0+7 w/app.

IN THE SUPREME COURT OF FLORIDA

Case No. 77,352

On Appeal From The Florida Public Service Commission

CITY OF HOMESTEAD,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

ANSWER BRIEF OF APPELLEE FLORIDA POWER & LIGHT COMPANY

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OTHER AUTHORITIES

I. INTRODUCTION

Florida Power & Light Company submits this Answer Brief pursuant to Fla. R. App. P. 9-210 in accordance with its status as an Appellee as that term is defined in Fla. R. App. P. 9.020(a)(2).

II. STATEMENT OF THE CASE AND FACTS

Pursuant to Fla. R. App. P. 9.210(c), Florida Power & Light Company (FPL) is presenting a Statement of the Case and Facts because of disagreement with specific statements contained in the City of Homestead's (City) Statement of the Case and Facts in the City's initial brief. FPL disagrees with the City's inference found in footnote 6 at page 5 of the City's brief, that the savings language found in §366.04(2) Fla. Stat. (1989) applies to restrict the Florida Public Service Commission's (Commission) authority to resolve territorial disputes found in subsection (e) of said section. Argument regarding how the "altered or abridged" language found in §366.04(2), Fla. Stat. (1989) should be interpreted and/or applied in the matter presently before the Court is reserved to FPL's argument section of this brief.

FPL also specifically disagrees with the City's characterization of its petition filed with the Commission as stated at pages 8 and 9 of the City's brief. After a history of the FPL/City territorial agreement from inception, to approval, to enforcement, to Commission Order No. 23955, the City states that the grounds set forth in its petition for its requested relief were the needs of Homestead citizens located in FPL's service area.[1] In Re: Petition to acknowledge termination or, in the alternative, to resolve territorial dispute between the City of Homestead and Florida Power & Light Company, 91 F.P.S.C. 1:24 (1991)

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[1]Pursuant to Fla. R. App. P. 9.220, an Appendix accompanies this brief. References to the Appendix are designated as [A____]. References to the record are designated as [R____].

[A 1]. While a review of the City's petition [R 1-14] will disclose a list of the needs of area residents, the grounds for the relief requested in the City's petition to the Commission are not based on those needs: rather, the sole basis proffered by the City for the termination of Commission Order No. 4285 is the City's belief that the service area boundary between FPL and the City is the subject matter of a contract which may be terminated upon reasonable notice. In Re: Application of Florida Power & Light Company for approval of an agreement with the City of Homestead, Florida, relative to service areas, Docket No. 9056-EU [A 5]. FPL believes that the City's characterization of its petition is misleading and could confuse the issue presented to the Court.

It should also be noted that the title of the City's petition to the Commission adds further confusion which is not readily apparent. The petition is styled as being in the alternative (i.e., acknowledge termination or, in the alternative, resolve a territorial dispute). However, the actual relief sought was two inextricable actions by the Commission: the City's Petition demands the termination of the FPL/City territorial agreement and the resolution of any territorial dispute which may arise following the resultant absence of an FPL/City territorial agreement.

The relevant facts to this appeal are briefly stated as follows. On August 7, 1967, FPL and the City executed a territorial agreement (hereinafter the FPL/City territorial agreement) [A 9]. The FPL/City territorial agreement was subsequently approved by the Commission pursuant to its Order No. 4285. Neither the FPL/City territorial agreement nor the Commission's order discussed or addressed how long the service area boundary was to be observed or how it could be modified. In 1974, Chapter 366, Fla. Stat. (1973) was amended and the Commission's jurisdiction over electrical cooperatives and municipal electric utilities was expressly delineated with respect to service areas. See Ch. 74-196, §1, Laws of Fla., now codified as §366.04(2), Fla. Stat. (1989).

