IN THE FLORIDA SUPREME COURT

LEE COUNTY ELECTRIC COOPERATIVE, INC.,
Appellant,
vs.
JOHN R. MARKS, ET AL.,
Appellees.

CASE NO. 68,346

On Appeal From The Florida Public Service Commission, Order #15452, Docket #85-0129-EU, John R. Marks, Chairman

INITIAL BRIEF OF APPELLANT

Filed on behalf of Lee County Electric Cooperative, Inc.
William H. Chandler
John H. Haswell
Chandler, Gray, Lang & Haswell, P.A.
P. O. Box 23879
Gainesville, Florida 32602
(904) 376-5226

Dated June 2, 1986

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STATEMENT OF THE CASE & FACTS

A. CASE:

On July 18, 1985 LEE COUNTY ELECTRIC COOPERATIVE, INC. (LCEC) filed its Amended Petition to Resolve a Territorial Dispute in the Florida Public Service Commission (PSC) (R-37). A technical amendment to paragraph 37 of the Amended Petition was filed July 19, 1985. (R-55). Florida Mining and Materials Corporation (FMM), an Intervenor (R-19&63) filed a Motion to Dismiss on August 5, 1985 (R-59), and FLORIDA POWER & LIGHT COMPANY (FPL) filed its Motion to Dismiss on August 8, 1985 (R-61). LCEC filed a response to the Motion to Dismiss (R-64), and on December 16, 1985 the PSC issued Order #15452, dismissing LCEC's Amended Petition with prejudice (R-78). LCEC's Motion for Reconsideration (R-82) was denied by PSC Order #15625, issued February 4, 1986 (R-95). On February 16, 1986 LCEC filed its Notice of Appeal (R-97).

Because this Court denied LCEC's Motion to Supplement the Record, no transcripts of the hearings in the PSC accompany the Record.

B. FACTS:

Although no evidentiary hearing has been permitted in the lower tribunal, for purposes of a Motion to Dismiss for Failure to State a Cause of Action, the allegations of the Complaint or Petition are deemed to be true by the reviewing court. C.G.J. Corporation v. Hurwitz, 123 So.2d 44 (Fla. 3d DCA 1960).

Hence the following are the factual allegations that the PSC determined failed to state a claim. The full set of factual allegations are as set forth in LCEC's Amended Petition (R-37-54) and are only summarized here. Reference is also made to the "facts" set forth in PSC Order #15452 which is the subject of review.

On October 8, 1964, LCEC and FPL entered into a retail territorial agreement with respect to service areas in Lee, Collier, Hendry, Charlotte Counties, Florida. (R-38, 47) The agreement was approved by the PSC on April 28, 1985, Order No. 3799. (R-50) FMM owns a rockcrushing plant, scale house and other facilities on property lying more than two miles inside LCEC's service area. (R-38) FPL has no customer of any kind within several miles of the subject area. (R-39)

On November 15, 1984, FPL filed with the PSC a Petition for Declaratory Statement, Docket #84-0414, (R-43,78) asking the PSC whether FPL is required under 366.03, Fla. Stat., to serve a customer who has built a line extending its point of service from the territory in which its operating facilities are located to that of FPLs. (R-78)

FPL did not serve process on LCEC, and did not join LCEC as a party to the Declaratory proceeding. (R-44) On November 19, 1984, LCEC filed a Petition to Resolve a Territorial Dispute between LCEC and FPL and moved to consolidate the case with FPL's Declaratory proceeding (R-44,78). FMM built a transmission line into FPL's service area (R-39). LCEC appeared at a December 4,

1984 Agenda Conference in its case to request the PSC to consolidate the two cases. (R-44,78) The PSC denied LCEC's Motion to Consolidate, even though Rule 25-22.35(2), Florida Administrative Code, provides for consolidation of matters involving similar issues of law or fact, or identical parties. (R-44,78)

LCEC declined to intervene as a party in FPL's Petition for Declaratory Statement at the Agenda Conference on December 4, 1984. (R-78).

In the declaratory statement proceeding, the PSC, with two members dissenting, concluded that FPL has a statutory duty, pursuant to 366.03 Fla. Stat., to serve "a customer", since this customer's "delivery point" was located within the territory allocated to the investor-owned utility pursuant to the terms of the 1964 Retail Territorial Agreement. (R-78, Appendix 1) LCEC filed a new Petition in this case, which was dismissed with leave to permit LCEC to amend to make specific allegations as to the provisions of the territorial agreement which were violated. (R-79)

LCEC filed its Amended Petition setting forth with specificity all of the violations of the territorial agreement which had occurred, and also specifying the manner in which the property rights of LCEC was taken by FPL and Florida Mining and Materials. (R-79-80) Again, FPL filed a Motion to Dismiss on the grounds that the facts constituting the territorial dispute

were already resolved in the declaratory statement action to which LCEC was not a party. (R-80). As previously stated, the PSC granted the Motion to Dismiss with prejudice, and a subsequent Motion for Reconsideration by LCEC was denied. (R-80,95).

LCEC's Amended Petition alleges a violation of the territorial agreement with FPL, asserts LCEC's right to serve FMM, alleges a conspiracy between FPL and FMM to deprive LCEC of its property rights, and asserts a denial of due process of law, all as guaranteed by the Florida and US Constitutions.

SUMMARY OF ARGUMENTS

I. Due Process Claim. LCEC's first argument is essentially a claim that the constitutional rights of LCEC have been violated by the PSC's order dismissing the Amended Petition without any evidentiary hearing. LCEC asserts that it has a valuable constitutional right to serve customers in its agreed on service territory (by agreement with FPL), and that such a right is not only provided by case law, but also by a contract approved by the PSC. The PSC conducted a Declaratory Statement proceeding at FPL's request, under §120.565 Fla. Stat., to which LCEC was not a party. The "proceeding" itself was not even an evidentiary hearing, but was conducted at an informal Agenda Conference. The PSC's dismissal is based on its erroneous view that the issues raised by LCEC were already decided by it in the Declaratory Statement proceeding, and such determination is binding on LCEC, rendering LCEC's Amended Petition to Resolve a Territorial Dispute moot. Dismissing LCEC's Petition without any semblance of a hearing, based on an informal proceeding to which LCEC was not a party is clearly a violation of LCEC's constitutional rights and does violence to any notion of due process.

