IN THE SUPREME COURT OF FLORIDA

FORT PIERCE UTILITIES AUTHORITY, Appellant, vs. FLORIDA PUBLIC SERVICE COMMISSION Appellee,	)	CASE NO. 80,712

AMENDED ANSWER BRIEF FOR APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, FL 32399-0851
(904) 488-7464

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, The Public Service Commission, is referred to in this brief as the "Commission." Appellant, Fort Pierce Utility Authority is referred to as "FPUA." Florida Power and Light Company (co-petitioner with FPUA for approval of territorial agreement) is referred as "FPL."

References to the record of this proceeding are designated by R._____.

References to the transcript of the Service Hearing held June 1, 1992 are designated as Tr._____."

References to the transcript of the final hearing held June 18, 1992 are designated Tr._____."

STATEMENT OF THE CASE AND FACTS

Appellee, the Florida Public Service Commission ("Commission"), adopts that portion of appellant's Statement of the Case and Facts found at Initial brief, p. 1-3, ending at ¶2 thereof. Appellee would add to that the following:

The Commission's Notice of Proposed Agency Action issued March 27, 1992, 92 FPSC 3:440 (1992), specified that

> Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding . . . [R. 202]

Within days following issuance of the Notice, some two hundred protests were received by the Commission. [Customer Tr. 93][1] The Commission also received a Joint Notice of Filing filed by Florida Power & Light Company ("FPL") and appellant, Ft. Pierce Utilities Authority ("FPUA") indicating 316 customers opposed to the proposed customer transfers and two customers favoring them out of 318 customers expressing a preference. [Customer Tr. 94]

At the service hearing, held June 1, 1992, customer testimony was taken concerning the detrimental effects the territorial agreement would have. Complaints were voiced by, inter alia, some of the 2100 residents of North Hutchinson Island who, pursuant to the agreement, would be transferred from FPL to FPUA'S electric utility service. Their complaints are summarized in the Order Denying Approval of the Territorial Agreement ("Order"), at p. 2, ¶1. [R. 271]

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[1] The "customer transcript" records the service hearing held June 1, 1992.

They include loss of conservation programs available from FPL but not from Ft. Pierce, the superior equipment and service of FPL as compared with Ft. Pierce's, inability of Ft. Pierce to handle additional growth, as stated by Ft. Pierce's director at a Ft. Pierce City Commission meeting and lack of representation on a city utility for customers outside the city.[2]

A prominent theme voiced by protesting customers was that they were pleased with FPL and that their transfer to FPUA was unjustified because no wasteful duplication of utility facilities exists on North Hutchinson Island. Those customers objected to being used as "pawns" in the negotiations between FPL and FPUA. [Customer Tr. 20, 22, 65, 66]

The final hearing was held before the Commission on June 18, 1992. Subsequently, the Commission issued its Order Denying Approval of the Territorial Agreement, which is the subject of this appeal. 92 FPSC 9:679 (1992). [R. 270] While the Commission's Argument, infra, addresses the contents of the Order and why the Court's standard of review requires its affirmance, it is necessary to note that the penultimate sentence in appellant's "Statement of the Case and Facts", Initial Brief, p. 4-5, is objectionable because it fails to demarcate the Commission's conclusions from appellant's arguments and presents the resulting ambiguity as "fact".

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[2] Transcript citations are found at p. 2 ¶1 of the Order. [R. 271]

Stated clearly, the conclusions that the Commission limited its analysis to the alleged detriments of the agreement on residents of North Hutchinson Island and that the agreement would provide increased reliability to all affected persons are, as a factual matter, appellant's conclusions, not the Commission's.

To the contrary, the Commission concluded that:

> [[T]he decision on] "whether or not to approve a territorial agreement is based on the effect the agreement will have on all affected customers..." [R. 272];
>
> [FPUA] "failed to sustain its burden in this proceeding to establish its ability to provide reliable service in either its existing territory, or in the territory proposed to be transferred." [R. 274];

Moreover, though the agreement would eliminate wasteful expenditures related to duplication of utility facilities, the Commission gave "some" consideration to the fact that North Hutchinson Island, (the largest transferred area) was not an area that was subject to duplication of facilities which would cause such wasteful expenditures. [R. 274-5; R. 270; Tr. 65]

However, it is agreed that, as appellant states, the Commission did conclude that the agreement was not in the public interest. [R. 274-5]

SUMMARY OF THE ARGUMENT

The Commission based its Order Denying Approval of Territorial Agreement at issue in this appeal on three factors:

1) Fort Pierce Utilities Authority (FPUA) failed to meet its burden to demonstrate its ability to provide reliable service in either its present territory or those areas to be transferred to it under the agreement.

2) A large number of customers would lose access to conservation programs available from Florida Power and Light (FPL) but not from FPUA.

3) The Commission gave some consideration to the fact that North Hutchinson Island, the largest area to be transferred under the agreement, was not part of the disputed area and had no duplicative utility facilities.

The record contains competent substantial evidence that the first two factors were detriments to the public interest generally, rather than harmful to just a few customers. A fortiori, they are not accurately described as mere lack of benefit to a few, the test found insufficient in the Utilities Commission New Smyrna Beach v. Florida Public Commission case. Therefore, appellant's attempt in Section I of the Initial Brief to find error under Utilities Commission is unavailing.

There is no support in the record for appellant's criticisms of the Commission's analysis of the conservation issue. The alternative suggested by appellant is itself precluded by Utilities Commission because it ignores the Commission's responsibility under that case to disapprove territorial agreements which harm the public interest. Moreover, appellant assumes that the testimony of utility witnesses should be found to outweigh the testimony of other witnesses, whereas the record indicates that the Commission found that the non-utility witnesses prevailed on the merits of a number of contested issues. The further assumption that the Court will now reweigh the evidence is contrary to the Court's role on appellate review. Contrary to appellant, the Commission had discretion to give some consideration to the harm caused residents outside the disputed area. The Commission's fact-finding, rather

than the utilities' stipulation determined what the area of dispute was.

Appellant's argument in Section II of the Initial Brief simply restates the testimony appellant believes the Commission should have weighed more heavily, in the hope that this Court will now reweigh the evidence. This is not the Court's proper role and, moreover, does not demonstrate that the Commission's Order was unsupported by competent substantial evidence. Since the record contains such evidence the Commission's Order must be affirmed. Moreover, FPUA's own witness, on cross-examination, provided competent, substantial evidence that the elaborate improvement plans testified about at length to demonstrate reliability were not approved by FPUA, discussed with the other utility involved, demonstrated to be feasible or permittable, or warranted absent growth. The Court's role on appeal is not to reweigh this evidence.

Appellant's request that the Court consider whether a comparison of residential and commercial conservation programs might mitigate the Commission's findings that the loss of conservation programs to 2100 transferred customers was a public detriment again asks the Court to reweigh and re-evaluate the evidence, but does not challenge the relevant fact that the Commission's Order is based on competent, substantial evidence and must, therefore, be affirmed.

The record and Order demonstrate that the Commission's decision denying the territorial agreement considered and balanced

the benefit to all residents of resolving the dispute as against the detriments of the agreement to the public interest. Therefore, appellant has failed to demonstrate any error by the Commission under the Utilities Commission no detriment test.

ARGUMENT

I. The Commission's Order Properly Comports With This Court's No Detriment Test And Is Supported By Competent, Substantial Evidence

The Commission concurs in the background argument contained in the Initial brief, p. 8-10. To that should be added, however, citation to the seminal case of City Gas v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965). Therein, this Court not only affirmed Commission Order No. 3051, cited by appellant, Initial Brief, p. 9, but also held that a utility territorial agreement is a nullity unless approved by this Commission. 182 So. 2d at 436. The duality of favoring such agreements and at the same time requiring their close supervision by the Commission thus has a long history.

A more recent manifestation of that duality in Utilities Commission New Smyrna Beach v. Florida Public Service Commission ("Utilities Commission") 469 So. 2d 731 (Fla. 1985), where the opinion favors territorial agreements but at the same time makes the Commission responsible for ensuring that such agreements work no detriment to the public interest, is in accord with that lengthy evolution. Neither aspect of the duality may be slighted if the Commission is to follow the Court's teachings properly in this area.

On p. 12 of the Initial Brief, appellant asserts that the Commission's numerical comparison [R. 275] is incorrect, but offers no different numbers or support in the record for its criticism.

The numerical comparison was made as a partial demonstration of why harm to the public interest was implicated by the conservation losses. Those conservation losses, in turn, formed but part of the total analysis on which rejection of the territorial agreement was premised. As demonstrated throughout this Brief, that analysis in its totality fully comports with the requirements of Utilities Commission.

On p. 12-13 of the Initial Brief, appellant then theorizes that no numerical comparison could be correct, based on considerations regarding residential and commercial customers and their respective conservation programs. No citation to the record is made to support this speculation which should, accordingly, be ignored.

At p. 13 of the Initial Brief, appellant then argues that, in effect, this Court should reweigh the evidence by giving greater weight to the testimony of the utility witnesses.[3]

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[3] The Commission objects strenuously to the implication that, regardless of the merits, testimony of utility witnesses, qua experts, is entitled to more weight than conflicting testimony of citizen intervenors, qua non-experts. Any review of the record of this case indicates that the citizen-intervenors were judged by the Commission to have prevailed on the merits on issues such as whether North Hutchinson Island was actually part of the territorial dispute or merely claimed as such, or whether FPUA's conservation programs were likely to be of practical benefit to customers in comparison to what they currently have. Moreover, the intervenors' cross-examination on technical issues led to the Commission's own cross-examination establishing that FPUA's system improvement planning was merely idea stage and had not been

As the Court has stated,

> It is not this Court's function on review of a decision of the Public Service Commission to re-evaluate the evidence or substitute our judgment on questions of fact.

Citizens of Florida v. Public Service Commission, 435 So. 2d 784 (1983).

In Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984), this Court also held:

> [W]e will not reweigh or re-evaluate the evidence presented to the Commission, but will examine the record only to determine whether the order complained of meets the essential requirements law and whether the agency had available to it competent, substantial evidence to support its findings.

Utilities Commission requires, first, that the Commission "should base its approval decision on the effect the territorial agreement will have on all affected customers in the formerly disputed territory, not just whether transferred customers will benefit." Second, the Commission must "ensure that the territorial agreement works no detriment to the public interest." 469 So. 2d at 732.

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approved, demonstrated to be feasible, permittable or warranted absent growth. [R. 272; Tr. 337-44]

Appellant's expectation that this Court will reweigh the evidence to give added weight to the utility witnesses' testimony is contrary to the Court's appellate role. Citizens, Polk County, supra.

Moreover, it distorts the holding in Utilities Commission and is contrary to the spirit and purpose of Chapter 120. The Commission's processes are open to all affected parties and then, not merely as a formality. Indeed, the presiding Commissioners at the service hearing suggested to those present that those who could do so participate in the final hearing and enlist the aid of Public Counsel so that their positions could be advocated before the Commission as effectively as possible. Both suggestions were acted on. [Customer Tr. 98-9; 101-102]

The first factor cited by the Commission for disapproving the agreement was that of reliability. The Commission concluded that,

> FPUA has failed to sustain its burden in this proceeding to establish its ability to provide reliable service in either its existing territory, or in the territory proposed to be transferred. [R. 274]

At hearing, Commissioner Clark asked FPL witness Lloyd whether reliability was a factor to look at to determine whether or not a territorial agreement was in the public interest:

> Commissioner Clark: Reliability, the effect on reliability would certainly be a factor?
>
> Witness Lloyd: Yes. [Tr. 124]
>
> Commissioner Clark: Let me ask you where you would put the ability to meet current load and future demand?
>
> Witness Lloyd: The ability to meet current load?
>
> Commissioner Clark: Yes.
>
> Witness Lloyd: Sufficient generating capacity?
>
> Commissioner Clark: Yes.
>
> Witness Lloyd: Yes.
>
> Commissioner Clark: And the ability to meet future demand in a reasonable time period, would that also be one of the elements in reliability?
>
> Witness Lloyd: Yes. [Tr. 125-6]

In concluding that FPUA failed to establish its ability to provide reliable service in either its current service area or those areas to be transferred under the agreement, the Commission addressed avoidance of a public detriment, exactly as required by

Utilities Commission. This can in no way be explained away as a concern for whether only some transferred customers would be negatively impacted, let alone an impermissible concern with lack of benefits to a few transferred customers.

The second factor cited in the Commission's Order was the loss of conservation programs to customers transferred from FPL to FPUA. [R. 274] Appellant is critical of the way the Commission balanced the loss to 2100 customers of their conservation programs as against the benefits of the agreement to all. But, the very fact of the balancing itself demonstrates compliance with Utilities Commission, whether or not appellant agrees with the result.

Thus, Commissioner Clark's examination of FPL witness Lloyd on the subject elicited the following:

> Commissioner Clark: [I]f a territorial agreement had the effect of reducing the conservation programs available to people affected by the territorial agreement, that would be a detriment?
>
> Witness Lloyd: To those people, yes.
>
> Commissioner Clark: What about the ratepayers in general (pause).
>
> Witness Lloyd: It seems to me that the programs which create conservation effects such as deferring the need for power plants would affect all customers.
>
> Commissioner Clark: So, assuming it met the ratepayer's test, or the test the Commission uses to determine whether or not the program should be implemented, to the extent less people have the opportunity to take advantage of that, it would be, on the whole a detriment to the public interest?
>
> Witness Lloyd: Yes, it would.

