IN THE SUPREME COURT OF FLORIDA

EDWARD ARENADO, as Personal Representative of the Estate of SUSANNA ARENADO,

Petitioner,

vs. CASE NO.: 72,533

FLORIDA POWER & LIGHT COMPANY, a Florida corporation,

Respondent.

BRIEF OF FLORIDA RURAL ELECTRIC COOPERATIVES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, FLORIDA POWER & LIGHT COMPANY

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INTRODUCTION

This brief is submitted on behalf of the Florida Rural Electric Cooperatives Association, (FRECA) an association of 18 member electric cooperatives throughout the State of Florida distributing electric energy to more than 500,000 member families, businesses and other services. The 18 members are specifically listed in FRECA's Motion for Leave to File a Brief as Amicus Curiae. These electric cooperatives are organized and are existing under Chapter 425, Florida Statutes, and under the Federal Rural Electrification Act reporting not only to the Rural Electrification Administration of the United States Department of Agriculture, but also subject to rate structure jurisdiction of the Florida Public Service Commission. Two of the 18 member cooperatives are generation and transmission cooperatives, furnishing power at wholesale to their respective member distribution cooperatives. The distribution cooperatives provide retail electric service to consumer members in the State of Florida and also provide service to the State of Florida and its political subdivisions. This brief is filed in support of the Respondent, Florida Power & Light Company, (FPL) the Defendant in the trial court below.

STATEMENT OF THE CASE & FACTS

Florida Rural Electric Cooperatives Association (FRECA) adopts the Statement of the Case and Facts as set forth in the Brief of Respondent, Florida Power & Light Company (FPL).

SUMMARY OF ARGUMENT

Neither Mugge v. Tampa Waterworks Company nor Woodbury v. Tampa Waterworks Company will support a duty owed by Florida Power & Light Company to provide continuous and uninterrupted electric service to traffic signals in Palm Beach County, that it neither owns nor maintains for the benefit of individual members of the public. FPL was merely furnishing electric service to Palm Beach County and nothing more. The Fourth Amended Complaint fails to meet the requirements of Mugge, Woodbury, and H. R. Moch Company v. Rensselaer Water Company in that it fails to establish a specific duty owed to individual members of the public or that FPL expressly agreed to assume such a responsibility and obligation, or that FPL agreed to be an insurer for individuals using roadways in Palm Beach County. Moch, far from being inconsistent with Mugge and Woodbury, sets forth the general rule that a utility is not liable to individual members of the public not in privity with the utility company unless more is shown. Moch, Mugge, and Woodbury all show that when "more" is shown, i.e., when it can be shown that the utility either specifically agreed to assume a duty to individual members of the public, or undertook to perform a public service for the direct and immediate benefit of individual members of the public, then the utility company would be subject to a duty of reasonable care. To hold otherwise would result in unlimited liability for

electric utilities, far beyond that intended by the initial agreement to provide electric service, and the inevitable increase in electric rates, as a result of shifting the burden of traffic accidents from the car-driving public to rate payers of electric utilities. It would also send the wrong message that drivers, already subject to a statutory duty to exercise due care when entering intersections in which traffic signals are inoperative, may ignore the rules of the road, and look to the rate payers of an electric utility to compensate them for disregard of the their own safety.

ARGUMENT

I. SHOULD AN ELECTRIC UTILITY COMPANY THAT ASSUMED NO DUTY TO INDIVIDUAL MEMBERS OF THE PUBLIC FOR INTERRUPTION OF ELECTRIC SERVICE TO A TRAFFIC SIGNAL, WHERE THE UTILITY DID NOT CONTRACT TO ASSUME ANY DUTY TO INDIVIDUAL MEMBERS OF THE PUBLIC AND DID NOT UNDERTAKE A PUBLIC SERVICE TO OPERATE AND MAINTAIN SUCH DEVICES, BECOME AN INSURER AGAINST A SERVICE INTERRUPTION IN THE ABSENCE OF AN EXPRESS AGREEMENT OR INTENTION ON ITS PART TO ASSUME SUCH RESPONSIBILITY AND OBLIGATION?

A. The Florida Courts have held that a utility is not liable to individual members of the public for interruption of a utility service in the absence of an express intention to insure the individual members of the public in the event of a default.

