

097

IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
SEP 18 1996

AmeriSteel Corporation
f/k/a Florida Steel Corporation,

) Case No. 88,427

Appellant,

-v-

Susan F. Clark, et al.,

) Appeal from Public Service

Appellee.

) Commission Docket No. 950307-EU

CLERK, SUPREME COURT
By
Clerk Deputy Clerk

APPELLANT'S INITIAL BRIEF ON THE MERITS

AMERISTEEL CORPORATION

✓ Richard J. Salem
✓ Florida Bar No. 152524
✓ Marian B. Rush
Florida Bar No. 373583
Salem, Saxon & Nielsen, P.A.
Suite 3200, One Barnett Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602
Phone: (813) 224-9000
Fax: (813) 221-8811

✓ Peter J.P. Brickfield
James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
Eighth Floor, West Tower
Washington, DC 20007
Phone: (202) 342-0800
Fax: (202) 342-0807

Dated: September 12, 1996

By: Marian B. Rush

TABLE OF CONTENTS

JURISDICTION 1

INTRODUCTION 1

ISSUES PRESENTED ON APPEAL 2

STATEMENT OF THE CASE AND OF THE FACTS 3

 A. Prior JEA and FPL Electric Service Arrangements Affecting
 the City of Jacksonville 3

 B. AmeriSteel’s Jacksonville Steel Making Operations 5

 C. Procedural History of the Territorial Dispute Docket 6

SUMMARY OF ARGUMENT 11

ARGUMENT 1 14

 The PSC Erred In Denying AmeriSteel’s Motion To Intervene Because It
 Constituted An Abuse Of The Agency’s Discretion and Effectively
 Violated AmeriSteel’s Equal Protection And Due Process Rights 14

 A. AmeriSteel has a substantially affected interest in the
 outcome of the territorial dispute docket 14

 B. The PSC failed to consider AmeriSteel’s interest as a
 resident of Jacksonville 16

 C. The Grid Bill does not extinguish a municipality’s
 prerogative to provide electric service within its
 municipal limits 17

 D. The PSC failed to take into consideration the interests
 of all ratepayers 18

ARGUMENT 2 21

 The PSC’s Final Ruling is not Supported by Competent, Substantial
 Evidence and the PSC’s Failure to Require Notice of the Changed Scope
 of the Territorial Dispute Docket Denied AmeriSteel and Similarly
 Situated Customers Their Due Process Safeguards Protected by Florida
 Law 21

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF CITATIONS

STATUTES

Florida Statutes (1995):	
§120.57.....	14, 15
§366.04.....	4, 19

RULES

Florida Administrative Rules:	
Fla. Admin. Code R. 25-22.025(2).....	23
Jacksonville City Charter and Municipal Code:	
Section 718.103.....	3

CASES

<u>Calder Race Course v. Department of Business and Professional Regulation,</u> 664 So. 2d 297 (Fla. 3d DCA 1995).....	14
<u>Gregory v. Indian River County,</u> 610 So. 2d 547 (Fla. 1 st DCA 1993)(Fla. App. 1 Dist. 1992).....	15
<u>Royal Palm Square Association v. Sevco Land Corporation,</u> 623 So. 2d 533 (Fla. 2d DCA 1993)(Fla. App. 2 Dist. 1993).....	15
<u>Sullivan v. Northwest Florida Water Management District,</u> 490 So. 2d 140 (Fla. 1 st DCA 1986)	15
<u>Fairbanks v. Department of Transportation,</u> 635 So. 2d 58 (Fla. 1 st DCA 1994)	15
<u>Agrico Chemical Co. v. Department of Environmental Regulation,</u> 406 So. 2d 478 (Fla. 2d DCA 1981)	15, 16
<u>Storey v. Mayo,</u> 217 So. 2d 304 (Fla. 1968)	16, 17, 19

<u>Utilities Commission of the City of New Smyrna Beach</u> <u>v. Florida Public Service Commission,</u> 469 So. 2d 731 (Fla. 1985)	18
---	----

<u>Citizens v. Mayo,</u> 333 So. 2d 1 (Fla. 1976)	22
--	----

ORDERS OF THE FLORIDA PUBLIC SERVICE COMMISSION

Order No. 9363.....	4, 6, 21
Order No. PSC-92-1213.....	3
Order No. PSC-96-0158.....	9
Order No. PSC-96-0755.....	10

OTHER REFERENCES

H.B. 1893. See, Bellack, Richard C. and Martha Carter Brown, <i>Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida</i> , 19 Fla. St. Univ. L.R. 407, (1995).....	17
---	----

JURISDICTION

This case is properly before the Florida Supreme Court on the merits pursuant to Rules 9.030(a)(1)(B)(ii), and 9.110, Fla. R. App. P., which provides for the direct appeal to this Court the action of a statewide agency relating to rates or service of utilities providing electric service.

