IN THE SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD, Appellant, V. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 77,352

ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission." Florida Power and Light is referred to as "FPL." Appellant, City of Homestead, is referred to as "City."

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts the City's Statement of the Case and Facts as it relates to the facts and chronology of events in this proceeding.

SUMMARY OF THE ARGUMENT

The Commission properly dismissed the City's request that the Commission acknowledge the termination of a territorial agreement between the City and FPL. The agreement was approved by the Commission and upon such approval became an order of the Commission. Orders of the Commission can be terminated or modified only when it is in the public interest to do so because of changed conditions or circumstances. The City did not plead or allege the existence of any such circumstances, instead claiming it had a right to unilaterally terminate the agreement after reasonable notice. Neither the City, nor any other interested party, has the right to unilaterally terminate a Commission-approved territorial agreement.

I.

THE COMMISSION COMPLIED WITH THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT DISMISSED THE CITY'S PETITION TO ACKNOWLEDGE TERMINATION OF A COMMISSION-APPROVED TERRITORIAL AGREEMENT BETWEEN THE CITY AND FLORIDA POWER AND LIGHT COMPANY.

The Commission properly dismissed the City's Petition to Acknowledge the Termination of a territorial agreement between the City and FPL. The territorial agreement the City sought to terminate is an order of the Commission which can be terminated or modified only under specific circumstances. The City's argument that it has a unilateral right to terminate a territorial agreement upon reasonable notice is in conflict with this Court's decision in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989), and the cases on territorial agreements which preceded Fuller.

A. Under Fuller And The Cases Which Preceded It, Territorial Agreements Are Commission Orders, Not Private Contracts.

The City's appeal in this case is based on the premise that the territorial agreement between it and FPL is a private contract which, having no definite term, can be terminated by either party upon reasonable notice. That premise disregards this Court's decisions regarding the nature of territorial agreements.

The Fuller case, and the cases which preceded it, make it clear that territorial agreements are not private contracts, rather they are Commission orders. As orders of the Commission they can be terminated or modified only in accordance with principles of regulatory and administrative law. The City maintains that the

Fuller case only determined that the Commission was the forum in which issues regarding territorial agreements would be resolved. It claims that, since the agreement is a contract, the Commission must apply principles of contract law to resolve disputed issues. The flaw in the City's interpretation of the Fuller case is that it looks only to the conclusion of the Court and ignores the rationale. The question before the Court was whether the circuit court had jurisdiction to construe, interpret, and adjudicate matters concerning the territorial agreement as part of its inherent jurisdiction to construe and interpret contracts. The City argued that the circuit court had jurisdiction because the agreement was a contract. This Court disagreed and explained its rationale as follows:

> We conclude that the purpose of the action brought by the City of Homestead in the circuit court is to modify the territorial agreement between it and FPL. We find that the agreement has no existence apart from the PSC order approving it and that the territorial agreement merged with and became a part of Florida Public Service Commission Order No. 4285. Any modification or termination of that order must first be made by the PSC. (emphasis supplied)

Fuller at 1212.

The Court's rationale for finding the circuit court lacked jurisdiction to proceed in the matter was that there was no contract between the City and FPL for the circuit court to construe or interpret; there was only a Commission order:

> Accordingly, we hold that the circuit

> court is without jurisdiction to conduct further proceedings in City of Homestead v. Florida Power and Light Co. and that the PSC has exclusive jurisdiction over the instant PSC order, with which the territorial agreement has merged. (emphasis supplied)

Fuller at 1213.

It is a fundamental underpinning of the Court's decision that there is no contract to divide territories - only an order. If there were a contract, the Court would have allowed the circuit court to proceed, because courts, not the PSC, have jurisdiction to construe and interpret contracts. To argue now that there is still a contract flies in the face of the Court's rationale.

The Fuller decision is well-supported by previous decisions on territorial agreements and is consistent with the overall scheme of regulation of electric utilities in Florida. The first case in which this Court considered the Commission's authority over territorial agreements was City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965).[1] Even though there was no specific provision in Chapter 366 addressing the authority of the Commission to approve territorial agreements, the Court concluded that the authority was implied and that an agreement dividing territory had no validity unless it had Commission approval:

> No one who contemplates the extensive powers granted to the commission under Ch. 366 can doubt that it has effective control over areas of service. . . .

