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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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City of Wetumpka

v.

Alabama Power Company

Appeal from Elmore Circuit Court
(CV-17-41)

PARKER, Chief Justice.¹

The City of Wetumpka ("the City") sued Alabama Power Company ("Alabama Power") in the Elmore Circuit Court, because Alabama Power had refused to relocate overhead electrical

¹This case was originally assigned to another Justice on this Court. It was reassigned to Chief Justice Parker on April 18, 2019.

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facilities located within the City's downtown area at Alabama Power's expense. The circuit court dismissed the case, finding that it was within the exclusive jurisdiction of the Alabama Public Service Commission ("the PSC"). We agree; the City challenges the service regulations of the PSC, and the PSC has exclusive jurisdiction to adjudicate such challenges. Accordingly, we affirm.

I. Facts and Procedural History

In 2014, the City adopted a Downtown and Riverfront Revitalization Plan ("the plan"), which covered seven blocks of downtown Wetumpka ("the project area"). The plan proposed relocating overhead utilities either underground or to secondary streets and alleys and estimated the cost of the relocation to be \$350,000. On April 17, 2017, the City council adopted Ordinance No. 2017-2 ("the ordinance"), which provides: "[O]verhead facilities used for the transmission or distribution of electric power of 15,000 volts or less and for communications, street lighting, and cable television services shall be prohibited [in the project area] and ... all utility companies having such services in said locations shall relocate them underground or elsewhere."

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On May 2, 2017, the PSC amended Alabama Power's Rules and Regulations for Electric Service, prohibiting Alabama Power from bearing utility-relocation costs. The amended regulation ("the costs regulation") provides:

"A Local Entity shall compensate the Company as follows for costs incurred by it when the Local Entity, through application of a Requirement, directs the Company to ... convert an existing distribution or transmission facility from overhead to underground ... [or] relocate or modify an existing distribution or transmission facility The Company shall not alter the design, configuration or location of its transmission or distribution facilities at Company expense except as consistent with ... these service regulations."

The next day, Alabama Power received from the City a notice of required relocation directing it to comply with the ordinance. The notice stated:

"A relocation of your company's facilities is required for the construction of the above referenced projects.

"... [T]he facilities in question have been determined to be located within the public right-of-way. Consequently, the City of Wetumpka is prohibited by law from reimbursing your company for the cost that will be incurred."

Alabama Power replied that it could not "move forward with the relocation work until the City accepts responsibility for the

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associated costs." Alabama Power estimated the cost of the relocation work at about \$4.2 million.

The City responded by suing Alabama Power and other utility providers in the Elmore Circuit Court, seeking a judgment declaring that the ordinance was valid and that the utility providers were responsible for the costs of relocating their facilities in accordance with the ordinance. Alabama Power moved to dismiss the case against it for lack of subject-matter jurisdiction, arguing that the PSC had exclusive jurisdiction over the case. The circuit court granted Alabama Power's motion to dismiss it as a defendant and certified its order as a final judgment under Rule 54(b), Ala. R. Civ. P. The City appeals.

II. Standard of Review

"A ruling on a motion to dismiss [for lack of subject-matter jurisdiction] is reviewed without a presumption of correctness. This Court must accept the allegations of the complaint as true. Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail."

Pontius v. State Farm Mut. Auto. Ins. Co., 915 So. 2d 557, 563 (Ala. 2005) (quoting Newman v. Savas, 878 So. 2d 1147, 1148-49 (Ala. 2003) (citations omitted)).

III. Discussion

The City contends that the circuit court erred in dismissing its action against Alabama Power because, it says, the circuit court had jurisdiction to determine the validity of the ordinance and the PSC lacked jurisdiction to interfere with the City's regulatory authority. Thus, the sole issue in this case is whether the PSC has exclusive jurisdiction over the City's action.

The PSC's exclusive jurisdiction is established by § 37-1-31, Ala. Code 1975:

"The rights, powers, authority, jurisdiction and duties by [Title 37] conferred upon the [PSC] shall be exclusive and, in respect of rates and service regulations and equipment, shall be exercised notwithstanding any rights heretofore acquired by the public under any franchise, contract or agreement between any utility and municipality, county or municipal subdivision of the state, and shall be exercised, so far as they may be exercised consistently with the Constitution of the state and of the United States, notwithstanding any right heretofore so acquired by any such utility."

