IN THE SUPREME COURT OF FLORIDA

AMERISTEEL CORPORATION, F/K/A FLORIDA STEEL CORPORATION, Appellant, vs. SUSAN F. CLARK, ET AL., Appellees.	)	CASE NO. 88,427

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

DAVID E. SMITH
Director of Appeals
Florida Bar No. 309011

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(904) 413-6084

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission". Appellant, AmeriSteel Corporation, f/k/a Florida Steel Corporation is referred to as "AmeriSteel". Appellee, Jacksonville Electric Authority, is referred to as "JEA", and Florida Power and Light Company is referred to as "FPL". References to material contained in the record on appeal is designated "R. ____". AmeriSteel's Initial Brief is referenced "Brief at ____".

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts the Statement of the Case and Facts presented by AmeriSteel. However, as set forth below, the Commission believes that certain statements by AmeriSteel are argumentative, inaccurate, or incomplete. The Commission, therefore, offers additional facts to aid the Court's understanding of the case and its procedural development before the Commission.

At page 3 of its Brief, AmeriSteel suggests in the second paragraph that JEA has casually reasserted its right to serve areas previously delegated to other utilities in the Jacksonville area. In support of that proposition, it cites to the Commission's action in Docket No. 911141-EU concerning a territorial dispute between JEA and Okefenokee Rural Electric Membership Cooperative. AmeriSteel concludes: "In 1991, JEA determined that it had become economic and practical to provide service to that area, and JEA successfully moved to displace Okefenokee". Brief at 3.

AmeriSteel's characterization of JEA's authority hardly does justice to the Okefenokee case and the important legal questions on the Commission's jurisdiction that were at issue. JEA, like AmeriSteel in this case, attempted to rely on a provision of Section 366.04, Florida Statutes, (the Grid Bill), to argue that the Commission had no authority to resolve the territorial dispute with Okefenokee. Supposedly, this was because the disputed area lay within the municipal boundaries of Jacksonville. The specific provision on which JEA relied is that cited by AmeriSteel in the second paragraph of its Brief at page 4. It states:

> No provision of this Chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electric energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby.

Section 366.04(2)(f), Fla. Stat.

In the Okefenokee case, the Commission denied JEA's Motion to Dismiss based on this provision of the Grid Bill[1]. In its Order No. PSC-92-0058-FOF-EU, 92 F.P.S.C. 3:234 (1992), issued March 12, 1992, the Commission rejected JEA's construction of the statute which would have effectively allowed it to take over service territory of other utilities in Jacksonville at will. The Commission stated:

> JEA's construction undermines the fundamental public policy purposes of the Grid Bill, and it creates conflict where none needs to be. We believe that the provision of Section 366.04(2)(f), Florida Statutes, at issue here does not exempt municipal electric systems from the Commission's jurisdiction, and thus it does not prevent the Commission from resolving territorial disputes, preventing uneconomic duplication of facilities, or insuring the reliability of the energy grid - in municipalities, as well as elsewhere in the state. The provision simply directs the Commission to apply its authority, and carry out its responsibilities, in a manner consistent with a municipality's right to serve customers within its 1974 corporate limits. For its part, a municipality may have a right to provide electric service to customers within its 1974 municipal

[1]The relevant text of that statute as it relates to the Commission's authority to approve territorial agreements and resolve territorial disputes between electric utilities is found at sections 366.04 (2) (d), (e) and (f); (4) and (5), Florida Statutes.

> 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.

Id. at 237-8.

In the Okefenokee case, the Commission rejected a second Motion to Dismiss by JEA on the same grounds in Order No. PSC-92-1213-FOF-EU, 92 F.P.S.C. 10:651 (1992), cited by AmeriSteel at page 3 of its Brief.

The Commission brings these rulings in the Okefenokee case to the Court's attention since the Commission has not accepted the position inherent in AmeriSteel's casual statement of "facts" at pages 3 and 4 of its Brief. AmeriSteel's statement does not do justice to the Okefenokee case and the controversy over municipal jurisdiction which was at issue. It implicitly states a legal argument not accepted by the Commission.

