ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

AMERISTEEL CORPORATION
f/k/a FLORIDA STEEL CORPORATION,

Appellant,

v.

SUSAN F. CLARK, et al.,

Appellee.

CASE NO. 88,427

PSC Docket No. 950307-EU

APPELLEE JACKSONVILLE ELECTRIC AUTHORITY'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA PUBLIC UTILITIES COMMISSION

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

LAWS OF FLORIDA

PRELIMINARY STATEMENT

In this Answer Brief, Appellant AmeriSteel Corporation, formerly known as Florida Steel Corporation, will be referred to as "AmeriSteel." Appellee Florida Public Service Commission will be referred to as "Commission." Appellee Jacksonville Electric Authority will be referred to as "JEA." Appellee Florida Power & Light Company will be referred to as "FPL." Citations to the Record on Appeal will be designated by "R.___."

STATEMENT OF THE CASE AND OF THE FACTS

AmeriSteel's Statement of the Case and Facts is colored by irrelevant statements that have no bearing on the issues before the Court. Accordingly, JEA submits its own Statement of the Case and of the Facts.

On March 19, 1963, JEA and FPL entered into a territorial agreement which, inter alia, established a territorial boundary line allocating exclusive service territory between JEA and FPL in Duval, Clay, Nassau and St. Johns Counties (R. 13). On April 28, 1965, the Commission's predecessor, the Florida Public Utilities Commission, issued an order approving the 1963 Agreement.[1]

Subsequently, in 1974, AmeriSteel established its plant in Duval County choosing to locate in FPL's exclusive service territory as defined under the 1963 agreement (R. 26, 30). In 1979, JEA and FPL entered into a second territorial agreement pursuant to which the utilities agreed to reaffirm and maintain the existing territorial boundaries initially established in the 1963 agreement (R. 38). On May 9, 1980, the Commission issued an order approving the 1979 agreement.[2]

From the time of the 1963 agreement and over the course of some thirty years, JEA and FPL peaceably co-existed in Duval and St. Johns Counties. From time to time, JEA permitted FPL to serve

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[1]Order No. 3799 issued April 28, 1965 (R. 34).

[2]Order No. 9363 issued May 9, 1980 (R. 46); In re: Petition of Jacksonville Electric Authority for approval of a territorial agreement between JEA and Florida Power and Light Company, 80 F.P.S.C. 5:10 (1980).

a relatively limited number of customers located in JEA's territory and FPL similarly permitted JEA to provide service to a smaller number of customers located in FPL's territory. Such interim service arrangements were made over the course of the years as part of good engineering practice, typically where one utility's distribution lines were closer to the customer and the utility in whose territory the customer was located would have to cross or duplicate lines in order to provide service in its territory.

On March 20, 1995, JEA filed a petition to resolve territorial dispute with the Commission wherein JEA sought an order from the Commission: (1) requiring FPL to relocate its existing facilities in JEA's territory; (2) ordering that customers temporarily released by JEA to FPL for interim service purposes be transferred to JEA; and (3) ordering FPL to continue serving customers served by FPL in JEA territory prior to 1979 through JEA facilities with the subsequent release of the service location to JEA once the customer terminated service (R. 1).[3]

JEA and FPL engaged in settlement negotiations which ultimately led to a new, third territorial agreement between JEA and FPL. On October 5, 1995, JEA and FPL filed a Joint Motion to Approve Territorial Agreement (R. 160). The agreement clearly

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[3]AmeriSteel engages in a bit of fiction by stating that JEA asserted in its petition that it expected to serve the FPL customers located in JEA's territory "once it could economically and practically do so." AmeriSteel Brief, at 6. No such statement is made in JEA's Petition. AmeriSteel is simply attempting to create a record in support of its legal position that JEA is required to serve AmeriSteel unless JEA finds it is not practical or economical to do so.

serves the public interest as it provides for the transfer of all customers currently served by one utility in another utility's territory so that all customers located in the territory of each utility will be served by that utility. Specifically, the agreement resolves the interim service issue raised in JEA's petition by requiring the transfer of 390 FPL customers in St. Johns County (located in JEA's territory under the 1963, 1979 and current agreements) to JEA. The agreement also "cleans up" Duval County by requiring the transfer of 57 FPL customers in Duval County (again, located in JEA's territory under the three agreements) to JEA and the transfer of 16 JEA customers (located in FPL's prior and current territory) to FPL (R. 357). The agreement also serves the public interest by requiring the relocation and construction of facilities which will serve to enhance the system reliability of each utility and eliminate the existing uneconomic duplication of facilities (R. 160). Of equal significance to this Appeal is the fact that under the 1979 agreement and the new agreement, AmeriSteel is an FPL customer situated in FPL's Commission approved territory. All of these facts concerning the new territorial agreement between JEA and FPL were never disputed by AmeriSteel below nor in AmeriSteel's Brief.

