

IN THE SUPREME COURT OF FLORIDA

1985
1986

JUL 27 1986

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MANATEE COUNTY,

Appellant,

v.

JOHN R. MARKS, et al., in the
official capacity as and constituting
the FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

) SUPREME COURT

) Deputy Clerk

) CASE NO. 68,657

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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DESIGNATIONS

Appellant, Manatee County, will be referred to as "Manatee County."

Appellee, the Florida Public Service Commission, will be referred to as the "Commission."

Appellee, General Telephone Company of Florida, Inc., will be referred to a "General."

Reference to the Record on Appeal will appear as (R-page).

References to the Hearing Transcript will appear as (TR. page).

STATEMENT OF THE CASE AND FACTS

This proceeding concerns a resolution filed before the Commission by Manatee County on April 12, 1986. The resolution sought the transfer of certain territory from the Sarasota Northside Exchange to the Bradenton Exchange. The area which Manatee County sought to transfer covers approximately four square miles in Manatee County along the border of Sarasota County in the Northeast corner of the exiting Sarasota Northside Central office service area (TR. 100).

In Order No. 14545, issued July 8, 1985, the Commission proposed to deny Manatee County's request (R-1). Manatee County timely requested a hearing which was held on December 13, 1985, in Tallahassee, Florida. Manatee County, General, and the Commission Staff entered appearances, with Manatee County and General filing prefiled testimony and legal briefs on the issues (R-49, 81; TR. 6, 55, 97, 157, 175).

At the hearing the following facts were determined. The disputed area is closer to downtown Sarasota than downtown Bradenton (TR. 33). At present, only one person lives in the affected area and has expressed no complaints with existing service (TR. 35). Although the disputed area has only one resident, the area is expected to grow rapidly in the next several years (TR. 101). Several developers own parcels in the disputed area. None of the developers appeared at the hearing or otherwise

supported the position of Manatee County (TR. 38). Residents of adjacent subdivisions are also satisfied with their present telephone service out of the Sarasota exchange (TR. 35). Emergency 911 is currently provided to the area from the Sarasota Public Safety Announcement Point (PSAP) to the appropriate Manatee County location by means of a one button transfer (TR. 104). The record demonstrated that by the time any significant development begins in the area technological changes will connect emergency calls directly to the Manatee County PSAP (TR. 105).

General Telephone presented evidence that transferring the disputed area as requested by Manatee County would require extensive recabling with attendant cost of approximately \$204,567 (R-38, R-39, Brief of General R-88, Exhibit 1-A).

On March 13, 1986, after considering the evidence, the testimony of the hearing and the parties' briefs, the Commission issued Order No. 15857 denying Manatee County's request (R-94). On April 15, 1986, Manatee County filed with the Commission Notice of Appeal to this Court of Commission Order No. 15857 (R-97).

SUMMARY OF ARGUMENT

Manatee County sought, by its petition, to have the Commission transfer the exchange office of a 4 square mile area containing one inhabitant. The cost of such a transfer is estimated at \$204,567 (R-38, R-39, Brief of General R-88, Exhibit 1-A).

The record is replete with competent substantial evidence supportive of the Commission's decision to deny the transfer.

Unable to disprove the existance of the competent substantial evidence, Manatee County endeavors to have this court step in as a fact finder and reweigh the evidence. This is a role which this court has uniformly declined to undertake. Citizens of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983).

Abundant evidence was presented that future residents of the subject area would prefer the existing service arrangement. Additionally, evidence was presented that a transfer would be costly with that cost borne by the entire body of General's customers.

Further, the evidence showed that none of the problems Manatee County complained of were a result of the current telephone configuration.

Finally, even if this court determines that it differs with the Commission's view as to the effects of the evidence as a

whole, this Court should uphold the order if it is supported by competent substantial evidence. Chicken 'N' Things v. Murray, 329 So.2d 302, 305 (Fla. 1976).

POINT I

THE DECISION OF THE PUBLIC SERVICE COMMISSION
IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE
AND AS SUCH SHOULD NOT BE DISTURBED BY THIS
COURT.

