IN THE SUPREME COURT OF FLORIDA

FLORIDA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

HONORABLE FRED L. BRYSON, HONORABLE HORACE A. ANDREWS, HONORABLE JOHN T. WARE, 111, and H. GELLER MANAGEMENT CORPORATION,

Respondents.

_____/

CASE NO. _____

RE: Circuit Civil NO. 89-18332-13 in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida

PETITION FOR WRIT OF PROHIBITION

Relief Souaht

Pursuant to Rules 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, Petitioner the Florida Public Service Commission hereby invokes the original jurisdiction of the Florida Supreme Court. Petitioner requests the Court to issue an extraordinary writ to prohibit the Honorable Fred L. Bryson, the Honorable Horace A. Andrews, and the Honorable John T. Ware, 111, from conducting further proceedings in Circuit Civil Case No. 89-18332-13, H. Geller Manaaement Corporation v. Public Service Commission, State of Florida, and to require the Circuit Court to enter an order dismissing the Complaint for injunction in that case, and dissolving the temporary injunction entered against the Florida Public Service Commission in that case.

Jurisdiction

Pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure, the Supreme Court "may issue writs of prohibition to courts and all writs necessary to complete the exercise of its jurisdiction." The Supreme Court has exclusive jurisdiction to review actions by the Florida Public Service Commission (FPSC or Commission) relating to rates or service of utilities providing electric or gas service. Rule 9.030(a)(1)(B)(ii), Fla.R.App.P., Sections 350.128, and 366.10, Florida Statutes, Art. V., Section 3 (b)(2), Florida Constitution.

In the case below, the Circuit Court enjoined the FPSC from conducting proceedings which relate to gas and electric rates. Since the FPSC action is ultimately reviewable only by the Supreme Court, orders and actions enjoining such proceedings effectively usurp the Supreme Court's jurisdiction.

Proceedinas In Circuit Court And Before FPSC

This case was initiated by complaint (see pages 81-113 of Appendix) filed with the Florida Public Service Commission by consumer John F. Falk (Falk or consumer) against the H. Geller Management Company (Geller). According to Mr. Falk's complaint the Geller Management Company, located at 8141 54th Avenue, North, St. Petersburg, Florida 33709, services the Five Towns-Terrace Park Condominium Complex, comprised of 33

buildings and 2 clubhouses. The services provided by Geller include the purchasing of electricity from Florida Power Corporation (for all common areas) and gas (for heating and cooking in the individual units) for which Geller is reimbursed by individual unit owners.

The complainant, Mr. Falk, lives in the Five Towns-Terrace Park Condominium Complex, and makes regular payments to the H. Geller Management Company for services provided, including electricity and gas. Mr. Falk's complaint before the Florida Public Service Commission seeks redress from the H. Geller Management Company for alleged overcharges in the cost of gas and electricity supplied to his condominium. In summary Mr. Falk's complaint alleges that:

1. The H. Geller Management Company has resold electricity and gas at a profit to condominium owners in the Jefferson Building within the Five Towns-Terrace Park Condominium Complex since January of 1980.

2. The H. Geller Management Company miscalculated Florida Power Corporation rate increases, resulting in unauthorized profits of over $170,000 on the sale of electricity to building unit owners within the Five Towns-Terrace Park Condominium Complex.

On July 20, 1989, the Florida Public Service Commission contacted the Geller Company by letter and requested a response to the complaint. The letter informed the Geller Company of the Commission's intent to conduct an informal conference on the complaint pursuant to Rule **25-22.032,**

Florida Administrative Code. (see pages **79-80** in Appendix)

On August **14, 1989,** the Geller Company submitted its response to Mr. Falk's complaint. The principal defense raised by the Geller Company was that the utility increases set forth in the maintenance contract were not charged to specifically pay for the increase in utility charges. Geller argued that, the utility rate increases were to be used as an index, rather than using a cost-of-living increase as an index. (see pages **72-75** in Appendix)

Review of the maintenance contract itself is revealing:

1. The maintenance agreement provides for an automatic annual cost of living increase in an amount equal to approximately **4%** of the maintenance fee (see pages **4** and **5** of service and maintenance agreement at pages **48-49** in Appendix).

2. The contract contains separate paragraphs delineating additional increases in the maintenance fee schedule for (a) Sewer; (b) Water; (c) Gas; (d) Electricity; (e) Trash; and (f) Insurance.

