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STATEMENT OF THE CASE

This action traces its inception to a petition filed by Florida Power & Light Company on April 30, 1979, before the Florida Public Service Commission to resolve a dispute between itself and the Utilities Commission of the City of New Smyrna Beach over the right to provide retail electrical service to certain customers surrounding New Smyrna Beach. That case was tried, and a decision was rendered by the Public Service Commission in order number 10300 in September, 1981. An appeal was taken by the Utilities Commission of that decision on or about October 16, 1981, to this Court, case number 61,308. That appeal had seen the filing of initial briefs by Appellant and Appellee when the two parties got together and entered into a territorial settlement agreement. Ordinarily, a settlement agreement would render any pending action moot. However, in this particular instance, Section 366.04, Florida Statutes, provides that no territorial agreement is final without approval by the Public Service Commission. This Court was, therefore, requested to relinquish jurisdiction for the sole purpose of permitting the Public Service Commission to consider approval of the settlement agreement. On April 23, 1982, the PSC filed its motion to dismiss the appeal. This Court heard argument respecting dismissal of the appeal on Monday, June 21, 1982. At that time, this Court expressed concern that, if the view held by the PSC was correct, the parties to a proceeding of this nature would never be able to settle their lawsuit. On July 6, 1982, this court denied the motion to dismiss and temporarily relinquished

jurisdiction remanding the case to the Public Service Commission for consideration of the territorial settlement agreement.

On August 17, 1982, at the PSC's agenda conference, the two commissioners who had sat as triers of the facts in this case, Commissioners Marks and Gunter, voted to approve the settlement agreement and the vote sheet reflecting the PSC's consideration of the matter is appended hereto at Tab 1. The vote sheet stated as follows:

Recommendation that Order No. 10300 be rescinded and that the settlement agreement agreed to by the Utilities Commission of the City of New Smyrna Beach and the Florida Power & Light Company on March 12, 1982, be approved.

On August 30, 1982, the PSC issued its Order/Notice of Intent to Approve Territorial Agreement. A copy of that order is appended hereto at Tab 2. That order cited the continuing, long-standing policy of the PSC that:

Mutual agreements which resolve areas of service not incorporated within a written instrument have been and continue to be encouraged by this Commission as the preferred method of eliminating potential areas of conflict between utility systems. (Tab 2, page 2).

The order further stated:

We, therefore, believe that approval of Florida Power and Light Company and New Smyrna Beach's proposed settlement agreement is supported by the evidence of record and would be in the best interest of their respective customers. (Tab 2, page 2).

That order gave potentially affected customers in the service territories 14 days within which to file petitions for hearing on

the issues in the case and stated that, in the absence of such a petition, the order would become final and effective.

During the interim 14-day period, a petition for formal proceeding was filed by a group of affected customers. New Smyrna Beach, on October 4, 1982, feeling that the substantive issues involving service to the territory had already been the subject of extensive trial and that further proceedings would merely be redundant, unnecessary, and inconsistent with the order approving the agreement entered by the Public Service Commission, filed its Petition for Writ of Mandamus to this Court. That petition was subsequently denied on November 17, 1982.

The PSC held public hearings in New Smyrna Beach on Thursday, January 27, 1983, and again on Friday, March 4, 1983, to permit the customers impacted by the settlement agreement to be heard.

The final order respecting the territorial settlement agreement was entered by the PSC on July 20, 1983. A copy of such order is appended hereto at Tab 3. The Commission stated that it would approve the agreement if it were revised to exclude the transfer of the South Beach area and was resubmitted. New Smyrna Beach and Florida Power & Light were subsequently unable to agree to a modification of their settlement agreement that deleted the South Beach area; and on July 20, 1983, New Smyrna Beach filed its appeal to this Court of order number 12277, which disapproved the settlement agreement.

STATEMENT OF THE FACTS

This matter began as a litigated, territorial dispute between Florida Power & Light and New Smyrna Beach. When the case was settled and the Public Service Commission decided to have an additional hearing focusing on the settlement agreement, it incorporated by reference the record of the earlier proceedings, since that earlier record contained the substantive engineering data and other evidence and reports that evaluated the two systems in the disputed area.

Reference to pages of the initial trial record will be by the letters "(IR-\_\_\_\_)" with the appropriate page numbers in the blank space.

A. Mission City.

Mission City is contiguous to New Smyrna's city limits, lying in an area north of Highway 44 and south of and adjacent to areas known as Smyrna West and Sandcastle. It is a highly developed area consisting primarily of residential housing. It is urbanized, bordering on other, similar urban areas directly adjacent to it that are within the city limits. (IR-317).

Mission City is currently served by FP&L with a single distribution line, which starts at FP&L's Edgewater Substation seven circuit miles south. (IR-505). Since the power currently being supplied to the Mission City area by FP&L must travel some seven circuit miles from the Edgewater Substation to Mission City, a significant amount of line loss is incurred by FP&L in serving this area. (IR-505-07). FP&L's closest customer service

center is located 17 miles away in Daytona Beach. FP&L maintains no service center in the immediate vicinity of Mission City and is, therefore, forced to dispatch crews to Mission City from the town of Port Orange to the north or from the town of Edgewater to the south. (IR-378).