In 1979, in Accursio v. Florida Power & Light Company, 80 F.P.S.C. 2:61, cert. denied, Accursio v. Mayo, 389 So.2d 1002 (Fla. 1980), the City acknowledged in its answer to the Accursio's complaint that the Commission had jurisdiction over the FPL/City territorial agreement and that it was governed by Section 366.04(2). See Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). Nevertheless, on August 1, 1988, the City filed an action in Dade County Circuit Court seeking a declaration that the FPL/City territorial agreement could be terminated upon reasonable notice. On March 20, 1989, the Florida Public Service Commission filed a Petition for Writ of Prohibition with this Court to prevent the City's Circuit Court action. The Circuit Court action was subsequently dismissed consistent with this Court's

opinion resolving the writ of prohibition. See Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989).

On September 4, 1990, the City filed a petition with the Commission initiating the present proceeding demanding the termination of the FPL/City territorial agreement on the ground that the City has a contract right to terminate the agreement upon providing reasonable notice. Commission Order No. 23955 dismissed the City's petition, with leave to file an amended petition, finding that "Homestead has failed to allege facts sufficient to support a modification of Commission Order No. 4285 consistent with Peoples Gas and Fuller." Order No. 23955 at page 2.

III. SUMMARY OF ARGUMENT

Through Order No. 23955, the Commission properly dismissed the City's Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute as failing to allege facts sufficient to support a modification of Commission Order No. 4285. While the Commission's order of dismissal is properly framed, the issue before this Court is not whether the City alleged sufficient facts to go forward with its petition; rather, the issue is whether the Commission applied the correct rule of law in reaching its conclusion that insufficient facts had been pleaded.

The Commission applied the law of Chapter 366, Fla. Stat. (1989) and the case law interpreting it, in finding the City's petition deficient. The City, through this appeal, argues that the Commission should have applied the law of contract in reviewing its petition. The City's argument is founded upon its assertion that the FPL-City territorial agreement is a contract. As a contract, the City argues the FPL-City territorial agreement, on a point of contract law, is terminable upon giving reasonable notice. The Commission's order of dismissal is founded upon this Court's conclusion that the FPL/City territorial agreement merged with and became a part of Commission Order No. 4285. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). Therefore, as an order of the Commission, the standards applicable for modification of Commission orders are found in Chapter 366, Fla. Stat. and the case law interpreting it. Thus, the issue presented is whether the FPL/City territorial agreement is the subject

matter of a Commission order to be created, enforced, and modified pursuant to Chapter 366, or whether it is the subject matter of a contract to be created, enforced, or modified pursuant to the law of contract.

The primary objective of the City's petition, by the City's own admission, was to obtain a new service area boundary between the City and FPL. Rather than comply with the prerequisites set forth in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), for the modification of a service area boundary, the City is, in effect, arguing that the Commission should apply §366.04(2)(e) and establish a service area boundary by means of the Commission's territorial dispute process. Whether such process would, upon its conclusion, ultimately dictate a different service area boundary than would result from complying with the Mason case's procedures is a subject of conjecture and not at issue here. The matter in issue between FPL, the Commission and the City is the City's argument about the application of contract law vis-a-vis Chapter 366. Acceptance of the City's argument will effectively preclude the Commission from meeting its statutory responsibilities with respect to those electric utilities which are subject to pre-1974 territorial agreements. Given the Commission's particularly broad powers to regulate service areas and its public interest responsibilities associated therewith, generalized concepts of contract law cannot be superior to the Commission's very specific and specialized jurisdiction.

Approval by the Commission of the FPL/City territorial agreement caused the agreement to merge with and became a part of Commission Order No. 4285. As an order of the Commission, the service area boundary established thereby may be modified or terminated only upon a specific finding by the Commission, after notice and hearing, that modification or termination of the Commission's order is necessary in the public interest because of changed conditions or other circumstances relative to the Commission's express statutory charge.

