IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,876**

IN RE: FLORIDA PUBLIC SERVICE COMMISSION,

Petitioner,

vs.

HONORABLE RICHARD S. FULLER, JUDGE AND THE CITY OF HOMESTEAD, A MUNICIPAL CORPORATION,

Respondents,

and

FLORIDA POWER & LIGHT COMPANY, A FLORIDA CORPORATION,

Intervenor.

REPLY TO CITY OF HOMESTEAD'S
RESPONSE TO PETITION FOR WRIT OF PROHIBITION

FLORIDA POWER & LIGHT COMPANY, (FPL), Intervenor, files this, its reply to the CITY OF HOMESTEAD'S, (City), Response to the Petition for Writ of Prohibition filed by the FLORIDA PUBLIC SERVICE COMMISSION, (FPSC).

STATEMENT OF THE CASE

On or about August **1, 1988,** the City filed its Complaint in the Circuit Court of the Eleventh Judicial Circuit against FPL alleging that the territorial agreement executed between the City and FPL could be terminated by giving reasonable notice and seeking entitlement to so terminate. (Appendix - pages **1-12).** FPL filed Motions to Abate and Dismiss the Complaint and Memorandum in Support of its Motions (Appendix - pages **13-49).** The Motions were denied by Order of Respondent, Judge Richard S. Fuller, entered January **16, 1989** (Appendix - page 50). On or about March **21, 1989,** FPL filed another Motion to Dismiss for Lack of Jurisdiction over the Subject Matter. (Appendix - pages 51-55).

The FFSC filed the instant Petition on or about March 20, 1989. At a previously scheduled hearing on March 23, 1989, Judge Fuller discussed the status of the case with FPL and City, and directed the City to file a response to FPL's Motion to Dismiss. Said Response was filed by the City on or about April 5, 1989. (Appendix - pages 56-73).

On April 11, 1989, the Judge, without ruling on FPL's Motion to Dismiss, entered his Order setting the case for trial for the week commencing June 19, 1989. (Appendix - pages 74-753.

This Court entered its Order to Show Cause why the Petition for Writ of Prohibition should not be granted on April 17, 1989. FPL moved to intervene and this case ensued.

STATEMENT OF THE FACTS

On August 7, 1967, FPL and the City entered into an agreement, subject to approval of FPSC, (herein the "Territorial Agreement"), to define service areas in and around the City stating that in the absence of a service area agreement there would continue to be "uneconomical duplications of plant and facilities and expansion into areas served by the competing parties, which in turn result in avoidable economic waste and expense." (Appendix - page 3).

FPL filed for approval of the Territorial Agreement and the FPSC, after hearing, approved the Territorial Agreement by Order No. 4285 entered December 1, 1967 (Appendix - pages 76-79). Certain customers being transferred from FPL to the City objected and, by certiorari, sought review of the FPSC's Order No. 4285 by this Court. FPSC Order No. 4285 was reviewed and upheld by this Court in Storey v. Mayo, 217 So.2d 304 (Fla. 1968).

Over the next eleven years, FPL and the City proceeded

to implement the Territorial Agreement and Order of FPSC. In 1979 another group of customers being transferred from FPL to the City objected to the transfer and filed complaint with the FPSC, which was dismissed by FPSC Order No. 9079 (Appendix - page 80). An Amended Complaint (Appendix - pages 81-90) was filed and subsequently dismissed by FPSC Order No. 9259. (Appendix - pages 91-92). Certiorari to this Court was denied per curiam in Case No. 58,853, (Appendix - page 93), dated October 23, 1980, at 389 So.2d 1002 (Fla. 1980).

ISSUE NO. 1: IS A TERRITORIAL AGREEMENT APPROVED BY THE PUBLIC SERVICE COMMISSION, AN ORDER OF THE COMMISSION?