II. Res Judicata. LCEC's second argument is essentially that the Order entered by the PSC in the Declaratory Statement proceeding (Appendix 1) to which LCEC was not a party, is not binding on LCEC. The issues raised by LCEC are not identical to the narrow issue raised by FPL. Even if the issues were

identical, LCEC cannot be estopped by such an Order when it was not a party to the proceeding and when no formal hearing was ever conducted on any issue. LCEC's claims include a specific agreement with FPL, while FPL's Declaratory Statement proceeding only involved a general statement of obligations of any public utility under §366.03 Fla. Stat..

III. Territorial Agreement & Chapter 366.04 Fla. Stat. LCEC's third argument is based on the actual agreement with FPL on service areas, the PSC Order approving the agreement, and the general public interest in avoidance of duplication of facilities under §366.04, Fla. Stat.. LCEC's point is that allowing FPL to furnish electric service to a customer whose end use facilities are wholly with LCEC's service area does violence to the intent and purpose of the territorial agreement, and §366.04 Fla. Stat.. Allowing such conduct, using an artificial "point of service" notion, renders the territorial agreement meaningless, and will permit "range wars" between competing utilities. This court should adopt a rule of reason in looking at the "point of service" theory, and decide that a geographic load center test or end use facility test comports with reason and logic, and will promote the objectives of avoidance of uneconomic duplication of facilities.

IV. Standard for Reviewing Tribunal on a Motion to Dismiss. LCEC's last argument is the basic, well settled principle that when a court is called on to review a complaint or petition for

purposes of a motion to dismiss, the facts alleged, for purposes of the motion, are deemed to be true. Based on that principle, it was error for the PSC to determine that the Petition failed to "demonstrate" a violation of the territorial agreement and then dismiss the Petition with prejudice. The Petition on its face alleges, (1) a violation of the territorial agreement, (2) a violation of §366.04 Fla. Stat., (3) a violation of LCEC's constitutional rights, and (4) a violation of established policy of the PSC to encourage territorial agreements. The PSC, ignoring the principle that such allegations must be treated as true, decided that LCEC "failed to demonstrate" a violation, without allowing any evidence to be presented, without any discovery, without any hearing. In short, the PSC denied LCEC the opportunity to demonstrate the violation (that's what the hearing is for), and then used the failure to demonstrate the violation as an excuse to dismiss the Petition. This must not stand.

I. WHETHER LCEC'S FEDERAL & STATE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW HAS BEEN ABRIDGED WHEN, (1) AN ORDER ENTERED IN A DECLARATORY STATEMENT PROCEEDING TO WHICH LCEC WAS NEITHER A PARTY NOR A PARTICIPANT HAS BEEN USED BY THE PSC TO BAR ANY CLAIM BY LCEC IN A SUBSEQUENT PROCEEDING TO RESOLVE A TERRITORIAL DISPUTE, AND (2) LCEC HAS BEEN DENIED THE RIGHT TO ANY EVIDENTIARY HEARING OR FORMAL PROCEEDING PROVIDED FOR BY CHAPTER 120 FLORIDA STATUTES.

The Florida Supreme Court held in Tampa Electric Co. v. Withlacoochee River Electric Coop. that the right of an electric utility to serve its customers in its service area is a property right which may not be unlawfully injured or hindered. 122 So.2d 471, 472-73 (Fla. 1960). The Court reasoned that this property right included the utility's interest in the revenue which it would receive from the services to be rendered to its customers in the future, and a utility's property rights could be damaged by the loss of profits and by the waste and disuse of equipment. Id. at 472-73.

Article 1, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution provide that no person shall be deprived of life, liberty or property without due process of law. In interpreting the meaning of "person" under the Florida and Federal Constitutions, the Florida Supreme Court in Freidus v. Freidus, 89 So.2d 604, 605 (Fla. 1956), held that a corporation is a "person" within the meaning of due process of law under the Fourteenth Amendment. Later, the Florida Supreme Court ruled that due process of law under the

Florida and Federal Constitutions extends to property rights of corporations. Aztec Motel, Inc. v. Faircloth, 251 So.2d 849, 854 (Fla. 1971). It is therefore well settled that LCEC as a corporation duly incorporated under the laws of Florida, is entitled to due process of law. Freidus at 605; Aztec at 854.

Administrative agency action in Florida is strictly held to the procedural due process requirements of notice and an opportunity to be heard. Hollywood Jaycees v. State Dept. of Revenue, 306 So.2d 109 (Fla. 1974); Hime v. Fla. Real Estate Commission, 61 So.2d 182 (Fla. 1952). LCEC, as a party with an actual, present, adverse and antagonistic interest to FPL's Petition for Declaratory Statement was not made a party to that proceeding.

The PSC, by denying LCEC's Motion to Consolidate its Petition with that of FPL's in Docket No. 840414-EI, refused to afford LCEC a reasonable opportunity to be heard. Not only was LCEC denied an opportunity to be heard through a consolidated proceeding, but has also been prohibited by the PSC from conducting discovery in the case at bar. (R-68) Where an affected party is denied reasonable opportunity to be heard, "or without obtaining or considering any substantial evidence, where investigation, inquiry and evidence are necessary as a basis for the action taken, the proceeding is not had in due course of law and this court [Florida Supreme Court] will not enforce it". State ex rel. Railroad Commissioners v. Florida East Coast Railway Co., 59 So. 385, 393 (Fla. 1912). Such a denial of due

process, as committed in the case at bar, avoids any statutory presumption that the action taken was reasonable or just. Id.

