ORIGINAL 38

FILED
SID J. WHITE
MAY 21 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

ORLANDO UTILITIES COMMISSION,

Appellant,

vs. Case No. 66,959

STATE OF FLORIDA, et al.,

Appellees.

_____/

APPELLANT'S BRIEF

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

J. CHARLES GRAY
CAROLYN J. THOMAS
GORDON H. HARRIS
PHILIP H. TREES
THOMAS J. WILKES, JR.

GRAY, HARRIS & ROBINSON, P.A.
201 East Pine Street
Post Office Box 3068
Orlando, Florida 32801
(305) 843-8880
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PREFACE

The Appellant, Appellee and Intervenor will hereafter sometimes be referred to as follows:

"OUC" - Appellant, The Orlando Utilities Commission

"State" - Appellee, the State of Florida, through its State Attorney for the Ninth Judicial Circuit of Florida.

"PNI" - POWER NOW, Inc., which intervened in the trial court proceedings in opposition to validation.

OUC's "Charter" will mean Chapter 9861, Laws of Florida (1923), as amended, plus all other special acts of the Legislature of Florida granting or affecting the powers of OUC. The Charter consists of 16 special acts, and the codified version as published in the City Code for the City of Orlando is included in the Appendix. (A:37) Two special acts which comprise part of OUC's Charter, but which, either in part or in whole, have never been codified, are also included in the Appendix. (A:46, 48)

References to page numbers in the Appendix to Appellant's Brief are noted as "(A:___)".

STATEMENT OF THE CASE AND THE FACTS

Statement of the Case

This appeal is before the Court pursuant to Article V, Section 3(b)(2), of the Florida Constitution and Section 75.08 of Florida Statutes (1983). Appellant, the Orlando Utilities Commission, seeks review of a Final Judgment of the Ninth Judicial Circuit in Orange County denying validation of bonds authorized by OUC for refunding purposes in an amount not to exceed $950,000,000.

OUC filed a complaint in Circuit Court on March 28, 1985, seeking the validation of the bonds. (A:1) An Order to Show Cause why the bonds should not be validated was entered on March 29, 1985, setting the matter for hearing on April 25, 1985. (A:8) All required publications and service of process were timely effected. (A:12) The State answered the complaint on April 23, 1985 (A:14); PNI, an intervening nonprofit, politically activist corporation, answered the complaint on April 24, 1985. (A:17)

The hearing was held on April 25, 1985. At the conclusion of OUC's case, its motion to amend the pleadings to conform with the evidence presented was granted without objection. (A:394-95) After hearing OUC's evidence and legal arguments, the State withdrew its objections to the validation of the bonds:

> "The State is not opposed to the validation of the bonds per se. Our main objection at this point now though is the form of the order." (A:402-03)

PNI stated that if bonds were being issued for construction or "manufacturing" [sic] purposes, PNI "would concede that they

[OUC] possibly have implied authority" to issue bonds. (A:408) However, PNI asserted that OUC did not have the authority to issue bonds to refund existing validated bonds. Id.

Circuit Judge W. Rogers Turner denied the complaint for validation by Final Judgment rendered on April 26, 1985, holding:

> (1) That the Plaintiff, ORLANDO UTILITIES COMMISSION...does not have explicit authority to issue bonds as required by Chapter 75, Florida Statutes.
>
> (2) Based on the evidence presented to this Court, the Court finds that the implied authority relied upon by the Plaintiff, OUC, Chapter 61-2589, Section 2, Laws of Florida, is not sufficient implied authority to allow this Court to depart from the essential requirements of law.
>
> (3) Each and every bond validation proceeding is separate and distinct and the Court must consider the law and evidence before it to determine the authority of the Commission. (A:33)

Notice of Appeal invoking the jurisdiction of this Court was timely filed on April 29, 1985. (A:35)

Statement of the Facts

The Orlando Utilities Commission was created in 1923 by the Legislature of Florida for the purpose of managing and controlling the water and electric utility systems of the City of Orlando, Florida. (A:37-48) OUC's powers and authority to act are granted to it by its Charter, Chapter 9861, Laws of Florida (1923) and subsequent amendments and legislation supplemental thereto. (A:37 et. seq.)

Pursuant to the authority granted by its Charter, OUC has

issued hundreds of millions of dollars in bonds and notes since the 1940's to make capital improvements to its water and electric systems and to refund its prior debt. Every previous issue of OUC's bonds and notes (at least thirteen) has been validated by circuit courts in Orange County (A:180-199, 347), and since 1978 OUC has authorized, issued and had validated bonds which have a currently outstanding aggregate principal amount equal to $580,370,000. (A:180-296) OUC also has tax-exempt commercial paper outstanding in an aggregate principal amount of $280,000,000. Id. A description of the issuance dates, types and amounts of the outstanding bonds and tax-exempt commercial paper to be refunded is included in the Appendix. (A:230-31) One of those validated issues of bonds, like the instant case, refunded existing debt. (A:180-85)

In 1982, the final judgment validating OUC's bonds for capital improvements was challenged by a resident of the City of Orlando. This Court found that the challenge was untimely and held that the validation was forever conclusive as to all matters adjudicated against all parties affected by the issuance. Hall v. Orlando Utilities Commission, 432 So. 2d 1318 (Fla. 1983).

