SUPREME COURT OF FLORIDA

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FLORIDA PUBLIC SERVICE COMMISSION,	**	
Petitioner,	**	
vs.	**	
FRED L. BRYSON, JUDGE, et al,	**	Case No. 75,575
Respondents.	**	

H. GELLER MANAGEMENT CORPORATION'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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PRELIMINARY STATEMENT

H. GELLER MANAGEMENT CORPORATION, a Florida corporation, Plaintiff below, will be referred to in this brief as "Geller." PUBLIC SERVICE COMMISSION, an administrative body of the State of Florida, Defendant in the case below, will be referred to as "PSC." Mr. Falk, not a party in the action below but about whom PSC makes certain allegations in its Petition, will be referred to as "Falk." Terrace Park of Five Towns, No. 15, Inc., a non-profit Florida condominium association, referred to as "Association", was not a party in the action below but owns the common elements which Geller maintains and services.

References to Geller's Appendix to this Response will be designated with the letter "A," followed by specific pagination. References to PSC's Petition or Appendix will be designated by the prefix "PSC" or "PSC A", respectively, followed by specific pagination. By reference to that portion of PSC's Appendix from A 60 through A 113, which is not a part of the record below, and not properly before this court, Geller does not waive either its objection to PSC's inclusion of those documents, or its Motion to Strike filed herewith.

STATEMENT OF THE CASE AND FACTS

PSC petitions this court for a Writ of Prohibition to prevent the trial court from exercising any jurisdiction in the case of Geller vs PSC. (PSC 1-13). PSC also appeals to this court to review and reverse the trial court's non-final Order on Motion to Dissolve on more traditional appellate grounds. (A 61-62). These include the alleged improper entry and wording of the temporary injunction, inadequate verification of the complaint, Geller's adequate remedy at law, and inadequate assertion of irreparable harm. (PSC 13-18). PSC has also filed an appeal of the same non-final order in the Second District Court of Appeal, but has elected to suspend that existing avenue of relief. (A 63-68, & 106-110).

On October 1, 1979, Geller entered into a Service and Maintenance Agreement with Association. (A 9-22). Geller agreed to provide maintenance and services for the Association and its members. The Agreement provided for Geller to use Association funds for obtaining the following services:

a. Provision of liability insurance, and fire and extended coverage (A 9);

b. Provision of gas for cooking and heating, hot and cold water, and maintenance of the hot water heaters (A 9-10);

c. Payment for sewer service (A 10);

d. Maintenance of the lawn, shrubbery, and walkways in the common elements (A 10);

e. Maintenance of the television antennae and amplifiers

(A 10);

f. Provision of garbage and trash collections (A 10);

g. Repair and maintenance of the exterior of the condominium building, including painting exterior doors and trim (A 10);

h. Sweeping of the common elements, and maintaining the utility rooms (A 10);

i. Provision of minor roof maintenance (A 10);

j. Maintenance of the elevator (A 10-11); and

k. Provision, maintenance, and supervision of recreational areas, which included shuffleboard courts, swimming pools, recreational hall, billiard rooms, sauna bath, steam rooms, meeting rooms, and kitchen (A 11 & 82).

For these numerous services, Geller would be paid a monthly fee, as set out in the Agreement. (A 12-16). These amounts were set forth in five categories, delineating the amounts to be paid by each type of condominium. (A 12). The Agreement provided for increases in the monthly fee, which were categorized by type of condominium and indexed to increases in rates charged by the public utility, private company, or corporate sovereign furnishing the service. (A 13-15). These increases were not linked to consumption of any product or service, but were rather utilized as indices. (A 2, 12-16, & 82-83). The separate indices considered in setting the maintenance fee included sewer, water, gas, electricity, trash, and the various forms of insurance required in the Agreement. (A 14-15).

Geller provided these listed services. (A 82-83).

Geller did not, and does not, have any ownership interest in the Association's property, which includes all of the areas, facilities, structures and fixtures for which these numerous services were provided. (A 9-22).

As specifically set forth in Geller's complaint, Mr. Falk, together with others, sued Geller on three separate occasions, accusing Geller of selling electricity and gas. One such case was filed in 1984, and two were filed in 1987. On each occasion, these plaintiffs agreed voluntarily to dismiss each case. (A 2-3).

On July 20, 1989, through the same Mr. Palecki who has filed both the appeal to the Second District and this action for prohibition, PSC advised Geller that Mr. Falk had now taken his same allegations to the PSC. (PSC A 79-80). Geller responded that there was no resale and that the PSC had no jurisdiction to investigate Mr. Falk's alleged resale of electricity and gas in a condominium. (A 23). PSC set a time and place for an hearing on the allegations. (PSC A 65).

Geller and PSC exchanged correspondence, and PSC refused to acknowledge its lack of jurisdiction and to cancel the hearing, scheduled to begin on December 20, 1989. (A 4). On November 17, 1989, Geller obtained a temporary injunction preventing PSC from holding a hearing prior to litigating the matter of the PSC's jurisdiction. (A 24). Mr. Palecki attended this hearing telephonically before Judge Bryson. (A 72 & 81). No transcript

of the hearing exists. No record evidence has been, or can be, provided this court regarding those proceedings on November 17, 1989. PSC allegations about this hearing are not based upon the record. (PSC 5).

Geller's complaint sought a declaratory judgment by the circuit court to determine and declare Geller's rights under the agreement. (A 6-8). As alleged in Geller's complaint:

> Petitioner is in doubt and is uncertain as to whether the Respondent PSC has jurisdiction to hear this matter, whether the unit owners who originally filed the complaint with Respondent had standing to do so, and finally, whether the language of the Agreement violates Florida law by constituting a reselling of electricity and gas provision.

(A 7). Geller further pled the clear mutual understanding of both Geller and the Association, the only parties to the Agreement, that the factors used to determine maintenance fee increases were indices to facilitate the calculation of the fee, not the resale of electricity. (A 7).

