

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

MAR 20 1989

FLORIDA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

CASE NO. 73 876

HONORABLE RICHARD S. FULLER, and
the CITY OF HOMESTEAD, a municipal
corporation.

Re: Case No. 88-32093CA28,
City of Homestead v. Florida
Power and Light Company,
Eleventh Judicial Circuit in
and for Dade County, Florida.

Respondents.

CLERK, SUPREME COURT
By _____
Deputy Clerk

PETITION FOR WRIT OF PROHIBITION

Pursuant to the provisions of Rule 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, the Florida Public Service Commission, Petitioner, hereby requests this Honorable Court to issue a Writ of Prohibition to the Honorable Richard S. Fuller, of the Eleventh Judicial Circuit in and for Dade County, Florida. The Writ should be issued to prohibit Judge Fuller from conducting further proceedings in Case No. 88-32093CA28, wherein the City of Homestead is attempting to modify the provisions of Florida Public Service Commission (FPSC) order No. 4285.

This FPSC order (Appendix, pp. 1-5) approved the territorial agreement between Florida Power & Light Company (FP&L) and the City of Homestead. An agreement between utilities not to compete must be approved by the FPSC to be valid. When the territorial agreement was approved, it became an order of the FPSC. orders of the FPSC are not subject to change by Circuit Courts. Judge Fuller should be required to either enter an order dismissing the complaint or transferring the issue to the Florida Public Service Commission.

JURISDICTION

This Court has exclusive jurisdiction to review actions of the FPSC relating to rates or service of utilities providing electric, gas, or telephone service (see Rule 9.030(a)(1)(A)(11), Florida Rules of Appellate Procedure, section 350.128, Florida Statutes,

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Article V, section 3(B)(2), Florida Constitution). The Circuit Courts of the State of Florida do not have jurisdiction to modify provisions of orders of the FPSC. See State Ex. Rel. McKenzie v. Willis, 310 So.2d 1 (Fla. 1975), discussed on pages 4-5.

CIRCUIT COURT PROCEEDINGS

The City of Homestead filed a complaint in Circuit Court (Appendix, pp. 6-11) seeking to modify FPSC order No. 4285, by providing for its termination upon "reasonable notice". Although the complaint states that Homestead seeks termination of the territorial agreement, Homestead actually seeks termination of FPSC Order No. 4285. A territorial agreement (agreement not to compete) is invalid unless approved by the FPSC. Once a territorial agreement is approved by the FPSC, it becomes an order of the FPSC. As a FPSC order, the territorial agreement loses any separate identity. The FPSC approved agreement (Appendix, pp. 8-11) does not contain provisions for termination.

The case is now pending before Judge Fuller in the Eleventh Judicial Circuit for Dade County. FP&L filed a Motion to Dismiss and Motion to Abate (Appendix, pp. 12-26) arguing that the case should be filed at the FPSC. Judge Fuller denied both Motions (Appendix, p. 27).

If the Circuit Court is allowed to proceed, the utility will be in an impossible situation. FP&L will be forced to choose between following FPSC Order No. 4285 or Judge Fuller's decision. The only action that Judge Fuller could take that would not be a modification of FPSC Order No. 4285 would be to dismiss the case.

BACKGROUND

By agreement dated August 7, 1967, the City of Homestead and FP&L entered into a territorial agreement. FP&L filed for FPSC approval of that agreement. Without FPSC approval such agreements are contrary to public policy and invalid. The FPSC approved the territorial agreement by Order No. 4285, issued December 1, 1967.

Customers of FP&L who were transferred to the city, by the terms of the agreement, challenged the FPSC order. In Storey v. Mayo, 217 So.2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), this Court denied the petition for certiorari and thereby upheld FPSC Order No. 4285. The Court stated:

[T]he power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary expensive competitive practices . . . It was a recognition of this basic concept that led us to approve territorial service agreements between two regulated utilities. Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966); City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965).

Storey at 307.

Based on this Court's approval, FPSC Order No. 4285 has been in effect since 1967. The Circuit Court is without jurisdiction to change that.