3. The terms and conditions of the contract specifically provide that these additional increases "represent increases for public utilities and other specific costs". (See page 6, line **1** of service and maintenance agreement at page 50 of Appendix.)

On October **27, 1989,** the Commission notified the parties of its intent to conduct an informal conference **in** St.

Petersburg, Florida, on November 15, 1989 at 9:45 a.m. (see pages 62-64 of Appendix) On November 14, 1989, the Geller Company requested a continuance of the conference because it was allegedly unable to locate an essential witness. The Commission, with the agreement of the parties, rescheduled the conference for November 27, 1989 in St. Petersburg, Florida. (see page 60 of Appendix)

On November 17, 1989, the Geller Company filed its complaint seeking an injunction. (see pages 37-44 of Appendix) The complaint was sworn to the "best of the knowledge and belief" of Herman Geller, President of the H. Geller Management Company. An unsigned facsimile copy of the complaint was wired to the Commission.

Later, On November 17th, the attorney for the Public Service Commission received a telephone call from Richard Kriseman, counsel for Geller, who stated that he was in the chambers of the Honorable Fred L. Bryson, seeking a temporary injunction against the Commission. The Court gave counsel an opportunity to argue against the injunction over the telephone, but heard no testimony in support of the injunction and gave the Commission no opportunity to present testimony. Judge Bryson thereafter enjoined the Public Service Commission from conducting its November 27, 1989 informal conference. The court's order did not "define the injury [and] state findings by the court why the injury may be irreparable" as

required by Rule 1.610(a)(2), Florida Rules of Civil Procedure. (see page 36 of Appendix)

On November 22, 1989, the Florida Public Service Commission filed its motion to dissolve the temporary injunction. (see pages 33-35 of Appendix) The matter was docketed as Circuit Civil No. 89-18332-13 and assigned to the Honorable John T. Ware, 111, who was unable to hear the motion because he was recovering from heart surgery. On December 21, 1989, the motion to dissolve was heard before the Honorable Horace A. Andrew, a substitute judge handling Judge Ware's hearings for that day. On January 2, 1990, Judge Andrews entered an order denying FPSC's motion to dissolve. (see pages 1-2 of Appendix) A notice of appeal from that order, to the Second District Court of Appeal, was filed with the Circuit Court on February 1, 1990. On February 14, 1990, the Commission moved for a stay of appellate proceedings in the Second District pending the resolution of this proceeding in the Supreme Court of Florida.

The Circuit Court Has Asserted Jurisdiction Over A Subject Matter Outside Its Jurisdiction

The Commission has exclusive jurisdiction over the rates and services of electric and gas utilities. Commission actions with respect to rate regulation are reviewable exclusively by the Supreme Court. By issuing its injunction, the Circuit Court asserted jurisdiction to review FPSC

actions. No such jurisdiction exists. Since the Supreme Court has exclusive jurisdiction to review the actions of the FPSC, the Supreme Court has jurisdiction to issue a Writ of Prohibition. Moffit v. Willis, 459 So.2d 1018 (Fla. 1984); and see this Court's recent opinion in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989).

The Public Service Commission Has Jurisdiction To Resulate Resale Of Electricity And Gas

Section 366.01, Florida Statutes (1977) gives the Florida Public Service Commission exclusive jurisdiction over public utilities. According to the consumer's complaint, Geller supplies electricity and gas and it is therefore a "public utility" as defined in Section 366.02(1), Florida Statutes:

> "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state.....

According to Mr. Falk's consumer complaint, the Geller Company, purchases electricity and gas from the local utility companies, Florida Power Corporation and Peoples Gas Company of Florida. Geller in turn obtains reimbursement (and according to the complaint a large profit) for the electricity and gas from condominium unit owners.

This Court, in Fletcher Properties, Inc. v. Florida Public

Service Commission, 356 So.2d 289 (Fla. 1978), held that the Public Service Commission had jurisdiction over those who provide utility services to condominiums. There, this Court ruled that the "public" included condominium unit owners and others not tenants.

The facts in Fletcher are strikingly similar to those alleged by consumer Falk. In Fletcher, a company served as managing agent for a private residential community containing condominiums. The company paid the local water company, Jacksonville Suburban Utilities, for the water used by the community. The company in turn obtained reimbursement for the water from the individual unit owners, on an equal share basis per occupied unit, collecting the same amount of money that it had paid to the water company. On these facts, this Court held that the managing agent was subject to the jurisdiction of the Public Service Commission.

