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.

INITIAL BRIEF OF APPELLANT CITY OF HOMESTEAD

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INTRODUCTION

This case is before the Court on appeal from a final order of the Public Service Commission ("PSC") dismissing a petition filed by Appellant, the City of Homestead ("the City"), to acknowledge the City's termination of its 1967 territorial agreement with Florida Power & Light Company ("FPL") delineating the boundary between their electric utilities service areas. In its Order Granting Motion To Dismiss (Order No. 23955) [A 1],[1] the PSC rejected the City's claim that it has a contractual right to terminate the territorial agreement, ruling that the agreement became "embodied in" the 1967 PSC order by which it was approved, and thus cannot be terminated or modified absent a showing that such termination or modification is necessary in the public interest due to changed conditions. Because the PSC's action relates to the services of electric utilities, this Court has jurisdiction to review that order. Art. V, §3(b)(2), Fla. Const.; §§350.128(1) and 366.10, Fla. Stat. (1989).

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[1] Pursuant to Florida Rule of Appellate Procedure 9.220, this brief is accompanied by an Appendix, which includes a copy of the order to be reviewed and other pertinent portions of the record. References to the Appendix are signified as [A __]. References to the record are signified as [R ___].

STATEMENT OF THE CASE AND FACTS

On August 7, 1967, the City of Homestead entered into a territorial agreement ("the Agreement") with Florida Power & Light Company to define the boundary of their respective electric utility service areas in and around Homestead [A 4-7]. At that time, the City's municipally owned electric utility, which served all residents within the City and some in adjacent areas, was not subject to the regulatory jurisdiction of the PSC.[2] FPL, which served extensive areas in eastern and southern Florida, including the territory around Homestead's city limits, was a privately owned utility regulated by the PSC.[3] Prior to the Agreement, the City and FPL actively competed for customers in the areas surrounding Homestead.[4]

The Agreement recited that due to the proximity of their respective distribution systems and the lack of any defined service areas, "there have been and, if there is not now an agreement as to service areas, there will in the future 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." [A 4.] Accordingly, the Agreement described a specific boundary to divide their service areas, and provided for a transfer of

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[2] Utilities owned and operated by municipalities were expressly exempted from PSC regulation by section 366.11, Florida Statutes (1967).

[3] See Storey v. Mayo, 217 So.2d 304, 306-07 (Fla. 1968), cert. denied, 395 U.S. 909 (1969).

[4] Id. at 306.

facilities and customers located in each other's newly defined territory.[5]

In recognition of the PSC's regulatory authority over FPL, the Agreement provided that it would be submitted to the PSC for approval, but would be immediately effective and binding on the parties pending such approval:

> The parties acknowledge that the Company 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 date hereof and that the parties shall abide by the terms hereof and be bound hereby pending such approval.

[A 5, paragraph 3.] Although the Agreement provided that the transfers of facilities and customers would occur "promptly" upon PSC approval [A 5, paragraph 5], it contained no specific duration or termination date.

FPL filed an application for approval with the PSC, which conducted a public hearing in Homestead and then entered its Order No. 4285 approving the Agreement by a 2-1 vote on December 1, 1967 [A 8-11]. In that order, the PSC noted that the Agreement "is not self-executing and will not be operative unless approved by this Commission," observing that "[a]lthough the Commission has no jurisdiction over the municipality, it does

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[5] Pursuant to the agreement, the City transferred 12 commercial and 66 residential customers to FPL, and FPL transferred 35 commercial and 363 residential customers to the City. Id. The City also expressly reserved the right to continue serving City-owned facilities located in FPL's territory, but agreed that FPL would continue to serve areas within its territory that may subsequently become included within the City limits. [A 6-7, paragraphs 6 and 8.]

have the power and authority to examine a territorial agreement to which a regulated public utility is a party." [A 9.] The PSC concluded that approval of the Agreement was justified because it "should better enable these utilities to provide the best possible utility services to the general public at a very reasonable price." [A 10.]

Certain customers whose service was being transferred from FPL to the City under the Agreement challenged the PSC order of approval by filing a petition for certiorari with this Court, contending that they had a right to obtain service from a regulated utility. In Storey v. Mayo, 217 So.2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), the Court denied their petition for certiorari and upheld the PSC's order approving the Agreement. While emphasizing that "the City pointedly saved itself against submission to Commission jurisdiction" because "municipally-owned electric utilities are expressly exempted from state agency supervision," the majority found that the PSC's regulatory powers over FPL were sufficient to authorize approval of a territorial agreement that would deny customers access to FPL's regulated services. 217 So.2d at 307-08.