JEA also omits from its Statement certain procedural events which are important for understanding the JEA-FPL territorial conflict as it developed before the Commission. As AmeriSteel correctly notes at page 7 of its Brief, FPL responded to JEA's Petition to Resolve Territorial Dispute in St. Johns County by asserting that JEA should be estopped from reclaiming customers which FPL had been allowed to serve. FPL also asserted bad faith on JEA's part and claimed that JEA was barred by the defense of laches from reestablishing service in the area. R. 49-51.

FPL thereafter filed a Second Amended Answer and Counter-Petition which sought to expand the dispute before the Commission. R. 71-76. FPL suggested the Commission should revisit the territorial agreement on a global basis and 1) "grant a modification to the agreement to establish a new territorial boundary between FPL and JEA"; or 2) grant "cancellation of the current agreement and territorial boundary between FPL and JEA and . . . order the utilities to negotiate a new agreement". R. 74-75.

JEA responded to FPL's Counter-Petition with a Motion to Dismiss. R. 77-83. JEA opposed the "drastic action" of cancellation of the existing agreement and alleged that FPL had failed to state a cause of action in its Counter-Petition. R. 82.

After FPL filed its response in opposition to JEA's Motion to Dismiss, the Commission issued Order No. PSC-95-0897-FOF-EU, 95 F.P.S.C. 7:303 (1995), denying the Motion to Dismiss. R. 96-109; 134-138. Thereafter, JEA filed its Answer and Affirmative Defenses to FPL's Counter-Petition. R. 139-141.

The JEA-FPL dispute remained in this quarrelsome posture, threatening the continued viability of the existing agreement between them, until mid-August 1995. On August 16, 1995, JEA indicated in a Motion for Extension of Time to file its testimony that settlement negotiations were under way. R. 143. The Commission granted the extension by Order No. PSC-95-1029-PCO-EU, 95 F.P.S.C. 8:353 (1995), issued August 21, 1995. R. 146-147. Shortly thereafter JEA and FPL filed a "Joint Motion to Suspend Remaining Filing and Hearing Dates" indicating that a settlement of

the territorial disputes had been reached. R. 149-150. The Commission granted that motion on August 31, 1995 in Order No. PSC-95-1086-PCO-EU, 95 F.P.S.C. 8:844 (1995) R. 152-153. By Order No. PSC-95-1202-PCO-EU, 95 F.P.S.C. 9:433 (1995), issued September 27, 1995, the Commission granted a further extension of time to file the proposed territorial agreement. R. 157-159. Thereafter, on October 5, 1995, JEA and FPL filed their "Joint Motion to Approve Territorial Agreement" embodying the realignment of service areas which AmeriSteel has sought to protest. R. 160-329.

All of the foregoing documents and orders indicating the scope of the controversy between JEA and FPL were matters of public record available to anyone wishing to inquire into the proceedings. AmeriSteel's statement at page 8, second full paragraph, that the staff's November 8, 1995 recommendation for approval of the territorial agreement "provided the first indication to the public that areas other than St. Johns County would be effected" is inaccurate to the extent that the entire agreement and all the foregoing documents were available by October 5, 1995.

At page 10 of its Brief, AmeriSteel also omits from its Statement the fact that its attempted appeal of the Commission's order denying intervention was dismissed by this Court on May 15, 1996 (Case No. 87,550, Florida Steel Corporation v. Susan F. Clark).

SUMMARY OF ARGUMENT

Under the Commission's rules and applicable case law, AmeriSteel had the burden to demonstrate standing to intervene and protest the Commission's action in approving the JEA-FPL territorial agreement. It was required to show both an injury in fact of sufficient immediacy to entitle it a 120.57 hearing and to show that the injury claimed was one which the proceeding was designed to protect.