The proper standard for this Court to apply in reviewing an order of the Public Service Commission is whether competent, substantial evidence supports a Commission order. Orders of the Commission come before this Court clothed with the presumption of validity. On review, this presumption of validity can only be overcome where the Commission's error either appears plainly on the face of the order or is shown by clear and satisfactory evidence, Citizens of Florida v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982).

The proper analysis for Manatee County would be to demonstrate to this Court that the evidence contrary to its position is either nonexistent or so insubstantial that it cannot support the results. Citizens of Florida v. Mayo, 333 So.2d 1 (1976). The burden is clearly on Manatee County to show that the Commission's Order is unsupported by the evidence. Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976). Unable to disprove that competent, substantial evidence existed in the record to support the Commission Order, Manatee County has done nothing more than present a word for word encore of its brief

filed before the Commission. (Brief of Manatee County, R-49).
The following excerpts are illustrative.

Manatee County's Brief
Before Court

Customer Preferences

General Telephone has offered two lines of justification for its opposition to changing the boundary. The first was its assertion that customers in the subject area will prefer to be served from the Sarasota Northside Exchange. To support this conclusion, General Telephone cited a survey which was introduced in the record as Exhibit 5. The PSC admitted the survey "for what it was worth" and then relied on it as an evidentiary basis for its decision. However, reliance on this survey was is totally misplaced and the survey is invalid ~~for the present case,~~ for at least three reasons.

First, the survey was sent not only to residents of Manatee County, but to all subscribers in the Sarasota County Exchange, including Sarasota residents. (TR 130). Thus, the survey does not purport to canvass results are-not-the-results only of Manatee County residents but includes are-the-results-of responses of Sarasota County residents as well. Approximately 35% of the Sarasota Northside Exchange customers are located in Manatee County and 65% are located in Sarasota County. (TR 141). Thus, the survey has no validity whatsoever, as a statistical analysis of the preferences of residents of Manatee County. Unless the figures given in the survey

Manatee County's Brief
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First, the survey was sent not only to residents of Manatee County, but to all subscribers in the Sarasota County Exchange, including Sarasota residents. (TR 130). Thus, the survey results are not the results only of Manatee County residents but are the results of responses of Sarasota County residents as well. Approximately 35% of the Sarasota Northside Exchange customers are located in Manatee County. (TR 141). Thus, the survey has no validity whatsoever, as a statistical analysis of the preferences of residents of Manatee County. Unless the figures given in the survey results could be isolated to show the actual votes of the Manatee County residents, the survey, as presently constituted is meaningless.

results could be isolated to show the actual votes of the Manatee County residents, the survey, as presently constituted, is neither valid or reliable meaningless.

The second reason that the survey is completely invalid, and statistically unreliable, is the wording of the questions therein, particularly questions 5 and 6 (which are the most significant questions in the survey.) Questions 5 and 6 are set forth as follows: . . ."

(p. 20).

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(p. 20, R-71).

While the above sample is typical, it is but one example. A review of the table of contents of both briefs confirms that the briefs are identical (Brief of Appellant (i), R-50). This unfortunate reliance on "word processor law" fails to meet Manatee County's burden.

Having failed to convince the Commission of the virtue of its position by a preponderance of the evidence, Manatee County now endeavors to have this Court step in as a fact finder and reweigh the evidence presented to the Commission at the hearing. This is a role that this Court has uniformly declined in reviewing Commission orders.

We have spoken time and time again of the task for this Court on judicial review of Commission orders. Our task is not to reweigh the evidence. Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976); General Telephone Co. v. Carter, 115 So.2d 554, 557 (Fla. 1959). We must merely determine whether competent, substantial evidence supports a Commission order. We cannot affirm a decision of the Commission if it is arbitrary or

unsupported by the evidence. Citizens of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982); Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973).

Citizens of Florida v. Public Service Commission, supra at 787 (Fla. 1983).

A. Granting Manatee County's request would result in adverse customer reaction and would result in significant economic impact upon General Telephone's ratepayers and thus the Citizens of Manatee County.