In 1974, seven years after the Agreement was executed by the parties and approved by the PSC, the Florida Legislature amended chapter 366 to confer upon the PSC limited jurisdiction over municipally owned electric utilities for certain purposes. Among the powers granted to the PSC was the authority to approve territorial agreements, subject to the proviso that the law as amended not be construed to alter existing agreements:

> In the exercise of its jurisdiction the commission shall have the power over ... municipal electric utilities for the following purpose:
>
> * * *
>
> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction or any of them; provided, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

Ch. 74-196, §1, Laws of Fla. (now codified as §366.04(2)(d), Fla. Stat. (1989)) [A 12].[6]

In 1979, certain customers of FPL who opposed the implementation of the 1967 Agreement filed a complaint with the PSC seeking to contest the terms of the Agreement. The PSC granted the motions of FPL and the City to dismiss, finding that despite the allegation of a "radical change" in the boundaries of Homestead, the complaint "fails to delineate any change of circumstances which would justify the Commission's reopening the matter." In re: Accursio v. Florida Power & Light Co., Order No. 9259 (Feb. 26, 1980) [A 15]. This Court denied the customers' petition for certiorari without opinion. Accursio v. Mayo, 389 So.2d 1002 (Fla. 1980).

The present dispute originated when the City, by letter to FPL dated May 11, 1988, gave formal written notice of its intent to terminate the Agreement effective August 7, 1988 --

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[6] By the same enactment, the PSC was empowered "[t]o resolve any territorial dispute involving service areas," again with the proviso that existing territorial agreements "shall not be altered or abridged hereby." Ch. 74-196, §1, Laws of Fla., subsequently codified as §366.04(2)(e), Fla. Stat.

the twenty-first anniversary of its execution [A 16]. While acknowledging that "[n]o duration was expressed in the agreement" and that "it has worked well for us in the past," the City advised FPL that it was necessary to terminate the agreement and invited FPL "to negotiate a new agreement." [A 16.] FPL responded by letter to the City dated June 23, 1988, in which FPL stated that the City's "request to terminate our Agreement effective August 7, 1988 is unacceptable," and that the 1967 Agreement "remains in full force and effect unless or until such time as a mutually acceptable change in the Agreement is approved by the Public Service Commission." [A 17.] FPL further advised the City that it "should receive our response [to the City's proposal to negotiate] around the first of August." [Id.]

On July 22, however, FPL filed a Petition For Declaratory Statement with the PSC, seeking a determination as to the rights and obligations of the parties under the Agreement [A 18-21]. Charging that the City's May 11 notice of intent to terminate "is an unequivocal repudiation of the agreement equivalent to a complete present breach," FPL asserted:

> FPL is of the view that the territorial agreement herein is a valid, binding contract that both parties thereto must comply with. However, since Homestead has unequivocally repudiated the agreement, Homestead may take actions in violation of the agreement resulting in uneconomic duplication.

[A 20.] FPL requested the PSC to enter an order declaring that the Agreement "is a valid, binding agreement between the parties, subject to the jurisdiction of the Commission, and

prohibiting and enjoining Homestead from undertaking any actions in violation thereof." [Id.]

On December 2, 1988, the PSC issued the Declaratory Statement requested by FPL "finding the territorial agreement between FP&L and the City of Homestead to be a valid, binding agreement," but denying FPL's demand for prohibitive or injunctive relief against the City [A 22-23]. FPL subsequently moved for reconsideration or clarification, requesting the PSC to further declare (a) that the territorial agreement constitutes an order of the PSC and is subject to the PSC's jurisdiction, (b) that the Agreement is only subject to modification by the PSC or by mutual agreement of the parties with PSC approval, and (c) that the City's unilateral termination of the Agreement was a violation of the PSC's Order No. 4285 and was subject to the imposition of penalties [A 24]. In its order on that motion, the PSC granted clarification to the extent of confirming that Order No. 4285 approving the Agreement was authorized and that the Agreement "is subject to modification by this Commission in a proper proceeding," but denied FPL's request for a finding that the City had violated the Agreement [A 24-26].

