IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC COOPERATIVE, INC. Appellant, v. JOHN R. MARKS, et al., Appellees.	)	CASE NO. 68,346

BRIEF OF APPELLEE FLORIDA MINING AND MATERIALS CORPORATION

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PRELIMINARY STATEMENT

Appellant, Lee County Electric Cooperative, finds itself in an uncomfortable position.

Its effort to include documents and matters not properly the subject of this appeal as part of the record on appeal were first thwarted by the Clerk of the Florida Public Service Commission, who correctly decided he should be guided by Rule 9.200(a)(1), Florida Rules of Appellate Procedure, rather than Appellant's out-of-bounds designations.

Appellant then filed a motion to supplement the record in this proceeding. In its own motion, and again in its motion for an extension of time to file its brief, Appellant observed:

> "Appellant cannot make reference to matters in its brief which are not contained in the Record on Appeal. Pipp v. Pipp, 213 So. 2d 517 (Fla. 1st DCA, 1968)."

The Court properly denied the motion to supplement the record.

Appellant then proceeded to ignore both its own authority and the Court's ruling by making wholesale references in its brief to proceedings not before the Court, and by including in an "Appendix" an order which is not the subject of this appeal.

Tactics born of desperation must not be allowed to obfuscate the issue properly before the Court, which is whether the Florida Public Service Commission properly dismissed with prejudice Appellant's amended attempt to allege a violation by Florida Power and Light Company of a territorial agreement between FPL and Appellant. In this brief, Florida Mining and Materials Corporation will emphasize what it believes is the only issue properly before the Court—which is whether the Amended Complaint succeeded in alleging a violation of the territorial agreement. In self-defense, it will also address other matters which it believes are best described as a belated, collateral challenge of a final, unappealed order rendered in another docket. The Statement of the Facts will be expanded to touch on both.

Throughout this brief, Lee County Electric Cooperative will be referred to as "Appellant" or "the Cooperative." Florida Power and Light Company will be referred to as "FPL," while Florida Mining and Materials Corporation will be shortened to "FMM," and the Florida Public Service Commission will be called "the Commission."

STATEMENT OF THE CASE

Docket No. 850129-EU was initiated on April 15, 1984, by a complaint filed by Lee County Electric Cooperative, Inc. (R-1). The complaint purported to allege a violation by FPL of a territorial agreement between FPL and the Cooperative. FPL and FMM submitted motions to dismiss the complaint on May 6 and 7, respectively. (R-20, 23). The Commission granted the motions in Order 14517, issued June 27, 1985. (R-34).

Appellant filed an amended complaint on July 18, 1985 (R-37), which was followed by motions to dismiss by FMM and FPL on August 5 and August 8, respectively. (R-59, 61). Appellant responded to the motions on August 20, 1985 (R-64). On December 16, 1985 the Commission issued Order No. 15452, in which it dismissed the amended complaint, this time with prejudice (R-78). Appellant's motion for reconsideration was denied in Commission Order No. 15625, issued February 4, 1985. (R-95).

STATEMENT OF FACTS

Because of the extent to which Appellant has attempted to incorporate earlier, separate proceedings in this appeal of Order No. 15452, this Statement will touch very briefly upon some of the matters treated in Appellant's brief.

In Docket No. 840414-EI, FPL requested a declaratory statement as to whether under the application of governing statutes, it must serve a customer who acquires property rights, builds its own line, establishes a delivery point in FPL's service area, and demands service. FMM intervened, established that it was the customer in question, and asserted that it was entitled to service at that delivery point. The Commission issued Order No. 13998, in which it ruled that under the circumstances described in the petition Section 366.03, Florida Statutes, required FPL to provide service. No appeal was taken of Order No. 13998.

Appellant refused an express invitation to intervene in the declaratory statement proceeding and did not appeal Order No. 13998. It chose to pursue a separate complaint in which it alleged that FPL was building a line into the Cooperative's territory (see Order No. 15452, p. 1). When FPL offered to consent to an order granting the Cooperative's claim for relief, Appellant took a voluntary dismissal of its complaint (see Order No. 15452, p. 2) It then initiated Docket No. 850129-EU with the first of two complaints which attempted to allege that FPL had violated the territorial agreement, notwithstanding the fact that the line had been built by FMM. The Commission dismissed both complaints; the second complaint was dismissed with prejudice.