In Geller's count seeking injunction, Geller specifically pled PSC's lack of jurisdiction, as well as the imminent threat of an administrative hearing which would be held prior to the determination of the parameters of the PSC jurisdiction. (A 4). Geller also pled the fact of the contractual interference by the PSC, the lack of standing on the part of Mr. Falk, the injury which would result from this unauthorized extension of PSC jurisdiction, and the lack of adequate redress for the damages this PSC action would cause. (A 1-4). Although Geller did not specifically enumerate the damages, it was prepared to do so at

the hearing on the motion to dissolve. (A 48-50, 53, 69-70, 74, 80, & 86).

Geller also sought a writ of prohibition to prevent this unauthorized exercise of jurisdiction by the PSC. Alleging the same operative facts as those supporting the complaints for declaratory judgment and injunction, Geller specifically alleged that this proposed action by the PSC exceeded its statutory and code authority. (A 5).

PSC filed its Motion to Dissolve Temporary Injunction, attacking the merits of the injunction's issuance, but not the notice. (A 25-27). At the hearing on PSC's motion, on December 21, 1989, no testimony was heard, although Geller offered several times to present evidence to substantiate the need for the Temporary Injunction. (A 69-70, 74, 80, & 86). Geller had subpoenaed a representative of the association with whom Geller has its agreement. (A 48-50, & 53). Both that witness and the president of Geller were present, and available to testify. (A 69-70). However, PSC repeatedly objected to the presentation of any testimony or evidence, and neither was allowed to testify for the trial court. (A 69-70, & 80).

PSC's entire presentation, consisting exclusively of Mr. Palecki's argument, is best summarized in the following colloquy:

> THE COURT: The nature of the injunction sought was just to prevent the Public Service Commission from asserting jurisdiction over this -- over Geller Management Corporation; is that --
>
> MR. STOLBA: Yes, . . .

. . .

> THE COURT: But you were just -- the Public Service Commission was apparently planning to have a hearing in response to this complaint by this one person who lives in that condominium?
>
> MR. PALECKI: Yes, an informal conference.
>
> THE COURT: A conference and which is a way of asserting your jurisdiction, I guess. I don't know when that will stop, do you, if you --
>
> MR. PALECKI: **That's correct, unless the Commission itself made a factual determination that it didn't have jurisdiction** it would be asserted all the way until it was tested by the Supreme Court to which they would-- if they were agreed they would have direct review.

(A 88-89)(Emphasis added). PSC's position at the hearing to dissolve the temporary injunction was simply this: PSC can and will determine the parameters of its jurisdiction, and a circuit court cannot and must not. (A 79, 88-89).

The hearing involved disagreements over several factual issues, for example:

> THE COURT: So you just say that no circuit court should ever give an injunction against the Public Service Commission if it seems on the surface that you're out there investigating a consumer complaint.
>
> MR. PALECKI: On a consumer complaint based upon rates for a utility.
>
> THE COURT: On a resale. This is a resale case?
>
> MR. PALECKI: Correct.

(A 79). Geller's counsel pointed out for the court that this case was not a resale case. (A 82-83). That matter was a fact question. (A 82-83).

Further fact questions concerned all of the services Geller

obtained for the Association and the method of payment, much of which involved maintenance and other services unquestionably not regulated by PSC. These would be the subject of the PSC hearing by virtue of being included in the determination of Geller's maintenance fee. (A 9-11, 80, 82 & 84).

A further fact question concerned whether or not a condominium management company, which does not own the property or facilities, is a "public utility". Geller maintained that it was not. (A 23). PSC maintained that it was. (PSC A 62-63).

Although PSC's Motion to Dismiss was also scheduled to be heard simultaneously with its Motion to Dissolve, the trial court made no ruling on that motion. (A 69, and 61-62).

The trial court denied PSC's Motion to Dissolve the temporary injunction (A 61-62), and PSC filed with the Second District an interlocutory appeal of the non-final order. (A 65).

While this appeal was pending, PSC filed the instant case, seeking a writ of prohibition directed to the trial court judges, but not to the district court judges. (PSC 1-20). In conjunction with the instant case, PSC filed a Motion for Stay of the Second District Court action, which the district court has granted. (A 106-108, & 111).

PSC included in its application for the Writ of Prohibition numerous letters, as well as the consumer complaint of Mr. Falk. (PSC A 60-113). These documents and the matters contained therein were never presented to the trial court, were never considered by the trial court, and have become part of the

"record" for the first time only because PSC appended them to its petition.

PROHIBITION IS INAPPROPRIATE AND SHOULD BE DENIED

A writ of prohibition is an extraordinary writ, extremely narrow in both scope and operation, in which this court may prevent a circuit court from exceeding its jurisdiction or usurping jurisdiction over matters not within its jurisdiction. English v. McCrary, 348 So.2d 293, 296 (Fla. 1977). It must be employed with "great caution and utilized only in emergencies." Id.

An appellate court will not issue a writ of prohibition against an inferior tribunal where application for that writ could have been made to an intermediate tribunal having jurisdiction, but where no such application was made. State ex rel Sentinel Star Company v. Lambeth, 192 So.2d 518, 523 (Fla. 4th DCA 1966) (citing Ex parte Republic of Peru, 318 U.S. 578 (1943) for support.)

Since the purpose of prohibition is to prevent the doing of something, rather than to compel the undoing of something already done, it cannot be used to revoke an order already entered, such as the temporary injunction in the instant case. 348 So.2d at 297. Appeal is the proper method of challenging an order already entered, and that avenue of relief still exists in the Second District. See State ex rel Sarasota County v. Boyer, 360 So.2d 388, 391-92 (Fla. 1978).

