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Public Utilities: Florida's Dual System of Regulation--A Denial of Adequate Protection to Some Consumers

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not all, states have long had class action remedies,[48] although perhaps not as efficient and workable as the federal rule.

The Court's decision is not only correct, but it also represents a wise policy choice that might effectively be used in the future to question the entire range of diversity jurisdiction. If the federal courts merely sit as state courts in diversity cases and apply state substantive law, what is the purpose of this duplication of jurisdiction? Federal intervention into diversity cases might be limited to instances where there is a state inadequacy. No such inadequacy has been shown to exist with class actions. Allowing aggregation of class members' claims in all circumstances to meet the jurisdictional amount would only add to an already overloaded federal court system.

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PUBLIC UTILITIES: FLORIDA'S DUAL SYSTEM OF REGULATION —A DENIAL OF ADEQUATE PROTECTION TO SOME CONSUMERS

Storey v. Mayo, 217 So. 2d 304 (Fla. 1968)

Petitioner sought review of an order issued by the Florida Public Service Commission approving a territorial service agreement between an electric utility owned and operated by the city of Homestead, and a privately owned public utility, Florida Power & Light Company. Prior to the agreement, petitioner, who resided outside the municipal limits of Homestead, was a customer of the Florida Power & Light Company. As a private utility, Florida Power & Light was subject to regulation by the commission.[1] By the terms of the service area agreement approved by the commission, petitioner was forced to accept service from the municipal utility, which by statute is exempt from regulation by the commission.[2] Petitioner contended that the challenged agreement was contrary to public policy, in restraint of trade, and was a denial of due process and equal protection. The Florida supreme court HELD, that the agreement, designed to avoid expensive competitive activity outside the municipal limits, was valid, and that the commission's approval was a proper exercise of the state's power to protect utilities from expensive competitive practices. Petition denied.[3] Justices Caldwell and Ervin dissenting.

48. 67 C.J.S. *Parties* §13 (1950); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399, 400 (1934).

1. FLA. STAT. §366.05 (1967).
2. FLA. STAT. §366.11 (1967).
3. 217 So. 2d 304 (Fla. 1968).

The fundamental obligations and rights of public utilities, established at common law, remain basically unchanged in most states today. Certain obligations are imposed upon public utilities because they are charged with a public interest.[4] Fundamental among these responsibilities is the obligation to serve that part of the public requesting service,[5] and to render such service without discrimination[6] and at reasonable rates.[7] This obligation is, of course, limited to the utility's service area. In return the common law recognized the right of the utility to protection from competition within its service area[8] and its right to charge a reasonable rate for the service rendered.[9]

The Florida Constitution of 1885 gave the legislature full power to enact laws necessary for the regulation of public utilities.[10] It was subsequently established that the legislature had the power to delegate this authority to an administrative agency,[11] and in 1947 the Florida Railroad and Public Utilities Commission was created.[12] This commission continued in effect until 1967 when the Florida Public Service Commission was created.[13] This later commission assumed the duties of its predecessor and was given the power to prescribe all rules and regulations reasonably necessary and appropriate for the regulation of public utilities.[14] In granting the commission this power the legislature declared the regulation of public utilities to be in the public interest and a proper exercise of the state's police power.[15] The legislature also expressed its intent that the powers of the commission be liberally construed for the accomplishment of the commission's purpose.[16] However, by expressly exempting municipal utilities from control of the commission the legislature impliedly endorsed a system of dual control[17] for the regulation of utilities within the state.[18]

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4. City of Gainesville v. Gainesville Gas & Elec. Co., 65 Fla. 404, 410, 62 So. 919, 921 (1913).

5. Messer v. Southern Airways Sales Co., 245 Ala. 462, 466, 17 So. 2d 679, 682 (1944).

6. Demeter Land Co. v. Florida Pub. Serv. Co., 99 Fla. 954, 966, 128 So. 402, 407 (1930).

7. Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552, 567 (4th Cir. 1950).

8. *Cf.* Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173 (1959).

9. Miami Bridge Co. v. Miami Beach Ry., 152 Fla. 458, 473, 12 So. 2d 438, 445 (1943).

10. FLA. CONST. art. 16, §30 (1885). This clause has been omitted from the constitution adopted in 1968, but such power has long been held constitutional as an inherent police power of the state, State *ex rel.* Wells v. Western Union Tel. Co., 96 Fla. 392, 395, 118 So. 478, 479 (1928). Additionally, FLA. CONST. art. 12, §10 (1968) provides that certain provisions of the 1885 constitution, including article 16, that are not inconsistent with the 1968 Constitution shall be retained as statutes.

11. Cooper v. Tampa Elec. Co., 154 Fla. 410, 412, 17 So. 2d 785, 786 (1944).

12. Fla. Laws 1947, ch. 24095, §1.

13. FLA. STAT. §350.011 (1967).

14. FLA. STAT. §366.05 (1967).

15. FLA. STAT. §366.01 (1967).

16. *Id.*

17. Dual control in the sense that the state, through the Public Service Commission, controls privately owned utilities while the municipalities control their own utilities free from state regulation.

