STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF ALACHUA, et al.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 82-202RP
	)	
FLORIDA PUBLIC SERVICE COMMISSION,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated hearing officer, R. L. Caleen, Jr., held a formal hearing in this case on March 8, 1983, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Howard E. Adams, Esquire
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For Respondent: Paul Sexton, Esquire
Florida Public Service Commission
101 East Gaines Street
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ISSUE

Whether respondent's proposed rule 25-6.100(7), Florida Administrative Code, providing that electric utilities may collect municipal or county franchise fees only from customers within the municipality or county levying the fee, constitutes an invalid exercise of delegated legislative authority.

BACKGROUND

On January 29, 1982, petitioners City of Alachua, et al., 32 municipally owned electric utilities ("Cities"), filed with the Division of Administrative Bearings a petition challenging the validity of franchise fee rule amendments, 25-4.10, 25-6.100, 25-7.85, and 25-10.03, Florida Administrative Code, proposed for adoption by respondent Florida Public Service Commission ("Commission"). Hearing was thereafter set for March 1, 1982.

On February 24, 1982, on the Cities' motion, Gainesville Regional Utilities was dropped as a party-petitioner and the Cities were granted leave to amend their initial petition.

On February 25, 1982, the Cities filed their amended petition challenging the validity of the Commission's proposed franchise fee rules on four grounds:

(1) the rules are an attempt by the Commission to exercise jurisdiction over municipal electric utilities' rates or rate-making power; (2) the rules fail to set out the amended rule in full; (3) the rules violate the one subject requirement of Section 120.54(8), Florida Statutes (1981), and (4) the attendant economic impact statement is inadequate.

The parties' subsequent motion for an indefinite continuance was granted. On September 13, 1982, the Commission's motion to sever proposed rules 25-4.10, 25-7.85, and 25-10.03 was granted, leaving rule 25-6.100(7)("the proposed rule") as the only rule being challenged in this proceeding.

The facts are undisputed. On December 29, 1982, the parties filed a joint motion to decide this case on the basis of stipulated facts, written memoranda, and oral argument. The motion was granted. Thereafter, memoranda of law were filed on February 10, 1983; oral argument was heard on March 8, 1983.

The parties' December 29, 1982, stipulation, which describes the relevant rulemaking proceedings conducted by the Commission, is substantially set out below. 1/

FINDINGS OF FACT

1. Notice of the proposed rule was published in the January 15, 1982, issue of the Florida Administrative Weekly ("FAW"). 2/ The notice set forth only the proposed amendment of the rule and did not publish the existing rule in full.

2. At the time that the notice of proposed rulemaking was published, an economic impact statement (EIS) was made available by the Commission. 3/

3. A public hearing on the proposed rule was held before a member of the Commission's staff on February 4, 1982. The Cities participated in the hearing and, subsequent thereto, filed with the Commission their Motion to Dismiss or Withdraw Proposed Rules. 4/ During the pendency of the rulemaking proceeding, the Commission drafted and circulated a revised economic impact statement. The Commission's staff member circulated to the participants of the rulemaking proceeding a proposed final amendment of Rule 25-6.100 and the revised economic impact statement, requesting comments thereon. 5/ Written comments were received from various participants in the rulemaking. 6/ While the comments addressed the substance of the proposed rule, none addressed the revised economic impact statement.

4. The Commission staff presented a written recommendation to the Commission on the proposed rule, which also included the participants' comments and the revised economic impact statement. At its regularly scheduled Agenda Conference of September 20, 1982 the Commission adopted the proposed rule recommended by its staff, as well as the revised economic impact statement. Order No. 11277 also denied the Cities' Motion to Dismiss or Withdraw Proposed Rule. 7/ Filing of the proposed rule with the Secretary of State was withheld pending a determination of validity by the Division of Administrative Hearings.

CONCLUSIONS OF LAW

I.

Jurisdiction and Standing

5. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. 120.54(4)(a), Fla.Stat. (1981).

6. The Cities, as owners of electric utilities, are "substantially affected" by, and have standing to challenge, the proposed rule. The rule regulates the way they may collect city or county franchise fees from their customers. Their standing to initiate this proceeding has not been challenged by the Commission.

II.