The City's argument that the execution of the FPL/City territorial agreement created contract rights superior to Chapter 366 and the case law interpreting it must fail on several grounds. First, no contract rights were created through the execution of the FPL/City territorial agreement. A territorial agreement is without validity and is unenforceable absent Commission approval. See City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). Secondly, the Commission's subsequent approval of the FPL/City territorial agreement established the applicable service area boundary pursuant to the Commission's order; the FPL/City territorial agreement is subject to the Commission's continuing jurisdiction, and is not enforceable as a separate contract. Finally, any contrary arguments were extinguished pursuant to the Florida Legislature's 1974 codification of the Commission's implicit authority regarding service area boundaries and the City's express admission in 1979 of the Commission's jurisdiction in the Accursio matter.

As the issue framed for argument to the court is whether the law of Chapter 366 or the law of contract is applicable to the FPL/City territorial agreement, FPL will not respond to the City's arguments as to what the law of contract is and how it would apply in this matter. Should the court find that contract law is applicable, it would be appropriate to remand this case to the Commission for an evidentiary hearing and argument regarding the application of the law of contract.

IV. ARGUMENT

A. Before modification or withdrawal of a Commission territorial order may occur, Chapter 366 and the case law interpreting it require a specific finding by the Commission, after notice and hearing, that modification or withdrawal of the order is necessary in the public interest because of changed conditions or other circumstances relative to the Commission's express statutory purpose.

The case law regarding the modification or termination of a territorial agreement approved by a Commission order is quite explicit. City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), and Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), form the basis upon which the instant case must turn. Both of these cases were recently discussed and reaffirmed in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). These cases conclude that a territorial agreement approved by the Commission merges with, and becomes a part of, the Commission's order of approval. As an order of the Commission, the territorial agreement may then be modified or terminated only after the Commission makes a specific finding, based upon adequate proof, after proper notice and hearing, that such modification or termination is necessary in the public interest because of changed conditions or other circumstances relative to the Commission's express statutory purpose which were not present in the proceedings which led to the original order.

City Gas established the fundamental precept that the practical effect of a Commission order approving a service area agreement "is to make the approved contract an order of the Commission, binding as such

upon the parties. Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812, 817 (1961)." City Gas at 436. This precept was discussed and applied in the Fuller case. In Fuller, the court was requested to determine what forum had jurisdiction to entertain a request for a review of the parties' rights and obligations under the FPL/City territorial agreement. In finding that jurisdiction over the parties' rights and obligations under the FPL/City territorial agreement rested solely with the Commission, the court held that the territorial agreement had merged with and became a part of the Commission's order of approval. In so reaching that holding, after review of both the City Gas and Mason cases, the court concluded that modification or termination of Commission Order No. 4285 could be accomplished only by the Commission consistent with its express statutory purpose. Fuller at 1212.

The Mason case, in turn, established the fundamental principle that modification or withdrawal (or termination) of a Commission order approving a service area agreement may be accomplished by the Commission only:

> 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.

Mason at 339. Consequently, a territorial agreement approved by the Commission (e.g., the FPL/City agreement) becomes an order of the Commission which may be modified or terminated only after the findings specified in Mason are made following compliance with the procedural

requirements specified therein. Therefore, any petition filed with the Commission seeking the modification of an order approving a territorial agreement must allege and identify changed conditions or other circumstances not present when the territorial agreement order was entered, relative to the Commission's express statutory jurisdiction, which if taken as true, would support a modification of the Commission's order as necessary in the public interest. The City in this case simply failed to allege facts sufficient to meet this burden, and its petition was properly dismissed.

The fundamental principles of the City Gas and Mason cases form the foundation necessary for the Commission's execution of its multi-faceted, express statutory authority. A primary regulatory function of the Commission is to ensure that utility customers receive sufficient, adequate and efficient service. See §366.03, Fla. Stat. (1989). It was in this vein that the City Gas and Mason cases pinpointed the Commission's implicit regulatory authority to approve or disapprove territorial agreements to effect electrical efficiencies and avoid wasteful duplication of facilities. The City Gas opinion further noted that, absent Commission approval, territorial agreements could not be allowed validity since the effect of the agreements would necessarily diminish, to some degree, the Commission's own ability to exercise its powers over jurisdictional utilities.