In contrast to FP&L, New Smyrna maintains an electrical substation with other backup systems immediately adjacent to Mission City, the result of such being that New Smyrna could provide more reliable and more energy efficient service to the area than can FP&L, i.e., it would not experience "line loss" to the extent experienced presently by FP&L (IR-506-07; see also R-Vol. V, Exhibit 22). The savings that would result from the avoidance of such line loss and through the use of New Smyrna's 23 KV service as compared to FP&L's 13 KV service is projected to be \$20,000 per year. (IR-504, 506-07). In addition to the superior distribution facilities available to New Smyrna for service to Mission City, New Smyrna has more conveniently located customer service facilities, with both its administrative offices and its service center being within a few minutes' drive of the Mission City area. (IR-378). Additionally, savings and efficiency will result if electric service in the Mission City area is consolidated with the water service already provided by New Smyrna to a portion of Mission City, in that one rather than two entities would perform utility hookups, servicing, meter reading, billing and collections. (IR-379-80).



B. South Beach.

The South Beach area (also referred to as Silver Sands and Bethune Beach) is between the Atlantic Ocean to the east, and the Intercoastal Waterway and the Indian River to the west and the City of New Smyrna Beach to the north. See, south section of map at Tab 4. South Beach is a residential area consisting of single-family dwellings, multi-family dwellings and high-density condominiums. It is an urbanized area and is contiguous to similar urbanized areas of New Smyrna Beach directly to the north. (IR-319, 320, 383).

FP&L currently services South Beach with electrical power while New Smyrna Beach provides the area with water and plans to provide sewage service. (IR-382). As was the case with Mission City, FP&L has no substation in the immediate vicinity of South Beach nor does it maintain customer service or other service centers in the area. (IR-372-73). The area is served with electricity by FP&L from its Edgewater Substation by way of a submarine cable under the Indian River. (IR-373). This is a radial feed and Florida Power & Light has no ability to provide backup service. (IR-373). When South Beach has experienced loss of service in the past, New Smyrna has provided the only backup service. (IR-373). In terms of customer service, customers who wish to deal personally with FP&L representatives would have to travel from South Beach through New Smyrna Beach almost directly past the Utilities Commission building to get to FP&L's administrative offices 17 miles to the north in Daytona Beach.

(R-589). Service personnel of FP&L who provide both routine and emergency service to the area are dispatched from either Edgewater to the south or Port Orange or Daytona to the north. (IR-378). These crews of FP&L have to pass within a short distance of New Smyrna's Smith Street Service Center in order to reach these customers. As is the case with Mission City, with respect to South Beach, New Smyrna has a 23 KV distribution system available, as compared to the 13 KV system maintained by FP&L. (IR-583). New Smyrna's power to the area directly to the north of and adjacent to the South Beach area is supplied by three high-capacity lines, two short submarine cables and a third high-capacity overhead line. (IR-373-74). Additionally, new Smyrna serves the beach with another low-capacity submarine cable. This is in sharp contrast to the single low-capacity submarine cable that FP&L uses to serve South Beach. (IR-373). New Smyrna already serves South Beach with water and plans to extend sewer services there. New Smyrna's administrative Service Center and its Smith Street Service Center, out of which routine and emergency services to the area are dispatched, are both located directly across the causeway in the city.

C. Smyrna West and Sandcastle.

Smyrna West is a subdivision which lies wholly within the city limits of New Smyrna Beach at the extension of Wayne Avenue. See, central section map appended hereto at Tab 4. Immediately to the east of Smyrna West is Sandcastle, which is also within the city limits and lies directly across the street from the

Fairgreen area of the City of New Smyrna Beach. Id. Smyrna West is a single-family residential housing development. Sandcastle is a high-density HUD housing development administered by the New Smyrna Beach Housing Authority similar to other HUD projects within the city administered by the Authority and served with electricity, water, and sewer by New Smyrna Beach. (IR-381-82). Both areas are highly urbanized and are located directly adjacent to other, similar urban areas within the city limits of New Smyrna Beach.

Pursuant to the request of developers of both Smyrna West and Sandcastle, New Smyrna currently provides both Smyrna West and Sandcastle with electric, water and sewer services. (IR-382). The existing electric utility customers in Smyrna West and Sandcastle are presently served from New Smyrna's Field Street Substation, which is in close proximity to these subdivisions. (R-Vol. V, Exhibit 22). In terms of providing customer service and rapid response to emergencies, New Smyrna is in a position to continue to render prompt service to its customers from its conveniently located Smith Street Service Center. Customers' savings will continue to accrue from the consolidation of electric, water and sewer services in a single entity.

FP&L maintains no electrical substation in the Smyrna West and Sandcastle areas nor does it maintain customer service or other service centers in such areas. FP&L's proposal would result in Smyrna West and Sandcastle being served out of a

substation in excess of seven circuit miles to the south in Edgewater. (IR-372). Under FP&L's proposal, service crews would be dispatched into the area from as far away as Port Orange or Daytona to the north and Edgewater to the south.

D. Corbin Park and Oliver Estates.

Corbin Park and Oliver Estates are located south of Highway 44. See, southeast section of map appended hereto at Tab 4. These areas are single-family residential areas and are currently developing rapidly. These areas are urbanized and adjacent to other, similar urbanized areas. Id.