> Commissioner Clark: Both the individual ratepayers who don't have the opportunity to take advantage of it and the general body of ratepayers.
>
> Witness Lloyd: Yes. [Tr. 124-5]

It could not be more clear that the Commission, on the record and in its Order, has fully comported with Utilities Commission. In its findings concerning reliability and conservation, the Commission was not concerned with mere lack of benefits to a few, but with detriments to the public at large. Indeed, the category of ratepayers as a whole necessarily includes all customers in the formerly disputed territory.

Utilities Commission requires that agreements which work such detriments to the public be disapproved. That case does not require that appellant's suggestions for a different balancing be used or permit this Court to reweigh the evidence according to those suggestions. Citizens of Florida, Polk County, supra.

Finally, the Commission indicated that some consideration was given to the fact that North Hutchinson Island was not an area that was subject to duplication of facilities. To be sure, the phrase "some consideration" indicates the non-dispositive nature of this issue. [R. 274]

However, appellant simply ignores this finding and asserts its own "findings" at Initial Brief, p. 11:

> The disputed area in the action below was "all areas outside of Fort Pierce's city limits as those limits existed on July 1, 1974."

Nothing more is cited in support than appellant's stipulation with FPL in the Petition To Resolve Territorial Dispute filed by those parties. [R. 3]

However, that stipulation is not binding on the Commission. The Commission heard a great deal of testimony from FPUA witness Schindehette to the effect that North Hutchinson Island was an "enclave" and thus part of the disputed area. Conflicting testimony was heard from intervenors to the effect that the claim was a pretext, that North Hutchinson Island was not part of the dispute and had no duplicate facilities. Clearly, the Commission agreed with the latter analysis. [Tr. 196-9; 340-2; R. 274-5]

This issue, again, does not speak to lack of benefits to a few, it speaks to harm impacting a large number of people found not even to be in the disputed area. In Utilities Commission, the Court noted that the Commission did not there say that anyone was harmed. Utilities Commission did not require that the Commission always find that the efficiency benefits of territorial agreements outweigh the detriments to the public at large no matter how many residents in territory outside the disputed area are negatively impacted by a negotiated "swap". Not only is the harm to those on North Hutchinson Island not the same as mere lack of benefit, but harm has also been found to be manifested in the form of conservation and reliability issues affecting all residents of the disputed territory. Contrary to appellant's assertion, the Commission had the discretion under Utilities Commission to give "some consideration" to the fact that North Hutchinson Island was

not part of the disputed territory and that the residents would be harmed by the agreement. 469 So. 2d at 733.

Finally, this Court should reject appellant's final point in Section I of the Initial Brief; i.e., that the Commission has "again required the parties to a proposed territory agreement to demonstrate a benefit to the public interest, directly contrary to the holding of Utilities Commission." Initial Brief, P. 13.

In support of this strained assertion, appellant cites the Commission's Order to the effect that the transfer of North Hutchinson island was not found

> to be in the public interest here. [R. 275]

In Utilities Commission, this Court stated that

> For PSC approval, any customer transfer in a proposed territorial agreement must not harm the public.

There is no discussion in the record of this case concerning lack of benefit to transferred customers under the proposed agreement. There is extensive discussion of harm. Added to the fact that "some consideration" was given to the circumstance that the largest number of transferred customers were located outside the disputed area, the finding that the transfer was not in the public interest related to avoiding harm, not to requiring a benefit. Nothing in Utilities Commission precludes the Commission from avoiding harm; quite the opposite. The Commission is precluded by that case from approving customer transfers which harm the public. 469 So. 2d at 733. On the record of this case, where general public harm was demonstrated regarding reliability concerns

and conservation program losses and some consideration was given to harm to residents found to be outside the disputed area, appellant has not identified any Utilities Commission error in the Commission's Order.

II. The Commission's Findings Of Public Detriment Are Based On Competent Substantial Evidence.

As noted previously, the Commission based its denial of approval of the territorial agreement at issue on three points:

1) Failure of FPUA to establish its ability to provide reliable service in accordance with Rule 25-6.0440(2)(b) F.A.C.

2) Losses to substantial numbers of customers of conservation programs thereby causing a detriment to the public interest as a result of the proposed agreement. [R. 274]

3) Some consideration accorded by the Commission to the fact that North Hutchinson Island, with the largest number of transferred customers, was not part of the disputed territory and had no duplicate facilities. [R. 274-5]

In Part I of the Initial Brief, appellant addresses only the second of these points, arguing that the Commission's numerical comparison of customers losing conservation programs with the number residing in the disputed territory was flawed and simplistic.

The substitute analysis offered by appellant is plainly at odds with Utilities Commission. That case held that an exclusive focus on a lack of benefit to a group of transferred customers was insufficient grounds for disapproval of a territorial agreement where no one was harmed by the agreement, 469 So. 2d at 732. Appellant's theory is apparently that the Commission lacks discretion to conclude that harm to a smaller group of customers

than the total number in the disputed area ever outweighs the benefits to all the customers in the disputed area of the elimination of duplicate facilities.[4] Initial Brief, p. 13. Clearly, appellant is wrong. Under Utilities Commission, the

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[4] The mere fact that the Commission so concluded is enough to prove to appellant that the Commission never balanced these factors. However, as earlier cited parts of the record made clear, the Commission had competent, substantial evidence to support the conclusion that loss of conservation programs in the circumstances of this case was a detriment to ratepayers generally, a group which is necessarily inclusive of all residents in the disputed territory. So, too, was FPUA's inability to demonstrate reliability. P. 9-10, supra.

Moreover, it is also clear from the Order and the record that the Commission considered the benefit to residents in the disputed territory of the elimination of duplicate facilities, though also giving some consideration to the fact that the largest transferred area, North Hutchinson Island, was not part of the disputed area and had no duplicate facilities.

Thus, on p. 1 of the Order [R. 270], the Commission noted that

> The petition stated that FPL provides electric service to areas in and around the corporate limits of Ft. Pierce and that FPUA had extended its service area so as to duplicate FPL's facilities.

On p. 3 of the Order [R. 272], the Commission cited Rule 25-6.0440, Florida Administrative Code, including apart (2)(c) thereof as to standards for approval for territorial agreements:

> c) the reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.

The record as a whole, as well as the Order, demonstrates that this standard was considered a "given" in the analysis since neither the standard nor its appropriate function therein was ever disputed. This is consistent also with the fact that the Commission approved the territorial agreement as proposed agency action before the detriments were known and the Commission could balance them against the benefit to residents in the disputed territory of eliminating duplicate facilities. The mere fact that appellant would balance the factors differently does not demonstrate that the balancing did not occur or that the Court may reweigh those factors.

Commission not only has that discretion, but the duty to exercise it:

> For PSC approval, any customer transfer in a proposed territorial agreement must not harm the public.

469 So. 2d at 733.

Accordingly, appellant's argument in Section I of the Initial Brief did not establish error in the Commission's Order under Utilities Commission. Instead, it asked the Court to reweigh the evidence according to theories which are themselves erroneous under the Court's Utilities Commission holding. Moreover, all of this was in lieu of addressing the one question relevant to the standard of appellate review; i.e., is the Commission's Order supported by competent, substantial evidence?

Appellant finally addresses that issue starting on p. 15 of the Initial Brief. In so doing, appellant still omits the third point on which the Order was premised,[5] but does discuss the reliability and conservation issues. This discussion fails, however, to demonstrate that the testimony relied on in the Order was not competent or substantial. Instead, appellant presents again the testimony it prefers along with the bare assertion that there was no competent, substantial evidence for the Commission's conclusions.

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[5] See, e.g. point 3, p. 14, supra. As previously stated, the Commission totally rejects appellant's assumption that its stipulation with FPL rather than the Commission's fact finding establishes what the disputed area included.

A. Reliability

Appellant's argumentation on this issue, Initial Brief, p. 15-18, is purely and simply another request that the Court reweigh the evidence, contrary to Citizens and Polk County, supra.

The argumentation pointedly ignores the record except for the purpose of restating at length the testimony appellant wishes the Court to substitute for the improper purpose of reweighing. None of the argumentation addresses the relevant issue of whether the testimony relied on by the Commission -- as contrasted with the testimony appellant improperly seeks to have the Court substitute in a reweighing process -- was a competent and substantial evidentiary basis for the Commission's decision.

Thus, appellant cites extensive expert testimony, Initial Brief, p. 18, that reliability was likely to increase because of, inter alia, elaborate plans to improve the system. However, FPUA's own witness provided competent, substantial evidence that those plans were highly uncertain. For one thing, engineering feasibility had not been established. [Tr. 413] The improvement plans were not approved by the utility. [Tr. 417-18] Where those plans involved another utility, the other utility had not even been contacted about them. [Tr. 412] Implementation of the improvements described was uncertain because it might be wholly conditioned on growth. [Tr. 414-5] These cross-examination responses were competent substantial evidence in support of the Commission's according to the remaining FPUA testimony the weight

that was given to it. It is improper for appellant to seek reweighing of it by the Court.

On pages 16-17, appellant sets out other testimony about the capacity of FPUA, the transfer of FPL facilities to FPUA, similarities in the two utilities' construction and an expert's conclusion that customer transfers would not decrease reliability.

However, to the Commission, this testimony was outweighed by the lack of any recordkeeping by FPUA related to its reliability. Moreover, the issue of reliability was not only addressed by FPUA's testimony on the criterion of Rule 25-6.0440(2)(b), F.A.C. Customer testimony [Customer Tr. 61, 75, 87] raised the issue of FPUA's director's statement at a city commission hearing that FPUA could not handle additional growth. Also raised were the arguments that FPL was better equipped, provided better service, was superior on service calls, and could better fix storm damage. [Customer Tr. 78, 79, 86, 57, 58, 63]

Appellant's claim that comparison with FPL was inapposite is unavailing. The Commission is, by statute, the agency responsible for the reliability of the grid statewide. §366.04(5) Fla. Stat. (1991). In fulfilling that function, PSC requires extensive periodic documentation by FPL of its reliability and monitors it by means of that documentation. Rule 25-6.018, F.A.C. If assurance by experts, helpful though that may be, were sufficient, the requirement of extensive routine documentation would be superfluous.

It was FPUA's burden to establish that no decrease of reliability was likely to result from the agreement. Rule 25-6.0440(2)(b), F.A.C. In its judgment, the Commission found bare assurances of expert witnesses, without more, to be insufficient in this case. It is improper for appellant to seek reweighing of that finding of insufficiency by this Court.

B. Conservation

At p. 19-21 of the Initial Brief, appellant first argues that it is bad policy for the Commission to consider effectiveness of conservation programs where utility territorial agreements involve non-FEECA and FEECA utilities.

While appellant is entitled to that opinion, the record established that loss of conservation programs under the circumstances of this case was a public harm. Utilities Commission requires that the Commission consider such public detriments in its decision to approve or disapprove territorial agreements. While appellant speculates that such consideration will cause many territorial agreements between non-FEECA and FEECA utilities to be disapproved, the fact-intensive nature of the analysis in this case and its complexity belie such easy predictability. As to this particular case, the Commission would respond that the outcome was not predicated exclusively on conservation concerns and that inclusion of the issue in the analysis has not been demonstrated to be bad policy. Indeed, it would be extraordinary and unjustified to conclude that, where the

issue had been raised by customers to be transferred, the proponents of the agreement had no duty to address it.

That leads to appellant's next argument relevant to conservation, that the testimony establishes that FPUA's conservation programs were adequate, though less extensive than FPL's. This, again, does not address whether evidence relied on by the Commission was competent and substantial, it merely invites the Court to reweigh the evidence and depart from the Commission's conclusion that the loss of these programs to 2100 customers would be a public detriment.

As to appellant's commercial versus residential comparison of conservation programs, this particular improper invitation to the Court to reweigh the evidence is accompanied by appellant's explicit suggestion as to how the evidence should be reweighed. However, the Commission had competent substantial evidence to conclude that loss of conservation programs under the proposed territorial agreement would be a detriment to the public interest [R. 274-5]. Under the standard of appellate review, the Order, which is so supported in its entirety, must be affirmed. Citizens of Florida, Polk County, supra.

Finally, appellant again raises, unsuccessfully, the unsupported claim that the Commission improperly considered the interests of only a few customers and failed to consider the interests of all affected customers. The Order and record demonstrate that this claim is baseless. It was baseless when put forward to demonstrate Utilities Commission error for the reasons

stated in Section I of this Brief and remains baseless for those same reasons. Moreover, restating the claim does not demonstrate that the Commission's Order is unsupported by competent, substantial evidence, the ostensible purpose of the argumentation in Section II of the Initial Brief. Appellant's failure to demonstrate that by means of any of its argumentation requires that the Commission's Order be affirmed.

Conclusion

The Commission's Order Denying Territorial Agreement is supported by competent substantial evidence and fully comports with this Court's holding in Utilities Commission New Smyrna Beach v. PSC. Accordingly, it should be affirmed.