The Fletcher case made it clear that a managing agent of a condominium complex who pays for a utility provided by a third party, and who is thereafter reimbursed by the condominium owners, is a supplier of utility services and thus subject to the jurisdiction of the Public Service Commission.

More recently, in P.W. Ventures v. Nichols, 533 So.2d 281 (Fla. 1988), this Court reaffirmed its holding in Fletcher, supra, and held that the phrase "to the public" as used in Section 366.02 means "to any member of the public," rather

than "to the general public". This Court ruled that sale of electricity even to a single customer would make the provider a public utility subject to regulation by the Public Service Commission.

The Florida Legislature in Section 366.01, Florida Statutes has deemed the regulation of utilities to be an "exercise of the police power of the state for the protection of the public welfare" and has specified that this chapter "shall be liberally construed for the accomplishment of that purpose." Section 366.03 requires that all rates charged by regulated utilities be "fair and reasonable", while Section 366.04 gives the Public Service Commission jurisdiction to regulate each public utility "with respect to its rates..."

Pursuant to the Commission's statutory authority to regulate the sale of electricity to the public, Rule 25-6.049(6)(b), Florida Administrative Code, provides that customers of record such as Geller may not resell electricity at a profit:

> Any fees or charges collected by a customer of record for electricity billed to the customer's account by the utility, whether based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity.

This rule is designed to protect Florida's citizens by ensuring that customers pay no more for electricity than those

rates set by the Public Service Commission. A management company which sells electricity to condominium unit owners for more than the actual cost of the electricity would be in violation of this rule.

The Public Service Commission's Jurisdiction Is Exclusive

The primacy of Commission jurisdiction was recognized in State ex rel McKenzie v. Willis, 310 So.2d, (Fla. 1975), where this Court stated that civil lawsuits involving matters within the authority of the Commission "improperly trench upon the jurisdiction of the Commission". This Court further held that where a matter calls for the exercise of the judicial or quasi-judicial powers of the Commission, subject to the review of the Supreme Court, jurisdiction does not lie with the circuit courts.

Rates and charges for electrical services are "without a doubt" matters coming exclusively within the primary jurisdiction of the Florida Public Service Commission. Florida Power Corporation v. Advance Mobile Homes, 386 So.2d 897 (Fla. 5 DCA 1980). There, the trial court was reversed and directed to enter an order or dismissal after conducting a jury trial on a customer complaint against a utility for overcharges.

In Richter v. Florida Power Corporation, 366 So.2d 798

(Fla. 2 DCA 1979) the Court said; "we hold that the Public Service Commission does have exclusive jurisdiction to decide [whether the consumer was overcharged]. The Public Service Commission is best equipped to investigate the consumers' allegations and if necessary to establish the mechanism whereby refunds could be made..." And see footnote 5 of Richter, where the court cites two unpublished writs of prohibition from the Florida Supreme Court wherein circuit judges were prohibited from hearing suits filed by consumers seeking refund of utility overcharges. In one of those cases, State ex rel Florida Power Corp. v. Pfieffer, No. 46384 (Fla. April 28, 1975), this court ordered the Circuit Court to refrain immediately from exercising jurisdiction as well as to immediately dissolve an injunction relating to electrical rates.

As recently as November 16, 1989, in Public Service Commission v. Honorable Richard S. Fuller, 551 So.2d 1210, (Fla. 1989), this Court prevented a judge in the Eleventh Judicial Circuit from conducting further proceedings in a case within the jurisdiction of the Florida Public Service Commission. The Court quoted from its previous opinion in State ex rel McKenzie v. Willis, 310 So.2d 1, 3 (Fla. 1975):

> No concurrent or cumulative power of direct review of Commission action by

> the Circuit Courts has been provided by general law under the limitations in Section 5(b) of Article V of the State Constitution.
>
> The controversies . . . are resolvable by the Commission within its jurisdiction subject to review by the Supreme Court. They do not lie within the jurisdiction of the Circuit Court.

The FPSC Has No Other Adeuuate Remedy

The FPSC has no other remedy sufficiently prompt and adequate in these circumstances to address the Circuit Court's lack of jurisdiction to review the Commission's regulation of electric and gas rates. An appeal of an order denying the motion to dissolve would be inadequate because such review would be by the District Court of Appeal, not the Supreme Court, whose jurisdiction is being usurped. It would create an anomalous situation of an inferior court determining the jurisdiction of a superior court. Furthermore, such an appeal would not prevent the Circuit Court from an excessive exercise of jurisdiction to entertain further proceedings in the case before it. State ex rel Department of General Services v. Willis, 344 So.2d 580, 593 (Fla. 1st DCA 1977).