The Commission correctly concluded that AmeriSteel could not demonstrate standing in this case. The Commission's order approving the territorial agreement had no actual, direct effect on AmeriSteel. AmeriSteel's status as a customer of FPL did not change; it was FPL's customer before the agreement was reached and it was a customer of FPL after it was approved. AmeriSteel has only asserted a unilateral desire to change its service provider to JEA. AmeriSteel cannot assert standing based on the right to choose a service provider. Under Florida law an individual does not have a constitutional, economic or political right to compel service from a particular electric utility. The savings provisions of the Grid Bill which allow a municipal utility to provide service within its 1974 boundaries do nothing to support AmeriSteel's claim. The public interest consideration in establishing orderly service territories for electric utilities is superior to any individual's asserted self-interest.

AmeriSteel's claim of potential harm to its competitive position as a steelmaker are at best speculative and remote. Such

claims do not demonstrate the direct and immediate harm necessary to establish standing under Florida law.

The Commission's proceedings to approve the JEA-FPL territorial agreement were not designed to protect or vindicate AmeriSteel's claimed economic interests. The proceedings were designed to promote the public interest. The Commission had a duty to approve the agreement where it found that there was no detriment to that interest. In no case was it required to find that the agreement could only be approved if individuals such as AmeriSteel received a benefit from the agreement.

The Commission's Notice of Proposed Agency Action approving the JEA-FPL territorial agreement provided AmeriSteel a clear point of entry into the proceedings. The Commission's notice complied with applicable provisions of the Florida Administrative Procedure Act (APA) and the Commission's rules. AmeriSteel was afforded due process under Florida law. Had AmeriSteel been able to demonstrate standing, it would have been afforded the opportunity for discovery, the presentation of evidence and argument guaranteed by the APA. AmeriSteel had no separate right to notice of the utilities' ongoing negotiations.

The Commission's order approving the territorial agreement is fully supported by the record in this case. The Commission based its approval on the stipulated facts and legal conclusions adopted in the territorial agreement between JEA and FPL. The Commission was not required to look behind that agreement and conduct an evidentiary proceeding. The Commission also accepted AmeriSteel's

allegations of interest for purposes of determining its rights to standing in the proceeding.

The Commission's denial of AmeriSteel's intervention and standing to protest comports with the essential requirements of the law and should be upheld.

ARGUMENT

I. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT AMERISTEEL LACKED STANDING TO INTERVENE AND PROTEST THE PROPOSED FPL-JEA TERRITORIAL AGREEMENT.

To intervene and protest the Commission's order approving the FPL-JEA territorial agreement, AmeriSteel had the burden to demonstrate that it would be affected by the Commission's action. Rule 25-22.039, F.A.C.; Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979). Meeting that burden entailed a demonstration that AmeriSteel would 1) suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57, Florida Statutes, and 2) that the injury was one which the proceeding was designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). AmeriSteel's arguments that it met its burden to show standing and the right to protest the territorial agreement are unavailing and should be rejected by this Court.

A. AmeriSteel has shown no injury of sufficient immediacy to entitle it to a hearing.

AmeriSteel attempts to demonstrate standing under the first prong of the Agrico test by claiming that the Commission has impaired its right as a resident of the City of Jacksonville to request service from JEA. It further claims that the Commission was bound to consider its allegations of economic harm to its steel mill operations as a result of remaining a customer of FPL. The first proposition is based on a misreading of the case of Storey v. Mayo, 217 So. 2d 304 (Fla. 1968) and the requirements of the Grid

Bill. The second proposition based on economic disadvantage is factually and legally insufficient to confer standing under the Agrico test.

The undisputed facts of this case indicate the fundamental reason why AmeriSteel cannot meet the test of standing. It is undisputed that AmeriSteel was a customer of FPL before the territorial agreement was reached. It remained a customer of FPL after the agreement was submitted and approved by the Commission. AmeriSteel's status as a customer of FPL and the service it receives from the utility were not affected by the Commission's approval of the territorial agreement. The Commission's order did nothing at all to affect AmeriSteel, much less directly impinge on its substantial interest.