The Proposed Rule is Within the Commission's Authority to Prescribe Rate Structures for Municipal Electric Utilities

7. The proposed rule, in its final form, provides:

> 25-6.100 Customer Billing.
>
> (7) Franchise Fees.
> (a) When a municipality charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that municipality. When a county charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that county.
> (b) A utility may not incorporate any franchise fee into its other rates for service.
> (c) For the purposes of this subsection, the term "utility" shall mean any electric utility, rural electric cooperative, or municipal electric utility.
> (d) This subsection shall not be construed as granting a municipality or county the authority to charge a franchise fee. This subsection only specifies the method of collection of a franchise fee, if a municipality or county, having authority to do so, charges a franchise fee.

In effect, this rule allows investor-owned, municipally-owned, and cooperatively-owned electric utilities paying franchise fees to local government to recoup those fees only from customers living within the franchised area. This, the Cities contend, is an unlawful attempt by the Commission to exercise jurisdiction over municipal electric utilities' rates. The Commission replies that it is exercising rate structure jurisdiction, not rate making jurisdiction--a power which it does not have.

8. The Commission may regulate the rate structures of municipal electric utilities, Section 366.04(2), Florida Statutes (1981), but lacks power to regulate their rates. See, Amerson v. Jacksonville Electric Authority, 362 So.2d 433 (Fla. 1st DCA 1978). The question posed is whether a rule which regulates collection of franchise fees is an exercise of power over the rates or rate structures of electric utilities.

9. These terms were judicially construed in the City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981), at 163:

> [t]here is a clear distinction between "rates" and "rate structure" though the two concepts are related. "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. "Rate structure" refers to the classification system used in justifying different rates.

10. Contrary to the Cities' contention, the proposed rule regulates rate structure, not rates. It does not affect the dollar amount charged for a particular service or amount of consumption. Franchise fees are set by local government. Utilities decide how much, if any, of these fees will be passed on to their customers as cost. The proposed rule simply establishes a classification system which justifies different rates. It establishes two classes of customers.

11. One class is located within a city or county charging electric utilities a franchise fee; from this class of customers, the utility may recoup all or part of its franchise fee costs. The other class consists of customers living outside the boundaries of the franchise fee charging city or county; these customers cannot be required to pay for any part of the franchise fee costs. Thus, when a utility passes on its franchise fee costs, its customers' rates will differ, depending on whether the customers are located within or without the boundaries of the government levying the franchise fee. The proposed rule, therefore, is derived from and does not exceed the Commission's explicit power to regulate rate structures of municipal electric utilities.

III.

The Proposed Rule Encompasses One Subject and Sets Out Existing Sections of the Rules to Be Amended

12. The Cities contend that the proposed rule violates Section 120.54(8), Florida Statutes (1981), by containing more than one subject and by failing to set out fully the rule being amended. Section 120.54(8) provides:

> Each rule adopted shall contain only one subject . . . No rule shall be amended by reference only. Amendments shall set out the amended rule in full in the same manner as required by the constitution for laws.

13. These requirements for the adoption of rules are analagous to the requirements for the enactment of laws. Article 3, Section 6 of the Florida Constitution (1968) provides:

> Section 6. Laws.--Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title . . . No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection, or paragraph of a subsection. . .

The One-Subject Requirement

14. The constitutionally imposed one-subject requirement was discussed in State v. Lee, 356 So.2d 276 (Fla. 1978) at 282:

> The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter. E.g., Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (1930). This constitutional provision, however, is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. See State ex rel. X-Cel Stores, Inc. v. Lee, 122 Fla. 685, 166 So. 568 (1936). This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject which is briefly expressed in the title. Farabee v. Board of Trustees, 254 So.2d 1 (Fla. 1971); Rouleau v. Avrach, 233 So.2d 1 (Fla. 1969)
>
> The subject of a law is that which is expressed in the title, Rouleau, supra, at 4; Ex parte Knight, 52 Fla. 144, 41 So. 786 (1906), and it may be as broad as the legislature chooses provided the matters included in the law have a natural and logical connection. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969)

15. The proposed rule amends existing Rule 25-6.100, titled, Customer Billing, by adding a new subsection (7), titled, Franchise Fees. Existing subsections (1) through (5) specify the manner in which investor-owned utilities may bill their customers. Subsection (6) requires that they apply uniform billing practices to all customers on the same rate schedule. The proposed rule, subsection (7), establishes a classification system for billing customers

of all electric utilities for franchise fees levied by local government. The proposed rule embraces but one subject: the manner in which utilities may bill their customers for franchise fee costs. The subject of the rule which it amends is Customer Billing. The proposed rule is naturally and logically related to that subject.

