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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 4 1993
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

CASE NO. 80,712

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FORT PIERCE UTILITIES AUTHORITY,

Appellant,

original

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

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ON APPEAL FROM
FLORIDA PUBLIC SERVICE COMMISSION

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# REPLY BRIEF FOR APPELLANT

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FREDERICK M. BRYANT
FL BAR ID #0126375

WILLIAM J. PEEBLES
FL BAR ID #0282741

Moore, Williams, Bryant,
Peebles & Gautier, P.A.
Post Office Box 1169
Tallahassee, Florida 32302
904/222-5510

Attorneys for Appellant
Fort Pierce Utilities Authority

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**I. THE FLORIDA PUBLIC SERVICE COMMISSION FAILED TO PROPERLY APPLY THE NO DETRIMENT TEST PREVIOUSLY ENUNCIATED BY THIS COURT.**

The Commission, in its Answer Brief, characterizes the Order Denying Approval of Territorial Agreement (the "Order"), which is the subject of this appeal, as having been premised 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.

Amended Answer Brief, p. 3-4.

This characterization of the Order only serves to emphasize the essential point in this Appeal. The Commission failed to consider the effect of <u>approval of the proposed territorial agreement</u> (the "Agreement") on all affected customers. In so doing, the Commission failed to properly apply the standard for approval set forth in <u>Utilities Commission of New Smyrna Beach v. Florida Public Service Commission</u>, 469 So.2d 731 (Fla. 1985).

The first basis cited in the Answer Brief for disapproval of the Agreement is that the Fort Pierce Utilities Authority ("FPUA") did not demonstrate its ability to provide reliable service. As even the Commission has previously recognized, this is not the appropriate standard in considering whether to approve or

disapprove a territorial agreement. The Commission has previously recognized in Rule 25-6.0440(2)(b), Florida Administrative Code, that the appropriate consideration is "(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;". (emphasis supplied)

The Order below is devoid of any consideration of what effect the Agreement itself, that is, the boundaries proposed to be established, the elimination of enclaves, and the transfer of certain customers, would have on the reliability of the electric distribution system in the area. A finding 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) does not in any way constitute a consideration of what effect the Agreement would have on reliability. This is particularly so in light of the fact that there is no discussion regarding the reliability of the Florida Power & Light Company ("FPL") system.

The Commission's focus in the area of reliability is clearly exposed in the following exchange between Commissioner Clark and FPL witness Lloyd:

> COMMISSIONER CLARK: Right. Well, tell me how the reliability is impacted by this. (Pause)
>
> WITNESS LLOYD: In some of those areas, particularly, what has been referred to as the enclaves, the opportunity for alternate feeds can be lost. And by having a contiguous service area, those opportunities are there.

COMMISSIONER CLARK: Are you talking about North Hutchinson Island?

WITNESS LLOYD: No, I was talking about --

COMMISSIONER CLARK: You're talking about the agreement in general?

WITNESS LLOYD: Yes.

COMMISSIONER CLARK: I want to limit it to North Hutchinson Island.

WITNESS LLOYD: Okay.

COMMISSIONER CLARK: I understand that the fact it has a benefit in terms of settlement of dispute and avoiding expenses that's tied into the whole agreement. But how is reliability to North Hutchinson Island enhanced by this transfer?

WITNESS LLOYD: Since the facilities as they exist will be transferred from one utility to the other, I would see no increase in reliability. (Pause)

Transcript of hearing held June 18, 1992, at 129.

The Commission impermissibly focused on the impact the Agreement would have on one particular group of customers rather than on the impact of the Agreement on all affected customers.

On the issue of potential loss of conservation benefits, the Order itself reveals the flaw in the Commission's analysis. It states: "We find that FPL's 2,100 customers on North Hutchinson Island would suffer a detrimental loss of conservation benefits if were they (sic) transferred to FPUA." (R. 274). Again, the Order completely fails to consider the effect that the Agreement would have in terms of the availability of conservation programs to all affected customers.

Finally, the Commission acknowledges that "some consideration" was given to the "fact" that North Hutchinson Island was not the

subject of the dispute and that no duplicative facilities existed on North Hutchinson Island. Nowhere in the Order or Answer Brief is it explained how this fact impacts the effect of the Agreement on the public interest. This frank admission by the Commission underscores its total failure to properly apply the "no detriment to the public interest" test.

