

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,)

Appellant,)

vs.)

CASE NO. 76,743)

SEMINOLE COUNTY and CITY OF)
LAKE MARY,)

Appellees.)
_____)

BRIEF OF AMICUS CURIAE
THE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

The Public Service Commission is referred to in this brief as the "FPSC" or "Commission." Appellant, Florida Power Corporation is referred to as "FPC." Appellee, City of Lake Mary is referred to as "City;" Appellee, Seminole County is referred to as "County."

STATEMENT OF THE CASE AND FACTS

The Commission adopts the Statement of the Case and Facts presented by the Appellant, FPC.

SUMMARY OF THE ARGUMENT

(The Commission concurs in and adopts FPC's Introduction to its Argument as the Commission's Introduction to the Argument which follows.)

The Final Judgment in this case should be overturned because it improperly invades the jurisdiction of the FPSC over public utility rates and services.

The Commission's statutory jurisdiction over such rates and service is exclusive, not concurrent. The City and County cannot assert a right to demand underground service for free without invading FPSC's exclusive jurisdiction over both of those subjects. For that reason, the assertions are void and the ordinances embodying them are unconstitutional.

Other state supreme courts are in accord that the claim asserted by appellees here invades the jurisdiction and authority of the public service commission to regulate public utilities statewide in the public interest. See, e.g., Union Electric Co. v. City of Crestwood, 499 S.W. 480 (Mo. 1973).

The Final Judgment below incorrectly assumes that undergrounding is a mere relocation and applies statutes (section 337.403, Florida Statutes) and cases relevant to relocation but not to undergrounding. In contrast, the Legislature, in section 366.04(7)(a), Florida Statutes, refers to both undergrounding (i.e., the conversion of overground facilities to underground facilities) and relocation and treats them as different concepts. The Final Judgment completely ignores section 366.04(7)(a), Florida Statutes. Appellees' position, as embodied in the Final Judgment,

is at odds with the Legislature's requirement of: 1) a Commission finding that undergrounding is cost-effective; 2) Commission action subsequent to that finding whereby the Commission requires undergrounding.

The appellees' position and the Final Judgment contravene the Commission's policy that cost causers pay the direct costs of undergrounding rather than the general body of ratepayers.

The Final Judgment contravenes both of the legislative policies reflected in section 366.04(7)(a), Florida Statutes; i.e., that undergrounding regulation be statewide and that undergrounding decisions be informed by cost-effectiveness determinations.

By its terms, section 366.04(7)(a), Florida Statutes, is consistent with the preemption arguments set out at I.A., supra.

The Final Judgment must be reversed as disruptive of the statewide regulation intended by the Legislature. See, e.g., Union Electric Co. v. City of Crestwood, supra.

Ignoring the Legislature's intended cost-effectiveness requirement for undergrounding decisions is not only contrary to law, section 366.04(7)(a), Florida Statutes, but catastrophic as a matter of policy.

If local governments need not bear the costs of undergrounding, a race to underground for free will ensue resulting in the uncontrolled transfer of billions of dollars into the ratebase borne by ratepayers statewide, regardless of whether they derive any benefit from the local governments' undergrounding

decisions or the cost-effectiveness of those decisions. See, e.g.,
Baltimore Gas & Electric Co., 80 Md. PSC 112 (May 9, 1989).

ARGUMENT

The Commission concurs and adopts FPC's Introduction to its Argument as the Commission's introduction to the argument.

I. THE ISSUES OF UNDERGROUNDING SERVICE AND ITS COSTS ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE COMMISSION

A. The FPSC Has Exclusive Jurisdiction Over Public Utility Rates and Service

Section 366.04(1), Florida Statutes, expressly confers exclusive jurisdiction on the Commission to "regulate and supervise each public utility with respect to its rates and service" The Final Judgment appealed from nonetheless determined that appellees' requirement that FPC underground its power lines without cost to appellees "is not in conflict with the authority of the Commission, but is part of the police power granted to local governments by the Legislature." Final Judgment, p. 4. This Court should reverse that finding and the Final Judgment because they conflict with section 366.04(1), Florida Statutes.

By its terms, the jurisdiction of the Commission over public utility rates and service is exclusive, not concurrent. Moreover, the Commission's jurisdiction is explicitly "superior to that of all . . . municipalities . . . or counties." See, e.g., Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989).

Clearly, the ordinances passed by the City and County requiring FPC to provide free underground service invade both areas of the Commission's exclusive jurisdiction; i.e., rates and

service. The service mode appellees have demanded, underground wires, has not been approved, ordered, or required by the Commission pursuant to its exclusive jurisdiction over public utility service. Similarly, the Commission has not approved, ordered, or required a utility to provide this service to appellees free pursuant to its exclusive jurisdiction over public utility rates. If appellees' ordinances are given effect to establish the service to be provided and the rate to be charged for that service, the exclusive jurisdiction over those subjects conferred by section 366.04(1), Florida Statutes, on the Commission would be rendered non-existent and nugatory.