Before the PSC could proceed on FPL's Petition For Declaratory Statement, the City filed an action in the Dade County Circuit Court to obtain a judicial declaration that the Agreement is terminable upon the giving of reasonable notice, and that the three-month notice given by the City on May 11, 1988 was reasonable [A 27-28]. FPL responded by filing a motion to dismiss and a motion to abate on the grounds that the PSC's

jurisdiction was exclusive or should be accorded priority [A 29-34]. When those motions were denied by the circuit court, the PSC intervened and filed a Petition For Writ of Prohibition in this Court on March 20, 1989. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989).

In Fuller, the PSC argued that the circuit court should be prohibited from proceeding with the City's suit for declaratory judgment, because that action constituted an attempt to modify the PSC's 1967 order approving the Agreement, over which the PSC had exclusive jurisdiction. The City maintained that it was not seeking to modify the PSC's order, but was entitled to a judicial determination of its contractual right to terminate the Agreement. This Court, framing the issue as "whether the PSC has exclusive jurisdiction to modify or terminate territorial agreements which it has expressly approved by orders of the commission," agreed with the PSC and held that the circuit court was without jurisdiction to conduct further proceedings on the City's complaint for a declaratory judgment. 551 So.2d at 1211-13.

Accordingly, on September 4, 1990, the City initiated the present proceeding by filing with the PSC a Petition To Acknowledge Termination Or, In The Alternative, Resolve Territorial Dispute [A 35-43]. Consistent with Fuller, the City alleged that the PSC "has jurisdiction to terminate territorial agreements of indefinite duration and resolve disputes involving service areas." [A 36.] As grounds for the requested relief, the City recited that the needs of area residents and the service

capabilities of the two utilities "are significantly different today than at the time the AGREEMENT was executed"; that the municipal boundaries of Homestead had been expanded to encompass a planned development known as the Villages of Homestead, whose residents were receiving water, sewer, waste collection, and police services from the City, and were requesting City electric services as well; that FPL had experienced severe capacity shortfalls and other technical problems, which caused service interruptions; and that the time was appropriate to terminate the 22-year-old Agreement and develop a new arrangement in the public interest that would more adequately fulfill the needs of citizens in the annexed area, where the City could provide better service [A 36-43]. The City requested that the PSC acknowledge the termination of the 1967 Agreement, instruct the parties to negotiate a new agreement in the public interest, and, if such negotiations fail, resolve the territorial dispute [A 42-43].

FPL filed a Motion To Dismiss [A 44-46], contending that the City's request for acknowledgment of the Agreement's termination could not be granted because it was in "direct conflict" with the "directives" of Fuller, and that the City's alternative request for resolution of a territorial dispute was groundless because no territorial dispute could exist so long as the Agreement remains in effect [A 44-45]. FPL further asserted that even if the City's petition were treated as a request to modify the 1967 order approving the Agreement, it failed to allege facts that would permit modification [A 45-46]. Following a hearing, the PSC entered its Order Granting Motion To Dismiss

on January 3, 1991, essentially adopting FPL's position [A 1-3].[7] The City then filed a timely Notice of Administrative Appeal to obtain review of that order in this Court [R 104].

Subsequent to the filing of this appeal, the City requested and was granted an extension of time pending consideration by the 1991 Florida Legislature of a bill that would, if adopted, have amended the provisions of chapter 366 relating to territorial agreements between electric utilities and the PSC's power over such agreements. Committee Substitute for House Bill 1863.[8] The proposed amendments would have provided, among other things, for the PSC to certify an approved exclusive service area for each electric utility in Florida by January 1, 1993, after which no other utility could offer competing service in that area, and would have authorized the PSC to modify existing agreements under certain conditions. Although the bill was passed by the House on a 57-54 vote,[9] it died in a Senate committee and thus did not become law.

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[7] The PSC order provided that the dismissal was without prejudice and allowed the City 30 days in which to file "an amended petition for modification of the territorial agreement." [A 2-3.] Because the City seeks termination rather than modification, it elected to proceed with this appeal for the purpose of contesting the PSC's ruling that the City has no right to terminate the Agreement.

[8] A copy of CS for HB 1863 is attached to the City's Motion For Extension Of Time filed in this Court on April 5, 1991.

[9] House Journal 00282 (March 18, 1991).

SUMMARY OF THE ARGUMENT

In relying on language from this Court's Fuller decision as the basis for dismissing the City's petition, the PSC erroneously applied statements that, while relevant to the jurisdictional issue considered in Fuller, are not dispositive of the issue presented here. The only issue in Fuller was whether the PSC or the circuit court was the proper forum to determine the City's right to terminate the Agreement; Fuller did not decide that the City has no right to terminate at all, as the PSC has assumed.

