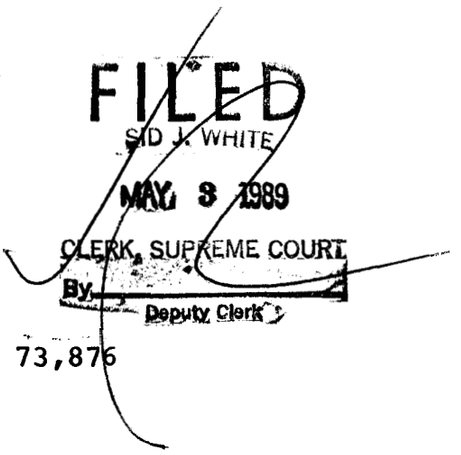
IN THE SUPREME COURT OF FLORIDA



IN RE:

FLORIDA PUBLIC SERVICE COMMISSION,

Petitioner,

vs. Case No. 73,876

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

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

COMES NOW the Respondent, the City of Homestead, and pursuant to this Court's April 17, 1989 Order To Show Cause files its Response to the Petition for Writ of Prohibition filed by Petitioner, the Florida Public Service Commission ("PSC").

I. THE PETITION FOR WRIT OF PROHIBITION WAS INAPPROPRIATELY FILED.

For various reasons which will be discussed in detail below, the Petition for Writ of Prohibition has been inappropriately filed and, thus, should be denied. The City of Homestead (the "City") is a municipal corporation and the Plaintiff in the Declaratory Judgment action filed in the Circuit Court of Dade County, Florida before the Honorable Richard S. Fuller. A complete copy of the Complaint with all attachments is in the City's Supplemental Appendix at pages A-1 through A-8. In order to adjudicate if the City should be denied its constitutional right to access to the courts of this State under Article 1, Section 21, Florida Constitution (1968), it is necessary to fully understand the issue pending before the Circuit Court, what is not pending before that Court, and the effect, if any, of a Circuit Court ruling on the single specific issue before it. The Petitioner has mischaracterized the issue before the Circuit Court and, thus, it is necessary to

1 of 10

discuss in factual ana legal detail certain issues that have nothing to do with the Declaratory Judgment action pending before the Honorable Richard S. Fuller.

II. THE ISSUE BEFORE THE CIRCUIT COURT.

Pursuant to Chapter 86, Florida Statutes (1987), the City of Homestead filed a Declaratory Judgment action seeking construction of an August 7, 1967 contract (the "Contract") between it and Florida Power & Light Company ("FPL"). The only issue raised by the City in its Complaint relates to the Contract's duration because (a) the over twenty-one (21) year old Contract contains no express termination date; (b) the City and FPL disagree on its duration; and (c) the agreement is one which would normally be for a definite term based on industry custom, thereby being terminable upon reasonable notice. In regard to item (c), the City will present evidence at the trial that of 59 contracts delineating territory between utilities, 11 have a 10-year term, 18 have a 15-year term, 5 have a 20-year term, 6 have a 25-year term, 8 have a 30-year term, 1 has a 50-year term, and 10 have an indefinite term (with varied cancellation and extension provisions).

III. THE CIRCUIT COURT HAS JURISDICTION TO ADJUDICATE THE ISSUE BEFORE IT.

The issue before the Circuit Court is clearly set out above. Jurisdiction rests with the Circuit Court of Dade County, not the PSC. As stated in Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 371 So.2d 152, 154 (Fla. 1st DCA 1979), "Jurisdiction to interpret such (ambiguous) contracts is, under our system, vested solely in the judiciary. It is to the judiciary that the citizenry turns when their rights under a document are unclear and they desire an interpretation thereof." See also, Point Management, Inc. v. Department of Business Regulation, Division of Land Sales and Condominiums, 449 So.2d 306 (Fla. 4th DCA), petition for review denied, 458 So.2d 271 (Fla. 1984).

Neither FPL nor the PSC (in PSC Docket No. 880986-EU where FPL filed a Petition for Declaratory Statement or in the Circuit Court where FPL filed Motions to Dismiss) has contended that the City's Complaint does not meet the allegation requirements of a Declaratory Judgment action or that it is not the type of dispute which would not be appropriate for a declaratory decree.