SUMMARY OF ARGUMENT

The extremely brief territorial agreement between FPL and the Cooperative did not contemplate, much less seek to prohibit, FMM's decision to acquire property rights and construct its own line to a delivery point within FPL's service area. Since the amended complaint acknowledges in its allegations that FMM built the line and that its delivery point is within the area served by FPL, it fails to allege a violation of the agreement by FPL.

Appellant's brief is principally a belated and untimely assault on a declaratory statement which it chose not to appeal and which represents final agency action on the issue of whether FPL must serve FMM under the circumstances presented in the petition. Procedurally, the Cooperative is too late; FPL and FMM sought the statement and have rightfully acted in reliance upon the agency's final action. From a substantive standpoint, the Commission has primary responsibility for the administration of the regulatory scheme and possesses expertise in the subject area; its interpretation and application of the statutes should be accorded deference and weight, and should be approved by the Court in this instance.

POINTS TO BE ARGUED

I. THE FLORIDA PUBLIC SERVICE COMMISSION PROPERLY DISMISSED THE AMENDED COMPLAINT.

II. THE DECLARATORY STATEMENT ESTABLISHING FPL'S OBLIGATION TO PROVIDE SERVICE TO FMM SHOULD NOT BE DISTURBED.

ARGUMENT

I. THE FLORIDA PUBLIC SERVICE COMMISSION PROPERLY DISMISSED THE AMENDED COMPLAINT.

Appellant's amended complaint attempted to allege a violation by Florida Power and Light Company of a territorial agreement between Appellant and FPL. The amended complaint is ten legal pages in length; the territorial agreement consists of a two page letter.

The relevant and operative paragraph of the agreement is even shorter. It states:

> It is agreed that neither will serve nor offer to serve a customer outside its service area as shown on Exhibit A without first consulting and reaching agreement with the other party.

The theory of Appellant's original complaint was at least consistent with the terms of the agreement. Unfortunately for Appellant, it was factually wrong. The first effort alleged that FPL was building its facilities into the service area acknowledged by the parties to be Appellant's under the terms of the agreement. FPL offered to accept an order of the Commission granting everything the Cooperative asked for in its original complaint; the Cooperative quickly filed a voluntary dismissal before the Commission could grant its prayer for relief.

Since then, the Cooperative has tried to find a combination of words which would overcome its dilemma: the territorial agreement contemplated only that each utility would not invade or encroach with its lines or facilities into the area allocated to the other. The agreement did not contemplate, much less attempt to control, what

happened here; the exercise by a corporate entity of its own property rights to acquire property and build its own facility on that property. That exercise of individual rights, coupled with FPL's obligation to honor a demand for service to a delivery point in its service area (Section 366.03, Florida Statutes), does not constitute a violation of the two-page agreement, which is why the Commission in Docket No. 850129-EU twice concluded that the Cooperative had failed to allege a violation of the territorial agreement (despite the choice of attention-getting terms, such as "conspire": one cannot "conspire" to engage in lawful activity).

For purposes of ruling on a motion to dismiss, the factual allegations are taken to be true. If, however, taken as true the allegations do not establish a basis for relief, the complaint is properly dismissed. Hembree v. Reaves, 266 So 2d 362 (Fla. 1st DCA, 1972).

In its amended complaint, the Cooperative reluctantly acknowledged that FPL did not invade the Cooperative's territory with FPL's lines; instead, the amended complaint recognizes that FMM acquired the property interest necessary to enable it to spend its own money, and built a facility which it owns to a point inside FPL's service area. FMM's action was not prohibited by the straightforward language of the territorial agreement attached to the Amended Complaint; nor could the agreement between the utilities have attempted to prohibit FMM from exercising its own property rights. Therefore, the "trappings" with which Appellant has surrounded this central admission—alleged cooperation, etc.—cannot, even if true, amount to a violation of the agreement.

Order No. 15452 determined as follows:

> We agree on both points. The territorial agreement between LCEC and FPL is a two-page document that is straightforward an concise. It establishes a boundary between the service areas of the two utilities and provides that neither shall serve a customer within the service area of the other without first consulting and receiving the approval of that utility. The agreement neither addresses, nor does it appear to contemplate the situation whereby a customer, through the use of a private transmission line, would effectively remove itself from the service territory of one utility by establishing a

> delivery point in the territory of a neighboring utility. We find that the allegations of LCEC's petition, even if taken to be true, fail to demonstrate a violation of the territorial agreement. (emphasis provided).

