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IN THE FLORIDA SUPREME COURT

LEE COUNTY ELECTRIC COOPERATIVE, INC.,)

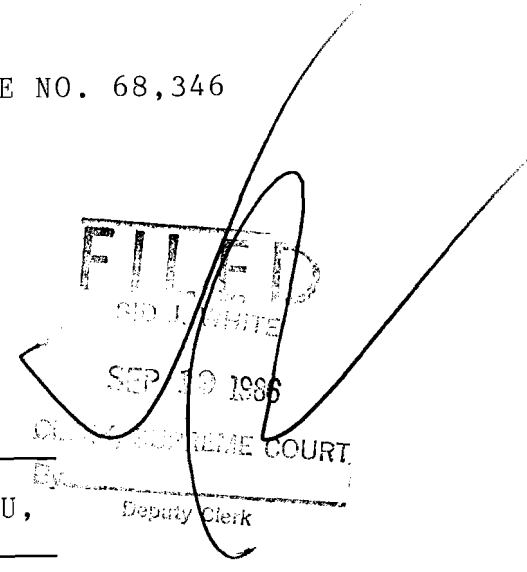
Appellant,)

vs.) CASE NO. 68,346

JOHN R. MARKS, ET AL.,)

Appellees.)

)



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

REPLY BRIEF OF APPELLANT

Filed on behalf of Lee County
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Dated September 18th, 1986

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PRELIMINARY STATEMENT

The generic "Appellees" will be used in this Reply Brief to refer to all three Appellees: FPL, PSC and FMM.

At all other times, when Appellant directs its argument to a particular Appellee(s), that Appellee(s) will be specifically named.

In citing to the respective Answer Briefs of the three Appellees, the citations will be as follows:

Appellee FPL's Answer Brief: (FPL at _____).
Appellee PSC's Answer Brief: (PSC at _____).
Appellee FMM's Answer Brief: (FMM at _____).

STATEMENT OF THE CASE & FACTS

Appellant, Lee County Electric Cooperative, Inc., realleges and incorporates by reference its Statement of the Case and Facts as set forth in its Initial Brief.

SUMMARY OF ARGUMENTS

I.

Appellees' suggestion that the language of the subject territorial agreement is unassailably clear is an empty contention at best. Furthermore, to suggest that 366.03 blindly condones evasion of the law through the devise of a powerline by the user to the system of the competing utility is utter nonsense. This is akin to arguing that Chapter 425 supports the demise of the very goals which it seeks to advance. The PSC does in fact have jurisdiction over the acts complained of by Appellant in its territorial dispute complaint since those acts were contemplated by the parties' 1964 territorial agreement. Failure of the PSC to construe the meaning of the language in this Agreement at a proper evidentiary hearing constitutes reversable error.

II.

Contrary to Appellees' contentions, the language of the subject territorial agreement is not clear on its face, and is subject to varied interpretations. The Agreement does not clearly set forth what is meant by the prohibition against "serving a customer outside its service area". Yet, without affording the parties to this appeal an opportunity to present evidence or testimony, the PSC construed the language of the Agreement at a Motion to Dismiss Hearing. At that hearing, the PSC erroneously concluded that the Agreement's language was absolute on its face,

and that such language did not contemplate the acts complained of by Appellant in its territorial dispute complaint. The PSC's wrongful and premature dismissal of Appellant's complaint constitutes reversible error in that such action constitutes a violation of procedural due process and a flagrant abuse of discretion.

I.

UNDER 366.04, THE PSC HAS JURISDICTION TO REGULATE THE ACTIVITIES COMPLAINED OF BY APPELLANT IN ITS TERRITORIAL COMPLAINT BECAUSE THE LANGUAGE OF THE SUBJECT AGREEMENT, ITS PURPOSE, AND THE INTENT OF THE PARTIES THERETO CONTEMPLATE THAT THE ACTS COMPLAINED OF SHALL VIOLATE THE SUBJECT AGREEMENT, AND THE PSC'S CONSTRUING OF THE AGREEMENT'S LANGUAGE AT A MOTION TO DISMISS HEARING AND ITS REFUSAL TO DETERMINE THE TRUE NATURE OF THE "CUSTOMER" ACTION INVOLVED IS REVERSIBLE ERROR

In addressing Point I in Appellee Florida Public Service Commission's (PSC) Answer Brief, Point II in Appellee FPL's Answer Brief, and Points I and II in Appellee FMM's Answer Brief, Appellant states as follows:

Appellee FMM erroneously contends that Appellant is asking this Court to review the January 11, 1985 declaratory order issued by the PSC. In addition, FMM contends that Lee County had a "clear and specific opportunity to . . . appeal the Commission's order." (FMM at 10). In asserting these matters, Appellee FMM has not only missed the entire point of the instant appeal, but is incorrect as to both of its assertions.