Corbin Park and Oliver Estates have been serviced by New Smyrna since the early 50's. In mid-1975, FP&L sought to extend its service into these areas, cutting across fields and down country lanes coming up from the south for a distance of some 3300 feet from its nearest lines, on Esslinger Road. (R-Vol. V, Exhibit 27, EAA-104).

New Smyrna services these areas out of its Field Street substation and Smith Street Service Center. (R-Vol. V, Exhibit 22). Again, with respect to this area, FP&L maintains no substations or service centers in the vicinity. The area is also directly adjacent to New Smyrna's Glencoe Road Water Plant where facilities have been in operation since the 1920's. While New Smyrna does not currently serve the area with water, it is currently pursuing requests for water services from customers in these areas. (IR-382-83).

E. Sugar Mill.

The Sugar Mill area lies north of State Road 40A and east of I-95. See, central area map appended hereto at Tab 4. It is a highly-developed and urbanized area lying directly west of the city limits of the City of New Smyrna Beach. Sugar Mill is a luxury residential area consisting of condominium townhouses, single-family residences and a championship golf course. New Smyrna is currently the sole utility serving the area with electric service. (R-548). It is presently entertaining requests for water service. (R-548). Again with respect to Sugar Mill, FP&L has neither electrical substations nor service facilities in the area.

F. Extended Samsula area.

The extended Samsula area is bounded on the west by the intersection of State Road 40A and State Road 44 west of State Road 415 and extends north of State Road 40A and south of State Road 44. See, map appended hereto at Tab 4. Samsula and its surrounding area is a suburban area consisting of homes, small farms, an elementary school and a number of commercial enterprises.

New Smyrna has been the sole utility providing service to the Samsula area since 1937, a time when service to those customers was refused by FP&L, and has continually over a period of time improved and upgraded its service to the area. (IR-374). New Smyrna is in the process of converting the entire area to its highly-reliable 23 KV service. (IR-375). The only major

substation in the vicinity of Samsula is the one owned and manned by New Smyrna, the Smyrna Substation situated west of I-95. FP&L has no substations in the immediate vicinity, its closest substations being located in Port Orange to the north and Edgewater to the south. (R-393).

The extended Samsula area encompasses approximately twenty 3-phase customers (businesses, a school, and small farms). (IR-358). New Smyrna has provided three-phase service in the area for more than twenty years. In contrast, FP&L has no three-phase service in the vicinity, although it does supply some single-phase residential customers on the fringe of the Samsula service area. (IR-375). If the Commission order stands FP&L will have to build totally new facilities, duplicating the existing facilities of New Smyrna in this area.

The essential, superior backbone distribution system of New Smyrna Beach with its centrally located substations and convenient service center have not been a dispute in this case. That superiority is even acknowledged by the Public Service Commission at page 4 of its initial order which is appended hereto at Tab 5.

At the territorial settlement agreement hearings, New Smyrna Beach had produced witnesses on the following points. It had made a comprehensive inventory of the facilities of Florida Power & Light that were going to be acquired by New Smyrna Beach and effectively determined that the acquisition costs of those facilities was going to be \$3,951,281.00. (Vol. III, page 340;

Exhibit 202). Florida Power & Light had earlier estimated that it thought the acquisition costs would be in the neighborhood of \$3.6 million. (Vol. II, page 194). New Smyrna Beach also established that with its superior capacity there would be no loss in quality of service or reliability to the customers involved in the transfer; and as a matter of fact, those customers could legitimately expect an increase in both reliability and service. (Vol. III, page 350). New Smyrna Beach further established that there would be no economic burden placed on either its current customers or the customers acquiring service in New Smyrna Beach. After considering the acquisition of the facilities and the projected revenues they would generate, the revenues generated from the new customers would more than cover the entire cost of the acquisition and debt service. (Exhibit 203; Vol. III, page 389). New Smyrna Beach further proved that the residential customers affected would not have any negative impact in their rates of service. (Vol. III, page 394). It was further unrefuted evidence that, as far as quality of service and the cost of service was concerned, the customers affected by the transfer would benefit as well as the current customers of New Smyrna Beach. (Vol. III, page 396, 397, 414-416.

The Public Service Commission's final order in this case does not take exception to the evidence that shows that, if New Smyrna Beach were to serve the entire territory, quality of the

service would improve and costs to the customers involved would not increase.

In its current order rejecting the settlement agreement, the PSC indicated that it would approve the territorial settlement agreement with respect to all the territory in dispute with the exception of the South Beach area. Since it lacked the power to modify the contract between FP&L and New Smyrna Beach, it had to reject the entire settlement agreement. In discussing the reasons for its decision as expressed in its order of July 20, 1983, the PSC stated that:

[C]ustomers from South Beach . . . were highly satisfied with the quality of service they received from FPL and voiced a very strong preference for continuing to receive service from FPL. (Tab 3, page 3).

The PSC further stated that:

[T]here are no substantial economic, reliability, or safety benefits to be realized from the transfer of the South Beach area. (Emphasis added). (Tab 3, page 4).