A territorial agreement is a contract, governed by principles of contract law. Under principles of Florida contract law, the laws in existence at the time a contract is made form a part of the contract. At the time this Agreement was made, a contract with no specified duration was deemed to be terminable upon reasonable notice. Although the PSC at that time was held to possess the implied power to approve territorial agreements, and to withdraw or modify such approval upon a finding of necessity due to changed circumstances, no statute or decision authorized the PSC to deprive a non-regulated party of its contractual right to terminate such agreement, or to impose conditions on the exercise of that right.

The 1974 amendment that conferred on the PSC regulatory power to approve the territorial agreements of municipally owned utilities was not intended to authorize the deprivation of rights or imposition of new conditions under existing agreements, but expressly provided that it would not alter such existing

agreements. To hold that the 1974 amendment authorized the PSC to deny termination, or to require a showing of necessity in the public interest due to changed conditions as a condition of termination, would clearly impair the City's rights under the Agreement.

Under Florida law, virtually no degree of contract impairment is tolerated, especially with respect to the right to terminate or cancel an agreement. There must be a showing of overriding necessity for the exercise of police powers, which outweighs the sanctity of the contract. In this case, there is no overriding necessity to deny termination because the PSC still retains ultimate authority to protect the public interest through its power to approve any new agreement or to resolve any resulting territorial dispute. Thus, the deprivation of the City's contractual right to terminate upon reasonable notice is unauthorized, unconstitutional, and unnecessary.

ARGUMENT

I. **THE PSC DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW AND DEPRIVED THE CITY OF A CONSTITUTIONALLY PROTECTED RIGHT IN RULING THAT THE CITY IS NOT ENTITLED TO TERMINATE THE AGREEMENT UPON REASONABLE NOTICE.**

The sole issue presented by this appeal is whether the City is entitled to terminate the Agreement upon reasonable notice. By dismissing the City's petition below, the PSC held in effect that there is no right to terminate the Agreement, but that the City's only recourse is to request modification or withdrawal of the PSC's 1967 order approving the Agreement, which requires a showing that "such modification or withdrawal of approval is necessary in the public interest because of changed conditions or circumstances not present in the proceedings which led to the order being modified." In so ruling, the PSC departed from the essential requirements of law and deprived the City of its contractual right in violation of the federal and Florida constitutions.

As the predicate for its order, the PSC undertook no independent analysis, but relied on the statements in this Court's Fuller opinion that the purpose of the City's circuit court suit was to modify the territorial agreement, and that the agreement merged with and has no existence apart from the PSC's 1967 order approving it. The fundamental flaw in the PSC's application of those conclusions below is that they were made by this Court in the context of the jurisdictional controversy

presented in Fuller, and are not dispositive of issues beyond the narrow question decided there.

In Fuller, this Court clearly identified the issue before it:

> The question to be resolved is whether the PSC has exclusive jurisdiction to modify or terminate territorial agreements which it has expressly approved by orders of the commission.

551 So.2d at 1211. The Court in Fuller was not required to decide whether the City has the right to terminate the Agreement, but only whether the proper forum to determine that issue was the circuit court or the PSC.

The Court's characterization of the City's circuit court suit as one "to modify the territorial agreement" obviously was not essential to its decision in Fuller, because the Court concluded that "[a]ny modification or termination of [the PSC order approving the agreement] must first be made by the PSC." Id. at 1212 (emphasis added). Nor was it relevant to the characterization of the City's subsequent petition to the PSC, the unmistakable objective of which is to confirm the City's termination of the Agreement.

Likewise, the Court's observation that the Agreement merged with the PSC order approving it was made solely for the purpose of resolving the jurisdictional issue, and could not have been intended to determine that the "merger" effectively destroyed or altered the City's contractual right to terminate the Agreement -- a right acquired under existing Florida law before the City was subjected to PSC regulatory jurisdiction. In

short, this Court's statement in Fuller that the Agreement "has no existence apart from the PSC order approving it" does not mean that Agreement -- or the City's right under the Agreement -- has no existence at all.