It is clear that AmeriSteel would like to be among the customers whose status did change as a result of their being transferred from FPL to JEA under the territorial agreement. However, that desire is more in the nature of a unilateral expectation or hope, not a substantial interest. See, Metsch v. University of Florida, 550 So. 2d 1149 (Fla. 3rd DCA 1989). (Unsuccessful law school applicant's desire to be admitted did not rise to the level of a substantial interest protected by the Administrative Procedure Act). AmeriSteel remains in the same position it was in under the old territorial agreement approved by the Commission in 1980. AmeriSteel cannot object to a Commission action which did not change its status quo. See, U.S. Sprint Communications Company v. Nichols, 534 So. 2d 698 (Fla. 1988)

(Long-distance carrier was not entitled to a hearing where Commission's access charge order simply corrected a mistake and implemented rates which would have been in effect absent the error).

AmeriSteel effectively argues that it has an absolute right as a resident of Jacksonville to request service from JEA. It finds support for this proposition in the following oft-quoted passage from Storey:

> An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service.

217 So. 2d 307 - 308.

The Court should first note that, at best, the Storey decision's reference to the rights of a city resident to compel service by a municipal utility is dicta. The issue in the case was whether the Commission had authority to approve an agreement which allocated customers living in a suburban area, not within municipal boundaries. There is essentially no dispute that, without more, a city resident served by a municipal utility would have the right to apply to that utility for service. However, that does not address the question of whether that obligation establishes a right which can be asserted over and above the municipal utilities' right to enter into a territorial agreement and the right of the Commission to approve that agreement in the public interest. The import of

the Court's statement in Storey that "[a]n individual has no organic, economic or political right to service by a particular utility" is clearly that such an interest cannot be asserted.

In this case, AmeriSteel is attempting to assert standing based not on a proposed transfer, as were FPL's Homestead customers in the Storey case, but based on a latent right to choose JEA over FPL.

AmeriSteel's position before this Court would be no different if it were a customer of FPL who suddenly decided that it would be preferable to have service from JEA. In the context of monopoly regulation that right to choose simply does not exist. As this Court recognized in Lee County Electric Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987), to allow such a choice would put the self-interest of the customer above the public interest. In Lee County, this Court rejected the Commission's approval of an arrangement which would have allowed Florida Mining and Minerals Corporation to receive service from FPL, even though the plant was located in the service territory of Lee County Electric Cooperative. This Court relied on the language of Storey quoted above to conclude that "[l]arger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC". Id. at 587. The Court recognized that the public interest was served by maintaining the integrity of the existing Lee County - FPL territorial agreement.

The Court should further note that in any case, AmeriSteel does not dispute that JEA had the right under its municipal

authority to enter into a territorial agreement with FPL. It simply asserts an absolute privilege to participate in the utility's decision even though no action has been taken directly affecting its interest. AmeriSteel has no substantial interest which would allow it to protest JEA's business decisions in entering the agreement with FPL.

Standing alone, the Commission could agree with AmeriSteel's statement at page 17 of its Brief that "the Grid Bill does not extinguish the municipality's prerogative to provide electric service within its municipal limits". Municipal utilities generally enjoy a monopoly within their boundaries just as regulated utilities enjoy a monopoly in the territory they serve. However, that does not mean, as AmeriSteel would have it, that a municipality has the right to serve customers within its boundaries irrespective of the public interest concerns which the Grid Bill is designed to protect.

The Legislature has found it in the public interest to give the Commission explicit authority to approve territorial agreements and to settle territorial disputes between electric utilities in the state of Florida. In this case, JEA and FPL have voluntarily submitted a plan for the orderly provision of electric service in and around Jacksonville. They have explicitly invoked the Commission's authority under the Grid Bill, and that authority is dispositive as to the rights of individual customers to obtain service within the territory affected.

The Commission explicitly recognized the interplay between the Grid Bill and JEA's right to serve in its Docket No. 911141, "Re: Petition to Resolve Territorial Dispute Between Okefenokee Rural Electric Membership Cooperation and Jacksonville Electric Authority" where it stated

> For its part, a municipality may have a right to provide electric service to customers 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.