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[1]While the case involved gas utilities, the Commission's jurisdiction over gas and electric utilities was the same.

> 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 an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission. . . .
>
> . . . Indeed, we agree with the North Carolina court that the practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties.

City Gas at 436.

The Court's conclusion that Commission approval is a prerequisite to the validity of the territorial agreement involved two considerations. First, allowing private utilities to agree among themselves without Commission review and approval would effectively allow utilities to usurp the statutory powers of the Commission. Second, without Commission review the utilities, through these agreements, would have the ability to exercise monopolistic control over price, production and quality of service to the detriment of the public:

> These provisions [of Chapter 366] add up to what can only be considered a very extensive authority over the fortunes and operation of the regulated entities. In any event, it would certainly seem that, in practice, this agreement could result in monopolistic control over price, production, or quality of service only by the sufferance of the commission. Certainly, its statutory powers are more than sufficient to prevent any such outcome if properly employed.

City Gas at 435.

Territorial agreements between utilities have been encouraged as a means of eliminating competition for retail customers. This competition among public utilities would likely result in uneconomic duplication of facilities and would adversely affect the ability of utilities to plan facilities and operations to serve the public in a safe and economical manner. Both of these results would have the effect of unnecessarily increasing the cost of utility service. See Storey v. Mayo, 217 So.2d 304 (Fla. 1968). The Commissions reviews and approves each utility's territorial agreements to ensure that the public interest in eliminating wasteful competition between utilities is served.

The conclusion that a territorial agreement is a Commission order was again the basis for this Court's decision in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). In that case, the Commission attempted to withdraw its approval of the agreement to the extent it applied to a certain area. The Court's analysis of the Commission's authority to withdraw its approval or modify the service boundaries described in the agreement started from the premise that the agreement was an order, not a private contract. The Court reviewed principles of administrative and regulatory law in analyzing the Commission's authority to modify its orders. In its analysis, the Court noted that Florida was among the jurisdictions "holding that agencies do have inherent power to reconsider final orders which are still under their control." However, the Court went on to say that under administrative law principles:

> [O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts.

Peoples Gas at 339.

The Court recognized that there are differences between the functions and orders of courts and those of regulatory agencies, such as the Commission. Regulatory agencies are "usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and the passage of time." Peoples Gas at 339. It was in view of such considerations that the Court determined that a Commission order could be modified even after it had become final if there were changed circumstances and a demonstrated public need or interest. (In Peoples Gas, the order to be modified had been issued more than four years prior to the attempted modification.) Specifically, the Court held:

> Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other

> circumstances not present in the proceedings which led to the order being modified.

Peoples Gas at 339.

At page 21 of its brief, the City seems to intimate that the Commission is somehow relying on the 1974 amendments to section 366.04, Florida Statutes, as authority for its conclusion that the City has no right to unilaterally terminate the territorial agreement. This argument misses the point. Prior to 1974, this Court had already held a territorial agreement was not a contract which was valid in the absence of Commission approval. City Gas at 436. This Court reaffirmed that holding with respect to the instant agreement and the instant Appellant in Fuller. Therefore, the City has no contractual rights to be abridged by the Commission either with or without the authority of the 1974 amendment.

B. The Premise Of The City's Arguments Would, If Accepted, Establish The City As A Violator Of Federal And Florida Antitrust Laws.

The City's premise, that there is an agreement between it and FPL to divide service territories which has an existence apart from the Commission's order, is in part supported by the statment that the agreement was enforceable prior to Commission approval:[2]

> [I]t merits emphasis that the agreement was, by its express terms, effective and binding on the parties from the date of its execution, even before it was submitted to and approved by the PSC in Order No. 4285 [December 1,

[2]The Commission disagrees that the agreement was enforceable prior to Commission approval. As a matter of law it is not. See Commission Order No. 4285 at p. 2, and City Gas at 436.