Thus, the PSC's reliance on Fuller as being dispositive of the City's entitlement to terminate the Agreement was misplaced, because the Fuller Court was not presented with or required to pass upon the issue in this case -- i.e., whether the right to terminate acquired by the City under the Agreement at the time of its execution was, or could be, abrogated or impaired by the subsequent approval order of the PSC or the 1974 legislative amendment subjecting territorial agreements of municipally owned electric utilities to PSC jurisdiction. Because Fuller dealt solely with the jurisdictional question, it remains for the Court in this case to decide the contract law and constitutional issues.[10]

At the outset, it 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

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[10] Insofar as Fuller held that the 1974 amendment effectively transferred to the PSC what was formerly the jurisdiction of the courts to adjudicate disputes over the exercise of the right to terminate the Agreement -- i.e., to determine whether reasonable notice was given -- that decision is consistent with the rule that purely remedial changes in the manner of enforcing contracts are not constitutionally objectionable. "It is assumed that parties enter into contracts with knowledge that the government may from time to time alter the methods of available for the vindication of existing rights." Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco, 503 So.2d 396, 399 (Fla. 1st DCA), rev. denied, 511 So.2d 998 (Fla. 1987) (where repeal of statute eliminated administrative apparatus for review of contract termination compliance, courts were available to resolve disputes).

and approved by the PSC in Order No. 4285. Although the provisions regarding a transfer of customers and facilities was not immediately operative, the agreement not to compete within the other party's designated area was clearly an enforceable contractual obligation during the four-month period prior to PSC approval. Because the City was at that time (and for seven years thereafter) expressly exempted by law from PSC regulatory jurisdiction, there is no question that the Agreement constituted a valid private contract at its inception.

A territorial agreement between electric utilities is in effect a settlement agreement, which is favored by the legal system. Utilities Comm'n v. Florida Public Service Comm'n, 469 So.2d 731, 732 (Fla. 1985). Moreover, "[a] settlement agreement ... is also a contract between the parties," whose rights thereunder "must be determined upon the basis of the laws of contract." Weinberg v. Lozman, 364 So.2d 841, 842-43 (Fla. 3d DCA 1978); see also, e.g., Palm Springs General Hospital, Inc. v. Health Care Cost Containment Board, 450 So.2d 1348, 1349 (Fla. 3d DCA 1990). Florida courts have repeatedly recognized that "[s]ettlement agreements are interpreted and governed by the principles of contract law." Modern Health Care Services, Inc. v. Drewry, 564 So.2d 1125, 1126 (Fla. 3d DCA 1990); see also J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249, 252 (Fla. 2d DCA 1989); Don L. Tullis & Assoc., Inc. v. Benge, 473 So.2d 1384, 1386 (Fla. 1st DCA 1985).

In Florida, it is settled that the laws in existence when a contract is made are deemed to be a part of the contract,

including decisional law regarding the right to terminate the agreement if the contract is silent on the subject. These principles were perhaps best summarized in Southern Crane Rentals, Inc v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983), where the court held that a lease contract containing no provision as to cancellation was governed by general principles of existing law:

> The laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge. Furthermore, contracts are made in legal contemplation of the existing applicable law. Since the parties remained silent on the issue of cancellation rights, the law of Florida in regard to cancellation rights is unambiguously annexed to the parties' contract.

429 So.2d at 773 (citations omitted). Moreover, this Court has recognized that within the meaning of the constitutional prohibition against laws impairing the obligation of contract,[11] the "obligation of a contract" is "measured by the law in existence when it is made which forms a part of it." King v. Duval County, 128 Fla. 388, 174 So. 817, 818 (1937).

Reference to the law in existence when the Agreement between the City and FPL was executed is pertinent to the resolution of this dispute for two reasons. First, because the Agreement contains no specific provision regarding its duration, the City's right to terminate the Agreement is governed by then prevailing principles of contract termination law. Second,

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[11] Art. I, §10, U.S. Const.; Art. I, §10, Fla. Const.

because the effect of the PSC's order dismissing the City's petition below was to eliminate or limit the City's right to terminate the Agreement, the propriety of that order depends upon whether the PSC had the legal authority at that time to so alter the contract. If it did not, then the Court must consider whether, assuming such power was subsequently acquired when the jurisdiction of the PSC was extended by the 1974 amendment, the PSC could exercise that power consistent with the constitutional prohibition against impairment of contracts.

