervene in the proceedings, and their testimony entered into the record before this Court without

objection. Some of that testimony is set out herein because it is of fundamental importance.

The testimony of Shirley Vining Hall:

> MRS. HALL: I seriously have questioned for some length of time the ability or the authority of the Orlando Utilities Commission, in and of itself, to issue bond. As I read -- I'm not a lawyer -- but as I read the law in 61, it said, The Orlando Utilities Commission and the City of Orlando.
>
> It is my belief that the only hold the people of the City of Orlando have over OUC is the fact that they cannot go into long-term debts. In their Charter, they may go into short-term bond anticipation notes, and I feel that the check and balance of government lies in the fact that the City of Orlando has the right, as a municipality, to issue the bonds, and they should issue them, in my opinion, with the name the City of Orlando and the Orlando Utilities Commission.
>
> Why the Commission refuses to let the City in on it, I don't know. I heard something stated here today that I believe to be untrue. I heard it stated that the City of Orlando had -- was it approved or ratified these bonds? It's my understanding, from watching City Hall, that their attorney, Mr. Hamilton, has said that the City of Orlando has no control whatsoever on it, that the minutes of the Orlando Utilities Commission come over merely for filing, that the City can neither approve or disapprove.
>
> This bond validation or this bond request was done in a special meeting, on a Monday, of the Orlando Utilities Commission; my one elected represented (sic), the Mayor of Orlando was not present on that day. It came the following Monday to the City Council, and it was put upon the consent agenda. The City Council, in my opinion, are not aware of the fact that they have agreed to or ratified these bonds. I think they are of the opinion thay have no control over OUC..."

MR. HALL: Sir, my name is William E. Hall, Sr.; I live at 1401 Falcon Drive, in Orlando. I would like to concern myself with the authority of OUC to issue bonds. They stipulate, or they comment that there is a general authority. I'm not a lawyer, and I don't know the specific section to which they refer, but they say that that authority, the general authority, gives them the right to build plants and operate and float bonds, validate bonds, and this type of thing.

If that be true, Your Honor, why does the charter set forth, specifically, what the ratio will be between the debt to the assets? It further sets forth, specifically, that they can issue notes for a certain period of time. It's very definitive in how much the notes will be, and for what period of time they can issue those. And, if that authority that they cite, the general authority, gives them the right to do all these other things, then, why would the charter be specific in those items? Thank you, Your Honor.

Appellee takes issue with the Appellant's contention set out in its Statement of Fact that the ratepayers will benefit from this refinancing. In fact, most disturbingly, the evidence clearly shows in the words of OUC's chief executive officer that the refunding would have no direct impact on rates and that the rates could be more or less (TT, p. 50, LL. 12-177). Moreover, OUC had not done an audit of its financial adviser, Merrill Lynch, to determine the reasonableness of the "educated guesses" which purportedly determined whether <u>any</u> <u>real</u> savings would result from this particular refinancing. (TT, p. 77) OUC's proposed final judgment makes no reference to a saving. (Appendix, pp. 22-29)

Mr. John Miller of Merrill Lynch used a cost rate of 2.7% which he obtained from OUC's last bond issuance (TT, p. 74). Mr. Harry Luff apparently did not know the proper cost factor (gross spread including all expenses). All the underwriters would receive about 2% ($20.00 of every $1,000.00) from this re-issue. (TT, p. 74) The remaining $7.00 of every $1,000.00 issued would be spread among legal expenses and other costs. Thus, the financial community, especially Merrill Lynch, would reap tremendous financial rewards whether or not the average ratepayer saved a penny on its rates.

## ISSUE

WHETHER THE TRIAL COURT WAS CORRECT IN DENYING VALIDATION OF OUC'S 950 MILLION DOLLAR REFUNDING BOND ISSUE PURSUANT TO FLORIDA STATUTES, CHAPTER 75.

## ARGUMENT I

ORLANDO UTILITIES COMMISSION (OUC) LACKS IMPLIED AUTHORITY TO ISSUE BONDS AND MAY NOT RELY UPON THE EVANS CASE, NOR UPON IMPLIED AUTHORITY HOLDINGS OF THIS COURT WHICH DEAL WITH MUNICIPALITIES; THE SPECIAL LAW UPON WHICH OUC BASES ITS CLAIM OF AUTHORITY GRANTS POWER TO OUC AND THE CITY OF ORLANDO JOINTLY, NOT TO OUC ALONE.

