IN THE SUPREME COURT OF FLORIDA

UTILITIES COMMISSION OF THE CITY OF NEW SMYRNA BEACH,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

CASE NO. 64,147

APPELLANT'S REPLY BRIEF

DAVISSON F. DUNLAP, JR., of
Pennington, Wilkinson & Dunlap
Post Office Box 13527
Tallahassee, Florida 32317-3527
(904) 385-1103

and

FREDERICK M. BRYANT of
Moore, Williams & Bryant, P.A.
Post Office Box 1169
Tallahassee, Florida 32302
(904) 222-5510

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

In its answer brief, the PSC argues that it made a factual determination that the proposed settlement agreement between New Smyrna and Florida Power & Light "would not be in the public interest." They suggest that this factual finding is supported by the record and therefore cannot be reversed. This argument fails for a number of reasons.

If one electrical utility attempts to acquire the retail electrical customers and territory of another utility against its will and through the judicial process, it certainly is logical that such an acquisition of customers and facilities should be based on a showing that it is "in the public interest." In that case, those statutory standards found in Section 366.04(e), Florida Statutes, would be applicable.

When two electrical utilities have made a determination that the exchange of territories and customers are in their mutual best interest and are in agreement regarding that transfer, the PSC is not faced with a situation in which one utility is trying to appropriate the customers, property and territory of another utility against its will. When there is agreement between the two utilities, the only interest that the Public Service Commission and the public at large could possibly have is to ensure that the transaction does not adversely affect the customers involved. As long as the affected customers are not in some way injured by the transfer, neither the PSC nor the public has any interest to protect. In the case at bar, there is no dispute in the record, nor was any finding of fact made by the

PSC, that the customers in the South Beach area or in any other portion of the territory would be adversely affected by the transfer. There simply is no other "public interest" that the PSC has a legitimate interest in protecting.

Unfortunately, neither the statutes nor any Florida case that New Smyrna Beach was able to locate defines the term "public interest" in this particular context. However, the highest appellate court in the State of Maryland has dealt with an analogous situation in the case of Electric Public Utilities Company v. West, 140 A. 840 (Md. Ct. of App. 1928). In that case, the Electric Public Utilities Company of the City of Baltimore was attempting to acquire four smaller electric companies. The Maryland statute stated that the transfer of any interest in one electrical company to another had to be approved by the Maryland Public Service Commission. The Maryland Public Service Commission refused to grant the transfers based on the fact that it was "not in the public interest" because there was no showing that the public was going to be benefited by the sale. That decision was reversed. On appeal the Court held that the Public Service Commission had misconstrued and misapplied the term "in the public interest." At page 844 of its opinion, the court had this to say. When electrical utilities are in agreement concerning the transfer

> It is not in their (PSC's) province to insist that the public shall be benefited, as a condition to change of ownership, that their (the PSC's) duty is to see that no such change shall be made as would work to the

> public detriment. "In the public interest" in such cases, can reasonably mean no more than "not detrimental to the public."

The Public Service Commission in the case sub judice has misconceived its obligation. As in Electric Public Utilities Company v. West, supra, the PSC's obligation is to ensure that there is no detrimental effect to the public by the transfer of the retail electrical customers from FP&L to New Smyrna Beach. That is the only legitimate interest that it has to protect. There is no evidence in the record that the retail electrical customers in the South Beach area will in any way be harmed by this transfer.

Assuming for the sake of argument that the PSC did have the right to go beyond a finding that the customers would not be harmed by the settlement agreement and could base their decision on a determination that the public had to be benefited in order for them to find that it was " in the public interest," that finding would still have to be based on evidence in the record. Clearly it is not.