First of all, Appellant is not asking this Court to review the January 11, 1985 declaratory order. Among other things, the action which Appellant asks this Court to review is the PSC's erroneous ruling that the declaratory order is binding on Appellant and is determinative of the instant territorial dispute. Secondly, Appellant could not ask this Court to review the declaratory order, even if Appellant desired such review.

This is so because Appellant was not a party to the declaratory statement proceeding, and therefore has no standing to appeal the declaratory order, 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).

Further, Appellees PSC and FPL try to mask the issue of FPL and FMM's violation of the subject territorial agreement by arguing that the actions complained of are those of a customer (FMM) and are not actions of FPL. Consequently, Appellees argue the PSC lacks jurisdiction to adjudicate Appellant's claim of a territorial dispute because Appellees conclude the PSC has no jurisdiction to regulate the activities of customers under 366.04(2) Fla. Stat. This argument is entirely without substance, and does violence to both the legislative intent beyond 366.04 and the express concerns embodied in the language of that statute itself.

The PSC's jurisdiction over the enforcement of territorial agreements extends to the acts complained of by Appellant. See 366.04(2)(e) Fla. Stat.; Gainesville-Alachua, et al. vs. Clay Electric Cooperative, Inc., 340 So. 2d 1159, 1162 (Fla. 1976) (under 366.04, the PSC has jurisdiction to enforce that which is

contained in the terms of the territorial agreement in dispute); see also 366.04(3) Fla. Stat. (subsection 3 gives the PSC jurisdiction "over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."). It is therefore essential that the PSC examine the Agreement in question to determine if the acts complained of violate the express or implied intent of the parties to that Agreement. This, however, the PSC has refused to do. To try to explain away its failure to do so by arguing the PSC has no jurisdiction over customers extending their points of service across the territorial boundaries set forth in the Agreement is totally fallacious. Without examining the Agreement, and taking testimony thereon, the PSC decided the instant territorial dispute action based upon its unilateral interpretation of the provisions contained in the subject Agreement.

Furthermore the Appellees' conclusions that Appellant failed to state a cause of action for breach of the territorial agreement is both an affront to due process as well as to the intent of 366.04 itself. Had the PSC proceeded in accordance with the APA's strict procedural due process requirements of notice and an opportunity to be heard, it may well have

discovered that the claim of a territorial violation was not based on the actions of the customer, FMM. Rather had the PSC comported with the established principles of due process by setting a hearing on the issues raised on Appellant's 366.04 petition, taking sworn testimony from witnesses presenting credible documentary evidence thereon, and providing a meaningful opportunity for cross examination of these witnesses - the PSC may have discovered the customer in question was enticed by Appellee FPL to extend its service line over the established territorial boundaries. After all, Appellees know that Appellee FPL is bound by the geographical lines establishing its own territorial service area. It cannot, on its own initiative, cross these lines to serve another utility's customer.

However, what is to say that the instant case did not involve a circuitous attempt by Appellee FPL to circumvent the operative effect of territorial lines by actively and secretively enticing and procuring FMM to cross the line itself. This is clearly just one evidentiary matter that the PSC failed to address by dismissing the action brought by Appellant without a hearing on the merits. Had the PSC afforded Appellant its due process rights, the testimony taken and the evidence readily presented at such a hearing on the merits might well have shown FPL's active involvement in FMM's powerline building across the boundary line in question. As such, Appellees' contention that the PSC has no jurisdiction over what Appellees' conveniently

characterize as "customer action" is entirely self-serving and erroneous. See Gulf Coast Electric Cooperative, Inc. vs Florida Public Service Commission, 462 So. 2d 1092 (Fla. 1985) (Florida Supreme Court looks unfavorably upon a utility serving a customer through the subterfuge of serving an adjacent lot).