There is no dispute among the parties here as to OUC's lack of express authority to issue bonds. Appellant claims however, that the OUC Charter, together with certain decisions of this Court, grants it implied authority to do so. This argument is based upon numerous errors, omissions and misconstructions in its examination of the law.

- In City of Orlando v. Evans, 132 Fla. 609, 182 So. 2601 (1938), while upholding OUC's authority to make improvements in the generating system, questions the manner in which OUC proposed to finance the improvements; it does not support bond-issuing by OUC.

- The cases relied upon by OUC to support its claim of implied authority to issue bonds, deal not with special purpose local government entities such as OUC, but with municipalities, which have a totally different status in the scheme of government established under the Florida Constitution.

- The only source of implied power is found not in OUC's Charter, but in a provision of Special Law, Chapter 61-2589, which was not included in OUC's Charter and, most importantly, granted power to OUC and the City jointly, not to OUC alone.

## OUC/CITY SPECIAL LAW IMPLIED AUTHORITY TO ISSUE BONDS

It is most significant that Appellant fails to point out that Chapter 61-2589 does not give OUC the power to "do all things necessary" to acquire or construct electric generating plants on its own, but in fact argues as if it were solely OUC's power. Quite the contrary, the Legislature made this grant to OUC and the City together. The language does not read, "the Orlando Utilities Commission and the City of Orlando be and each is hereby authorized to do all things necessary or required..." Rather the Legislature provided that, "they are hereby authorized..."

The interesting question: Since OUC, on this occasion and on previous bond issues, has obtained City Council approval, why is it unwilling to draw attention to this passage in Chapter 61-2589 which is the only basis in law for implied authority for issuance of bonds? Why was this passage never even raised by OUC in Hall v. OUC, 432 So. 2d 1318 (Fla. 1983), a validation case specifically challenging OUC's bond issuing authority, which was argued extensively in briefs and orally before this Court?* Why has it apparently never been cited to the Circuit Court in previous bond validations so that the Court might "determine" such authority as required by Chapter 75, Florida Statutes (1983)?

*As this Court will recall, that case was decided on a procedural point and the authority issue not addressed in the decision.

Before answering these questions we must look at precisely where this legislative grant is found. It is not as claimed by Appellant in OUC's Charter. [The reason it does not appear in the Charter is no codifier's error as suggested by OUC Counsel in the hearing below.] The 1961 Legislature granted OUC authority to acquire, construct, etc., generating plants by amendment to OUC's Charter. Chapter 61-2589 at Sec. 1. The grant of power to OUC and the City together "to do all things necessary or required" to accomplish this function is found in a separate section of the special act which does not amend OUC's Charter. Id. at Sec. 2. Clearly, had the Legislature intended OUC to exercise this broad grant of power alone, it would have omitted reference to the City and placed the grant in OUC's Charter. The relevant sections of Chapter 61-2589 are set out in full:

> Section 1. That Section 9 of Chapter 9861 of the Laws of Florida of 1923 be and the same is hereby amended to read as follows:
>
> Section 9. The said Utilities Commission is hereby authorized to acquire, establish, construct, maintain and/or operate electric generating plants, electric lines and facilities incident thereto within the boundaries of Orange county and Brevard county; to furnish electricity, power and water to persons, firms and corporations in any part of Orange county and otherwise as hereinafter provided, and to construct and maintain electric lines and water mains in, along and under all public highways and streets throughout Orange county for the purpose of conveying water and/or electric current; and may contract with any other municipality in Orange county for furnishing

> electric power and water, provided said Commission shall not serve any consumer outside the boundaries of Orange county, except...
>
> Section 2. The Orlando Utilities Commission and the City of Orlando be and they are hereby authorized to do all things necessary or required to carry into effect the provisions of this act.

We may conjecture about the reason for OUC's peculiar reticence on so essential a matter as the exact basis of its authority to issue bonds prior to the challenge in the 1983 Hall case. By that time, however, OUC's reason for not wanting the City's role in bond issuance revealed becomes quite understandable.

The bond financing attacked in Hall involved OUC's construction of a controversial coal-fired generating plant. There was substantial local opposition to the project, beginning with the Florida Chapter of the Sierra Club's participation in the plant certification hearings in March, 1982, (DOAH #81-1431). An initiative petition drive was commenced by this Appellee, seeking a vote on proposed City Charter amendments which would have barred OUC's construction of any coal-fired generating plant in Orange County and would have also barred the City's assistance to OUC on any such project. Gaines v. City of Orlando, 450 So. 2d 1174 (5th D.C.A. 1984) Having obtained signatures of more than 15% of Orlando's registered voters on the petition, Appellee presented it to City Council, asking that an election be held.