Unrefuted testimony was presented at the validation hearing that two major benefits would be derived by OUC and, thus, its customers from the proposed refunding. First, the average interest rate currently payable by OUC on its long term debt would be immediately reduced, thereby reducing debt service costs. (A:346) Second, a restructuring of the bond resolution underlying OUC's

debt would allow different methods of marketing financial obligations of OUC and, ultimately, save money. (A:346,372)

Harry Luff, the General Manager and Executive Vice President of OUC, testified that "the refunding offers a substantial savings" (A:346,361) and that OUC would definitely be at fault if it failed to validate and issue the bonds. (A:361) Mr. Luff's testimony was reinforced by the testimony of John Miller, the national Manager of the Municipal Utilities Department at Merrill Lynch, Pierce, Fenner & Smith, Incorporated. Not only did Mr. Miller agree that OUC could realize savings by authorizing refunding bonds, but also he pointed out that "unless the bonds are validated when that market shows up you may miss it and never achieve it." (A:372)

No other witnesses testified. All documents and resolutions authorizing or related to the bonds were submitted by OUC into evidence. (A:49-229, 232-306) These documents included computer calculations of the projected savings of more than $100,000,000 which could be realized by OUC and its ratepayers if the bonds are validated and issued. (A:305-06)

Neither the State nor PNI offered any witnesses or documentary evidence.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE ORLANDO UTILITIES COMMISSION WHICH HAS BEEN ISSUING BONDS FOR ALMOST HALF A CENTURY IN THE FURTHERANCE OF ITS MUNCIPAL UTILITY PURPOSES, HAS THE AUTHORITY TO CONTINUE TO DO SO.

Answer: YES.

II. WHETHER THE TRIAL COURT SHOULD REVIEW AND SUBSTITUTE ITS JUDGMENT FOR THE PROPERLY CONSIDERED COLLECTIVE BUSINESS JUDGMENT OF THE MEMBERS, PROFESSIONAL STAFF AND CONSULTANTS OF THE ORLANDO UTILITIES COMMISSION.

Answer: NO.

SUMMARY OF ARGUMENT

In excess of three-quarters of a billion dollars of OUC's bonds and commercial paper are currently in the hands of institutional and private investors. Under current conditions in the municipal bond market, the refinancing of those obligations through the issuance of the bonds which are the subject of these validation proceedings could save OUC and its customers over one hundred million dollars.

OUC's ability to finance delivery of utility services to the residents of the City of Orlando and Orange County through long-term debt is derived from its Charter and from this Court's holding in the New Smyrna Beach, Key West, Trudnak, Daytona Beach and Evans cases cited in the Argument. Its authority to issue revenue bonds has been expressly recognized by the Legislature. The ability to refinance its debt by issuing bonds for refunding purposes is a necessary corollary to its ability to incur the debt in the first instance, and the authority to do so exists as a matter of law. To hold otherwise requires the Court to ignore fifty years of precedent.

The reasons, advisability of and motives for the proposed refinancing is the responsibility of the issuer, not the trial court, and the trial court's substitution of its business judgment for that of OUC constitutes reversible error.

ARGUMENT

I. SINCE 1938 OUC HAS BEEN FOUND TO HAVE AND HAS EXERCISED THE AUTHORITY TO ISSUE REVENUE BONDS; TO NOW REVERSE OR LIMIT THIS AUTHORITY IS CONTRARY TO A LONG LINE OF WELL REASONED SUPREME COURT CASES, LEGISLATIVE INTENT, PUBLIC POLICY AND COMMON SENSE.

The trial court held as a matter of law that Chapter 75 of Florida Statutes requires OUC to have "explicit" authority for the issuance of bonds. (A:33) This is patently in error. Nowhere in Chapter 75 can such a requirement be found or inferred.

The trial court further held that "based on the evidence presented" OUC did not have "sufficient" implied authority to allow the "Court to depart from the essential requirements of law." (A:33) However, implied authority is not a matter of degree subject to proof by evidence. Either it exists as a matter of law or it does not. Neither OUC nor any other litigant could ever introduce evidence "sufficient" to justify any court departing from the essential requirements of law.

The trial court's erroneous holding that somehow implied authority is a matter of fact and evidence, rather than a question of law, is repeated in paragraph 3 of the Final Judgment, where the court holds that the issue of authority is an "evidence" question to be determined on a case by case basis. (A:33) The determination as to the authority to issue bonds is de jure, not de facto. The authority of OUC to issue bonds has been judicially determined on numerous occasions and, absent a change in the Charter or general law, is not the proper subject of factual findings.

Of course, OUC must prove that it has followed the requisite procedure for authorizing its bonds by introducing its properly adopted bond resolution and showing that the purpose of the bonds is consistent with OUC's municipal utility purposes. Once this is done, OUC's determination that the bonds should be issued is conclusive, and its business judgment is not subject to trial court review.

With the exception of the instant case, OUC's authority to issue bonds has been confirmed by Florida courts for almost half a century. Proof of the resolution and the purpose of the bonds should not be confused with the legal question of authority to issue the bonds, as the trial court has apparently done. The only type of evidence that could affect OUC's authority to issue these bonds would be evidence of fraud, evidence of a violation of legal duty, or evidence that OUC exceeded its statutory purposes. There is no such evidence in this case.