On November 8, 1995, the Commission Staff filed its recommendation recommending approval of the territorial agreement which was scheduled for consideration by the Commission on November 21, 1995 (R. 331). On November 21, AmeriSteel appeared before the Commission for the purpose of requesting a deferral. AmeriSteel's

request was granted.

On December 4, 1995, AmeriSteel filed a Motion to Intervene (R. 353). AmeriSteel claimed that it has a substantial interest that would be directly affected by Commission approval of the agreement. That interest is a financial interest. AmeriSteel is dissatisfied with the electric rates that it pays as an FPL customer. Contrary to the relatively low rates AmeriSteel enjoyed when AmeriSteel built its facility in FPL's territory in 1974, FPL was now allegedly "... a very high cost utility." (R. 356). AmeriSteel alleged that FPL's rates threatened the long-term viability of its Jacksonville facility and that the possible closure of the Jacksonville facility would cause a loss of jobs and hurt the local economy. Based on these contentions, AmeriSteel sought intervention, a deferral of the Commission's consideration of the proposed new territorial agreement and a meeting of the parties to discuss AmeriSteel's desire to receive service from JEA (R. 358). AmeriSteel appeared again before the Commission on December 5, 1995 seeking a second deferral. AmeriSteel's second request for deferral was granted.

On February 5, 1996, an order was issued denying AmeriSteel's Motion for Intervention (R. 380). Commissioner Johnson, in her capacity as Prehearing Officer, held that AmeriSteel lacked standing to intervene for the purpose of challenging the proposed territorial agreement. The Order Denying Intervention did provide explicit notice of AmeriSteel's opportunity to participate and comment on the proposed territorial agreement at the February 6,

1996 Agenda Conference pursuant to Section 366.04(4), Florida Statutes and Rules 25-6.0442(1) and 25-22.0021(1), Florida Administrative Code (R. 385).

At the February 6, 1996, Agenda, the Commission heard comments by the Commission Staff, JEA, FPL, AmeriSteel and other interested persons and voted to approve the proposed territorial agreement. A proposed agency action ("PAA") order was issued on February 14, 1996, approving the territorial agreement (R. 386). AmeriSteel subsequently filed a petition protesting the Commission's preliminary approval of the new Agreement. (R. 414). Oral argument on AmeriSteel's Petition and the Motions to Dismiss was held before the Commission on May 21, 1996 (R. 482). That petition was dismissed in response to motions to dismiss filed by FPL and JEA, the Commission finding again that AmeriSteel lacked standing to challenge the Agreement. Following the June 10, 1996, final order granting the motions to dismiss and finalizing the PAA Order approving the territorial agreement (R. 498), AmeriSteel filed this appeal.

SUMMARY OF THE ARGUMENT

This appeal focuses on the Commission's denial of AmeriSteel's attempts to intervene and protest a territorial agreement between FPL and JEA. Under the agreement, AmeriSteel remains an FPL customer in FPL territory, the same status AmeriSteel has held since constructing its Jacksonville plant in 1974. In its quest to secure lower electric rates, AmeriSteel asks this Court to revert from its long-standing pronouncement that no individual has the legal right to secure electric service from the electric utility of his choice. AmeriSteel's goal of introducing a principle of "customer choice" in the establishment of territorial boundaries between utilities is contrary to law and should be swiftly rejected by this Court.

The Commission approved the territorial agreement between FPL and JEA in accordance with Rule 25-6.0440(2), Florida Administrative Code, Section 366.04, Florida Statutes and the decisions of this Court. The reestablishment of the historical territorial boundary line between JEA and FPL, transfers of customers and required relocation and construction of facilities pursuant to the agreement will eliminate existing uneconomic duplication of facilities and enhance the quality, safety and reliability of electric service for JEA's and FPL's customers.

