IN THE SUPREME COURT OF THE
STATE OF FLORIDA

ORLANDO UTILITIES COMMISSION,

Appellant,

vs. Case No. 66,959

STATE OF FLORIDA, et. al.,

Appellees.

_____/

REPLY BRIEF

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

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PREFACE

Terms defined in the Preface to Appellant's Initial Brief shall have the same meaning in this Reply Brief. References to pages in the State's Answer Brief and PNI's Answer Brief are noted as "(State:____)" and "(PNI:____)", respectively.

ARGUMENT

I. OUC IS A MUNICIPAL UTILITY AND, AS SUCH, IS SUBJECT TO THIS COURT'S HOLDINGS WITH RESPECT TO MUNICIPAL UTILITIES.

OUC is a municipal utility. For some fifty years it has relied on the holdings of this Court regarding the implied financing powers of municipal utilities (i.e., the New Smyrna Beach, Daytona Beach, Key West, Trudnak and Evans cases cited in OUC's initial brief). Yet, the State and PNI argue that a municipal utility such as OUC should not be subject to this Court's municipal utility cases because OUC is not a municipality. (State: 6-8; PNI: 6, 13-15) Instead, Appellees argue, OUC, when treated as a "special district," is not governed by those cases.

The argument has no merit. Under its Charter, OUC is a municipal utility and is inextricably part of the City of Orlando. For example, OUC is expressly "part of the government of the City of Orlando". Charter, §1 (A:37) The Mayor of Orlando is, ex officio, a voting member of OUC. Charter §2 (A:38) The Orlando City Council elects the other members of OUC and fills any vacancies. Charter, §4 (A:38) OUC must make monthly reports of its operations and finances to the Orlando City Council. Charter, §11 (A:42) OUC's Charter contains numerous other provisions showing unquestionably that OUC is part of Orlando city government, fully accountable to the Mayor and City Council.

Merely because OUC is governed by an appointed board instead of a city council does not make the New Smyrna Beach line of

cases inapplicable. In arguing that those cases do not govern OUC, neither the State nor PNI used Dillon's Rule in their analysis. Consequently, both were analytically incorrect.

Dillon's Rule has long been recognized by this Court as a summary of the decisions construing the powers of municipalities. cf. Jacksonville Electric Light Company v. City of Jacksonville, 36 Fla. 229, 18 So. 677 (1895); Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271, 282 (1973). The rule is stated as follows:

> A municipal corporation may exercise only those powers which have been expressly granted plus those powers necessarily or fairly implied in or incident to the municipality's express powers, and any doubt concerning the existence of the power is to be resolved against the muncipality. cf. 18 So. at 680.

Although not cited in New Smyrna Beach and its predecessors, Dillon's Rule was used by this Court at the time of those cases to construe the powers of not only municipalities, but also counties and special districts. Williams v. Town of Dunnellon, 125 Fla. 114, 169 So. 631, 637 (1936); see also 3A Antieau, Local Government Law, §30J.02 (1984). Although municipalities and counties have gained home rule powers under the 1968 Florida Constitution and Chapters 125 and 166 of Florida Statutes (cf. City of Miami Beach v. Forte Towers, 305 So.2d 764 (Fla. 1974) and Speer v. Olsen, 367 So.2d 207 (Fla. 1978)), special districts continue to be governed by Dillon's Rule. cf. Harvey v. Board of Public Instruction for Sarasota County, 101 Fla. 273, 133 So. 868

(1931); Hopkins v. Special Road and Bridge District No. 4 of Brevard Co., 73 Fla. 247, 74 So. 310 (1917); 1979 Op. Att'y. Gen. Fla. 079-3 (Jan. 16, 1979); Antieau, supra;

Thus, the distinction argued by the State and PNI between OUC and municipalities is of no consequence: Dillon's Rule governed the municipalities and OUC at the time of New Smyrna Beach and its predecessors and, even assuming the distinction exists, Dillon's Rule governs OUC now. The rule of construction for those cases is the same as for this case. Therefore, New Smyrna Beach and its predecessors do indeed control this appeal.