The decision by the trial court is contrary to a long and well reasoned line of cases by this Court, contrary to statutory law, contrary to public policy and contrary to common sense. It impairs the credit and good name of OUC, and it should be reversed.

A. CHAPTER 75 DOES NOT REQUIRE "EXPLICIT" OR EXPRESS AUTHORITY TO VALIDATE BONDS; EVERY CASE APPLYING THE DOCTRINE OF IMPLIED AUTHORITY IN BOND VALIDATION PROCEEDINGS NECESSARILY AFFIRMS THIS FACT.

Chapter 75 of Florida Statutes (1983), which governs bond validation, does not require "explicit" or express authority for the issuance of bonds. Instead, Section 75.02 provides, in pertinent part, that:

> Any ... municipality ... or other political district or subdivision of this state ... may determine its authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith.... For this purpose a complaint shall be filed in the circuit court....

No language in the statute requires either allegation or proof of express legislative grant of authority to issue bonds. On the contrary, an extensive line of cases decided by this Court over a span of some fifty years establishes that bonds may be validated and issued under implied authority. The entire doctrine of implied authority rests on the fact that the legislature does not require express authority. This is a practical and common sense approach to the needs and variations of public financing. The legislature's intent is apparent. To now hold that express authority is required would reverse a long line of cases and disrupt municipal utility financing and operations throughout Florida at a time of dramatic growth in population, commerce and industry.

B. IN SEEKING TO VALIDATE ITS BONDS, OUC ACTED IN ACCORDANCE WITH AND IN RELIANCE UPON ITS IMPLIED AUTHORITY ESTABLISHED BY HOLDINGS OF THIS COURT, JUST AS IT HAS DONE ON NUMEROUS OCCASIONS OVER THE PAST FIVE DECADES, AND SHOULD NOT NOW BE TOLD THAT SUCH IMPLIED AUTHORITY IS "NOT SUFFICIENT".

OUC's Charter, when read in connection with numerous decisions of this Court, clearly grants it the implied authority to finance.

In 1961, the legislature amended the Charter, granting to OUC the following express and implied authority:

> Section 1 The ... 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 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 ....
>
> 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. Ch. 61-2589, Laws of Florida[1] (A:46-47)

The same year the legislature enacted this amendment, this Court issued its opinion on rehearing in City of New Smyrna Beach v. State, 132 So.2d 145 (Fla. 1960), the culmination of a long line of cases holding that the express authority of a public utility to construct, operate and maintain electric and water utilities and to do all things necessary or required to effect such express powers implies the authority to incur long term debt payable from the revenues of the utility.

In New Smyrna Beach, the city requested the validation of $1,500,000 in bonds to be paid solely from the revenues of the city's water and electric system and to be issued without referendum approval. The trial court invalidated the bonds because the city's charter granted express authority only to

---

[1]Section 2 of Chapter 61-2589, Laws of Florida, was inexplicably never codified in the City Code for the City of Orlando. Nevertheless, it is still law and has never been amended or repealed.

issue bonds which (i) pledged both the income of the city's utility system and its utility property and (ii) were approved at referendum. Id. at 146. The city did not pledge the property of its utility system and did not conduct a referendum. The trial court refused to validate the bonds, reasoning that the charter's express grant of authority to finance in one manner precluded financing in some other manner. In its initial opinion, this Court agreed. Id. at 147.

One year later, this Court granted rehearing, reversed itself, and validated the bonds. In its opinion on rehearing, the Court held that the express authority in the city's charter to incur debt in one form did not preclude the implied power to incur debt in other forms. To reach its decision, this Court necessarily held that the express power to construct, operate and maintain a utility implies the power to incur debt:

> ...Our analysis of other decisions leads us to the conclusion that implicit in the power to construct the utility is the power to finance it by any legitimate means. ... Id. at 148. [emphasis supplied]
>
> * * *
>
> In State v. City of Miami, Fla., 113 Fla. 280, 152 So. 6, we took cognizance of the fact that in the operation of a self-supporting revenue producing utility a municipality exercises a proprietary function. ...it was explicitly held that a municipality could exercise this type of financing power whether or not it acted under special legislative authority given it to do so. In other words, the power to finance in this fashion was implicit in the power to maintain the utility. Id. at 149. [emphasis supplied]

In New Smyrna Beach, the Court cited with approval State v. City of Key West, 153 Fla. 226, 14 So. 2d 707 (Fla. 1943). In Key West, the city proposed to issue bonds to acquire an electric light and power system; the bonds were to be payable solely from the revenues to be derived from the operation of the system after its acquisition. The city had the express power "to establish, purchase, lease, condemn or otherwise acquire an electric utility ... and to do all things necessary to that end." Id. at 708. However, the city had no express power to issue the bonds which were the subject of the validation proceedings. Nevertheless, this Court held that the city's express powers described above implied the power to issue revenue bonds to acquire the system. Id.