This implicit authority to approve territorial agreements was made explicit by the enactment of Chapter 74-196, Laws of Florida, whereby

§366.04(2)(d), Fla. Stat. was added. Fuller at 1212. By that enactment, the Commission's authority to approve territorial agreements between public utilities and municipal electric utilities was expressly delineated. The new statute also expanded the Commission's jurisdiction to the regulation of service areas of all electric utilities, and further delineated the Commission's authority over "the planning, development, and maintenance of a coordinated electric power grid ... to assure an adequate and reliable source of energy for operational and emergency purposes and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."[2] See §366.04(5), Fla. Stat. (1989).

It is the interrelationship of the Commission's primary regulatory function regarding service and its jurisdiction over service areas that forms the basis for the Commission's continuing jurisdiction over its territorial orders as contemplated by the City Gas and Mason cases. If the purpose of territorial agreements is rooted in gaining electrical efficiencies through the establishment of territorial boundaries to avoid further uneconomic duplication of electric facilities, and to take into account the planning, development and maintenance of a coordinated electric power grid, then any modification of a territorial boundary established by Commission order must follow the requirements of the

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[2]Section 366.04(2) Fla. Stat., established by the 1974 legislative enactment, did reserve to municipalities jurisdiction over service areas within such municipalities' respective incorporated areas as those corporate limits existed on July 1, 1974. This reservation is irrelevant to the issue presented herein.

Mason case. The court in Fuller expressly recognized this fact:

> 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. The subject matter of the order is within the particular expertise of the PSC, which has the responsibility of avoiding the uneconomic duplication of facilities and the duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida. The PSC must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.

Fuller at 1212. To accept the City's contention (i.e., the Commission must terminate Order No. 4285 at the sole election of the City) would make irrelevant and meaningless the choice of tribunals mandated by Fuller. The whole point of precluding the City's action before the circuit court regarding the City's request for termination of the FPL/City territorial agreement was that modification or termination of the Commission's order approving the FPL/City territorial agreement must be made consistent with the Commission's express statutory authority and the case law interpreting it. Thus, without question, the proper way to seek modification or termination of a Commission order establishing a service area boundary is through the application of the Mason case and Chapter 366 in a proceeding before the Commission.

B. Chapter 366 and the case law interpreting it applies to the FPL/City Territorial Agreement.

FPL submits that there is no doubt whatsoever as to the applicability in this case of Chapter 366 and the case law interpreting it. Any doubts which might conceivably have been raised were extinguished by the Legislature's express delineation of the Commission's jurisdiction in 1974 and the City's subsequent submission to (i.e., admission of) that jurisdiction in the Accursio matter, wherein the City defended the instant FPL/City territorial agreement on the basis of the applicability of Chapter 366. It is important that this court recognize that the City has twice relied on the Commission's jurisdiction and this Court for enforcement of the Commission's 1967 Order No. 4285 and Chapter 366 against FPL customers. See Storey v. Mayo, 217 So.2d 304 (Fla. 1968), and Accursio v. Mayo, 384 So.2d 1002 (Fla. 1980).

The City, however, argues that because of the City's unregulated status at the time when the FPL/City territorial agreement was entered and thereafter approved, the territorial agreement must be construed pursuant to the law of contract as opposed to Chapter 366. The City's sole argument in this regard is that it acquired a contract right under the FPL/City territorial agreement at the time of its execution, which cannot be abrogated by the Commission's subsequent approval of the FPL/City territorial agreement, or the 1974 legislative amendment subjecting the City and the FPL/City territorial agreement to the Commission's express jurisdiction, or the City's subsequent

acknowledgment of the Commission's jurisdiction over the FPL/City territorial agreement in 1979 in Accursio. The City's argument presents two issues. First, did the City acquire a contractual right? Second, could such a right, if it existed, be abrogated by the Commission or waived by the City?