The Commission correctly denied AmeriSteel's attempts to intervene and protest the agreement. AmeriSteel's substantial interests are not affected by the agreement. AmeriSteel will remain a customer of FPL in FPL territory under the agreement.

AmeriSteel's interests in securing lower rates and preserving the financial viability of its Jacksonville facility are insufficient to establish standing to protest a territorial agreement.

AmeriSteel also relies on its status as a citizen of the City of Jacksonville in support of its claim that it may compel electric service from JEA. AmeriSteel is incorrect. AmeriSteel has no right to select the utility of its choice. The provision of electric service by JEA and FPL within exclusive service territories in the City of Jacksonville is governed by the current territorial agreement between the two utilities approved by the Commission. Although AmeriSteel alleges that the territorial agreement is inconsistent with the City of Jacksonville Code, the Commission has no authority to interpret the Charter or Municipal Code of the City of Jacksonville. Further, while it is evident that AmeriSteel's only interest in this proceeding pertains to the rate that it pays for electricity, such an interest does not establish standing to protest a territorial agreement.

AmeriSteel participated in the proceeding below prior to, during and after the Commission's consideration of the agreement. The Commission provided several opportunities for AmeriSteel to submit written comments and present oral argument in opposition to the proposed agreement. AmeriSteel participated in the proceeding below to the full extent permitted by law. AmeriSteel cannot now claim that it did not have notice of the proceeding.

AmeriSteel's Brief provides no basis for this Court to reverse the Commission's orders. The Commission's orders must be affirmed.

ARGUMENT

The Commission's Orders[4] come to this Court "clothed with a presumption of validity." City of Tallahassee v. Mann, 411 So.2d 162, 164 (Fla. 1981). Moreover, the Commission's interpretation of Section 366.04, Florida Statutes, ("Grid Bill") is entitled to great deference and must be approved by this Court unless such interpretation is clearly erroneous. Florida Cable Television Association v. Deason, 635 So.2d 14, 15 (Fla. 1994); Floridians for Responsible Utility Growth v. Beard, 621 So.2d 410, 412 (Fla. 1993). AmeriSteel bears the burden of overcoming these presumptions by demonstrating that the Commission's orders depart from the essential requirements of law. City of Tallahassee v. Mann, 411 So.2d at 164; Shevin v. Yarborough, 274 So.2d 505, 508 (Fla. 1973). AmeriSteel has not met its burden.

Territorial agreements are favored by the legal system and the Commission must approve a proposed territorial agreement unless it works a detriment to the public interest. Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731, 732 (Fla. 1985). The new territorial agreement between JEA and FPL unquestionably promotes the public interest. The agreement requires the transfer of customers resulting in exclusive service territories wherein each utility serves only its customers in its exclusive territory. Facilities will be constructed and relocated

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[4]Order No. PSC-96-0158-PCO-EU, at R. 380; Order No. PSC-96-0755-FOF-EU, at R. 498.

to eliminate historic uneconomic duplication of facilities and enhance electric service reliability. This Court[5] and the Legislature[6] both have recognized that uneconomic duplication must be avoided. The Agreement also will prevent further uneconomic duplication of facilities by JEA and FPL in St. Johns County. The Commission considered the relevant facts and determined that the agreement serves the public interest. Accordingly, the Commission's decision must be upheld.

ARGUMENT I

THE COMMISSION CORRECTLY DETERMINED THAT AMERISTEEL DOES NOT HAVE STANDING TO CHALLENGE THE TERRITORIAL AGREEMENT[7]

A. AMERISTEEL LACKS STANDING UNDER THE AGRICO TEST

It is undisputed that AmeriSteel built its facility in FPL's service territory in 1974, as that territory was defined by the Commission approved 1963 agreement between JEA and FPL[8], that AmeriSteel's facility historically has received service from FPL, that AmeriSteel's facility will remain in FPL's service territory under the new agreement and that AmeriSteel will continue to

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[5]See, e.g., Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987).

[6]Section 366.04(5), Florida Statutes, requires the Commission "to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."

[7]AmeriSteel states in the title of its Argument 1 that the Commission "effectively violated AmeriSteel's equal protection and due process rights." AmeriSteel Brief, at 14. Since AmeriSteel failed to offer any substantive discussion or legal authority in support of this contention, JEA will not address this contention in this Answer Brief.