Without question prohibition can be invoked only in

"emergency cases to forestall an impending present injury where persons seeking writ has no other appropriate and adequate legal remedy." 348 So.2d at 297. Mere absence of adequate remedy by appeal is not sufficient to authorize the writ. Id. The writ will issue only if damage is likely to follow the inferior court's acting without authority of law or in excess of jurisdiction. Curtis v. Albritton, 101 Fla. 853, 132 So. 677, 679-80 (Fla. 1931) **(appeal of jurisdiction question provided adequate remedy, so prohibition does not lie to restrain circuit court from further proceeding after entering injunction).**

As this supreme court observed in English:

> [C]ircuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specifically appears so to be. Curtis et al. v. Albritton, supra.

Id. at 297. In English, this Court distinguished between the trial court acting in excess of its jurisdiction and the trial court erroneously exercising jurisdiction with which it is invested. As this court observed, prohibition does not lie to correct errors or grievances which may be redressed in the ordinary course of judicial proceedings. 348 So.2d at 298. Prohibition can "never be employed as a process for the correction of errors of inferior tribunals." Id. It "matters not whether the court below has decided correctly or erroneously." Id.

PSC argues that it will be irreparably harmed if it is not allowed to circumvent the clear dictates of both the Florida

Constitution and the Rules of Appellate Procedure. Article V, Section 3(b), Florida Constitution (1968); and 9.030(a), F.R.A.P. Neither the Florida Constitution nor the Rules of Appellate Procedure permit appeal of a non-final interlocutory order from the circuit court directly to the Supreme Court. See Hodkin v. State, 248 So.2d 649, 650 (Fla. 1971).

Jurisdiction of this court extends only to a narrow class of cases enumerated in Article V, Section 3(b), Florida Constitution (1968). Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976). Further, there is no critical or compelling reason to prevent the Second District from considering this case, as there was in West Flagler Associates v. Division of Parimutual Wagering, 251 So.2d 856, 857-58 (Fla. 1971). Unlike West Flagler, this litigation is at the very beginning of Geller's proceeding for declaratory judgment, and this court's acceptance of jurisdiction will not effect the speedy termination of this litigation. Id.

Abuse of discretion by the trial court acting within its jurisdiction is not a matter to be considered by prohibition. English, 348 So.2d at 298. "If the existence of jurisdiction depends on controverted facts which the inferior court has the jurisdiction to determine, and the court errs in the exercise thereof, prohibition is not available." Id. Clearly, in the instant case jurisdiction depends upon many facts yet to be developed and presented to the trial court. Numerous factual disputes have been identified above. Further, once the facts

have been fully presented to the trial court, the trial court may yet determine that it has no jurisdiction to enjoin the PSC permanently, to enter a declaratory judgment, or to enter the requested writ of prohibition. The trial court ought to be allowed to consider these many factual and legal matters.

PSC SEEKS TRIAL DE NOVO BEFORE THIS COURT

PSC argues numerous "facts" not in evidence, which are actually hearsay. (PSC 2-8, containing argument about the non-record, unverified allegations of Mr. Falk). These have never been considered by any court, have never been subjected to cross-examination, and have no place being asserted for the first time at this judicial level. Hastings v. Hastings, 45 So.2d 115 (Fla. 1950)(statements in appellate brief, not reflected by the proper record, cannot be considered by the Supreme Court). Since neither Mr. Falk's allegations, nor any testimony substantiating the conduct of business in strict accordance with the agreement were presented to the trial court, these cannot be considered for the first time in this court. Allen v. Town of Largo, 39 So.2d 549 (Fla. 1949).

Mr. Falk's complaint, about which PSC makes so many glib references, remains just that: a complaint, and an extraneous non-issue for this instant case. It is not properly before this court, because PSC never introduced it into evidence, never made it a part of the record below for the trial court to consider, and never complied with the minimum statutory requirements of verification. Section 81.011, Florida Statutes (1989)(petition

must be verified regarding non-record matters). PSC's attempt to pull itself up by its bootstraps, and create a record on review cannot be condoned. Rosenberg v. Rosenberg, 511 So.2d 593, 595 (Fla. 4th DCA 1987)(at note 3).

PSC apparently presents these "facts" in an effort to convert Geller's jurisdictional challenge into a rate case, and thus ostensibly subject to Rule 9.030(a)(1)(B)(ii), F.R.A.P. The transcript demonstrates without question that the trial court never had before it any PSC proceedings for review. The entire matter considered by the trial court was its jurisdiction to temporarily enjoin the PSC, and the adequacy of the temporary injunction per se. (A 61-62, 74, & 79-80). Despite PSC's argument in its brief, this is neither a rate case nor a review of PSC action. As argued in the accompanying Motion to Strike, these same arguments apply to the non-record, non-evidentiary documents attached to PSC's petition at PSC A 60-113.

PSC IS ATTEMPTING TO ADOPT A RULE WITHOUT COMPLIANCE WITH CHAPTER 120, FLA. STAT.

Section 120.52(16), Florida Statutes (1989), defines a "rule" as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency . . . **The term also includes the amendment or repeal of a rule.**

Thereafter, the definition sets forth seven specific exceptions which clearly do not cover the statement of general applicability set forth in In re Sale of Electricity to be Resold. (A 95-105)(cited with approval in Fletcher, infra).

Section 120.52(11), Florida Statutes (1989), defines an "order" as:

> [F]inal agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form.

Having established for the entire state of Florida the policy that **condominiums, trailer parks, apartments, shopping centers, and marinas are not subject to the PSC's regulatory jurisdiction in the case of In re Sale**, PSC's attempt in the instant case to assert the antithesis of this policy constitutes rulemaking. See McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977)(results of such adversary proceedings are "incipient policy"). Industry-wide policies should be determined in rulemaking process. City of Plant City v. Mayo, 337 So.2d 966, 972 at note 15 (Fla. 1976)(adequate forum must be provided by PSC).