This very Court has stated, in Williams v. Kelly, 182 So. 811 (1938), that whenever life, liberty or property rights are involved in any official action, the organic requirements of due process of law must be afforded, whether such action is the exercise of the powers of government by governmental departments, or whether the action of an administrative or ministerial function. The United States Supreme Court, in Hughes v. Rowe, 101 S.Ct. 173 (U.S. 1980), held that procedural due process is absolute, not depending on the merits of a claimant's allegations, because of the importance to organized society that due process be observed. Denial of due process should be actionable without proof of actual injury. Id. at .

While no one will argue that the PSC is not a court of record, nonetheless, it is bound by basic standards of fairness which must be met if due process is to prevail. City of Miami v. Jarvis, 139 So.2d 513, 515 (Fla. 3d DCA 1962). Basic standards were described in Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971), where the court, in determining that the Department of Commerce failed to afford due process to the petitioner, Deel Motors, Inc., held that Administrative Procedure Act proceedings contemplates: 1) reasonable notice, 2) opportunity to appear and be heard on the issue, 3) an order based on sworn testimony of witnesses and

credible documentary evidence, 4) the right to cross-examine witnesses against them, and 5) to be heard regarding proposed agency action. Id. at 389, 394.

In the case at bar, LCEC has not been afforded even the pretense of basic fairness. A proceeding (we decline to use the word "hearing" because no witnesses were called, no testimony was taken, and no evidence was presented) was had on December 4, 1984 on a Petition by FPL. LCEC was not a party. Tongue-in-cheek the PSC says in Order #15452, that LCEC "was offered intervenor status... but declined the same". Yes, that is true. LCEC was offered, at the very conference at which the PSC was going to issue the declaratory statement, the "opportunity" to intervene. That would have afforded LCEC about as fair a hearing as one would receive intervening in a proceeding that had already been tried, with the only matter remaining being the judgment. No witnesses, no evidence, no argument. The same Order says that LCEC was "represented by counsel at the December 4th Agenda Conference...," as if LCEC were present in the FPL docket. Yes, LCEC was in the room, appearing in LCEC's own docket and arguing a Motion to Consolidate as stated in the Order. The PSC chose to deny the Motion. It should not now be allowed to claim that LCEC had an opportunity to be heard.

The substantive rights of LCEC have been decided by resort to a declaratory statement proceeding at which no hearing of any substance took place. As an administrative agency, the PSC is not exempt from the constitutional requirements of procedural due

process. Thorn v. Florida Real Estate Commission, 146 So.2d 907 (Fla. 2d DCA 1962).

LCEC does not ask this Court to decide the merits of the case, what it wants is a fair hearing. So far it has been denied.

II. WHETHER A DECLARATORY STATEMENT ISSUED BY THE PSC OVER AN ISSUE OF FPL'S OBLIGATIONS UNDER FLA. STAT. §366.03 TO SERVE A CUSTOMER IS BINDING AND RES JUDICATA AS TO LCEC'S TERRITORIAL DISPUTE CLAIM, WHEN, (1) LCEC WAS NOT A PARTY TO THE PRIOR ACTION, (2) THE TERRITORIAL DISPUTE INVOLVES PROPERTY RIGHTS OF LCEC AND A WRITTEN AGREEMENT BETWEEN FPL AND LCEC, AND (3) NO FORMAL, EVIDENTIARY HEARING OF ANY KIND HAS EVER BEEN HELD EITHER IN THE CASE AT BAR, OR IN THE DECLARATORY STATEMENT CASE.

With respect to declaratory statements, the Florida Administrative Procedure Act provides as follows:

> Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements. A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only. The agency shall give notice of each petition and its disposition in the Florida Administrative Weekly, except that educational units shall give notice in the same manner as provided for rules in s. 120.54(1)(a), and transmit copies of each petition and its disposition t the committee. Agency disposition of petitions shall be final agency action.

§120.565, Fla. Stat. (1983). The Florida Public Service Commission has implemented §120.565 by providing that "[a]ny person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Commission as it applies to the Petitioner in his or her particular set of circumstances only." Rule 25-22.20(1) F.A.C.. The PSC has described the purpose and use of the declaratory statement as follows:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his or her particular circumstances only. The potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy, question or doubt.

Rule 25-22.21 F.A.C.

Under the Commission's rules, the Commission "may" hold a hearing to dispose of a petition for a declaratory statement. Rule 25-22.22. If a hearing is held, it is to be conducted pursuant to §120.57, Fla. Stat. on an expedited basis, or as otherwise agreed upon by the Commission and the parties. Section 120.57 of the Florida APA provides for the holding of evidentiary hearing "in all proceedings in which the substantial interests of a party are determined by an agency...." §120.57 Fla. Stat. (Supp. 1984). In the case at bar, the PSC refused to hold an evidentiary hearing on FPL's Petition for Declaratory Statement, merely bringing it up at an Agenda Conference (R-78). LCEC declined to intervene in the declaratory statement proceeding because if it did, LCEC would have to take the case as it found it, proceed without a chance to prepare, and waive all due process rights of notice. LCEC was not a party to the declaratory statement proceeding, and therefore no standing to appeal the Order on Request for Declaratory Statement, which determined the narrow issue that FPL had a statutory duty under §366.03 Fla. Stat. (1983) to serve FMM. See §120.68(1)

Fla. Stat. ("A party who is adversely affected by final agency action is entitled to judicial review"); State Department of Health & Rehabilitative Services v. Barr, 359 So.2d 503, 505 (Fla. 1st DCA 1978) (persons not parties to a Section 120.565 proceeding are not in a position to seek judicial review of the resulting declaratory statement).

