IN THE SUPREME COURT OF FLORIDA

UTILITIES COMMISSION OF THE CITY OF NEW SMYRNA BEACH, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	Case No. 64,147

ANSWER BRIEF OF APPELLEE

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General Counsel

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CITATIONS OF AUTHORITY

Citations of Authority Cont'd

DESIGNATION OF PARTIES

Appellant, the Utilities Commission of the City of New Smyrna Beach, will be referred to as "New Smyrna."

Appellee, Florida Public Service Commission, will be referred to as the "Commission" or the "PSC."

Cross Appellant, Save Our Services, will be referred to as "SOS."

Co-petitioner in the proceeding below, Florida Power and Light Company, will be referred to as "FPL."

Order 12277, which is the subject of this appeal, will be referred to as "the Order."

References to the transcripts of the hearing will be followed by the appropriate volume and transcript page number. (V. ____, Tr. ____). References to documents in the record are designated by the appropriate volume and page number. (V. ____, R. ____). References to exhibits submitted into evidence are designated by the appropriate volume and exhibit number. (V. ____, Ex. _____).

STATEMENT OF THE CASE

The Commission files this Statement of the Case because the Appellant's Second Amended Brief fails to include a complete statement of what has transpired in this case, as well as all relevant facts.

On April 30, 1979, Florida Power and Light Company (FPL) filed a complaint with the Commission requesting the resolution of a territorial dispute between it and the City of New Smyrna Beach. (V. 1, R. 1). The dispute involved service to two areas known as Smyrna West and Sandcastle. In its answer, New Smyrna claimed its right to serve the disputed area and in its counterclaim enlarged the dispute to include an additional area of 90 square miles surrounding the municipal limits. (V. 1, R. 7). Although New Smyrna withdrew its counterclaim, FPL later included the additional area in its claim. (V. 2, R. 230).

A prehearing conference was held before Commissioner Marks on March 23, 1981 in Tallahassee. The prehearing order, delineating the issues to be heard, was issued March 31, 1983. (V. 3, R. 512). The final hearing was held before Commissioners Gunter and Marks on April 2, 1981 in Daytona Beach. The Commission resolved the territorial dispute in Order 10300, issued September 18, 1981. (V. 3, R. 608). In that order, the Commission found, among other things, that: 1) there was no material difference in the rates charged by the two utilities; 2) with regard to generating capacity, FPL was the only system capable of expanding service in the disputed area within its own capabilities; and 3) FPL served 2700 customers in the disputed

area while New Smyrna served only 1300. Additionally, the Commission concluded that, while it was proper for a municipal electric system to provide service to non-resident customers where other service was not available or was impractical on a cost-of-service basis, it was not proper for a tax-subsidized municipal electric system to engage in unrestrained proprietary competition for non-resident customers with investor-owned utilities not having similar tax advantages. Accordingly, the Commission apportioned the disputed area among the parties with the majority of the non-municipal territory going to FPL.

On October 16, 1981, New Smyrna sought review of Order 10300 in this Court, Case No. 61,308. On April 16, 1982, after the initial and answer briefs were filed, New Smyrna filed its Petition for Order of Remand. The basis for the petition was that New Smyrna and FPL had reached a territorial agreement that would resolve the parties' earlier dispute. The territorial agreement, however, would have no force until approved by the Commission pursuant to Section 366.04(2)(d), Florida Statutes (1981). This Court issued its order temporarily relinquishing jurisdiction of the matter to the Commission for the purpose of allowing New Smyrna to petition for approval of the territorial agreement.

On July 19, 1982, New Smyrna filed its petition with the Commission. (V. 6, R. 618). The Commission recognized that approval of the territorial agreement would constitute agency action that may affect the substantial interests of persons not party to the proceeding. For that reason, the Commission gave notice of its intent to approve the territorial agreement. (V. 6,

R. 629). As provided by Rule 25-22.29, Florida Administrative Code, a request for hearing was timely filed by a group of citizens referred to as Save Our Services (SOS) on September 13, 1982. (V. 6, R. 627). SOS was opposed to the territorial agreement and its transfer, under the agreement, to New Smyrna. Acting under a misapprehension of administrative law relative to proposed agency action, New Smyrna filed its motion requesting the Commission to approve the settlement agreement. (V. 6, R. 640). That motion was denied by the Commission in Order 11199, issued September 23, 1982. (V. 6, R. 646). As a last resort, on October 4, 1982, New Smyrna sought a writ of mandamus from this Court that would have compelled the Commission to approve the territorial agreement. On November 17, 1982, this Court issued its order denying the petition for writ of mandamus without comment.