This court has previously recognized that the PSC's ad hoc pronouncements, "either through the orders of the PSC or through decisions made after adversary proceedings should be viewed as de facto rules. . .". City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505, 507 (Fla. 1983).

Whether the instant case is viewed as an attempt by PSC to promulgate or amend a rule, initiate and conduct adversary proceedings, or conduct a hearing from which an order will emanate, PSC's attempted procedure is inadequate. The record clearly shows this. As a "rule", which includes attempts to amend an existing rule, PSC has failed to comply with Section

120.54, Florida Statutes (1989). As either an order or an adversary proceeding, which the court has defined as de facto rules, this statewide policy turnabout failed to afford the public an adequate forum as required in City of Plant City, supra.

Consideration in this proceeding of any argument that 25-6.049, Florida Administrative Code, supercedes or amends In re Sale is premature. The issues of the adoption and amendment of this portion of the Code have not been fully explored by the trial court, are not a part of the record, and would require additional fact finding by this court.

As recognized by this court in Teston v. City of Tampa, 143 So.2d 473 (Fla. 1962), and subsequent decisions, administrative action may be segregated into "quasi-judicial" and "quasi-legislative." The instant case falls within the "quasi-legislative" function of the PSC, and the appropriate remedy would be an equity suit and injunction.

PSC's argument is, in essence, that its proceedings were "quasi-judicial." However, this does not lie in view of its apparent announced intention to recede from the public policy set forth in In re Sale of Electricity. (A 95-105, & PSC, A 62-63). See School Board, 346 So.2d at 565.

JURISDICTION OF CIRCUIT COURT VS. PSC

Even PSC must concede that a circuit court has jurisdiction (1) to consider the jurisdiction vel non of the PSC, State ex rel McKenzie v. Willis, 310 So.2d 1, 3 (Fla. 1975); (2) to interpret

a contract, Liza Danielle, Inc. v. Jamko, Inc., 408 So.2d 735, 737 (Fla. 3d DCA 1982); (3) to intervene in agency action which is egregious or whose rule or order is unconstitutional, State ex rel Department of General Services v. Willis, 344 So.2d 580, 590 (Fla. 1st DCA 1977); (4) to consider matters of law, State ex rel Shevin v. Tampa Electric Company, 291 So.2d 45, 47 (Fla. 2d DCA 1974); and (5) to obtain a declaration of rights under an agency regulation, Adams Packing Association v. Florida Department of Citrus, 352 So.2d 569, 571 (Fla. 2d DCA 1977). Each of these issues exists in the instant case; therefore, the circuit court's jurisdiction cannot be quashed by a writ of prohibition.

PSC argues that certain of these issues have not been fully framed by the pleadings. However, since this action is merely at the initial pleading stage, and no evidence has been introduced into the record, clearly Geller is within its rights to replead this case at the trial level, if that becomes necessary when discovery has been completed. Metropolitan Dade, infra. Since the trial court has not ruled upon PSC's Motion to Dismiss, the issue of repleading this action remains open. It is not the policy of the judiciary to foreclose access to the court system based purely on the pleadings.

Without question, section 120.73, Florida Statutes (1989) provides, in pertinent part:

> Nothing in this chapter shall be construed. . to divest the circuit courts of jurisdiction to render declaratory judgments under the provisions of chapter 86. . .

Chapter 86 is both substantive and remedial and is to be

liberally construed. Section 86.101, Florida Statutes (1989). School Board of Leon County v. Mitchell, 346 So.2d 562, 564 (Fla. 1st DCA 1977) [declaratory judgment action will not be dismissed on the ground that there is another adequate remedy. Section 86.111, Florida Statutes (1989)]. Declaratory action in circuit court is a proper method for challenging agency action in excess of its jurisdiction. Falls Chase, 424 So.2d 794, citing Leedom v. Kyne, 358 U.S. 184, 188-89 (1958), infra. School Board recognized the continued validity of a declaratory judgment action to challenge certain agency action. 346 So.2d at 568. The difference between the action in School Board and that in the instant case is that here there is no review of final agency action, as there was in School Board. Since Geller's declaratory judgment action is both viable and proper, this action will continue after this review process has been completed.

An action in circuit court for an injunction is another proper method for challenging agency action in excess of its jurisdiction. David, 473 So.2d at 306, infra.

PSC argues that the circuit court is attempting to review the actions of the PSC, and thus usurping the role of the supreme court. In reality, the trial court was attempting to determine whether the PSC had jurisdiction to define its own jurisdiction in the first place. (A 88-89). Procedurally, the trial court determined to freeze the status quo until it could hear the entire cause and determine all relevant issues raised in the declaratory judgment action. (A 61-62).

Clearly, where an administrative agency attempts to act beyond the powers delegated to that agency, the court has jurisdiction to intervene. Odham v. Foremost Dairies, Inc., 128 So.2d 586, 592-593 (Fla. 1961). Additionally, some agency error may be so devastating that an apparent administrative remedy, such as certiorari review to this supreme court, may be too little or too late. State, ex rel, Department of General Services v. Willis, supra. See also, Metropolitan Dade County v. Department of Commerce, 365 So.2d 432, 433-434 (Fla. 3d DCA 1978) (declaratory judgment and injunctive relief available where party has no other "adequate administrative remedy to cure egregious agency error or where party's constitutional rights are in danger"; pleadings amended after appeal to allege issues).

As discussed at length in Adams, infra, there exists a fundamental distinction between seeking review of agency action (which the supreme court would conduct) and seeking a determination of rights by declaratory judgment (which the circuit court would conduct). 352 So.2d at 570-571. Here, as in Adams, there is no agency action to review, rather, respondent seeks a declaration of its rights and status under an agency regulation: to wit, In re Sale. Further, the constitutional question is limited solely to a ruling by the court, not the administrative agency. Id. at 571.