This Court reached similar decisions in several cases preceding New Smyrna Beach and Key West. In Trudnak v. City of Ft. Pierce, 135 Fla. 573, 185 So. 353 (1938), the city tried to issue water and electric revenue certificates for expansion of its utility system; a taxpayer sought an injunction on the argument, among others, that Ft. Pierce had no authority to issue the certificates. The Ft. Pierce charter provided, in pertinent part, that:

> ... the City Commission shall have power ... to establish, maintain and operate plants ... for lighting and heating by electricity ... and to supply the inhabitants of said city with artifcial light, heat, and power for domestic, business and other purposes ....
>
> * * *

> The City Commission shall have power to construct, establish, and maintain water works, ... and do such other things as may be necessary, essential, or convenient ... for procuring and distributing an abundant supply of good wholesome water to the inhabitants of said city .... Id. at 355-56. [emphasis supplied]

Regarding the taxpayer's contention, this Court held that:

> 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. Id. [emphasis supplied]

In State v. City of Daytona Beach, 118 Fla. 29, 158 So. 300 (1934), the city authorized water revenue certificates for expansion of its water system. The certificates were characterized by this Court as "borrowing the present value" of anticipated future water revenues, to be repaid solely from such revenues of the water system. Id. at 301. The trial court validated the certificates and intervenors appealed, arguing that the city did not have the power under its charter to incur the debt. Id.

The charter for Daytona Beach at that time granted the city the power

> ... to construct, establish and maintain waterworks ... and to do such other things as may be necessary, essential or convenient for procuring and distributing an abundant supply of good ... water.... Id.

The charter granted no express power to Daytona Beach to incur the debt, but this Court decided that the city's implied powers were sufficient:

> The authority given to the city of Daytona Beach by its charter to construct, establish, and maintain a municipal waterworks in its proprietary capacity, and to do all things that may be necessary, essential, or convenient for the purpose of procuring and distributing a supply of good and wholesome water ... is legally sufficient to enable the city in its proprietary capacity to anticipate its water revenue collections in order to raise the funds needed to provide for essential additions and facilities to its plant to enable the system to serve the purpose for which the statutes provide it shall be maintained. Id. at 304.

The New Smyrna Beach, Key West, Trudnak and Daytona Beach cases control this appeal. Just as in those four cases, OUC has authorized bonds payable solely from the revenues of its utility systems. (A:272) Like the charters in those four cases, OUC's Charter contains no express authority to issue revenue bonds; however, like the charters in those four cases, OUC's Charter authorizes OUC to

> acquire, establish, construct, maintain and/or operate electrical generating plants ... and facilities incident thereto ... and to construct and maintain electric lines and water mains ... for the purpose of conveying water and/or electric current ... [and] to do all things necessary or required to carry into effect [its express powers]. §§ 1 and 2, Ch. 61-2589, Laws of Florida (A:46-47)

Finally, in each of those four cases, the utility system was owned and operated by a municipality; similarly, by statute OUC is part of the government of the City of Orlando. Charter, § 1. (A:37)

Thus, under the line of cases initiated with Daytona Beach and culminating with New Smyrna Beach, OUC's Charter unquestion-

ably grants it the implied authority to finance in any legitimate manner, including the issuance of long term revenue bonds.

In 1938 this Court specifically addressed the issue of OUC's authority to incur long term debt to expand its electric system. Even though OUC's Charter did not then contain the authority granted in 1961 "to do all things necessary or required" to effect OUC's express powers, this Court nevertheless held that OUC could, indeed, incur such debt. In City of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938)[2], the City of Orlando sought a restraining order against OUC when it tried to purchase a new generator for its electric system. OUC intended to pay cash for one-third of the purchase price and to "obligate the income of the plant, pledge its good name and credit for two-thirds of the purchase price in the form of deferred payments ... over a long term ... without the approval of the City Council." Id. at 266. This Court framed the issue as follows:

> Has the Utilities Commission of the City of Orlando, under [its charter], 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. [emphasis supplied]

---

[2]This case, decided nearly 50 years ago, involved two distinguished lawyers. The lawyer for the City of Orlando seeking the order to restrain OUC from incurring the long term debt was Campbell Thornall, who as a justice on this Court some 22 years later authored the opinion on rehearing in New Smyrna Beach. The lawyer defending OUC was J. Thomas Gurney, Sr., who drafted OUC's charter in 1923 and served as its general counsel for some 60 years.

This Court ruled for OUC and affirmed the trial court's denial of a restraining order, holding that (i) OUC's charter was constitutional, (ii) OUC had the power to purchase the generator and to finance it over a long term as proposed, and (iii) no referendum or city council approval was required. In holding that OUC had the power to finance and make the purchase of the generator, this Court expressly rejected the effort by the City to have it construe OUC's powers narrowly:

> We doubt the wisdom of a strict construction of the grants of power, supra, so as to defeat or affect the intention of the Legislature when such power is implied if not clearly expressed as above shown. Id. at 268. [Emphasis supplied]

Indeed, the Court found that OUC's charter grants it ample authority to finance improvements to its utility system:

> The Utilities Commission was granted by the provisions, supra, "full authority over the management in control of the electric light and water works plants in the City of Orlando." Bouv. Law Dict. defines the word "full" as "complete, entire, detailed." Webster defines "full" as "abundantly furnished or provided; sufficient in quantity or degree; copious, plentious, ample or adequate." It is positive that the management and control of the electric light and water plants of the City of Orlando by the Utilities Commission of said City shall not only be entire, but adequate and complete in furnishing electricity to the general public of said City and the facilities as supplying the necessary equipment and appliances in carrying out the purpose was fully provided and authorized. Id.