This is a simple, yet important case where Petitioner attempts to expand the duty owed by a public utility, in this case an electric utility, far beyond that contracted for or assumed by the public utility. The trial judge in this case, citing Abravaya v. Florida Power & Light Company, 30 Fla. Supp. 153 (Circuit Court Dade County September, 1973) stated that based on the allegations contained in the Fourth Amended Complaint there was no duty existing between FPL and the Plaintiff's decedent. "There being no duty, as a matter of law, there can be no breach of duty". In Abravaya an automobile driver had suffered injuries in a vehicular collision at an intersection where the traffic signals were inoperative allegedly due to the negligence of FPL. The Court observed that FPL had no duty to regulate traffic for the City of Miami and therefore found that

FPL did not owe a duty to the Plaintiff driver. In that case FPL was furnishing electric service to a traffic control device owned and operated by the City of Miami. Florida courts have held that the cities and counties themselves are not liable for damages resulting from collisions at intersections where the traffic control devices are not operating. Ferri v. City of Gainesville, 362 So. 2d, 345 (Fla. 1st DCA 1978); Pearce v. State of Florida, Dep't of Transp., 494 So. 2d 264 (Fla. 1st DCA 1986).

Indeed this Court has held that even with respect to electric service to an individual, a public utility is not an insurer of the continuous flow of electric current. Bromer v. Florida Power & Light Company, 45 So. 2d, 658 (Fla. 1949). In Bromer the Plaintiff's alleged an implied contract whereby Florida Power & Light agreed to furnish 220 volts of electric current continuously in any and all events. Plaintiff alleged that FPL was negligent in not furnishing a continuous 220 voltage current. In affirming a judgment in favor of FPL, this Court held:

> "No public utility corporation shall be required to become an insurer by virtue of anything less than an express contract on its part to assume such responsibility and obligation". (Id., at 660).

That decision was followed in Landrum v. Florida Power & Light Company, 505 So. 2d, 552 (Fla. 3d DCA 1987) where that court held that a public utility is not required to become an insurer absent an express duty.

B. The District Court opinion under review is not inconsistent with nor a departure from the Mugge and Woodbury decisions, and follows existing established precedent.

Petitioner places almost exclusive reliance on the claim that this court's earlier opinions in Mugge v. Tampa Waterworks Company, 52 Fla. 371, 42 So. 81 (1906) and Woodbury v. Tampa Waterworks Company, 57 Fla. 243, 49 So. 556 (1909), directly conflict with the opinion of the District Court below. In claiming the conflict, Petitioner also asserts that the Mugge and Woodbury decisions represent a minority view contrary to the leading case of H. R. Moch Company v. Rensselaer Water Company, 247 N.Y. 160, 159 N.E. 896, 62 A.L.R. 1199 (1928). None of these cases are inconsistent.

Petitioner's reliance on Mugge and Woodbury is misplaced. In Mugge the Plaintiff sued Tampa Waterworks Company for failure to provide sufficient pressure at a fire hydrant to enable the fire department to put out a fire at Mugge's two-story brick building. The waterworks company defended on the basis that there was no privity of contract between it and the individual property owner and that it had no duty to individual members of the public for negligence in providing an adequate supply of water and pressure to the fire hydrants. Except for the fact that FPL and Tampa Waterworks may be both regarded as "public utilities" there are no other similarities between these two cases. Tampa Waterworks did not merely agree to provide water to the City of Tampa. It entered into a contract which was embraced

in an ordinance adopted by the City Council (Mugge, at 81). In consideration of the contract, the water works company was granted an exclusive franchise to lay pipes and erect hydrants and other structures in and on all the streets and public ways of the city together with the exclusive right and privilege to construct and operate its system for a term of 30 years. The company owned the hydrants and rented them to the city. It agreed that it would assume all liabilities to persons and property arising from constructing or operating the system. The complaint alleged that the defendant water company:

> "was to provide for and secure to the citizens, residents and property owners of the city better protection against fires; that the said contract was made and acquiesced in by the defendant company for the benefit of citizens and property owners of the city including the plaintiff who, was at the time of making the contract, and ever since has been, a citizen, property owner and taxpayer in said city". (Id., at 81).

The court then cited numerous cases where it had been held that a water company was not liable in damages to the owner of property burned for the neglect to supply water, observing that a lack of privity of contract between a property owner and the water company ran through all those cases. It should further be noted that a special tax was to be assessed on the citizens of the City of Tampa specifically to pay Tampa Waterworks Company for its public fire service. The court determined that,

> "the contract of the water company is the measure of its duty to the property owner and therefore of its liability". (Id., at 86).