18. FLA. STAT. §366.11 (1967). "No provision of this chapter shall apply in any manner

While the Florida supreme court has previously approved service area agreements between two regulated utilities,[19] the present decision is the first concerning the validity of an agreement between a regulated and a nonregulated utility. There is no express statutory authority for the commission's approval of such agreements.[20] The commission has, however, express authority to order improvements and extensions of service.[21] The commission has taken the position that any service area agreement would limit this power and would therefore be invalid without commission approval.[22] The courts have long upheld such implied powers in similar agencies[23] and have specifically upheld the commission's power to determine the validity of such agreements between regulated utility companies.[24] Florida Power & Light Company was thus bound to submit the agreement for commission approval before putting its terms into effect. The city of Homestead, however, expressly stated that it was not conceding commission jurisdiction over the operation of its utility.[25]

The weight of authority in the United States would hold such agreements invalid.[26] The justification for such a position is that such agreements are generally in restraint of trade and are contrary to public policy.[27] Even courts holding such agreements valid have admitted that both the agreement and the commission's approval are in derogation of the common law.[28]

The agreement in the instant case appears on its face to be in violation of chapter 542 of the Florida Statutes.[29] Nevertheless, the Florida supreme court, in *City Gas Co. v. Peoples Gas System, Inc.*,[30] interpreted this statute as not intended for literal application but as designed only to prevent undue or unreasonable restrictions upon free competition. The court further indicated that only those agreements that permit price and production control are undue restrictions on trade. In the instant case the court alludes to *Peoples Gas* and seems to follow its reasoning. *Peoples Gas* held that the two utilities could not control prices or production because of their regulation by the commission, and upheld a similar service area agreement. There is, however, one major distinction between the cases. *Peoples Gas* dealt with two regu-

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to utilities owned and operated by municipalities, whether within or without any municipality . . . ."

19. *E.g.*, City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965).

20. 217 So. 2d 304, 308 (Fla. 1968) (dissenting opinion).

21. FLA. STAT. §366.05 (1967).

22. City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 436 (Fla. 1965).

23. *E.g.*, State *ex rel.* Wells v. Western Union Tel. Co., 96 Fla. 392, 118 So. 478 (1928).

24. City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965).

25. 217 So. 2d 304, 307 (Fla. 1968).

26. *E.g.*, Montana-Dakota Util. Co. v. Williams Elec. Cooperative, Inc., 263 F.2d 431 (8th Cir. 1959).

27. Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409-10 (1889).

28. Ohio-Midland Light & Power Co. v. Columbus & S. Ohio Elec. Co., 123 N.E.2d 675, 678 (C.P. Ohio 1954).

29. FLA. STAT. ch. 542 (1967) prohibits restrictions in trade and commerce of any article or service. No exception is made for utility companies.

30. 182 So. 2d 429 (Fla. 1965).

lated utilities, while in the principal case only the privately owned utility was subject to commission regulation. *Peoples Gas* held that approval of the agreement by the commission had the effect of an order binding upon both parties. The consumers affected by the agreement were still protected by the commission's regulation of both companies. Such is not the effect in the instant case.

Florida's system of dual control has resulted in petitioner's forced acceptance of service from a utility over which neither he nor the state regulatory commission has any direct control. It has been said that since the people themselves own the municipal utility, no regulation by the commission is necessary.[31] However, when the consumer is not a resident of the municipality that owns the utility, this reasoning is inapposite. While consumers within the municipality exercise some degree of control over the operation of the utility,[32] nonresident consumers have no controls.

Approval of the agreement has deprived petitioner and a substantial number of other consumers of electricity produced by the Florida Power & Light Company. Injury to the public from deprivation of the restricted parties' industry is a primary reason for holding such agreements void as against public policy.[33] Because of the system of dual control, Florida Power & Light was forced to enter the agreement to secure for itself one of the basic public utility rights, that of protection from competition within its service area. The city, while possessing a monopoly within its corporate limits, is also free to serve consumers outside those limits. Such service and the resulting competition with Florida Power & Light led to the instant agreement. Approval of the agreement bound Florida Power & Light to furnish service to consumers within its designated area.[34] The city is not so bound to consumers within its area. The city cannot be compelled to furnish service to those consumers except upon approval by city authorities.[35] While approval exists in the instant case, it is clear that city authorities have the power to withdraw it.[36] Petitioner's legal recourse in such a case would be an appeal to the same authority that had previously refused such service.[37] Because of the commission's inability to regulate the municipal utility, the petitioner is left virtually unprotected and in a position possibly even less favorable than that of other customers served by the municipal utility.[38]

The principal decision goes beyond that of *Peoples Gas* and raises serious doubts as to the wisdom of Florida's dual system of utility regulation. The petitioner is placed in an unfavorable position that would not be possible

31. City of St. Petersburg v. Carter, 39 So. 2d 804, 806 (Fla. 1949).
32. FLA. STAT. §172.02 (1967).
33. Gibbs v. Consolidated Gas Co., 130 U.S. 396 (1889).
34. City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965).
35. FLA. STAT. §172.06 (1967).
36. *Id.*
37. *Id.*
38. Long v. Town of Thatcher, 62 Ariz. 55, 153 P.2d 153 (1944), held that those persons residing outside the municipality but served by the municipality's electric utility were entitled to only "excess" power produced by the utility.