Customer Preferences

The record presented at hearing is replete with competent, substantial evidence supportive of the Commission's determination that current as well as future residents of the disputed area would prefer service out of the Sarasota Northside office.

First, General's witness, Mr. Cacciatore testified about a survey taken of the adjacent telephone subscribers of the Whitfield Estates/Palm Aire Subdivision (TR. 101). Residents of this development like potential future occupants of the subject area, are located in extreme South Manatee County, yet served out of the Sarasota office. The results of the survey almost unanimously support the Commission's findings and is a valid indicator of the calling preferences of potential future residents, despite Manatee County's dissatisfaction with its methodology. Interestingly, while Manatee County is quick to point to the Whitfield Estates/Palm Aire experience to support its

position that any alleged confusion occurring there would "spread" to the subject area, the County seems unwilling to accept Whitfield Estates/Palm Aire customer preferences as indicators of those of any future subject area residents. Yet, Manatee County clearly does not dispute that the Whitfield Estates/Palm Aire customers prefer Sarasota service. Witness the following testimony at Tr. 35:

Q. Mr. Parker (Counsel for General): . . . Now could you tell me if it [the confusion] is such a huge problem for Manatee County, why Whitfield Estates and Palm Aire have been excluded from your petition?

A. Mr. Starner (Manatee County's Witness): Because we have it on good authority from General Telephone that those people do not want their service changed. In the new area we are talking about people who aren't even there.

Q. Mr. Parker: I see. So, Manatee County pays some credence to the interests of the residents that live in the County, is that correct?

A. Mr. Starner: I would say so, uh-huh.

Q. Mr. Parker: An the people that reside in Whitfield Estates and Palm Aire are content with their telephone service, would that not be an accurate statement?

A. Mr. Starner: That would be an accurate statement.

Secondly, as previously stated, only one person lives in the disputed area and he is content with his telephone service (Tr. 36).

Additionally, as Manatee County concedes (TR. 38), the developers of the disputed area are in a special position to

anticipate the service preferences of the future residents of their developments. Significantly, not one developer appeared in support of Manatee County's position and at least one expressed his desire to continue receiving service from the Sarasota Northside office (TR. 37-38, 171-172).

Finally, Witness Cacciatore testified that future development in the affected area would most likely identify with Sarasota due to its physical proximity and because it is the bigger community with the larger commercial base (TR. 101). Mr. Cacciatore also testified that the existing road network provides easier access to Sarasota than Bradenton.

It is perhaps illustrative, though not surprising, that Appellant chose to devote a significant portion of its initial brief in an attempt to refute the evidence received concerning the preference of future and current residents of the area.

Since Manatee County was the petitioning party before the Commission, the burden of proof concerning the issues in this transfer fell on it. Withers v. Metropolitan Dade County, 290 So.2d 573 (Fla. 3rd DCA 1974).

The relevant point is that Manatee County presented not one shred of evidence supportive of its contention that the future residents of the subject area would prefer service out of Manatee County's Bay office.

Clearly, substantial competent evidence was presented on customer preference to support the Commission's order.

Economic Considerations

Since Manatee County's residents are customers of General and since substantial competent evidence was presented that the transfer would present significant costs to General's ratepaying customers, Manatee County's claim that the Commission arbitrarily failed to consider the economic effect of its decision on Manatee County residents is fatuous.

Testimony was received by the Commission that the Sarasota Northside office is closer to the affected area than the Bay office from which Manatee County would propose service be provided (TR. 33). Further, it was clearly established at the hearing that the costs associated with serving a particular area vary directly with distance. It would be more costly to serve the area from the Manatee County office (TR. 146).

By its argument, Manatee County once again displays its confusion as to the proper standard for review as well as to whose burden it was to present evidence supportive of its petition.

Since Manatee County was before an agency charged with protecting the public interest, it is not surprising that the cost of this proposal was of special concern to the Commission. This is established clearly by issues 4, 5 and 6 in the Prehearing Order (TR. 38). Despite this guidance, Manatee County chose not to present evidence to address the costs associated with such a transfer.