In reversing the lower court which found no duty owed to the property owner, this court found that the water company assumed

the public duty of furnishing water for extinguishing fires according to the terms of its contract, that it had the exclusive right to furnish water to the city and its inhabitants for 30 years, the right to have special taxes levied on the property of the citizen for its benefit and the right to use the streets with mains and hydrants owned by the water company. In short, the water company specifically contracted for the duty to the individual property owner. It contracted for and undertook the obligation to construct the waterworks and to supply the citizens with water and fire protection.

Petitioner argues that the Mugge court held the waterworks company liable, whether or not a contract existed, citing quoted language as a statement of the court. (See p. 6 of Petitioner's main Brief.) That citation was not a statement or finding of the court. It was part of a general review by the court of then existing case law on privity of contract, and was a quote from the United States Supreme Court case of Guardian Trust Company v. Fisher, 200 U.S. 57, 26 Sup. Ct. 1986, 50 L.Ed. 367 (1906). The Mugge court was reviewing current case law as it considered its own opinion based on the Mugge facts. However, the quote itself is helpful in understanding the Mugge decision. The key to that quote lies in the language

> "yet, having undertaken to do so, it comes under an implied obligation to use reasonable care". (Mugge, at 85).

What undertaking? The quote refers to earlier language of the Guardian Trust Company decision in which the Supreme Court held that "if the company proceeds under its contract and constructs

and operates its plant, it enters upon a public calling". The Supreme Court was simply noting that even where the water company had no contract to construct waterworks and supply the citizens with water, if it proceeds with the undertaking to do so, it has, obviously, undertaken the obligation. Of course that was not the case in Mugge. In Mugge the defendant waterworks company specifically contracted for the liability. Having violated its obligation, the duty it agreed to perform for each citizen, it rightly should be liable for the fire loss. The court bottomed its decision on the following statement:

> "What we understand from this discussion is that the contract of the water company is the measure of its duty to the property owner and therefore of its liability". (Mugge, at 86).

The Woodbury decision says nothing to support the petitioner's position. In that case, contrary to the Mugge case, this court found that the complaint failed to state a cause of action based on the allegations of the complaint. Quite simply the court found that "no count of the declaration in this case sufficiently alleges that the negligence charged was a proximate cause of the injury complained". (Woodbury, at 559). In following the Mugge reasoning, the Woodbury court stated "where a contract shows its clear intent and purpose to be a direct and substantial benefit to third parties.... the third parties who are directly and substantially benefitted by the performance of the contract may maintain an action for its breach...". (Id., at 560). The Woodbury court went into a lengthy discussion of duty and liability owned by public service corporations, none of which

deviated from or modified the Mugge decision. Both Mugge and Woodbury deal with the same waterworks company that specifically assumed liabilities and specifically undertook obligations with the clear intent to be liable to individual members of the public.

Do these two cases, Mugge and Woodbury, conflict with or differ from Judge Cardozo's opinion in H. R. Moch Company v. Rensselaer Water Company? Whether Florida follows a minority view or how it characterizes the Mugge and Woodbury cases is a matter for this court to decide, not the authors of legal treatise's or other courts around the country. Judge Cardozo stated the basic contract theory which was quoted with approval by the court below

> "In a broad sense it is true that every city contract not improvident or wasteful is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party". (Moch, at 897).

In Mugge, more was shown to give a right of action to a member of the public nor formally a party to the contract. Indeed, one could argue that in Mugge, each individual citizen of the City of Tampa was a party to the contract and in both Mugge and Woodbury, the water company specifically assumed the requisite duty and liability. Continuing the quote from Moch:

> "It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability." (Moch, at 897).

Again, Mugge and Woodbury clearly show the assumption of the

duty to make reparation by contract and by the specific undertaking of the water company. Judge Cardozo was setting forth the general law regarding privity of contract with respect to the duty of a public utility. Mugge and Woodbury provided an expansion of that duty when the utility company specifically assumed the duty and responsibility of the benefit of individual members of the public. Moch does not conflict with Mugge or Woodbury and neither does the opinion below.