The City states as a matter of "fact" that the FPL/City territorial agreement was an enforceable contract prior to Commission approval. The City then uses this statement of "fact" to bootstrap its claim that a contractual right of termination exists which cannot be abrogated. However, the FPL/City territorial agreement was not an enforceable contract prior to the Commission's approval of the territorial agreement and, therefore, no contractual rights were created. This conclusion is inescapable given the express language of the City Gas case wherein the Court found (City Gas at 436):

> [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.

The City appears to contend [City Brief 20] that the Commission had no authority prior to 1974 to approve or disapprove territorial agreements between municipal electric utilities and public utilities and, therefore, City Gas would not apply here. In discussing the Commission's powers to approve territorial agreements prior to 1974, the City admits that the Commission had the power to approve territorial agreements only as to and between regulated utilities. The City's brief fails to address whether a pre-1974 territorial agreement between a

municipal electric utility and a public utility must be approved by the Commission, or the effect of such an approval.

While the City Gas case did involve a pre-1974 territorial agreement in which both parties were regulated by the Commission, it is clear from the premises upon which the implicit authority to approve such agreements was based that a pre-1974 territorial agreement between a municipal electric utility and a public utility must also come within the Commission's purview. Since a public utility cannot contract away the Commission's jurisdiction, it necessarily follows that a public utility lacks the legal capability of entering into a contract for the establishment of service area boundaries. City Gas, id.; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (1919). The Commission likewise has no capacity to contract away its jurisdiction. Miami Bridge Co. v. Railroad Commission, 20 So.2d 356 (Fla. 1944), cert. denied, 325 U.S. 867 (1945); Union Dry Goods v. Georgia Public Service Corp., 248 U.S. 372 (1919). Consequently, any order establishing service area boundaries through the approval of a territorial agreement must necessarily continue to be subject to the Commission's jurisdiction to allow the Commission to comply with its statutory duties. Fuller, id. The City obviously recognized this at the time when the FPL/City territorial agreement was entered because the FPL/City agreement explicitly states that the parties acknowledged Commission approval was necessary to the validity of the agreement (see paragraph 3 thereof) [A 10].

To accept the premise that City Gas does not apply to the FPL/City territorial agreement because of a lack of express Commission jurisdiction prior to 1974 to approve territorial agreements would require one to assume that, prior to 1974, and without Commission endorsement and oversight, an enforceable contract could exist between a municipal electric utility and a public utility regarding service areas. The acceptance of such a proposition would neuter the Commission's statutory authority over the public utilities subject to pre-1974 territorial agreements with pre-1974 non-jurisdictional utilities.

Since a public utility cannot escape the Commission's jurisdiction by contract, the Commission's jurisdiction must be seen as continuing and controlling over the FPL/City territorial agreement; this is precisely why the FPL/City territorial agreement must be found to be an order of the Commission after its approval. While the City may have saved itself from many facets of the jurisdiction of the Commission prior to 1974, it did not save the FPL/City territorial agreement from the Commission's plenary jurisdiction. See Storey v. Mayo, 217 So.2d 304 (Fla. 1968). With Commission approval of the FPL/City territorial agreement came the continuing jurisdiction of the Commission over that agreement and the application of case law relevant thereto.

Assuming that contract rights were somehow created by the FPL/City territorial agreement or the Commission's order approving the FPL/City agreement, the 1974 legislative enactment of Chapter 74-196, Laws of

Florida [presently §366.04(2) and (5), Fla. Stat. (1989)] supplies express jurisdictional power for the Commission to apply the law of Chapter 366 rather than the law of contract to the Commission's territorial orders. The City, however, reiterates two arguments for the proposition that the 1974 legislative delineation of the Commission's jurisdiction over service areas may not apply to the FPL/City territorial agreement: (1) the City argues as it did in Fuller that the savings language found in subsection (2)(d) of §366.04 prevents any Commission action that would affect the parties rights' acquired under pre-existing territorial agreements, and (2) the City maintains that to apply the law of Chapter 366 on the basis of the 1974 legislative enactment would constitute an impermissible impairment of the City's (presumed) contract rights.