Although this court has jurisdiction to issue a Writ of Prohibition directed to the circuit court where that court **is without jurisdiction** to consider a matter, Moffitt v. Willis, 459

So.2d 1018 (Fla. 1984), the circuit court has jurisdiction to determine whether or not the PSC has jurisdiction in the first place. PSC's citation of Moffitt is inapposite here. That case involved the circuit court in both the interpretation of the Florida Constitution and the interpretation and application of internal legislative rules, a constitutionally legislative prerogative. The case did not involve the determination of a policy commitment of the State of Florida or the expansion of jurisdiction asserted by a public agency, which is the case presented in the instant case.

PSC's citation to Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989) is also incorrect in that the parties to that concern repeatedly acknowledged jurisdiction of the PSC to modify or terminate territorial agreements which had been approved by its orders. Id. It has long been the law that the PSC has exclusive jurisdiction to modify or terminate such territorial agreements. See City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). No such territorial agreement or PSC order is the subject of this action.

Although the PSC has jurisdiction to regulate the sale of electricity and gas, it is undisputed that the PSC has no similar jurisdiction over the removal of trash, the provision of television service, the provision of recreational facilities, and maintenance of condominium common areas and recreational facilities. See Devon-Aire Villas Homeowners Association, No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60, 65 (Fla. 3d

DCA 1985) (cable television not a "public utility").

PSC cites Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978) for the proposition that the PSC has jurisdiction over condominium owners and managers. This expansive reading of Fletcher is not justified by the actual holding in that case, as this court recognized in PW Ventures, infra. To begin with, Fletcher, the developer, was developing single family homes, not condominiums and it owned and metered the facilities which transmitted the water to these homes. Fletcher just happened to be also the developer of condominiums in that development as well. 356 So.2d 390-91. Fletcher read these meters and charged the individual home owners for the water used. Finally, Fletcher filed a Petition for Declaratory Statement with the PSC. 356 So.2d at 290. Fletcher specifically, voluntarily submitted to the PSC's jurisdiction.

Although PSC would have this Court believe that the facts in Fletcher are strikingly similar to the existing case, it is clear that the following critical distinguishing facts exist in the instant case (A 9-22), which did not exist in Fletcher:

1. Geller does not own the facilities which transmit any of the electricity, gas, water, or sewer.

2. Geller does not meter the individual recipients of electricity.

3. Geller cannot increase the maintenance fee based upon increased use.

4. Geller provides many services which are unregulated by

the PSC, which the PSC now apparently wants to regulate, including garbage and trash collection, television costs, maintenance of condominium property, insurance rates, and the assorted services argued to the trial court. (A 82).

5. Geller's agreement with Association provides indices for increases in the maintenance fees.

As this Court held in Fletcher and in numerous other cases, jurisdiction of the PSC must be codified by statute or rule. 356 So.2d at 292. In Fletcher, this Court cited with approval an order or rule of the PSC which is instructive for determination of this Writ of Prohibition. **This Court specifically cited with approval "Order No. 4874 Docket No. 69319-EU, 85 PUR 3d 107", In re: Sale, in which PSC determined that condominiums, trailer parks, apartments, shopping centers, and marinas are not subject to the regulatory jurisdiction of the PSC.** 356 So.2d 291.

PSC's reliance upon PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988) is similarly misplaced. In PW Ventures, the Petitioner constructed, owned and operated a power plant (clearly within the bailiwick of the PSC). Petitioner again voluntarily submitted to the jurisdiction of the PSC. This court expressed concern that a utility, such as Florida Power, could form "a subsidiary and [raid] large industrial clients within areas served by another utility." 533 So.2d at 283, note 5. The critical public policy question addressed in PW Ventures focused on diversion of existing revenues from regulated utilities, and the increased cost to the remaining customers. The court felt

compelled to interpret the phrase "to the public" as meaning "to any member of the public" to avoid this. Id.

None of these factors exists in the instant case. Geller is not building, does not operate, and does not own any generating facility or transmission lines, as did PW Ventures and Fletcher. Geller is not purloining customers. Finally, Geller consistently has refused to submit to the jurisdiction of PSC, and has argued repeatedly that PSC has no jurisdiction, citing In re Sale.

PSC's reliance upon State ex rel McKenzie v. Willis, 310 So.2d 1 (Fla. 1975), is misplaced. That court acknowledged the PSC's primary jurisdiction to consider electric rates, and went on to admonish, at 310 So.2d 3:

> [O]ur holding. . .is not intended to preclude exercise of jurisdiction by the Circuit Court's in different situations where the jurisdiction of the [public service] commission does not lie or its jurisdiction could not provide complete or adequate remedy.

Compare Southern Bell TNT Company v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974).

PSC's cases cited for the proposition that the PSC is entitled to deference by the Court are of no import. The general proposition is sound; however, no deference should be accorded an illegal act of an agency. Jurisdiction of the PSC is clearly not with its peculiar bailiwick of technical expertise. It is clearly within the expertise and jurisdiction of the judiciary, as are the other legal questions raised. This temporary injunction and its enforcement involve PSC's potential denial of procedural due process to Geller, inter alia, not the

appropriateness of the PSC's agency action and its determination of matters within its peculiar expertise. See Adams, supra; Shevin (interpretation of matters of law), supra; and Key Haven v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 157 (Fla. 1982)(**whether controversy may be taken out of administrative process and into circuit court is judicial policy question, not a matter of judicial jurisdiction**).

An affected agency is not the appropriate body to determine its own status as a judicial tribunal. Myers v. Hawkins, 362 So.2d 926, 928-29 (Fla. 1978) (reviewing an order of the Public Service Commission and its declaratory statement issued pursuant to Section 120.565, Florida Statutes (1977)).