In order to issue a Writ of Prohibition, this Court would nave to adjudicate that the Legislature constitutionally granted the PSC exclusive subject matter jurisdiction to adjudicate a contract dispute between the City and FPL. As will be shown below, this nas not and cannot be done.

IV. ISSUES GERMANE TO A COMPLETE UNDERSTANDING OF CASE BUT NOT BEFORE THE CIRCUIT COURT.

A. THE DECLARATORY JUDGMENT ACTION FILED BY THE CITY OF HOMESTEAD DOES NOT SEEK TO CHANGE, MODIFY OR ALTER ANY ORDER OF THE FLORIDA PUBLIC SERVICE COMMISSION.

Territorial agreements are contracts between utilities that define their respective electric service areas, Although the Florida Statutes have been modified from time to time, today tne PSC has statutory authority to approve agreements between utilities as to territorial service areas. Thus, two or more utilities cannot divide the State or any portion tnereof and unilaterally assign themselves the respective rights to provide electricity in certain areas without PSC approval, The Legislature has given this territorial approval authority to the PSC in order to ensure adequate and reliable service and to avoid the noneconomic duplication of facilities with its resulting financial impact on Florida citizens. In addition, utilities seek PSC approval of territorial agreements to avoid antitrust implications.

It should be noted, however, tnat a PSC order approving a contract between utilities does not change the express terms of the contract, and the PSC Order approving the August 7, 1967 Contract between the City and FPL did not change its terms. A territorial contract tnat terminates by its own express terms

does not change, modify or alter any PSC order approving it. Further, Chapter **366,** Florida Statutes **(1987),** does not grant the PSC authority to map out the entire State and assign different areas to different electric utilities. There are many areas of Florida not covered by a territorial agreement - an area not covered by a territorial agreement is not unique.

The only issue pending before the Circuit Court is the duration of the Contract between the City and FPL. If the Circuit Court rules that the Contract is terminable after reasonable notice, the situation between the City and FPL will be no different than if the parties expressly provided in the Contract for its duration and the time had expired. Similarly, the territory involved will be no different than many other areas of Florida which are not covered by a territorial agreement.

B. THE PSC HAD NO AUTHORITY OVER THE CITY WHEN THE PSC APPROVED THE CONTRACT.

The Contract was submitted to the PSC for approval in **1967** solely for FPL's benefit. At that time, the PSC had absolutely no jurisdiction over the City of Homestead. Storey v. Mayo, **217 So.2d 304** (Fla. 1968), cert. denied, **395** U.S. **909 (1969).** As stated in paragraph **3** of the Contract, "(t)he parties acknowledge that the Company (FPL) is regulated by the Florida Public Service Commission and that it will have to apply to the Commission for the approval of this Agreement, but the parties, nevertheless, agree that this Agreement shall become effective on the day hereof ana that the parties shall abide by the terms hereof and be bound hereby pending such approval." As the Supreme Court acknowledged in Storey, the City of Homestead made it clear that it was in no way submitting to the PSC's jurisdiction. It was not until **1974,** approximately seven **(7)** years after the City and FPL contracted and the PSC approved their Contract, that the PSC acquired limited jurisdiction over municipal electric utilities in areas designated in Section **366.04(2),** Florida Statutes. Further, there is no "territorial dispute" between the City and FPL. Again, the only

issue presented to the Circuit Court is the duration of the contract. The fact that tne Circuit Court should rule that the Contract is terminable after giving reasonable notice will not create a territorial dispute.

Even if the Contract had been entered into after 1974, the Circuit Court would still have subject matter jurisdiction under Chapter 86, Florida Statutes (1987), to adjudicate the intent of the parties as to the Contract's duration. Notwithstanding that the Public Service Commission has been granted certain authority under Chapter 366, Florida Statutes (1987), the following cases illustrate that circuit courts of this State have not been divested of their subject matter jurisdiction by grants of jurisdiction to the Public Service Commission.