Because the municipal and county ordinances at issue invade the Commission's exclusive jurisdiction, they are unconstitutional. Article VIII, Sections 1 and 2, Florida Constitution. They are not rehabilitated by the unsupported finding in the Final Judgment below that they are within the local governments' police power. The necessary consequence of section 366.04(1), Florida Statutes, is that local government police power does not include the regulation of public utility service and rates. The jurisdictional boundaries are clear.

Other states' supreme courts are in accord. The Supreme Court of Missouri noted that if one municipality had the right to require free undergrounding, all did, with the result that

costs and resulting capital requirements could mushroom [S]upervision and control by the Public Service Commission with respect to the company, its facilities, its method of operation its service, its indebtedness, its investment, and its rates which the

[legislature] obviously contemplated would be nullified. [e.s.]

Union Electric Co. v. City of Crestwood, supra.

This has been the consistently articulated position of the FPSC as well, as more fully described in Part I.B., infra.

B. The Legal Reasoning Of The Final Judgment is Erroneous And Conflicts With Section 366.04(7)(a), Florida Statutes

As is evident in paragraph 5 of the Final Judgment, the Court below assumed that undergrounding is merely a form of relocation:

Here, the [City and County] have required FPC to relocate its power lines. [e.s.]

Thus, the lower court applied a relocation statute, section 337.403(1), Florida Statutes, which does not refer to undergrounding at all.

The assumption that undergrounding is merely a form of relocation conflicts with a recent provision, section 366.04(7)(a), Florida Statutes, which explicitly refers to both relocation and undergrounding and treats them as two different concepts. In pertinent part, section 366.04(7)(a), Florida Statutes, provides that

By July 1, 1990, the commission shall make a determination as to the cost-effectiveness of
. . . the conversion of overhead distribution
. . . facilities to underground distribution
. . . facilities when such facilities are
. . . relocated. [e.s.]

Using the Legislature's phraseology as embodied in section 366.04(7)(a), Florida Statutes, the lower court's finding that "the

[City and County] have required FPC to relocate its power lines" is incomplete and inaccurate as a matter of fact and law. A complete and accurate statement, consistent with the Legislature's terminology, would state as follows: The City and County have required that FPC convert its overhead distribution facilities to underground when those facilities are relocated for a road widening project.

Neither the statute relied upon by the lower court, section 337.403, Florida Statutes, nor the case cited in support, Anderson v. Fuller, 41 So. 684 (Fla. 1906), addresses the issue of conversion of overhead facilities to underground. Both address the different issue of relocation. Both, therefore, are inapposite to the disposition of this case.

In contrast, section 366.04(7)(a), Florida Statutes, which is relevant and necessary to the disposition of this case, is ignored in the Final Judgment. But the requirements of that legislation are clear:

Upon a finding by the commission that the installation of underground distribution and transmission facilities is cost-effective, the commission shall require electric utilities, where feasible, to install such facilities.

The statute establishes two primary predicates for undergrounding, neither of which is satisfied by the Final Judgment. The first is a finding by the Commission that undergrounding is cost-effective. The Final Judgment cites no such Commission finding of cost-effectiveness because that finding has not been made:

[The Commission concludes] that undergrounding of facilities should not be ordered at this time. We will, however, instruct the staff to open a rulemaking docket to further explore the underground wiring issue. [e.s.]

Order On the Investigation Into Underground Wiring, Order No. 23126; Docket No. 890833-EU; 6-28-90. The rulemaking docket referred to is currently ongoing.

The second predicate for undergrounding established by section 366.04(7)(a), Florida Statutes, is that, when and if the Commission does find undergrounding to be cost-effective, the Commission will require the undergrounding to be accomplished. No provision is made for local governments to impose the requirement of undergrounding.¹ Thus, the Final Judgment facially lacks compliance with the statutory commands of the Legislature on undergrounding in section 366.04(7)(a), Florida Statutes.

The Commission addressed this issue in Order No. 23126 under "Preemption," at p. 15-16. There, noting that section 366.04(7)(a), Florida Statutes, did not even exempt municipal utilities from the Commission's determination of undergrounding issues, the Commission found that

unless or until the statutory language states otherwise, the Legislature contemplated exclusive, not supplemental or complementary, jurisdiction to the Commission concerning the determination of the cost-effectiveness of undergrounding.

¹A current Commission rulemaking docket is considering such issues as municipal utility undergrounding where it is financed locally. See, FPSC Order No. 23126, p. 2, 15-16.