The City flatly refused, claiming that all of the proposed amendments were beyond the scope of the City's powers. Appellee's members were forced to commence the litigation which culminated in the decision in Gaines, a case in which OUC vigorously participated by opposing the right of the City or its citizens to exercise any power in relation to the City's utility.

Quoting the grant of power to both OUC and the City to do all things necessary for OUC's construction of generating plants from Chapter 61-2589, Section 2, Gaines quashed the lower Court's denial of mandamus to the City. It held that Orlando voters have the right to tell their City not to assist OUC in the construction of a generating plant. Gaines at 1182.

This is the crux of the matter: OUC's determination to exercise total control even in those areas in which the Legislature has granted power to be shared with the City.* It is the shared nature of this power - its only basis for bond-issuing authority - which OUC actually attempts to hide from the Court being asked to validate its bonds! The only possible explanation for such extraordinary behavior must be OUC's hope that the City and/or its citizens will not focus on the shared nature of power in this area, as pointed out in the Gaines decision, and begin to

* Another example of City assistance required by OUC in plant construction is exercise of eminent domain power. All condemnation proceedings are brought for OUC by the City. If OUC believes Chapter 61 - 2589 to afford it authority to issue bonds on its own, as it now reluctantly admits, why has it not proceeded on its own to condemn land?

exercise some control over its own actions with respect to OUC. So far OUC's hope seems to be borne out. Not a single question is asked by members of City Council about its utility taking on now almost a billion dollars in debt which must be paid off by OUC ratepayers, largely Orlando citizens; pro forma City approval is obtained on a consent agenda!

Construction of the coal-fired generating plant is no longer an issue. An underlying issue remains, however: the City's power, and through their control over the City, the citizens power, to exercise some limited form of control over its public utility by assisting or declining to assist OUC in certain functions which the Legislature has not given OUC authority to perform.

As the Court in Gaines noted:

> ...The City/OUC tandem is unique and strange...OUC is answerable to no tax payer or voter group... Id at 1182.

It may also be noted that the Florida Public Service Commission does not regulate its rates and, unlike an investor-owned utility, it has no stockholders to whom its board is accountable.

Being a creature of the Legislature, however, OUC is subject to that body's control. When it ignores the clear legislative intent that in certain areas - such as issuance of bonds - it may only share power with the City, it not only makes a sham of bond validation proceedings, it flauts the Legislature.

We might note at this point that Appellant's claim that the Legislature has expressly recognized OUC's authority to finance through the issuance of revenue bonds by the reference to "authority to borrow money otherwise provided by this Act or of general law" is grasping at straws. OUC has authority to issue revenue bonds under certain provisions of general law dealing with joint power projects and, as discussed above in detail, implied authority jointly with the City to issue bonds for construction provided by special law amending the OUC Charter.

What is at stake here is a fundamental principle of American government - the obligation of public officials to act in accordance with the law. When the question is issuance of bonds by OUC, it is clear that the only way the legislative intent of joint OUC/City control of this function will be assured is by joint issuance of bonds by OUC and the City together. Pro forma ratification by the City is obviously wholly inadequate to meet the legislative standard.

## IMPLIED BOND-ISSUING AUTHORITY CASES

Appellant relies upon a number of cases involving municipal utilities in making its claim of implied authority to issue bonds:

City of New Smyrna Beach v. State, 132 So. 2d 145 (Fla. 1960)

State v. City of Key West, 153 Fla. 226, 14 So. 2d 707 (1943)

Trudnak v. City of Ft. Pierce, 135 Fla. 573, 185 So. 353 (1938)

State v. City of Daytona Beach, 118 Fla. 29, 150 So. 300 (1934)

None of these cases are applicable to OUC. As the case names indicate, each of them involves a city directly managing its own utility. Appellant cites them in the apparent hope that this Court will not notice that OUC is not itself a municipality. OUC is a local government entity created by the Legislature for a special purpose. It is "a part of the government of the City of Orlando (Chapter 9861, Laws of Florida 1923, Section 1), but it is not the government of the City of Orlando and cannot claim the same powers as a city.