Appellant's suggestion of active involvement by Appellee in FMM'S building of the disputed powerline is a suggestion only of a single evidentiary matter that could have been brought to light had a hearing been held on Appellant's Complaint. It is a suggestion and not an accusation. As such, however, the suggestion serves its purpose in showing the acute and urgent need for there to have been a hearing afforded Appellant on its territorial dispute complaint. The types of evidentiary matters through demonstrative evidence and witness testimony that could have been clearly established at a hearing before the PSC remain untold. That is precisely the problem with such an abrupt violation of due process: rights are adjudicated where no opportunity has been afforded for investigation, inquiry, and fair adjudication of the issues based upon a full and meaningful presentation of the facts. See Deel Motors, Inc. v. Dept. of Commerce, 252 So. 2d 389 (Fla. 1st. DCA 1971).

Appellees' attempt to circumvent the legislative intent of 366.04 by arguing "customer" rather than utility involvement is

patently offensive. It has been aptly stated by the PSC itself that:

> "If there is no agreement, 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 the 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 competitive squabbles and must suffer the resulting service ineffeciencies. 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 through the detriment of the customer, and accordingly, not in the public interest." (R - 50, 51).

This summation by the PSC of the purpose of 366.04 not only highlights the goals which the Florida legislature sought to achieve by enacting this statute, but the PSC's own summation incisively points to the very matters which Appellees' "customer action" argument seeks to abrogate. Appellees' argument that the PSC has no jurisdiction over the instant territorial dispute because of alleged "customer action" essentially advocates that henceforth territorial boundaries will not serve as deterrants of unrestrained competition and duplications of service.

In asking this Court to adopt the myopic viewpoint that 366.04 has no application because the instant dispute involves only customer action, Appellees seek to establish the dangerous precedent that individual and industrial customers may unilaterally, or through the enticement of the non-servicing utility, build lines across established territorial service boundaries. Such acts violate the entire purpose of 366.04 by rendering territorial agreements meaningless, by providing uneconomic duplication of services by utilities, and by encouraging "range wars". See (R-Appendix 4: Order No. 13998).

At the very least, if Appellees' argument of lack of PSC jurisdiction because of "customer action" is to be given any merit by the PSC, a hearing should have been held to determine the true nature of this alleged "customer action". The outright denial thereof by binding Appellant to the PSC's prior declaratory judgment action to which Appellant was not given notice, was not made a party, and was not given a full and fair meaningful opportunity in which to participate, is a violation of Appellant's due process rights afforded under the APA, the Florida Constitution and the United States Constitution.

II.

THE DECISION OF THE PSC THAT THE 1964 TERRITORIAL AGREEMENT BETWEEN LEE COUNTY ELECTRIC COOPERATIVE AND FPL DID NOT CONTEMPLATE THE ARTIFICIAL RELOCATION BY A CUSTOMER OF ITS POINT OF DELIVERY WAS PREMATURE, RENDERING ERRONEOUS ITS SUBSEQUENT CONCLUSION THAT THE AGREEMENT HAD NOT BEEN BREACHED.

In addressing Point II in the Answer Brief of Appellee Florida PSC, and Point I in the Answer Brief of Appellee FPL, Appellant states as follows:

The question of whether the 1964 Retail Territorial Service Agreement was breached is a question of fact. Testimony should have been taken by the PSC, at a hearing on the merits of Appellant's Complaint, to construe the language of the Agreement and to determine the intent of the parties thereto. The language of the Territorial Service Agreement between FPL and Lee County Electric Cooperative states: "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). By way of its ruling on Appellee's Motion to Dismiss, the PSC held that on the face of this language, the Agreement did not address the factual scenerio under which Appellant brought its territorial dispute action. Without affording Appellant any opportunity to present testimony on the actual meaning of the Agreement's language, the PSC dismissed Appellant's complaint because the PSC erroneously concluded that the Agreement did not "appear to contemplate the

situation" set forth in the Complaint.

In adopting this absolutist position, the PSC ignored the fact that the above-quoted language of the territorial agreement is susceptible of varied interpretations. Specifically, that portion of the quoted language stating that "neither will offer to serve a customer outside its service area" is ambiguous in the context of the instant disputed action of FMM. It is possible that this language simply means that Lee County and FPL have agreed not to cross over each other's territorial boundary lines to service a customer not belonging to the encroaching utility. On the other hand, however, this language could be evidence of the parties' intention that as long as the customer itself is outside the service area of one of the parties to this territorial agreement, the non-serving utility shall not provide electricity to that customer regardless of where the latter places its point of delivery.