The Commission held a full evidentiary hearing on the question of whether to approve the territorial agreement. This hearing was necessary in order for it to properly complete agency action under the Administrative Procedures Act, Chapter 120, Florida Statutes, and because disputes of material fact were evident. The hearing was held before the full Commission on January 27, 1983 in New Smyrna Beach and was continued on March 4, 1983 in Tallahassee. At those hearings, the two utilities, as well as the intervenor, SOS, and the Commission Staff were allowed to present evidence and cross-examine witnesses. Public Counsel was also present to represent any additional public witnesses not represented by SOS. New Smyrna Beach and FPL stipulated to the record developed in the first hearing on the territorial dispute being included in the

record of this hearing. Based on over six volumes of record evidence in this matter, the Commission determined that approval of the territorial agreement would not be in the public interest. That decision was embodied in Order 12277, issued July 20, 1983. (V. 6, R. 711).

A petition for rehearing was filed by SOS on August 8, 1983 (V. 6, R. 715). Prior to the disposition of the petition, New Smyrna filed its notice of appeal with the Commission on August 19, 1983. (V. 6, R. 725). The Commission denied the petition for rehearing on October 12, 1983 in Order 12606. (Filed after index prepared).

Notice of Cross-Appeal was filed by SOS on October 24, 1983. On October 24, 1983, New Smyrna filed a Motion for Reassertion of Jurisdiction in Case No. 61,308. SOS then filed its Motion to Consolidate this case with Case No. 61,308. The Commission responded with its Motion to Dismiss Case No. 61,308. In support of its motion, the Commission explained that the case was moot in that the competing utilities were no longer in dispute. New Smyrna's Motion for Reassertion of Jurisdiction was granted. SOS's Motion to Consolidate and the Commission's Motion to Dismiss were both denied. SOS subsequently withdrew it's Notice of Cross-Appeal.

The instant appeal is limited to a review of Order 12277, which denied New Smyrna's petition for approval of the territorial agreement. New Smyrna filed its initial brief on January 10, 1984. On January 27, 1984, the Commission filed its Motion to Strike the initial brief based on various references to matters

outside the record. This Court granted that motion by order dated April 26, 1984. Pursuant to that order, New Smyrna filed its amended brief on May 14, 1984. However, New Smyrna failed to purge the brief of references to all matters outside of the record. The Commission filed its Motion to Strike Appellant's amended brief, which motion was granted by this Court on May 22, 1984. The Appellant filed its second amended brief on July 27, 1984. It is in response to that brief that the Commission submits this answer brief.

STATEMENT OF THE FACTS

On July 19, 1982, New Smyrna petitioned the Commission for approval of the territorial agreement entered into between it and FPL as a settlement of their earlier territorial dispute. The utilities were required, under Section 366.04(2)(d), Florida Statutes (1981), to submit the territorial agreement to the Commission for approval. As a basis for the request for approval, New Smyrna merely recited the procedural history of the dispute between the two competing utilities. (V. 6, R. 618). New Smyrna failed to allege that the agreement would further the public interest. This petition set the tone for the case in that it established that New Smyrna expected the Commission to give its rubber stamp approval of the agreement without any inquiry as to its substance. New Smyrna's viewpoint crystalized when the Commission did not summarily approve the territorial agreement. It was at that time that New Smyrna sought a writ of mandamus to force the Commission to approve the agreement. This Court refused to do so.

From the outset, the Commission has followed statutory guidelines that require reaching a decision that would be in the public interest. The Commission proposed to approve the territorial agreement based upon an initial review and issued its notice of proposed agency action. As required under Section 120.57, Florida Statutes and Rule 25-22.29, Fla. Admin. Code, the Commission provided substantially affected parties the opportunity to request a hearing prior to the decision becoming final. A group of 1300 concerned citizens, referred to as SOS, made such a

request and a hearing was held.