With respect to the first question, it is clear that under Florida law as it existed in 1967, the City had the legal right to terminate the Agreement despite the absence of a specific provision conferring that right. The established rule of Florida contract law is "that a contract for an indefinite period, which by its nature is not deemed to be perpetual, may be terminated at will on giving reasonable notice." Florida-Georgia Chemical Co. v. National Laboratories, Inc., 153 So.2d 752, 754 (Fla. 1st DCA 1963) (emphasis in original); see also, e.g., Perri v. Byrd, 436 So.2d 359, 361 (Fla. 1st DCA 1983); Sound City, Inc. v. Kessler, 316 So.2d 315, 318 (Fla. 1st DCA 1975); Gulf Cities Gas Corp. v. Tangelo Park Service Co., 253 So.2d 744, 748 (Fla. 4th DCA 1971).[12]

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[12] The PSC, as a state agency, may not disregard an established rule of contract construction. Island Manor Apartments of Marco Island, Inc. v. Division of Fla. Land Sales, Condominiums, and Mobile Homes, 515 So.2d 1327, 1330 (Fla. 2d DCA 1987), rev. denied, 523 So.2d 577 (Fla. 1988). Thus, the PSC is bound by Florida contract law establishing that contracts of unlimited duration are terminable by either party upon reasonable notice.

This principle recognizes, in effect, the profound and potentially disruptive impact of conferring a legal right or imposing a legal obligation on a party forever. Thus, Florida law does not permit the imposition of a perpetual contractual obligation unless the parties clearly so intended.

> [I]n 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 ... 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 ... it may not be terminated by either party without first giving reasonable notice.

Sound City, 316 So.2d at 318. Stated more succinctly, "the construction of a contract conferring indefinite duration is to be avoided unless compelled by the unequivocal language of the contract." Southern Bell Tel. & Tel. Co. v. Florida East Coast Railway Co., 399 F.2d 854, 858 (5th Cir. 1968).

In this case, the plain language of the Agreement does not support, let alone compel, the conclusion that the City and FPL intended the Agreement to be perpetual. Nor do the circumstances surrounding the parties' relationship support such a conclusion. In fact, the only evidence of record on this subject are the affidavits submitted by the City, in which the original signatories to the Agreement and persons involved with its negotiation have attested that there was no intent for the

Agreement to extend forever.[13] Because the Agreement contains no provisions as to a specific duration, it clearly was, under then-existing law, terminable upon reasonable notice given by either party.[14]

As for the power of the PSC in 1967, the City does not dispute that under Florida law in effect when this Agreement was made, the PSC was held to possess the implied authority to approve territorial agreements between regulated utilities, People's Gas System, Inc. v. City Gas Co., 167 So.2d 577 (Fla. 3d DCA 1964), affirmed, 182 So.2d 429 (Fla. 1965), and the implied authority to withdraw or modify such approval if found to be "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 System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966). But there was no authority, statutory or decisional, empowering the PSC to deprive a party of its contractual right to terminate a territorial agreement, or to require as a precondition to the exercise of such right that the party show a necessity for termination due to changed conditions.

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13 See Affidavits of Vernon Turner, Ruth Campbell, and William Dickinson [R 20-25].

14 The City provided reasonable notice to FPL of its intent to terminate the Agreement when, by letter dated May 11, 1988, the City formally notified FPL that the Agreement was terminated effective August 7, 1988. At the time of the letter, the Agreement had been in effect for over 20 years, which is more than a reasonable duration compared with other territorial agreements on file at the Commission.

Nor can any such authority be derived from the 1974 amendment to section 366.04, which expressly conferred on the PSC the power to approve territorial agreements and extended its regulatory authority to municipally owned electric utilities for that purpose. That the legislature did not intend to authorize the deprivation of rights acquired under pre-existing contracts is manifest from the explicit proviso in the 1974 enactment that "nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements." Ch. 74-196, §1, Laws of Fla. Moreover, any attempt to apply the 1974 amendment as authority for the abrogation or limitation of rights under prior agreements would manifestly exceed constitutional constraints. As this Court recognized in Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), the PSC's power over regulated electric utilities, however extensive, must still be exercised "within the confines of the statute and the limits of organic law."[15]

The PSC's power to alter the rights and obligations conferred by contracts between regulated utilities is narrowly circumscribed by the constitutional prohibition against impair-

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[15] This Court has established that, in reviewing orders of the PSC, it "will not affirm a decision of the Commission if it is ... in violation of a statute or a constitutionally guaranteed right." Shevin v. Yarborough, 274 So.2d 505, 509 (Fla. 1973).

ment of contracts.[16] This Court has acknowledged and endorsed the United States Supreme Court's holding

> that a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution.

United Telephone Co. v. Public Service Comm'n, 496 So.2d 116, 119 (Fla. 1986).