In justifiable reliance on Evans, the 1961 Charter amendments described above, and New Smyrna Beach and its predecessor cases, OUC has incurred hundreds of millions of dollars in debt

since the 1940's to finance expansions of its utility systems so that it might service one of the fastest growing cities in Florida. Unquestionably, the dramatic growth in Florida's population -- especially the growth since 1965 in Orlando -- has created tremendous challenges for public utility systems like OUC, particularly their ability to raise capital for expansion. OUC's financings have consistently been upheld in validation proceedings by the circuit courts of Orange County, relying on Evans, New Smyrna Beach, and the other cases described above as precedent. As OUC's General Manager, Mr. Harry Luff, testified at the hearing, OUC in the last 38 years has successfully obtained judgments validating its obligations at least 13 times. (A:347)

The need for stability, predictability and reliability in the law demand that the courts not deviate from such firmly established legal precedent without compelling reason. cf. McGregor v. Provident Trust Company of Philadelphia, 119 Fla. 718, 162 So. 323 (1935). No such compelling reason exists in this case, and the trial court erred in ruling that OUC lacks authority to issue the bonds.

C. THE LEGISLATURE NEED NOT SUPERFLUOUSLY GRANT AUTHORITY WHERE SUCH AUTHORITY NOT ONLY EXISTS, BUT ALSO HAS BEEN EXPRESSLY RECOGNIZED BY THE LEGISLATURE.

In Paragraph 4 of its Final Judgment, the trial court stated:

> The Plaintiff, OUC, is not without remedy. It can seek the legal express authority to issue bonds from the legislature. (A:33)

OUC does not need express authority to issue its bonds. As shown above, it irrefutably has the implied authority to do so. Nothing more is needed. Yet, the trial court would have OUC petition the legislature for some sort of redundant authority. Any litigant appreciates suggestions from a court on how to accomplish its ends, but this suggestion appears more of a justification or excuse for the trial court's incongruous ruling.

In any case, the Legislature has in recent years expressly recognized OUC's authority to finance through the issuance of revenue bonds. In 1982 the Legislature amended OUC's Charter by enacting Chapter 82-415, Laws of Florida, which provides in pertinent part that:

> ... In addition to the power and authority to borrow money otherwise provided by any other provision of this Act or of general law, the Orlando Utilities Commission shall also have the power to borrow money and incur indebtedness from time to time with a maturity date of not more than three years ... § 7, Ch. 82-415, Laws of Florida. [Emphasis supplied]

The legislature is presumed to have adopted the particular wording of a statute advisedly and for a purpose. Lee v. Gulf Oil Corp., 148 Fla. 612, 4 So. 2d 868 (1941). Since an inspection of the Charter reveals no other express authority to borrow money, only additional "power and authority" to which the legislature can be referring is the implied authority granted by the 1961 Charter amendment (Ch. 61-2589, Laws of Florida, as described above) and the implied authority recognized by this Court in Evans.

In 1980, the legislature was even more direct in recognizing the authority of OUC to issue revenue bonds. In Chapter 80-560,

Laws of Florida,[3] the legislature provided the following:

> The rates of interest payable on revenue bonds ... issued by the Orlando Utilities Commission shall be set by the commission, notwithstanding any interest rate limitation prescribed by general law or any other special law. § 1, Ch. 80-560, Laws of Florida. [Emphasis supplied] (A:48)

In summary, if the trial court really believes that OUC needs to go to the legislature for authority to issue bonds, it stands alone in its belief. Neither the legislature nor this Court concurs.

D. BECAUSE THE IMPLIED AUTHORITY TO ISSUE BONDS FOR REFUNDING PURPOSES HAS BEEN ESTABLISHED BY NUMEROUS COURT DECISIONS TO BE A NECESSARY COROLLARY TO THE AUTHORITY TO ISSUE BONDS FOR CAPITAL IMPROVEMENTS, OUC HAS THE AUTHORITY TO ISSUE THESE BONDS TO SAVE THE RATEPAYERS AND CITIZENS OF ORANGE COUNTY MILLIONS OF DOLLARS.

New Smyrna Beach, Key West, Trudnak, Daytona Beach and Evans establish OUC's authority to issue bonds. No cases even suggest that this authority might not exist.

At the hearing, the State acknowledged that OUC had authority to issue the bonds and withdrew its opposition to validation of them. (A:402-03) Only PNI continued to oppose validation by ignoring controlling precedents and arguing that bonds for refunding purposes, as distinct from bonds for capital improvements, require a finding of additional authority by the trier of fact. (A:407-08)

---

[3] Chapter 80-560 has never been amended or repealed. However, like Section 2 of Chapter 61-2589, Laws of Florida, it was not codified in the Orlando City Code (see footnote 2, above), probably because one month after becoming law Chapter 80-560 was superseded by Chapter 80-318, Laws of Florida (Section 215.84, Florida Statutes (1983)).