Respectfully submitted,

ROBERT D. VANDIVER
Florida Bar No. 344052

RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, FL 32399-0861
(904) 488-7464

Dated: February 12, 1993

C80712.mrd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Answer Brief of Appellee, Florida Public Service Commission has been furnished by U. S. Mail to the following parties on this 12th day of February 1993.

Richard C. Bellak

RICHARD C. BELLAK

Frederick M. Bryant
William J. Peebles
Moore, Williams, Bryant,
Peebles & Gautier, P.A.
Post Office Box 1169
306 E. College Avenue
Tallahassee, FL 32302

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Motion for approval of territorial agreement and dismissal of territorial dispute.	DOCKET NO. 891245-EU ORDER NO. PSC-92-1071-FOF-EU ISSUED: 09/28/92

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
BETTY EASLEY

ORDER DENYING APPROVAL OF TERRITORIAL AGREEMENT

BY THE COMMISSION:

On October 23, 1989, Florida Power & Light Company (FPL) filed a petition to resolve a territorial dispute with Fort Pierce Utility Authority (FPUA). The petition stated that FPL provides electric service to areas in and around the corporate limits of Ft. Pierce and that FPUA had extended its service area so as to duplicate FPL's facilities. North Hutchinson Island was not named in the petition as an area subject to dispute or duplication of service.

After several motions were exchanged by the parties, on March 29, 1990 the parties filed a joint motion for suspension of filing dates. The joint motion stated that the parties were negotiating a settlement.

On January 29, 1992, FPL and FPUA filed a joint petition for approval of territorial agreement and dismissal of territorial dispute. According to the petition, the agreement would eliminate duplication that had resulted led to needless and wasteful expenditures. The parties agreed to transfer certain customer accounts and distribution facilities. FPUA proposed to transfer approximately 900 customers to FPL and FPL proposed to transfer approximately 3,200 customers to FPUA, 2,100 of whom were residents of North Hutchinson Island. The agreement included detailed terms and conditions and specifically identified the geographic area to be served by each utility. The agreement also contained a detailed map of the area.

On March 27, 1992, the Commission issued a Notice of Proposed Agency Action Approving Territorial Agreement. Numerous protests to the Proposed Agency Action were filed by customers in the affected areas. A customer hearing was held on June 1, 1992 in Ft. Pierce. Many of the customers who testified were residents of North Hutchinson Island who were happy with the service from FPL and didn't want to be transferred to FPUA. (Customer TR 45, 47, 50, 58, 78, 83, 84, 86). Several customers testified that they benefitted from the numerous conservation programs offered by FPL, that were not available from FPUA. (Customer TR 18, 21, 23, 24, 25, 50, 51, 62, 86, 87). Other customers testified that North Hutchinson Island was not part of the dispute between FPUA and FPL; that there is no duplication of services on North Hutchinson Island, but that the Island was a pawn in the territory swap between the utilities. (Customer TR 20, 22, 65, 66). Several customers complained that if they were transferred to FPUA, they would have no representation on a utility that is not subject to PSC regulation. (Customer TR 22, 52, 55, 77). Other customers testified about a Ft. Pierce Commission meeting at which the director of FPUA stated that FPUA could not handle additional growth. (Customer TR 61, 75, 87) Customers also testified that FPL was better equipped, provided better service, was superior on service calls, could provide service during a hurricane, and was better equipped to fix storm damage (Customer TR 78, 79, 86, 57, 58, 63) Finally customers testified that FPL offered budget billing which was not offered by FPUA. (Customer TR 51).

On June 18, 1992, an evidentiary hearing was held on the issue of whether the territorial agreement should be approved.

We have jurisdiction over both FPL and FPUA for the planning, development, and maintenance of a coordinated electric power grid to avoid uneconomic duplication of distribution, transmission, and generation facilities as provided in Section 366.04(5), Florida Statutes. Furthermore, we have jurisdiction pursuant to Section 366.04(2) to resolve territorial disputes between municipal electric utilities and investor-owned utilities and to approve territorial agreements. Rule 25-6.0440, Florida Administrative Code, states in pertinent part:

> (2) Standards for Approval. In approving territorial agreements, the Commission may consider, but not be limited to consideration of:
>
> a) the reasonableness of the purchase price of any facilities being transferred;

b) the reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electrical service to the existing or future ratepayers of any utility party to the agreement; and

c) the reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.

Our decision on whether or not to approve a territorial agreement is based on the effect the agreement will have on all affected customers, not just on whether transferred customers will benefit. It is our responsibility to insure that the territorial agreement works no detriment to the public interest. For Commission approval, any customer transfer in a proposed territorial agreement must not harm the public. See Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d. 731 (Fla. 1985).

In the instant case the record reflects that North Hutchinson Island was not named in the original petition as an area subject to dispute or duplication. In fact, the entire island is served by FPL. FPUA does not have a single customer on the island. While the customers of North Hutchinson Island expressed a strong preference to remain with FPL (see transcript of June 1, 1992 customer hearing, 1-end), we may not consider customer preference in resolving territorial matters unless all other factors are substantially equal. See Rule 25-6.0441, Florida Administrative Code.

In meeting our obligation to determine that an award of territory to a particular utility will not harm the public we may consider the capability of the utility to provide reliable electric service to existing and future ratepayers. One factor we consider in predicting whether a utility will be able to provide reliable service in a new area is whether the utility is providing reliable service in its existing territory. If a utility is doing a good job now in its existing territory, it reflects on it ability to provide reliable service in the territory to be transferred.

Here the record reflects that FPUA does not keep records relating to its reliability (TR 312, 313). At the hearing FPUA was unable to provide any records that would have allowed us to quantify FPUA's reliability, or the number of consumer complaints it may have had over the years due to outages. In fact, at the hearing FPUA was unable to provide data by which its reliability could be judged and compared to that of FPL. (TR 313) While FPUA

does keep records regarding "feeder operations", FPUA's witness testified that it would be "almost impossible" to quantify how customers were affected, using this data. (TR 316) Thus, while the testimony in this docket contains bare assertions regarding FPUA's reliability, the ability of FPUA to provide reliable service to its existing territory has not been demonstrated on the record.

The record also reflects that on November 18, 1991, the Director of FPUA stated at a city commission meeting that FPUA does not have the capacity, without expanding, to meet the projected growth of its existing territory or to meet the growth in North Hutchinson Island (TR 226, 228, Exhibit 12). While the Director of FPUA testified at the hearing that FPUA had extensive plans for expansion, cross-examination by the Commission revealed the testimony to be somewhat misleading. The utility had not yet made a decision to make the improvements that were the subject of FPUA's previous testimony. In fact, the Director was not even sure the improvements were "engineeringly feasible" (TR 413), or that permitting could be obtained (TR 417):

> There has not been a decision, the Utilities Board has not even addressed doing that for sure. We may find that we could not even get permitting to go across the line -- to go across the river with a transmission line.
>
> * * * * *
>
> ....to answer your question, it has not been definitely approved that we're going to be doing that.
>
> (TR 417-418)

The fact that the utility may theorize that under some set of circumstances it could make transmission improvements does not demonstrate the utility's present ability and intent to do so. The utilities intent to further address the plans and to later make a decision on whether they are feasible is not sufficient to convince us that the improvements will reach fruition.

Thus, the record reflects that FPUA has represented at a public forum that it does not have the capacity to meet the growth in North Hutchinson without expanding. The record further reflects that the proposed expansion, which was the subject of extensive testimony, is uncertain at best. Finally, the record reflects that

FPUA was unable to provide records regarding reliability, outages, or consumer complaints in its existing territory. Under these circumstances we find that FPUA has failed to sustain its burden in this proceeding to establish its ability to provide reliable service in either its existing territory, or in the territory proposed to be transferred.

Another factor we may consider in determining whether a transfer of territory is in the public interest is the availability of conservation programs to customers being transferred. In Section 366.81, Florida Statutes, the Florida Legislature found and declared "that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens".

The record reflects that FPL makes available numerous conservation programs to its customers. A number of FPL's customers residing on North Hutchinson Island testified that they benefit from these programs. (Customer Hearing TR 18, 21, 23, 24, 25, 50, 51, 62, 86, 87). FPL's exhibit 8 shows that FPL has spent approximately $240 million in the years 1987-1992 on residential conservation programs. This has saved FPL's ratepayers through 1991 approximately $112 million.

The record reflects that FPUA was unable to show a history of benefit to its customers through its conservation programs (TR 282-283). FPUA has only limited conservation programs in place. The only program available until recently was the energy survey program (TR 286, 290). FPUA's other programs (education, air conditioning, and construction design assistance) were just recently approved by FPUA's board (TR 290). Significantly, FPUA's air conditioning program was only approved the week before this hearing, to become effective October 1, 1992. The budgeted funds for the remainder of FPUA's conservation programs are merely for studies to see whether or not these conservation measures are feasible (TR 311).

We find that FPL's 2,100 customers on North Hutchinson Island would suffer a detrimental loss of conservation benefits if were they transferred to FPUA. Since the number of customers who will have their conservation programs reduced or eliminated is greater than the number of customers who reside in areas of duplication, we find that the public interest would not be served by approval of this territorial agreement.

We believe it is important to mention that in reaching our decision to withhold approval of the territorial agreement in this particular case we have given some consideration to the fact that

North Hutchinson Island was not an area that was subject to duplication of facilities. There may, of course, be many situations where it would be in the public interest to approve the transfer of territories not part of an original dispute or actually subject to duplication. Based on the record in this proceeding, as we described earlier, we do not find such a transfer to be in the public interest here.

It is therefore,

ORDERED for the reasons set forth above, that the joint petition of Florida Power and Light Company and Fort Pierce Utility Authority for approval of a territorial agreement and dismissal of a territorial dispute is denied. It is further,

ORDERED that this docket shall remain open to allow the parties to renegotiate a settlement of their dispute. It is further ordered that the parties shall return to the Commission for resolution of the dispute if they are unable to resolve it themselves.

By ORDER of the Florida Public Service Commission this 28th day of September, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION

In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida.

DOCKET NO. 6231-GU

ORDER NO. 3051

ORDER APPROVING AGREEMENT

BY THE COMMISSION:

Peoples Gas System, Inc. and City Gas Company of Florida are gas public utilities operating under the jurisdiction of the Florida Railroad and Public Utilities Commission pursuant to Chapter 366, Florida Statutes. Said utilities have filed with this Commission a copy of a Territorial Agreement entered into between them on September 9, 1960. The Territorial Agreement is an agreement between said companies as to the territorial service area boundary between said two companies in Dade and Broward Counties, Florida. Its approval is requested by the Commission.

Chapter 366, Florida Statutes, does not authorize the Commission to grant franchises or certificates of public convenience and necessity to electric and gas public utilities. The Commission's jurisdiction under said chapter extends to the rates, service, and the issuance and sale of certain securities of public utilities as defined therein. In the exercise of this jurisdiction, the Commission is specifically authorized to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extensions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission.

It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste. In the absence of a specific statute limiting the service areas of various public utilities, territorial agreements such as we are concerned with here, constitute no unreasonable restriction on the Commission's powers, but actually assist the Commission in the performance of its primary function of procuring for the public essential utility services at reasonable costs.

Based upon our study of the Territorial Agreement under consideration and the circumstances surrounding the execution of said agreement, it is our opinion that said agreement is in the public interest

...t should be approved by this Commission.

NOW, THEREFORE, IN CONSIDERATION THEREOF, it is

ORDERED by the Florida Railroad and Public Utilities Commission that the Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida as of September 9, 1960, be and the same is hereby approved.

By Order of Chairman Jerry W. Carter, ... Wilbur C. ... and Commissioner Edwin L. Mason, as and ... Florida Railroad and Public Utilities Commission, this ... , 1960.

(S E A L)
GPM

trial judge and will depend on further development of the law on a case by case basis.

We commend the committee for its conscientious work.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, EHRLICH and SHAW, JJ., concur.

CITIZENS OF THE STATE OF FLORIDA, Appellant, Cross-Appellee,

v.

PUBLIC SERVICE COMMISSION and Florida Power and Light Company, Appellees, Cross-Appellants.

No. 61619.

Supreme Court of Florida.

July 14, 1983.

Cross appeals were taken from an order of the Public Service Commission which granted a rate increase to an electric utility. The Supreme Court, Adkins, J., held that: (1) Public Service Commission did not err in using a year-end rate base to establish interim rates for an electric utility; (2) Public Service Commission did not err in denying utility an attrition allowance; and (3) Public Service Commission did not abuse its discretion in its exclusion of categories of property from rate base.

Affirmed.

1. Electricity ⇐11.3(2)

Public Service Commission did not err in using a year-end rate base to establish interim rates for an electric utility. West's F.S.A. § 366.071(5).

2. Statutes ⇐176

Where words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent.

3. Public Utilities ⇐130

In establishing interim rates, Public Service Commission may use a test period different from the test period used for permanent relief. West's F.S.A. § 366.071(1).

4. Electricity ⇐11.3(6)

Public Service Commission was within its discretionary authority in barring consideration of merits of an issue concerning propriety of Commission's allowance of full amount of electric utility's rate base expense to be included in test year where issue was not addressed in Commission's prehearing order or its final order. West's F.S.A. § 120.68(12).