The City maintains the Territorial Agreement between FPL and the City is merely a contract. However, the Agreement between the parties specifically recognized the FPSC jurisdiction and that FPSC approval was required. (Appendix - page 4). The Agreement was really an Agreement for FPL to seek approval of FPSC and the parties merely agreed to ". . . abide by the terms hereof and be bound hereby pending such approval." (Appendix - page 4, paragraph 3, emphasis added). See, also, paragrapn 5 (Appendix - page 4) where transfer of facilities was further conditioned upon an Order of FPSC approval of the service areas. Thus, the Agreement was not a binding Agreement until the condition of FPSC approval was satisfied. FPL seeking FPSC approval of the service areas as provided in the Agreement is the only element of the Agreement which makes the Agreement enforceable. If the FPSC had disapproved the proposed service areas, there would have been no Agreement. The Territorial Agreement is not just another contract. As set forth in the FPSC's Petition, it is a contract "infused with" the public interest. Territorial agreements are so infused with the public interest that they are unenforceable in the absence of FPSC approval. See City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). It is this necessity of approval of territorial agreements by the FPSC that leads this Court to conclude that "the practical effect of such approval is to make (an FPSC approved territorial agreement) an order of the commission, binding as such upon the parties." Id. at 436. (Citation omitted).

Consequently, the entire premise of the Response filed by the City that the issue before Judge Fuller is a simple contract issue involving the duration of the contract begs the issue of jurisdiction presented to this Court. The issue before this Court affects not a simple contract between two parties, but an order of the FPSC. While the Territorial Agreement is a contract, it has long since been converted into an order of the FPSC to which issues of interpretation and application of the order properly lie in a proceeding before the FPSC.

ISSUE NO. 2: DOES THE FPSC HAVE JURISDICTION OVER THE INSTANT TERRITORIAL AGREEMENT?

The City states that the FPSC did not have jurisdiction over the City when the Territorial Agreement was approved and therefore the FPSC cannot presently have jurisdiction over the interpretation or application of the service area agreement as it applies to the two utilities' service areas. The City further argues that even if the FPSC presently has jurisdiction over the Territorial Agreement, the question of interpreting the utilities' rights and obligations in providing electric service under Territorial Agreement properly lies in Circuit Court. Both of these contentions are without merit.

A. FPSC JURISDICTION AS AMENDED IN 1974

It is true that the FPSC had no jurisdiction over municipal utilities prior to 1974. However, in 1974 the Legislature enacted Section 366.04(2), Florida Statutes, which unequivocally provided the FPSC jurisdiction over municipal utilities with respect to service territory. Specifically, Section 366.04(2) provided the FPSC jurisdiction to "approve territorial agreements'' and "resolve any territorial dispute". Additionally, the Legislature has made it clear that public policy and welfare

require the FPSC to resolve territorial or service area disputes in order to "require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes" in Section 366.04(2)(c), Florida Statutes, and by the grant of jurisdiction "over the planning, development, and maintenance of a coordinated electric power grid throughout Florida . . . and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities" in Section 366.04(3), Florida Statutes. The Legislature has further stated that all provisions of Chapter 366, Florida Statutes, "shall be liberally construed for the accomplishment" of protecting the public welfare. See Section 366.01. Obviously, the regulation of electric service areas where utility systems interface such that a territorial agreement is necessary or the FPSC dispute process is necessary is an important regulatory function.

Given the import of such matters by the Legislature and the FPSC, it is an inescapable conclusion that territorial agreements between rural electric cooperatives, municipal electric utilities, and public utilities entered into and approved by Order of FPSC prior to 1974, such as the instant Territorial Agreement and Order, were placed under the FPSC's jurisdiction pursuant to Section 366.04, Florida Statutes. To conclude otherwise would defeat the purpose of the statute and frustrate the FPSC's ability to perform its duties with respect to the grid and the avoidance of uneconomic duplication of electric facilities. This Court has recognized the FPSC's jurisdiction and duty to resolve issues arising under territorial agreements pursuant to Section 366.04. See Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987). The subject matter of that case was a Territorial Agreement and Order approving same between FPL and a rural electric cooperative which was

entered into prior to 1974. The issue presented to the FPSC was one of interpreting the Agreement and Order, i.e., what is service in another's territory, and this Court directed the FPSC to hear the issue.