The savings language in §366.04(2)(d), on which the City relies defines a portion of the Commission's jurisdiction as follows:

> (d) 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. (Emphasis added)

The City argues that the underscored language acts as a prohibition to Commission action which would "alter" an existing territorial agreement. Reviewing the underscored language in the context of subsection (2)(d) leads to the simple and inescapable conclusion that the savings language is nothing more than a specific grandfathering of the Commission's orders approving territorial agreements which, prior to 1974, had been

executed by and between electric cooperatives, municipal utilities and public utilities, and then submitted for such approval.

If the Court follows the City's proffered interpretation, the Commission will be left without jurisdiction to modify or terminate any territorial agreement approved by the Commission prior to 1974 despite such modification or termination being necessary to carry out the Commission's regulatory responsibilities set forth in Chapter 366. The Legislature can not logically be said to have given the Commission expansive powers over service areas which are necessary to one of its primary regulatory functions and yet limit such power to apply only to service areas established after 1974. To do so would impair the Commission's ability to carry out one of its principle responsibilities:

> avoiding the uneconomic duplication of facilities and the [Commission's] duty to consider the impact of [its territorial orders] on the planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida.

Fuller at 1212.

The City in its footnote 6 [City Brief 5] also quoted similar savings language found in §366.04(2), Fla. Stat. (1989), for the proposition that the Commission's authority specified in subsection (e) of §366.04(2) is limited thereby. Subsection (e) of §366.04(2), Fla. Stat. (1989) provides the Commission authority to resolve territorial

disputes. The savings language quoted is found at the end of §366.04(2), Fla. Stat. (1989), 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 electrical 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)

FPL submits that the underscored language does not apply to subsection (e) to limit the Commission's jurisdiction over territorial disputes regarding which "utility has the right and the obligation to serve a particular geographic area." See Fla. Adm. Code Rule 25-6.0439(1)(b), Definitions, "Territorial Dispute." The intent of the underscored language is simply to preserve the validity of those territorial agreements which permit public utilities to provide service within the corporate limits of municipalities as they existed on July 1, 1974. The City's suggestion in footnote 6 would preclude the Commission from resolving a dispute over how to apply a territorial agreement regarding which utility has the right and obligation to serve a particular geographic area. This point is brought up only to correct the gratuitous statement found in the City's brief regarding subsection (e) of §366.04(2), and to demonstrate that such language does not remove the FPL/City territorial agreement from Commission jurisdiction.

The City's impairment of contract argument must also fail for the same reasons discussed above relating to the savings language in the

1974 enactment. Pursuant to the City's impairment argument, any contract right, including the location of the service area boundary, would be beyond the Commission's authority to alter, no matter what the circumstances, because it would be an impairment of the contract rights possessed by the contracting parties. Clearly, the Commission's regulation of "the planning, development, and maintenance of a coordinated electric power grid ... to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities" represents an overriding necessity for the State to exercise its police power. §366.04(5), Fla. Stat. (1989).

Furthermore, an exercise of the State's police power to regulate areas of service by electric utilities should not be found to be a violation of the inhibitions against the impairment of contracts. The Commission's regulation of utilities has specifically been deemed to be "an exercise of the police power of the State for the protection of the public welfare . . . ." See §366.01, Fla. Stat. (1989). In the same manner that the Court has found the Commission's regulation of rates to supersede any pre-existing contract rights between a utility and a customer, the Court should find, if necessary, that any pre-existing rights in territorial agreements are secondary and are superseded by the Commission's present jurisdiction. See Miami Bridge Co. v. Railroad Commission, 20 So.2d 356 (Fla. 1944), cert. denied, 325 U.S. 867 (1945);

Cohee v. Crestridge Utilities Corp., 324 So.2d 155, (Fla. 2d DCA 1975); H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979).