In the earlier hearing held to resolve the territorial dispute, several citizens intervened on behalf of FPL. These citizens resided outside of the city limits and did not want to receive service from New Smyrna. (V. 7, Tr. 30). The earlier group of citizens was not composed of all citizens substantially affected by the territorial agreement. Therefore, SOS was formed.

The territorial agreement relates to approximately 65 square miles. (V. 7, Tr. 132). The agreement proposed to include in New Smyrna's service area the South Beach area, as well as other territory not within New Smyrna's municipal boundaries. The South Beach area has historically been served by FPL. Under the agreement, New Smyrna would receive approximately 2,800 additional customers, which would result in a 25% increase in total customers for the utility. (V. 7, Tr. 118). According to the agreement, New Smyrna would pay one and one-half times replacement value new for all of FPL's facilities transferred to it pursuant to the agreement. The total cost of the transfer would be about $4.2 million. (V. 7, Tr. 133). This total included only the money actually paid to FPL and not any of the other costs that New Smyrna will incur to complete its plan to make the systems compatible. (V. 7, Tr. 140).

Mr. Canfield, the Chairman of the Utilities Commission of New Smyrna testified as to New Smyrna's decision to enter into the agreement. He explained that New Smyrna did not have written figures as to the actual facilities to be transferred under the agreement or the actual cost of the agreement. (V. 7, Tr. 81-82,

128). At the hearing, New Smyrna did not know the exact territory involved. (V. 7, Tr. 82). New Smyrna stated that it relied on its staff and the recommendations of the consulting firm of R. W. Beck in deciding to enter into the agreement. (V. 7, Tr. 89, 128). New Smyrna did not have a detailed study regarding FPL's system because New Smyrna did not want to perform an expensive study until the Commission first approved the agreement. (V. 7, Tr. 127, 151).

Only distribution facilities are to be transferred under the agreement. New Smyrna's overall investment per customer, in the absence of the agreement, was $1,200. According to the agreement, New Smyrna would be paying $1,500 per customer for FPL's distribution system alone. (V. 7, Tr. 173). New Smyrna attempted to justify the $300 difference on a cash flow basis assuming a 9% financing rate. (V. 7, Tr. 178).

A citizen's group, appointed pursuant to a resolution of the Utilities Commission, performed a study to determine the effects of expansion on New Smyrna. (V. 9, Ex. 23). The study concluded that expanding New Smyrna's territory would not be in the interest of New Smyrna's customers. (V. 7, Tr. 236). The group recommended a consolidation of existing services rather than expansion of the municipal utility's services as called for under the agreement. (V. 7, Tr. 239). The study stated that extension of service pursuant to the agreement would result in it being more costly for New Smyrna to serve all of its customers. (V. 7, Tr. 240). The study noted that 92.6% of New Smyrna's customers are satisfied with their service. (V. 7, Tr. 243).

New Smyrna's system currently operates at 4 KV or 23 KV, while FPL's system has a voltage of 13 KV. (V. 7, Tr. 125). If the agreement was approved, New Smyrna would initially have to integrate the FPL system into its system after the transfer of facilities. This would be done by stepping down its 23 KV system to be compatible with FPL's 13 KV system. (V. 8, Tr. 347). Moreover, New Smyrna presented testimony as to its plan to eventually convert the areas acquired from FPL to 23 KV. The reason for the conversion to 23 KV is the economics of electrical efficiency resulting from the reduction of line losses. (V. 8, Tr. 355).[1] However, the conversion that would result in a decrease in line losses may never be done in the South Beach area and will not be done immediately in the other areas. (V. 8, Tr. 352-353). The total cost to integrate the systems will be approximately $190,000 (V.10, Ex. 202), while the cost of materials to convert FPL's system to 23 KV will be $531,000. (V. 8, Tr. 358).

Data as to each utility's reliability established that each provided highly satisfactory service. In the period April 1979 through March 1981, New Smyrna's system was 99.99% reliable. (V. 4, Ex. 23). FPL's system operated at a reliability level of 99.94%. (V. 6, Tr. 711). Both utilities operate at such a high level of reliability, that the marginal improvement of five one hundreths of a percent is not worth the cost of the transfer.

