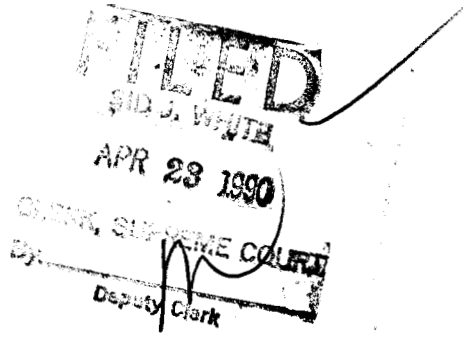
IN THE SUPREME COURT OF FLORIDA

FLORIDA PUBLIC SERVICE COMMISSION, Petitioner, v. HONORABLE FRED L. BRYSON, HONORABLE HORACE A. ANDREWS, HONORABLE JOHN T. WARE, III, and H. GELLER MANAGEMENT CORPORATION, Respondents.	CASE NO. 75,575



THE FLORIDA PUBLIC SERVICE COMMISSION'S REPLY TO RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Statement of the Case and Facts

There are several matters set forth in Geller's response which require clarification. The first is respondent Geller's contention that the Commission received notice, and telephonically "attended" the hearing before Judge Bryson at which the temporary injunction was issued. The notice received by the Commission was a telefaxed copy of the complaint, as yet unsigned, and a telephone call from Respondent Geller's attorney, Richard Kriseman. Mr. Kriseman informed the undersigned counsel that he would be taking the complaint'before a judge and would attempt to obtain a temporary injunction. Mr. Kriseman was unable to inform the Public Service Commission of the time, place, or the name of the judge before whom the "hearing" would take place.

Later that day the undersigned counsel answered the telephone and Geller's attorney was on the line in Judge Bryson's chambers. 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 on Mr. Falk's consumer complaint.

A second matter which requires clarification is Respondent Geller's argument that he attempted to present testimony at the hearing on petitioner's motion to dissolve injunction, but was prevented from doing so. The record reveals that the Commission was able to get fifteen minutes on the Judge's calendar for a hearing on its motion to dissolve which is a mandatory hearing guaranteed by Rule 1.610, Florida Rules of Civil Procedure. (See Respondent's appendix at page 69). The Commission had set the matter for hearing on its motion which asserted numerous legal reasons that the Court had erred in granting the temporary injunction. The Commissions Motion was supported by an extensive memorandum of law and an appendix consisting of twenty supporting cases. (See Petitioner's appendix at A3-A33).

The matters argued by the Commission in its Motion to Dissolve were legal issues, which called for no testimony from

either party. When Respondent Geller's attorney arrived at the hearing he immediately objected on the ground that he had two witnesses to testify and that fifteen minutes was inadequate time to conduct the hearing.

The record reveals that this hearing was set at Petitioner's instance, to argue the issues set forth in Petitioners Motion to Dissolve which were solely legal issues. This was not a final hearing on an injunction and was not an evidentiary matter. The respondent had not reserved additional hearing time to present his witnesses' testimony, and had not set a hearing at any future date to present said testimony. After the Court ruled in Respondent's favor and refused to dissolve the injunction, respondent apparently decided that it was not necessary to present the testimony. At the close of the hearing the respondent requested no continuance to present the testimony of its witnesses at a future date.

Finally, respondent contends that the utility increases set forth in the maintenance contract were not charged to specifically pay for the increase in utility charges; rather respondent argues the utility rate increases were to be used as an index, instead of using a cost-of-living increase as an index.

The maintenance contract itself reveals that this contention is incorrect:

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.)

PROHIBITION IS APPROPRIATE AND SHOULD BE GRANTED

This case presents the issue of whether the Circuit Court has exceeded its jurisdiction in enjoining the Florida Public Service Commission from proceeding on a consumer complaint regarding the amount the consumer is required to pay for electricity and gas. The writ of prohibition provides the appropriate remedy in cases involving jurisdiction of the subject matter. See the committee notes to Rule 9.130, Florida Rules of Appellate Procedure. The case of State v. White, 162 So.2d 697 (Fla. 2 DCA 1964) contains a concise, yet complete definition of the purpose of the writ of prohibition:

"The writ of prohibition is that process by which a superior court prevents an inferior

court from exceeding its jurisdiction or usurping jurisdiction with which it has not been vested by law." 162 So.2d at 699.