92 F.P.S.C. 3:234 (1992).

Stripped down to its bare essentials, the only claimed substantial interest asserted by AmeriSteel is one of hypothetical economic harm. In its various petitions and memoranda, and in its Brief, AmeriSteel has continually asserted that because FPL's rates are higher than JEA's and those of other utilities around the country, it may not be able to continue to operate the Jacksonville mill in a competitive manner. Supposedly, this could lead to closure of the Jacksonville facility, a loss of jobs and a general detriment to the economic well-being of the city.

The Commission correctly rejected AmeriSteel's claims of economic harm as being too remote and speculatively to establish standing. Neither JEA, FPL nor the Commission has done anything in approving the territorial agreement which affects the status quo of AmeriSteel's Jacksonville operations. Thus, it is clear that whatever consequences AmeriSteel assigns to the territorial

agreement, they are based on what might happen, not what has happened. Moreover, AmeriSteel's basic claims are that its "steel making operations are at risk"; that "the cost of energy is a significant factor in operating the economics of the steel mill"; and that it is "attempting to improve operating efficiency at the Jacksonville mill to allow it to become economically competitive". R. 415-417. This includes attempting to get a lower energy rate. Indeed, AmeriSteel does not claim that the result of this proceeding, even if intervention were granted would be to provide the relief requested. It notes that "[i]t is not necessary in the context of this docket to determine what level of electric rates are needed for the Jacksonville mill to remain or to become competitive". R. 420. Essentially, AmeriSteel would have the Commission open up the proceeding to consider the company's desire to switch electric service to JEA based on the belief that some benefit to its competitive position might possibly accrue at some unknown time.

AmeriSteel's speculative arguments about potential economic harm cannot form the basis for standing under Florida law. International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3rd DCA 1990)(Jai-Alai players' claims of potential economic harm from fronton owners' application to Florida Pari-Mutuel Commission to change playing dates were too remote and speculative to support standing claims); Village Park Mobile Home Association, Inc. v. State, Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987) (Attempt of mobile

home owners to intervene and request hearing in Department of Business Regulation proceedings approving prospectus under Mobile Home Act did not show injury of sufficient immediacy to prove standing where there was no indication that mere approval of prospectus would have any effect on the marketability of homes in the park).

AmeriSteel builds on its economic harm arguments by claiming that the Commission erred in not taking into account the effect that rate differentials between FPL and JEA may have on "local manufacturing and the Jacksonville economy". Brief at 19. Such projected harm is even more tenuous than the economic harm claimed by AmeriSteel itself. The Commission's primary responsibility under the Grid Bill is to approve territorial agreements in the public interest so far as they directly affect the provision of electric service. There is nothing in Section 366.04 or the Commission's rules that compels it to decide what utility should serve based on which has the lower rates and the general economic benefit to local economy that might be derived from lower rates. In short, the Commission is not the arbiter of economic development in utility's service territories.[2]

---

[2] Nor is the Commission the proper forum for AmeriSteel to assert any claims it may have against JEA for choosing to provide service in the manner it does. AmeriSteel's statement at page 18 of its Brief that the "PSC is the proper forum for hearing a resident customer's claims" to compel service from the municipality is incorrect. The Commission has authority to provide for the safe and orderly provision of electric service though its ability to resolve territorial conflicts and approve territorial agreements. It is not authorized, absent some event triggering that jurisdiction, to tell JEA which customers it will serve within the borders of Jacksonville and which it will not. That is a matter

AmeriSteel relies on the case of Utilities Commission of the City of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731 (Fla. 1985) to further support its claims of a right to be heard. The Commission agrees that case requires that the Commission consider the effect of the territorial agreement on the public interest. According to New Smyrna Beach, an agreement should be approved where there is no detriment to the public interest. The Commission does not agree that the case should be read so broadly as to encompass the speculative economic interest asserted by AmeriSteel in this case. On the contrary, AmeriSteel would have this Court stand the New Smyrna Beach decision on its head. What AmeriSteel really wants is for the Commission to be required to find that the JEA-FPL territorial agreement provides an economic benefit to the company and presumably to other economic interests in Jacksonville. That simply is not the standard upon which the Commission acts. In fact, this Court rejected the Commission's position that some benefit be conferred on ratepayers in the New Smyrna Beach case. Again, the Commission's role is to promote territorial agreements which serve the public interest under its statutory criteria governing the provision of electric service. It is not the Commission's role to vindicate the self-interest of an individual ratepayer to choose electric service, which is the sole basis for AmeriSteel's position.