Clearly, under this second interpretation, the Agreement contemplates that neither party thereto would acquiesce to the kind of subterfuge characteristic of the actions taken by FMM in the instant case. Neither party to this territorial agreement would thus condone the crossing of territorial boundaries by customers extending their points of delivery just beyond the territorial lines defining their respective service areas. In short, neither party would provide electricity to be used at a

geographical location that is within the other facility's service territory. That the language of this Agreement is susceptible of this interpretation is clear on the face of the Agreement itself.

Furthermore, the intrinsic purpose of the instant territorial agreement supports this interpretation. The Agreement of 1964 was to fix the perameters of the service territories of Lee County and FPL so as to prevent uneconomic duplication of facilities and services. Such agreements carry the imprimatur of the Florida legislature under Chapter 366 because of the great public need to prevent such wasteful duplication, and to provide for a coordinated, economic electric power grid in Florida. Given the intent of the parties to the 1964 territorial agreement to advance these causes, and the concommitant legislative support therefor, it is extremely difficult to assert that the Agreement in question did not in fact contemplate the situation where a customer essentially tries to duplicate services and facilities by extending an artificial point of delivery beyond its own service area.

Yet without the opportunity to present evidence or testimony, the PSC construed the language of the Agreement at a Motion to Dismiss hearing and stated: The territorial agreement between LCEC and FPL is a two page document that is straightforward and concise . . . The agreement neither addresses nor does it appear to contemplate the situation whereby customer,

through the use of a private transmission line . . . establish [es] a delivery point in the territory of a neighboring utility (R-80).

Appellant has demonstrated in this section of its Reply Brief that the language viewed by the PSC as "seemingly straight-forward" is susceptible of varied interpretations. Therefore the PSC's ironclad ruling on what the subject Agreement did or not contemplate was entirely premature. As Appellees readily admit, the purpose of a Motion to Dismiss hearing is to test the factual allegations of the complaint to determine whether said allegations, if taken as true, state a cause of action. See Hembree vs. Reeves, 266 So. 2d 362 (Fla. 1 D.C.A. 1972). Had the PSC applied this standard, and had the PSC viewed the language of the subject agreement in the light most favorable to Appellant, the Motion to Dismiss Appellant's Territorial Dispute action would have been summarily denied. However, this premature ruling, denying Appellant its due process rights to present evidence and testimony on the issues at hand, formed the basis for the PSC's subsequent conclusion that the parties' territorial agreement had not been breached. Consequently, both such rulings by the PSC constitute an abuse of discretion, a violation of procedural due process, and are clearly erroneous.

CONCLUSION

It is entirely inconsistent with the concept of a coordinated electric power grid that customers, displeased with the rates and rate structures of one utility, may construct powerlines to cross into the territorial service areas of competing utilities. Yet, the PSC's dismissal of the instant territorial dispute complaint is the harbinger of such practice. In dismissing the Lee County's complaint to resolve its territorial dispute, the PSC has ignored its duties under 366.04, and has done violence to the maintenance and the future of a coordinated, economic electric power grid in Florida. The dismissal of the instant territorial dispute action essentially assures Florida ratepayers that there will be range wars and duplications of facilities and services, despite the existence of territorial agreements.

Appellant therefore asks that this Court determine that Lee County was not a party to the declaratory proceeding brought by FPL and FMM, and that Order Number 13998 is not res judicata of any of the issues alleged in Lee County's territorial dispute complaint. Appellant asks that this Court reverse Order Number 15452, and determine that said Order violates Lee County's due process rights guaranteed under the Federal and Florida Constitutions. Lastly, to prevent the destruction of a coordinated economic electric power grid in Florida, Appellants

asks that this Court adopt a rule of reason in determining the "point of service" of an electric customer such that the "point of service" shall be the geographic load center of the customer, or that point at which the electric service reaches the customer's end use facility.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant has been furnished to WILLIAM H. HARROLD, Associate General Counsel, Florida Public Service Commission, 101 E. Gaines St., Tallahassee, Florida 32301-8153, WILLIAM BILENKY, Esquire, General Counsel, Florida Public Service Commission, 101 E. Gaines St., Tallahassee, Florida 32301-8153, WILTON MILLER, Esquire, Suite 500, 201 S. Monroe St., Tallahassee, Florida 32301, and JOSEPH A. McGLOTHLIN, Esquire, 201 E. Kennedy Blvd., #821, Tampa, Florida 33601 by U.S. mail on this 18th day of September, 1986.

Of Counsel