IN THE SUPREME COURT OF FLORIDA

JIM FORD, Brevard County Property Appraiser; and JAMES NORTHCUTT, Brevard County Tax Collector,

Petitioners,

vs.

ORLANDO UTILITIES COMMISSION,

Respondent.
_____/

CASE NO. 81,440

5th DCA CASE NOS.: 92-539
92-677

CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT
CASE NOS.: 90-2558-CA-S
90-20858-CA-S

AMICI CURIAE
FLORIDA LEAGUE OF CITIES, INC.,
FLORIDA MUNICIPAL ELECTRIC ASSOCIATION,
FLORIDA MUNICIPAL POWER AGENCY,
THE CITY OF ALACHUA, THE CITY OF BUSHNELL,
GAINESVILLE REGIONAL UTILITIES,
KISSIMMEE UTILITY AUTHORITY, UTILITIES COMMISSION OF THE CITY OF NEW SMYRNA BEACH, AND THE CITY OF OCALA

AMENDED BRIEF IN SUPPORT OF RESPONDENT, ORLANDO UTILITIES COMMISSION

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PRELIMINARY STATEMENT

The FLORIDA LEAGUE OF CITIES, INC. (hereinafter the "League") is a Florida non-profit corporation composed of more than 380 municipalities and 8 charter counties located in the State of Florida. The League's Board of Directors and Corporate Officers include local public officials from throughout the State. As provided in its Charter, the general purpose of the League is to seek to improve the delivery of municipal services through efficient local government administration by bringing together local governments and their elected public officials for the purposes of collectively solving municipal problems, fostering civic consciousness, and improving the welfare of the public.

The Florida Municipal Electric Association (hereinafter "FMEA") is a trade association consisting of 31 municipally-owned electric systems located throughout the State of Florida.

The Florida Municipal Power Agency (hereinafter "FMPA") is an inter-local entity created pursuant to Chapters 163 and 361, Florida Statutes. FMPA, on behalf of various of its member municipal electric utilities, owns an 8.806 percent ownership interest in Florida Power & Light Company's St. Lucie Unit No. 2, a nuclear powered electrical generation facility located in St. Lucie County; a 26.6265 percent ownership interest in the Orlando Utilities Commission's Stanton Unit No. 1, a coal-fired electric generation facility located in Orange County; a 39 percent interest in two Orlando Utilities Commission combustion units located at the Indian River Plant; a 21 percent interest in two Orlando Utilities Commission combustion turbine units located at the Indian River

Plant; a 28.4091 percent interest in the Orlando Utilities Commission's Stanton Unit No. 2, a coal-fired electric generation facility currently under construction in Orange County; and a 50 percent interest in the Kissimmee Utility Authority's Cane Island Unit, a gas turbine electric generation facility currently under construction in Osceola County.

The City of Alachua, the City of Bushnell, Gainesville Regional Utilities, Kissimmee Utility Authority, Utilities Commission of the City of New Smyrna Beach, and the City of Ocala (hereinafter the "CR3 Cities") are collectively the owners of a 4.0941 percent fee simple interest in a Florida Power Corporation's Crystal River Unit No. 3, a nuclear-powered electrical generating facility located in Citrus County, Florida.

The parties referred to above will collectively be referred to herein as "Amici".

Petitioner, JIM FORD, is the duly-elected Property Appraiser of Brevard County, Florida, and will be referred to herein as "the Property Appraiser".

Petitioner, JAMES NORTHCUTT, is the duly-elected Tax Collector of Brevard County, Florida, and will be referred to herein as "the Tax Collector".

Respondent, ORLANDO UTILITIES COMMISSION, will be referred to herein as "OUC".

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici adopt the Statement of the Case and Statement of the Facts as it appears in the Answer Brief of Respondent, Orlando Utilities Commission.

SUMMARY OF THE ARGUMENT

Article VII, Section 3(a), Florida Constitution, provides that "all property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." Despite the plain language of the Constitution, Petitioners here contend that the electric generation facilities of the Orlando Utilities Commission located in Brevard County are not exempt from ad valorem taxation because the Orlando Utilities Commission is prohibited from providing retail electric service within Brevard County. This proposed geographic distinction regarding when a municipal or public purpose is served is without basis in Florida law.