Under Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985), the proper standard for the Commission to apply in considering territorial agreements is whether approval of the Agreement as it relates to all affected customers, including transferred customers, will result in a detriment to the public interest. The Commission in its Order below failed to apply this test. The Order below should be reversed.

## II. THERE IS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF A DETRIMENT TO THE PUBLIC INTEREST.

Contrary to the repeated assertion of the Commission in its Answer Brief, FPUA's argument on this point is not an invitation to the Court to reweigh the evidence presented below regarding the issues of reliability and availability of conservation programs. It is true, as the Commission argues, that the Initial Brief of FPUA cites extensive expert testimony regarding the enhanced reliability which would result from approval of the Agreement. The point in citing that testimony is not, however, to invite the Court to reweigh this evidence; it is simply to point out that the only testimony adduced below regarding the effect that approval of the Agreement would have on reliability is that it would enhance system reliability.

This is in contrast to the evidence cited in the Commission's Answer Brief in support of the finding in the Order that "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). The only evidence cited by the Commission is the failure of FPUA to produce outage records, customer testimony and the cross examination of FPUA Director of Utilities, Mr. Schindehette. But, as the Commission acknowledges in its brief at page 17, the cross examination of Mr. Schindehette related only to the likelihood that certain enhancements to system reliability on North Hutchinson

Island might take place. The customer testimony consists of general allegations by customers that FPL service is superior to that of FPUA. However, such testimony does not constitute competent substantial evidence upon which the Commission could have based a finding that FPUA would be unable to provide reliable service in areas to be transferred to FPUA. The customer testimony received below is akin to the testimony of the residents to be affected by a proposed rezoning in Pollard v. Palm Beach County, 560 So.2d 1358 (Fla. 4th DCA 1990), which testimony was found not to constitute competent substantial evidence. See also, Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980), holding the "conclusory statements" relied on therein by the Commission did not constitute competent substantial evidence.

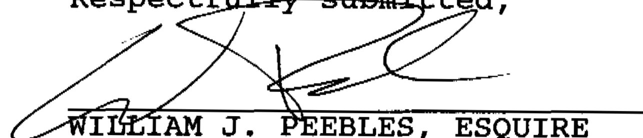
Finally, it is incredible that the Commission would seek to sustain a finding that FPUA failed to carry its burden of demonstrating its ability to provide reliable service because it did not have outage and reliability records. Neither did FPL produce outage or reliability records, yet no adverse finding regarding FPL's reliability was made by the Commission.

Moreover, the evidence cited regarding the existing or future ability of FPUA to service its customers is not relevant to what effect approval of the Agreement would have on overall system reliability in the area. To illustrate the point, assume that FPUA in fact does provide unreliable service to its customers. The proper question to ask is whether, if the Agreement is approved,

its implementation will result in less reliable service. The only competent substantial evidence in the record on this point, as is extensively cited in the Initial Brief, is that implementation of the Agreement will not result in a decrease in reliability.

Similarly, the Commission in its Answer Brief misapprehends the point of FPUA's argument regarding conservation. There is indeed competent substantial evidence that, as the Commission found, "FPL's 2,100 customers on North Hutchinson Island would suffer a detrimental loss of conservation benefits if they were transferred to FPUA." (R. 274). There is, however, no competent substantial evidence in the record which would support a finding that the overall effect of implementation of the Agreement would result in a net loss of conservation benefits available or utilized by all affected customers and, therefore, is a detriment to the public interest.

Respectfully submitted,

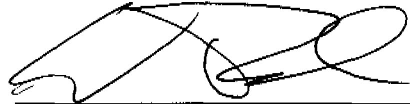


WILLIAM J. PEEBLES, ESQUIRE
Moore, Williams, Bryant,
Peebles & Gautier, P.A.
306 East College (32301)
Post Office Box 1169
Tallahassee, Florida 32302
904/222-5510

Attorneys for Appellant
Fort Pierce Utilities Authority

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing REPLY BRIEF FOR APPELLANT has been furnished by U.S. Mail to Robert D. Vandiver, General Counsel, and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0851, this 4th day of May, 1993.



WILLIAM J. PEEBLES