[8]Order No. 3799 (R. 35).

receive service from FPL pursuant to the new agreement.

Pursuant to Section 120.57(1), Florida Statutes, and Rule 25-22.029(4), Florida Administrative Code, only one whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a formal administrative hearing. Similarly, in the case of intervention, Commission Rule 25-22.039, Florida Administrative Code, requires a person to demonstrate that his or her substantial interests are subject to determination or will be affected through the proceeding. The burden is upon the petitioner/putative intervenor to demonstrate that he does, in fact, have standing to participate in the case. Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979). To demonstrate standing in an administrative proceeding, a person must demonstrate 1) that he will suffer injury in fact which is sufficient in immediacy to entitle him to a Section 120.57 hearing; and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981)(emphasis supplied). AmeriSteel's Motion to Intervene and Petition Protesting the Proposed Territorial Agreement fail both tests.

1. AmeriSteel will not suffer an injury in fact of sufficient immediacy

The Commission correctly determined that AmeriSteel's allegations fail to demonstrate that it will suffer an injury in fact which is of sufficient immediacy to warrant a Section

120.57(1) hearing. The Agrico test requires AmeriSteel to affirmatively establish that it has suffered a real and immediate injury. The new territorial agreement has no effect on AmeriSteel. AmeriSteel is an FPL customer located in FPL territory under the 1963, 1979 and new agreements. AmeriSteel would still receive service from FPL even without a new agreement. Moreover, the challenged new territorial agreement has no impact on the rate AmeriSteel pays for electricity.

The Commission's Orders do not affect whatever right AmeriSteel believes that it has to request service from JEA. Prior to the new agreement, JEA and FPL operated under the Commission approved 1979 agreement. The 1979 agreement prohibits JEA from providing service to customers, such as AmeriSteel, that are situated outside of its defined service territory. The terms of the new agreement are very similar to the terms of the preceding agreement. Moreover, the right of either utility to file a petition with the Commission seeking modification of the territorial boundary lines between the two utilities is the same under the 1979 agreement and the new agreement.[9] Any right that AmeriSteel believes that it has to request service from JEA is not affected by the Commission's approval of the agreement.

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[9]Under Section 1.1 of the 1979 agreement, either FPL or JEA could unilaterally seek modification or cancellation of the agreement 15 years after April 13, 1979 (the date of the agreement), i.e., after April 13, 1994. This right is immediately available to FPL or JEA under Section 7.1 of the new agreement; Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989) (the Commission may withdraw or modify its approval of a territorial agreement).

AmeriSteel also argues that FPL's rates, which allegedly are higher than JEA's rates, threaten the economic viability of its operation in Duval County. The economic viability of AmeriSteel's Jacksonville facility is not affected by the new agreement. As under the 1979 agreement, AmeriSteel receives electric service from FPL under the new agreement. Conversely, had AmeriSteel successfully secured a Commission order rejecting the new agreement, AmeriSteel would still receive service from FPL. Therefore, the rates paid by AmeriSteel for electric service are not affected by the Commission's approval of the new territorial agreement. Simply put, the Commission's action inflicts no injury on AmeriSteel and certainly not an injury of sufficient immediacy to satisfy the Agrico test.

Furthermore, Section 366.04(2)(d), Florida Statutes, and Rule 25-6.0440(2), Florida Administrative Code, are silent as to the Commission's consideration of rate differentials in a territorial proceeding. The Commission previously has determined that a rate differential between utilities is not a factor that can be raised by a customer in a territorial dispute[10], and the Commission's interpretation of the Grid Bill is entitled to great deference. Florida Cable Television Association v. Deason, 635 So.2d 14, 15 (Fla. 1994); Floridians for Responsible Utility Growth v. Beard, 621 So.2d 410, 412 (Fla. 1993). The argument is merely a poorly disguised attempt by AmeriSteel to compel service from JEA to serve

[10]In re: Petition of Florida Power and Light Company for resolution of a territorial dispute with Fort Pierce Utilities Authority, 94 F.P.S.C. 7:340 (1994).

its own self-interest. As recognized by the Commission in the Order Denying Intervention, this Court has made it clear that such self-serving attempts to secure service from a specific electric utility are contrary to law. Lee County Electric Cooperative v. Marks, 501 So.2d 585, 587 (Fla. 1987) ("larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the Florida Public Service Commission."); Storey v. Mayo, 217 So.2d 304, 307-308 (Fla. 1968), cert. denied, 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed.2d 222 (1969) ("An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.").[11]