The PSC and FPL nevertheless contend that the declaratory statement issued by the Commission in response to FPL's Petition must be regarded as having collaterally estopped LCEC from contesting any of the issues raised and decided in the declaratory statement proceeding, thus rendering moot LCEC's Amended Petition for Resolution of a Territorial Dispute. This collateral estoppel is said to arise simply because LCEC had the "opportunity" to intervene and participate in the declaratory statement proceeding. Such a contention is contrary to the well-established proposition in Florida administrative law that a declaratory statement is stare decisis if anything, not res judicata, with respect to persons not parties to the declaratory statement proceeding. In State Department of Health & Rehabilitative Services v. Barr, supra, the Department of Health and Rehabilitative Services issued a declaratory statement in response to an appropriate petition pursuant to §120.565 Fla. Stat.. The respondents then filed a rule-challenge petition pursuant to §120.56 Fla. Stat., contending that the declaratory statement amounted to an illicit rule not promulgated in accordance with §120.54 Fla. Stat.. The First District Court of

Appeal initially held that §120.56 did not vest jurisdiction in a hearing officer "to invalidate or obliterate an agency's declaratory statement, regularly issued under Section 120.565, as in whole or in part a rule". 359 So.2d at 505.

The respondents expressed concern that persons not parties to a Section 120.565 proceeding, who therefore are not in a position to seek judicial review of the resulting declaratory statement, might later "be adversely affected by the agency's enforcement against them of its interpretation of law thus announced". Id. The court responded to this concern by saying:

> "That is true. Agency orders rendered in Section 120.57 proceedings may in the same way indirectly determine controversies and affect persons yet unborn. But the rule is stare decisis, not res judicata. If such a person's substantial interests are to be determined in the light of a prior agency order or declaratory statement, Section 120.57 proceedings will afford him the opportunity to attack the agency's position by appropriate means, and Section 120.68 will provide judicial review in due course."

Id, at 505 (emphasis added); accord Cenac v. Florida State Board of Accountancy, 399 So.2d 1013, 1018 (Fla. 1st DCA 1981) (declaratory statements are final agency action, are reviewable, and have the effect of stare decisis); Rice v. Department of Health & Rehabilitative Services, 386 So.2d 844, 847 (Fla. 1st DCA 1980) (appellants' construction of the statute is not necessarily foreclosed by a contrary agency order entered earlier in proceedings to which appellants were not parties; there has been no rulemaking to construe the statute, and as to these

appellants that earlier order has no res judicata effect, citing Barr).

Of course, if the PSC had engaged in rulemaking and promulgated a formal rule that the point of delivery, rather than the point of use or consumption, should always control in determining whether a violation of a PSC-approved territorial agreement has occurred, that rule "would be well-nigh conclusive". Bowling v. Department of Insurance, 394 So.2d 165, 174 (Fla. 1st DCA 1981). But the PSC did not engage in rulemaking. It only issued a declaratory statement, which is directed to resolving a controversy or question as to the applicability of a statute, rule or order to a petitioner "in his or her particular circumstances only". Rule 25-22.21. Thus, a declaratory statement proceedings is more akin to an adjudicatory proceeding under §120.57 Fla. Stat..

In State Department of Health & Rehabilitative Services v. Professional Firefighters of Florida, 366 So.2d 1276, 1277 (Fla. 1st DCA 1979) The Court said, "A declaratory statement adjudicates rights...; it is 'final agency action' and 'reviewable in the same way as orders entered in Section 120.57 proceedings...' A rulemaking proceeding, authorized by §120.54(3), on the other hand, allows 'affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform [the agency] of their contentions.'"). The necessity of reproving contested nonrule

policy in Section 120.57 proceedings is the price the agency pays to avoid rulemaking. Bowling v. Department of Insurance, supra, 394 So.2d at 174 n.16; see Hill v. School Board of Leon County, 351 So.2d 732, 733 (Fla. 1st DCA 1977), cert. denied, 359 So.2d 1215 (Fla. 1978).

Moreover, LCEC's decision not to intervene in the declaratory judgment proceedings was justified by the PSC's arbitrary denial of an evidentiary hearing which would have occurred if it had granted LCEC's Motion to Consolidate. In Sans Souci v. Division of Florida Land Sales & Condominiums, 448 So.2d 1116 (Fla. 1st DCA 1984), condominium unit owners, through their condominium association, sought a Section 120.565 declaratory statement from the Division to preclude San Souci from raising the rent by exercising the rent escalation clause in the master sublease. The Division granted San Souci's motion to intervene, but refused to grant its request for an evidentiary hearing. Rule 7-3.01(4)(a)(2) of the Florida Administrative Code provides that the Division, in its discretion, "may" conduct an evidentiary hearing prior to rendering its declaratory statement. Sans Souci argued that the agency's denial of an evidentiary hearing amounted to a denial of due process. The Court held that the Division committed an abuse of discretion by denying Sans Souci an evidentiary hearing:

> "In the instant case, although the division had the discretion to deny an evidentiary hearing, we hold that it abused its discretion in doing so under the circumstances. As stated above, the novation issue

> necessarily involved the division's considering mixed questions of law and fact, the resolution of which could have, and proved to, greatly impinge on San Souci's right to exercise its contractual prerogatives. Given the nature of the issue and the rights at stake, San Souci, or either of the parties, was due an evidentiary hearing."

448 So.2d, at 1120 (emphasis added). Similarly, LCEC is due an evidentiary hearing since the issue as to the proper interpretation of the 1964 territorial agreement involves consideration of mixed questions of law and fact, the resolution of which will certainly have great impact on LCEC's protected property rights under the agreement. See Tampa Electric Co. v. Withlacochee River Electric Cooperative, Inc., 122 So.2d 471, 473 (Fla. 1960).

In short, LCEC is not barred by res judicata or collateral estoppel from proceeding with its territorial dispute action. The order entered in the §120.565 declaratory statement proceeding to which LCEC was not a party is stare decisis at best. LCEC is entitled to a full evidentiary hearing on the issues addressed in its Amended Petition.