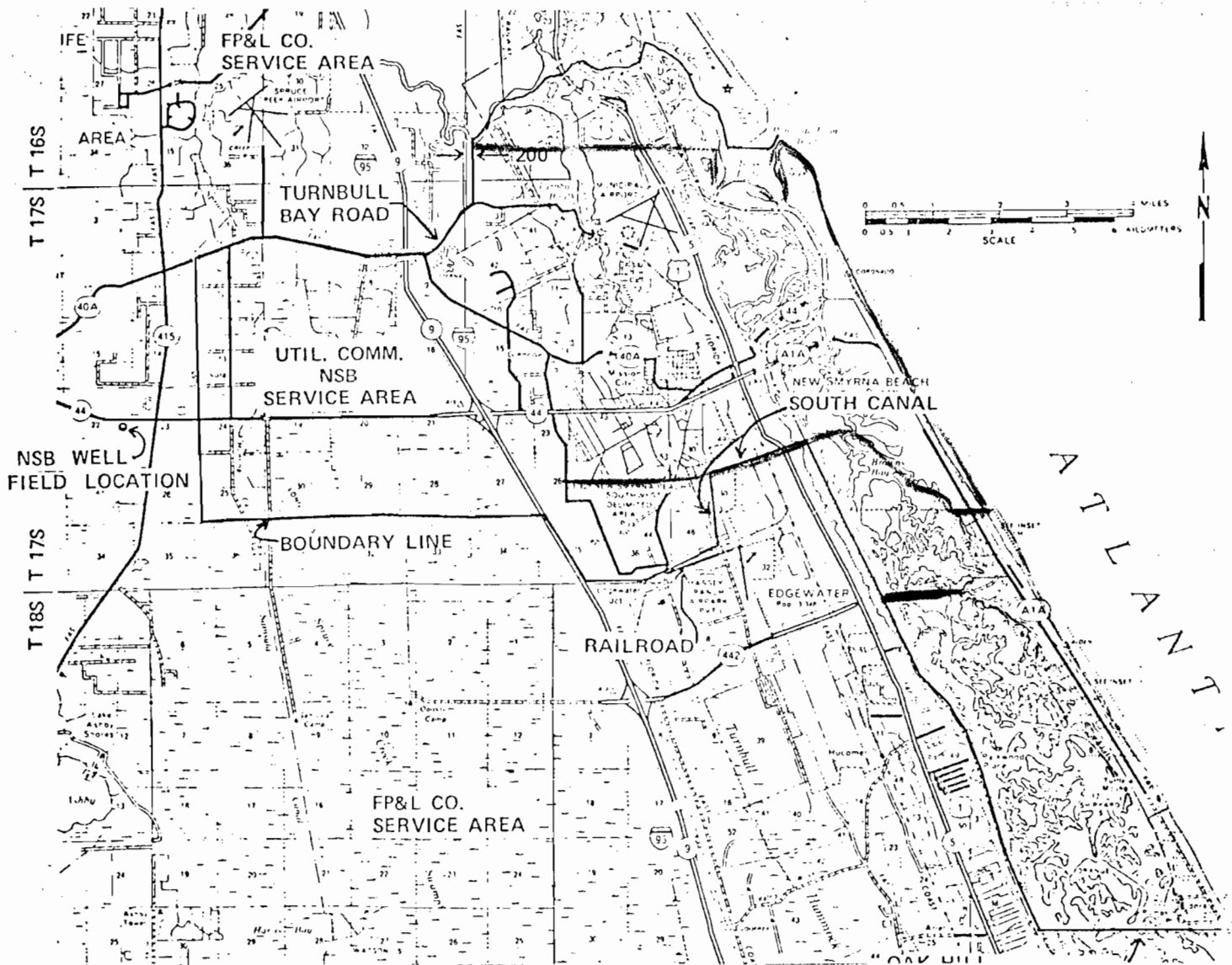
Since the PSC would approve the agreement respecting the remaining territory, New Smyrna Beach must assume that there are compelling economic, reliability, and safety benefits favoring New Smyrna Beach's service in the rest of the service territory.

Since service to the South Beach appears to be at the crux of the problem, New Smyrna Beach will direct the remainder of its Statement of the Facts to the South Beach area.

The South Beach consists of a narrow strip of land in the form of a peninsula consisting of approximately three square



miles of territory. It is bordered by the Indian River (intercoastal water) on the west and the Atlantic Ocean on the east and south. (IR-373). Its only contact with land is where it joins the City of New Smyrna Beach on its northern boundary. The following map gives the location of South Beach with respect to the rest of the town of New Smyrna Beach.



The South Beach area is highlighted in blue on the foregoing map and New Smyrna Beach is highlighted in red. It is at the point where the South Beach area and New Smyrna Beach meet that the two electrical systems contact each other.

South Beach is supplied with power by FP&L through a single, underwater cable lying beneath and across the Indian River (indicated by the green line on the map). (IR-382). The only backup power source for the South Beach area is provided by New Smyrna Beach, where the two systems connect at the northern border of South Beach. (IR-373). At times in the past when the service has been interrupted because of a problem with the underwater cable, New Smyrna Beach has supplied power to South Beach. (IR-373). FP&L currently services South Beach with electric power, while New Smyrna Beach provides the area with water and fire-hydrant service and is currently in the process of providing sewer service to the area. FP&L has no substation in the immediate vicinity of South Beach, nor does it maintain customer service or other service centers in the disputed area. (IR-372-73; 589). The area is served with electricity by FP&L from its Edgewater Substation by way of a single, submarine cable under the Indian River. (IR-373). This is a radial feed, which means that, if power is interrupted at any point on the line, from that point to the end of the line, service is interrupted and FP&L has no ability to provide backup services. (IR-373). When South Beach has experienced loss of service in the past, New Smyrna has provided the only backup service. (IR-373).