Cities and counties throughout the State have made enormous investments in capital facilities located outside their political boundaries which would be adversely impacted were the Court to accept the Petitioners' argument. Moreover, many other areas of Florida law regarding what constitutes a public or municipal purpose, including the right to sovereign immunity, the right to exercise the power of eminent domain, and the right to issue tax-exempt debt, would be undermined. Article VII, Section 3(a), Florida Constitution, provides that the Legislature may subject property owned by a municipality and located outside its boundaries to a payment to the appropriate taxing unit. The radical departure from long-standing Florida case law which is advocated here by the Petitioners should only be undertaken by the Legislature.

ARGUMENT

POINT I. WHERE A MUNICIPALITY, PURSUANT TO STATUTORY AUTHORITY, LOCATES ON ITS PROPERTY IN ANOTHER COUNTY AN ELECTRICAL GENERATING PLANT WHICH SUPPLIES MOST OF ITS ELECTRICITY TO SUCH MUNICIPALITY'S RESIDENTS AND THE REMAINDER TO PRIVATE UTILITY COMPANIES, BUT DOES NOT SUPPLY ANY ELECTRICAL POWER TO THE RESIDENTS OF SUCH COUNTY, SUCH MUNICIPALLY-OWNED PROPERTY IS EXEMPT FROM AD VALOREM TAXATION.

In the face of the clear language of Article VII, Section 3(a), Florida Constitution, and Section 196.199(1)(c), Florida Statutes (1991), both of which provide that property owned by a municipality and used for municipal or public purposes is exempt from ad valorem taxation, Petitioners persist in arguing that the OUC Indian River Plant located in Brevard County is, in fact, taxable. The Petitioners contend, necessarily, that the Indian River Plant is not used for a municipal or public purpose. The basis for this contention is that OUC is prohibited from providing retail electric service in the county where the power plant is located and, consequently, that the plant serves no municipal or public purpose in Brevard County. This contention is without basis in law or logic; its adoption by the Court here would have enormous adverse financial impacts on local governments throughout the State and would introduce substantial confusion into the law of Florida regarding what constitutes a municipal or public purpose.

In response to increases in population, increased pressure on natural resources and increasingly intense land use patterns in urbanized areas, many cities in the State have found it desirable or necessary to construct facilities outside their corporate

boundaries in order to meet their obligation to provide municipal services to their citizens. This is particularly true in the provision of utility service. Dwindling water supplies, increasingly stringent standards regarding the disposal of wastewater effluent and solid waste and strict siting requirements for electric power plants have all resulted in a situation in which cities throughout the State have made substantial capital investments outside their territorial boundaries in order to provide required utility services. The simple fact that those facilities may be located in an area where the city does not or cannot provide utility service should not in any way affect the character of that facility as one used for a municipal or public purpose. The consequences of such a holding would be widespread.

For example, if Petitioners' premise is correct, no property held by FMPA would be exempt from ad valorem taxation. FMPA is an interlocal entity organized pursuant to Chapter 163, Florida Statutes, and Part II of Chapter 361, Florida Statutes, for the joint acquisition and ownership of electric generating facilities by its member municipalities. In State v. Florida Municipal Power Agency, 428 So. 2d 1387 (Fla. 1983), this Court held that the purchase by FMPA of an 8.8 percent ownership interest in a Florida Power and Light nuclear power plant located in St. Lucie County constituted a proper public purpose. FMPA itself is prohibited by Section 361.12(4), Florida Statutes (1991), from selling electricity at retail. Only one participant in the FMPA St. Lucie Project, the Fort Pierce Utility Authority, is located within

St. Lucie County. There is, consequently, little or no direct benefit to the citizens of St. Lucie County, other than customers of the Fort Pierce Utilities Authority, which flows from the FMPA ownership interest in St. Lucie Unit No. 2. Under the rationale advanced by Petitioners, the FMPA interest in the St. Lucie Unit No. 2 would clearly be taxable, despite the fact that this Court has previously held that the purchase of this interest constitutes a proper public purpose. However, Section 361.17, Florida Statutes (1991), makes it absolutely clear that the Legislature contemplated that the FMPA ownership interest would, in fact, be exempt from ad valorem taxation:

> Except as provided in § 10, Article VII of the State Constitution, no joint electric supply projects authorized under this statute shall lend or use its taxing power or credit to aid any corporation, association, partnership, or person. The private interest portion of such joint projects shall be subject to all taxation in accordance with their proportionate interest in such projects. § 361.17, Fla. Stat. (1991) (emphasis supplied)

This constitutes a clear indication of the Legislature's recognition that property owned by FMPA and used for the generation of electricity, no matter where the ultimate retail sale of that electricity takes place, is exempt from ad valorem taxation because a public purpose is served.