III. WHETHER FPL IS VIOLATING (1) THE 1964 TERRITORIAL AGREEMENT WITH LCEC AND (2) THE INTERESTS OF THE PUBLIC UNDER CHAPTER 366 FLORIDA STATUTES, BY DELIVERING ELECTRIC SERVICE TO A CUSTOMER WHOSE ENTIRE END USE FACILITY IS 2 MILES INSIDE LCEC SERVICE AREA WHEN THE CUSTOMER, TO AVOID THE EFFECT OF THE TERRITORIAL AGREEMENT, BUILT ITS OWN TRANSMISSION LINE TO A POINT JUST ACROSS THE BOUNDARY LINE BETWEEN LCEC AND FPL?

The 1964 Retail Territorial Service Agreement between FPL and LCEC provides: "It is agreed that neither will offer to serve a customer outside its service area as shown on Exhibit A without first consulting and reaching agreement with the other party." (R-48) In Order No. 3799, dated April 28, 1965, (R-50) by which the Florida PSC approved the agreement, the Commission enumerated the following "advantages of having a territorial agreement":

> "If there is no agreemennt, there will be duplications of service as a result of unrestrained competition, which in turn has several undesirable results. Unrestrained competition leads to attempted preemption of areas by the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment and, in effect, must be subsidized by other customers of the utility. It means duplication of facilities in the same public ways which results in neither utility being able to get a full return on its investment, to the detriment of other customers who, in effect, also subsidize such uneconomical operations. It requires more employees to be constantly in the competitive areas and consumes more time and energy in efforts to "outsell" the competing utility. It makes for unsatisfactory customer relations in that the customer, being betwixt competing utilities, is drawn involuntarily into the competitive squabbles and must suffer the

> resulting service inefficiencies. It prevents the full development of the customer potential in the competitive area since knowledge that a full return is unobtainable tends to divert the activities necessary for such development to more profitable areas, all to the detriment of the customer, and accordingly, not in the public interest. (R-50,51).

It is clear that FPL's provision of electric power to Florida Mining & Materials for use and consumption at Florida Mining's rock crushing operations within LCEC's service area as designated in the territorial agreement amounts to a violation of the agreement even though the power is being supplied to Florida Mining at a point within FPL's service area. For example, in Southwestern Electric Power Co. v. Carroll Electric Cooperative Corp., 261 Ark. 919, 554 S.W.2d 308 (1977), Southwestern Electric Power Company (SWEPCO) and Beaver Water Distric (Beaver) entered into a contract whereby SWEPCO agreed to provide electrical service to Beaver over a private line constructed by the water district. The private line ran from Beaver's intake, treatment and pumping facilities located in an area certificated to Carroll Electric Cooperative Corp. (Carroll) to a point outside Carroll's area certificated to SWEPCO. Carroll brought a declaratory judgment action and obtained a judgment that the contract between Beaver and SWEPCO was void as violating an Arkansas statute prohibiting any public utility from undertaking a utility service in an area allocated to another electric cooperative or public utility. Ark. Stat. Ann. §73-240 (1975).

In upholding the trial court's judgment, the Arkansas

Supreme Court said:

> While there appears to be no previously decided case in Arkansas, other jurisdictions have recognized that the place and purpose of the use of electric energy is controlling, rather than the place of connection... [T]he sound reasoning that the place of delivery of the electric current is not controlling, but rather the place and the purpose of its use must be the controlling factor is without question.

554 S.W.2d at 310 (emphasis added).

A number of other courts and public service commissions have also held or indicated that it is generally the point at which the electric or other service is consumed, and not the metering point, which controls with respect to the question as to whether a utility has the right or authority to supply the service. [See, Incorporated Town of Ackley v. Central States Electric Co., 204 Iowa 1246, 214 N.W. 879, 880 (1927) (creamery, located in the town, purchased a private right-of-way upon which to build its lines to connect with a canning company's line and thus indirectly tie into the electric company's line outside the town); Town of Coushatta v. Valley Electric Membership Corp., 139 So.2d 822, 829 (La. Ct. App. 1961) (electric membership corporation which had no right to sell electricity in town could not circumvent law by serving customer in town through a meter located outside the town limits); Baizen v. Board of Public Works of Everett, 1 Mass. App. Ct. 602, 304 N.E.2d 586, 588 (1973) (holding that town was not authorized to supply water to part of parcel of land lying within town where water was to be used to

furnish water service to nine-unit apartment building located entirely on that portion of parcel lying outside town and within neighboring city); Village of Blain v. Independent School District No. 12, 272 Minn. 343, 138 N.W.2d 32, 42-45 (1965) (school district could not purchase natural gas for heating from a village utilities commission without the consent of a second village in which the gas was to be consumed, even though the gas was received at a metering station on school district property within the supplying village and then transported under and across a school to buildings within the second village via facilities constructed by the school district); Capital Electric Power Association v. Mississippi Power & Light Co., 218 So.2d 707, 713 (Miss. 1968) (college could not buy electric energy from first electric company at a metering point within first company's service area and transmit that energy over its privately owned line for use in a dormitory building in an area certificated to the second company); Western New York Water Co. v. City of Buffalo, 124 Misc. 257, 208 N.Y.S. 387, 390 (Sup. Ct.), aff'd, 213 A.D. 458, 210 N.Y.S. 611 (1925), rev'd on other grounds, 242 N.Y. 202, 151 N.E. 207 (1926) (city lacked authority to supply water service to gas plant through a metering point located inside city line on vacant lot owned by gas corporation); Holston River Electric Co. v. Hydro Electric Corp., 17 Tenn. App. 122, 66 S.W.2d 217, 224 (1933) (defendant electric company could not sell electricity to creamery for use within municipality where