If the City's contention is accepted, then Territorial Agreements entered into and approved by Order of FPSC prior to 1974 between municipalities or electric cooperatives and public utilities would not be subject to the FPSC's jurisdiction and questions of interpreting the parties' rights and obligations under those Territorial Agreements and Orders would fall to the Circuit Courts of this state. This is an unacceptable conclusion if the FPSC is to carry out its regulatory function. Part of the FPSC's regulatory function identified by this Court in Lee County Electric Cooperative, Inc. v. Marks, supra, was the enforcement of "territorial agreements for the public good." Id. at 587. Allowing the City's complaint to go forward before Judge Fuller would "[establish] a policy which dangerously collides with the entire purpose of territorial agreements, as well as the FPSC's duty to police 'the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.' Section 366.04(3), F.S. (1985)." Id. at 587. The rights and obligations of the parties under the FPSC Order sought to be determined by the City directly affect which utility shall provide electric service in the areas where the City's electric system interfaces with FPL's system. Therefore, the City should be required to proceed before the FPSC where its real issue, modification of the FPL - City territorial boundary, can be properly addressed and the public interest properly protected.

B. CITY'S SUBMISSION TO FPSC JURISDICTION

It should also be noted that the City, in a proceeding before the FFSC, stated that the instant Territorial Agreement between FPL and the City is "a territorial agreement which is governed by the provisions of Florida Statutes 366.04(2)." This statement is contained in the City's answer to a complaint filed by FPL customers in In Re: Complaint of Joseph and Lavera Accursio, et al. v. FPL and the City of Homestead, Docket No. 790623. See Appendix - pages 95-97 for the full answer of the City in that docket. The Accursio complaint, which was ultimately appealed to this Court, sought the termination or modification of the Order approving the Territorial Agreement. The FPSC dismissed the Complaint as failing to allege grounds on which a complaint could be heard. The point to be made here is that the City, by its actions in the Accursio complaint, submitted itself, pursuant to Florida Statutes 366.04(2), to the jurisdiction of the FPSC and should now be estopped from arguing that the FPSC has no jurisdiction over the City, the instant Territorial Agreement, and the Order of FPSC.

C. SAVINGS CLAUSES PROVIDED BY THE LEGISLATURE FOR TERRITORIAL AGREEMENTS ENTERED INTO PRIOR TO 1974

The City's argument that the Legislature intentionally excluded territorial agreements executed prior to 1974 between electric cooperatives or municipalities and public utilities from the FPSC's jurisdiction is also without merit. The City cites language found in two different parts of Section 366.04, Florida Statutes. The first quote used by the City in its response is found in subsection 366.04(2)(d), Florida Statutes, and states: "However, nothing in this chapter shall be construed to alter existing

territorial agreements as between the parties to such agreements."

Somehow the City concludes that this removes all territorial agreements between public utilities and municipal utilities or electric cooperatives executed prior to **1974** from the FPSC's jurisdiction. Taken at its plain meaning this section is nothing more than a specific grandfathering of the FPSC's Order approving territorial agreements executed prior to **1974** between electric cooperatives or municipal utilities and public utilities. The clause merely saves agreements executed and aproved by FPSC prior to **1974** from going through the approval process a second time, and the possibility of a different result. To conclude otherwise would present the same regulatory paradox discussed earlier regarding the FPSC's ability to carry out its regulatory purpose with respect to territorial agreements executed and approved by FPSC prior to 1974.

The City also quoted similar language contained in the concluding paragraph of subsection **366.04(2).** The full text of the sentence partially quoted by the City reads as follows:

> No provision of this Chapter shall be construed or applied to impede, prevent or prohibit any municipally owned electric utility system from distributing at retail electric energy within its corporate limits, as such corporate limits exist on July 1, **1974;** however, existing territorial agreements shall not be altered or abridged hereby. (emphasis added)

The underlined portion of the quote is that which is quoted in the City's response. Obviously, the underlined language is intended to save those territorial agreements which permit public utilities to provide service within City limits as they existed on July 1, **1974,** and does not remove the instant Territorial Agreement from the FPSC's overview.

D. CIRCUIT COURT JURISDICTION AFTER THE **1974** AMENDMENT OF SECTION **366.04,** FLORIDA STATUTES

Finally, the City refers the Court to three cases for the proposition that the above discussed statutes have not divested the Circuit Court from jurisdiction over the Territorial Agreement. City first cites City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), as proof positive that Circuit Courts have jurisdiction over territorial agreements. The issue therein did not involve an interpretation as to what the parties' rights and obligations were under the two utilities' territorial agreement. The subject complaint filed in Circuit Court sought the enforcement of an FPSC order and the appeal to this Court concerned the validity of the FPSC approved territorial agreement. By the opinion in City Gas this Court stated that the FPSC had authority to approve territorial agreements and that an approved territorial agreement is an order of the FPSC. The jurisdiction of the FPSC vis-a-vis the Circuit Court was not at issue, nor should it have been.