The City of Tallahassee power plant which was the subject of litigation in Gwin v. City of Tallahassee, 132 So. 2d 273 (Fla. 1961), was located in St. Marks in order to take advantage of the plentiful supply of water and less expensive transportation costs for fuel. Gwin, 132 So. 2d at 280, (dissenting opinion). As is

the case with the OUC Indian River Power Plants, electric generating plants have often been located some distance from the customers who purchase the electricity from the plant. Increasingly today, this is also the case with municipal water and wastewater utilities. Increasing pressures on coastal water supplies are causing many local governments to look far afield from their own municipal limits in order to secure a source of water for their inhabitants.

The Legislature has long recognized the fact that it may be necessary for a city to exercise jurisdiction outside its city limits in order to provide utility service. Section 180.02(2), Florida Statutes (1991), authorizes the extraterritorial exercise of the right of eminent domain, which is granted to cities pursuant to Section 180.22, Florida Statutes (1991), and Section 166.401, Florida Statutes (1991). The right of eminent domain can only be exercised for a proper public purpose. Article X, § 6(a), Fla. Const. This power may be exercised, and municipal facilities may be located, in geographical areas where cities are prohibited from providing utility service either as a result of limitations in the municipal charter or in general law, such as Florida Public Service Commission jurisdiction over electric service territories. It would be incongruous to hold, as Petitioners would have it, that a facility for which a city had demonstrated a public purpose in order to exercise its power of eminent domain would not also serve a public purpose for purposes of coming within the Constitutional exemption from ad valorem taxation for property owned by

municipalities which serves a municipal or public purpose.

Not only does the premise advanced by Petitioners here have the potential to result in the taxation of municipally-owned facilities around the State, but it could also result in other unintended consequences. The logical conclusion of the Petitioners' argument is expressed in Petitioners' Initial Brief, page 11, in this manner: "When a municipal corporation extends itself outside its boundaries, into the county or another county, and acquires property or engages in activities outside its boundaries, it loses its public municipal character and is no different from any other corporation, unless the Legislature has conferred extraterritorial jurisdiction on it." Petitioners then conclude that it is essential to an exercise of extraterritorial jurisdiction that a utility be permitted to serve retail customers within the extraterritorial area. Essentially, Petitioners contend that if a municipality owns facilities beyond its legal service area, those facilities are no longer municipal facilities and should be treated as any other private utility. This contention raises several interesting questions:

- Florida law provides sovereign immunity to counties and municipalities. Would such extraterritorial facilities continue to be protected by sovereign immunity if they were found by the Court here to not be serving a municipal purpose?

- Municipal property held for public purpose is exempt from levy for the satisfaction of judgments. City of Coral Gables v. Hepkins, 107 Fla. 778, 144 So. 385 (Fla. 1932). Would a holding by

the Court here that such extraterritorial facilities do not satisfy a public purpose subject such properties to levy?

- Part II, Chapter 166, Florida Statutes (1991), provides that municipal governments may issue bonds in order to borrow money only in the furtherance of a public purpose. Would a finding by the Court here that such extraterritorial facilities do not serve a municipal or public purpose prohibit a city from issuing bonds to purchase and construct, for example, a well field in an adjacent county? Also, what effect would a finding by the Court here that such extraterritorial facilities do not serve a municipal or public purpose have on outstanding tax exempt bonds issued by local governments for such facilities?

There are a host of other related questions which would be raised by a ruling in favor of the Petitioners. The complexity of the issue, the long-settled state of the law in this area, and the significant legal and financial ramifications of accepting the argument advanced by Petitioners only serve to emphasize the conclusion that the District Court of Appeal reached below in this case and that the Court in Gwin reached, that is, the only relief available to Petitioners, and the proper relief for Petitioners, lies in the Florida Legislature.

In all other respects, Amici endorse and adopt the arguments and positions set forth in the Answer Brief of Respondent, Orlando Utilities Commission.

Respectfully submitted,

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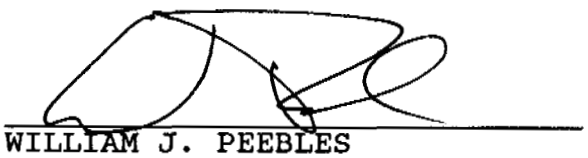
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to those listed below on this 7th day of June, 1993.



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