If this case results in a new rule of law, as PNI urges, that a public body with implied authority to finance must nevertheless have express authority to refinance, the decisions of this Court described below will be emasculated. Moreover, numerous municipal utilities in Florida (such as those in the New Smyrna Beach, Trudnak, Key West, and Daytona Beach cases) will be strapped with an absurd, pointless holding: Although a utility has implied power to issue bonds for capital improvements, it may not refinance those bonds until expressly authorized by the legislature.

This Court has repeatedly refused to limit the power of an issuer in the manner urged by PNI. Advance refunding, indeed, even "double" advance refunding, of bonds issued for public projects is a legal and legitimate method of local government financing. cf. State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978). There is no public policy reason to treat bonds for refunding differently than bonds for capital improvements. Refundings are merely a renewal and continuation of existing debt. State v. City of Miami, 155 Fla. 180, 19 So. 2d 790 (1944); State v. City of Okeechobee, 99 Fla. 617, 127 So. 339 (1930). From the standpoint of both the issuer and the bondholder, a bond for refunding purposes is the same as a bond for capital improvements. The type of security being issued is identical; the only difference is the purpose for which it is issued. A refunding is simply a method of recasting existing debt on terms more favorable than the existing terms. This Court has long recognized the character of bonds issued for refunding purposes:

> The theory of the cases so holding is that, since the bonds are not the debt itself, but the legal evidence of the existence of the debt, the issuance of refunding bonds for the purpose of discharging an existing legal indebtedness, originally incurred in accordance with the constitutional requirement, does not create a new debt or impose any new liability against the taxpayers or their property within the meaning of such constitutional provision, but merely renews and continues in a changed form the original existing indebtedness which was originally created in conformity with the Constitution. State v. City of Okeechobee, supra, at 340.

In State v. City of Miami, 155 Fla. 180, 19 So. 2d 790 (1944), the city requested validation of bonds to refund previously issued water revenue bonds. Although Miami had express authority in its charter to issue bonds, it had no express power to refund them, once issued. However, the Court found that power to be necessarily implied,[4] holding:

> While there may be no specific power in the [charter] to refund bonds once issued, it does not follow that authority to refund may not be implied from authority to issue originally; nor is doubt reasonable that a municipality empowered to undertake certain obligations may renew them at a substantial saving to the people.
>
> * * *
>
> We find no difficulty in holding that power expressly granted to issue bonds payable from revenue includes the power to refund those bonds upon terms more favorable to the obligorcity. The conclusion is in entire harmony with our frequent expressions that refunding bonds are but a renewal and continuation of the existing debt. Id. [emphasis supplied]

---

[4]The State's argument that "Dillon's Rule" (cf. Jacksonville Electric Light Company v. City of Jacksonville, 36 Fla. 229, 18 So. 677, 680 (1895)) precluded Miami's refunding was expressly rejected. Id.

If refunding bonds are but a renewal of the existing debt, there is no reason to require express authority for them merely because the existing debt arose from implied authority.

This Court followed the holding of the Miami case in State v. Escambia County, 52 So. 2d. 125 (Fla. 1951). There, too, the county had express authority to issue bonds for improving its public beach facilities, but it had no express authority to refund. Despite the contention of the state that the bonds were invalid absent such express authority, this Court held that the Legislature had granted the county the power to refund by inference. Id. at 129. See also Juvenal v. Dixon, 99 Fla. 936 128 So. 27 (1930) where this Court held that the issuance of bonds by a special tax school district for refunding purposes was valid despite the lack of express authority where "the district is assuming no new obligation or additional debt", but is only "providing for the liquidation of its existing debt.... " Id. at 30.

Public policy demands that municipal utilities such as OUC have the power to refund debt from time to time. Indeed, where (as in this case) a municipal utility can effect substantial savings by refunding, it has not only the legal authority, but also the responsibility, to do so. In Daytona Beach, this Court held:

> A municipal corporation can and should run the utility enterprises which it may be authorized to own with the same degree of business prudence, conservative business judgment, and sound fiscal management as would be applied

> to a private enterprise of the same general character. To that end the vestiture of power upon a municipality to own and operate certain public utilities for the benefit of its inhabitants implies that it is given such power charged with a responsibility to so manage and operate the same and deal with the earnings thereof as will be for the best advantage of the public service required to be rendered. 158 So. 305 [Emphasis supplied.]

In New Smyrna Beach, this Court reaffirmed that the above language is still the law in Florida:

> In [Daytona Beach] ... we clearly held that when a municipality is endowed with the power to acquire certain public utilities then the very act of endowment implies that the city is given that power charged with a responsibility to manage and operate the plants and to deal with the earnings to the best advantage of the public service required to be rendered. Any prohibition or restriction upon such power must be expressly stated in the charter. 132 So. 2d. 150 [Emphasis supplied.]

OUC's charter contains no prohibition whatsoever against refunding its debt for the benefit of the ratepayers. OUC has received the thoughtful, well considered advice of its staff, its underwriter and its financial advisor that it and its ratepayers will enjoy substantial savings and added future financial flexibility by refunding. (A:300, 305-06, 343-44, 346-47, 357, 371-72) Thus, under Daytona Beach and New Smyrna Beach, OUC not only may, but also has a responsibility, to refund its debt.