ARGUMENT

The Florida case law regarding utility territorial agreements was developed in the 1960's. City Gas Company and Peoples Gas Company were two of the utilities involved. City Gas and Peoples Gas entered into an exclusive service agreement defining the areas where each would sell natural gas. The agreement was jointly submitted to the FPSC for approval. In its order, the FPSC stated that such agreements would not be valid without its approval. This Court, on review of the FPSC order, specifically considered the question of whether the territorial agreement would have been invalid under Chapter 366, Florida Statutes, if it had not been approved by the FPSC, City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 432 (Fla. 1965). The question was affirmatively answered:

In short, we are of the opinion that the Commission's existing statutory powers over areas of service, both express and implied, are sufficiently broad to constitute insurmountable obstacle to the validity of a service area

agreement between regulated companies, which has not been approved by the Commission.

Id. at 436.

The Court also ruled that the effect of the FPSC approval of a territorial agreement, "is to make the approved contract an order of the Commission, binding on the parties", Id. at 436, citing Duke Power Company v. Blue Ridge Electric Membership Corporation, 253 N.C. 596, 117 S.E. 2d 812, 817 (1961).

At the time of the City Gas-Peoples Gas territorial agreement, the FPSC had implied authority to approve territorial agreements. In 1974, the Florida Legislature provided the explicit authority to approve territorial agreements by enacting Chapter 74-196, Laws of Florida, 1974. The provisions of section 367.04(2)(d), Florida Statutes, grant the Commission the authority:

To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

In addition to this authority to approve territorial agreements between electric utilities, the Legislature also granted authority to:

Resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction
▪ ▪ ▪ ▪ Section 366.04(2)(e), Florida Statutes.

Based on these two statutory provisions, it is inevitable that Homestead and FP&L will be before the FPSC to resolve territorial disputes or for approval of territorial agreement(s).

The controversy between Homestead and FP&L is resolvable by the FPSC. It is a question infused with public interest considerations that the FPSC is especially equipped to analyze. Whether FPSC order No. 4285 should be terminated (or modified) requires the FPSC to consider the impact on the planning, development, and maintenance of the coordinated electric power

grid throughout the state. The Legislature has assigned the FPSC the responsibility to assure an adequate and reliable source of energy and to avoid uneconomic duplication, section 366.04(3) and (4), Florida Statutes. Where the FPSC is exercising its jurisdiction pursuant to Chapter 366, Florida Statutes, it is an exercise of police power for the protection of the public. The authority granted is to be liberally construed for the accomplishment of the public interest, section 366.01, Florida Statutes.

In 1979, the FPSC was requested to modify the terms of the territorial agreement between Florida Power & Light and the City of Homestead. Certain customers of FP&L filed a complaint seeking to change the terms of the territorial agreement approved by Order No. 4285. The complaint was assigned Docket No. 790623-EU. Florida Power & Light and the City of Homestead both filed responses urging the Commission to dismiss the complaint. After due consideration, the FPSC issued Order No. 9259 (Appendix, p. 28) dismissing the complaint. The customers appealed to this Court. By Order No. 58,853 (Appendix, p. 29) dated October 23, 1980, a "PER CURIAM DENIED" was issued.

This Court's ruling in State Ex. Rel. McKenzie v. Willis, 310 So.2d 1 (Fla. 1975), is on point. In that case, two writs of prohibition were filed seeking to restrain two Circuit Court judges from exercising jurisdiction in two matters which were within the exclusive administrative jurisdiction of the FPSC. In discussing the merits of the cases, the Court stated:

we agree noncompetitive agreements between regulated carriers must be approved by the Commission . . .

No concurrent or cumulative power of direct review of Commission action by the Circuit Courts has been provided by general law under the limitations in section 5(b) of Article V of the State Constitution. The controversies involved in the two suits are resolvable by the Commission within its jurisdiction subject to review by the Supreme Court. They do not lie within the jurisdiction of the Circuit Courts. Citations omitted.

Id. at 3.

In Mckenzie, the Court did not issue the Writs of Prohibition stating that:

We do not issue preemptory Writs of Prohibition because we are confident Respondent will duly comply with the views expressed herein.

Id. at 3-4.


Similar direction should be provided to the Eleventh Circuit Court for Dade County.

CONCLUSION

Case No. 88-32093CA28 pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County before Judge Fuller seeks to modify the provisions of FPSC Order No. 4285. The Circuit Court does not have jurisdiction to modify the provisions of an FPSC order. This Court has exclusive jurisdiction to review actions of the FPSC relating to rates or service of electric utilities. Therefore, the FPSC requests the issuance of an order prohibiting Judge Fuller from conducting further proceedings and dismissing Case No. 88-32093CA28.

Respectfully submitted,

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Dated: March 20, 1989

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 20th day of March, 1989 to the following:

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