Here, even a District Court of Appeal reversal of the trial court's order denying the motion to dissolve temporary injunction would not prevent the trial court from proceeding to trial on Geller's complaint for permanent injunction. As

stated in the committee notes to Rule 9.130, Florida Rules of Appellate Procedure, "the writ of prohibition provides an adequate remedy in cases involving jurisdiction of the subject matter." Thus, the rule does not provide for appellate review of non-final orders involving jurisdiction of the subject matter.

The Supreme Court has jurisdiction to issue a writ of prohibition, and prohibition is the proper remedy, where a Circuit Court attempts to act upon a matter within the exclusive jurisdiction of the Public Service Commission. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989)

Appellate Issues

The Commission has appealed the Circuit Court's denial of its motion to dissolve injunction to the Second District Court of Appeal. As discussed earlier, appellate relief is an inadequate remedy because even reversal on appeal would not prevent the Circuit Court from entertaining further proceedings in the case, despite its lack of subject matter jurisdiction. The Commission has thus moved for a stay of appellate proceedings in the Second District pending the resolution of this proceeding in the Supreme Court of Florida.

The Commission therefore, respectfully requests that this Court, pursuant to Savoie v. State, 422 So.2d 308 (Fla. 1982) and Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961),

exercise its discretion and dispose of the entire cause, including the appellate issues. Once a court has properly exercised jurisdiction over a cause, it is within its discretion to consider all issues raised in the interest of judicial economy. Plevy v. Plevy, 517 So.2d 129 (Fla. 4th DCA, 1987); In re Estate of Kulow, 439 So.2d 280 (Fla. 2nd DCA, 1983); Metropolitan Dade County v. Kelly, 348 So.2d 49 (Fla. 1st DCA, 1977). As this Court stated in Zirin v. Charles Pfizer & Co., supra:

> Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here...."[m]oreover, the efficient and speedy administration of justice is ... promoted" by doing so.

128 So.2d at 596

In this case the Circuit Court disregarded the vast body of Florida law, including procedural safeguards specifically designed to insure that the extraordinary remedy of an injunction is not issued imprudently. The Circuit Court errors include:

1. Violation of Rule 1.610(a)(2), Florida Rules of Civil Procedure. Specifically, the Circuit Court issued its

temporary injunction, without hearing testimony in support of the injunction and without giving the Commission an opportunity to present testimony. Despite the absence of a hearing the Circuit Court failed in its order to "define the injury [and] state findings by the court why the injury may be irreparable", as required by Rule 1.610.

2. The injunction was improperly issued on a complaint which was not sworn on personal knowledge.

Facts sworn to the best of one's knowledge and belief are not admissible into evidence and should not be considered by the court. Thompson v. Citizens Bank of Leesburq, 433 So.2d 32 (Fla. 5 DCA, 1983); Campbell v. Salman, 384 So.2d 1331 (Fla. 3d DCA 1980); Silber v. Campus Sweater & Sportswear, 313 So.2d 409 (Fla. 1st DCA 1975); Garwood v. Equitable Life Assurance Society of U.S., 299 So.2d 163 (Fla. 3d DCA 1974).

The oath of Mr. Geller that he believes the allegations set forth in the complaint is, to say the least, frail support for the entry of an injunction. Mr. Geller's belief of the alleged facts is irrelevant and by no means establishes those facts. Thus, the complaint herein was fatally defective. Waldo v. United States Ramie Corp., 74 So.2d 106 (Fla. 1954). In the absence of supporting testimony such complaint constitutes a wholly inadequate basis for entry of an injunction.

3. The injunction was improperly entered where Geller

had an adequate remedy at law.

Should Geller be unhappy with any action taken by the Florida Public Service Commission, his remedies at law include the safeguard of direct review by the Supreme Court of Florida (see Section 366.10, Florida Statutes). Geller has asserted no reason that this remedy is inadequate.

4. The injunction was improperly entered on a complaint which contains no adequate assertion of irreparable harm.

Geller's sole claim of irreparable harm is alleged interference "in a contractual relationship between Petitioner and the Association that has been in existence for a period in excess of ten (10) years." (see Geller's complaint of page 40 of appendix) Geller makes no claim as to what harm if any will occur as a result of interference in the contractual relationship, and makes no claim of a constitutional violation.