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[1]Whenever power is transported over lines or through transformers there is some loss of power. (V. 8, Tr. 358).

The petitioning utilities failed to affirmatively establish that the agreement was in the public interest. The Commission had no choice but to refuse to approve the agreement.

POINT ON APPEAL

THE PUBLIC SERVICE COMMISSION COMPLIED WITH THE ESSENTIAL REQUIREMENTS OF LAW IN REJECTING THE TERRITORIAL AGREEMENT WHEN THE PARTIES FAILED TO DEMONSTRATE THAT THE AGREEMENT WAS IN THE PUBLIC INTEREST.

A. The Commission properly placed the burden of proof on the Petitioners, New Smyrna and FPL, to establish that the territorial agreement was in the public interest. New Smyrna and FPL failed to carry their burden.

The Commission gave notice of its intent to approve the territorial agreement submitted to it for approval by New Smyrna and FPL, subject to a request for formal hearing filed within fourteen days. Save Our Services timely filed such a request and a Section 120.57 hearing was held. The Commission properly treated the hearing as a de novo proceeding in which the petitioners, New Smyrna and FPL, had the ultimate burden of proof. New Smyrna and FPL failed to carry that burden in that they were unable to properly establish that approval of the territorial agreement would be in the public interest.

The Commission's tentative approval of the territorial agreement was not final agency action. Instead, the notice of proposed agency action was free-form agency action, preliminary in nature. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981). The request for hearing timely filed by SOS, pursuant to Rule 25-22.29, Florida Administrative Code, commenced a de novo proceeding under Chapter 120, Florida Statutes. Id. The purpose of the hearing was for the Commission to formulate final agency action, not to review action already taken. Capeletti Bros., Inc. v. Department of General Services,

432 So.2d 1359 (Fla. 1st DCA 1983); Florida Department of Transportation v. J.W.C. Co., Inc., supra.

In the J.W.C. Co. case, the petitioner, Department of Transportation, argued that once the Department of Environmental Regulation noticed its intent to issue a permit to the Department of Transportation, it no longer had to carry the burden of showing that it met the requirements for the permit. The petitioner argued that it was being forced to prove its case twice because a request for hearing was filed. The court disagreed and found that the applicant had to affirmatively establish its right to a permit and that the proposal to act on the part of the administrative agency did not change that burden. Id. The facts of the J.W.C. Co. case are analogous to the instant challenge.

New Smyrna claims that the provisions for hearing under the Administrative Procedures Act alters the basic principle as to burden of proof. Specifically, New Smyrna argues that once the Commission proposed to approve the territorial agreement, New Smyrna no longer had the burden to prove that the agreement would be in the public interest. As the J.W.C. Co. case establishes, there is no merit to New Smyrna's argument.

> In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.'

J.W.C. Co. at 788.

New Smyrna has cited to the Commission's decision in the Vero Beach case in Docket No. 800596-EU to support its theory. In that

order, the Commission approved a territorial agreement after a Section 120.57 hearing was held upon the request of affected persons who opposed the agreement. The Commission had earlier issued notice that it proposed to approve the agreement. As a basis for its final approval of the agreement, the Commission stated:

> We believe that our decision is in the best interest of all parties concerned. Our approval of the territorial agreement serves to eliminate competition in the area; prevent duplicate lines and facilities; prevent the hazardous crossing of lines by competing utilities; and, provides for the most efficient distribution of electrical service to customers within the territory.

In re: Application of Florida Power and Light Company and the City of Vero Beach for approval of an agreement relating to service areas, Docket No 800596-EU, Order 11580, issued February 2, 1983.

New Smyrna has misread the Commission's decision in the Vero Beach case. The Commission properly placed the burden of proof on FPL and the City of Vero Beach as it did in this case. As the Commission clearly noted in its order, the utilities satisfied their burden of establishing that it would be in the best interest of all customers to approve the agreement. The burden then shifted to the protesting customers to establish that approval of the territorial agreement would not be in the public interest. See Capeletti Bros., supra. In the Vero Beach case, the protesting customers failed to carry their burden. The factual distinction between the Vero Beach case and this case is that in this case the utilities did not initially satisfy their burden of establishing that approval of the agreement would be in the

public interest. Therefore, the Commission did not need to go any further.