In novel but erroneous reasoning, the State makes a second distinction between OUC and the municipalities in the New Smyrna Beach line of cases: general law and OUC's Charter expressly authorize OUC to incur only short term debt; in contrast, the municipalities had and now have express authority under "Chapter 169, Florida Statutes (1933)"[1] as well as Chapters 159 and 166 of Florida Statutes (1983) to incur long term debt by issuing general obligation bonds and revenue bonds. (State: 5-7)

The State seems to suggest that those municipalities were found by this Court to have implied charter authority to issue

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[1]In 1933 there were no "Florida Statutes." The State's cite to "Ch. 169, Fla. Stat. (1933)" is erroneous. Presumably, the State meant to cite Section 3008 et. seq. of the Compiled General Laws of Florida (1927) which authorized municipalities to issue general obligation bonds and was the forerunner of Chapter 169 of Florida Statutes (1971).

utility revenue bonds only because they had express authority under separate, inapplicable statutes to issue general obligation and other revenue bonds. The State's inference is that the legislature has shown an unwillingness ever to allow OUC to incur long term debt.

Contrary to the State's belief, OUC does indeed have express general law authority to issue bonds: Under Section 361.15 of Florida Statutes, OUC may exercise the financing powers under Part I of Chapter 159 of Florida Statutes whenever OUC is participating with other utilities in a joint electric power supply project.[2] Thus, contrary to the State's inference, allowing OUC to incur long term debt is hardly repugnant to the legislature. Furthermore, merely because a charter expressly authorizes one type of borrowing (e.g., short term) does not preclude implied power to use other types of borrowing (e.g., long term). City of New Smyrna Beach v. State, 132 So.2d 145 (Fla. 1960).

PNI would have this Court discard its numerous cases applicable to municipalities and their utility systems and, instead, look to Hopkins v. Special Road and Bridge District No. 4 of Brevard County, 73 Fla 247, 74 So.310. (1917). Hopkins is a 1917 case dealing not with municipal utilities and bonds payable

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[2]Note that these financing powers under Chapters 159 and 361 of Florida Statutes are additional and supplemental to any other financing powers OUC derives from its charter or other general or special law. §361.16, Fla. Stat. (1983).

from utility revenues, but with a special district issuing bonds payable from ad valorem taxes for road construction. The case simply is not applicable, and neither PNI nor the State offer any other case law in support of their argument.

In summary, New Smyrna Beach and its predecessors are the controlling cases. They hold unequivocally that the express power to acquire and construct a municipal utility implies the power to finance by any legitimate means. 132 So.2d at 148. This Court has never shown any doubt as to the existence of such power.

II. THIS COURT DECIDED NEARLY FIFTY YEARS AGO THAT OUC MAY LEGALLY INCUR LONG TERM DEBT.

Both the State and PNI argue that City of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938), is not authority for OUC to incur debt. Although PNI mentions Evans only in passing and without analysis (PNI:6), the State acknowledges that the case contains the issue of whether OUC legally could incur long term debt. (State: 8-9) The State then attempts to distinguish Evans from this case by arguing that the debt in Evans took the form of a "retain title" contract, not bonds.

The distinction is immaterial. As with revenue bonds, OUC had only implied, not express, authority to execute a retain title contract. Moreover, long term debt has the same consequences for OUC's budget, rates and operations regardless of the form it takes. To argue otherwise elevates form over substance.

Of course, even without Evans OUC has the authority under its

Charter and the holdings of this Court in New Smyrna Beach and its predecessors to finance by any legitimate means.

III. OUC NEED NOT PROVE THAT SAVING ITS RATEPAYERS SOME $100,000,000 OR MORE IS "NECESSARY OR REQUIRED".

Incredibly, both the State and PNI argue that refunding OUC's debt to save some $100,000,000 or more in debt service (A:305-06) may be "unnecessary" or "not required" and, therefore, illegal. PNI offers little analysis for the argument. (PNI:16) The State's syllogism begins with the language of Section 2 of Chapter 61-2589, Laws of Florida:

> 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.

The State reasons that this language (i) is essential for OUC to be deemed to have implied power to finance or refinance and (ii) places a burden on OUC to prove that the bonds are "necessary or required." Otherwise, the State argues, the bonds cannot be validated. (State: 11, 12)

Again, the State fails to apply Dillon's Rule and this Court's decisions in New Smyrna Beach and its predecessors. Under Dillon's Rule and those cases, OUC may exercise all necessarily implied powers (here, the power to finance and refinance) in order to effect all powers expressly granted (here, the power to acquire and construct the water and electric systems). Thus, OUC's implied authority to finance and refinance is not predicated on

the "necessary and required" language of Chapter 61-2589. In New Smyrna Beach, this Court held that the power to construct and maintain the utility system includes the power to finance it by any legitimate means. 132 So.2d at 148, 150. The Court did not base its holding on charter authority to "do all things necessary and required" to effect express charter powers. Moreover, although the municipalities in the Daytona Beach, Key West, and Trudnak cases all had charter language similar to OUC's "necessary and required" wording, this Court did not predicate its holdings on that language.