This Court is reminded that the area in dispute consisted of six contiguous geographical areas. They were as follows: Mission City, South Beach, Smyrna West and Sandcastle, Corbin Park and Oliver Estates, Sugar Mill and the extended Samsula area. In its order at page 4, the PSC determined that since it could find "no substantial . . . benefits to be realized from the transfer of the South Beach area from FP&L to New Smyrna" it was going to disapprove the entire territorial agreement. The PSC

did say that, if the South Beach area were eliminated from the agreement, it would approve it with respect to the other five areas involved. Obviously, the PSC felt that with respect to the majority of the area the record established that there was a substantial benefit to the customers if the transfer were approved. Only with respect to the South Beach area did the Public Service Commission find that the agreement was "not in the public interest."

Since the statute fails to define what "in the public interest" means, New Smyrna Beach has given the subject some thought. What interest would any typical retail electrical utility customer located on the South Beach have that might be affected by the transfer to New Smyrna Beach? New Smyrna Beach suggests that the following is a list of those potential interests:

(1) The customers of South Beach would want to make sure that they would not have to pay more for their electrical services. The PSC has made no finding that the electrical rates for the customers on South Beach would be higher. As a matter of fact, such a finding would not be supported by the record.

(2) The customers on South Beach would have an interest in seeing that the service they were going to receive from New Smyrna Beach was just as reliable as the service they were getting from Florida Power & Light. The evidence is unrefuted that as a system, New Smyrna Beach has higher reliability than the system of Florida Power & Light. In addition, the

unchallenged evidence establishes that the South Beach area is served by Florida Power & Light with a single submarine cable underneath the Indian River and that New Smyrna Beach would serve the South Beach area with adjacent land lines, significantly increasing the reliability of service to the area.

(3) The customers would have an interest in insuring that the emergency response time is not slower for New Smyrna Beach than it is for FP&L. The evidence in this record is clear that New Smyrna Beach's service centers are located much closer to the customers than are Florida Power & Light service centers from which it dispatches its trouble crews. Response time for New Smyrna Beach is faster.

(4) Finally, the utility customers might be concerned that they would be inconvenienced by the transfer. The evidence in this record shows to the contrary. The customers of South Beach currently have to go to Daytona Beach (some 12 miles away) if they need to personally consult anyone concerning their electrical service. Those same customers, if they were served by New Smyrna Beach, could merely go directly to downtown New Smyrna Beach. The customers currently pay their bills to Florida Power & Light for electrical service and pay New Smyrna Beach for their water. If New Smyrna Beach served those customers, they would only have to deal with one utility and could pay both electrical and water bills at the same time. The evidence is clear that the customers would not be in any way inconvenienced by the change to New Smyrna Beach.

Even with respect to the South Beach area, the PSC did not find that those customers would not be benefited to some degree. The PSC rejected the agreement because it did not feel the benefits that would be enjoyed by the South Beach area would be significant enough.

Specific findings of the PSC are found in its order on pages 3 and 4, and in its brief on pages 20-23. The first of those findings states that there are "marginal reliability benefits" that will result from the transfer. Here, the PSC argues that, even though the customers on the South Beach will benefit to some degree by increased reliability, the difference is only marginal. The system reliability figure that was cited by the Public Service Commission takes all of the customers of Florida Power & Light in the State of Florida, regardless of where they are located, and averages the amount of time that those customers are without service. That is where the 99.94 reliability figure comes from. It has nothing to do with whether or not the South beach area would have a more reliable source of power if that power were supplied by New Smyrna Beach. The PSC does not contest this fact. There are other distinct reliability benefits that would be realized by the South Beach area were the transfer to occur. The South Beach is supplied with power by FP&L through a single underwater cable lying beneath and across the Indian River (IR-383). The only back-up power source for the South Beach is provided by New Smyrna Beach where the two systems connect at the northern border of the South Beach (IR-373);

FP&L's single underwater submarine cable is a radial feed, which means that, if power is interrupted at any point on the line, FP&L has no ability to provide back-up services (IR-373); New Smyrna Beach would supply power to South Beach through the use of both land-based and submarine cables, which provide a tremendous margin of additional reliability to the South Beach area.

Next, the PSC argues that, although there are potentially significant line-loss figures to be realized by the acquisition of the South Beach area by New Smyrna Beach, these numbers are not significant and are too remote. Again, there is "some benefit," but not enough.