5. Electricity ⇐11.3(1)

Public Service Commission, in granting permanent rate relief to electric utility, did not err in denying utility an attrition allowance.

6. Public Utilities ⇐194

In reviewing an order of the Public Service Commission, reviewing court's task is not to reweigh the evidence but merely determine whether competent, substantial evidence supports the Commission order; decision of Commission cannot be affirmed if it is arbitrary or unsupported by the evidence.

7. Electricity ⇐11.3(2)

Public Service Commission, in granting permanent rate relief to electric utility, did not abuse its discretion in its exclusion of categories of property from rate base.

Jack Shreve, Public Counsel, and Stephen C. Burgess and Stephen Fogel, Associate Public Counsels, Tallahassee, for Citizens of the State of Florida, appellant, cross-appellee.

William S. Bilenky, Gen. Counsel, Joseph A. McGlothlin, Legal Director, and Paul

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Sexton, Staff Counsel, Tallahassee, for Fla. Public Service Com'n.

William B. Killian, Matthew M. Childs and Patricia A. Seitz of Steel, Hector & Davis, Miami, for Fla. Power & Light Company.

ADKINS, Justice.

Public Counsel for the state of Florida asks us to review a rate increase awarded to Florida Power and Light Company (FP & L) by the Florida Public Service Commission (Commission). The only aspects of the Commission's decision which are challenged by Public Counsel are the Commission's use of a year-end rate base to establish interim rates and the allowance of the full amount of FP & L's rate case expense in the test year. On cross-appeal, FP & L asks us to review the Commission's denial of an attrition allowance and it's exclusion of categories of properties from the rate base.

In January of 1981, FP & L petitioned the Commission for a $476 million annual rate increase based upon a projected 1981 test year. Pursuant to the Commission's authority under section 366.06(3), Florida Statutes (Supp.1980), the Commission suspended the proposed rates which accompanied the petition and directed that additional proceedings be conducted concerning the merits of FP & L's request. FP & L also filed a request for interim relief under section 366.071, Florida Statutes (Supp.1980), in February of 1981 requesting a $51 million base rate increase and an attrition allowance of $160 million or a total annual amount of $211 million based upon the 1980 average rate base. Alternatively, FP & L asked for an interim increase of $220 million based upon the same projected 1981 test year upon which its permanent request was based.

After hearing oral argument on FP & L's contention that interim rates could be awarded pursuant to section 366.06(3) or section 366.071, the Commission granted FP & L approximately $148 million in interim rates on an annual basis based upon an historic year-end rate base. (Order No. 9941). Following twelve days of hearings in which evidence was taken, the Commission issued Order No. 10306 on September 23, 1981, granting FP & L an increase in annual revenues of approximately $257 million. The order specified that no refund of the interim award would be required. FP & L and Citizens filed separate petitions for reconsideration. On December 12, 1982, both petitions were disposed of and denied as to their requests on rate case expense. (Order No. 10467).

In January of 1982, Public Counsel filed this appeal to Order No. 10306 and FP & L filed a cross-appeal. A motion to dismiss the cross-appeal was denied by this Court on March 8, 1982.

[1] Public Counsel for the state of Florida seeks review of the Commission's use of a year-end rate base to establish interim rates. Rate base is the total amount which a utility has invested in capital items to provide its service to the public. The ratio of the company's net income to its rate base provides its rate of return. Since the level of investment reflected on the company's books may vary during its test year period, the rate of return is susceptible to variations attributable to the choice of an average or a year-end rate base. Public Counsel contends that the Commission's decision to employ a year-end rate base contravenes this Court's directive enunciated in *Citizens of Florida v. Hawkins*, 356 So.2d 254 (Fla. 1978) (hereinafter referred to as *Gentel*). Public Counsel argues that *Gentel* permits use of a year-end rate base only as a growth factor and only when evidence reflects extraordinary growth. He also argues that the Commission never made the necessary finding of extraordinary growth in this case.

The Commission's order notes that the *Gentel* case was based upon the authority which existed prior to the adoption of section 366.071(5) in 1980. The order further states that the statute clearly empowers the Commission to utilize an end-of-period investment base for interim purposes. Order No. 10306, page nos. 6 & 7. Section 366.071 was enacted to expand the procedures for

interim rate relief and complements the statutory "file and suspend" procedure of section 366.06(3), which we have utilized in previous cases. *See Maule Industries, Inc. v. Mayo*, 342 So.2d 63 (Fla.1977); *Citizens of Florida v. Mayo*, 333 So.2d 1 (Fla.1976).

Section 366.071(5) reads:

(5) The commission, in setting interim rates or setting revenues subject to refund, shall determine the deficiency or excess by applying:

(a) The rate of return for the public utility for the most recent 12-month period, which shall be calculated by applying appropriate adjustments consistent with those which were used in the public utility's most recent rate case and annualizing any rate changes occurring during such period but based upon an average investment rate base; or

(b) The rate of return calculated in accordance with paragraph (a) but based upon an end-of-period investment rate base.

[2] It is apparent on its face that the statute grants the Commission absolute discretion to base an interim rate award on either an average or a year-end investment rate base. Public Counsel does not contend that the Commission lacks this discretionary authority, but suggests that generic principles of statutory construction and common law doctrines governing permanent rate proceedings mandate denial of the use of a year-end rate base in this case. We do not agree. Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent. *Heredia v. Allstate Insurance Co.*, 358 So.2d 1353 (Fla.1978). Therefore, we do not feel that this statute, which is clear on its face, presents an occasion to permit interpretative principles governing different types of proceedings.

We also cannot agree with Public Counsel's contention that the *Gentel* case is applicable to these proceedings. *Gentel* involved two issues, the first of which Citizens contend is applicable to this controversy. The first issue was the consistent application of year-end rate base in granting a permanent rate increase. This Court reversed the Commission's order and held that year-end rate base should only be used when the utility is experiencing extraordinary growth. *Gentel* is not applicable to interim rate proceedings which are at issue here.

In granting permanent rate relief, the procedural and statutory safeguards found in the interim section, section 366.071, are not applicable. Once permanent rate relief is granted, those rates are changed without the revenues derived from those rates being subject to further hearing or refund. The contrary is true for interim relief. Any revenues derived from an interim award are collected subject to refund and the Commission may authorize the payment of interest on the interim revenue ordered refunded. § 366.071(2).

In addition, interim rates are granted upon an expedited basis with the possibility of additional hearings to follow. At the subsequent hearing elements of the award of interim relief may be addressed and further adjustments may be made at the conclusion of the hearing. § 366.071(4). Such is clearly not the case for permanent relief. Once a permanent rate award becomes final, those rates are collected free of the encumbrance of possible refund. Permanent rates may be subsequently challenged, but such challenge affects revenues prospectively collected and has no effect on revenues previously collected.

Interim awards attempt to make a utility whole during the pendency of a proceeding without the interjection of any opinion testimony. The statute removes most of the Commission's discretion in such areas as cost-of-equity capital. Interim relief is prescribed by a formula that locks the authorized rate of return to the previously authorized rate of return and mandates that any adjustment be made consistent with those authorized in the last rate case. §§ 366.071(2)(a) and 366.071(5)(a). The statute requires a grant of interim relief, if one is to be made, within sixty days of the filing for such relief. This limits the number of issues which may be initially considered in

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granting interim relief. § 366.071(2). The Commission is, however, given twelve months to deliberate and grant a permanent award. § 366.06(3). After eight months, if the Commission has not concluded its work, the utility is required to put requested rates into effect under bond.

[3] It is clear from a reading of the entire statute that the granting of interim relief should be done so that earnings are increased to the minimum of the previously authorized range. To accomplish this level of earnings the statute authorizes several accounting alternatives. The Commission may use a test period different from the test period used for permanent relief. § 366.071(1). Section 366.071(5) authorizes the use of either average or end-of-period investment rate base for the granting of relief. Accordingly, we affirm the Commission's order on the issue of year-end rate base to establish interim rates.

[4] The next issue that Public Counsel raises is whether the Commission erred in allowing the full amount of FP & L's rate case expense to be included in the test year. This issue was not raised by Citizens until they petitioned for reconsideration of the Commission's final order. Thus, the issue of rate case expense was not addressed in the Commission's prehearing order or its final order.

The Commission unquestionably has the discretionary authority under the Administrative Procedure Act, chapter 120, Florida Statutes (1981), to determine issues which will be litigated in a rate proceeding, both to put parties on notice and to ensure an adequate mustering of evidence. The Commission's prehearing conference was held to provide counsel an opportunity to raise issues of concern and its prehearing order then formalized the decisions there agreed upon. Public Counsel did not take the opportunity to identify his issues either prior to or at the prehearing conference and he did not show good cause for raising this new issue after hearing.

The Commission was well within its discretionary authority in barring consideration of the rate case expense issue on the merits. Under section 120.68(12), the Court may not now substitute its judgment for the Commission's own action taken within the statutory range of discretion. *See Florida Real Estate Commission v. Webb*, 367 So.2d 201, 202 (Fla.1978).

[5] The first issue that FP & L brings to this Court for review on its cross-appeal is whether the Commission erred in denying FP & L an attrition allowance. Attrition is a term used to describe the phenomenon present when factors, other than extraordinary growth, are forcing costs upward without a concomitant increment in revenues. To combat attrition, regulatory bodies developed the concept of a separate attrition allowance.

As part of its requested revenue increase, FP & L sought an attrition allowance of approximately $69 million, which was later adjusted to $62.6 million. FP & L contends that the Commission's denial of any attrition allowance is erroneous as a matter of law. The basis of their argument is that the Commission's decision is improper in light of the fact that the Commission was provided with evidence supporting justification of the need for the allowance and data upon which it could have applied a methodology previously used by the Commission.

[6] We have spoken time and time again of the task for this Court on judicial review of Commission orders. Our task is not to reweigh the evidence. *Florida Retail Federation, Inc. v. Mayo*, 331 So.2d 308, 311 (Fla.1976); *General Telephone Co. v. Carter*, 115 So.2d 554, 557 (Fla.1959). We must merely determine whether competent, substantial evidence supports a Commission order. We cannot affirm a decision of the Commission if it is arbitrary or unsupported by the evidence. *Citizens of Florida v. Public Service Commission*, 425 So.2d 534 (Fla. 1982); *Shevin v. Yarborough*, 274 So.2d 505 (Fla.1973).

The record reveals that the Commission was presented with competing testimony on the proper treatment for attrition. Public Counsel's witness, James Dittmer, present-

ed evidence refuting FP & L's need for a specific attrition allowance. In summarizing his objections to any attrition allowance, Mr. Dittmer stated the following:

> I do not feel an attrition adjustment is warranted in this case. Based on historical data, the company has experienced little erosion of earnings or attrition. The biggest cause of what attrition was incurred was caused—by the company's own admission—by the lag in fuel recovery under the old fuel adjustment clause. This deficiency has supposedly been corrected with implementation of the new fuel adjustment clause.
>
> Secondly, the often cited "regulatory lag" which causes attrition to occur has further been alleviated by using a budgeted test year which actually overlaps the collection period.
>
> And finally, the Company has attempted to quantify future attrition by use of a 1982 forecast. Obviously, this measurement tool is only as good as the forecast itself, such forecast having been prepared approximately one and a half years in advance, and not even having been approved by the Budget Committee. But even assuming all the components utilized were reasonably accurate, the attrition adjustment developed by the Company would still be significantly less when all the components and factors are accurately included. In summary, I feel the attrition experienced in the past, as well as projected for the future, has been overstated by FP & L. Accordingly, I feel the attrition adjustment in this case should be rejected.

The Commission relied on the testimony of Mr. Dittmer. The order stated:

> We agree with those parties who expressed reservations or objections to the proposed attrition factor. We note, first of all, that the use of a projected test year reduces the need and justification for an attrition allowance. More importantly in this case, however, is the fact that the Company's methodology has failed in our opinion to provide credible evidence of what attrition should be anticipated in the 1982 timeframe. The Company has projected attrition in certain areas unlike that which it has ever experienced, and has failed to carry its burden of proving that such projections are justified. Because we find that the Company has failed to provide us with the tools with which to deal with the subject, we deny the use of an attrition allowance in this case.

The Commission obviously weighed the evidence presented on this issue. We find their decision supported by competent substantial evidence.

FP & L also asserts that the Commission's denial of any attrition allowance is contrary to this Court's directive in *Citizens of Florida v. Hawkins (Gentel)*. This Court's ruling in *Gentel* is not dispositive of the issue here. In *Gentel*, the Court was ruling on the propriety of using a year-end rate base to combat the effects of attrition. The Court stated it would require independent determinations of growth and of attrition in future cases to insure a more workable basis on which to review rate awards. 356 So.2d at 258. The Court then held that a separate attrition allowance was the appropriate tool by which to account for all adjustments for attrition rather than using a year-end rate base. *Id.*

We find neither of FP & L's arguments on this issue to be persuasive. We affirm the Commission's denial of an attrition allowance in this case.

[7] FP & L also challenges the Commission's exclusion of three categories of properties from FP & L's rate base. FP & L sought to include approximately $147.7 million which had been invested in these properties and the Commission adjusted out of rate base approximately $72.7 million of investment in Martin County dam repairs, approximately $67.8 million of investment in Turkey Point steam generator repairs, and approximately $12 million of investment in the expansion of Turkey Point's spent fuel storage facility. FP & L contends that the Commission's sole ground for adjusting these investments out of rate base was due to the fact that each property

was the subject of pending litigation. The company argues that this action has deprived FP & L of the opportunity to earn a fair rate of return on its investment.