In City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), two natural gas distributors entered into a territorial agreement which was approved by the Florida Public Utilities Commission. Less than two years later, "Peoples Gas Company filed a complaint in circuit court alleging that City Gas Company had violated the agreement" and sought "specific performance, an injunction against continued violation of the agreement, and other appropriate relief." Id. at 430-431. The Supreme Court found "that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission." Id. at 436. The Court also found "that the commission has adequate implied authority under Cn. 366 to validate such agreements as the one before us ... (and) the practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties." Id. In spite of this language, the issue of the circuit court's lack of jurisdiction was never raised. There was never any question but that the circuit court had jurisdiction to hear an action for violation of a territorial agreement previously approved by the Commission.

Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974), involved a claim that Mobile America had been damaged by Southern Bell's negligent failure to provide efficient telephone service. Id. at 201. Southern Bell conceded on appeal that the PSC did not have exclusive jurisdiction over its claim and the court found that since the PSC lacked authority to award money damages, the pursuit of that administrative remeay was of no avail. Further, the court found that a trial court could refer a matter to the PSC for findings if it involved technical questions but that "ultimate issues raised in a suit for money damages for a completed, past failure to meet the statutory standards are, however, a matter of judicial cognizance and determination." Id. at 202.

In Lake Worth Utilities Authority v. Barkett, 433 So.2d 1278 (Fla. 4th DCA 1983), the Palm Beach Junior College filed a complaint for declaratory and injunctive relief alleging that a surcharge on customers outside the city limits

> was invalid because (a) the Utility Authority was illegally constituted; (b) the surcharge was discriminatory; (c) the enacting resolution was adopted without proper notice; (d) the Utility Authority was estopped to impose the surcharge, and; (e) the charge would impose a hardship upon the College.

Id. at 1279. The court held that the PSC "has exclusive jurisdiction to determine the reasonableness of an electricity surcharge and whether or not it is discriminatory ... (as) provided in Section 366.04 (1), Florida Statutes (1981)." Id. The circuit court, however, had jurisdiction over other issues in the complaint.

C. THE ISSUE BEFORE THE CIRCUIT COURT IS NOT PARTICULARLY AMENABLE TO PSC EXPERTISE.

The issue presented in the Declaratory Judgment action is not one "particularly amenable" to the PSC's jurisdiction because it does not involve any question which is within the PSC's realm of technical expertise. The legal principles to be utilized in resolving this contractual question are set forth in

Sound City, Inc. v. Kessler, 316 So.2d 315, 318 (Fla. 1st DCA 1975):

> In summary we hold that in the absence of an express provision as to duration in a contract, the intention of the parties with respect to duration and termination is to be determined from the surrounding circumstances and by application of a reasonable construction of the agreement as a whole and that if it appears that no termination was within the contemplation of the parties, or that their intention with respect thereto cannot be ascertained, the contract will be terminable within a reasonable time depending upon the circumstances and that it may not be terminated by either party without first giving reasonable notice.

See also Florida-Georgia Chemical Co., Inc. v. National Laboratories, Inc., 153 So.2d 752 (Fla. 1st DCA 1963); Southern Bell Telephone and Telegraph Co. v. Florida East Coast Railway Co., 399 F.2d 854 (5th Cir. 1968); Collins v. Pic-Town Water Works, Inc., 166 So.2d 760 (Fla. 2d DCA 1964); Freeport Sulphur Co. v. Aetna Life Ins. Co., 206 F.2d 5 (5th Cir. 1953); Perri v. Byrd, 436 So.2d 359 (Fla. 1st DCA 1983); City of Gainesville v. Board of Control, 81 So.2d 514 (Fla. 1955).

Although the PSC certainly has the competence to resolve territory issues, that competence is not involved here. Rather, the issue of the Contract's duration is within the particular expertise of the judiciary. For that reason, even if the PSC's statutory jurisdiction to approve territory agreements could be read to imply the power to resolve this contractual issue, Florida law would still require the PSC to step aside in deference to the Circuit Court of Dade County.