Customers who wish to deal personally with FP&L representatives have to travel from South Beach through the town of New Smyrna Beach, almost directly past the Utilities Commission building, and proceed to FP&L's administrative offices, some 17 miles north in Daytona Beach. Service personnel of FP&L who provide both routine and emergency service to the area are dispatched from either Edgewater to the south or Port Orange or Daytona to the north. (IR-589). These crews of FP&L have to pass within a short distance of New Smyrna Beach's Smith Street Service Center (pass over the causeway at New Smyrna Beach) and pass through the New Smyrna Beach service territory in order to reach the South Beach area. New Smyrna Beach supplies power to the area directly to the north of and adjacent to South Beach by three, high-capacity lines via two submarine cables and one overhead cable. New Smyrna Beach's customers are served with 23 KV voltage, where FP&L serves South Beach with 13 KV voltage. Evidence is that the 23 KV voltage would represent a savings, once the system is converted, of approximately \$20,000 per year. New Smyrna Beach also enjoys the significant advantage in reliability with fewer numbers of hours of its customers being out of service in a given year as compared to comparable customers of FP&L. Another factor relating to service in South Beach is that currently, customers have to deal with two utilities -- New Smyrna Beach for water and sewer and FP&L for electric service. If New Smyrna Beach were to serve the area, they would only have a single utility to deal with. (IR-382).

ARGUMENT

POINT ON APPEAL

A REJECTION OF THE SETTLEMENT AGREEMENT BY THE PUBLIC SERVICE COMMISSION BECAUSE THERE WOULD BE NO "SUBSTANTIAL BENEFIT" TO THE CUSTOMERS IN THE SOUTH BEACH AREA CONSTITUTED AN INCONSISTENT APPLICATION OF AN ARBITRARY STANDARD THAT WAS UNSUPPORTED BY THE RECORD.

INCONSISTENT APPLICATION

After this case had been remanded back to the PSC to permit it to consider the settlement agreement, on August 17, 1982, the two commissioners who sat as the triers of fact, Commissioners Marks and Gunter, announced that they approved the settlement agreement. An order followed on August 30, 1982, entitled Order/Notice of Intent to Approve Territorial Agreement. That order cited the long-standing policy of the PSC favoring settlement agreements as a preferred method of resolving disputes between utilities and also found that "the proposed settlement agreement is supported by the evidence of record and would be in the best interest of their respective customers." The order further stated that it would become a final, binding order unless affected customers protested within 14 days.

One of the most long standing and universally accepted legal principles is the one that stands for the proposition that settlement of disputes is favored by the law. The Supreme Court of the state of Florida has stated it thus:

It is the policy of the law to encourage and favor the compromise and settlement of controversies, when such settlement is entered into fairly and in good faith between competent parties, and is not procured by fraud or overreaching.

Florida East Coast Ry. Co. v. Thompson, 111 So. 525 (Fla. 1927).

Under most circumstances, parties to a lawsuit are free to reach a settlement at any stage during the course of litigation, and the court is not normally called upon to approve such settlements. However, there are instances in both state and federal courts where the settlement of disputes is not final until approved by the court. Even under those circumstances, the long standing maxim favoring and encouraging compromise and settlement is adhered to.

When courts are called upon to approve settlements, they have consistently held that those opposed to the settlement carry the burden of convincing the court to disapprove it. U.S. v. City of Miami, Florida, 614 Fed.2d 1322. Consistent with this view, the Court in Lotspeich Co. v. Neogard Corp., 416 So.2d 1163 (Fla. 3d DCA 1982), again confirmed the fact that settlement agreements are "highly favored in the law and will be upheld whenever possible" and further decided that those settlement agreements:

[S]hould not be invalidated or, as here, collaterally defeated by the court, unless there is (1) failure of the agreement to satisfy required elements for a contract, (2) illegality, (3) fraud, (4) duress, (5) undue influence, or (6) mistake.

Lotspeich Co. v. Neogard Corp., supra, at 1165. Even the Public Service Commission itself in its prior orders has indicated that it is the PSC's policy to favor settlement of disputes, and it has specifically stated that it is its policy to favor settlement of territorial disputes between electrical utilities. In the instant case in its initial Order/Notice of Intent to Approve Territorial Agreement entered on August 30, 1982, on page two the PSC states that:

Mutual agreements which resolve areas of service not incorporated within a written instrument have been and continue to be encouraged by this commission as the preferred method of eliminating potential areas of conflict between utility systems.

Great caution should be exercised before a court, be it circuit court or the PSC acting in its judicial capacity, rejects a settlement agreement. In those instances where court approval of settlement agreements is necessary, those who oppose the settlement agreement have the burden of showing why that settlement agreement should not be approved.

The status of the case at the time of the hearing on the settlement agreement was that New Smyrna Beach and FP&L had an order finding that the settlement agreement was in the best interest of the customers involved. Because of this, there was no stated or implied duty on the part of FP&L or New Smyrna Beach to defend the settlement agreement. Whatever burden of proof either Florida Power & Light or New Smyrna Beach had had been met. The PSC had evaluated the record and entered its

preliminary order finding that the settlement agreement was in the best interest of the customers. New Smyrna Beach was entitled to assume that, if the PSC were going to reverse itself, the protesting customers would have to carry the burden of proof to justify a reversal of the decision.