In other words, the express power to acquire, construct, operate and manage a utility system in and of itself implies the power to finance the system by any legitimate means. The "necessary or required" language is neither necessary nor required.

Even assuming Appellees' contention has merit, OUC's efforts to save its ratepayers millions of dollars is "necessary or required" as a matter of law. That is, in Daytona Beach, this Court held that the mere authorization to operate a utility creates the responsibility to "deal with the earnings thereof as will be for the best advantage of the public service required to be rendered." 158 So. at 305. This holding was reaffirmed some 16 years later in New Smyrna Beach. 132 So.2d at 150. OUC cannot deal with its earnings to the best advantage of the public if it cannot legally refinance its debt when interest rates decline.

Even if saving some $100 million or more in debt service is

not "necessary" as a matter of law, OUC proved the necessity for the refunding at the hearing. OUC offered ample, uncontroverted proof of the benefits and purposes of issuing the bonds, all of which were summarized in OUC's initial brief (pages 3, 4, and 26) and will not be repeated here.

PNI argues in effect that OUC failed to meet its burden of proof (assuming one even exists) because OUC's General Manager, Mr. Harry Luff, testified that the refinancing will have no direct impact on rates. Why this would destroy the "necessity" for refinancing is unknown. In any event, PNI misstates the record: Mr. Luff testified on cross exam by PNI's counsel that the savings will, indeed, have a direct impact on the rates by reducing the revenue requirements for OUC's utility systems. (A:357-58) None of Mr. Luff's testimony was impeached or controverted.

In reality, Appellees' argument that the bonds are invalid as being not "necessary or required" is merely an attempt to have the judiciary review the judgments of OUC and its staff regarding whether the bonds should, from a business standpoint, be issued. This Court has always refrained from such review. Town of Medley v. State, 162 So.2d 275 (Fla. 1962). As discussed in the Initial Brief, there are neither legal nor public policy reasons to deviate from the business judgment rule merely because the power to finance is implied, not express.

The State's final argument that validation of OUC's bonds

"might result in validity" (State: 16-18) merely repeats its "necessary or required" argument. However, one appealing but erroneous component of the argument should be corrected. Specifically, the State contends that OUC's Bond Resolution of March 25, 1985 (A: 232-296) correctly requires future parity or "pari passu" bonds to result in debt service savings while improperly failing to require that the proposed bonds save money.

The covenant to which the State refers has nothing whatsoever to do with "necessity". As OUC's General Manager testified, one important purpose of the refinancing is to allow OUC to improve its bond covenants. (A: 346) The existing 1978 bond resolution (A: 49-179) does not allow OUC to refund only a portion of its existing senior lien debt; under the new Bond Resolution, all or any part of OUC's senior lien debt could be refunded (compare Article III, Section T of the 1978 bond resolution (A: 64-65) with Article III, Section T of the 1985 Bond Resolution (A: 291-92)).

Before accepting the new bond resolution, prospective bond purchasers will demand assurances that future partial refundings will not increase debt service costs to OUC. Otherwise, a partial refunding could jeopardize OUC's ability to pay those outstanding bonds which are <u>not</u> being refunded. In other words, the requirement for a certificate that future refundings will not increase OUC's debt service is a contractual provision to protect the future holders of the bonds which are the subject of this

appeal. It has nothing to do with the "necessity" for the refunding.

The State also analogizes to the Turnpike Authority cases and uses a hypothetical example of OUC issuing bonds for a baseball stadium.(State: 13-14) The selection of the route for the Florida Turnpike was subject to certain statutory restrictions and was not an exercise of business judgment, as the State claims; thus, those cases are inapplicable to this appeal. Likewise, the hypothetical in which OUC builds a facility wholly unrelated to its water and electric system is entirely irrelevant and does not merit reply.

IV. ALTHOUGH NOT REQUIRED TO DO SO, THE CITY OF ORLANDO HAS APPROVED THE ISSUANCE OF THE BONDS.

Relying on certain language in OUC's Charter, PNI insists throughout its brief that the City of Orlando and OUC jointly share the power to issue bonds and that OUC cannot issue bonds on its own. Under rules of statutory construction and Gaines v. City of Orlando, 450 So.2d 1174 (Fla. 5th DCA, 1984), PNI is wrong. However, the issue is moot: as the record shows, the City of Orlando has approved the bonds. (A:300-304)

Despite the issue being moot, the Court should note that PNI urges an entirely erroneous reading of Section 2 of Chapter 61-2589, Laws of Florida, the relevant Charter language, which provides as follows:

> 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.