16. In their posthearing brief, the Cities urge that the manner of franchise fee collection is a substantive requirement which would far better be included in ratemaking rules or in other portions of the Florida Administrative Code (petitioner's Memorandum of Law, p. 10). While the Commission could have placed the proposed rule elsewhere in the Florida Administrative Code, its choice to include it as part of the existing Customer Billing rule was a permissible one.

17. The courts accord the legislature wide latitude and will strike down only plain violations of the single-subject rule. State v. Lee, supra, at 282. Similar latitude should be granted administrative agencies when they exercise their quasi-legislative rulemaking function. Cf. Agrico v. State Department of Environmental Regulation, 365 So.2d 759, 762 (Fla. 1st DCA 1978). It is concluded, therefore, that the proposed rule does not violate the one subject requirement of Section 120.54(8).

The Requirement to Set Out an Amended Rule in Full

18. Section 120.54(8), supra, requires that rule amendments be set out in full in the same manner as required by the constitution for laws. See, Art. III, 6, Fla. Const. (1968). The constitutional requirement is satisfied "[i]f the statutory enactment is complete and intelligible in itself without reference to the act it purports to amend . . . ." Lipe v. City of Miami, 141 So.2d 738, 743 (Fla. 1962). Also, see, Auto Owners Insurance Co. v. Hillsborough Aviation Authority, 153 So.2d 722, 725 Fla. 1963):

> If the statutory enactment is complete and intelligible in itself, without the necessity of referring to the books to relate it to the amended statute in order to ascertain the meaning of the Amendment, then Article III, Section 16, supra, is satisfied. On the other hand, if the amendatory enactment is not a complete, coherent and intelligible act, or if it necessitates separate research and analysis of the statute which is being amended, it does not meet the requirements of Article III, Section 16, supra.

This constitutional requirement was designed

> . . . to prevent the enactment of amendatory statutes in terms so blind that the legislators themselves are sometimes deceived concerning their effect and the public fails to become advised of the changes made in the law because of difficulty in making the necessary examination and comparison. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905, 908 (Fla.l969).

Section 120.54 (8) must be given like effect.

19. Here, the Commission failed to set out in full the existing rule, Rule 25-6.100(A)-(6), which the proposed rule amends. However, when measured by the standards enunciated in Lipe, supra, and Auto Owners, supra, it is evident that the Commission's action satisfies Section 120.94(8). The proposed rule (amendment) is complete, coherent, and intelligible in itself, without reference to the rule which it purports to amend; separate research and analysis of the amended rule is uncalled for.

IV.

The Commission's Economic Impact Statement is Adequate

20. One step in rulemaking is the preparation of an economic impact statement ("EIS"). The EIS must include an estimate of the cost to the agency of implementing the proposed rule, an estimate of the cost or economic benefit to all affected persons, an estimate of the impact of the proposed action on competition, and a detailed statement of the data and methodology used in preparing these estimates. 120.54(2)(a), Fla.Stat. (1981). Thoughtful and detailed preparation of the EIS is required. Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238, 242 (Fla. 1st DCA 1981). The EIS serves to "promote agency introspection in administrative rulemaking. . .[to direct] agency attention to certain key considerations and. . .[facilitate] informed decision making." Florida-Texas Freight, Inc. v. Bawkins, 379 So.2d. 944 (Fla.1979).

21. A proposed rule, however, is not invalid simply because the attendant EIS is facially deficient or fails to address each of the factors required by the statute. Texas-Freight, Inc., supra, at 946; Plantation Residents' Association, Inc. v. School Board of Broward County, 424 So.2d. 879, 881 Fla. 1st DCA 1982):

> Such a standard would add a transparent technicality to the rulemaking process and would exalt form over substance. Id.