In sum, AmeriSteel has not alleged an injury in fact which would be affected by the Commission's approval of the new

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[11]The alleged differential between FPL's and JEA's rates is merely one factor that could lead to the closing of AmeriSteel's mill, and such an injury is not of a sufficient immediacy to demonstrate an injury in fact. Paragraph 12 of AmeriSteel's Motion to Intervene states that "As a result of the closure of its Tampa mill this summer, as well as other considerations, Florida Steel must decide which of its production facilities must be modified or expanded. It must also decide if continued operation of the Jacksonville mill can be justified in the long term." (R. 357) (Emphasis supplied). Clearly, other factors may render AmeriSteel's mill nonviable even if service is provided by JEA, and such conjecture about possible future economic detriment is too remote to establish standing. See International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3rd DCA 1990)(the fact that a change in the playing dates might affect the labor dispute, resulting in economic detriment to players, was too remote to establish standing). See also Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987)(speculation on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).

territorial agreement. The Commission correctly determined that the interests alleged by AmeriSteel fail the first prong of the Agrico test.

2. The alleged injury is not of a type or nature this proceeding is designed to protect

AmeriSteel's arguments also fail the second prong of the Agrico test. This case is by no means the first case where the Commission and this Court have rejected a customer's self-serving attempt to secure the utility of his choice. In a territorial agreement proceeding involving FPL and a rural electric cooperative, the Commission cited Storey v. Mayo, and Lee County Electric Cooperative in stating:

> ... the court has firmly established the general rule that a territorial agreement is not one in which the personal preference of a customer is an issue. Therefore, the alleged injury, even if real and direct, is not within the zone of interest of the law.[12]

In another territorial agreement proceeding involving FPL and Fort Pierce Utilities Authority ("FPUA"), a customer petitioned to intervene seeking to transfer from FPUA to FPL. The customer alleged that it was unhappy with FPUA's rates and quality of service. The prehearing officer denied the petition to intervene, holding that

> Harbor Branch has not alleged that it is located in any area that is subject to dispute or that is subject to any duplication of facilities by the two utilities. Harbor

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[12]Order Denying Intervention (R. 382-83) citing Joint Petition for Approval of Territorial Agreement Between Florida Power and Light Company and Peace River Electric Cooperative, Inc., Order No. 19140 issued in Docket No. 870816-EU; 88 F.P.S.C. 4:276-277 (1988).

> Branch has not alleged that either approval or disapproval of the territorial agreement will cause any change in its circumstances. Harbor Branch simply alleges that it is unhappy with the quality of service that is provided by FPUA and that FPUA charges a higher rate than FPL. Neither of these allegations are sufficient to show that Harbor Branch's substantial interests will be affected by the outcome of this proceeding.[13]

The similarities between Harbor Branch and AmeriSteel were not lost on the prehearing officer in the proceeding below. In the Order Denying Intervention, the prehearing officer focused on the fact that both AmeriSteel and Harbor Branch remained in the exclusive service territory of the same utility both before and after the new territorial agreement and that both customers sought intervention essentially to secure lower rates from a utility other than the utility authorized to provide service under the Commission approved territorial agreement (R. 383).

Although AmeriSteel has received service from FPL for over twenty years, in an effort to secure lower rates, AmeriSteel now questions JEA's "decision not to provide service to" AmeriSteel in accordance with the City of Jacksonville's Charter and Code.[14] However, the Commission does not have the statutory authority to interpret or enforce Jacksonville's City Charter or its Municipal

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[13]In re: Petition of Florida Power and Light Company for Resolution of a Territorial Dispute with Fort Pierce Utilities Authority, 94 F.P.S.C. 7:340 (1994).

[14]AmeriSteel's Brief, at 17.

Code.[15] Whereas the Commission must approve any changes to the territorial boundary between JEA and FPL[16], and the Commission must approve JEA's provision of service to a customer that is situated outside of its approved service territory, the Commission is without jurisdiction to interpret or enforce the City of Jacksonville's Charter and Code. The decision that AmeriSteel takes issue with clearly is beyond the jurisdiction of the Commission, and the Commission's proceeding is not designed to protect AmeriSteel's alleged interest.