The trial court mistakenly embraced the argument that the purpose of the bonds (i.e., refunding) made OUC's authority to issue a question of fact to be determined de novo as a part of the validation process. In fact, the authority of OUC to issue long term debt was established fifty years ago in Evans--decided

even before OUC's powers were expanded in 1961--and consistently recognized in at least thirteen validations since Evans. (A:347) Indeed, in the three separate validation proceedings for the bonds which are now to be refunded, the question of OUC's authority was consistently ratified--not as a question of fact, but as a matter of law (A:180-199). Note that, like this case, one series of those bonds was validated and issued for refunding purposes. (A:230) This Court has stated:

> Public policy demands that we adhere to our many holdings that 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. Lipford v. Harris, 212 So. 2d 766 (Fla. 1968)

Given that these bonds are to be issued only to refund other OUC bonds previously validated, the only matter properly before the trial court is that involving OUC's exercise of previously recognized authority in accordance with the spirit and intent of the law. Cf. McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980). OUC's authority to issue the bonds is unchanged and, under the doctrine of stare decisis, should not be subject to challenge. As this Court observed in In Re: Seaton's Estate, 154 Fla. 446, 18 So. 2d 20, 22 (Fla. 1944):

> In general, when a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide the courts in future similar cases. Especially is this so when a decision ... affects the validity of a certain mode of transacting business ... and a change of decision will necessarily confuse or invalidate transactions entered into and acted upon in reliance upon the law as judicially construed. [Emphasis supplied]

OUC seeks to refinance over $500,000,000 of outstanding bonds--

bonds which were correctly validated in reliance on this Court's opinions in Evans and New Smyrna Beach and its predecessors. OUC's authority and responsibility to save its ratepayers money by refunding its current debt should not be prevented by the trial court's erroneous judgment. This Court should reverse and reaffirm OUC's authority to do so.

II. AS A FUNDAMENTAL PRINCIPLE OF LAW IN BOND VALIDATIONS, THE PROPERLY CONSIDERED BUSINESS JUDGMENTS OF PUBLIC AGENCIES LIKE OUC ARE NOT SUBJECT TO BEING REVIEWED AND OVERTURNED BY TRIAL COURTS.

Paragraphs 2 and 3 of the trial court's Final Judgment said, in effect, that the authority of OUC to issue bonds was an issue of fact to be determined by the evidence:

> 2. Based on the evidence presented to this court, the court finds that the implied authority relied upon by the plaintiff, OUC, Chapter 61-2589, Section 2, Laws of Florida, is not sufficient implied authority to allow this court to depart from the essential requirements of law.
>
> 3. ... the Court must consider the ... evidence before it to determine the authority of [OUC to issue bonds]. (A:33)

As previously noted, whether a public body has authority to issue bonds is a question of law, not fact. Either it exists as a matter of law or it does not. The only factual question properly before the trial court was whether OUC has legally exercised the authority it has as a matter of law.

Reviewing OUC's proceedings to determine whether its authority has been legally exercised does not include reviewing OUC's business judgment. If the trial court predicated its evidentiary

findings on improper or inadequate business judgments by OUC (as was urged by both the State and PNI), it erred and must be reversed.

OUC offered ample, uncontroverted, unimpeached evidence: (i) that the bonds are expected to result in millions of dollars in savings to OUC and its rate-payers; (ii) that in calculating such projected savings, OUC's underwriter used reasonable assumptions based on current market conditions; (iii) that in deciding to proceed with the refunding, OUC received expert advice from both Merrill Lynch, its managing underwriter, and M. G. Lewis & Co., Inc., its financial advisor, regarding the benefits which OUC could expect from the refunding; and (iv) that OUC had business reasons for the refunding independent of the projected savings, (i.e., acquiring increased future financial flexibility through an updated bond resolution). (A:344-48, 355, 360-61, 371-72) Based on these factors, OUC determined that the bonds should be issued. The trial court legally cannot go behind OUC's determination and review whether these factors are accurate, whether OUC's determination to issue the bonds based on such factors is reasonable, or whether OUC's proposed plan of finance is financially or economically feasible.

In the case of Town of Medley v. State, 162 So. 2d. 257 (Fla. 1964), the town attempted to validate public improvement bonds payable from revenues of its water system and other sources. The trial court invalidated the bonds on several grounds, one of which was that "the proposed plan of financing was unreasonable and not financially and economically feasible under the facts

and circumstances ... and would eventually result in depriving the Town of its traditional and necessary operating expenses." Id. at 258. This Court rejected that reasoning:

> We have consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal duty.
>
> * * *
>
> ... the courts do not have the authority to substitute their judgment for that of officials who have determined that revenue certificates should be issued for a purpose deemed by them to be in the best interest of those whom they represent. The responsibility of the courts in such proceedings is primarily that of determining whether the issuing body has the power to act and whether it exercised that power in accordance with law.
>
> A contrary holding would make an oligarchy of the courts giving them the power in matters such as this to determine what in their opinion was good or bad for a city and its inhabitants thereby depriving the inhabitants of the right to make such decisions for themselves as is intended under our system of government. Id. at 258-59. [Emphasis supplied]