defendant did not have a franchise, even though electricity was delivered at point outside municipality and transmitted over creamery's private line; Re Arizona Edison Co., 61 Pub. Util. Rep. (N.S.) 5, 12 (Ariz. Corp. Comm'n Dkt. No. 9751-E-993, Decision No. 15860 Oct. 15, 1945) ("[A] utility and a user of service may not evade the law through the device of the construction of a line by the user to the system of the competing utility"; utility holding franchise to serve area outside city, which was served by another utility, could not provide electric service to refrigerator company plant inside city over private line contructed by company from its plant into utility's service area); Town of Pineville v. Southern Bell Telephone & Telegraph Co., 41 Pub. Util. Rep. 4th 619, 625 (N.C. Utilities Comm'n Dkt. No. P-89, Sub. 17 Feb. 17, 1981) (physical location of PBX switch through which Southern Bell would provide telephone service was not determinative of whether Southern Bell must provide service to industrial customer, whose operations were located entirely within town's service area); Re Lukens Steel Co., 57 Pub. Util. Rep. 4th (PUR) 524 (Pa. PUC Dkt. No. P-810310 Jan. 13, 1984) (denying steel company's petition for authority to purchase a transmission line so as to permit it to take delivery of electricity from first electric utility within that utility's service area and transmit that electricity for use and consumption at its plant located within certificated service area of second utility).]

The only exceptions to this rule are either (1) where a

single home or a single store or factory facility is located partlywithin and partly without a utility's service area, see YMJ Co. v. City of Lorain, 105 Ohio App. 166, 151 N.E.2d 667, 670 (1957) (holding that a shopping center erected under one roof and containing 26 separate stores, nine of which were within city limits and 17 outside the limits, did not satisfy the requirements of an entire continuous home or business in an inhabitant's occupation; owner of center therefore could not compel water and sewer service to be provided at stores outside city limits); Re London & Leeds Investments (Holland) B.X., 8 Pub. Util. Rep. Digest 3d (Supp.) 32 (Conn. PSC Dkt. No. 810924, March 15, 1982) (public service company cannot be required to furnish service for end use that will be totally outside its service area; therefore, the fact that a readily severable portion of an electric customer's end use upon a given parcel of land was within a utility's service area did not require the utility to provide service to other severable end-use facilities on adjacent parcels that were outside the service area); or, more liberally, (2) where there is "a contiguous complex of buildings in a single ownership which straddles the common...boundary if the water [or other service] is delivered to one of the buildings at a point lying within the limits of the supplier". Baizen v. Board of Public Works of Everett, supra.

Florida Mining does not fall within either of these exceptions. The mining company does not own or operate a single

building or rock crushing operation which straddles the service areas of FPL and LCEC. Nor does it own a contiguous complex of buildings that sit partly within and partly without the service area of FPL. Florida Mining's rock crushing and related operations lie wholly within LCEC's service area. (R-38). The only "facilities" of Florida Mining located within the service area of FPL is a "point of delivery". (R-38). Absent a single building or facility, or a contiguous set of buildings or facilities straddling the border, Florida Mining must take power from the electric utility serving the area designated in the retail territorial agreement approved by the Florida PSC. Cf. Penn United Technology v. Pennsylvania Public Utility Commission, 49 Pa. Commw. 182, 410 A.2d 948, 951-52 (1980) (Penn United, a tool and die manufacturer, was properly required by Pennsylvania PUC to buy power for its new, additional facility from an electric cooperative, whose existing distribution line was closer than the nearest existing line of any other electric supplier, even though Penn United wanted to have its electric power furnished by West Penn Power, which serviced its existing facility. Florida Mining's preference for FPL must give way to the interests of the public in general with respect to the provision of electric service. See 410 A.2d at 951; Storey v. Mayo, 217 So.2d 304, 307, 308 (Fla. 1968), ("An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself").

Moreover, the Iowa Supreme Court recently decided that even

in cases where a customer straddles the boundary between the certificated service areas of two electric utilities, the point of delivery should not be the controlling factor in determining which utility should serve that customer. In O'Brien County Rural Electric Cooperative v. Iowa State Commerce Commission, 352 N.W.2d 264 (Iowa 1984), the Iowa Public Service Company (IPS) filed a complaint with the Iowa State Commerce Commission, challenging the right of the O'Brien County Electric Cooperative (O'Brien) to provide electrical service to a rural water district straddling the border between the "assigned service areas" of both IPS and O'Brien. The water district, Osceola Rural Water System (Osceola), had developed a well field consisting of four wells. Two wells, numbered one and two, were located within the exclusive service area assigned by the commission to IPS and were equipped with thirty-horsepower electric motors. One well, number four, was located within the exclusive service area of O'Brien. Well number three was located directly on the service area boundary of the two utilities. Wells three and four were equipped with twenty-horsepower motors. Each of the four motors was expected to run eight hours per day. The proposed "point of delivery" where electric service was to be taken by the customer was also located within O'Brien's assigned service area.

Applying a "geographic load center" test, the commission concluded that the proposed usage of electricity was centered in the area of service assigned to IPS. It therefore ordered

O'Brien to abandon its line which it had constructed to serve this customer, concluding that the line had been illegally constructed without a franchise.

In upholding the Commission's decision, the Iowa Supreme Court conceded that under the "point of delivery" test, a utility may not ordinariliy service a new customer if another utility already has a line closer to the customer's "point of delivery". (Id. at 264.) (The Iowa Supreme Court had previously defined the term "point of delivery" as "the point at which the customer proposes to take delivery of the merchandise; in this case, electricity". Nishnabotna Valley Rural Electric Cooperative v. Iowa Power & Light Co., 161 N.W.2d 348, 352 (Iowa 1968).) However, the O'Brien Court found that "the point of delivery test has its drawbacks", (352 N.W.2d at 264). First, the court noted that the point of delivery test encouraged the use of artificial customer points of delivery and the consequent invasion of exclusive service territories assigned to electric utilities:

> "As we noted in Nishnabotna, this approach allows a customer to choose one utility over another by strategically locating its point of delivery. The commission noted this problem in an earlier proceeding in which it quoted with approval this argument favoring the application of a geographic load center test in lieu of the point of delivery test:
>
> > 'Carrried to the extreme, [under the point of delivery test], an industrial or commercial customer located many miles within the service territory of a utility could run a primary extension to the boundary line at which point service could be

> taken from another utility.' In re Establishment of Service Territory Boundaries Between Iowa Electric Light and Power Co. and D.E.K. Rural Electric Cooperative, Docket Number SPU-79-11, P. 7 (Iowa State Commerce Commission, May 13, 1981).