Furthermore, a utility's rates are properly addressed in a rate case pursuant to Section 366.05, Florida Statutes, not in a territorial dispute pursuant to Section 366.04, Florida Statutes. It is noteworthy that AmeriSteel built its plant in FPL's service territory in 1974, not in JEA's service territory. Since 1974 AmeriSteel has had the opportunity to participate in the Commission's dockets that effect FPL's rates. While AmeriSteel has standing to file a complaint with the PSC regarding FPL's rates,

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[15]See, e.g., In Re: Petition for declaratory statement pertaining to Chapter 93-151, Section 2, 381.00655, F.S., regarding connection of existing onsite sewage treatment and disposal systems to central sewerage system requirements, by BETMAR UTILITIES, INC., in Pasco County, 94 F.P.S.C. 4:313, 314-315 (1994) (denying Betmar's request for an interpretation of Section 381.00655, Florida Statutes); In Re: Application of East Central Florida Services, Inc., for an original certificate in Brevard, Orange, and Osceola Counties, 92 F.P.S.C. 3:374 (1992) (denying city's request to determine impact of utility certification on water withdrawal permitting scheme of Chapter 373, Florida Statutes); and In Re: Objection to notice of Conrock Utility Company of intent to apply for a water certificate in Hernando County, 90 F.P.S.C. 4:537, 557 (1990) ("The Commission has no authority to administer or enforce Chapter 163.").

[16]§366.04(2)(d), Fla. Stat.

and AmeriSteel has standing to intervene in FPL's rate proceedings before the Commission, AmeriSteel does not have standing to challenge FPL's rates in a proceeding to approve a territorial agreement.

The Commission's proceeding was not designed to protect against the injuries that AmeriSteel has alleged. The Legislature's mandate that the Commission plan, develop and maintain a coordinated electric power grid throughout Florida to enhance the adequacy, safety and reliability of electric service and to avoid further uneconomic duplication of facilities would be totally obliterated if the Commission were to permit territorial agreements to become a function of customer choice. Accordingly, the Commission correctly determined that AmeriSteel's Petition fails the second prong of the Agrico test.

B. THE COMMISSION IS NOT REQUIRED TO CONSIDER AMERISTEEL'S INTEREST AS A RESIDENT OF JACKSONVILLE

AmeriSteel claims that the "clear purpose of the territorial dispute docket was to consider and resolve any pertinent matters relating to the territorial boundary, including the effect of the agreement on city residents and the local economy."[17] However, the Florida Statutes and the Commission's Rules are silent as to the consideration of the effect of a territorial agreement upon a local economy. Furthermore, the Commission cannot discriminate in favor of municipal residents over ratepayers that do not reside within the corporate limits of a municipality and, as discussed above, the

[17]AmeriSteel's Brief, at 16.

Commission is without jurisdiction to require JEA to serve AmeriSteel.

AmeriSteel relies upon dicta in Storey v. Mayo for the proposition that any customer located within the municipal limits of the City of Jacksonville may compel service from JEA.[18] Storey v. Mayo involved a request by a resident of the City of Homestead to transfer from the City's electric system to FPL's system. Storey v. Mayo did not resolve the issue of whether a customer within the City's limits that presently receives service from a private utility can compel service from the municipally-owned utility. Furthermore, the dicta that AmeriSteel relies upon has been rendered moot by the Legislature.

The dicta on which AmeriSteel relies cannot be viewed in a vacuum. In Storey v. Mayo this Court specifically determined that a customer does not have an "organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself."[19] Furthermore, at the time that this Court decided Storey v. Mayo municipally-owned utilities were exempt from the Commission's jurisdiction and they enjoyed "the privileges of legally protected monopolies within municipal limits."[20] Pursuant to the enactment of the Grid Bill in 1974[21], Municipally-owned utilities no longer are exempt from the

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[18]AmeriSteel's Brief, at 17.

[19]Storey v. Mayo, 217 So.2d 307-308.

[20]Id. at 307.

[21]Ch. 74-196, Laws of Florida.