---

for JEA to decide under its charter.

B. AmeriSteel has not shown that its claimed interests were among those to be protected in the Commission's proceedings approving the JEA-FPL territorial agreement.

The foregoing makes clear that AmeriSteel's arguments also fail to meet the second prong of the Agrico standing test. Neither the provisions of Section 366.04(2), Florida Statutes, nor the "Standards for Approval" articulated in the Commission's Rule 25-6.0440(2), Florida Administrative Code, nor this Court's decisions contemplate approval of territorial agreements based on assertions of economic self-interest. The Commission's statutes and rules and this Court's decisions do contemplate that territorial agreements should be approved to the extent that they eliminate existing and potential uneconomic duplication and otherwise provide for the orderly, safe and reliable provision of electric service in the state of Florida. The economic interests that AmeriSteel has asserted are not of the type that the Commission's proceedings were designed to protect. The Commission, therefore, correctly concluded that, even if AmeriSteel's interests were real, it was not the object of the Commission's proceedings to advance those interests or to protect them.

AmeriSteel would like the Commission and this Court to rewrite Chapter 366 to introduce competition in the electric industry. However, if and when that occurs, it will be the responsibility of the Legislature, not of the Commission or the Court.

II. THE COMMISSION'S NOTICE OF ITS INTENDED ACTIONS WAS ADEQUATE AND DID NOT VIOLATE ANY DUE PROCESS RIGHTS OF AMERISTEEL OR OTHER CUSTOMERS.[3]

The Administrative Procedure Act, Section 120.57, Florida Statutes (1995) and the Commission's Rule 25-22.029, Florida Administrative Code, Point of Entry into Proposed Agency Action Proceedings, require the Commission to give notice and opportunity for hearing to persons affected by its actions. Moreover, the Commission's rule on approval of territorial agreements, Rule 25-6.0440(1), Florida Administrative Code, requires the petitioning utilities to provide "assurances that the affected customers have been contacted and the differences [in rates and service] explained".

There is no question in these proceedings that the legally required notice provisions were complied with. The utilities advised their customers of the pending transfer; the Commission gave notice that the approval of the territorial agreement was scheduled for its December 5, 1995 agenda conference, and at the February 6, 1996 agenda conference after the matter was deferred. AmeriSteel received notice of the Commission's Proposed Agency Action order approving the territorial agreement and exercised its rights to file a protest in response.

Notwithstanding the Commission's compliance with all applicable notice provisions, AmeriSteel claims that its due

---

[3] The Commission has broken AmeriSteel's Argument 2 at page 21 of its Brief into two sections since AmeriSteel's formulation brings together two disparate points. The Commission's Point II addresses the due process arguments while Point III addresses those arguments touching on the competent substantial evidence standard.

process rights have been violated because it was not notified that JEA and FPL, in their private negotiations, had decided to consider resolving their territorial disputes on a global basis including areas other than those in St. Johns County. AmeriSteel's arguments on this point are devoid of any legal authority which would support this position. There is no requirement in the Administrative Procedure Act, Chapter 366, or the Commission's rules which requires two negotiating utilities to publish notice of their negotiations and invite the participation of interested persons such as AmeriSteel. Nor is there any requirement that the Commission provide such notice.

AmeriSteel's misquoted reference to Rule 25-22.026(2), Florida Administrative Code, at footnote 8, page 23 of its Brief, does nothing to aid its arguments. That rule defines who will be considered a party in proceedings determining substantial interests. It provides that the Prehearing Officer may require notice to persons whose interests will necessarily be determined by the proceedings. In no way does the rule stand for the proposition that the Commission was obligated to give notice that JEA and FPL were considering a broad-based territorial agreement to resolve their differences.