Id., at 267. Second, the Court pointed out that the point of delivery test would result in the proliferation of unregulated customer-owned facilities:

> The commission also noted in the earlier case that adherence to the point of delivery test would lead to other, more pragmatic problems: "[A]rtificial customer points of delivery will proliferate thousands of yards of customer maintained facilities over which the [commission] has no service or safety review." In re Establishment of Service Territory, supra, at 7.

Id., at 267.

Finally, the O'Brien Court concluded that these concerns were equally applicable to situations involving a customer straddling two service areas:

> Competition in any field may be said to be healthy. Extending customer lines to an artificial point of delivery, however, has other implications. As notoed by the commission, the goal of planned electrical distribution is to obtain the most economical system for customers of all utilities. The legislature has determined that this is best accomplished through the area-designation scheme of section 476.25. ...O'Brien's interpretation of 476.23(2), which would leave the point of delivery test intact in any case where a customer spanned more than one utility's designated area, would seriously erode that scheme.
>
> . . . .
>
> "The policy arguments favoring a territorial

> approach are just as pertinent in the multi-area customer case as they are in that of the single-area customer.

The Court then went on to uphold the commission's use of the geographic load center test, reasoning as follows:

> "While its exact computation might well be quite technical, the effect of the geographic load center test is simply to locate the electrical usage where it is primarily concentrated not where a potential customer might locate its point of delivery. The problems inherent in settling border disputes on the latter method have already been discussed.
>
> . . . .
>
> "The commission in this case concluded an application of this test 'would best ensure the territorial integrity concept of §476.24, would eliminate customer redesignation of points of delivery calculated to achieve customers' short-term interests, and would reduce, if not eliminate, opportunities for territory conflicts."
>
> "We believe this is rational reasoning and a proper exercise of the powers and expertise of the commission. See Iowa Health Systems Agency, Inc. v. Wade, 327 N.W.2d 732, 733 (Iowa 1982)."

Id. at 268-69 (emphasis added).

Applying the holding and reasoning of the O'Brien decision to the dispute in question here, it is clear that LCEC and not FPL, is entitled to service Florida Mining's rock crushing operations. Thus, if the geographic load center test, rather than the point of delivery test, is applied, Florida Mining's usage of electricity is clearly centered in LCEC's service area designated in the retail territorial agreement approved by the

Florida PSC. FPL should therefore be ordered to cease and desist from supplying electricity at an artificial customer point of delivery located within its service area, where the great bulk, if not all, of the electricity supplied is to be transmitted over the private distribution facilities of the customer for use and consumption within LCEC's service area.

It should further be noted that unlike LCEC, FPL has no customer or distribution facilities within several miles of Florida Mining's rock crushing operations. (R-39). The rationale of those cases is directly applicable to the case at bar. First, many of the above cited authorities emphasized the importance of avoiding economically wasteful retail competition, and the construction of duplicate distribution facilities, and pointed to the detriment to other customers caused by retail competition, concerns expressly, raised by the Florida PSC in its order approving the territorial agreement between LCEC and FPL. For example, the Mississippi Supreme Court in Capital Electric Power Association v. Mississippi Power & Light Co., supra, said:

> One of the primary objectives of the [Public Utility] Act is to prevent duplication of facilities and services. A utility has the express right and duty to provide service within its certificated area. To allow invasion of a certificated area because of the desire of a customer to be served by another utility would cause wasteful duplication and undermine completely the purpose of the Public Utility Act.

218 So.2d at 713.

Similarly, the North Carolina Utilities Commission in Town of Pineville v. Southern Bell Telephone & Telegraph, supra, stated as follows: "[T]he public interest requires that territorial boundaries remain inviolate except upon a clear showing of public need for a change in the boundary, otherwise boundaries might be assailed from different directions. This could lead to destructive practices, wastefullness, and duplication of facilities". 41 Pub. Util. Rep. 4th at 624 (emphasis added; citations omitted). The Utilities Commission reasoned that to allow a circumvention of this "established law and policy" by the "subterfuge" of allowing a customer to receive service from a neighboring utility merely by extending its private facilities into that neighboring utility's territory "would place from over substance". Id. at 627. The practice would lead to "cream skimming", with valued customers being "skimmed" away by the preferred utitilites, and the customers of the "unpreferred" utilities being forced to pay higher rates to support plant investment. Id.; see also Town of Coushatta v. Valley Electric Membership Corp., supra, 139 So.2d at 838 ("To permit one not authorized to enter into the town and serve only those of its own selection would result in confusion and in a degeneration in the character of services t be performed. One selecting the patrons he would serve would, no doubt, in the exercise of good judgment, select the most profitable and leave to the holder of a franchise, obligated to serve all impartially and indiscriminately, the unprofitable business.").

In short, to allow FPL to serve Florida Mining by the fiction or subterfuge of serving an artificial metering point inside FPL's service area would give a green light to the widespread invasion of electric utility service areas throughout the state, as utilities would seek to skim away the business of large commercial and industrial customers. Such retail competition would lead to the very evils which the Commission sought to alleviate by encouraging electric utilities to enter into territorial allocation agreements and by approving and enforcing such agreements. See also Re Florida Power Corp., 77 Pub. Util. Rep. 3d 426, 429 (Fla. PSC Dkt. 9535-EU, Order No. 4486, Dec. 30, 1968) ("The purpose of territorial orders is to protect utility companies and the customers they serve from the economic waste that results from such duplication [of facilities].").