This conclusion results from the doctrine of primary jurisdiction which states that in situations where concurrent jurisdiction exists in an administrative agency and a court, the administrative agency has primary jurisdiction only if the matter is within the specialized competence or expertise of the agency. Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368 (Fla. 2d DCA 1985), review denied, 488 So.2d 68 (Fla. 1986). Clearly a case such as this, which is to be resolved by the application of legal standards developed over many years by the courts of Florida, is within the particular competence of a

Circuit Court, not the PSC. In fact, this case is much like the situation found in State ex rel. Shevin v. Tampa Electric Company, 291 So.2d 45 (Fla. 2d DCA), cert. denied, 297 So.2d 571 (Fla. 1974), where the Attorney General sought a determination that generating plant discharges created a public nuisance. The Court held that the circuit court was the appropriate forum in which to adjudicate the issue; while related to regulatory matters, the question of the existence of a public nuisance was ultimately within the special competence of the courts which were responsible for the historical development of the law relating to public nuisances.

Similarly, the courts of Florida have developed the body of law which will determine whether Homestead has properly terminated its contract with FPL and the courts of Florida are particularly suited to apply that body of law to the facts at hand.

D. THE CONTRACT BETWEEN THE CITY AND FPL IS EXEMPTED FROM ALTERATION OR MODIFICATION BY THE PSC IN THE LIMITED 1974 LEGISLATIVE GRANT TO THE PSC UNDER SECTION 366.04(2), FLORIDA STATUTES.

Section 366.04(2), Florida Statutes (1987), gives the PSC jurisdiction to "approve territorial agreements." It also specifically provides, "(n)owever, nothing in this chapter shall be construed to alter existing territorial agreements as between tne parties to such agreements." Further, Section 366.04(2) provides, "existing territorial agreements shall not be altered or abridged hereby." Thus, there is a specific limitation on the PSC's authority to change a territorial agreement existing in 1974 as was the August 7, 1967 contract between the City and FPL.

E. THE PSC DOES NOT HAVE JURISDICTION TO ADJUDICATE DECLARATORY JUDGMENTS.

The statement by the PSC on page 1 of its Petition for Writ of Prohibition that "Judge Fuller should be required to ... enter an order ... transferring the issue to tne Florida Public Service Commission" is clearly an improper request. First, cases can be transferred but issues cannot. Secondly, the PSC does not have general Declaratory Judgment authority as does

a circuit court under Chapter 86, Florida Statutes (1987). The only similar PSC authority is the authority to issue declaratory statements which is given to agencies in Section 120.565, Florida Statutes (1987), and is codified in PSC Rules 25-22.020 through 25-22.022, Florida Administrative Code. This limited authority applies in an ex parte proceeding between a petitioner and an administrative agency such as the PSC and the agency is only authorized to issue its "opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." Section 120.565, Florida Statutes (1987).

This limited jurisdictional grant was discussed in Manasota - 88, Inc. v. Gardinier, Inc., 481 So.2d 948 (Fla. 1st DCA 1986) which clearly held that a declaratory statement under Section 120.565, Florida Statutes (1987), cannot affect the rights of a non-petitioning party. It is interesting to note that after FPL received the May 11, 1988 letter from the City giving notice of its intent to terminate the Contract, FPL filed a Petition For Declaratory Statement with the PSC (Petitioner's Appendix at pages A-15 through A-18). However, the City has not filed a request for a declaratory statement with the PSC and, thus, the PSC cannot affect its rights.

Further, while Section 120.57 (1), Florida Statutes (1987), sets forth a procedural mechanism to determine the substantial interests of a party, it is not an independent grant of jurisdictional authority to an administrative agency.

V. CONCLUSION,

The Petition for Writ of Prohibition has been inappropriately filed. The Circuit Court is rightfully exercising jurisdiction over the cause before it and the Writ of Prohibition should, therefore, be denied. To rule otherwise would be to hold that the Legislature has constitutionally granted the PSC exclusive subject matter jurisdiction to adjudicate the contract dispute between the City and FPL.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF PROHIBITION has been furnished by U.S. Mail, postage prepaid, this 3rd day Of May, 1989, to the following:

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