In the instant case the Circuit Court has exceeded its jurisdiction in enjoining the Public Service Commission, and continues to exceed its jurisdiction each day the temporary injunction remains in force. Prohibition is the appropriate remedy in this case.

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) Respondent attempts to distinguish Florida Public Service Commission v. Fuller, on the ground that Fuller involved a territorial agreement and the Public Service Commission has exclusive jurisdiction to modify or terminate territorial agreements. Respondents argument is ineffectual because the Public Service Commission also has exclusive jurisdiction to regulate the rates charged the public for gas and electricity. Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. 2 DCA, 1979). The Fuller case stands for the proposition that this Court will not permit Circuit Courts to litigate matters within the exclusive jurisdiction of the Florida Public Service Commission. Here, as in Fuller, where the Circuit Court has attempted to litigate a matter within the

exclusive jurisdiction of the Public Service Commission prohibition is the proper remedy. See footnote 5 of Richter, supra, 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.

THE PUBLIC SERVICE COMMISSION DOES NOT SEEK A TRIAL DE NOVO

In this case the Public Service Commission merely seeks to proceed on a consumer complaint which asserts that Respondent Geller has overcharged the consumer for gas and electricity. In its Petition for Writ of Prohibition the Public Service Commission has carefully set forth the consumer's allegations as just that - allegations. The Public Service Commission has made no findings of fact with regard to the consumer's complaint because the Public Service Commission *has* been prevented from proceeding on the complaint by the Circuit Court.

What is a fact, however, is that the allegations have been placed before the Florida Public Service Commission by a Florida consumer. It is therefore the Commission's statutory

obligation to proceed on the consumers complaint. In enjoining the Commission the Circuit Court has "improperly trenched" upon matters within the authority of the Commission. State ex rel McKenzie v. Willis, 310 So.2d (Fla. 1975). This Court recently quoted from McKenzie in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989):

> 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.

Contrary to Respondent's contention, the Public Service Commission does not seek a trial de novo, but merely wishes to proceed on a matter within its jurisdiction, subject to review by the Supreme Court.

THE PUBLIC SERVICE COMMISSION IS NOT ATTEMPTING TO ADOPT A RULE

Contrary to Respondent Geller's assertions, the Commission has no need to adopt a rule because such a rule was adopted in 1988. Pursuant to the Commission's statutory authority to regulate the sale of electricity to the public, Rule 25-6049(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.

Respondent's reliance on the Commission's 1970 order in In re: Sale of Electricity to be Resold, Order No. 4874, Docket No. 69319-EU, 85 PUR 3rd 107, is misplaced. In Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So. 2d 289 (Fla. 1978), this Court specifically held that condominium owners and others not tenants do constitute "the public", thus limiting In re: Sale of Electricity, to the proposition that tenants of a landlord are not 'the public". The rationale for the distinction is explained in In re: Sale of Electricity:

> A tenant who may be dissatisfied with any service provided by a landlord, whether it be electric service or otherwise, has the option to move to another location where he may find the service more to his satisfaction.

Respondent's attempt to distinguish Fletcher from the

instant case fails because, Fletcher's ultimate holding is that condominium owners constitute the public. Here, as in Fletcher, resale of a utility service to condominium owners, is a matter within the exclusive regulatory jurisdiction of the Public Service Commission.

Even absent Fletcher however, Rule 25-6049(6)(b), promulgated in 1988, supersedes the Commission's 1970 decision in In re: Sale of Electricity. Respondent's contention that the Commission is engaging in rulemaking is lacking in merit where a rule already exists. Even were respondent to challenge the existing rule as being facially unconstitutional (which it is not) the Circuit Court could not entertain this action because adequate remedy, including direct review by the Supreme Court, remains available in the administrative process. Key Haven v. Board of Trustees, 427 So.2d 153 (Fla. 1982).