In addition, the Florida Supreme Court recently indicated that it would look unfavorably upon a utility serving a customer through the subterfuge of serving an adjacent vacant lot. In Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So.2d 1092 (Fla. 1985), which involved a territorial dispute between an electric cooperative and an investor-owned utility, the electric cooperative disputed the PSC's observation that "we will not condone the utilities' competitive conduct in racing to serve the customers". This Court responded by saying:

> "Whether the conduct was right or wrong, the record clearly demonstrates a competitive race. Gulf Coast did indeed act in a manner to preempt Gulf Power from serving the area. Although Gulf Coast was not obligated to consult with Gulf Power before providing service, it knew Gulf Power lines were half as far as its own yet it proceeded to install line using a circuitous route to reach one customer which, "coincidentally", wired a substantial area of the rest of the development. Once Gulf Coast became aware of Gulf Power's intentions to serve a customer, it hurriedly extended its own lines to the same customer, on the apparent pretense of serving an adjacent vacant lot. ...Whether this constitutes wrongful behavior by either party is beside the point; it is within the discretion of the Commission to refuse to condone it.

Id. at 1095 (emphasis added).

IV. THE PSC ERRED IN GRANTING A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, WHEN (1) THE FOUR CORNERS OF THE PETITION CLEARLY ESTABLISH CLAIMS FOR BREACH OF A TERRITORIAL AGREEMENT, DUE PROCESS CLAIMS, AND VIOLATIONS OF THE CLEAR MEANING OF §366.04 FLA. STAT.; AND (2) WHEN, FOR PURPOSES OF A MOTION TO DISMISS, THE REVIEWING TRIBUNAL MUST TREAT ALL FACTUAL ALLEGATIONS AS TRUE.

It is well settled in Florida that in order to withstand a Motion to Dismiss for Failure to State a Cause of Action, a Complaint need only state ultimate facts sufficient to indicate the existence of a cause of action. Greenwald v. Triple D Properties, Inc., 424 So.2d 185 (Fla. 4th DCA 1983). See also Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7 (Fla. 1973). In addition it is well settled that the affect of a Motion to Dismiss, based on an alleged failure to state a cause of action is to admit the truth of all essential facts which are well and sufficiently pleaded, as well as all reasonable inferences arising from such facts. C.G.J. Corp. v. Hurwitz, 123 So.2d 44 (Fla. 3d DCA 1960), Maybarduk v. Bustamante, 294 So.d 374 (Fla. 4th DCA 1974). In the case at bar, LCEC has clearly alleged a violation of a territorial agreement, has described what it alleges that violation to be, has alleged a violation of a statutory command (§366.04 Fla. Stat.), has alleged a denial of due process of law, and has alleged that the PSC has violated its own policy and policy statements regarding duplication of electric facilities. Essentially the PSC decided the merits of the case, without allowing any evidence to be presented, thereby denying LCEC the opportunity to prove the factual allegations.

Indeed, the PSC, in Order #15452 (R-78) stated that

> "The territorial agreement between LCEC and FPL is a two page document that is straightforward and 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." (R-80).

In short, it's not that the territorial agreement affirmatively states language that would defeat LCEC's claim. The PSC claims that the agreement does not address the specific allegations of LCEC's Complaint, and erroneously concluded that because it didn't the agreement does not "appear to contemplate the situation" set forth in LCEC's Petition. The PSC, has therefore, without hearing any evidence, testimony of any witnesses, argument over the intention of the parties, in express disregard of the spirit and intent of the agreement, construed the agreement at a Motion to Dismiss hearing, and interpreted the language in such a fashion as to defeat LCEC's Petition. This is not the purpose of a Motion to Dismiss hearing.

CONCLUSION

In conclusion, for the reasons expressed in arguments 1 through 4, Appellant respectfully requests that this Honorable Court reverse Order #15452 of the Florida Public Service Commission issued December 16, 1985, reinstate LCEC's Amended Petition to Resolve a Territorial Dispute, determine that because LCEC was not a party to the prior proceeding which resulted in Order #13998 (the Declaratory Statement proceeding) that LCEC is not barred from bringing its Amended Petition and that Order #13998 is not res judicata of any issues alleged by LCEC in its Amended Petition, and that the Court adopt a rule of reason in determining the "point of service" of an electric customer such that the point of service rationally be the geographic load center of the customer or that point at which the electric service reaches the customer's end use facility. Finally, Appellant prays that this Court determine that Order #15452 violates LCEC's constitutional rights guaranteed under the Federal and Florida Constitutions and that such Order has had the effect of denying LCEC due process of law. In its bare essentials, that's what this appeal is all about. Due process of law. It is the conclusion of LCEC that the proceedings before the PSC have been nothing more than a sham. LCEC would like to close with a quote from Commissioner Leisner who dissented from Order #13998 (joined in the dissent by Commissioner Marks), stating "by focusing solely on a statute which requires a utility

to serve any customer requesting service within its territory, the Commission is ignoring its duties under two other statutes designed to assure a coordinated, economic electric power grid in Florida. Worse still, violence is being done to our efforts to end the 'range wars' between competing utilities that have been unable or unwilling to reach territorial agreements. ...By declaring that FPL has an 'obligation' to serve this customer, we are insuring that facilities will be duplicated and that a portion of the investment made by the coop to serve its customers will be stranded. ...Finally, I must note with dismay the haste with which the Commission took up the Petition for Declaratory Statement. The Petition was initially taken up less than a week after it was filed. ...Because of the important policy implications that this decision has on all electric utilities in the state, the Petition deserves a more methodical, thoughtful, and reasoned deliberation." (R-Appendix 4). The dissent by Commissioner Leisner very ably summarizes the due process implications of this agency action, as well as its affect on the PSC's responsibility under §366.04 and its own efforts to end "range wars".

Respectfully submitted,

CHANDLER, GRAY, LANG & HASWELL, P. A.

John H. Haswell & William H. Chandler
P. O. Box 23879
Gainesville, Florida 32602
(904) 376-5226
Attorneys for Appellant