The Commission, instead of including these items in rate base, authorized FP & L to compute the amount of interest associated with carrying the costs of these items until future ratemaking procedures. This "carrying cost," or AFUDC (Allowance for Funds Used During Construction), was to be capitalized and then added to the cost ultimately to be included in the plant capital accounts. If the Commission subsequently determined that the costs should be included in rate base without adjustment, FP & L would be authorized a return on the capitalized interest in addition to costs previously insured. The Commission submits that the course it followed balanced the interests of FP & L and its ratepayers and was also a course within its discretion to adopt. We agree. The arguments of FP & L fail to demonstrate an abuse of that discretion.

Thus, for the reasons stated, Order No. 10306 of the Public Service Commission is affirmed as to all issues raised by both the Public Counsel and FP & L on this appeal.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

STATE of Florida, Petitioner,

v.

William GETZ, Respondent.

No. 62581.

Supreme Court of Florida.

July 14, 1983.

Defendant was sentenced in the Circuit Court, Suwannee County, Royce Agner, J., for burglary of a structure, burglary of a dwelling, grand theft and two counts of petit theft. On appeal by the defendant, the District Court of Appeal, Joanos, J., 428 So.2d 254, vacated sentence for one petit theft, otherwise affirmed, and certified question. The Supreme Court, Overton, J., held that: (1) grand theft of firearm and petit theft of calculator and coins from same property at same time constituted separate offenses under theft statute for which defendant could be separately convicted and sentenced, and (2) multiple sentences arising out of single criminal episode did not violate double jeopardy clause.

Question answered; decision quashed with directions.

1. Criminal Law ⇐29, 984(3)

Defendant can be given separate judgments and sentences for theft of firearm and theft of other property worth less than $100 arising out of single burglary where theft statute requires proof of different elements for each conviction under various subsections of the statute. West's F.S.A. §§ 812.014, 812.014(1, 2), (2)(b)3, (2)(c).

2. Criminal Law ⇐29, 984(3)

Grand theft of a firearm and petit theft of a calculator and coins from the same property at the same time constituted separate offenses under theft statute for which defendant could be separately convicted and sentenced. West's F.S.A. §§ 812.014, 812.014(1, 2), (2)(b)3, (2)(c).

3. Larceny ⇐6, 23

If a firearm is stolen, its value is not an element of offence and it is grand theft even if firearm is worth less than $100. West's F.S.A. §§ 812.014, 812.014(2)(b)3.

4. Criminal Law ⇐29, 984(1)

Fact that offenses for which defendant was convicted and sentenced were defined in same statute was irrelevant to determination of whether defendant could be separately convicted and sentenced of both of-

no complaint. This strongly indicates that all the terms were acceptable to him.

It is difficult to see how he could have agreed only to the payment of alimony so long as he lived, for two reasons: The alimony was described as "permanent" and the only terminal limitations were the respondent's death, not his, and the respondent's remarriage. If he had had any misgiving about the effect upon his estate, he could have dissipated it when the decree was executed and if he wished to avert such inroads on his estate, he could have complained as 25 years passed and he, month by month for 300 of them, paid the alimony allotment freely, if not cheerfully.

It seems to this writer that to hold otherwise than to affirm the decision of the two courts would be to shun the very reasons for alimony in the first place. When a man takes unto himself a wife he assumes an obligation to support her. Not only is he pledged to furnish food and shelter for her sake but there is a corresponding duty so to care for her that she will not become a charge upon the community. No one questions the propriety or legality of the allotment of alimony as such. The former husband paid the installments faithfully. It can be assumed that the need of the former wife for support was as great after the husband died as before, and it can be further assumed that the want did not diminish during the ravages of a quarter century.

It is the conviction of this writer that the circumstances of this case lift it out of the operation of what might appear as an inexorable rule that alimony payments expire with the death of the former husband in the absence of an express agreement that they be continued by his estate.

I would affirm the judgment of the District Court of Appeal approving the decision of the chancellor.

ROBERTS, and ERVIN, JJ., concurred with THOMAS, J.

CITY GAS COMPANY, a Florida Corporation, Petitioner,

v.

PEOPLES GAS SYSTEM, INC., a Florida Corporation, Respondent.

No. 33815.

Supreme Court of Florida.

July 14, 1965.

Rehearing Denied Dec. 15, 1965.

Action involving determination of validity of exclusive service agreement defining areas in which two gas companies could sell natural gas. The Circuit Court, Dade County, Marshall C. Wisehart, J., entered decree adverse to defendant. The District Court of Appeal, Third District, reversed, 167 So.2d 577. The Supreme Court, O'Connell, J., granted certiorari and held that public utility commission has adequate implied authority under statute to validate exclusive service area agreements between regulated utilities.

Decision of District Court of Appeals affirmed.

Ervin, J., dissented.

1. Monopolies ⇐12(1.10)

Antimonopoly statutes are not intended for literal application, but rather are intended only to prevent undue or unreasonable restrictions upon free competition. F.S.A. § 542.01 et seq.

2. Monopolies ⇐10

Antimonopoly statutes are not directed against monopoly per se, but rather against evils that led to their enactment. F.S.A. § 542.01 et seq.

3. Monopolies ⇐12(1.10)

Agreement which has effect of leaving unreasonable degree of control over price, production or quality of product or service in hands of parties thereto is within scope

of state antimonopoly statute. F.S.A. § 542.01 et seq.

4. Monopolies ⇐12(16)

Agreement between gas companies which created exclusive service territories was not invalid under state antimonopoly statute. F.S.A. § 542.01 et seq.

5. Public Service Commissions ⇐6.8

Public utilities commission's statutory powers over areas of service, expressed and implied, are sufficiently broad to preclude validity of exclusive service area agreements between regulated utilities which have not been approved by commission. F.S.A. § 366.01 et seq.

6. Public Service Commissions ⇐6.8

Public utility commission has adequate implied authority under statute to validate exclusive service area agreements between regulated utilities. F.S.A. § 366.01 et seq.

7. Public Service Commissions ⇐6

Public utility commission's powers include both those expressly given and those given by clear and necessary implication from the provisions of statute, and neither category is possessed of greater dignity or effect than other. F.S.A. § 366.01 et seq.

8. Appeal and Error ⇐747(4)

Chancellor's refusal to rule upon asserted invalidity of exclusive service area agreement under federal law was not includable as cross assignment of error within rule limiting assignments and cross assignments to judicial acts. 31 F.S.A. Florida Appellate Rules, rule 3.5.

Ward & Ward, W. G. Ward, and Dubbin, Schiff, Berkman & Dubbin, Miami, for petitioner.

McClain, Thompson & Turbiville, J. A. McClain, Jr., Tampa, Scott, McCarthy, Preston & Steel and George W. Wright, Jr., Miami, for respondents.

Edgar H. Dunn, Jr., St. Petersburg, and Erskine W. Landis, DeLand, amici curiae.

O'CONNELL, Justice.

This cause is before this Court on petition for writ of certiorari pursuant to the certification by the District Court of Appeal, Third District, that its decision reported as Peoples Gas System, Inc. v. City Gas Company, Fla.App.1964, 167 So.2d 577, "passes upon a question * * * of great public interest." Article V, Sec. 4(2), Florida Constitution, F.S.A.

In September, 1960, petitioner and respondent, both distributors of natural gas in Dade and Broward Counties, entered into a territorial service agreement. The agreement delineated service areas for each of the parties and provided that neither would extend its operations to the territory of the other. It was provided that each party would purchase the equipment of the other located within its assigned territory and that enforcement of the agreement would be by specific performance. The obvious purpose was to eliminate competition between, and duplication of facilities and service by, the parties within the area covered.

In accordance with the terms of agreement, it was jointly submitted by the parties to the Florida Public Utilities Commission. That agency gave its formal approval, observing that such agreements were in the public interest and should be encouraged. Although acknowledging that it is not authorized to grant franchises or certificates of convenience and necessity to electric and gas companies, the commission asserted that such territorial service agreements would not be valid without its approval because they necessarily limited the commission's statutory authority to require additions and extensions to plant and equipment. Although the validity of such agreements has never been judicially determined, it appears that the commission has previously approved similar ones.

On May 7, 1962, Peoples Gas Company filed a complaint in circuit court alleging

that City Gas Company had violated the agreement by taking certain steps, including interim distribution of liquefied gas, toward the establishment of a gas distribution system in an area reserved by the agreement to Peoples. The complaint sought a decree for specific performance, an injunction against continued violation of the agreement, and other appropriate relief.

City Gas filed an answer which in substance (1) denied that the disputed area was covered by the agreement; (2) asserted that Peoples was estopped from bringing such a complaint by reason of its failure to take earlier action, although having adequate notice of the activity complained of; and (3) asserted that in any event the agreement was void and unenforceable under F.S. Chapter 542, F.S.A. and Title 15, U.S.C.A., the latter being the Sherman Antitrust Act. City Gas also filed a counterclaim to enjoin Peoples from interfering further with its efforts to extend its service to the area involved.

On May 23, 1962, the chancellor issued a final decree dismissing the complaint on the ground that the agreement did not cover the disputed area. The City Gas counterclaim was dismissed without prejudice. The decree did not deal with the other issues raised in the answer.

On appeal, the District Court of Appeal, Third District, reversed and remanded, holding that the disputed area did fall within the area reserved to Peoples by the agreement. See Peoples Gas System, Inc. v. City Gas Company, Fla.App.1962, 147 So.2d 334.

After further proceedings, the chancellor issued the final decree here involved, holding that in the absence of a specific, as opposed to merely implied, statutory provision therefor, the Florida Public Utilities Commission lacked authority to approve such agreements and that they were therefore invalid under the Florida antimonopoly statute, F.S. Ch. 542, F.S.A. City Gas' counterclaim, which had been reinstated, was again dismissed without prejudice. The chancellor observed that this disposition of the case made it unnecessary to decide questions concerning estoppel and the possible invalidity of the agreement under federal law.

On appeal, Peoples Gas listed seventeen assignments of error, the combined import of which was that it was error for the chancellor to hold that in the absence of express statutory provision, the commission lacked authority to immunize, by its approval, the agreement against invalidity under F.S. Ch. 542, F.S.A. City Gas filed a cross-assignment of error charging that the chancellor had erred in refusing to hold specifically that the agreement was also void as being in violation of Title 15, U.S. C.A. and as burdening interstate commerce, although these issues had been clearly framed by the pleadings and the testimony.

In its opinion reported at 167 So.2d 577, the District Court of Appeal, Third District, stated the crucial question to be: "Can the Public Utilities Commission exercise any power not expressly granted?" The court reversed the decree, holding that on the basis of (1) the broad scope of the powers granted to the commission by F.S. Ch. 366, F.S.A., (2) the extent of the public interest in the effective regulation of public utilities, and (3) the express statutory direction that the powers of the commission be liberally construed, the commission did have implied authority to approve such agreements, thereby immunizing them against invalidity under Ch. 542. The district court refused to consider defendant's attempted cross-assignment of error, on the ground that Rule 3.5, Florida Appellate Rules, 31 F.S.A., limits assignments and cross-assignments to judicial acts, as opposed to mere grounds given by the court below for its judicial acts.

The district court and both parties are in agreement that the principal question to be answered is whether the commission possesses authority under the statutes to approve such service area agreements. The petitioner, City Gas, takes the position that

the agreement is void under both state and federal antitrust legislation, whether or not approved by the commission. The respondent, Peoples Gas, agrees that the agreement would have been invalid in the absence of commission approval, but argues that this would have resulted from Ch. 366, which authorizes the regulation of distributors of gas and electricity, rather than from the antitrust acts.

We prefer to formulate the questions that need answering as follows: (1) whether the agreement would have been invalid under Ch. 542 in the absence of commission approval; (2) whether the agreement would have been invalid under Ch. 366 in the absence of commission approval; (3) assuming an affirmative answer to either of these questions, whether commission approval would have the effect of immunizing the agreement against such invalidity; and (4) whether the District Court of Appeal, Third District, was correct in its interpretation of Rule 3.5, F.A.R.

On its face the agreement seems to be in violation of Ch. 542. That chapter forbids combinations which have the purpose of imposing "restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state" or of preventing "competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities * * *." There is no doubt that in restricting the activities of each of the parties in the areas allocated to the other, the agreement seems to do what is prohibited.

[1–3] But it is a commonplace that anti-monopoly statutes are not intended for literal application, but, rather, are intended only to prevent undue, or unreasonable, restrictions upon free competition. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1910); Lee v. Clearwater Growers' Ass'n, 93 Fla. 214, 111 So. 722 (1927); McQuaig v. Seaboard Oil Co. et al., 96 Fla. 275, 118 So. 424 (1928); Montana-Dakota Utilities Co. v. Williams Elec. Coop., 263 F.2d 431 (C.A. 8th 1959). Thus, such statutes are not directed against monopoly per se, but rather against the evils that led to their enactment. As Chief Justice White analyzed the history of such legislation in Standard Oil Co. of New Jersey v. United States, supra, 221 U.S. at p. 52, 31 S. Ct. at p. 512, these were: "(1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." If, in short, the agreement under consideration has the effect of leaving an unreasonable degree of control over price, production, or quality of product or service in the hands of the parties thereto, it would evidence the kind of monopolistic advantage that Ch. 542 and other statutes of the kind were intended to prevent. If it does not leave such control in the hands of the parties we perceive no conflict between the agreement and the anti-monopoly statute.