Nothing in this Section 2 or in Chapter 61-2589 or in any other part of OUC's Charter suggests that OUC must act jointly with the city in exercising its implied charter powers, such as the power to finance. The "and" in the phrase "The Orlando Utilities Commission and the City of Orlando" has a disjunctive connotation. The word "and" often means "or" depending on the context of the statute. cf. Dotty v. State, 197 So.2d 315, 317 (Fla. 4th DCA, 1967) This is precisely the construction placed on Section 2 by the Fifth District Court of Appeal in Gaines v. City of Orlando, supra:

> Chapter 61-2589, Laws of Florida, authorizes the OUC to acquire, manage, and construct electrical generating plants which the boundaries of Orange and Brevard Counties, and to furnish electrical power to users within Orange County. But it also grants to both the OUC and the City the power and authority "to do all things necessary or required to carry into effect the provisions of this act." 450 So.2d at 1178 [emphasis original]
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> * * *
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> In 1961, Chapter 61-2589, section 9 [sic], Laws of Florida, authorized the OUC to "acquire, establish, construct, maintain and/or operate electric generating plants ... within the boundaries of Orange county and Brevard county...." Section 9(b) [sic] allowed the OUC "to do all things necessary or required to carry into effect the provisions of this act." ... The OUC is a part of the City for some purposes, but we agree with the trial judge that it is independent and beyond the control of the City as regards the powers granted to it under the special acts. Id. at 1181.

In summary, PNI's construction of Section 2 is patently in error.

In addition to mistakenly arguing the question of the city's approval, PNI also makes certain related insinuations which compel a response. Specifically, PNI repeatedly accuses OUC of intentionally misrepresenting the law to this Court. (PNI: 7,9, 10) PNI claims that OUC, fearing the import of the act's language, avoided any mention of Section 2 of Chapter 61-2589 as its authority to issue bonds. PNI obviously failed to note pages 10, 14, 25 and 29 of OUC's initial brief. Moreover, Section 2 of Chapter 61-2589 is quoted in full on page 10, the first occasion in which OUC refers to it. OUC in no way altered or avoided the substance of Ch. 61-2589 in its brief, and PNI's insinuations to that effect are completely unwarranted.

V. APPELLEES IMPROPERLY RELY IN THEIR RESPECTIVE BRIEFS ON PURPORTED "FACTS" NOT IN THE RECORD.

OUC objects to the extensive allegation by both the State and PNI of "facts" which are not in the record. In their respective briefs, Appellees assert as facts matters which are debatable at best and, in some cases, distorted or false. Among the unsubstantiated allegations made by Appellees are statements concerning:

1. Past bond validations in which OUC purportedly never cited its authority for issuing bonds (PNI: 7-21);

2. "Substantial local opposition" to construction of OUC's coal-fired generating plant (PNI: 9);

3. Orlando City Council members' supposed failure to question the bond issue prior to approval (PNI: 11);

4. "Rampant" and "alarming" defaults and alleged impending default by the City of Sebring (PNI: 19), (State,.10);

5. Reasons for the enactment of Chapter 75 (PNI: 22);

6. Speculation as to the effect of utility bond defaults on the bond market (PNI: 22);

7. OUC's attitudes and actions after the Evans decision. (State: 9); and

8. Widespread "belief" concerning the federal deficit (State: 10).

These "facts" are not subject to judicial notice because Appellees failed to request judicial notice and to provide OUC timely notice of such a request. §90.203, Fla. Stat. (1983) As an example, had PNI earlier made its contention that the City of Orlando Council members failed to ask any questions regarding the proposed bond issue, OUC would have had the opportunity to present affidavits establishing that, in fact, the council held an extensive discussion of the bonds before granting its approval.

In sum, all of the above assertions are subject to dispute and incapable of being judicially noticed. Appellees' depiction of these matters as fact is, therefore, entirely improper.

CONCLUSION

OUC cannot fulfill its legal responsibility to deal with its funds and assets to the best benefit of the public if it cannot refinance its debt when interest rates decline. Based on some fifty years of precedent from this Court, OUC's power to finance and refinance is unquestionably implied by its express power to acquire, construct, operate and manage its utility systems and the trial court cannot substitute its judgment as to whether the bonds should or should not be issued.

OUC respectfully requests this Court to restore OUC's credit and good name by reversing the trial court and remanding the proceedings for entry of final judgment validating the bonds.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by hand delivery this 27th day of June, 1985:

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