There is absolutely no evidence in the record that the payment by New Smyrna Beach to Florida Power and Light for the customers involved in this transfer will in any way cause any economic hardship on the customers involved through raising their rates. As a matter of fact, the PSC recognizes this to be the case. The only finding made by the Public Service Commission with respect to expenditures for South Beach is found at page 4 of its opinion, it says that New Smryna Beach would have to spend in excess of $134,000.00 to integrate South Beach within its system. The undisputed evidence in this record supports the fact that this expenditure is easily within the New Smyrna budget and that the transfer of customers and the revenue produced by those customers will more than offset this cost. There is simply no evidence in the record that the payment for those customers or the cost of converting those customers over to New Smyrna Beach

customers will in any way adversely affect the existing customers of New Smyrna Beach or the customers that are going to be acquired. The PSC makes no such finding and no such finding is justified by any evidence in this record.

The only other piece of "factual" evidence that is cited in support of this decision is mentioned not in the order of the PSC, but in its Statement of the Facts of the case at page 8. A group of laymen had been requested by the City of New Smyrna Beach to look into the question of expansion of various utilities including electric utilities. That citizens group had recommended, as general proposition, that the Utilities Commission should not expand its services beyond its city limits. However, that group was quick to admit that it was a group of laymen and that it had not specifically undertaken to evaluate the substance of the New Smyrna Beach and Florida Power & Light agreement.

The PSC does not argue with the fact that the Utilities Commission of New Smyrna Beach does enjoy significant system-wide advantages over Florida Power & Light in the retail distribution of electrical power to the customers in the entire disputed area, as well as South Beach.

Although the PSC does not define what it means when it uses the term "in the public interest," its order does shed some light on the standard that it feels needs to be applied in this situation. At page 4, the PSC states that it is rejecting the agreement because it finds that there are "no substantial . . .

benefits to be realized" by the transfer of the South Beach area from FP&L to New Smyrna Beach. By placing an obligation on FP&L and New Smyrna Beach to demonstrate that there was "substantial benefit" to the customers in the particular area of the transfer involved, the PSC has created a virtually impossible standard and burden on both utilities. If one takes the PSC's definition to its logical conclusion, it would preclude utility companies from voluntarily settling their disputes. In the situations where those affected customers have no loss of quality of service and no increased cost, the Public Service Commission could always find that the transfer was not "in the public interest" because those customers would not be benefited "enough" by the agreement. Once the PSC gets beyond the proposition that there is undeniably some benefit to the electrical customers involved in the transfer, the analysis becomes totally subjective. What some commissioners perceive to be of marginal benefit to the customers, other commissioners might feel is significant. When that type of purely subjective analysis forms the basis for any decision, that decision, by definition, becomes arbitrary and capricious.

Adding further to the problem is the PSC's insistence that New Smyrna Beach and FP&L had the burden of proof in this case. In support of that contention, the PSC characterizes its initial order approving the agreement as "free form agency action." In order to understand this issue, the Court is reminded that there were two hearings in this matter. The first was presided over by

Commissioners Gunter and Marks when this case was in the posture of a territorial dispute rather than a settlement agreement. After the settlement agreement had been reached by FP&L and New Smyrna Beach, the case was remanded back to the Public Service Commission. The original triers of fact, Commissioners Marks and Gunter, entered their Notice of Intent to Approve the Territorial agreement. Since there was a record, those Commissioners made findings of fact that the proposed agreement eliminates the duplication of service in the areas affected and that each utility would be better able to plan for and serve the expected rapid growth in the disputed area. They noted that the proposed territorial agreement would result in higher quality electrical services to the customers of both systems. They concluded that by saying that

> [W]e, therefore, believe that the approval of the Florida Power & Light 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.

That order further found that the settlement agreement "should be approved" and that it would be approved absent a petition opposing it. This order speaks for itself. It is issued by the two commissioners who have heard the evidence in this case. It makes a specific finding based on that record that the agreement is in the best interest of the customers involved and should be approved. Certainly, if any burden of proof existed at that point it lay with anyone opposing the agreement.