INTRODUCTION

Appellant, AmeriSteel Corporation, formerly known as Florida Steel Corporation, will be referred to as "AmeriSteel" or "Appellant". Jacksonville Electric Authority, the municipal electric utility for the City of Jacksonville, will be referred to as "JEA". Florida Power and Light Corporation, an investor owned utility, will be referred to as "FPL". The Florida Public Service Commission will be referred to as "PSC" or the "Commission". "R" refers to the record page cite in the record on appeal.

ISSUES PRESENTED ON APPEAL

1. Whether the Public Service Commission erred in denying the standing of AmeriSteel, a resident consumer of electricity in the City of Jacksonville, to challenge a proposed settlement of a territorial dispute between JEA and FPL that redefines the service boundaries of the utilities within the city municipal limits, when the agency's action constituted an abuse of discretion and violated AmeriSteel's equal protection and due process entitlements.

2. Whether the final ruling of the Florida Public Service Commission approving a proposed settlement of a territorial dispute between JEA and FPL is supported by competent substantial evidence when the Public Service Commission refused to allow AmeriSteel, an affected resident of the City of Jacksonville, to intervene and participate in the docketed proceeding, and no discovery was performed subsequent to the unnoticed expansion of the scope of the territorial dispute docket, and no record was developed concerning the demarcation of a boundary line within the Jacksonville city limits.

STATEMENT OF THE CASE AND OF THE FACTS

A. Prior JEA and FPL Electric Service Arrangements Affecting the City of Jacksonville

The Jacksonville Electric Authority ("JEA") owns and operates the electric system established by the City of Jacksonville in 1895 (R.2). Under the Jacksonville City Charter and Municipal Code, JEA has the exclusive authority and obligation to provide electric service to all who work and live within the city limits. Section 718.103 of the Jacksonville Municipal Code authorizes JEA to grant permission to other electric utility companies to extend their lines to serve city residents when it is not practical or economical for JEA to furnish the service (R.417).

Based on those limits to its service obligation, JEA has not provided service to every resident electric customer in Jacksonville, but has allowed other utilities to serve some segments of the City. JEA, however, has from time to time revisited its delegation of service to other utilities. For example, Okefenokee Rural Electric Cooperative provided electric service to businesses and residents in northwest portions of Jacksonville for many years. In 1991, JEA determined that it had become economic and practical to provide service to that area, and JEA successfully moved to displace Okefenokee.¹

In 1963, JEA and FPL entered into a territorial agreement setting the boundary lines of their adjacent service areas (R.3). With respect to Duval County,

¹ *Petition to Resolve Territorial Dispute Between Okefenokee Rural Electric Membership Cooperative and Jacksonville Electric Authority*, Docket No. 911141-EU, Order No. PSC-92-1213-FOF-EU.

they agreed the boundary line would be a point midway between the extreme ends of their respective then-existing distribution networks. In 1968, the City of Jacksonville annexed substantial portions of Duval County. FPL continued to serve its pocket of Duval County within the Jacksonville municipal limits after this consolidation (R.5).

In 1974, the Florida legislature enacted changes to Chapter 366 of the Florida Statutes, collectively known as the "Grid Bill"², which authorized the Florida PSC to approve territorial agreements and resolve territorial disputes between and among investor owned utilities, municipal electric systems and rural electric cooperatives. The Grid Bill specifically provided that:

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 electrical 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.

§366.04, Fla. Stat. (1995).

In 1979, JEA and FPL mutually agreed to revoke and cancel the 1963 agreement and filed a new territorial agreement with the PSC. Under this agreement, neither would unilaterally seek a change in the settled boundaries for a period of fifteen years. In Order No. 9363, the PSC approved the new territorial agreement (R.6).

² Ch. 74-196, 1974 Fla. Laws 538 (codified at Fla. Stat. §§ 366.04(2), .05 (7)-(8) (1989).

B. AmeriSteel's Jacksonville Steel Making Operations

In 1974, AmeriSteel Corporation, then known as Florida Steel Corporation, selected a site in the City of Jacksonville for a new steel "mini-mill". Although located within Duval County and the Jacksonville municipal limits, the AmeriSteel mill site receives electricity from FPL (R.354-55). This mill uses an electric arc furnace to melt recycled scrap steel. The resulting molten steel is cast into long strands (billets). The billets are reheated and shaped into rebars and rods that are used for various construction and commercial purposes (R.354).