One year later, in State v. Manatee County Port Authority, 171 So. 2d 169 (Fla. 1965), this Court similarly rejected an attack on the feasibility of a proposed port facility project, the revenues of which would be used to service debt on bonds:

> We have held that the fiscal feasibility of a revenue project is an administrative decision to be concluded by the business judgment of the issuing agency. Such problems as the advisability of the project and its income potential, must be resolved at the executive or administrative level. They are beyond the scope of judicial review in a validation proceeding. Id. at 171. [Emphasis supplied]

With specific regard to financings by municipal utilities, the unequivocal holding of this Court in the Daytona Beach case, supra, governs this validation proceeding:

> A municipal corporation can and should run the utility enterprises which it may be authorized to own with the same degree of business prudence, conservative business judgment, and sound fiscal management as would be applied to a private enterprise of the same general character. To that end, the vestiture of power upon a municipality to own and operate certain public utilities for the benefit of its inhabitants implies that it is given such power charged with a responsibility to ... deal with the earnings thereof as will be for the best advantage of the public service required to be rendered....Questions of business policy are therefore beyond the scope of judicial interference unless some charge of negligence, fraud, or violation of legal duty is made as a predicate for the attack. Id. at 305 [emphasis supplied]

This specific holding was reaffirmed by this Court some 28 years later in New Smyrna Beach. 132 So. 2d. at 150.

The business judgment rule is not affected by the fact that the bonds are being issued for refunding purposes. In State v. Florida State Turnpike Authority, 134 So. 2d 12 (Fla. 1961), in which bonds were validated for refunding purposes, this Court held that:

> Moreover, the question of the fiscal soundness or advisability of refunding the $64,000,000 of 3.25% bonds with bonds bearing an interest rate of close to 5% is also a matter involving the exercise of business judgment and this Court is without any authority to substitute our opinion in the matter for that of the Authority. Id. at 19.

Indeed, unlike OUC's effort here to secure a lower interest rate on its debt, the Turnpike Authority was actually increasing its

interest rate. Yet, even in the face of a refinancing with higher interest rates, this Court refused to interfere with the business judgment of the governmental body issuing the bonds.

The Medley case above, is particularly indicative of the lengths to which this Court has gone to avoid reviewing business judgments. In Medley, the trial court invalidated the bonds in part because the town had not gotten "recognized disinterested tax, fiscal and municipal advice" regarding the contract to sell the bonds. This Court admitted that the town apparently never got any such advice, but refused to consider the argument:

> While good business practice dictates that a city obtain such advice before contracting to sell its bonds, we know of no legal requirement that it do so. 162 So. 2d at 259.

Thus, even where the record shows that the public body has received either no advice or bad advice, the courts still do not interfere.

The State admitted at the hearing that under Florida law the trial court's review of business judgments in connection with bond issues is clearly prohibited. (A:105) The State argued, however, that the rule applies only where the authority to issue bonds is express, not implied. (A:105) According to the State, because OUC's authority to issue bonds derives from its general charter power "to do all things necessary or required to carry into effect [its specified charter powers]" (§ 2, Ch. 61-2589, Laws of Florida), OUC must show that the refunding is "necessary or required." (A:105)

Neither the State nor PNI offered any authority for the court

to deviate from the business judgment rule. Indeed, there is none. Nor is there any public policy reason for an exception to the rule. Because OUC relies on implied authority to finance does not change the exigencies of managing a municipal utility. OUC and its staff and consultants are still the persons experienced and equipped to consider the numerous complex factors, both objective and subjective, which must bear on the multitude of business decisions to be made daily. The courts are no better able to second-guess OUC's judgment merely because the power to finance is implied, not express.

In summary, to the extent it substituted its judgment for OUC's, the trial court erred and should be reversed.

CONCLUSION

The trial court erred in ruling that OUC was required to have either "explicit" authority to issue bonds or evidence of "sufficient implied authority" to do so. As a matter of law, OUC has implied authority to issue bonds and to refund bonds once issued.

OUC requests that this Court reverse the lower court's decision and direct it to enter an order validating the proposed bonds.

Respectfully Submitted,

GRAY, HARRIS & ROBINSON, P.A.

J. CHARLES GRAY

CAROLYN J. THOMAS

GORDON H. HARRIS

PHILIP H. TREES

THOMAS J. WILKES, JR.

CERTIFICATE OF SERVICE

I certify that a copy hereof plus its appendix has been furnished to the following by hand delivery this 20th day of May, 1985:

Keith Johnstone, Esq.
Assistant State Attorney
205 N. Orange Avenue
Orlando, Florida 32801

Irby G. Pugh, Esq.
218 Annie Street
Orlando, Florida 32801

Steven R. Bechtel, Esq.
Mateer & Harbert, P.A.
100 E. Robinson Street
Orlando, Florida 32801

Carolyn J. Thomas

Carolyn J. Thomas
GRAY, HARRIS & ROBINSON, P.A.
201 East Pine Street
Post Office Box 3068
Orlando, Florida 32801
(305) 843-8880
Attorneys for Appellant