Title 37 confers two types of jurisdiction on the PSC. First, the PSC has regulatory jurisdiction to set rates for utility service, to establish service regulations for utility providers, and to regulate utility equipment. See Taffet v. Southern Co., 967 F.2d 1483, 1490 (11th Cir. 1992). Second,

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the PSC has adjudicatory jurisdiction over certain disputes involving utilities, including claims "made against any utility ... by any body politic or municipal organization" to determine whether "any ... service regulation ... is in any respect unfair, unreasonable, unjust or inadequate." § 37-1-83. Under § 37-1-31, this adjudicatory jurisdiction is exclusive. And most significantly here, this jurisdiction applies to challenges to a "service regulation." § 37-1-83. "Service regulation" is defined as "every rule, regulation, practice, act, or requirement in any way relating to the service or facilities of a utility." § 37-4-1(9). Therefore, the PSC has exclusive jurisdiction over a municipality's challenge to rules, regulations, or practices relating to the service or facilities of a utility.

Although the City brought its action as a declaratory-judgment action seeking to enforce the ordinance, the action, as to Alabama Power, was in effect a challenge to the costs regulation. If an action against a utility provider necessitates a determination of the validity of a service regulation, the action is in effect a challenge to the regulation. See QCC, Inc. v. Hall, 757 So. 2d 1115 (Ala.

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2000). In QCC, the plaintiff sued to challenge a utility provider's practice of "slamming," or changing a customer's long-distance carrier without the customer's permission. We held that, because the plaintiff attacked a practice relating to the utility's service, which practice was a "service regulation" under § 37-4-1(9), her claim was in effect a challenge to service regulations and thus was within the exclusive jurisdiction of the PSC.

Here, in order for the City to have been successful in its claim that Alabama Power was responsible for the costs of relocating its overhead electrical facilities, the circuit court would necessarily have had to determine that the costs regulation was invalid. Therefore, the City's claim was in effect a challenge to a service regulation. Accordingly, the subject matter of the City's action was within the exclusive adjudicatory jurisdiction of the PSC.

The City contends that its action was within the circuit court's jurisdiction because, it contends, the City filed its action under the Alabama Declaratory Judgment Act, § 6-6-220 et seq., Ala. Code 1975 ("the Act"). In particular, the City relies on § 6-6-223: "Any person ... whose rights, status, or

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other legal relations are affected by a statute ... [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute ... [or] ordinance ... and obtain a declaration of rights, status, or other legal relations thereunder."

The City contends that this statute provides the circuit court jurisdiction over its action because the City sought a judgment declaring the validity of the ordinance and because the action raised questions of construction under Article XII, § 220, Ala. Const. 1901, and §§ 11-43-62 and 37-1-35(1), Ala. Code 1975. However, the City's reliance on the Act is misplaced.

To begin with, the Act simply does not address which of two alternative tribunals has jurisdiction over the subject matter of a controversy. The Act merely provides a remedy. See § 6-6-221, Ala. Code 1975 ("This article is declared to be remedial"). For example, in Bluemly v. Little, 632 So. 2d 1334 (Ala. 1994), this Court held that the Act did not grant the circuit court jurisdiction to declare an adoption void, because the probate court has primary jurisdiction over adoption proceedings. Similarly, in Love v. Rennie, 254 Ala.

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382, 48 So. 2d 458 (1950), this Court held that the Act did not give the circuit court jurisdiction to construe a will, because the probate court has jurisdiction over the probate of a will. Cf. Talton Telecomm. Corp. v. Coleman, 665 So. 2d 914 (Ala. 1995) (plurality opinion) (relying on the PSC's exclusive jurisdiction as basis for rejecting the argument that the Act relieved a party of the requirement of exhausting administrative remedies).

Likewise, here the Act does not address the subject-matter jurisdiction of the circuit court vis-à-vis the PSC. Therefore, the Act cannot be relied on to circumvent the exclusive jurisdiction of the PSC. To hold otherwise would be "'to construe the declaratory judgment act as conferring upon the [circuit] court jurisdiction of subject matter which it had not possessed theretofore.'" Bluemly, 632 So. 2d at 1336 (quoting Love v. Rennie, 254 Ala. at 389, 48 So. 2d at 465).

Further, the case the City relies on, Brogden v. Employees' Retirement System, 336 So. 2d 1376 (Ala. Civ. App. 1976), did not hold that the Act grants circuit courts jurisdiction over all cases seeking a declaratory judgment. In Brogden, the plaintiff filed a declaratory-judgment action

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in the Covington Circuit Court against a public corporation whose principal office was in Montgomery County. The corporation challenged the Covington Circuit Court's subject-matter jurisdiction, claiming that only the Montgomery Circuit Court had jurisdiction under the Act. The Court of Civil Appeals disagreed, holding that the Covington Circuit Court had jurisdiction because no statute restricted jurisdiction over the declaratory-judgment action to a particular county. 336 So. 2d at 1379-80. Notably, the Court of Civil Appeals did not hold that the Act granted all circuit courts jurisdiction over all declaratory-judgment actions. And here, unlike in Brogden, there is a statutory restriction on the circuit court's jurisdiction -- the grant in § 37-1-31 of exclusive jurisdiction over disputes regarding service regulations to the PSC. Accordingly, Brogden does not support the City's argument that the Act gave the circuit court jurisdiction here.