Proposed agency action under the Administrative Procedures Act is similar to a show cause proceeding. In both, the agency indicates the action it is going to take and gives the parties an opportunity to present evidence to challenge the proposed action. In City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982), the City of Tallahassee brought a revised rate structure to the Commission for approval. The Commission issued a show cause order yet the City argued that it was the Commission that had to establish that the City's rate structure was reasonable. The Court stated:

> By issuing an order to show cause, the Commission is affording the City an opportunity to present evidence justifying its present rate structure and to prepare a record to rely upon in making a legal challenge to the Commission's final action should the City be dissatisfied with it. Therefore, it is proper for the City to have the burden of going forward with evidence in justification of its present practices.

City of Tallahassee, supra at 164.

The Court properly found that the burden was on the City, as it must also find here.

This case is not just the settlement of a lawsuit between private parties. Instead, the Commission's decisions are imbued with the public interest. Section 366.01, Fla. Stat. (1981). A petitioning party must affirmatively establish that the public interest will be served. The Legislature has given the Commission explicit authority to approve territorial agreements. Section

366.04(2)(d), Fla. Stat. (1981). New Smyrna's argument that any agreement submitted to the Commission should prima facie be approved because it will alleviate a potential territorial dispute would render the Commission's authority to approve territorial agreements meaningless because it would amount to a mere rubber stamp approval.

The cases cited by New Smyrna are irrelevant to the present controversy. A determination by a federal court whether to approve a settlement agreement entered into by the Department of Justice (DOJ) and the City of Miami relative to an employment discrimination suit is readily distinguishable from an administrative determination of whether a territorial agreement between two competing utilities would be in the public interest. In the case of United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), cited in Appellant's brief at 18, an agreement was reached by the federal department charged with seeing that the federal laws are enforced. As the appellate court noted, the fact that the government department was involved in the settlement agreement changed the tenor of the court's review. In the instant case, the Commission did not negotiate for and is not a party to the territorial agreement brought to it by New Smyrna and FPL, as was the DOJ. Instead, the final agreement was brought to the Commission for formal approval. This distinction is a substantial difference which renders the City of Miami, case inapposite to the instant determination.

Similarly, New Smyrna's cite to the case of Lotspeich Co. v. Neogard Corporation, 416 So.2d 1163 (Fla. 3rd DCA 1982), adds

nothing to its argument. The Lotspeich case merely states that a settlement agreement is subject to the same challenges to which an ordinary contract is subject. In other words, where it can be shown that a contract or agreement was procured by fraud, illegality, duress, undue influence, etc., it will not be enforced by the courts. Lotspeich at 1165. The same holding can be found in the case of Florida East Coast Railway Company v. Thompson, 111 So. 525 (Fla. 1927). Cited in Appellant's Brief at p. 18.

The Commission properly required New Smyrna and FPL to carry the burden of proving that their territorial agreement would be in the public interest. The fact that the Commission had earlier issued notice of its intent to approve the agreement did not alter the burden that the petitioning parties, New Smyrna and FPL, had to carry. New Smyrna and FPL failed to carry their burden of proof.

B. The Commission's decision not to approve the territorial agreement was based on the standards contained in Chapter 366, Florida Statutes, and was supported by reason and logic.

The Commission properly refused to approve the territorial agreement submitted to it by New Smyrna and FPL. After two lengthy public hearings, the Commission determined that approval of the territorial agreement would not be in the public interest. Order 12277 clearly states the standards relied upon by the Commission in its determination.

In its order, the Commission stated that it was to be guided by the mandates of Sections 366.04(2)(c), (d), and (e), Florida Statutes. Order at p. 2. (V. 6, R. 711). Those sections state:

> (2) In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperatives and municipal electric utilities for the following purposes: . . .
> (c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.
> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.
> (e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

Additionally, the Commission stated that it looked to its authority to require power reliability within a coordinated grid. Order at p. 2. (V. 6, R. 711).

> The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Section 366.04(3), Fla. Stat. (1981).