In similar cases, the PSC had placed the burden on the protesting customers. See, In re Application of Florida Power and Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Area, docket no. 800596-EU, order no. 11580, decided February 2, 1983. (A copy of that order number 11580 is appended hereto at Tab 6). In that case, the Public Service Commission had made a preliminary finding that a territorial agreement between Florida Power & Light and City of Vero Beach, whereby Florida Power & Light would obtain certain customers from the City of Vero Beach, was in the best interest of customers; and the PSC had entered its preliminary order approving that agreement, subject to any public hearing. Certain customers of Vero Beach did protest the transfer. However, the PSC rejected the argument of the protesting customers, pointing out that the customers "did not present evidence which would support reversal of the Commission's original decision" (Tab 6, page 1) and that the evidence presented by those customers did "not justify reversing our decision in this case as proposed in Order No. 10382 (their preliminary order)." (Tab 6, page 2). The burden of proving that the territorial agreement should not be approved was squarely placed on the affected customers, not

the utilities. Following precedent and being consistent, the burden should have been on those customers protesting the agreement sub judice to show why the settlement agreement should not be approved.

What burden, then, should those customers protesting the agreement have carried forward? They should have been required to demonstrate that they would be harmed by the settlement agreement -- to show that the quality of their service would suffer or that the reliability of their service would diminish or that economic hardship would be caused.

Instead of imposing such a burden on the protesting customers, the PSC in this case shifted the burden to New Smyrna Beach and FP&L. Even if it were proper to shift the burden to New Smyrna Beach and FP&L (which it was not), that burden should not have been one of demonstrating that the affected customers would not be harmed by the agreement.

To the surprise of New Smyrna Beach, the PSC not only shifted the burden of proof to New Smyrna Beach and FP&L but changed the burden. In its order, the PSC rejected the settlement because there was no "substantial benefit" to the customers located in the South Beach area resulting from the agreement. By finding that there was no "substantial benefit" to those customers in the South Beach area, the PSC has placed on New Smyrna Beach and FP&L the burden of showing that those customers will be "substantially benefited" by the settlement agreement. Stated another way, by its order, the PSC has



relieved the protesting customers of their obligation to show they will be harmed by the agreement and has required New Smyrna Beach and FP&L to affirmatively demonstrate not only that the customers will realize some benefit but that they will be "substantially benefited." This stood as a direct departure from the PSC's own policy of placing the burden of challenging such orders on the protesting customers. It also violates established law. See, Lotspeich, supra. If the PSC was applying the standard of "substantial benefit," FP&L and New Smyrna Beach had the right to assume that, when the PSC entered its initial order approving the settlement agreement and finding that it was in the best interest of the customers, it was making an initial determination that the customers would be "substantially benefited" by the agreement.

The PSC is under the same constraints that govern the actions of all administrative agencies when acting in their judicial capacities. The PSC is bound to apply the same standards to all litigants similarly situated. If they adopt a burden of proof in a given case, they are bound to apply that same burden in similar future cases. To do otherwise would be discriminatory. City of Pensacola v. Kirby, 47 So.2d 533 (Fla. 1st DCA 1950). As stated by the First District Court of Appeal in the case of ABC Liquors, Inc. v. City of Ocala, 366 So.2d 146 (Fla. 1st DCA 1950), at page 149:

Nevertheless the constitutional guaranty of equality before the law assures that every citizen, whether natural or corporate, be treated equally.

Consistent with Florida law, the PSC, in prior cases, required that those who opposed a territorial agreement carry the burden of showing why it should not be approved. See, In re City of Vero Beach, supra. Therefore, the PCS in the case sub judice was bound to place the burden of proof on the contesting customers. Instead, it shifted that burden to FP&L and New Smyrna Beach. This constituted inherently unequal treatment.

In other similar cases, the PSC has encouraged settlements and has indicated that they would be approved absent some showing that justified disapproval. In the instant case, the PSC has adopted a posture that discourages settlements by forcing the proponents of the settlement to affirmatively demonstrate some "substantial benefit" to the affected customers. The PSC is applying one standard to the instant case and another to all other similar cases.

#### ARBITRARY STANDARD

Even if the PSC could get away with shifting the burden of proof from the customers to New Smyrna Beach and FP&L, the standard that the PSC has chosen to apply is completely arbitrary and not capable of being reviewed by the appellate court. What in the world does "substantial benefits" mean? It is known from the unrefuted facts in the record that there will be some benefit to the customers in the South Beach area. New Smyrna Beach

suggests that the term "some" does not have a direct and definable meaning. It means more than none. (Webster's Dictionary). However, the PSC apparently is not satisfied with some benefit and has imposed the burden of establishing "substantial benefit." The term "substantial" implies a degree of benefit that is something more than "some," but how much? Two people viewing the same set of circumstances might have totally differing opinions as to whether a thing is "substantial" or not. Without a strict definition of the term "substantial" and guidelines and criteria for determining whether a set of facts conforms to the definition, the term is meaningless. Without such a legal frame of reference, the trier of fact will be forced to judge a thing to be "substantial" or "not substantial" based on purely personal preference. Such an act would be completely subjective. How could a court review such an act? Clearly, it could not. Without definitions and guidelines, the reviewer would be in no better position than would the trier of fact to determine whether something were "substantial" or not. Is that not the very position in which the parties find themselves in this appeal? Where is the term "substantial" defined? Where are the standards and criteria by which an evaluation can take place? What means did the PSC employ to determine that New Smyrna Beach and Florida Power & Light had not established that there was "substantial benefit" to the customers located in South Beach? How can this Court review whether the PSC erred in finding there was no "substantial benefit" to the South Beach area? It cannot