City's second citation was to Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974). By the City's own description of that case it is readily apparent that the case was a tort action and properly belonged in Circuit Court. A careful reading of the case reveals that there was no question regarding what Southern Bell's tariff meant or whether the tariff was reasonable. Only a factual issue was presented regarding whether the utility's actions met the statutory standards imposed on it by the FPSC and Chapter 364, Florida Statutes.

The last case the City referred to was Lake Worth Utilities Authority v. Barkett, 433 So.2d 1978 (Fla. 4th DCA 1983). It is not clear why City has cited this case since it stands for the proposition that matters statutorily placed within the jurisdiction of the FPSC are within the

primary jurisdiction of the FPSC. The Petitioner therein, Lake Worth Utilities Authority, sought a Writ of Prohibition from this Court to prohibit a complaint filed by the Palm Beach Junior College from going forward on the grounds that the issues presented were within the jurisdiction of the FPSC. This Court found that those issues for which the FPSC had statutory authority over properly belonged before the FPSC. That is precisely the resolution which should be applied to the City's Complaint. The City has, by its Complaint, presented an issue regarding the rights and obligations of the parties pursuant to a territorial agreement that is an order of the FPSC. Since the FPSC has statutory authority over service area agreements the Writ requested by the FPSC should issue.

The statutory authority which governs the matter at issue in the City's Complaint comes from both subsections (d) and (e) of Section 366.044(2). The City's claim that no territorial dispute exists plainly ignores their own Complaint. There is a dispute between the City and FPL regarding the rights and obligations of the parties under that service area agreement and resulting Order of the FPSC. See paragraph 5 of the City's Complaint (Appendix - page 2). Since the FPSC has statutory authority over service area agreements any dispute or question involving the rights and obligations of parties to an FPSC approved service area agreement properly lies before the FPSC.

E. FPSC EXPERTISE

The City also contends that the issue involved herein is not particularly amenable to the expertise of FPSC. The Legislature, in Sections 366.04(2)(c) and (3), and this Court, in City Gas Company v. Peoples Gas Systems, Inc., supra, and Storey v. Mayo, supra, have recognized that the

issue of service areas is particularly amenable to the expertise of FPSC in avoiding uneconomic duplication of facilities and the planning, development, and maintenance of a coordinated electric power grid throughout this state. The contention of the City that the FPSC does not have the authority to modify would seem to be contrary to Peoples Gas Systems, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), where this Court stated at page 339:

> . . . Nor can there be any doubt that the Commission may withdraw or modify its approval of a service area agreement . . .

CONCLUSION

The Petition for Writ of Prohibition should be granted. The Complaint pending in Circuit Court seeks to affect an Order of FPSC. The subject matter of the Order, a service area agreement, is within the jurisdiction of FPSC and the public interest requires the expertise of the FPSC in this area to avoid uneconomic duplication of facilities and the planning, development, and maintenance of a coordinated electric power grid throughout Florida.

If the proceeding in Circuit Court were to continue and be resolved in the City's favor, the result would be that the Order of FPSC, upheld by this Court, would be, in effect, reversed by the Circuit Court while still leaving FPL bound by the Order of the FPSC, because the Constitution of Florida permits review of such Orders only by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply to City of Homestead's Response to Petition for Writ of Prohibition has been furnished to Susan F. Clark, Esq., General Counsel, and William H. Harrold, Esq., Associate General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida **32399-0861**; Michael E. Watkins, Esq., City Attorney, City of Homestead, 790 North Homestead Boulevard, Homestead, Florida 33030; L. Lee Williams, Jr., Esq. and Frederick M. Bryant, Esq., Moore, Williams, Bryant, Peebles & Gautier, P.A., Post Office Box **1169**, Tallahassee? Florida **32302**; and Honorable Richard S. Fuller, Dade County Courthouse, 73 West Flagler Street, Miami, Florida **33130**, by U. **S.** Mail this 19th day of May, **1989.**

J. CHRISTIAN MEFFERT