In 1995, the Jacksonville mill, which has over 260 employees, recycled more than 800 million pounds of scrap steel. This process consumes enormous amounts of electricity and the cost of electricity is a major component of the total cost of operating the mill. Under prevailing FPL rates, the Jacksonville mill pays more than \$10 million annually for electricity (R.356).

In addition to its Florida mills, AmeriSteel operates steel making facilities at three locations in Tennessee and North Carolina. On average, the Jacksonville mill pays electricity rates that are roughly 40% higher than its sister mills in other states (R.417). Further, based on publicly available data, the Jacksonville mill faces a comparable electricity cost disadvantage compared to its competitors (R.357).

In the 1980's, U.S. steel making operations were decimated by lower cost foreign imports. Domestic steel makers were forced to adopt lean cost structures and operate very efficiently in extremely competitive product markets to survive. In these markets, AmeriSteel's Jacksonville mill cannot compete effectively with its current electricity cost disadvantage.

In the summer of 1995, AmeriSteel closed its other remaining steel mill in Florida, a rolling mill located in Tampa, because it was not economically competitive (R.354). The high cost of electricity provided by the local utility (Tampa Electric Company) was cited as a significant factor in the plant closure decision. With the closure of the Tampa mill, the Jacksonville mill has become AmeriSteel's marginal source of production. Since the Jacksonville AmeriSteel mill has the highest production costs and electric rates, it has become the first facility curtailed and the last to return to full production whenever market conditions require such adjustments (R.415).

C. Procedural History of the Territorial Dispute Docket

On March 20, 1995, JEA petitioned the PSC to resolve a growing territorial dispute with FPL concerning service to hundreds of customers in St. Johns County. The customers in question were situated in areas exclusively reserved to JEA by the 1979 territorial agreement approved in Order No. 9363, but were being served by FPL(R.5). JEA asserted that it had accepted FPL's presence in these areas of St. Johns County on a temporary basis, but that it expected to serve those customers itself once it could economically and practically do so, and that that time had arrived due to current and expected growth of the areas in St. Johns County JEA already served (R.7-8).

JEA requested that the actual utility boundary lines in St. Johns County be redrawn to conform to the boundary established by the PSC Order in 1979.

JEA indicated that it was willing to reimburse FPL for distribution facilities FPL had installed, and it proposed to relocate other FPL facilities (at JEA's expense) to FPL's side of the 1979 territorial boundary (R.11). It did not propose to compensate FPL for future customer revenues expected from the contested customer accounts (R.11).

FPL responded that JEA had asked it to serve the customers in question and that JEA should be estopped from claiming that the customers still belonged to JEA. FPL argued that JEA had abandoned those areas of its territory and asked the PSC to redraw the boundary in St. Johns County to correspond with its "modified" service territory (R.50).

The PSC established a docket to hear the dispute and scheduled hearings in the matter (R.60-67; 68-69). After several months of discovery and preparation for the scheduled hearings before the PSC, JEA and FPL jointly requested a delay in the filing of testimony and pre-hearing statements in order to pursue a stipulated agreement over the matters in dispute (R.92-95). The PSC granted this request (R.110-111).

At some point in the off the record settlement discussions, the utilities elected to expand the scope of these settlement talks to matters beyond the disputed customers and facilities in St. Johns County. With no notice of any kind, JEA and FPL began discussing a "comprehensive" settlement of all issues related to their adjacent boundary lines in Clay, Duval and Nassau Counties as well as the St. Johns County issues and concerns. Thus, under the guise of settling the St. Johns County dispute, FPL and JEA negotiated, without any public notice of their agenda,

where the boundary line in Duval County should be drawn, which customers in Duval County should be served by FPL or JEA, and compensation, if any, to be paid for transferred customers, facilities or both.

In October 1995, FPL and JEA filed a comprehensive settlement concerning their territorial areas with the PSC (R.160-329). Pursuant to this settlement, FPL agreed to transfer 390 customer accounts in St. Johns County and 57 accounts in Duval County to JEA (R.162). JEA agreed to transfer 16 customers to FPL and pay FPL \$1,730,000.00 for various facility related costs and customer revenue (R.389).

The settlement was placed on the PSC's conference agenda for November 21, 1995, for the purpose of preliminary Agency action to accept or disapprove the proposed settlement. The PSC Staff summary and recommendation for the conference agenda dated November 8, 1995 provided the first indication to the public that areas other than St. Johns County would be affected by the settlement of this docket (R.331-52).