JURISDICTION OF THE CIRCUIT COURT VS. PUBLIC SERVICE COMMISSION AND EXHAUSTION OF STATE REMEDIES

Respondent is simply incorrect with regard to its arguments concerning "jurisdiction of the Circuit Court vs. Public Service Commission" and exhaustion of administrative remedies. In State Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1 DCA 1982) the court held that "[o]nly in exceptional cases may the courts assume jurisdiction to render declaratory and/or injunctive relief without requiring exhaustion of

administrative remedies" and that "judicial intervention with administrative action is justified only in those instances where the invalidity of the administrative act is not subject to reasonable differences of opinion". 424 So.2d at 794. In Falls Chase, the court committed itself to the following test for determining whether an administrative forum may be bypassed once an issue has been raised challenging an agency's jurisdiction to take certain action:

> When an agency acts without colorable statutory authority that is clearly in excess of its delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief. A finding of lack of colorable statutory authority provides the necessary limitation on this exception to the requirement of exhaustion of administrative remedies. A jurisdictional claim which has apparent merit, or one which depends upon factual determination in most instances requires exhaustion of administrative remedies before resort to judicial forum. 436 So.2d 796-97

In Department of Professional Regulation vs. Marrero, 536, So.2d 1094 (Fla. 1 DCA 1988), the First District more recently explained its Falls Chase decision, and pointed out that its opinion was derived from federal holdings that "[t]he courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction ," and exhaustion is required where the jurisdictional issue is "not free from doubt." 536 So.2d at 1095. Applying the Falls Chase test to the facts in Marrero, the court stated:

> ....we cannot say, from the record before us, that the Board acted without colorable statutory authority which was clearly in excess of its implicitly or reasonably delegated powers. We therefore conclude that the agency should be allowed to make the initial decision regarding the merits of the jurisdictional issue. 536 So.2d at 1096.

More recently the court applied the Falls Chase test in St. Joe Paper Company vs. Florida Department of Natural Resources, 536 So.2d 1119 (Fla. 1 DCA 1988). There the court stated:

> ....we cannot say that the Department's claim of jurisdiction is "without colorable statutory authority," or that it has acted "clearly in excess of its delegated powers," or that the question of the validity of the Department's action is "not subject to reasonable differences of opinion," so as to justify an exception to the judicially created doctrine of exhaustion of administrative remedies. We therefore conclude that the Department should be allowed to make the initial decision regarding the merits of the jurisdictional issue. 536 So.2d at 1124.

The Fifth District Court of Appeal in Tambert vs. Rogers, 454 So.2d 672 (Fla. 5 DCA 1984), followed the Falls Chase test in requiring compliance with the exhaustion doctrine, thereby allowing a school board, rather than a court, make the initial determination of the length of the school principal's contract. These courts have recognized that ordinarily the administrative agency should be given the opportunity to reach a "considered decision upon a complete record appropriate to the issue." Key Haven Associated Enterprise, Inc. v. Board of

Trustees, 427 So.2d 153, 158 (Fla. 1982). Here, the Circuit Court in issuing its temporary injunction has deprived the Public Service Commission of that opportunity.

In the instant case, the Commission's authority to proceed on the consumer's complaint is not only colorable, but is clear. This Court's opinion in Fletcher Properties, Inc. vs. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978) 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. In addition, 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.

Finally, Respondents'reliance on David v. City of Dunedin, 473 So.2d 304 (Fla. 2 DCA 1985) is misplaced. David held only that a party may attack the validity of an illegally enacted ordinance without exhausting administrative remedies. There, a zoning ordinance was enacted in violation of the notice provisions of Section 166.041, Florida Statutes (1977), a point which was conceded by the parties. On these facts the court ruled that the ordinance was null and void, and that any affected resident, citizen or property owner had standing to

challenge such a zoning ordinance. Simply put, the David case applies only to enactment of ordinances, and has no bearing whatsoever on the instant case.

THE FLORIDA PUBLIC SERVICE COMMISSION HAS NO OTHER ADEQUATE REMEDY

An appeal from the trial courts' order denying the motion to dissolve temporary injunction 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. Geller's complaint also contains a count seeking prohibition against the Public Service Commission as well as a count seeking a declaratory judgment. An appellate reversal would not prevent the trial court from conducting further proceedings on these matters.

The writ of prohibition provides the correct remedy in cases involving jurisdiction. See the Committee Notes to Rule 9.130, Florida Rules of Appellate Procedure. Here, where the circuit court lacks jurisdiction over the subject matter, issuance of the writ would be dispositive of all issues

pending before the trial court. This cannot be accomplished on appeal.

APPELLATE ISSUES

Respondent has shown no reason that the appellate issues raised by the petitioner should not be resolved by this Court in the interest of judicial economy.

Petitioner is somewhat astounded by the Respondent's criticism of the Commission for failing to have the telephone conference with Judge Bryson taken down by a court reporter. The Public Service Commission had not been informed of the time, date, or even before what judge the "hearing" would take place. The attorney for the Public Service Commission simply answered the phone and Geller's attorney was on the line in the judge's chambers.