Contrary to the claim of the City below, the Commission's interpretation of section 366.04(7)(a), Florida Statutes, is not consistent with the City's. Though the Commission has expressed interest in further legislative directives on the general issue of preemption re: undergrounding, should they be forthcoming, the Commission was crystal clear as to its policy with respect to the specific issue raised in this litigation:

[C]urrent Commission policy . . . provides for direct costs being borne by cost causers rather than the full body of ratepayers.
[e.s.]

Order No. 23126, at p. 20 (Letter of FPSC Chairman Michael M. Wilson).

The City and County are the cost causers under the facts of this case. Their refusal to bear the direct cost of undergrounding runs counter to Commission policy. The Final Judgment provides no legal basis for appellees' position and this Court should accordingly reverse.

II. THE FINAL JUDGMENT CONTRAVENES LEGISLATIVE POLICY

Section 366.04(7)(a), Florida Statutes, embodies clear legislative policy, first by placing undergrounding matters within the purview of the Commission for resolution on a statewide basis and second, by establishing a nexus between undergrounding decisions and their cost. The Final Judgment directly contravenes both policies.

A. Section 366.04(7)(a), Florida Statutes, Is Consistent With Commission Preemption of Undergrounding Issues

Without reiterating Part I. A. of this brief, we note that the Legislature's placement of undergrounding issues within the purview of the Commission is consistent with the arguments set forth therein. This Commission cannot effectively regulate public utilities on a statewide basis as the Legislature intended in Chapter 366 generally and section 366.04(7)(a), Florida Statutes, specifically, if the Final Judgment is upheld. Union Electric, supra. The Final Judgment should accordingly be reversed as inconsistent with the policy of statewide public utility regulation promulgated by the Legislature, which chose to make explicit the extension of that policy to undergrounding in section 366.04(7)(a), Florida Statutes.

B. The Final Judgment, If Upheld, Would Sever The Nexus Between Undergrounding Decisions And Their Cost Established In Section 366.04(7)(a), Florida Statutes, By The Legislature

The text of section 366.04(7)(a), Florida Statutes, makes the determination of cost-effectiveness the main subject with respect to undergrounding and the essential predicate to subsequent Commission action. As such, section 366.04(7)(a), Florida Statutes, embodies a legislative policy that cost-effectiveness considerations be a vitally important component in undergrounding decisions.

In contrast, the Final Judgment is utterly silent as to the cost-effectiveness of the undergrounding at issue. Indeed, since the Final Judgment asserts that the City and County "cost causers" will not have to pay the cost of the undergrounding they would cause, the lack of any concern whatsoever about cost-effectiveness is not surprising.

The legal infirmities of the Final Judgment in this regard have already been addressed. Part I.B., supra. The policy implications of this departure from the requirements of section 366.04(7)(a), Florida Statutes, would be catastrophic.

It is to be anticipated that many local governments allowed to choose an expensive additional utility service mode without any responsibility to pay for it would race to make that choice, increasing the burden on ratepayers by billions of dollars. Provision of free undergrounding would also violate section 366.03, Florida Statutes, by allowing and requiring preferential treatment

of those local governments. For those reasons, the Maryland Public Service Commission rejected any system like that contemplated by the Final Judgment in this case, and imposed the extra costs of undergrounding on the local government which caused them:

The Commission [finds] it inequitable to charge all of BG&E's ratepayers, because they did not cause the cost to be incurred and they do not share in the benefits as much as Annapolitans do. It also rejects surcharging BG&E's Annapolis customers, because the City, not those customers, caused the cost to be incurred.

Re: Baltimore Gas & Electric Co., supra.

The Final Judgment below directly contravenes the legislative policy requiring consideration of cost-effectiveness in undergrounding decisions and the Commission's policy of charging cost causers rather than ratepayers generally for the extra costs of undergrounding. Accordingly, the Final Judgment should be reversed.

CONCLUSION

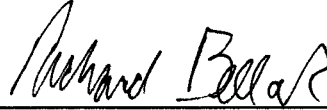
The Commission's undergrounding rulemaking docket is ongoing and, based on Order 23126, p. 15-16, it may be anticipated that a variety of undergrounding issues will be addressed appropriately by rule. The Commission notes that it has already approved, by rule, undergrounding for residential development when the costs are assumed by the developer. Rule 25-6.074-.078, Florida Administrative Code.

In the case before the Court, however, appellees attack the Commission's jurisdiction and ignore the legislative commands in section 366.04(7)(a), Florida Statutes. Because the actions of the City and County in this case, approved in the Final Judgment of the Court below, invade the exclusive jurisdiction of the FPSC to regulate public utility rates and service and contravene legislative and Commission policy on undergrounding, the Final Judgment of the Court below should be reversed.

WHEREFORE, the Florida Public Service Commission urges that this Court vindicate the state-wide regulation of public utilities by the Commission by reversing the Final Judgment of the court below and invalidating the local government ordinances requiring free undergrounding.

Respectfully submitted,

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Dated: November 16, 1990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 16th day of November, 1990 to:

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