As previously noted, the Agreement was a valid private contract from the date of its execution. Indeed, FPL successfully urged the position in its 1988 petition for declaratory statement before the PSC "that the territorial agreement is a valid, binding contract that both parties thereto must comply with." [A 20 (emphasis added).] Thus, the City's rights under the Agreement are subject to the constitutional protection of the impairment clause, even as against the PSC's exercise of its regulatory authority pursuant to the police power.

In two of its leading decisions on the subject of contract impairment, this Court has unmistakably signified that any attempt to alter a party's right to terminate an agreement by imposing more onerous requirements or conditions on the exercise of that right is constitutionally impermissible. Yamaha Parts

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[16] Florida courts have recognized, as a limited exception, that an exercise of the PSC's statutory authority to modify the rates charged by regulated public utilities is not subject to objection as an impairment of prior contracts purporting to specify such rates. Miami Bridge Co. v. Railroad Comm'n, 20 So.2d 356 (Fla. 1944), cert. denied, 325 U.S. 867 (1945); Cohee v. Crestridge Utilities Corp., 324 So.2d at 155 (Fla. 2d DCA 1975).

Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), involved a franchise agreement that provided Yamaha the right to terminate the contract on 30 days' notice. A statute enacted after the contract had been entered into required that such franchise agreements could only be cancelled upon the giving of 90 days' notice. When Yamaha attempted to terminate the agreement, the franchisee sued for injunctive relief in reliance on the statutory 90-day notice requirement, and the trial court ruled that the termination was invalid for failure to comply with the statute. 316 So.2d at 558.

On appeal, this Court reversed. Rejecting the franchisee's argument that the 90-day notice statute could be applied to the pre-existing contract as "a valid regulatory scheme adopted under the state's 'police power'" or a "procedural safeguard for franchisees," a unanimous Court declared:

> To justify retroactive application it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts. Virtually no degree of contract impairment has been tolerated in this state. Under the circumstances of this case, we hold that the state's interest in policing franchise agreements and other manifestations of the motor vehicle distribution system is not so great as to override the sanctity of contracts.

316 So.2d at 559 (emphasis added; footnotes omitted). The Court concluded that the 30-day notice provision of the contract could not be extended by application of the new statute, observing that "no subsequent governmental enactment should require the

continuation of an unwanted situation for a significantly longer term." Id. at 560.

A similar result was reached in Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681 (Fla. 1980), which involved the right to terminate an oral contract granting Southern an exclusive distributorship. The Court initially recognized that, as in the present case, "[s]ince no termination date for this contract existed, it was terminable at will by either party." 391 So.2d at 682. Southern nonetheless asserted, and the trial court held, that a law requiring manufacturers to show good cause to the state regulatory agency before such contacts could be terminated was constitutional and applicable to pre-existing agreements.

Once again, this Court reversed on the ground that an impairment of the absolute right to terminate was impermissible. While acknowledging the state's authority to regulate the distribution of liquor, the Court reaffirmed that such legislation "must fall if it violates a constitutional prohibition," and then reiterated the principles enunciated in Yamaha:

> Both the United States and the Florida Constitutions provide that no law impairing the obligation of contracts shall be passed. Exceptions have been made to the strict application of these provisions when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state.

391 So.2d at 683 (emphasis added; footnote omitted). The Court then applied a "balancing test" to determine "whether the nature and extent of the impairment is constitutionally tolerable in

light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 780 (Fla. 1979). Because application of the statute would change the contract from one that was terminable at will to one that could be terminated only upon a showing of good cause to an administrative agency, the Court concluded that the impairment was impermissible. 391 So.2d at 684.

The reasoning employed by the Court in Yamaha and Park Benziger clearly compels the same result in the present case. Under the law in existence at the time it was made, the territorial agreement between the City and FPL was terminable at will by either party upon the giving of reasonable notice. To the extent that the subsequent approval order or the 1974 amendment is construed by the PSC to authorize the alteration of the City's termination rights under the original agreement, either by abrogating such rights altogether or by conditioning their exercise on a showing of good cause to the PSC, there is no doubt that the application of the subsequent changes in the law to this pre-existing agreement imposes a new requirement on the right to terminate and thus constitutes an impairment of the contract.[17]

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[17] Conversely, it is equally clear in Florida that where the law in existence at the time a contract is made imposes conditions on the right to terminate the agreement, the subsequent repeal of that law does not eliminate or affect the parties' obligation to comply with the condition. See Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco, 503 So.2d 396, 398-99 (Fla. 1st DCA), rev. denied, 511 So.2d 998