It is well settled that a temporary injunction is an extraordinary remedy which a court should grant only after the movant has clearly demonstrated that it is entitled to relief. Dania Jai Alai International, Inc. v. Murua, 375 So.2d 57 (Fla. 4th DCA 1979); Jennings v. Perrine Fish Market, Inc., 360 So.2d 434 (Fla. 3rd DCA 1978); Bemas Corporation v. City of Jacksonville, 298 So.2d 467 (Fla. 1st DCA 1974).

Therefore, it follows that at the first hearing directed toward such a temporary injunction, the burden must fall upon the party seeking to support the temporary injunction. De Lisi v. Smith, 401 So.2d 925 (Fla. 2 DCA 1981). In failing to

have the telephone "hearing" with Judge Bryson taken down by a court reporter, it is the respondent, and not the Public Service Commission which has failed to sustain its burden. Any matters regarding the propriety of the Court's action at the unrecorded hearing should therefore be resolved adversely to the Respondent.

The Respondent's interpretation of State v. Beeler, 530 So.2d 932 (Fla. 1988) is broader than the actual holding in that case. In Beeler, the Respondent attacked the injunction solely on the propriety of the court's issuing the injunction without notice. The Respondent thereafter received the benefit of notice and the opportunity to be heard at the hearing on its motion to dissolve injunction. On these facts this Court held that the issue regarding prior notice was moot and not subject to attack on appeal.

In the instant case, the Petitioner has raised four appellate issues. The first is the failure of the trial court to comply with Rule 1.610(a)(2), Florida Rules of Civil Procedure. Unlike Beeler, this is not an attack based solely upon lack of notice. Rather, the Petitioner's contention is that the Circuit Court violated Rule 1.610 in failing in its order to "define the injury [and] state findings by the court why the injury may be irreparable."

The significance of this issue is underscored by the Commission's fourth appellate issue which is that the

complaint itself contains no adequate assertion of unreparable harm. Geller's sole claim of irreparable harm is alleged interferance "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 at page 40 of the appendix) Such conclusory assertions are legally insufficient. County of Orange v. Webster, 503 So.2d 958 (Fla. 5 DCA 1987). Thus to date, there has been no adequate assertion of irreparable harm by respondent, and no attempt by the Court to "define the injury [and] state findings by the court why the injury may be irreparable" as required by Rule 1.610(a)(2).

The fact that Geller's complaint is improperly sworn remains a fatal defect in that the complaint constitutes a wholly inadequate basis for entry of an injunction. The fact that Geller was prepared to offer some testimony at the hearing on the Motion to Dissolve does not cure this defect in the absence of an on-record proffer specifying the subject matter of the proposed testimony.

Finally, the fact that Geller has an adequate remedy at law is in and of itself a sufficient ground for reversal of the lower court. Geller has simply failed to assert how his remedies, including direct review by this Court, are inadequate.

CONCLUSION

The Respondent has failed to show cause why the petition for writ of prohibition should not be granted. The trial court exceeded its jurisdiction in enjoining the Florida Public Service Commission from proceeding on a consumer complaint which alleges that the consumer had been overcharged for electricity and gas.

The Petition for writ of prohibition should be granted and the Circuit Court should be prohibited from conducting further proceedings in Circuit Civil Case No. 89-18332-13, and from taking any other action on this matter which is within the subject matter jurisdiction of the Florida Public Service Commission, subject to the direct review of the Supreme Court of Florida.

DATED this 23RD day of April, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the HONORABLE FRED L. BRYSON, Circuit Judge, Pinellas Judicial Building, 545 First Avenue North, St. Petersburg, Florida 33701, the HONORABLE HORACE A ANDREWS, County Judge, Pinellas Criminal Complex, 5100 144 Avenue, Room 320, Clearwater, FL 34620, the HONORABLE JOHN T. WARE, Circuit Judge, Pinellas Judicial Building, 545 First Avenue North, St. Petersburg, Florida 33701, DAVID B. McEWEN, ESQUIRE, Stolba, Englander & Shames, P.A., Post Office Box 41750 , St. Petersburg, Florida 33743-1750, WALTER M. MEGINNISS, Assistant Attorney General, ROBERT A. BUTTERWORTH, Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32399-1050, Counsel for Respondent, Fred L. Bryson, this 23rd day of April, 1990.

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