That this is the construction to be placed on this state's anti-monopoly legislation seems to be indicated by an earlier decision of this Court. In Lee v. Clearwater Growers' Ass'n., 93 Fla. 214, 111 So. 722, 723–724 (1927), in which the issue was the validity of a co-operative marketing agreement under the federal legislation, the Court said:

> "In construing statutes and contracts against monopolies or in restraint of trade both state and federal courts in this country have applied the rule of reason rather than the literal import of the statute, and have said in substance that it must amount to an undue or unreasonable restraint of trade. It must, in other words, be such a restraint as to be detrimental to public welfare and obnoxious to public policy. * * * There is no attempt here to

limit production or control or to fix the price in the market of the commodities embraced in the contract, and so far as we have been able to find no contract has been declared void that does not do this."

[4] If, then, the purpose of Ch. 542 be taken as prohibiting only unreasonable restraints on trade and competition, and if "unreasonable restraints" be understood as including only those combinations which permit the control of price, production, or quality of service or product, it would appear that this agreement would be valid so far as Ch. 542 is concerned. This is so because the public welfare does not need Ch. 542 for protection against this kind of agreement. And it does not need it because the public interest is adequately protected by an alternative arrangement under F.S. Ch. 366, F.S.A.

It has long been recognized that although competition is usually a trustworthy protector of the public interest in reasonable prices and quality of goods and services, it is not necessarily the most efficient protective device in all circumstances. In short, in some circumstances, reliance has been placed rather upon the principle of regulated monopoly. The Montana Public Service Commission has expressed this view in strong terms. Public Service Commission of Montana v. Blue Flame Gas Company, 1926D P.U.R. 314, 319:

"* * * [I]t has been conclusively demonstrated in almost every small community where the experiment has been tried, that the grant of franchises to competing public utilities is wrong in principle and invariably results in unsatisfactory service. Competition has long ceased to be potent as a regulatory factor in public utility operations. Where it was relied upon, it proved to be bad in the long run for consumers of utility service, as it too often meant duplication of facilities in a field not large enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment, by means of high rates, of losses due to competition. It has taken a long time for the public to understand that competition as a regulator of charges in the public utility industry is a failure, and even now, the fact is not appreciated by casual observers."

Judge Prettyman, recently writing for the United States Court of Appeals for the District of Columbia in the case of People of State of Calif. v. Federal Power Commission, 111 U.S.App.D.C. 226, 296 F.2d 348, 353–354 (1961), had occasion to discuss the relationship between these two devices for the protection of the public interest:

"We are here dealing with the interweaving of free competition, regulated monopoly, and the public interest. Free competition is a basic postulate of our free enterprise system, but it is not always—in all conditions—in the public interest; sometimes regulated monopoly, or a measure of controlled monopoly, is in the public interest. The policy of the antitrust laws is to foster free competition. The policy of regulatory measures such as the Natural Gas Act is public regulation of controlled monopoly, or partial monopoly. Thus, in the fields of merchandising and manufacturing, the law prohibits interference with competitors or competition and requires full and free play to rivalries in the marketplace. The resultant constrictions upon prices and practices are deemed to be in the public interest. But, in the field of public utilities, monopoly, or partial monopoly, under public regulation is deemed to be in the public interest. Public utilities are treated as public services. The principal requirement is service, and service is not a necessary result of a competition bent on mutual destruction. * * * The antitrust laws and the regulatory laws are not in conflict; they are complementary. Both have as their objective the public interest.

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They deal with different subject matters. They have been entrusted by the Congress to different enforcement agencies. When the Power Commission considers the policies and provisions of the antitrust laws in respect to the transactions of utilities under its jurisdiction, it is not required to—and indeed should not—begin with a general premise that competition is always and under all circumstances in the public interest. Its premise should be that the antitrust laws in certain areas of our economy and the regulatory laws in other areas are supplementary enactments and each must be given full effect in its area, recognizing always its concomitant body of law in the other area."

We will not go so far as to hold that the regulation of a specified industry as a public utility automatically withdraws that industry from the operation of the antitrust statutes. It is enough to say that the agreement under discussion will not be held to be violative of those statutes unless, all things considered, it threatens the results which they were designed to prevent. In determining whether the agreement threatens to result in monopolistic control over prices, production, or quality of service, it is appropriate to consider the kind and extent of control to which both of these parties are subject under F.S. Ch. 366, F.S.A.

No exhaustive analysis of Ch. 366 is necessary to enable one to conclude that it effectively forecloses the subject agreement having the effect forbidden by Ch. 542. Section 366.03 requires each public utility (i.e., in general, any supplier of gas or electricity to the public) to furnish to all persons applying therefor "reasonably sufficient, adequate and efficient service upon terms as required by the commission." Section 366.04 vests in the commission "jurisdiction to regulate and supervise each public utility with respect to its rates, service and the issuance and sale [of certain] of its securities * * *." In prescribing the powers of the commission under this chapter, section 366.05 authorizes the commission, *inter alia,*

"to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; * * * to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; * * * to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter; and to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements."

Section 366.06(2) relates to the setting of rates. It provides:

"(2) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just and reasonable rates that may be requested, demanded, charged or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall

be used for rate-making purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation * * *."

Finally, section 366.07 authorizes the commission, upon a finding that rates or charges or rules, practices, and so forth relating to them are "unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in any wise in violation of law," to "determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future."

These provisions 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.

We are aware that it has been reported that a majority of jurisdictions considering this question have held similar agreements violative of antitrust statutes. 70 A.L.R. 2d 1326; Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co., 184 F.2d 552 (4th Cir. 1950), cert. denied, 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655 (1950); Montana-Dakota Utilities Co. v. William Elec. Coop., Inc., 263 F.2d 431, 70 A.L.R.2d 1318 (8th Cir. 1959). However, we are of the opinion that the cases so holding have emphasized unduly the universal desirability of competition and have not shown sufficient awareness of the implications of the modern development of the regulated monopoly. We believe the more enlightened view to be that set out above.

Some evidence that the point of view accepted herein is not unreasonable can be seen in the fact that the Ohio antitrust statute, Baldwin's Ohio Revised Code and Service, Sec. 4905.48, the operative language of which is otherwise substantially the same as that of the Florida statute, expressly permits two or more utilities, with the consent of the commission, to enter into an agreement "that will enable them to operate their lines or plants in connection with each other." Nor do we believe that this evidence is greatly weakened by the circumstance that the Ohio court has held that without the statutory provision, the Ohio commission would be without authority to approve such an agreement as is involved here. Ohio-Midland Light & Power Co. v. Columbus & Southern Ohio Elec. Co., Ohio Com.Pl., 123 N.E.2d 675 (1954). The significant fact remains that the Ohio experience shows that such agreements are not necessarily incompatible with the scheme of regulation in effect there and in Florida.

In view of our holding that the Service Area Agreement is not invalid under F.S. Ch. 542, F.S.A., it is unnecessary to determine whether commission approval would operate to immunize the agreement from invalidity under the chapter.

Next we inquire whether the Service Area Agreement is valid under the other applicable statute, Ch. 366, and if not, whether it would be immunized from such invalidity by commission approval. Since it is apparent that any invalidity under Ch. 366 would result from the possibility—even the likelihood—that the agreement would interfere, directly or indirectly, with the legitimate exercise of the commission's statutory powers, both questions can be considered simultaneously.

We assume that if the powers of the commission under this chapter included the authority to issue certificates of convenience and necessity, there would be little or no doubt that such an agreement would be considered violative of the statute as in

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derogation of the commission's statutory authority over service areas. Indeed, the brief of City Gas contains more than a hint that in such circumstance it would agree that the commission had implied authority to immunize such agreements by its approval. In any event, it seems clear that, without commission approval, such an agreement would be incompatible with the possession of the degree of areal control that such a provision would vest in the commission. This being so, it seems logical next to inquire whether the commission's present statutory powers fall sufficiently short of those hypothesized to warrant a different holding as to the effect of the statute upon an unapproved agreement and as to the effect of the commission's approval.

We are inclined to the view that the differences between the two patterns of regulation are more apparent than real, more of degree than of kind. 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. Certainly, the statute is quite explicit in granting the commission authority to order extensions of service, additions to equipment, and the like. It may be true that the commission lacks authority, under Ch. 366, to order a public utility out of an area being served. However, there would be obvious limitations on its authority to do so even if it possessed authority to issue certificates of convenience and necessity. Moreover, we assume for the present purposes, without so deciding, that the statutory powers now possessed could be exercised in various subtle ways that would assure the same result—for example, under the authority to determine, for rate making purposes, whether certain investments for equipment were prudently made.

[5] In short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission. This, of course, is the position taken by the commission itself, in its order approving this very agreement. Said the commission,

> "In the exercise of [its] jurisdiction the Commission is specifically authorized to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extensions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission."

[6, 7] By substantially the same reasoning, we also conclude that the commission has adequate implied authority under Ch. 366 to validate such agreements as the one before us. 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. Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812, 817 (1961). Moreover, as did the district court of appeal, we reject the notion of any such distinction between express and implied statutory authority as posited by the chancellor. The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute. State ex rel.

Wells v. Western Union Tel. Co., 1928, 96 Fla. 392, 118 So. 478. Neither category is possessed of greater dignity or effect.

[8] The remaining question relates to the district court's application of Rule 3.5 F.A.R. We agree with the interpretation that the rule forbids appellant's including as a cross-assignment of error the chancellor's refusal to rule upon the asserted invalidity of the service area agreement under federal law. At most, this would have been but another ground for the decree entered.

Since this ground of decision has not been adjudicated, it remains available as the basis for further proceedings if petitioner desires to bring them.

For the foregoing reasons the decision of the District Court of Appeal, Third District, is affirmed.

THORNAL, C. J., and THOMAS and CALDWELL, JJ., concur.

ERVIN, J., dissents with opinion.

ERVIN, Justice (dissenting).

I respectfully dissent. Among the several powers prescribed in F.S. Chapter 366, F.S.A., for the Florida Public Service Commission to exercise in regulating gas companies, I do not find that the Commission is given the power to fix by certificate of necessity, franchise or other directive the territory or area in which any of such companies may furnish service to consumers. Since this power is not expressly given, I do not believe it should be implied. Cf., Radio Telephone Communications, Inc., v. Southeastern Tel. Co., Fla., 170 So.2d 577; Coast Cities Coaches, Inc., v. Dade County, Fla., 178 So.2d 703, opinion filed July 7, 1965.

In our free enterprise system governmental officials and agencies should not undertake to regulate competing businesses unless the statutes in the clearest and most unmistakable language provide the regulation is necessary to the public interest. This is particularly true where the regulation interferes with the territorial extent to which businesses may extend their competitive services.

dispute is between two parents, where both are fit and have equal rights to custody, the test involves only the determination of the best interests of the child. When the custody dispute is between a natural parent and a third party, however, the test must include consideration of the right of a natural parent "to enjoy the custody, fellowship and companionship of his offspring .... This is a rule older than the common law itself." *State ex rel. Sparks v. Reeves*, 97 So.2d 18, 20 (Fla.1957). In *Reeves* we held that in such a circumstnace, custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child. We explained what would constitute detriment to the child and approved a temporary grant of custody to the grandparents because of the father's temporary inability to care for the children after the mother's death. We cautioned, however, that the father would be entitled to custody once his ability to care for the children was established. *Id.* at 20–21.

[3, 4] In the instant case, the district court remanded with directions that the trial court award custody to the natural father and correctly stated that there is

> strong public policy which exists in this state in favor of the natural family unit ... [and] a natural parent of a child born out of wedlock should be denied custody only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child.

429 So.2d at 703–04 (footnote and citation omitted). We agree with this statement of the law and find the opinion of the district court is fully consistent with prior decisions of this Court. To hold otherwise would permit improper governmental interference with the rights of natural parents who are found fit to have custody of and raise their children.

The district court in the instant case recognized apparent conflict with *Singleton* on the issue of a natural parent's right to custody of a child. *Singleton* is disapproved to the extent that it did not address the appropriate test to determine the custody rights of a natural parent as opposed to the rights of a third party. We do not disapprove the result in *Singleton* because the facts of that case are distinguishable. We observe that the children in *Singleton* had resided almost exclusively in the grandparent's home for six years prior to the natural mother's death. In addition, it appears that the natural father in *Singleton* had virtually no involvement with the children during that time. We recognize that the First District Court of Appeal, in *Pape v. Pape*, 444 So.2d 1058 (Fla. 1st DCA 1984), recently receded, in part, from its decision in *Singleton*.

Accordingly, we fully approve the district court opinion in the instant cause.

It is so ordered.

BOYD, C.J., and ADKINS, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

POLK COUNTY, Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, et al., Appellees.

LEON COUNTY, Appellant.

v.