For these reasons, we conclude that the Act did not override the PSC's exclusive jurisdiction over the City's challenge to the costs regulation.

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The City also contends that the PSC lacked subject-matter jurisdiction as a result of the City's constitutional and statutory authority to regulate use of its streets and rights-of-way by utility providers. See Art. XII, § 220, Ala. Const. 1901 ("No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city ... for the construction or operation of any public utility ..., without first obtaining the consent of the proper authorities of such city"); § 11-43-62, Ala. Code 1975 ("The [city] council shall regulate the use of the streets for the erection of telegraph, telephone, electric, and all other systems of wires and conduits and may require the same to be placed underground if deemed necessary for the public convenience and safety and generally to control and regulate the use of the streets for any and all purposes."); § 37-1-35(1) ("Nothing in [Title 37 regarding public utilities and public transportation] is intended or shall be construed ... [t]o limit or restrict the police jurisdiction or power of municipalities over their streets and other highways and public places or the power to

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maintain or the power to require maintenance of the same
....").

The City relies on several cases that confirm that municipalities have certain regulatory authority that may not be infringed by the PSC. See Birmingham Elec. Co. v. Allen, 217 Ala. 607, 610, 117 So. 199, 202 (1928) (holding that the PSC "has no control" over municipalities' "exercise of legislative discretion"); Covington Elec. Coop. v. Alabama Power Co., 277 Ala. 162, 166, 168 So. 2d 5, 9 (1964) (holding that requiring a utility provider that has obtained from a municipality a franchise to construct electric lines to then also obtain permission from the PSC infringes on the municipality's regulatory authority); BellSouth Telecomms., Inc. v. City of Mobile, 171 F. Supp. 2d 1261, 1277 (S.D. Ala. 2001) (holding that municipality could require utility provider to obtain a permit without intruding on the PSC's exclusive jurisdiction). The City points out that the PSC itself has recognized municipalities' complete authority over their streets and rights-of-way. See Wilson v. Alabama Power Co., PSC order, No. 30528, Sept. 28, 2007 (municipalities

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"retain complete jurisdiction over their streets, highways, and other public places").

The City also cites decisions from other states for the proposition that a utility commission's regulatory authority over rates, service regulations, and equipment is subordinate to a municipality's authority to regulate utility providers' use of local streets and rights-of-way. See Northern States Power Co. v. City of Oakdale, 588 N.W.2d 534 (Minn. Ct. App. 1999); U.S. West Commc'ns, Inc. v. City of Longmont, 948 P.2d 509 (Colo. 1997); City of Edmonds v. General Tel. Co. of the Northwest, Inc., 21 Wash. App. 218, 584 P.2d 458 (1978). In each of those cases, the court concluded that a utility commission could not interfere with a municipality's authority to require relocation of utilities at the utility provider's expense.

The City's argument and supporting cases are ultimately inapposite, however, because they concern the merits of the City's challenge to the costs regulation. In other words, the City's argument attacks the PSC's exercise of regulatory jurisdiction as improperly interfering with the City's regulatory authority. The City's argument does not attack the

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PSC's adjudicatory jurisdiction to determine, in the first instance, whether the PSC's regulation has in fact so interfered.² And because this is solely a case about adjudicatory jurisdiction, the City's argument regarding the merits of the claim to be adjudicated will have to wait for another day in the appropriate tribunal.

IV. Conclusion

The City's action challenging the validity of the PSC's regulation prohibiting Alabama Power from bearing the cost of relocating its overhead electrical facilities in the City is within the exclusive adjudicatory jurisdiction of the PSC. Accordingly, we affirm the circuit court's dismissal of the City's action against Alabama Power based on a lack of subject-matter jurisdiction.

AFFIRMED.

Bolin, Shaw, Wise, and Mendheim, JJ., concur.

Sellers, J., concurs in the result.

Stewart and Mitchell, JJ., recuse themselves.

²Similarly, the Alabama Attorney General's advisory opinion to the City regarding utility-relocation costs, Op. Ala. Atty. Gen. No. 2017-025, which has been relied on by both parties at different points, addresses the issue of regulatory jurisdiction, not adjudicatory jurisdiction.