The Commission properly applied the appropriate standard. This paragraph standing along is a sufficient basis for dismissing the complaint. Order No. 15452 should be affirmed.

II. THE DECLARATORY STATEMENT ESTABLISHING FPL'S OBLIGATION TO SERVE FMM SHOULD NOT BE DISTURBED.

Much of Appellant's efforts are devoted to an indirect challenge of the declaratory statement which established FPL's obligation to serve FMM at a delivery point in FPL's service area. Procedurally, the Cooperative is late; substantively, it is wrong.

Appellant cannot avoid the fact that Section 120.565, Florida Statutes, provides a mechanism whereby an agency may rule on the application of a statute, rule, or order to a presented set of facts. Florida Power and Light Company's petition for a declaratory statement placed before the Commission the question whether FPL was obligated by statute to serve a customer who by acquiring property and building its own line established a point of delivery within FPL's service area. FMM intervened; the Cooperative was invited to intervene but refused on the basis that it had alleged different facts in a separate complaint. On the one hand, it chose not to participate in the declaratory statement and chose not to appeal the order of the Commission. On the other hand, in its dramatic "mini-series" of complaints, it retreated from the essential factual allegation which set its complaint theory apart from the facts presented in the declaratory statement proceeding. In Order No. 13998, issued in Docket No. 840414-EI, the Commission ruled that where FMM acquired property rights, built its own line, and demanded that FPL provide service to a delivery point in FPL's recognized service area, Section 366.03, Florida Statutes, imposed on FPL a statutory obligation to provide service to FMM at that point. Substantively, the ruling was correct. Procedurally, the

Cooperative has only itself to blame for having failed to intervene or to seek judicial review of that final agency action. The Cooperative complains loudly about a denial of its "rights," but has not explained its unexercised rights to participate in the declaratory statement proceeding or raise on appeal of the declaratory statement order any issue related to the agency's final action, including any perceived or claimed procedural defects. FMM and FPL petitioned for, received, and have rightfully acted in reliance on a declaratory statement which constituted final agency on the question presented and which was not the subject of a timely appeal. To disturb that ruling now would do violence to the rights of the parties who properly invoked the procedure and were governed by the result. The declaratory statement rendered at FPL's request constituted final agency action subject to judicial review at the instance of those affected by it. It is not an example of a decision now about to affect parties or controversies which were remote in time and circumstances ("yet unborn") at the time of decision. State Department of Health, etc. v. Barr, 359 So 2d 503 (Fla. 1st DCA, 1978). The Cooperative had a clear and specific opportunity to become involved in the proceeding and/or to appeal the Commission's order. It did not.

Indirectly (and, the various Appellees have asserted, improperly), the Cooperative is attempting to challenge the substantive determination by the Commission that FPL was required to honor FMM's demand for service to a delivery point in FPL's service area. That determination necessarily passed on the Cooperative's offered distinction between "point of delivery" and "point of use." As stated above, the final, unappealed declaratory statement of the agency is binding on the affected parties, including, we submit, the Cooperative. Even if the Court determines the order is not binding on the Cooperative, it nonetheless has stare decisis effect and is properly reflected in the decision which granted motions to dismiss the amended complaint. (See Cenac v. Florida State Board of Accounting, 399 So. 2d 1013 (Fla. 1st DCA, 1981) at 1018, in which the court concluded that an inconsistency between an agency decision and

a prior declaratory statement of that agency would be occasion for judicial remand, because the declaratory statement has the effect of stare decisis.)

More importantly, the Commission was called on to interpret and apply to a given situation a statutory and regulatory scheme for which it has both primary responsibility and expertise. In Florida, courts have established a strong doctrine of attaching great deference to the interpretation of statutes given by the responsible agency in the first instance. Sans Souci v. Division of Florida Land Sales and Condominiums, 421 So 2d 623 (Fla. App. 1st DCA, 1982) appeal after remand 448 So. 2d 1116.

The case of Tampa Electric Company v. Withlacoochee River Electric Cooperative, 122 So. 2d 471 (Fla., 1960), relied upon by Appellant, does not present a situation analogous to this case. That case involved a situation in which one utility attempted to extend its lines into an area served by another. Like the territorial agreement which is the basis for the Amended Complaint, that case did not contemplate the exercise by a customer of its own legitimate property rights.