be done. The application to New Smyrna Beach and Florida Power & Light of this new standard directly conflicts with the PSC's obligation against arbitrary actions. The courts of this state have consistently warned that standards must be reasonable and uniform to cut constitutional mustard. As noted in ABC Liquors, Inc., supra, at page 149:

Any standard, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality.

The standard of "substantial benefit" is a classic example of what the court had in mind. It is inherently capricious and subject to whimsical application.

#### NO RECORD FOUNDATION

Admitting in advance that New Smyrna Beach has no greater insight than does anyone else as to what "substantial benefit" means, the following is a list of significant (and New Smyrna Beach feels perhaps substantial) benefits that the record establishes would be realized by the customers in the South Beach area as a result of the settlement agreement:

1. The South Beach area would be served by New Smyrna Beach through one overhead and two subterranean 23 KV cables, giving the South Beach far greater capacity and reliability than it currently receives by the single submarine cable with which FP&L currently serves it. (IR-373).

2. New Smyrna Beach customers suffer power outages that amount to 42 minutes per year, which would benefit the South

Beach customers who are currently FP&L customers and suffer power interruptions amounting to 302 minutes per year. (IR-Late Filed Exhibit No. 22).

3. New Smyrna Beach would respond to service requests and emergencies by dispatching crews from its Smith Street Service Center, which is located in New Smyrna Beach directly on the other side of the causeway, which is the only access across the Indian River. FP&L's service crews from Port Orange and Edgewater must pass through New Smyrna Beach territory to reach the South Beach area. This would constitute an improvement in service response time for South Beach customers. (IR-589).

4. The customers in South Beach currently receive water from New Smyrna Beach. Those customers currently have to apply to two utilities for their service. They apply to New Smyrna Beach for water and Florida Power & Light for electricity service. They will benefit from the agreement by being able to deal with a single utility, rather than being forced to deal with two, separate utility companies. (IR-373, 374).

5. Currently, South Beach customers who wish to personally discuss a matter affecting their service with a representative of Florida Power & Light have to travel to Daytona Beach, which is 17 miles away from South Beach. Those same customers would benefit from the settlement agreement by being able to drive directly across the causeway and into the town of New Smyrna Beach where Utilities Commission headquarters are located. (IR-373, 374, 378).

The benefits enumerated above strike New Smyrna Beach as being significant and substantial, but who knows?

The PSC's order cites customer opposition coming from the South Beach area. What was the nature and extent of this public outcry? A public hearing was held in New Smyrna Beach on Thursday, January 27, 1983, and continued in Tallahassee on Friday, March 4, 1983. At that time, any member of the consuming public was permitted to appear and be heard. It is interesting to note that, with respect to the South Beach area, only two public witnesses appeared. The first was George Ingram, who expressed concern that the customers in the South Beach area would incur additional costs if New Smyrna Beach took over service to that area. Those concerns were satisfied by Commissioner Cresse, who clarified for Mr. Ingram the fact that there would be no impact fee or any other additional charge for the customers in South Beach to connect to the New Smyrna Beach system. (R-Vol. II, pp. 251-252).

The only other witness from the South Beach area was Mr. Carlton C. Hooks, who was president of the Silver Sands Civic Association, representing a group of homeowners in a six-block area in the South Beach vicinity, whose chief concerns involved costs. He was concerned that they would be financially hurt by the Utilities Commission's taking over service to them. (R-Vol. II, pp. 284-287). The record clearly shows that the utility rates that would be paid by the residential users in South Beach were virtually the same for both Florida Power & Light and New

Smyrna Beach and that the acquisition of the facilities of New Smyrna Beach would not cause the Utilities Commission's rates to increase. The Commission's final order does not make any finding that there would be any adverse financial impact on the cost of service to any customer of the South Beach area if the settlement agreement were approved.

Neither of the witnesses from South Beach expressed any concern that the quality of electrical service provided to them would suffer. As a matter of fact, the only evidence in the record is that the quality of the service, in terms of reliability and response time, would be improved if New Smyrna Beach were to serve the South Beach area.

Even if customer preference were a rational and reasonable basis upon which the Public Service Commission should rely (which it is not), New Smyrna Beach does not feel that the appearance of two public witnesses (one being satisfied after he learned that there would be no additional impact fees charged by New Smyrna Beach and the other representing a six-block group of citizens) does not indicate any general groundswell of concern or opposition by residents in the South Beach area to approval of the settlement agreement. As a matter of fact, the low level of actual participation and concern by those people living in the South Beach area would indicate a majority of the people in that area would have no such objection. Since there was a general lack of civic concern expressed by the citizens of the South

Beach area, what else is there in the record that might explain PSC's position with respect to South Beach?

