

IN THE SUPREME COURT OF FLORIDA

FLORIDA PUBLIC SERVICE COMMISSION, )  
 )  
 Petitioner, )  
 v. )  
 HONORABLE RICHARD S. FULLER and )  
 the CITY OF HOMESTEAD, a municipal )  
 corporation, )  
 Respondents. )

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CASE NO. 83,576  
**FILED**  
 SID J. WHITE  
 MAY 12 1989  
 CLERK, SUPREME COURT  
 Registry Clerk

FLORIDA PUBLIC SERVICE COMMISSION'S REPLY

COMES NOW the Petitioner, Florida Public Service Commission (FPSC), and files its reply to Homestead's response.

On March 20, 1989, the FPSC filed its PETITION FOR WRIT OF PROHIBITION to prohibit the Circuit Court from modifying FPSC order No. 4285. On April 17, 1989, this Court issued its ORDER TO SHOW CAUSE and commanded the Respondents, Richard S. Fuller, Circuit Judge of the Eleventh Judicial Circuit, and the City of Homestead, to show cause on or before May 3, 1989, why the Petition should not be granted. On May 3, 1989, the City of Homestead filed its response. No other response was received.

1. THE TERRITORIAL AGREEMENT IS INSEPARABLE FROM ORDER NO. 4285.

On December 1, 1967, the FPSC issued Order No. 4285. This order approved a territorial agreement between the City of Homestead (Homestead) and Florida Power and Light (FP&L). Neither the agreement nor order No. 4285 provided for termination.

Prior to approving this agreement, the FPSC had to find that the agreement was "in the public interest". If Homestead and FP&L had agreed on termination provisions in the territorial agreement, then the FPSC would have had that issue before it, as part of its "public interest" determination. The fact is that the Florida Public Service Commission found the territorial agreement between Homestead and FP&L, without provisions for its termination, to be "in the public interest", and that agreement became Order No.

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4285. One can only speculate on whether the FPSC would have found the agreement "in the public interest" if termination provisions had been included.

The law in Florida is that the territorial agreement between Homestead and FP&L became an order of the FPSC when it was approved by the FPSC. This Court so held in City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965). FPSC order No. 4285 approves the agreement not to compete. Because agreements not to compete are contrary to public policy, they are invalid in the absence of state approval. The territorial agreement between Homestead and FP&L cannot be considered as simply a contract. The territorial agreement does not have a separate existence from FPSC Order No. 4285.

2. APPROVAL OF TERRITORIAL AGREEMENTS BETWEEN UTILITIES IS WITHIN THE EXCLUSIVE JURISDICTION OF THE FPSC.

In 1965, this Court found that the FPSC had the implied authority to approve territorial agreements which, if not approved, would be invalid, City Gas. In 1974, the Florida Legislature provided explicit authority by enacting Chapter 74-196, Laws of Florida, 1974. The question of whether the territorial agreement, which became Order No. 4285 should be modified, requires the FPSC to consider whether its "in the public interest." (See section 366.01, Florida Statutes). This is consistent with the FPSC's responsibility of assuring an adequate and reliable source of energy pursuant to section 366.04(3) and (4), Florida Statutes.

Based upon this Court finding the implied authority and the legislative grant of explicit authority, it is clear that the FPSC has the exclusive jurisdiction to approve and, thereby, validate territorial agreements between utilities. Homestead is aware of the requirement and value of an FPSC order approving a territorial agreement. In its Response on page 3, Homestead states: " . . . [U]tilities seek PSC approval of territorial agreements to avoid antitrust implications." The territorial agreement must be

approved to be valid and the FPSC is the only agency that has the authority to approve it.

3. MODIFICATIONS TO AN APPROVED TERRITORIAL AGREEMENT MUST BE FOUND TO BE IN THE PUBLIC INTEREST.

The approval of a modification to an approved territorial agreement requires a finding that the modification is "in the public interest." The same public interest showing that is required for initial approval of a territorial agreement is required where a modification of an existing territorial agreement is sought.

Clearly, Homestead is seeking to modify the provisions of the territorial agreement and FPSC order No. 4285. The vehicle selected by Homestead is a declaratory judgment action in the Eleventh Judicial Circuit in and for Dade County, Florida. However, the Circuit Court is without jurisdiction to provide for modification of the territorial agreement which is FPSC order No. 4285.

4. THE FPSC COULD MODIFY AN EXISTING TERRITORIAL AGREEMENT, IN A PROPER PROCEEDING.

The language in section 366.04(2), Florida Statutes, which states that "existing territorial agreements shall not be altered or abridged thereby . . ." means that existing territorial agreements are not changed by that statutory amendment. This statutory language does not prevent the FPSC from hearing a petition to modify an existing approved territorial agreement after notice and opportunity to be heard. This type of proceeding could be conducted pursuant to Rule 25-22.036 (4) or (5), Florida Administrative Code. In fact, in 1979, Homestead and FP&L were parties to a proceeding before the FPSC where certain customers sought to change terms of order No. 4285 (Docket No. 790623-EU -- more fully discussed on page 5 of FPSC's Petition for Writ of Prohibition).

5. THIS COURT MUST ISSUE THE WRIT OF PROHIBITION TO PREVENT JUDGE FULLER FROM CONDUCTING FURTHER PROCEEDINGS IN CASE NO. 88-32093CA28.

It is appropriate to issue a Writ of Prohibition to restrain a Circuit Court Judge from exercising jurisdiction in matters (approval of territorial agreements) which are within the exclusive administrative jurisdiction of the Florida Public Service Commission, State Ex Rel. McKenzie v. Willis, 310 So.2d 1 (Fla. 1975).


CONCLUSION

The Writ of Prohibition must be issued to prevent Judge Fuller from conducting further proceedings in Case No. 88-32093CA28, wherein the City of Homestead is attempting to modify the provisions of the territorial agreement and FPSC Order No. 4285.

FPSC orders relating to rates or service of electric utilities are reviewable only by this Court (Rule 9.030(a)(1)(A)(11), Florida Rules of Appellate Procedure, section 350.128, Florida Statutes, and Article V, Section 3(B)(2), Florida Constitution).

Respectfully submitted,

SUSAN F. CLARK  
General Counsel

  
WILLIAM H. HARROLD  
Associate General Counsel  
Florida Bar No. 142364

FLORIDA PUBLIC SERVICE COMMISSION  
101 East Gaines street  
Tallahassee, Florida 32399-0861  
(904) 488-7464

Dated: May 12, 1989

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida public Service Commission's Response has been furnished by U.S. Mail this 12th day of May, 1989 to the following:

Wilton R. Miller, Esquire  
J. Christian Meffert, Esquire  
Bryant, Miller and Olive, P.A.  
201 S. Monroe St., Suite 500  
Tallahassee, FL 32301

Honorable Richard S. Fuller  
Dade County Courthouse  
73 West Flagler street  
Miami, FL 33130

Robert E. Stone, Esquire  
Florida Power & Light Co.  
Post office Box 029100  
Miami, FL 33102

L. Lee Williams, Jr., Esquire  
Frederick M. Bryant, Esquire  
Moore, Williams, Bryant,  
Peebles & Gautier, P.A.  
Post Office Box 1169  
Tallahassee, FL 32302

Michael E. Watkins, Esquire  
City Attorney  
City of Homestead  
790 N. Homestead Blvd.  
Homestead, FL 33030

  
William H. Harrold

9027G