Commission's jurisdiction, and the application of the Court's decision in Storey v. Mayo must be consistent with the Commission's statutory authority over the State's electric grid.[22] Any doubt as to this proposition was laid to rest by the Commission in JEA's territorial dispute with Okefenokee Rural Electric Membership Corporation, where the Commission recognized the superseding effect of the 1974 Grid Bill and held:

> For its part, a municipality may have a right to provide electric service within its 1974 municipal boundaries, but that right is not inviolable. A municipality must exercise it in a manner that is consistent with the other provisions, and the public policy purposes, of the Grid Bill. It is the Florida Public Service Commission's responsibility to see that it does so.[23]

Although the Grid Bill is silent as to a citizen's right to compel service from a municipally-owned utility, it clearly stands for the proposition that a utility cannot duplicate another utility's facilities to provide service to a customer. As recognized by this Court, "Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC." Lee County Electric Cooperative v. Marks, 501 So.2d 585, 587 (Fla. 1987) (A customer may not construct a line into another utility's service area to avoid the effect of a territorial agreement).

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[22]§366.04, Fla. Stat.

[23]In Re: Petition to resolve territorial dispute between Okefenokee Rural Electric Membership Corporation and Jacksonville Electric Authority, 92 F.P.S.C. 3:234, 238 (1992).

C. JEA IS PROHIBITED FROM PROVIDING SERVICE TO AMERISTEEL

AmeriSteel correctly asserts that the Grid Bill did not extinguish JEA's right to serve customers situated within the corporate limits of the City of Jacksonville as those limits existed on July 1, 1974. However, AmeriSteel ignores the fact that JEA has operated and continues to operate pursuant to territorial agreements with FPL that have been approved by the Commission pursuant to Section 366.04, Florida Statutes. Under these territorial agreements, FPL retains exclusive rights to provide electric service in portions of the City of Jacksonville. As a matter of law, JEA cannot provide service to such customers situated outside of its defined, Commission approved service territory. Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987).

D. THE AGREEMENT DOES NOT WORK A DETRIMENT TO THE PUBLIC INTEREST

The Commission's review of a proposed territorial agreement does not require a determination that every customer will receive a benefit under the agreement. Contrary to AmeriSteel's position, the Commission is not required to evaluate every customer's interest nor is it required to consider the potential effect of the Agreement upon the City of Jacksonville.

Section 366.04(2)(d), Florida Statutes, authorizes the Commission "To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction." This Court has expressly limited the Commission's review of a proposed territorial

agreement to a determination that the agreement "works no detriment to the public interest." Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731, 732 (Fla. 1985). The Commission's Rule 25-6.0440(2), Florida Administrative Code, sets forth the criteria that the Commission must consider when it approves a territorial agreement.[24] Although the Commission may consider factors that are not listed in its Rule, the Commission is not required to do so.

AmeriSteel does not assert that the Commission's approval of the new territorial agreement violates Rule 25-6.0440(2). Instead, AmeriSteel argues that the Commission must consider criteria that are outside the scope of Rule 25-6.0440(2), specifically the effect of FPL's rates upon AmeriSteel and the City of Jacksonville. As stated above, the Commission is not required to consider the economic impact of a territorial agreement upon a community's economy or the rates of the various utilities when resolving territorial disputes or approving territorial agreements.[25]

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[24](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.

[25]In re: Petition of Florida Power and Light Company for resolution of a territorial dispute with Fort Pierce Utilities Authority, 94 F.P.S.C. 7:340 (1994).

AmeriSteel's arguments clearly address only AmeriSteel's own best interest, which must be distinguished from the public interest that the Commission is required to consider when it approves a territorial agreement. Contrary to AmeriSteel's assertions, the Commission is not required to consider the self-serving interest of any single customer.[26]

AmeriSteel argues that the Commission must recognize the concept of customer choice because it is an issue that has been considered by most states. AmeriSteel's argument is nothing more than an outright admission that until such time as the Florida Legislature approves customer choice for the provision of retail electric service, customers such as AmeriSteel lack standing to challenge a territorial agreement in the pursuit of customer choice.

E. THE COMMISSION PERMITTED AMERISTEEL TO PARTICIPATE IN THE PROCEEDING BELOW TO THE EXTENT PERMITTED BY LAW

The Legislature has created two classes of customers for purposes of customer participation in Commission proceedings to approve territorial agreements or resolve territorial disputes. Section 366.04(4), Florida Statutes, states that "Any customer shall be given an opportunity to present oral or written communications in commission proceedings to approve territorial agreements or resolve territorial disputes. If the commission proposes to consider such material, then all parties shall be given a reasonable opportunity to cross-examine or challenge or rebut it.