> 1967]. . . . [T]he agreement not to compete. . . was clearly an enforceable contractual obligation during the four-month period prior to PSC approval. . . . [T]here is no question that the Agreement constituted a valid private contract at its inception (i.e., August 7, 1967). (emphasis supplied)

City's Initial Brief at p. 15.

Assuming arguendo that all of the precedent cited in Part A, supra, presents no obstacle to the City's position, the contract, which the City claims exists independently of any Commission order would clearly be illegal. Agreements among competitors to divide customers or territories are per se illegal under section 1 of the Sherman Act. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). Moreover, application of the rule of per se illegality by the U.S. Supreme Court to allocation of customers as well as territories has been consistent. United States v. Koppers Co., 652 F.2d 290 (2nd Cir.), cert. denied, 454 U.S. 1083 (1981).

Incredibly, the City has submitted a brief to this Court in which it claims to have agreed with FPL, independently of the Commission, to do both illegal acts; i.e., allocate customers and territories. The City claims to have entered into this "enforceable" agreement prior to any regulatory act by the Commission which could have created antitrust immunity in either FPL or the City. See, Parker v. Brown, 317 U.S. 343 (1942).

Not only does the City come before this Court pleading facts which, if true, constitute a federal antitrust violation, but it now wishes its unilateral termination of that illegal contract recognized in order to create a new illegal agreement, again

outside the aegis of the Commission, to divide territories and customers with FPL. Because section 542.16, Florida Statutes, incorporated federal antitrust precedents into Florida law in 1980, the City, in effect, now announces its intent to violate Florida, as well as federal antitrust laws.

The requirements for antitrust immunity for a private party acting under state regulatory supervision are two pronged: the state must clearly articulate and closely supervise the conduct. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). (Midcal)

The City has forthrightly disclaimed, by its pleadings, antitrust immunity under the "close supervision" prong of the Midcal test, stating that it effectively allocated territories and customers with FPL before the Commission ever got involved. Now it proposes to do the same thing again. This agency and this Court have repeatedly held that, as a matter of law, the City has done no such thing. The "Catch-22" is, of course, that if the City ever succeeds in persuading the Court of its theory, it will also succeed in identifying itself as an antitrust violator.[3]

C. The City's Objective Is The Modification Of Territorial Boundaries Which Requires Modification Of A Commission Order.

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[3]It should be made clear that the Commission does not believe the instant agreement is violative of antitrust laws because the agreement has been reviewed and approved by the Commission. The Commission's objective in this section of the brief is only to illustrate the absurdity inherent in the City's too often reiterated claim.

This Court has already recognized that the purpose of the City's quest for recognition of its right to terminate the territorial agreement between it and FPL is so that agreement can be modified - or more precisely, so the boundaries between the City's service territory and FPL's can be redrawn. Redrawing the boundaries necessarily involves a modification or withdrawal of the Commission's previous order establishing the boundaries. As the pleadings in this case indicate, the City has steadfastly refused to seek modification of the order, claiming instead it has the unilateral right to simply terminate the agreement. To find the City has authority to do so is tantamount to finding it has the unilateral authority to terminate a Commission order.

One ramification of such a finding would be to wrest control of divisions of territory from the Commission and deliver control to the parties involved. That result would once again bring into play the abuses of monopoly power Commission approval of the agreement is designed to prevent. It would also usurp the Commission's statutory responsibilities over rates and service.

D. The City Has The Opportunity To Request Modification Of The Commission's Order Approving The Territorial Agreement Between It And FPL.

The Commission's order dismissing the City's petition was without prejudice for it to file an appropriately-styled petition containing allegations sufficient to support a modification of the Commission's order establishing the territorial boundaries. The Appellant has that opportunity now and at any time in the future. A modification or termination of a Commission order is always

appropriate where changed conditions or circumstances make it in the public interest to do so.

CONCLUSION

The City has no right to unilaterally terminate the Commission-approved territorial agreement between it and FPL. When the Commission approved the agreement, it became an order of the Commission subject to termination or modification only under limited circumstances. The City's petition requesting the Commission to acknowledge the City's termination of the agreement was properly dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of the Florida Public Service Commission has been furnished by U.S. Mail this 17th day of June, 1991, to:

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