In contrast, General Telephone on numerous occasions expressed its position that the requested transfer would involve extensive recabling with attendant costs of approximately \$204,567 (R-38, R-39, Brief of General R-88, Exhibit 1-A).

Manatee County's only attempt to address this most important concern was an attempt to show that a portion of General's cost would be as a result of crossing the Braden River. Manatee County's offer of a right-of-way over the river, thereby reducing General's cost to a "minimal amount," was demonstrated to be technically naive. As cross-examination proved, the "minimal costs" which Manatee County stated would be General's costs, do not include the trunking costs (TR. 68). In fact, Manatee County's witness had no idea what the trunking costs would be (Tr. 69). Absent evidence from Manatee County, as was their burden, the Commission chose to believe the testimony of General's expert witness, Mr. Cacciatore, who stated at TR. 181-182:

Generally the greater the distance involved in providing the service, the higher the cost. The physical distance, and therefore, the cost of service is considerably greater (by about two times) that to the Northside central office, with or without the right of way over the Braden River. (emphasis supplied)

Tr. 181-182.

Apparently lacking the technical expertise to determine what those trunking costs would be, Manatee County presented no evidence to dispute General's figures and thus alleviate the Commission's concerns. Manatee County, therefore, would encourage

the Commission to sign a blank check drawn on the accounts of General's full body of ratepaying customers.

B. Maintaining the current telephone exchange boundaries so that the subject area of Manatee County is served by the Sarasota Northside Exchange will not have an adverse impact on Manatee County or its citizens.

Manatee County lists a parade of horrors it insists are attributable to General's serving this area out of the Northside Exchange. At the hearing, these concerns were found to be irrelevant since they were not a result of the existing telephone service. Manatee County's claim that these concerns are "indisputable" is not supported by the record.

Once again, Manatee County had the burden to demonstrate that the alleged problems resulted from the existing telephone service configuration. While Manatee County spent a great deal of hearing time attempting to convince the Commission of the existence of these problems, it failed completely to demonstrate any causal connection with the current phone configuration.

Manatee County does not attempt to argue that the alleged problems now exist in the disputed area. Such an assertion would have little credibility since the disputed area is occupied by only one person. Rather, Manatee County attempts to argue by analogy and show the existence of these problems in an adjacent populated development, the Whitfield Estates/Palm Aires

development. If these problems do arise in the disputed area when it is developed, as Manatee County argues, the evidence presented at hearing proved that they will exist as a result of physical proximity to Sarasota, consumer and business preference, and human error, and not as a result of what central office serves the developments.

Manatee County expressed its concern that a few residents of Whitfield Estates were improperly charged Sarasota sales tax on their phone bills despite their location in Manatee County. This was demonstrated at the hearing to be a function of human error unrelated to what exchange the subscribers were served from (TR. 179).

As Mr. Starner, Manatee County's witness, admitted on cross-examination, sales tax is a function of a property's physical location, not telephone service (TR. 39). To the extent that these properties straddle county lines they are much more likely to produce human mistakes concerning their location. Manatee County failed to present any evidence that the alleged sales tax problem had anything to do with the telephone service configuration. In fact, the bulk of the evidence presented proved that other factors, apart from telephone service, caused the problem if it existed at all. First, as acknowledged by Manatee County in its initial brief, the sales tax problem was largely a function of these residents having a Sarasota postal address. See Appellant's Brief, p. 4, footnote 2. As Manatee County concedes,

any potential problem will be greatly eliminated by the recent change in postal designation from a Sarasota mailing address to a University Heights mailing address.

Secondly, while Manatee County claims a loss of \$19,566.71 in sales tax, as a result of location confusion, that figure must be netted against several thousand dollars improperly paid to Manatee County by individuals located in Sarasota County (TR. 45). This fact would seem to fly in the face of any assertion that the confusion is in any way telephone related. Clearly, the problem is the proximity of the two adjacent political entities. The problem is unrelated and irrelevant to which central office serves the subject area.