22. Even the complete absence of an EIS may be harmless error if it is shown that the proposed rule will have no economic impact or that the agency fully considered asserted economic factors and impacts. Division of Workers Compensation, Department of Labor and Employment Security v. McKee, 413 So.2d.805,806 (Fla. 1st DCA 1982). To prevail, the challenging party must show that the proceedings were rendered unfair or incorrect by an inadequate EIS, Plantation Residents' Association, supra; otherwise, the deficiency will be considered harmless error. Id; Florida-Texas Freight, Inc. supra; Polk v. School Board of Polk County, 373 So.2d. 960 (Fla. 2nd DCA 1979) at 962 ("The preparation of an economic impact statement is a procedural aspect of an agency's rulemaking authority. . . .Even though an agency has committed a procedural error, we must affirm the agency's action unless the error rendered the ruling unfair or incorrect.")

23. In the instant case, the Commission prepared one EIS, then another, before it adopted the proposed rule. The first EIS, dated October 28, 1981, was prepared when the proposed rule, in its original form, was proposed for adoption. The Cities argue that this EIS is facially invalid because (1) it fails to describe the economic effects of the proposed rule on municipal electric utilities, and (2) it fails to specify, in sufficient detail, the

methodology used in its preparation. No extrinsic evidence was presented to prove its inadequacy.

24. The first alleged defect lacks merit, since the EIS implicitly describes the effects of the proposed rule on municipal electric utilities:

> Electric . . . .utilities currently follow the practice of confining franchise fee collection to the area in which it is assessed. No substantial changes are expected for these companies. 8/

25. But the second alleged defect has merit. The EIS fails to describe in detail the data and method used in its preparation. The description which it provides lacks detail and is, obviously, incomplete:

> Data on the telephone industry was supplied by the Communications Department

Id. No mention is made of the method or data used in estimating the impacts on electric utilities.

26. The Commission's staff, apparently recognizing this deficiency, prepared a second (or revised) EIS on July 16, 1982. This revised EIS was circulated to affected persons, including municipally-owned electric utilities, for their comments prior to its submittal to the Commission, and prior to the Commission's adoption of the proposed rule on September 20, 1982. No comments were received concerning the revised EIS--a detailed document which specifically addresses each factor listed by the statute. Its adequacy is not challenged here. The Cities simply contend that the second EIS cannot, as a matter of law, cure any defects in the first.

27. This contention also lacks merit. The Commission's revision of the original EIS convincingly shows that it engaged in the very introspection which the statute encourages. Prior to adoption of the proposed rule, it turned its attention to, and affirmatively considered, the relevant economic factors and impacts. Division of Workers Compensation, Department of Labor and Employment Security, supra.

28. Furthermore, no showing has been made that the Commission's inadequate description of methodology used in Preparing its first EIS was prejudicial to the Cities or rendered the Commission's action unfair or incorrect. Plantation Residents' Association, supra. The defect in the first EIS, later cured, must therefore be considered harmless error. Id. Accordingly, it is concluded that the Commission's EIS, as subsequently revised, is adequate and satisfies the requirements of Section 120.54(2).

Based on the foregoing, it is

ORDERED:

That the Commission's proposed rule 25-6.100 (7) constitutes a valid exercise of delegated legislative authority, and that the Cities' amended petition seeking to invalidate the proposed rule is DENIED.

DONE and ORDERED this 8th day of April, 1983, in Tallahassee, Florida.

R. L. CALEEN, JR.
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of April, 1983.

ENDNOTES

1/ Exhibits appended to the stipulation, which are referred to in the findings of fact, are incorporated as though fully set out herein.

2/ See Appendix A to Joint Notion for Disposition of Amended Petition on Stipulated Facts.

3/ See Appendix B to Joint Motion for Disposition of Amended Petition on Stipulated Facts.

4/ See Appendix C to Joint Motion for Disposition of Amended Petition on Stipulated Facts.

5/ See Appendix E to Joint Motion for Disposition of Amended Petition on Stipulated Facts.

6/ See Appendix F to Joint Motion for Disposition of Amended Petition on Stipulated Facts.

7/ See Appendix G to Joint Motion for Disposition of Amended Petition on Stipulated Facts.

8/ See Appendix B to Joint Motion for Disposition of amended Petition on Stipulated Facts.

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