AmeriSteel's claim at page 23 of its Brief that it or "other interested parties may have moved to intervene far earlier in the proceedings" hardly serves as a basis for a claim of a due process violation. There would have been no formal discovery or other adversarial procedure to pursue prior to the Commission's taking

some action. AmeriSteel was in no way precluded from exercising any of its procedural rights by the process followed by the Commission in approving the agreement. If AmeriSteel had been able to demonstrate standing, it would have been able to obtain a hearing, conduct discovery and present evidence challenging any aspect of the agreement. The failure here is not in the Commission's procedure but in the type of interest that AmeriSteel has attempted to assert.

AmeriSteel's argument on this point is fanciful at best, since the agency can only act on what is officially brought to it by the parties, i.e., here, the signed territorial agreement. The Commission cannot issue notice based on rumor of what may being going on in negotiations between the utilities it regulates.

III. THE COMMISSION'S ORDER APPROVING THE JEA-FPL TERRITORIAL AGREEMENT COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW AND IS BASED ON AN ADEQUATE RECORD.

AmeriSteel's suggestion in its Argument 2 that the Commission's order is deficient for lack of competent substantial evidence is off-base. The territorial agreement presented to the Commission was effectively a stipulation between the parties based upon a set of agreed-upon facts and legal conclusions. The Commission found that the filing was adequate under its rules and met applicable statutory and administrative requirements.

The Commission had a duty to approve the agreement if it was found to be in the public interest. New Smyrna Beach, supra. It was not required to look behind the agreement and conduct a formal hearing in the absence of a valid protest alleging disputes of

material fact. The agreement itself and the record material accompanying it constitute an adequate record upon which the Commission could make its decision. There can be no claim that this stipulated agreement does not constitute competent substantial evidence upon which the Commission could act. See, Troup v. Bird, 53 So. 2d 717 (Fla. 1951) (Stipulation binding on trial and appellate court as to facts).

CONCLUSION

The Commission's approval of the JEA-FPL territorial agreement was not an action affecting AmeriSteel's substantial interests which would give rise to standing to protest the order. AmeriSteel's status as a customer of FPL did not change and the company has no constitutional, economic, or political right to select its electric service provider in a monopoly environment. The interests asserted by AmeriSteel are no more than a unilateral desire to change service providers.

AmeriSteel has not shown that the Commission's denial of standing is inconsistent with Florida law or in any other way violates due process standards. AmeriSteel has not met its burden of overcoming the presumption of correctness which attaches to Commission orders, and the order should be affirmed. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981).

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

DAVID E. SMITH
Director of Appeals
Florida Bar No. 309011

Dated: October 7, 1996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 7th day of October, 1996 to the following:

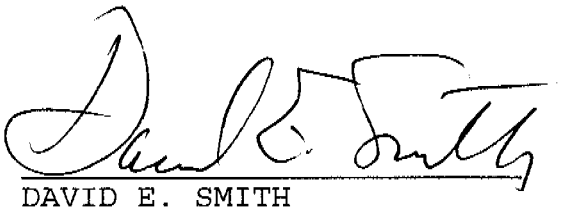
Richard Salem
Marian B. Rush
Salem, Saxon & Nielsen, P.A.
101 E. Kennedy Blvd., Suite 3200
P. O. Box 3399
Tampa, FL 33602

Peter J.P. Brickfield
James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson St., N.W.
Eight Floor - West Tower
Washington, D.C. 20007

Mark K. Logan, Esquire
Bryant, Miller and Olive, P.A.
201 S. Monroe Street
Suite 500
Tallahassee, FL 32301

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Underwood,
Purnell & Hoffman
216 S. Monroe St.
Suite 420
Tallahassee, FL 32301

Roger Howe, Esquire
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399



DAVID E. SMITH

ANS88427.MRD