Thirdly, the fact that the affected customers complained about the improper application of sales tax is indicative of the fact that there is no confusion as to their proper county of residence. This is further highlighted by the fact that no such problem exists with ad valorem taxes. Witness Starner's response to Commissioner Gerald Gunter's inquiry (TR. 41-42) is especially illustrative:

COMMISSIONER GUNTER . . . Now, secondly, the ad valorem taxes. Can there be any confusion as to ad valorem taxes?

WITNESS STARNER: No sir, and that is surprising.

COMMISSIONER GUNTER: Well now, you see, I'm not sure that we have a confusion factor. I'm not sure it isn't a contrived factor because people know where they are, they know where their ad valorem taxes are. . . .

Fourth, as Manatee County's witness conceded, potential problems could be greatly alleviated by a county sponsored education program informing new residents of their county of residence. In any case, the problems, to the extent they exist, were not demonstrated to be caused in any way by the telephone service. Neither did Manatee County show how a transfer of the disputed area would resolve the problems. A similar analysis quickly dispells Manatee County's other concerns.

The \$.50 surcharge for 911 service by Sarasota County was similarly shown at hearing to be as a result of human error caused by the physical proximity of the two locations. As Appellant's own testimony indicates, all the individuals improperly charged had Sarasota addresses despite their location in Manatee County (TR. 42-43). Clearly the problem was related to the resident postal location, which has since been corrected, not their telephone prefix.

Manatee County also raises the point that future residents of the disputed area will, when the area is developed, receive Sarasota yellow pages. While this is true, the Commission also considered two other factors. First, the decision to serve or advertise in a particular area is discretionary with the business proprietor. If a business man felt that the developed area presented a market significant enough for him to compete in, he would place an ad in the Sarasota yellow pages. Second, all business and residential

phone listings of both Sarasota and Bradenton are located in the Sarasota white pages (TR. 40).

Clearly in its order the Commission carefully considered whether transferring the subject area would reduce any potential problems to Manatee County. Since the evidence taken demonstrated that the problems experienced by the adjacent development were not related to its telephone service. Manatee County failed to convince the Commission that ordering the proposed transfer would alleviate any potential problems in the disputed area.

C. Retaining the current telephone exchange boundaries so that the subject area of Manatee County is served from the Sarasota Exchange will not have an adverse impact on the furnishing of emergency services to the citizens of Manatee County.

Perhaps no issue presented at the hearing produced more evidence to support the Commission decision than the current state of Emergency 911 service in the disputed area.

Currently, an emergency caller in the subject area must give his information first to an operator at the Sarasota Public Safety Announcement Point (PSAP) who after identifying that the call is from a Manatee County resident, can with the operation of a push button, immediately transfer the call to the appropriate location in Manatee County (TR. 104). The testimony from General Telephone was that this resulted in no delay for Manatee County

residents attempting to call emergency assistance by dialing 911 (TR. 181). Manatee County maintains that such a technical arrangement presents a risk for Manatee County residents.

However, Manatee County's argument completely misses a factual point. Specifically, it is difficult to understand how "potential disaster is brewing" in the affected area as a result of the current 911 set up when only one person lives in the area and that person has indicated he is going to move (TR. 36). The testimony was clear that the area is currently undeveloped. The testimony clearly showed the fact that it will be 18 months to 2 years before anybody lives in the area.

Furthermore, by the time any significant population growth occurs in the area in question, the current method of providing 911 service will be supplanted by an automatic routing system which will route the calls from residents in this area directly to Manatee County. General plans to provide this enhanced 911 service by mid-1987 at the latest. (TR. 105, TR. 88). In other words, the preponderance of competent, substantial evidence in the record supports the Commission's determination that the current method of providing 911 service did not pose any risk for the one Manatee County resident living in the subject area and that by the time the area did develop, technology would render the County's hypothetical concerns moot.