Since the powers of the PSC "are only those conferred expressly or impliedly by statute . . . any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." State Department of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1977).

As the PSC has already determined: condominiums, trailer parks, apartments, shopping centers, and marinas are not subject to the regulatory jurisdiction of the PSC. In re Sale of Electricity to be Resold, 34 Fl. Supp. 40, 42 & 45 (1970); P.S.C. Order No. 4874, Docket No. 69319-EU, 85 PUR 3rd 107. (A 95-105). Regulated services, such as electricity, must be available to the indefinite public. Id. Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289, 291 (Fla. 1978). PW Ventures does not alter this because its overriding policy issues

regarding purloining of customers limit its applicability in a condominium setting such as this.

PSC WILL SUFFER NO MATERIAL DAMAGE BECAUSE IT HAS AN ADEQUATE REMEDY OTHER THAN THIS WRIT

PSC attempts to invoke this supreme court's jurisdiction by utilizing a shotgun approach. Its specific reliance upon the all writs provision of Rule 9.030(a)(3), and the review of agency rate action provision of Rule 9.030(a)(1)(B)(ii), is misplaced. This action can be adjudicated just as easily by the Second District Court of Appeal, which is not named as a respondent, but which will be prohibited effectively from acting in this cause. This court should not "issue prohibition to disturb the district court's right to make the decision." State ex rel Sarasota County v. Boyer, 360 So.2d 388, 393 (Fla. 1978)(note 17).

PSC would have this court believe that this presents the anomalous position of the district court of appeal reviewing the actions of the PSC. PSC is clearly a party in this instance, not the tribunal. This is a jurisdictional challenge, and an action for declaration of legal rights, not a rate case. Numerous cases exist in which the PSC, as a party litigant, hails before a district court of appeal as appellant or appellee, petitioner or respondent. There is no guaranty for the PSC that all its actions can and must be heard before the supreme court. Since the instant case does not involve the PSC as the tribunal, PSC's invocation of Rule 9.030(a)(1)(B)(ii), F.R.A.P., is groundless. As in Adams, supra, jurisdiction is properly in the circuit court, with review by the district court.

PSC's argument that the district court would be effectively defining the jurisdiction of this Supreme Court mis-states the proposition before this court for the same reasons. This action does not involve the circuit or district court interpreting or reviewing PSC agency action relating to rates or services of utilities. This action involves the circuit court temporarily enjoining agency action so the circuit court can determine if the agency has jurisdiction, if Mr. Falk has standing to file a complaint, if the agreement and the actual practice of the parties constitute reselling of gas and electricity, and the legal import of the agreement's language. The trial judge certainly has the power to interpret a contract. Liza Danielle, supra.

PSC's chosen method of review places an unnecessary and unwarranted burden upon this court, and ignores the very purpose of the district courts of appeal. The proper procedure of appealing to the district court of appeal was initiated by PSC herein, and that avenue remains adequate, open, and viable. (A 63-67, & 1Ø6-111).

APPEAL ISSUES SHOULD NOT BE ADDRESSED IN THIS PROCEEDING BECAUSE PSC HAS AN ADEQUATE FORUM IN THE DISTRICT COURT

Geller does not concede that this court needs to address the appellate issues raised by PSC. A fully adequate forum exists for that review in the Second District Court of Appeal, where there is now pending PSC's appeal of the same trial court actions. (A 63-67, & 1Ø6-111). Although the Second District action is currently abated (A 111), awaiting this court's

determination of the jurisdictional question raised in PSC's Petition for Writ of Prohibition, that court is fully capable of determining the issues which are argued hereafter. Article V, Section 4(b), Florida Constitution (1968).

PSC's citation of Savoie v. State, 422 So.2d 308 (Fla. 1982) (review of District Court opinion based on conflict jurisdiction), Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961) (review of District Court certified question), and the cases collected at PSC's brief page 14, states a generally sound judicial principal addressing due process and judicial economy.

PSC's argument fails in the instant case, however. There is no judicial economy in the PSC's filing an appeal, abating that appeal, filing an action with this court for a writ of prohibition, and then seeking to remove the appellate issues from the consideration of the very district court in which the PSC had initially sought relief. Since the PSC's requested writ is directed solely at the trial courts, and the Second District Court of Appeal is constitutionally empowered to issue the same writ of prohibition, it is apparent that the PSC is simply engaged in forum shopping. Article V, Section 4(b)(3), Florida Constitution (1968).

Again, there is no critical or compelling reason to prevent the Second District from considering the appellate issues, as there was in West Flagler, supra. Unlike West Flagler, Savoie, and Zirin, this litigation is at the very beginning of Geller's proceeding for declaratory judgment, and PSC's attempt to raise

these extraneous appellate issues will not effect a speedy termination of this litigation or be dispositive of the case. 251 So.2d at 857-58, 422 So.2d at 312, and 128 So.2d at 596.

This court's consideration of the appellate issues will certainly lead to the "[p]iecemeal determination of a cause [which] should be avoided . . .". Zirin, 128 So.2d at 596. Geller's declaratory judgment issues at both the district court and the circuit court must still be addressed. An evidentiary hearing must still be held on the facts underlying the action for declaratory judgment, the scope of PSC's jurisdiction, the nature of the threatened harm, and the necessary elements supporting continuation of the injunction. See State v. Beeler, 530 So.2d 932, 934 (Fla. 1988).

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS UNNECESSARY

Where a party is affected by administrative action, that party may make a general attack on the validity of the action, ordinance, or statute through an injunction in circuit court **without exhausting its administrative remedies, and without alleging special damages.** David v. City of Dunedin, 473 So.2d 304, 306 (Fla. 2d DCA 1985), citing City of Miami Beach v. Perell, 52 So.2d 906 (Fla. 1951) and Renard v. Dade County, 261 So.2d 832 (Fla. 1972).