The cases that are cited by the Public Service Commission on this point are clearly distinguishable. In City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982), the Public Service Commission had issued to the City of Tallahassee an order to show cause as to why that city's surcharge should not be eliminated. Of course, anyone faced with such a show cause order would assume that it had the burden of going forward and demonstrating the viability of its surcharge. In that case, unlike the case at bar, there was no preliminary finding that the city's surcharge was acceptable. As a matter of fact, the show cause order constituted an opposite initial finding. Likewise, in the other case cited as authority by the PSC, the case being Florida Department of Transportation v. J. W. C. Co., Inc., 369 So.2d 778 (Fla. 1st DCA), the DOT had applied to the Department of Environmental Regulation for a permit to construct a complex source of air pollution, asserting in its application that the pollutants (in the form of automobile exhaust fumes along the proposed roadway) would not exceed permissible standards adopted by DER. Later, the Department of Transportation argued that since DER has issued a preliminary notice of intent to issue the permit, it did not have any burden of producing any evidence in support of that application. That factual situation stands in sharp contrast to that presented by FP&L and New Smyrna Beach. In its preliminary order of notice of intent to approve the territorial agreement, Commissioners Gunter and Marks had made specific findings based on an existing record that was before

them. No such record existed in the J. W. C. Co., Inc. case, supra.

In both of the cases cited by the PSC there was a finding that the relief being sought would harm the public. That is the reason it was against the "public interest." Reference is made to Florida Department of Transportation v. J. W. C. Co., Inc., case in which there was a specific finding by the hearing officer that there was a substantial possibility that the projected concentrations of pollution would exceed acceptable limits and that the public adjacent to the project would be harmed by it. Therefore, it was determined not to be in the public interest. In the case sub judice the customers would benefit.

CONCLUSION

The only burden New Smyrna Beach had was to demonstrate that there would be no adverse affect on the customers involved. The record is unchallenged on that point. Beyond that, the record is clear that the customers in the affected area would receive "some benefit" although the Public Service Commission did not feel that it would be benefited sufficiently by the transfer. New Smyrna Beach did not have an obligation as stated by the order of the Public Service Commission to show that there would be "substantial benefit" to the customers in the South Beach area or in any other disputed area in order to have the Public Service Commission approve this order. The PSC has inappropriately adopted the wrong standard and criteria in evaluating whether or

not to approve the settlement agreement between FP&L and New Smyrna Beach. Applying appropriate standards to this settlement agreement leaves the Public Service Commission with no choice but to approve the agreement. The decision of the Public Service Commission is not consistent with the law and should be reversed.

Respectfully submitted,

DAVISSON F. DUNLAP, JR., ESQUIRE
Pennington, Wilkinson & Dunlap
Post Office Box 13527
Tallahassee, Florida 32317-3527
(904) 385-1103

and

FREDERICK M. BRYANT, ESQUIRE
Moore, Williams & Bryant
Post Office Box 1169
Tallahassee, Florida 32302
(904) 222-5510

ATTORNEYS FOR APPELLANT

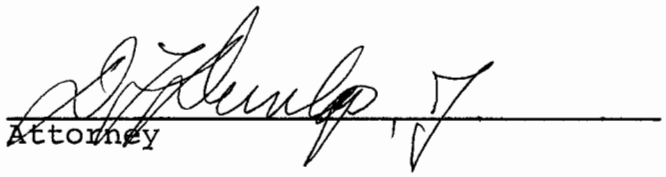
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished by regulare United States mail to the following persons on this 10th day of September, 1984:

WILTON R. MILLER, ESQUIRE
Attorney for Florida Power & Light
700 Barnett Bank Building
Tallahassee, Florida 32301

WILLIAM S. BILENKY, ESQUIRE
General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

WILLIAM CLAY HENDERSON, ESQUIRE
Attorney for Intevenors, SOS
Post Office Box 1840
New Smyrna Beach, Florida 32070-1840



Attorney