The Court's finding in Miami Bridge at 361, that "[c]ontracts by public service corporations ... because of the public interest, are not to be classified with personal and private contracts ..." should be equally applicable here. That is, because of the public interest, territorial agreements should not be classified with personal and private contracts. Therefore, no violation against the inhibitions upon the impairment of contracts should be found in the Commission's exercise of its jurisdiction in Order No. 23955. This conclusion rests on the principle that governmental powers cannot be contracted away nor withdrawn from the implied liability to governmental regulation. Miami Bridge at 361.

Lastly, any contract rights, reserved to the City by virtue of its unregulated status at the time when the FPL/City territorial agreement was approved by the Commission and which are inconsistent with the Commission's present jurisdictional powers, were waived by the City in 1979 through the City's express submission of the FPL/City territorial agreement to the Commission's jurisdiction. In its answer to a complaint filed by FPL customers in Accursio v. Florida Power & Light Company, 80 F.P.S.C. 2:61, the City maintained that the FPL/City territorial agreement was subject to and "governed by the provisions of Florida Statutes 366.04(2)." [A 13]. The Accursio complaint, the resolution which was ultimately appealed to this Court, cert. denied,

Accursio v. Mayo, 389 So.2d 1002 (Fla. 1980), sought the termination or modification of the Order approving the FPL/City territorial agreement. The Commission dismissed the complaint as failing to allege grounds on which a complaint could be heard; the Commission did so in the same manner as it did in the order now on appeal. See Accursio v. Florida Power & Light Company, 80 F.P.S.C. 2:61 [A 4]. Clearly, the City conceded the jurisdiction of the Commission over the FPL/City territorial agreement, and the resulting order ended any question that could be raised about the pre-1974 execution of the FPL/City agreement and the order of approval.

This exercise in reviewing the City's claim that it has contract rights beyond the control of the Commission only serves to highlight the utter implausibility of the City's position that the law of Chapter 366 does not apply to the City's petition filed before the Commission. The creation, enforcement and modification of service area agreements between electric utilities is a function infused with the public interest. It must be supervised and carried out within the confines of the Commission's express statutory purpose. No electric utility should [except as specifically envisioned by Section 366.04(2)] be allowed to set itself apart from the strictures of the Commission's jurisdiction. While the City argues that no harm will come from the application of contract law as sought by the City, the conclusions necessary to allow the City to proceed under contract law would remove other territorial agreements from the Commission's jurisdiction and thereby preclude the Commission from performing one of its primary regulatory functions.

The City's arguments in support of its position that a contract right of termination survived both the Commission's approval of the FPL/City territorial agreement and the 1974 legislative enactment would, if found persuasive by this Court, remove from the Commission's jurisdiction the power to alter or modify any territorial agreements approved prior to 1974. This follows from the City's argument that a territorial agreement is a contract and, therefore, all contractual rights existing thereunder may not be altered either because of the savings language in §366.04(2)(d) or because such would impair the parties' rights thereunder. Following that reasoning, the Commission would be without jurisdiction to modify a service area boundary established prior to 1974 since it would either be found to be prohibited by the savings language in §366(2)(d) or be an impermissible impairment of the parties rights to a specified service area under a territorial agreement. Such a finding would paralyze the Commission in carrying out its statutory duties.

V. CONCLUSION

Based upon the foregoing, the Commission's Order No. 23955 dismissing the City's Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute with Leave to Amend should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by United States mail to Michael L. Rosen, Esq. and D. Bruce May, Esq., Holland & Knight, P. O. Drawer 810, Tallahassee, Florida 32302; and to Susan F. Clark, Florida Public Service Commission, 101 East Gaines Street, Room 226, Tallahassee, Florida 32301 this 17th day of June, 1991.

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