A state agency has only such power or jurisdiction as is expressly, or by necessary implication, granted by the legislature. State v. Falls Chase Special Taxing District, 424 So.2d 787, 793 (Fla. 1st DCA 1982); and Lee v. Division of

Florida Land Sales and Condominiums, 474 So.2d 282, 284 (Fla. 5th DCA 1985). The agency may not increase its own jurisdiction, and has no inherent power like a circuit court. Id. As the Falls Chase court noted:

> When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.

424 So.2d at 793. Accord Lee, 474 So.2d at 284.

Where the individual challenges the agency's jurisdiction, exhaustion of administrative remedies is not required. Osceola County v. St. Johns River Water Management District, 486 So.2d 616, 617 (Fla. 5th DCA 1986). Such a jurisdictional challenge is "a widely recognized exception to the exhaustion doctrine." Falls Chase, 424 So.2d 794, citing Leedom v. Kyne, 358 U.S. 184, 188-89 (1958). As the Falls Chase court observed:

> [W]here the individual does make out a prima facie case of lack of agency jurisdiction over him, why should he have to resort to the expensive and time consuming administrative procedures which may convert the exhaustion of remedies into the exhaustion of litigants?

424 So.2d 794, at note 19.

Geller's position is identical to Chase Falls, Mrs. Lee, and St. Johns. Geller may be exhausted in the administrative process by an agency which had no jurisdiction over Geller in the first place. This is precisely the time and place for the judiciary generally, and the circuit court specifically, to step into the process to determine PSC's jurisdictional limits, as well as the other purely legal issues, i.e. statutory construction and

contract interpretation.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISSOLVE THE TEMPORARY INJUNCTION

On appeal, a presumption of correctness is accorded to the judgment of the trial court, and the burden is imposed on Appellant, or PSC in this case, to show reversible error. First Atlanta National Bank of Daytona Beach v. Cobbett, 82 So.2d 870, 871 (Fla. 1955). The determination of whether or not to dissolve an injunction is founded upon the trial judge's sound discretion, and will not be reversed without a showing of clear abuse of discretion. M.G.K. Partners v. Cavallo, 515 So.2d 368, 369 (Fla. 4th DCA 1987).

Although PSC here complains that there is no factual support for the trial court's determination to preserve the status quo, pending trial of the ultimate issues, PSC prevented the trial court from hearing any such testimony. (A 69-70, 74, 80, & 86). Clearly Geller was ready to produce that testimony, having subpoenaed the witnesses. (A 48-50, 53, & 69-70). However, when Geller's counsel attempted to present this testimony, as required by Beeler, supra, PSC objected to the testimony, and prevented its presentation. (A 69-70, & 80).

Geller had the burden of coming forward with evidence sufficient to sustain the temporary injunction. Shea v. Central Diagnostic Services, Inc., 552 So.2d 344, 346 (Fla. 5th DCA 1989) and DeLisi v. Smith, 401 So.2d 925, 927 (Fla. 2d DCA 1981). This Geller's attorney attempted to do, in spite of PSC's objections.

Unfortunately, PSC convinced Judge Andrews not to consider the available evidence.

Having thus created this error, PSC cannot now complain. Stossel v. Gulf Life Ins. Co. of Jacksonville, 123 Fla. 227, 166 So. 821, 824 (1936)(appellant objecting to introduction of evidence cannot complain that exclusion is error); and Bloomfield v. City of St. Petersburg Beach, 82 So.2d 364, 369 (Fla.1955) (evidentiary burden of proof; invited error cannot be ground for appeal).

Assuming this obvious invitation of error is not dispositive of this issue, we must examine whether or not the trial judges abused their discretion, as the PSC alleges. As set forth in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980):

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

The purpose of this preliminary injunction was merely to preserve the relative positions of the parties until the trial on the merits could be held. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Therefore, Geller was not required to prove his entire case as he would at trial. Id.

Generally, all districts which have considered the issuance of temporary injunctions hold that the party seeking a temporary injunction must establish four items:

(1) A likelihood of irreparable harm and the

unavailability of an adequate remedy at law;

(2) A substantial likelihood of success on the merits;

(3) That the threatened injury to the petitioner outweighs any possible harm to the respondent, and;

(4) That the granting of a temporary injunction will not dis-serve the public interest.

See Cordis Corporation v. Prooslin, 482 So.2d 486, 489-90 (Fla. 3d DCA 1986); and Contemporary Interiors, Inc. v. Fourmarks, Inc., 384 So.2d 734, 735 (Fla. 4th DCA 1980).

The criterion of "a substantial likelihood of success on the merits" and the "clear, legal right factor" are equivalent. Reinhold Construction, Inc. v. City Counsel of Vero Beach, 429 So.2d 699 (Fla. 4th DCA 1983).

Once the enjoined party moves to dissolve the injunction, thereby waiving any objection to notice, the Plaintiff has the burden to show that the Complaint and supporting affidavits are sufficient. State v. Beeler, 530 So.2d 932, 934 (Fla. 1988). Again, Geller attempted to do just this.

Geller clearly set forth uncontradicted, direct and positive averments in both the verified Complaint and the verified Motion for Temporary Injunction:

a. The numerous facts set forth in excruciating detail in the statement of case and facts above;

b. The matter involved preservation of the public interest in that Geller sought to prevent PSC from violating its own rules, set forth partially in In re Sale;

c. Geller had no remedy at law because once the PSC had exercised jurisdiction over Geller, or Geller had submitted to that jurisdiction, the harm would have been fully effected.

d. PSC could not be harmed by the enjoining of an unauthorized act beyond its jurisdiction.

Clearly, Geller would have no remedy at law to recover its damages if PSC were ultimately found to be in error. Sovereign immunity would defeat any potential action for damages by Geller against PSC.