Petitioner asserts that the opinion of the Fourth District Court of Appeal conflicts with its own decision in Vendola v. Southern Bell Telephone & Telegraph Company, 474 So. 2d 275 (Fla. 4th DCA 1985) which reversed a jury verdict finding Southern Bell not liable for the negligent failure to timely trace a phone call on a 911 emergency system. Judge Yawn very carefully analyzed the tariff that Southern Bell urged as a defense and concluded that the obligation to trace calls (as opposed to providing the 911 service) was nowhere in the tariff (Id., at 278). All the contract language in the tariff that purported to limit Southern Bell's liability was directed to the provision of the 911 service and not to tracing calls. Since tracing calls was not even mentioned in the tariff, the exculpatory language was not applicable. Therefore, as Judge Yawn aptly noted,

> "when it undertook the service of tracing these calls, Southern Bell exposed itself to that venerable principal of law that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care". (Id., at 278).

That "something more" that Judge Cardozo referred to in Moch that

must be shown before an individual, not a party to a contract, would have a right of action was present in Vendola. Southern Bell entered upon an undertaking of tracing calls, and more importantly it entered upon a specific undertaking and course of action to aid a specific individual, namely tracing Vendola's phone call. By doing so, Southern Bell not only assumed a duty to use reasonable care in its undertaking, but also it went a step beyond merely a public service, and committed itself to aid an individual member of the public. The case could have been decided simply on the doctrine of rescue. While there is no general duty to aid a person in peril, once a person enters upon an affirmative course of conduct,

> "...affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions." (Prosser, Law of Torts, §38, 1955).

Petitioner failed to allege that "something more" required by Moch and recognized by Mugge and Woodbury, that would impose a duty on FPL to the specific individual named in the Complaint. FPL entered upon no undertaking to perform the public service of controlling traffic in Palm Beach County, nor did it undertake a specific duty to the decedent. Indeed, the Complaint fails to allege that the decedent was anything more than a member of "the public". She was not a taxpayer of Palm Beach County, nor a customer of FPL.

C. Imposition of liability to individual members of the public under the circumstances of this case would have far reaching adverse economic consequences to the rate payers of

all electric utilities.

FRECA and its 18 member cooperatives share the same concern expressed by Judge Nesbitt in Abravaya, "tort law is largely concerned with the allocation of risks, and the determination of who should bear risks has far reaching consequences". Shifting the risk of signal failures to electric companies will do nothing but shift the cost to the rate payers. All the electric utilities in the State of Florida are subject to the policies of the Florida Public Service Commission regarding cost based rates. In short, the rates charged electric consumers in the state should track the cost of providing such service. Passing the risk for traffic accidents to the electric utilities will simply increase the cost to the consumer and would immediately entitle the investor owned utilities subject to the PSC's rate making jurisdiction to file for a rate increase for all their classes of customers to cover the increased risk. The board of trustees of all of the electric cooperatives would be under an obligation to do the same thing.

The allocation of risks and imposition of duty is largely a matter of public policy. As Professor Prosser said:

> "The statement that there is or is not a duty begs the essential question - whether the plaintiff's interest are entitled to legal protection against the defendant's conduct... but it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection". (Prosser, The Law of Torts, 2d Ed., Section 36, 1955)

This court is then faced with a policy decision as to

whether or not to extend a public utilities duty for interruption of electric service to those members of the public who drive through intersections controlled by traffic signals. Imposing such a duty will inevitably lead to the joinder of whatever public utility was providing electric service to the traffic signal in any litigation involving an intersectional collision. It will also shift the burden and risk from the traveling public, those who are presumed to be licensed drivers, responsible for their own actions, to a utility company, and its rate payers. Before making a determination for or against expanding the scope of the utility's duty, the court should carefully consider how the risks are allocated presently, and whether a sufficient duty exists between and among the traveling public to provide protection against unreasonable risks.

D. Fla. Stat. §316.1235 and existing case law sufficiently address the allocation of risks for inoperable traffic signals without shifting the risks and costs to public utilities and their rate payers.

If licensed drivers have no defense against an inoperable traffic signal, and are subjected to a set of circumstances where no one can take adequate precautions against injury, then one could argue that a duty may be imposed on those providing the electric service and those operating and maintaining the traffic signal. That could be a fair allocation of risk, and if the utility knew it was subject to such risk, it would have the opportunity to impose a higher rate of such service and to pass the increased cost to all its rate payers.