Nor can it be fairly contended that such a substantial impairment is justified by any "overriding necessity for the state to exercise its police powers" in this context. Permitting the City to terminate the Agreement, and thereby compel FPL to renegotiate, will in no way diminish the PSC's ultimate authority to ensure that the public interest is protected against harm.[18] If the City and FPL are able to reach a new territorial agreement, that agreement must be submitted to the PSC for approval under section 366.04(2)(d) and Rule 25-6.0440 of the Florida Administrative Code; if negotiations fail to produce a new agreement, the resulting territorial dispute will be resolved by the PSC pursuant to section 366.04(2)(e) and Rule 25-6.0441.

In any event, there is no appreciable difference in the degree of control exercised by the PSC when the Agreement is terminated upon reasonable notice than when it is submitted for modification. There is, however, a significant difference in the ability of the City to obtain a new agreement, by which it can

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(Fla. 1987) (statutory provision that prohibited termination of distributorship agreements absent showing of good cause continued to apply to pre-existing contracts after repeal of statute, because abrogation of requirement imposed by law existing when parties executed agreement "would constitute a prohibited impairment of the obligations of the contract"); Standard Distributing Co. v. Florida Department of Business Regulation, 473 So.2d 216, 219 (Fla. 1st DCA 1985) (On Motion For Rehearing) (same).

[18] This Court has held that the PSC should approve a territorial agreement if the agreement "works no detriment to the public interest," and may not impose a higher standard to require a showing that the agreement would produce "substantial benefits" to the utilities' customers. Utilities Comm'n v. Florida Public Service Comm'n, 469 So.2d 731, 732-33 (Fla. 1985). The same standard presumably applies to the resolution of territorial disputes.

better discharge its duty to serve the interests and needs of its residents.[19]

The City has alleged below that the needs of residents in the disputed areas and the capabilities of the two utilities have changed since the Agreement was made 24 years ago. Those changes may not be sufficient in the judgment of the PSC to satisfy the high standard that must be met in order to warrant modification of a territorial agreement prior to the expiration of its specified term; but the City did not contemplate that its ability to respond to changing needs and conditions would be so limited in perpetuity.

By entering into a contract of unspecified duration, the City effectively reserved the right to terminate whenever, in the City's judgment, the Agreement was no longer in the best interests of its citizens. Having now made that judgment, the City is entitled to exercise its right to terminate, subject only to a determination by the authority having jurisdiction -- in this case the PSC -- that the notice given was reasonable. Because the PSC's action in depriving the City of its contractual right to terminate is unauthorized as a matter of statutory law, impermissible as a matter of constitutional law, and unjustified as a matter of practical necessity, the order dismissing the City's petition should be reversed.

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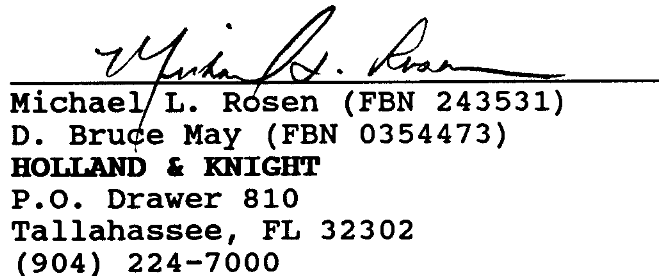
[19] The record reflects that FPL has refused the City's offer to negotiate and will oppose any effort to modify the Agreement. Thus, the City is attempting to terminate because it has no reasonable alternative means of adjusting for changes over the past 24 years.

CONCLUSION

Based on the foregoing arguments and authorities, the City submits that the order entered by the PSC dismissing the City's petition constitutes a departure from the essential requirements of law. Accordingly, the order should be reversed and this case remanded to the PSC with directions to determine the reasonableness of the notice of termination given by the City to FPL, and, unless the notice is deemed unreasonable, to declare the Agreement terminated and Order No. 4285 withdrawn.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by United States mail to J. Christian Meffert, Bryant, Miller & Olive, P.A., 201 S. Monroe St., Suite 500, Tallahassee, FL 32302; to K. Crandal McDougall, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100; and to Susan F. Clark, Florida Public Service Commission, 101 E. Gaines Street, Room 226, Tallahassee, FL 32301, this 22nd day of May, 1991.



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