The factors contained in the statute outline the areas of inquiry that the Commission will focus on in determining whether

to approve a territorial agreement. The Commission looked to those factors in making its decision in this case. The statute indicates to the petitioning utilities what concerns should be addressed by a prospective application for approval of a territorial agreement. New Smyrna's contention that the decision to disapprove the territorial agreement was devoid of any standards ignores the criteria contained in Section 366.04, Florida Statutes, and the fact that the Commission looked to those criteria in making its decision.

New Smyrna cites to the case of ABC Liquors, Inc. v. City of Ocala, 366 So.2d 146 (Fla. 1st DCA 1979), Appellant's Brief at p. 25, to establish a definition of arbitrary action. That case deals with the validity of a municipal ordinance relating to the granting of licenses to sell alcoholic beverages. The City of Ocala had no standards or guidelines by which it determined whether a business should be licensed to sell alcohol. In fact, the decision was left to the complete discretion of the Mayor and the City Council. In the instant case, the statute provides the criteria to be used by the Commission in approving territorial agreements. The instant case is clearly dissimilar to the A.B.C. Liquors, case in that there were standards that guided the Commission's decision.

The appropriate test of whether agency action is arbitrary is found in Agrico Chemical Co. v. State, 365 So.2d 759, 763 (Fla. 1st DCA 1979), where the District Court of Appeal stated:

> An arbitrary decision is one not supported by facts or logic, or despotic.

The Commission's decision was clearly reasoned and supported by logic. New Smyrna has isolated the words "substantial benefit" and ignored the accompanying text of the order in claiming impropriety with the Commission's decision. In fact, the Commission found that the agreement, as regards South Beach, was simply a trade of FPL's facilities and customers for 1.5 times what it would have cost New Smyrna to replace those facilities at the time of the last hearing. Order at p. 3. (V. 6, R. 711) Moreover, the Commission found that the reliability benefits of the transfer were in actuality a marginal improvement from 99.94% to 99.99%. Order at p. 3. (V. 6, R. 711) Once a utility operates at that high a level of reliability, the change in five hundreths of a point is insignificant. Finally, the Commission reviewed the utilities' claim of $20,000 annual savings as a result of reduced line losses relative to the transfer of the South Beach area and discovered that the cost to achieve those savings would be in excess of $134,000. Order at p. 4. (V. 6, R. 711) The Commission concluded that the cost did not justify the savings under the agreement. The Commission's conclusion was based on a reasoned and logical approach to a review of the facts.

The party challenging the Commission's action on the ground that it is arbitrary must establish by a preponderance of the evidence that the agency abused its discretion. Agrico Chemical Co. v. State, supra. New Smyrna has clearly not carried its burden. The Commission employed the standards contained in the statute and lucidly explained the use of those standards in its order. Its decision was not arbitrary.

C. **The Commission's determination that approval of the territorial agreement would not be in the public interest was supported by competent substantial evidence.**

The Commission declined to approve New Smyrna's and FPL's territorial agreement because of its determination that the public interest would not be served. This determination was based upon the evidence presented at the two formal hearings. Particularly, the Commission stated:

> Although increased reliability and economic savings might result from the transfer of South Beach, we find that these potential benefits are too tenuous and distant and of insufficient quality and character to warrant the transfer of some 1200 FPL customers. Specifically, the projected increase in reliability is extremely marginal.

Order at p. 3. (V. 6, R. 711).

The Commission's conclusion that only marginal reliability benefits would result from the territorial agreement was based on the documentation provided by both New Smyrna and FPL. New Smyrna's witness Beckman provided a summary of electrical outages for the two year period from April 1, 1979 through March 31, 1981. (V. 4, Ex. 24). For that period, New Smyrna's system was 99.99% reliable. Evidence as to FPL's reliability in the area showed that service was complete to FPL customers 99.94% of the time. (V. 4, Ex. 23). Thus, the evidence established that both New Smyrna and FPL were providing highly satisfactory service.

In discussing the current cost to replace FPL's system in the South Beach area, New Smyrna's Witness Stevens spoke of the high quality of FPL's facilities.

MR. SHELL:

> Q Mr. Stevens, could you clarify something for us, please? I think you stated that the South Beach area had a really topnotch system out there, but apparently the system in Mission City[2] is somewhat different. Could you again explain the differences in those two systems, please?