But are there sufficient protections built into our existing system of risk allocation? Are drivers defenseless when faced with an inoperable signal? Are the owners and operators of traffic signals helpless when the electric service fails? Has no one planned for a service interruption? The clearest answer is legislative. The enactment of §316.1235, Florida Statutes, in 1977 (Chapter 77-229, Laws of Florida) contemplates and provides the ultimate solution to the risk allocation for inoperable traffic signals, by imposing the duty and burden of dealing with inoperable signals on the driver of a vehicle:

> **"Vehicle approaching intersection in which traffic lights are inoperative.** - The driver of a vehicle approaching an intersection in which the traffic lights are inoperative shall stop in the manner indicated in s.316.123(2) for approaching a stop intersection. In the event that only some of the traffic lights within an intersection are inoperative, the driver of a vehicle approaching an inoperative light shall stop in the above described manner. (§316.1235, Florida Statutes, 1987)

This very issue was addressed in Metropolitan Dade County v. Colina, 456 So.2d, 1233 (Fla 3d DCA 1984). An accident occurred at an intersection in Miami where the traffic signal was inoperable. Although the court focused on the proximate cause issue, it found that the drivers involved in the accident, observing that the signal was not functioning, could have avoided a collision by complying with the statutory requirements of §316.1235 and §316.123(2). (Id., at 1235) Even if the negligence of Dade County, in allowing the signal to become inoperative or in failing to correct it, was the occasion that led to the chain of events resulting in the accident, that did

not relieve the drivers of their statutory duty to proceed with due care and avoid a collision. In addressing the policy issue and the allocation of risk, the court concluded:

> "To hold the county liable on these facts would make it an insurer of motorists acting in disregard of their own safety and that of others. Such a responsibility would be an unwarranted social burden." (Id., at 1235)

In the case at bar, FPL is in a more remote position than that of Metropolitan Dade County in Colina. FPL was not providing a public service controlling traffic in Palm Beach County. FPL was not charged with maintaining and operating traffic signals generally or the traffic signal in question. FPL had no right or responsibility to station its personnel at the intersection to control traffic while repairs were made to the signal. The responsibility for operating and maintaining the signal and for traffic control rests solely with Palm Beach County. If Palm Beach County could not be held liable (on the basis of Colina) FPL certainly can't be held to a higher standard of liability.

Are there other ways besides §316.1235 to protect against the risks of collision at inoperable signals? Obviously drivers are supposed to carry insurance. In addition the county, in planning for traffic control, has the option to build in back up systems to guard against power outages. It could purchase battery back up systems or back up power from alternate power lines from the public utility.

If the law imposed a duty, and assumption of risk on FPL for inoperable traffic signals, and if FPL entered into a contract

with Palm Beach County knowing that it was assuming the risk of loss, then at least FPL would have been,

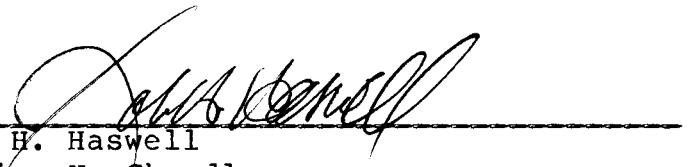
> "...given an opportunity to refuse to enter into such a contract or to fix a higher rate for its service in the nature of a premium and/or compensation to it for the untold and otherwise uncompensated expenditures which would be entailed were it to enter into a definite contract requiring such unusual responsibility and assumption of risk". (Bromer v. Florida Power & Light Company, at 660).

The four corners of the Complaint fail to allege facts that would create any legal duty owed by FPL to specific individuals, nor does the Complaint allege any facts that would excuse compliance by the decedent with §316.1235 Florida Statutes.

CONCLUSION

As a matter of law and public policy this court should affirm the decision of the court below, for to do otherwise would relieve drivers of a statutory duty to use due care and would cause electric rates to all electric consumers to go up, shifting the losses for traffic accidents to innocent rate payers. FPL agreed to provide electric service to Palm Beach County. It did not agree to assume the duty of providing uninterrupted electric service to individual members of the traveling public, nor did it have any duty or responsibility for controlling traffic in Palm Beach County. It certainly did not agree to be an insurer against injuries that might occur at an intersection and it had no contract to guarantee an individual's safety at the intersection. The legislature has already determined that the drivers of vehicles bear the ultimate duty and responsibility for exercising due care at intersections at which traffic lights are inoperative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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