The people of Florida granted municipalities broad powers of self government in Article 8, Section 2 of the Florida Constitution. The Florida Constitution contains no such grant of powers to special purpose local government entities. The Florida

Legislature gave effect to this Constitutional provision by enacting the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes (1983). In addition to the Section 166.021 broad grant of authority to exercise any power for municipal purposes not expressly prohibited by law, Section 166.111 affords Florida cities express authority to issue bonds. The Florida Legislature has made no similar general law grants, either of broad powers or express bond-issuing authority to special purpose local government entities such as OUC. Unlike cities which have constitutional and general law powers, as well as special law charters, the only source of power for the special purpose entities is their charters enacted by special law.

Any attempt by OUC to exercise municipal powers would violate Article 8, Section 2(b) of the Constitution which requires that the governing body of a city must be elective. Far from being elective, OUC is a self perpetuating body, its new members being nominated by current members. (OUC Charter, Sec. 4) OUC exercises legislatively granted powers for a municipality, rather than possessing municipal powers of its own and cannot rely upon the above-cited cases.

OUC cites no case dealing with implied bond-issuing authority of a special purpose entity like itself.

In Hopkins v. Special Road and Bridge District, 73 Fla. 247, 74 So. 310 (1917), this Court reversed a judgment of validation,

holding that the statute gave no authority to issue bonds to reconstruct roads and bridges that had already been consstructed by a bond issue under the statute.

A decision that an entity which could build bridges could not rebuild is certainly quite restrictive. In comparison OUC exercises broad powers, indeed. It may acquire, construct, maintain the generating system and has full control over its management. Within the area of its granted powers it is supreme, as the Court held in Gaines. However, the point here - a crucial one - is that these broad powers were expressly granted OUC by the Legislature.

## ARGUMENT II

OUC CAN SHOW NO NECESSITY IN LAW TO IMPLY THAT IT HAS SOLE AUTHORITY TO ISSUE REFINANCING BONDS.

As noted in the discussion of Argument I above, a special purpose entity such as OUC may claim implied powers only where they are essential to carry out other expressly granted powers. OUC can demonstrate no necessity in law for implying any bond-issuing authority because Chapter 61-25 grant of power jointly to OUC and the City to do all things necessary to give effect to OUC's Charter authority to acquire, construct, etc., the generating system meets this need.

## ABSENCE OF ANY AUTHORITY TO ISSUE REFINANCING BONDS

OUC cites no basis in statutory or case law for implied authority for issuance of refinancing bonds on its own. Such authority has been implied only from an express grant of authority to issue bonds, which is absent here. State v. City of Miami, 155 Fla. 180 19 So. 2d 790 (1944) Any authority to issue bonds initially here is implied from the grant of power to do all things necessary to give effect to OUC's authority to acquire, construct and maintain the generating system. Authority to issue refinancing bonds would constitute an implied authority based upon another implied authority.

Although the City of Orlando may properly claim implied authority to issue refinancing bonds because it has authority to issue bonds expressly granted by Florida Statutes, Section 166.11 of the Municipal Home Rule Powers Act, OUC, lacking any express bond-issuing authority, can make no such claim.

This underscores the absolute necessity for equal City participation as a co-issuer in this proposed refinancing issue particularly: Participation by the City supplies the otherwise lacking express bond-issuing authority which is rquired as a basis for implying the refinancing bond-issuing authority.

## ARGUMENT III

LESGISLATIVE INTENT, PUBLIC POLICY AND COMMON SENSE DICTATE THAT OUC HAS NO SOLE IMPLIED AUTHORITY TO ISSUE REFINANCING BONDS, UNDER THE INSTANT LAW AND FACTS, UNDER FLORIDA STATUTES, CHAPTER 75.

## DISCUSSION

A validation proceeding under Florida Statutes, Chapter 75, is not mandatory. The issuor may ask the Court to validate its bonds. It is a proceeding whose basic purpose is to protect the bond holders and the investors and potential investors in public projects and to give additional security for these investors. For that reason alone - to give the proceedings integrity every bond issue must be considered on its own law and facts. The lower Court was immently correct in so ruling and rightfully rejected the Appellant's main argument here, that past Court validations are precedent for the instant validation.

Appellant argues that its "business judgment" right or wrong, should not be questioned and it cites a number of cases for that proposition. It is notable that in all those cases the authority implied was from the express authority of a municipality. Those municipalities were actively involved in managing the affairs of their utilities - unlike the curious legal relationship between Orlando and OUC.