FLORIDA PUBLIC SERVICE COMMISSION, et al., Appellees.

Nos. 63875, 63892.

Supreme Court of Florida.

Dec. 6, 1984.

Counties challenged rule of Public Service Commission which allowed municipal

POLK

electric utility to im
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tax imposed on cust
limits. The Supren
held that: (1) Com
and jurisdiction to
did not authorize n
tax on nonresidents
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States Constitution
clause; and (3) fi
were supported by
evidence.

Affirmed.

1. Public Utilities
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2. Electricity ⇐11
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3. Electricity ⇐1
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4. Constitutional
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electric utility to impose surcharge on residents outside municipality equal to service tax imposed on customers within corporate limits. The Supreme Court, Overton, J., held that: (1) Commission had authority and jurisdiction to adopt the rule; (2) rule did not authorize municipality to impose a tax on nonresidents in violation of due process or equal protection clauses of United States Constitution or state due process clause; and (3) findings of Commission were supported by competent, substantial evidence.

Affirmed.

1. Public Utilities ⇐120

Public Service Commission has no authority to regulate specific dollar amounts charged for a specific service.

2. Electricity ⇐11.3(1)

Public Service Commission had jurisdiction and authority to issue rule allowing municipal electric utilities to impose a surcharge on customers outside their corporate limits equal to service tax imposed on customers within limits because rule operated to regulate "rate structure," as opposed to rates.

3. Electricity ⇐11.3(1)

Public Service Commission has jurisdiction and authority to regulate the "rate structure" of municipal electric utilities, as opposed to their "rates"; "rates" refers to the dollar amount charged for a particular service or established amount of consumption while "rate structure" refers to the classification system used in justifying different rates.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐242, 298(7)

Rule of Public Service Commission authorizing municipal electric utility to impose surcharge on customers outside municipality equal to service tax imposed on customers within corporate limits did not violate due process or equal protection clauses of United States Constitution or due process clause of State Constitution because surcharge resulted in equality of rates charged all customers and persons challenging imposition of the charge were entitled a public hearing, regardless of the amount of the surcharge. U.S.C.A. Const. Amend. 14, West's F.S.A. Const. Art. 1, § 9.

5. Electricity ⇐11.3(7)

The Supreme Court, in its review of Public Service Commission rule on surcharge imposed by municipal electric utility would not reweigh or reevaluate evidence presented to Commission, but examined the record to determine whether findings supporting rule were supported by competent, substantial evidence.

Irvin S. Cowie, Monte J. Tillis, Jr., Mark F. Carpanini and Dawn Grant Kahre, Bartow, for Polk County.

F.E. Steinmeyer, III, County Atty., and O. Earl Black, Jr., Asst. County Atty., Tallahassee, for Leon County.

William S. Bilenky, Gen. Counsel and Paul Sexton, Associate Gen. Counsel, Tallahassee, for Florida Public Service Commission.

Roy C. Young and Claire A. Duchemin of Young, van Assenderp, Varnadoe & Benton, Tallahassee, for Orlando Utilities Commission and City of Lakeland.

Frederick M. Bryant of Moore, Williams & Bryant, Tallahassee, and Davisson F. Dunlap, Jr. of Pennington, Wilkinson & Dunlap, Tallahassee, for City of Tallahassee.

Ann Carlin, Office of the City Atty., Gainesville, amicus curiae for City of Gainesville and joins in brief of appellees.

Frederick M. Bryant and Davisson F. Dunlap, Jr. of Pennington, Wilkinson & Dunlap, Tallahassee, amicus curiae for City of Moore Haven, City of Wauchula, Lake Worth Utilities Authority, City of Blountstown, City of Alachua and City of Bushnell and joins in brief of appellees.

OVERTON, Justice.

These consolidated cases are before us on petitions for review of action of the Florida Public Service Commission. We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.

The question presented concerns the validity of Florida Administrative Code Rule 25–9.525.* The rule, adopted by the Public Service Commission after giving proper notice and conducting public hearings, permits a municipal electric utility to impose a surcharge on customers outside of its corporate limits equal to the service tax imposed on customers within its corporate limits. Appellants challenge the rule on three grounds and allege that: (1) the rule is beyond the jurisdiction and authority of the Public Service Commission; (2) the rule improperly authorizes a municipality to impose a tax on persons beyond its corporate limits; and (3) the action of the commission in adopting the rule is not supported by competent, substantial evidence. For the reasons expressed below, we reject each of these contentions and find that the commission acted properly and within its prescribed authority in adopting the rule.

[1–3] The appellants, Polk and Leon Counties, first contend that the rule is beyond the authority and jurisdiction of the commission. Appellants argue that the rule represents an attempt by the Public Service Commission to regulate the dollar amounts charged by municipal utilities, and that this constitutes an invalid regulation of utility rates. We disagree with this characterization. It is true that the commission has no authority to regulate specific dollar amounts charged for a specific service. *City of Tallahassee v. Mann*, 411 So.2d 162 (Fla.1981); *Amerson v. Jacksonville Electric Authority*, 362 So.2d 433 (Fla. 1st DCA 1978). We find, however, that the rule in question operates to regulate "rate structure" and is, therefore, within the jurisdiction and authority of the commission. As we stated in *Mann*,

> there is a clear distinction between "rates" and "rate structure" though the two concepts are related. "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates.

411 So.2d at 163 (citation omitted).

The rule in this case regulates only the relative rate levels charged to different classes of customers. It mandates that, if a public service tax is levied by a municipality on utility customers residing in the municipality limits, the municipality may impose an equivalency surcharge upon municipal electricity customers residing outside of the municipality. The rule does not mandate a surcharge and does not set the dollar amount of a surcharge if one is, in fact, imposed. Thus, it is clear that the rule regulates rate structure and not rates.

This holding is consistent with our recent decision in a related case, *City of Tallahassee v. Public Service Commission*, 441 So.2d 620 (Fla.1983). In that case we affirmed an order of the commission which required the city to eliminate a fifteen percent surcharge imposed on non-resident utility customers. The commission determined that the surcharge was not justified and ruled that a city could impose an out-of-city surcharge equal to the in-city surcharge. We agreed and found that "such a

* 25–9.525 Municipal Surcharge on Customers Outside Municipal Limits.

(1) The provisions of Rule 25–9.52 notwithstanding, a municipal electric utility may impose on those customers outside of its corporate limits a surcharge equal to the public service tax charged by the municipality within its corporate limits. To be equal to the tax, the surcharge shall apply to the same base, at the same rate, in the same manner and to the same types of customers as the tax. The surcharge shall not result in a payment by any customer for services received outside of the city limits in excess of that charged a customer in the same class within the city limits, including the public service tax.

(2) Each municipal electric utility seeking to impose a surcharge on customers outside of its municipal limits shall provide written documentation to the Commission demonstrating compliance with the terms of this rule.

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tory." *Id.* at 624.

[4] Appellants'
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328 So.2d 422 (Fl
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Carter, 115 So.2

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surcharge would not be unduly discriminatory." *Id.* at 624.

[4] Appellants' second claim alleges that the rule authorizes a municipality to impose a tax on non-residents in violation of the due process clauses of the constitutions of the State of Florida and the United States and the equal protection clause of the constitution of the United States. We reject this contention. This Court, in upholding an analogous surcharge authorized by section 180.191, Florida Statutes (1973), held that a twenty-five percent surcharge on non-resident municipal water customers was not unreasonable, discriminatory, or unconstitutional. *Mohme v. City of Cocoa*, 328 So.2d 422 (Fla.1976). The statute allowed the twenty-five percent surcharge, but limited the rates charged non-residents to not more than fifty percent in excess of the rates charged residents. A public hearing on the rates charged was required only if the surcharge exceeded twenty-five percent. We find that the surcharge authorized by the rule in the instant case is much more reasonable than the one authorized by section 180.191. The rule provides for a more equitable surcharge and results in equal overall charges to both residents and non-residents. Moreover, persons challenging the imposition of the surcharge are entitled to a public hearing, regardless of the amount of the surcharge. In addition, application of the "end-result" test to the rate structure authorized by this rule results in equality of rates charged all customers. *See General Telephone Co. v. Carter*, 115 So.2d 554 (Fla.1959).

[5] Appellants' third claim that the action of the commission is not supported by competent, substantial evidence, revolves around alleged deficiencies in the commission's economic impact statement which was submitted in support of the rule. We have previously held that this Court will not reweigh or re-evaluate the evidence presented to the commission, but should only examine the record to determine whether the order complained of complies with essential requirements of law and whether the agency had available competent, substantial evidence to support its findings. *Carter* at 557. We find that the commission had available for its consideration the requisite evidence to adopt the rule.

Accordingly, the order of the commission is affirmed.

It is so ordered.

BOYD, C.J., and ADKINS, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Morris Lee MILLER, Petitioner,

v.

STATE of Florida, Respondent.

No. 64505.

Supreme Court of Florida.

Dec. 6, 1984.

After being charged in information with second-degree murder, defendant was convicted in the Circuit Court, Broward County, LeRoy H. Moe, J., of attempted second-degree murder, his punishment being enhanced for use of firearm, and he appealed. The District Court of Appeal, 438 So.2d 83, Hurley, J., affirmed, and defendant applied for review. The Supreme Court, Alderman, J., held that defendant's sentence could be enhanced for conviction of a necessarily lesser included felony, under statute allowing reclassification of felony to a higher degree for defendants "charged with a felony."

District court decision approved.

Overton, J., concurred specially with an opinion.

A 028

UTILITIES COMMISSION OF the CITY OF NEW SMYRNA BEACH, Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, Appellee.

No. 64147.

Supreme Court of Florida.

March 21, 1985.

Rehearing Denied June 18, 1985.

Appeal was taken from a decision of the Public Service Commission which disapproved a proposed territorial agreement on electric service between a city utilities commission and a utility. The Supreme Court, McDonald, J., held that the Public Service Commission erred in refusing to approve the territorial agreement as contrary to public interest, where the final order found that the agreement served the public interest in all areas except for one group of customers transferred but the Commission concluded that the benefit to those customers was too remote and unsubstantial to justify the customer transfer.

Reversed and remanded.

Alderman and Shaw, JJ., dissented.

1. Compromise and Settlement ⇐3

Legal system favors settlement of disputes by mutual agreement between contending parties.

2. Electricity ⇐8.1(2)

General rule that legal system favors settlement of disputes by mutual agreement applies with equal force in utility service agreements between and among rural electric cooperatives, municipal electric utilities and other electric utilities under jurisdiction of Public Service Commission. West's F.S.A. § 366.04(2)(d).

3. Electricity ⇐8.1(2)

Public Service Commission should base its decision to approve utility service agreements between and among rural electric cooperatives, municipal electric utilities and other electric utilities under its jurisdiction on effect territorial agreement will have on all affected customers in formerly disputed territory, not just on whether customers transferred from one utility to another will benefit. West's F.S.A. § 366.04(2)(d).

4. Electricity ⇐8.1(2)

For Public Service Commission Approval, any customer transfer in proposed territorial agreement between and among rural electric cooperatives, municipal electric utilities and other electric utilities must not harm public; Public Service Commission has responsibility to insure that territorial agreement works no detriment to public interest. West's F.S.A. § 366.04(2)(d).

5. Electricity ⇐8.1(2)

Where agreement settling territorial dispute between city utilities commission and electric utility served public interest in all areas except one group of customers transferred from utility to city, Public Service Commission's determination that benefit to transferred customers was too remote or unsubstantial did not justify PSC refusal to approve territorial agreement as contrary to public interest. West's F.S.A. § 366.04(2)(d).

Davisson F. Dunlap, Jr. of Pennington, Wilkinson & Dunlap, and Frederick M. Bryant of Moore, Williams & Bryant, Tallahassee, for appellant.

William S. Bilenky, Gen. Counsel and Carrie J. Hightman, Associate Gen. Counsel, Tallahassee, for appellee.

McDONALD, Justice.

This case is before us on a direct appeal from a final order of the Florida Public Service Commission (PSC) which disapproved a proposed territorial agreement on electric service between the Utilities Commission of the City of New Smyrna Beach (city) and Florida Power & Light (FP & L). We have jurisdiction. Art. V, § 3(b)(2),

Fla. Const. The issue involved in this appeal is whether the PSC applied the proper standard in disapproving the territorial agreement. We find that it did not and reverse the order.

The city and FP & L disagreed over the provision of electric services in the area surrounding the city. The PSC held a hearing on this dispute and entered an order dividing the disputed territory. The city appealed that order to this Court in case no. 61,308. While the appeal was pending, the city and FP & L agreed to settle the territorial dispute. This Court relinquished jurisdiction in case no. 61,308 and remanded to the PSC for consideration of the proposed territorial agreement.

On remand the PSC issued a preliminary order approving the proposed territorial agreement as being in the best interest of the public. The approval order would become final unless adversely affected persons petitioned the PSC for a formal proceeding. A group of utility customers, objecting to the transfer of customers in an area known as South Beach from FP & L to city electric service, petitioned for a formal proceeding. The PSC refused to approve the territorial agreement without a hearing, and this Court rejected the city's request for mandamus against the PSC. The PSC held hearings on the territorial agreement and then denied approval because transferring the South Beach area electric service from FP & L to the city would result in no substantial economic, reliability, or safety benefits to those affected customers. It did not say that anyone would be harmed by the agreement.