MR. STEVENS:

> A Certainly I would, sir. The South Beach area has been built using all, being that it's much newer construction, it's using all of the latest standards. The majority of it is what we call armless construction. And if you will refer to sheet drawing No. 5, where it says armless primary at the top, three-phase construction, and also to No. 6. This is the latest style construction in the business today. It eliminates cross arms, it's more aesthetic, it's more eye pleasing, it's cheaper labor-wise, it's cheaper from construction costs. . . .

(Vol. 8, Tr. 368).

New Smyrna's emphasis on the desirability of purchasing FPL's facilities in the South Beach area also served to establish the quality of FPL's system and the potential for reliable service from FPL to the South Beach area.

Testimony was presented to establish that the territorial agreement would result in economic improvements that would benefit New Smyrna's customers. The claim by New Smyrna of an additional

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[2]The Mission City area is an area outside of the city limits of New Smyrna Beach that has been served by FPL and that would, under the territorial agreement, be served by New Smyrna.

benefit in the reduction of uneconomic line losses must be tempered by the realization that the benefit can result only if extensive, expensive changes are made to the South Beach and Mission City systems. (V. 8, Tr. 355). Line losses can result from the stepping up or stepping down of power between differing voltages or merely from transporting power. Because FPL's South Beach system is operating at a different voltage level than New Smyrna's system, the potential for line loss exists. Immediately after the agreement, New Smyrna's system would be operating at three different voltages levels: 4,000 volts, 13,000 volts, and 23,000 volts. (V. 8, Tr. 358). Thus, the need for the conversion.

MR. HENDERSON:

Q Okay. Now, you said the reason why you would be doing that is it would be more efficient to convert to a 23,000 system?

MR. STEVENS:

A I said yes, it would be for economic purposes, yes.

Q For economic purposes.

A Right.

Q That's not electrical efficiency, that's just the economics of the situation?

A Well, it's the economics of the electric efficiency, yes, sir. Line losses, load losses, whatever.

Q All right. So there will be an increase in the cost or there will be a cost associated with that increase in voltage, albeit amortized for the years?

A Yes, when it's converted over there will be some cost. But bear in mind, again, that we are not going in there today or tomorrow or the day the settlement

> agreement comes into effect and start converting this thing. We are going to-- it would be ridiculous to go spend money for a stepdown transformer bank and then turn around and convert the whole system. We don't physically have the people on the staff of the Utilities Commission to go into these areas and completely convert this thing overnight. That is why we would integrate it into the system and pick away at it as time permitted.

(Vol. 8 Tr. 355-356).

The system conversion for the reduction of line loss might not occur for another twenty years. (V. 8, Tr. 354). Moreover, the cost to convert FPL's system would be in excess of $531,000. (V. 8, Tr. 356). Consequently, the Commission concluded that any economic improvement to New Smyrna's system is remote and based upon great cost which overrides the benefit. This conclusion is supported by the record.

The evidence of record establishes that the residents of South Beach were receiving satisfactory electric service. The reliability of service in that area had been close to perfect for the previous two years and well within Commission standards. Acting in the public interest, the Commission found no basis for approval of such an extensive and costly transfer of customers and facilities as called for under the territorial agreement.

New Smyrna has asked this Court to reweigh the evidence. This Court's role is not to reweigh the evidence, Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976), but to determine whether the Commission's decision is supported by competent substantial evidence. Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983). The

Commission's decision was clearly supported by competent substantial evidence. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). New Smyrna has the burden of proving that the decision was an abuse of discretion. Citizens of the State of Florida v. Public Service Commission, supra. New Smyrna has not met this burden.

The Commission's decision not to approve the territorial agreement must be affirmed.

CONCLUSION

The Commission acted in accordance with the essential requirements of the law when it refused to approve the territorial agreement submitted to it by New Smyrna and FPL. The Commission properly placed the burden of establishing that the agreement would serve the public interest on the petitioning utilities. The fact that the Commission initially proposed to approve the agreement did not change the burden of proof. The Commission's decision was based on the criteria contained in the Florida Statutes and was supported by competent substantial evidence. Therefore, the Commission's decision must be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail this 20th day of August, 1984 to the following:

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