Appellant has gone far afield to find examples of situations involving customer activity.

Aside from the fact that Appellant must leave Florida in search of aid, the cases cited by Appellant are not persuasive because of many differences in factual situations and in statutory schemes. For instance, in Southwestern Electric Power Company v. Carroll Electric Cooperative Corporation, 554 SW 2d 308 (Ark S Ct, 1977) the court noted that the "customer" was an agency created by statute; as such it had only the powers provided in enabling legislation, and those enumerated powers did not specifically include the ability to build its own line to another utility. Here, the ability of a private corporate entity to exercise property rights suffers no similar limitation.

In Incorporated Town of Ackly v. Central States Electric Company, 214 N.W. (Iowa S. Ct., 1927), the fact that the customer had unlawfully strung its wire over

the streets and alleys of the protesting city was central to the decision: "Of course, we do not have before us now the question of regulation of such wires where the line is being lawfully constructed." Ackly, supra, at 882. And in Capital Electric Power Assoc. v. Mississippi Power and Light Co., 218 So 2d 707 (Miss. S Ct, 1968) the respondent utility first extended its lines into the area of the complaining utility, then arranged to sell those facilities to the customer (a college) after the protest had been made. In fact, the Court in Capital Electric felt constrained to distinguish its case from another which reached a different result because "The customer built his own line." Capital, supra, at 714. And the emphasis of rulings on the location of the customer's use in Holston River Electric Co. v. Hydro Electric Corp., 66 SW 2d 217 (Tenn. Ct. App., 1933) and Re Arizona Edison Co., Inc., 61 PUR (NS) 5 (Ariz. Corp. Comm., 1945), was made in the context of statutory schemes involving certificates of public convenience and necessity or specific franchises, evincing a different approach to regulation than exists for electric utilities in Florida. In fact, in Capital Electric, supra, a case relied upon by Appellant, the court observed that different jurisdictions having different regulatory statutes reach varying results when questions of this nature are presented. (Capital Electric, supra, at 713-714.) With that in mind, the chief significance of O'Brien County Rural Electric Cooperative v. Iowa State Commerce Commission, 352 NW 2d 264 (Iowa SU, 1984) lies not so much in the rationale of the agency but in the manner in which the court in that case obviously and repeatedly deferred to the primary role of the agency in administering the particular regulatory scheme throughout its opinion. O'Brien, supra, at 267, 269, 271.

Analogous to this case is Rural Electric Co. v. City of Burley, 403 P 2d 580 (Idaho S Ct, 1965). In that case a cooperative attempted to require a municipality to discontinue service to one Paulson, who had built his own line to reach the city's installation. The court refused, stating:

> ...the record is devoid of any showing that the City extended its lines to service the customer of another; nor did the City construct new lines to serve the customer of another, as prohibited by I.C. §61-333...

> As to the Paulson property, all installations on Paulson's property were made by Paulson and belonged to him. The City made only the physical connection of its meter to Paulson's installation, in the rendition of the Service. Id, at 584.

In Order 15452, as something of an additional basis for dismissing the amended complaint, the Commission stated:

> ...FPL and FMM correctly argue that LCEC is asking us for the third time to reverse the decision we made in the declaratory statement docket. For the reasons previously stated, and for the last time, we decline to do so.
>
> Order No. 15452, at p. 3.

Whether viewed as a non-essential observation, as Appellee suggests, or as a basis for the dismissal, this statement too should be affirmed by the Court.

CONCLUSION

For a long time, the Cooperative has attempted to avoid the effect of the Commission's determination that FMM was entitled to service from FPL. Its amended complaint failed to allege facts which would demonstrate a violation of the territorial agreement between FPL and the Cooperative, and Appellant cannot now assault the declaratory statement which it chose not to appeal. The Court should affirm the order of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by U.S. Mail to WILTON R. MILLER, ESQUIRE, Bryant, Miller and Olive, P.A., 201 S. Monroe Street, Suite 500, Tallahassee, FL 32301; JOHN H. HASWELL, ESQUIRE, Post Office Box 23879, 211 N.E. 1st Street, Gainesville, FL 32602; and WILLIAM H. HARROLD, ASSOCIATE GENERAL COUNSEL, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, FL 32301 on this 25th day of August, 1986.

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