One would assume that Manatee County is not suggesting that the provision of 911 service via a one button transfer to one

person for an 18-month period is a significant enough hazard to justify the cost of this transfer. In view of the estimates provided by General (R-38, R-39, Brief of General R-88, Exhibit 1-A) it would appear to make more economic sense to station a rescue squad permanently at the one potential victim's residence. Further, the record shows no validity to Manatee County's concern that a transient emergency situation occurring in the disputed area would not receive proper 911 response. The testimony verified what common sense would dictate. In the event of confusion as to the location of the call, both County's emergency agencies would respond (TR. 95).

D. Manatee County failed to show that the current service configuration is inadequate, inefficient, improper or insufficient.

As its last point, Manatee County relies on two Florida Statutes to attempt to support its contention. Section 364.10, Florida Statutes, states:

No telephone company shall make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (emphasis supplied)

The evidence in the record clearly demonstrates that no undue or unreasonable preference or advantage is being given to either county. Any "advantage" displayed by Sarasota is a result

of the physical proximity of Sarasota to the subject area. Since it was clearly established at the hearing that the cost for service varies directly with distance (TR. 146), it is clear that General's service of the subject area has its basis in logic and efficiency and not out of any desire to "unreasonably prejudice" Manatee County.

Finally, but certainly not least in importance, the Commission relied on one aspect, overlooked by Manatee County, but highlighted by the language of Section 364.14(2), Florida Statutes:

Whenever the commission finds that the . . . practices of any telephone company are unjust or unreasonable, or that the equipment, facilities or service of any telephone company are inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed and used and shall fix the same by order or rule as hereinafter provided. (emphasis supplied)

No allegation was made by Manatee County or any affected subscriber that the service to the subject area was in any way inadequate, inefficient, improper or insufficient. The one person living in the area seemed content with his service (TR. 35). Further, it should not be overlooked that the proposed transfer would have a negligible effect on the calling scope of the subscribers in the subject area. Extreme South Manatee County residents served out of Sarasota's Northside office can still call Bradenton on a local basis, just as Bradenton residents can call

Sarasota (TR. 102-103). In fact the only difference between the calling scope of the Sarasota office and the Bradenton office is that Bradenton can call the Palmetto exchange north of the Manatee County exchange on a local basis while Sarasota's Northside office provides local calling to the Venice exchange south of Sarasota (TR. 102-103).

As the testimony indicated, this arrangement clearly conformed to the calling preferences of the Whitfield Estates/Palm Aire development located adjacent to the subject area. The point is clear, future residents in the subject area will still be able to call or be called by anyone in Bradenton on a local basis (102-103).

In view of the cost estimates presented by General there was no basis to support an argument that General's engineering based decision to serve out of the Sarasota office was in any way unjust, unreasonable, inadequate, inefficient, improper or insufficient.

Finally, even if this court was to determine that a review of the facts presented at the hearing would have compelled a different result, this court should not overturn the Commission's order absent a finding that the evidence relied upon was so unsubstantial that it could not support the results. International Minerals & Chemical Corp. v. Mayo, 336 So.2d 548 (Fla. 1976); Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976).

This principle was further outlined in the following excerpt:

When orders of the Public Service Commission are challenged in this Court as being unsupported by the facts, this Court will uphold the orders even though it differs with the Commission's view as to the effect of the evidence as a whole, so long as there is competent substantial evidence to support the orders. Chicken 'N' Things v. Murray, supra at 305.

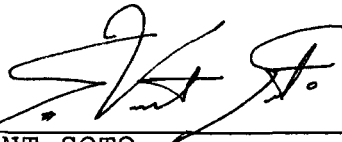
It is clear that the record in the instant case contained competent substantial evidence to support the Commission's decision not to transfer the subject area from its existing telephone service.

CONCLUSION

The decision of the Commission was based on competent, substantial evidence and complied with the essential requirements of the law. As such it should be affirmed by this court.

Respectfully submitted,

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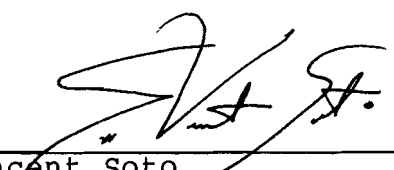
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Appellee Florida Public Service Commission (Docket No. 850127-TL) has been furnished by United States mail, this 21st day of July, 1986, to:

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