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[26]Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987).

Any substantially affected customer shall have the right to intervene in such proceedings." See also Rule 25-6.0442, Florida Administrative Code.[27] Pursuant to Section 366.04(4) and Rule 25-6.0442(2), every customer is entitled to submit comments to the Commission in a proceeding to approve a territorial agreement, but the right to intervene is available only to substantially affected customers.

AmeriSteel addressed the Commission in this proceeding in writing (R. 353, 368, 414, 446, 459, 495) and through oral argument at the Commission's agenda conferences on November 21, 1995, December 5, 1995, February 6, 1996 and May 21, 1996. Contrary to AmeriSteel's allegation[28], AmeriSteel participated in the Commission's proceeding to the fullest extent authorized by law.

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[27](1) Any customer located within the geographic area in question shall have an opportunity to present oral or written communications in commission proceedings to approve territorial agreements or resolve territorial disputes. If the commission proposes to consider such material, then all parties shall be given a reasonable opportunity to cross-examine or challenge or rebut it.
(2) Any substantially affected customer shall have the right to intervene in such proceedings.
(3) In any Commission proceeding to approve a territorial agreement or resolve a territorial dispute, the Commission shall give notice of the proceeding in the manner provided by Rule 25-22.0405, F.A.C.

[28]AmeriSteel's Brief, at 14.

ARGUMENT II

THERE WAS NO DUTY TO NOTIFY AMERISTEEL THAT THE TERRITORIAL BOUNDARY IN DUVAL COUNTY WOULD BE MODIFIED

The Commission required JEA and FPL to provide direct notice to each of its customers that would be transferred pursuant to the agreement (R. 192, 194, 330). Adequate notice was provided to such substantially affected customers of both utilities.

AmeriSteel argues that the Commission was required to provide notice to AmeriSteel once "... the Duval County line became a settlement issue."[29] AmeriSteel's claim is specious. First, there was no reason, and certainly not a requirement, for the Commission to provide notice to Duval County customers such as AmeriSteel who remained unaffected by the new territorial agreement. Second, the Commission can resolve a territorial dispute by affecting areas that are not initially placed in dispute by the utilities[30].

Furthermore, AmeriSteel cannot argue that it did not receive timely notice of the Commission's proposed action. AmeriSteel filed its Motion to Intervene in the proceeding prior to the Commission's consideration of the agreement. In fact, the Commission's consideration of the agreement was delayed on two occasions, for close to six months, at the request of AmeriSteel. Clearly, AmeriSteel was provided every procedural opportunity available by law to establish its right to participate in the proceeding. The Commission correctly found that, as a matter of

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[29]AmeriSteel Brief, at 22.

[30]In re: Complaint of Green Cove Springs against Clay Electric Cooperative, Inc., 82 F.P.S.C. 4:158 (1982).

law, AmeriSteel lacked standing to intervene in the Commission's proceeding.

Citizens v. Mayo, 333 So.2d 1 (Fla. 1976), is not applicable to the instant proceeding. Citizens v. Mayo discussed the procedures that are applicable in a rate review proceeding, not a territorial dispute. Whereas every customer is affected by a rate increase, and every customer has a substantial interest in a rate proceeding, the Legislature has specifically segregated customers in general from customers that have a substantial interest in a territorial proceeding. Section 366.04(4), Florida Statutes. As previously stated, AmeriSteel participated in the proceeding below in accordance with its rights under Section 366.04(4), Florida Statutes.

CONCLUSION

In the instant case the Commission correctly determined that the "Grid Bill does not authorize us to set territorial boundaries in response to one customer's desire for lower rates." Order No. PSC-96-0755-FOF-EU at 4 (R. 501). The Commission's decision is consistent with Section 366.04, Florida Statutes, and this Court's decisions that interpret Section 366.04. AmeriSteel failed to demonstrate that its substantial interests would have been affected by the Commission's action. The Commission properly denied AmeriSteel's Motion to Intervene and Petition Protesting the Preliminary Approval of the Territorial Agreement. Accordingly, the Commission's orders should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellee Jacksonville Electric Authority's Answer Brief was furnished to the following by U. S. Mail this 7th day of October, 1996:

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