Now Appellant says it is not the business of the Court to address the wisdom of the bond issuance. If that were the case

why did Appellant introduce evidence intended to show that a valid public purpose was being served? Why did Appellant specifically in its proposed Final Judgment request that the Court order and adjudge "that the issuance [of the bonds] is for a proper, legal and valid public purpose and is fully authorized by law..." [A., p. 29]

Now that the trial Court has refused to find a public purpose Appellant says it did not need one in the first place. The Appellant now says that authority is a matter of law - not fact. It is Appellee's position that every bond validation of the instant nature where the plaintiff is relying on tenuous implied grants of authority, the Courts have a right and a duty to go behind the presentation of bare documents and examine the reasonableness of the proceeding. Public policy and the integrity of validation proceedings demands it. Recent defaults of utility revenue bonds in the United States are rampant, including the Washington State electrical system where billions of dollars of bonds are in default. Here in Florida the City of Sebring Utility is or will be in default on its recent revenue bond issues. Appellee is not asking the Courts to be judicial activists, but conservative in construing implied grants of authority such as the instant authority.

The Appellant had the burden of proof to show it had clear authority to issue bonds and that authority was being properly exercised. The Appellant states on pages 25 and 26 of its brief, "If the trial Court predicated its evidentiary findings on improper or inadequate business judgments by OUC...it erred and must be reversed." The trial Court did not so find and neither did the Court find that the "authority" was simply a matter of law. The trial Court wisely and correctly refused to validate the 950 million dollar refinancing revenue bond issue based on the law and facts as Appellant pleaded and presented them.

## CONCLUSION

OUC is a special local legislative entity who filed a complaint with the Circuit Court, 9th Judicial Circuit, the Honorable W. Rogers Turner, presiding, seeking validation of a 950 million dollar bond refinancing issue pursuant to Chapter 75, Florida Statutes.

A hearing was held on April 25, 1985 and on April 26, 1985 the trial judge denied validation of those bonds. The trial judge found that OUC had no express authority to issue bonds and insufficient implied authority based on the law and facts as presented.

OUC says it should be granted authority under a special act which granted a general authority to the City of Orlando and OUC jointly. That authority was evidently presented in the instant validation proceeding for the first time and clearly does not give OUC sole authority to issue refinancing bonds. It is easy to see from the trial transcript that OUC was initially reluctant or embarrassed to reveal the specific language that it relied on for its grant of authority. Perhaps, the reason for that reluctance is that OUC does not want to invite Orlando's control over its financing. Since 1938 Orlando and OUC have been jousting in the courts over their legal relationship. As the trial judge suggested OUC could go to the Legislature and amend its Charter. Instead OUC picks the instant forum and the opportunity for this Court to make bad law and a liberal

precedent which would make a mockery of the delegated grants of legislative authority and render meaningless Chapter 75 bond validation proceedings. The Appellant can cite no persuasive precedent, but even under the legal analogies urged by Appellant, any legislative entity can claim the right to speculatively finance via tax exempt bonds.

These principles should be evident:

(1) Bondholders, those who purchase bonds in the free marketplace, must be given security. Chapter 75 evolved from the frequent defaults of bonds issued in the 1920's. Recent utility bond defaults have shaken the bond market.

(2) Tax exempt bonds are not merely a financial scheme but serve a valid public purpose in that they finance public projects.

OUC urges that its instant 950 million dollar refinancing issue should be validated because the Courts always have for "half a century". But "half a century" of not following the law is not precedent for the instant validation.

OUC states that the trial judge was wrong to rule on OUC's business judgment. There is no language in the Final Judgment appealed mentioning business judgment. However, OUC did request in its proposed Final Judgment that the Court adjudge the refinancing to be for a valid public purpose.

Essentially, the trial judge could not, in good faith, extrapolate from the law and facts presented by OUC to validate the instant bond re-issue. It is urged that the trial judge was imminently correct; that his ruling is presumptively correct; that this Court would make awkward precedent reversing this decision in light of the law and facts; and, therefore, it is respectfully suggested that this Court per curiam affirm the trial judge.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellee's, P.O.W.E.R. NOW, INC., Reply Brief, has been furnished by U.S. Mail delivery this the 10th day of June, 1985 to:

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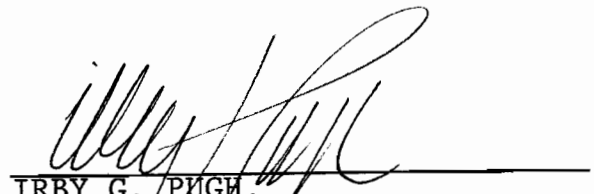

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