Geller put on a prima facie case of illegality, and PSC did rebut it. PSC presented no evidence, relying instead exclusively upon argument of counsel. When the verification of Geller is compared with the absence of evidence presented by PSC, it is clear that the court's order temporarily preserving the status quo was proper.

It must be remembered that at this stage of the proceedings, no permanent injunction has been entered. This issue must still be presented to the trial court. This is not the trial of the declaratory judgment and permanent injunction issues where the final result is determined forever. Judge Bryson's determination, in issuing the temporary injunction, and Judge Andrews' determination, in upholding the temporary injunction, simply preserve the status quo so that these parties can litigate the merits of the case without having to be put in the position of finding illegal actions of the PSC after the parties have spent years litigating the issues.

PSC's general theory, re. the verification of the Complaint and the quantum of the proof to support the temporary injunction were inadequate, belies Florida jurisprudence. See City Gas Company of Florida v. Ro-mont South Green Condominium "R", Inc., 350 So.2d 790, 791 (Fla. 3d DCA 1977)(appeal of entry of temporary injunction considers record at time of hearing on motion to dissolve), and Zuckerman v. Professional Writers of Florida, Inc., 398 So.2d 870, 872 (Fla. 4th DCA 1981)(even if pleadings are inadequate to issue temporary injunction, review is based on record at the time of the hearing on the motion to dissolve, not merely on the initial pleadings). At the time of the hearing on the motion to dissolve the temporary injunction, PSC prevented the very proof which would have substantiated the need for the injunction. PSC can not now take advantage of this alleged error. Stossel, and Bloomfield, supra.

PSC's argument for dissolution ignores the critical fact that no record has been, or can be, provided to this court to examine the proceedings before Judge Bryson. Without a record, this court would be merely guessing at the reasoning of Judge Bryson when he entered the temporary injunction. This court is not the trial court, and cannot determine questions which are not properly preserved and presented. Angelis v. Tarpon Springs Sponge Producers Association, 111 Fla. 740, 149 So. 630 (1933)(sole question is propriety of issuance of temporary injunction), Builders' Supply Co. v. Action, 56 Fla. 756, 47 So. 822 (1908) (nonrecord pleadings cannot be considered, even though

copied into the transcript), and Hotel-Motel Restaurant Employees et al v. Black Angus of Lauderhill, Inc., 290 So.2d 479, 482 (Fla. 1974)(appellate court can not review factual matters unless hearing on motion to dissolve is held, and evidence adduced).

PSC waived the adequacy of the verification and notice when it filed it motion to dissolve, attended the hearing, and then affirmatively obstructed the introduction of the evidence to sustain the temporary injunction. See Beeler, and Stossel, supra. Unlike the petitioner in County of Orange v. Webster, 503 So.2d 988 (Fla. 5th DCA 1987), PSC had notice of the hearing before Judge Bryson, or waived that notice issue. 503 So.2d at 989. Unlike the complaint in County of Orange, Geller's complaint specifically alleged the impending injury. Mr. Webster did not plead the injury. Id.

Since PSC wants to act as the judge, prosecutor, and the jury (compare A 23, 26, 58, 88-89, 91, & PSC A 59-65, & 69-75), review by the trial court is the only independent forum in which Geller can examine and challenge PSC's jurisdiction. Courts serve an critical function. They are a check against the unbridled exercise of administrative power. When the government acts improperly, it is the right of any citizen to challenge the government's improper action. When a citizen is affected by the improper governmental act to a greater extent than the citizens as a whole, the right of challenge is even greater. Such a right to petition is fundamental to our constitutionally based government of the people, and the government may not abridge the

individual's right to redress grievances to that government. U.S. Constitution, Amendment 1.

CONCLUSION

PSC's Petition for Prohibition must be denied since the trial court has jurisdiction to (1) consider the constitutional impact of the PSC action against Geller, (2) determine the jurisdiction vel non of the PSC, (3) interpret the agreement, (4) to intervene in agency action which is egregious or whose rule or order is unconstitutional, (5) consider matters of law, (6) determine if the PSC has promulgated, or is promulgating a rule of general applicability without compliance with Chapter 120, Florida Statutes, and (6) determine if the PSC action is an unauthorized exercise of validly delegated legislative function.

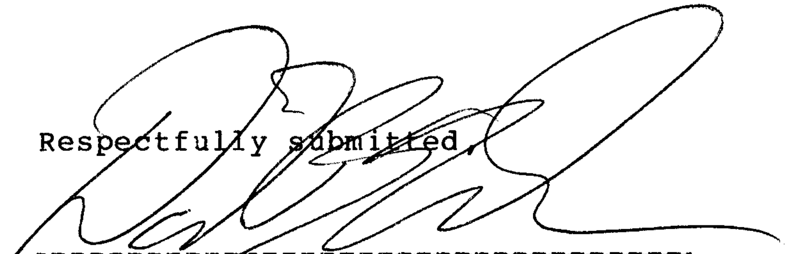
No material injury will be suffered by PSC which could not be addressed adequately on appeal to the District Court of Appeal, before which the PSC currently has an appeal pending in this matter.

Issuance of the writ would not be dispositive of all issues pending before the trial court since jurisdiction would still lie in the trial court under the above guidelines. The scope of this action is still being defined. The trial pleadings have not been closed, and can be amended to reflect these additional issues as the evidence is developed in discovery.

PSC's appellate issues can and should be addressed by the Second District Court of Appeal, which currently has pending before it an interlocutory appeal of the trial court order denying PSC's motion to dissolve the temporary injunction. By this court's ruling on the merits of these appellate issues, the

Florida Constitution and the Rules of Appellate Procedure will be circumvented, and forum shopping will be encouraged. This should not be condoned.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to 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, MICHAEL A. PALECKI, ESQUIRE, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Room 226, Tallahassee, FL 32399-0863, WALTER M. MEGINNIS, 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 March, 1990.

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