The PSC has jurisdiction "[t]o approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction." § 366.04(2)(d), Fla. Stat. (1983). This Court has stated that the PSC's power to approve territorial agreements and resolve territorial disputes does not constitute an unlawful delegation of legislative authority because the PSC is guided in such cases by a statutory mandate to avoid "further uneconomic duplication of generation, transmission, and distribution facilities." *Gainesville-Alachua County Regional Electric, Water & Sewer Utilities Board v. Clay Electric Coop., Inc.*, 340 So.2d 1159, 1162 (Fla.1976), quoting from § 366.04(3), Fla.Stat. (1975). We do not see how these objectives are served by the PSC requirement as expressed in this case that certain customers must receive substantial benefits before a territorial agreement will be approved.

[1–3] The legal system favors the settlement of disputes by mutual agreement between the contending parties. This general rule applies with equal force in utility service agreements. Territorial agreements by public utilities have been approved because they serve both the interests of the public and the utilities by minimizing unnecessary duplication of facilities and services. *Storey v. Mayo*, 217 So.2d 304 (Fla.1968), *cert. denied*, 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed.2d 222 (1969). The substantial benefit test used by the PSC in this case runs directly counter to the principle favoring settlement of utilities' territorial disputes. The PSC order on appeal focuses almost exclusively on the lack of substantial benefits to those customers in the South Beach area, rather than addressing the merits of the territorial agreement as a whole.* The PSC should base its approval decision on the effect the territorial agreement will have on all affected customers in the formerly disputed territory, not just whether transferred customers will benefit.

[4] We do not relegate the PSC to a "rubber stamp" role in approving territorial agreements. The PSC has the responsibility to ensure that the territorial agreement works no detriment to the public interest. We find this situation analogous to that in transfer of utility asset cases, where other courts have held that the pub-

* The PSC agreed to approve the territorial agreement if the parties would resubmit it without the South Beach area customer transfer.

lic need not be benefited by the transfer so long as the public suffers no detriment thereby. *E.g., Pacific Power & Light Co. v. Federal Power Commission*, 111 F.2d 1014 (9th Cir.1940); *Montgomery County v. Public Service Commission*, 203 Md. 79, 98 A.2d 15 (1953); *Electric Public Utilities Co. v. West*, 154 Md. 445, 140 A. 840 (1928). For PSC approval, any customer transfer in a proposed territorial agreement must not harm the public.

[5] Applying the no-detriment test to the facts of this case, we find the PSC erred in refusing to approve the territorial agreement as contrary to the public interest. The PSC's final order found the territorial agreement served the public interest in all areas except for the South Beach customer transfer. The PSC recognized that the South Beach transfer would result in increased reliability and economic savings, but found those benefits too remote or unsubstantial to justify the customer transfer. This substantial benefit requirement imposed on the South Beach transfer created an unnecessary burden on the settling utilities. The agreement as a whole contained no detriment to the public and should have been approved. Accordingly, we reverse the PSC order on appeal and remand for entry of an order approving the territorial agreement as proposed.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON and EHRLICH, JJ., concur.

ALDERMAN and SHAW, JJ., dissent.

STATE of Florida, Appellant,

v.

Perry Lamar JENKINS, Appellee.

No. 65810.

Supreme Court of Florida.

April 4, 1985.

Rehearing Denied June 17, 1985.

State appealed from order of the Circuit Court, Suwannee County, Royce Agner, J., dismissing four counts of a criminal indictment charging county property appraiser with official misconduct. The District Court of Appeal, Ervin, C.J., 454 So.2d 79, affirmed, and State appealed. The Supreme Court held that statute subsection proscribing official misconduct in knowingly refraining or causing another to refrain from performing duty imposed upon him by law is unconstitutionally vague and susceptible to arbitrary application.

Affirmed.

Overton, J., concurred specially and filed opinion.

Alderman and McDonald, JJ., dissented.

1. Officers and Public Employees ⇐121

Statute subsection proscribing official misconduct in knowingly refraining or causing another to refrain from performing duty imposed upon him by law is unconstitutionally vague and susceptible to arbitrary application. West's F.S.A. § 839.-25(1)(a).

2. Administrative Law and Procedure ⇐417

Agency rules and regulations duly promulgated under authority of law have effect of law.

Jim Smith, Atty. Gen. and Wallace E. Allbritton and Michael J. O'Bringer, Asst. Attys. Gen., Tallahassee, for appellant.

To require electric power conservation and reli-
within a coordinated grid, for operational as well
ergency purposes.
To approve territorial agreements between and
g rural electric cooperatives, municipal electric util-
and other electric utilities under its jurisdiction.
ver, nothing in this chapter shall be construed to
existing territorial agreements as between the par-
to such agreements.
To resolve, upon petition of a utility or on its own
on, any territorial dispute involving service areas
en and among rural electric cooperatives, munici-
ectric utilities, and other electric utilities under its
ction. In resolving territorial disputes, the commis-
may consider, but not be limited to consideration of,
ility of the utilities to expand services within their
capabilities and the nature of the area involved,
ing population, the degree of urbanization of the
its proximity to other urban areas, and the present
reasonably foreseeable future requirements of the
for other utility services.
To prescribe and require the filing of periodic
rts and other data as may be reasonably available
s necessary to exercise its jurisdiction hereunder.

rovision of this chapter shall be construed or
d to impede, prevent, or prohibit any municipally
d electric utility system from distributing at retail
ical energy within its corporate limits, as such cor-
limits exist on July 1, 1974; however, existing ter-
agreements shall not be altered or abridged
y.
In the exercise of its jurisdiction, the commission
have the authority over natural gas utilities for the
ng purposes:
To approve territorial agreements between and
g natural gas utilities. However, nothing in this
er shall be construed to alter existing territorial
ments between the parties to such agreements.
To resolve, upon petition of a utility or on its own
on, any territorial dispute involving service areas
en and among natural gas utilities. In resolving ter-
disputes, the commission may consider, but not
ited to consideration of, the ability of the utilities
pand services within their own capabilities and the
e of the area involved, including population, the
ee of urbanization of the area, its proximity to other
areas, and the present and reasonably foresee-
uture requirements of the area for other utility ser-
.
For purposes of this subsection, "natural gas utili-
ans any utility which supplies natural gas or manu-
ed gas or liquefied gas with air admixture, or simi-
eous substance by pipeline, to or for the public
ncludes gas public utilities, gas districts, and natu-
utilities or municipalities or agencies thereof.
Any customer shall be given an opportunity to
t oral or written communications in commission
dings to approve territorial agreements or resolve
rial disputes. If the commission proposes to con-
such material, then all parties shall be given an
unity to cross-examine or challenge or rebut it.
ubstantially affected customer shall have the right
rvene in such proceedings.

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida 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.

(6) The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities. In adopting safety standards, the commission shall:

(a) Adopt the 1984 edition of the National Electrical Safety Code (ANSI C2) as initial standards; and

(b) Adopt, after review, any new edition of the National Electrical Safety Code (ANSI C2).

The standards prescribed by the current 1984 edition of the National Electrical Safety Code (ANSI C2) shall constitute acceptable and adequate requirements for the protection of the safety of the public, and compliance with the minimum requirements of that code shall constitute good engineering practice by the utilities. The administrative authority referred to in the 1984 edition of the National Electrical Safety Code is the commission. However, nothing herein shall be construed as superseding, repealing, or amending the provisions of s. 403.523(1) and (10).

(7)(a) By July 1, 1990, the commission shall make a determination as to the cost-effectiveness of requiring the installation of underground electric utility distribution and transmission facilities for all new construction, and for the conversion of overhead distribution and transmission facilities to underground distribution and transmission facilities when such facilities are replaced or relocated. In making such determination the commission shall consider the total cost involved including, but not limited to, the overall cost of accidental electrocutions and temporary and permanent disabilities to both the utility employees and others; vehicular accidents involving distribution and transmission facilities; ascertainable and measurable costs of adverse health effects; the differential between the rights-of-way required for underground versus overhead utilities; the cost differential due to the elimination of tree-trimming requirements; the cost differentials between underground and overhead utilities to be expected from repairing storm damage, as well as the incurred loss to the private sector as a result of outages due to storm damage; and costs of associated insurance, attorney's fees, and legal settlements and costs. Further, in making its determination, the commission shall survey the experiences of other states and utilities operating outside of Florida with respect to the cost-effectiveness of underground utilities. Upon a finding by the commission that the installation of underground distribution and transmission facilities is cost-effective, the commission shall require electric utilities, where feasible, to install such facilities.

(b) The commission shall, by July 1, 1990, make a determination as to the cost-effectiveness of converting existing overhead electric distribution and transmission

A 032

25-6.016 Maps and Records.
(1) Each utility shall keep and, upon request, provide the Commission with an adequate description or maps defining the territory it serves.
(2) Each utility shall maintain primary maps, records, diagrams or drawings showing the location of its major units of operating property.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.05(1), F.S.
History: Amended 7/29/69, formerly 25-6.16.

25-6.017 Operating Records. As required by the Commission, each utility shall keep appropriate operating records and such other details of plant operation as may be necessary to substantially reproduce its operations for use in statistical and analytical studies for regulatory purposes.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.05(1), F.S.
History: New 7/29/69, formerly 25-6.17.

25-6.018 Records of Interruptions and Commission Notification of Threats to Bulk Power Supply Integrity or Major Interruptions of Service.
(1) Each utility shall keep a record of all major and/or prolonged interruptions to services affecting an entire community or a substantial portion of a community. Such record shall show cause for interruption, date, time duration, remedy, and steps taken to prevent recurrence, where applicable.
(2) The Commission shall be notified as soon as practicable of:
(a) any action to maintain bulk power supply integrity by:
1. requests to the public to reduce the consumption of electricity for emergency firm customer load reduction purposes.
2. reducing voltage which affects firm customer load.
3. reducing firm customer loads by manual switching, operation of automatic load-shedding devices, or any other means except under direct load management programs as approved by the Commission.
(b) any loss in service for 15 minutes or more of bulk electric power supply to aggregate firm customer loads exceeding 200 megawatts.
(c) any bulk power supply malfunction or accident which constitutes an unusual threat to bulk power supply integrity. The utility shall file a complete report with the Commission of steps taken to resume normal operation or restore service and prevent recurrence, where applicable, within 30 days of return to normal operation unless impracticable, in which event the Commission may authorize an extension of time.
(3) Each utility with interruptible or curtailable rate schedules shall provide a report to the Commission of customer interruptions and curtailments for each applicable rate schedule for those months when interruptions occur. The report should include the names of the customers interrupted or curtailed, the reason for interruption or curtailment, the date, time, and duration of the interruption or curtailment and amount of load shed. For utilities with optional billing provisions which provide for the utility to purchase power from another utility and supply it directly to the interrupted or curtailed customer, the utility shall provide a report to the Commission indicating the name of the customer, the source, date, time, and amount of purchase in megawatt hours and cost per megawatt hour for those months when purchases are made under the optional billing provision. Reports of customer interruptions or curtailments are not required when done under direct load management programs as approved by the Commission.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.03, F.S.
History: Amended 7/29/69, 4/13/80, formerly 25-6.18.

25-6.0440 Territorial Agreements for Electric Utilities.

(1) All territorial agreements between electric utilities shall be submitted to the Commission for approval. Each territorial agreement shall clearly identify the geographical area to be served by each utility. The submission shall include: (a) a map and a written description of the area, (b) the terms and conditions pertaining to implementation of the agreement, and any other terms and conditions pertaining to the agreement, (c) the number and class of customers to be transferred, (d) assurance that the affected customers have been contacted and the difference in rates explained, and (e) information with respect to the degree of acceptance by affected customers, i.e., the number in favor of and those opposed to the transfer. Upon approval of the agreement, any modification, changes, or corrections to this agreement must be approved by this Commission.

(2) Standards for Approval. In approving territorial agreements, the Commission may consider, but not be limited to consideration of:

(a) the reasonableness of the purchase price of any facilities being transferred;

(b) the reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electrical service to the existing or future ratepayers of any utility party to the agreement; and

(c) the reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.

(3) The Commission may require additional relevant information from the parties of the agreement, if so warranted.

Specific Authority: 366.05(1), F.S.
Law Implemented: 366.04(2), 366.04(4), 366.05(7), F.S.
History: New 3/4/90.

25-6.0441 Territorial Disputes for Electric Utilities.

(1) A territorial dispute proceeding may be initiated by a petition from an electric utility requesting the Commission to resolve the dispute. Additionally the Commission may, on its own motion, identify the existence of a dispute and order the affected parties to participate in a proceeding to resolve it. Each utility which is a party to a territorial dispute shall provide a map and a written description of the disputed area along with the conditions that caused the dispute. Each utility party shall also provide a description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of electrical facilities and other utility services to be provided within the disputed area.

(2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:

(a) the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;

(b) the nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;

(c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and

(d) customer preference if all other factors are substantially equal.

(3) The Commission may require additional relevant information from the parties of the dispute if so warranted.

Specific Authority: 366.05(1), F.S.
Law Implemented: 366.04(2), 366.04(4), 366.05(7), F.S.
History: New 3/4/90.