As incredible as it may seem, the PSC apparently found persuasive the argument that customers of an investor-owned utility (i.e., FP&L) should not be transferred to a municipal system unless there were compelling benefits to the affected customers!

In its final order rejecting the settlement agreement, the PSC departs from established standards and criteria and rejects the entire agreement based on the fact that:

[T]here are no substantial economic, reliability, or safety benefits to be realized from the transfer of the South Beach area from FPL to New Smyrna, we must disapprove the entire proposed territorial agreement because it is contrary to public interest. (Tab 3, at page 4).

As previously pointed out, this stands in sharp contrast to the recent approval by the Public Service Commission of the territorial agreement between the City of Vero Beach and Florida Power & Light. That case involved the transfer of customers from a municipal system, Vero Beach, to a "regulated utility," FP&L. There, the PSC found that the customers "did not present evidence which would support reversal of the Commission's original decision." It is also interesting to note in the Vero Beach, supra, decision that the basis for justifying the transfer of the customers from Vero Beach to the "regulated utility," FP&L, was to provide "the most economical means of distributing electrical service to all present and future customers in the area." (Tab



6, page 1). There is no question in the New Smyrna Beach case that New Smyrna Beach will provide the most economical means of distributing electrical service to the South Beach area. It is also interesting to note that the Public Service Commission in the Vero Beach case dismissed the customers' input with the following admonition:

An individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself. Tab 6, page 1.

Apparently, the PSC has adopted a heretofore unannounced policy that it will not approve the transfer of customers from a regulated, investor-owned utility such as Florida Power & Light to a municipal utility such as New Smyrna Beach unless the utility can show "substantial benefits" to the customers. Whether this is because of the PSC's feeling expressed in its earlier order that municipal electrical systems are engaged in proprietary competition with private, regulated utilities; or whether it is because of the PSC's dislike of the ability of a municipal electrical system to raise capital through tax-free, municipal bonds; or whether it is because of the philosophy that customers should not be transferred from an investor-owned utility to a municipal utility, it still adds up to a totally arbitrary decision based on personal prejudice.

New Smyrna Beach feels that this Court's decision in Storey v. Mayo, 219 So.2d 304 (Fla. 1968), is still the law of the state of Florida. Customers of an electrical system do not have any

organic, economic, or political right to service by a particular utility, even if they deem it in their best interest. Any expression of customer preference is irrelevant. Even if there had been a thousand South Beach electrical customers, rather than two, who appeared at the public hearing, all expressing a desire to remain the customers of Florida Power & Light, it should have absolutely no bearing on the outcome of the decision by the Public Service Commission. It does not matter that they would prefer to be served by Florida Power & Light nor does it matter whether they feel disenfranchised because they cannot vote for the members of the Public Service Commission who are appointed either.

If the customers, as in the case sub judice, are permitted to object to the settlement, their obligation is to present substantive evidence upon which the agreement should be rejected.

The customers have presented no evidence that refutes that service to the South Beach area would be improved if New Smyrna Beach provided the electrical service. The customers did suggest that New Smyrna Beach was making a bad economic deal in paying the price that it had agreed to pay for the facilities of Florida Power & Light. The evidence in the record clearly supports the fact that the revenue to be generated by the customers who would be acquired by New Smyrna Beach would more than offset the cost of acquisition by New Smyrna Beach. This conclusion is not challenged by the PSC. (Tab 3). In its final order, the PSC makes no finding that the customers in the South Beach area would

suffer any economic hardship because of increased rates or costs as a result of the transfer. The Commission's only finding was that, while the customers in the South Beach area would benefit from the transfer, they would not benefit enough.


The customers have offered no rational basis for claiming they would be prejudiced by the transfer. When, as in this case, customers will experience some benefit from the transfer in terms of quality, service, and reliability and will not experience any increase in cost, then one has to assume that their reasons for opposing the transfer are purely emotional and irrational. Perhaps there is some justification for the old saying that utility customers never like their own utility until someone tells them they are going to have to change.

#### CONCLUSION

Settlements are favored by the law. There is no substantive reason contained in this record justifying the denial of this settlement by the PSC. New Smyrna Beach and Florida Power & Light should be free to pursue an agreement that they feel is beneficial to themselves and the customers involved. There is no evidence indicating that the customers would be adversely affected by this agreement, and the PSC has made no such finding. Implicit in the Public Service Commission's order, which finds that there is no "substantial benefit" to the customers in the South Beach area, is the finding that, as to the rest of the areas involved, there would be "substantial benefit" to those customers. Also implicit in that order is the finding that, as

to the customers in the South Beach area, there would be at least some benefit. Customer preference is a totally inappropriate and legally insufficient basis upon which to reject the settlement agreement. The PSC's decision predicated upon a misapplication of the law and is contrary to the evidence. It should not be permitted to stand.

Respectfully submitted,

  
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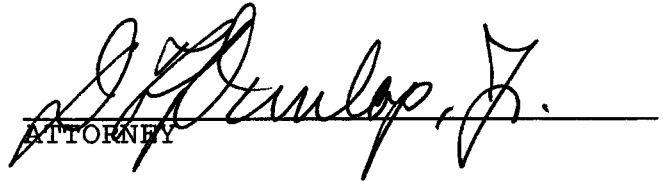
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Brief of Appellant has been furnished by regular United States Mail this 27<sup>th</sup> day of July, 1984, to the following persons:

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