Geller's assertion of irreparable harm is conclusory, and fails to allege specific facts to establish that immediate and irreparable injury, loss or damage would result. Such conclusory assertions are legally insufficient, and an injunction entered upon conclusory assertions of irreparable harm will be subject to reversal. County of Orange v. Webster, 503 So.2d 988 (Fla. 5 DCA 1987). As the court stated in Islandia Condominium Assoc. v. Vermont, 438 So.2d 89 (Fla. 4 DCA 1983), "the issuance of a preliminary injunction is an extraordinary and drastic remedy which should be granted sparingly."

In addition, even constitutional claims of contractual interference have been universally rejected by the courts in the face of the Public Service Commission's exercise of its statutory authority to regulate utility rates. Specifically, the Commission's regulation of utility rates is considered a valid exercise of its police power. When an existing contract is voided by the Commission's actions, there is no unconstitutional impairment of contract under the Florida or United States Constitution. H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979); City of Plant City v Mayo, 337 So.2d 966 (Fla. 1976); City of Plantation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963); Union Dry Good Co. v. Georaia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309; Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

See also State v. Burr, 84 So. 61 (Fla. 1920) and Cohee v. Crestridse Utilities Corp., 324 So.2d 155 (Fla. 2 DCA, 1975), which hold that the Public Service Commission has authority to raise as well as lower rates established by a pre-existing contract. In fact, Cohee holds that the Commission is not even permitted to take into consideration a pre-existing contract in its determination of reasonable rates.

Finally, Geller's assertion of irreparable harm based upon interference with contract establishes, at best, the possibility of financial or economic loss. Allegations of

financial or economic loss do not establish the prerequisites for injunctive relief. See Palenzuela v. Dade County, 486 So.2d 12 (Fla. 3 DCA, 1986); Liza Danielle, Inc. v. Jamko, Inc., 408 So.2d 735, 738 (Fla. 3d DCA, 1982) (irreparable injury is injury of a peculiar nature such that compensation money cannot atone for it); see also State, Department of Health and Rehabilitative Services v. Artis, 345 So.2d 1109 (Fla. 4th DCA 1977) (mere loss of income does not constitute irreparable injury).

Request For Expedited Consideration Of Petition

The FPSC respectfully requests expedited consideration of its Petition for Writ of Prohibition, *so* that the FPSC which has exclusive jurisdiction over the subject matter raised in Mr. Falk's Complaint, can address the issues raised therein. Furthermore, having the Supreme Court rule on the issues raised will serve judicial efficiency and economy by avoiding unnecessary proceedings before the Circuit Court and, the District Court of Appeal.

Conclusion

The Circuit Court ignored a vast body of Florida precedent restricting circuit court interference with state agencies and

requiring exhaustion of administrative remedies. Whether the H. Geller Management Company acted as a public utility in its resale of electricity and gas is a question solely within the jurisdiction of the Florida Public Service Commission's authority over electric and gas rates.

The injunction issued by the Circuit Court has disrupted the orderly administrative process, which includes the safeguard of direct review by the Florida Supreme Court. The Circuit Court departed from essential legal requirements in depriving the Commission of the opportunity to reach a "considered decision upon a complete record appropriate to the issue." Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So.2d 153, 158 (Fla. 1982). In addition, the Circuit Court deprived the Florida Supreme Court of review over the Commission's actions. The Circuit Court's exercise of review over the Commission directly usurps the Supreme Court's exclusive jurisdiction.

Here, the Florida Public Service Commission has no adequate remedy at law. Even successful appeal of this non-final order would not prevent the Circuit Court from proceeding to trial on Geller's complaint. Therefore, the writ of prohibition provides the appropriate remedy in cases involving jurisdiction of the subject matter. The Florida Public Service Commission respectfully requests this Court to issue an extraordinary writ prohibiting the Circuit Court from

conducting further proceedings in Circuit Civil Case No. 89-18332-13 and to enter an order dismissing the complaint which seeks to enjoin the Florida Public Service Commission from acting on a matter solely within its jurisdiction.

DATED this 21ST day of February, 1990.

SUSAN F. CLARK
General Counsel
Florida Bar No. 179580

Michael A. Palecki

MICHAEL A. PALECKI
Staff Counsel
Florida Bar No. 223824

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Writ of Prohibition, has been furnished by U. S. Mail to the Richard D. Kriseman, Esquire, Stolba, Englander & Shames, P.A., 405 Pasadena Avenue South, Post Office Box 41750, St. Petersburg, Florida 33743-1750, this 21ST day of February, 1990.

Michael A. Palecki

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