Pursuant to the separate requests of AmeriSteel and the Mayor of Jacksonville, the PSC deferred consideration of the matter to its February 6, 1996 conference agenda (R.417).

On December 5, 1995, AmeriSteel filed a Motion to Intervene ("Motion") and Objection to the Entry of a Proposed Agency Action (PAA) approving the proposed settlement of the territorial dispute. AmeriSteel stated in its Motion that no notice had been given of the changed scope of the St. Johns County territorial dispute docket, explained its interest in the determination of the Duval County boundary line, described the competitive disadvantage it suffered under FPL's current rates,

and described the impact that closure of the Jacksonville mill and the resulting loss of 263 well compensated, highly skilled jobs would have on the local economy (R.353-58).

On December 18, 1995, FPL filed a Memorandum in Opposition to AmeriSteel's Motion to Intervene and Objection to Preliminary Agency Action (R.360-66). FPL maintained that AmeriSteel lacked standing to intervene in the docket because the settlement did not propose to transfer AmeriSteel's account to JEA. On January 18, 1996, AmeriSteel submitted a response to FPL's Memorandum in Opposition (R.368-75).

In Order No. PSC-96-0158 dated February 5, 1996, the PSC denied AmeriSteel's Motion to Intervene (R.380-84). The Commission concluded that Florida Steel had not established a substantial injury of sufficient immediacy to establish standing to participate as a party in the docket (R.383). The Commission deemed the possibility that FPL's high electric rates would lead AmeriSteel to curtail or cease operation of the Jacksonville mill and the effect of such a plant closure on the Jacksonville economy to be too remote and speculative to warrant a hearing in the docket (R.381). The Commission's Order allowed AmeriSteel to comment on the proposed settlement at the February 6, 1996, Commission agenda conference in this docket.

At the February 6 conference agenda, the Commission heard comments by the Commission Staff, FPL, JEA, AmeriSteel, the Jacksonville Chamber of Commerce and First Coast Manufacturing and voted to approve the territorial agreement. This was not an evidentiary hearing; no testimony or evidence could

be submitted for consideration by the PSC. The Commission issued its Proposed Agency Action (PAA) approving the agreement on February 14, 1996 (R.386-415). On February 17, 1996, attorneys for AmeriSteel received a copy of the PAA.

On, March 5, 1996, AmeriSteel filed a Petition and Protest to the Commission's February 6 Proposed Agency Action to Approve a Territorial Agreement (R.414-423). On this same date, AmeriSteel filed a Notice of Administrative Appeal to the PSC's February 5 Order denying its Motion to Intervene (R.406).

On March 26, 1996, JEA and FPL filed Motions to Dismiss Florida Steel's Protest to the February 5 Order (R.426-445).

On June 10, 1996, the Commission issued its Final Order No. PSC-96-0755 approving the territorial agreement. In the Order, the Commission granted the Motion to Dismiss AmeriSteel's Protest and request for hearings for essentially the same reasons stated in the February 5 Order denying AmeriSteel's motion to intervene (R.498A).

On July 1, 1996, AmeriSteel filed its Notice of Administrative Appeal of the PSC's June 10, 1996 Final Order to this Court.

SUMMARY OF ARGUMENT

The PSC has an obligation to determine if proposed territorial agreements serve the public interest. In this case, the PSC's rulings unreasonably precluded input by affected members of the public into its decision making process, specifically, AmeriSteel, a Jacksonville resident consumer of electricity that is served by FPL rather than the city's municipal electric system (JEA).

The Commission's approval of the territorial settlement has a sweeping and permanent effect that prevents some Jacksonville residents, including the Appellant AmeriSteel, from obtaining service from JEA. The interests of the city residents are very clearly at stake when a municipal electric system proposes not to serve some electric consumers within the city limits. The PSC's disregard of city resident's interests (AmeriSteel) and its definition of customers with a "substantially affected" interest as only those customer accounts the utilities proposed to transfer between them is unreasonably narrow, violates equal protection requirements, and is contrary to the public interest.

In the past, JEA delegated the responsibility to serve the western Duval County area where AmeriSteel's mill is located to FPL because it was not economic or practical to provide this service itself. JEA and FPL, however, made service to customers in Duval County an issue when, without notice of any kind, they expanded the scope of the issues to be resolved in the St. Johns County territorial dispute docket to include all boundary lines between them, including the dividing line through the Jacksonville municipal limits in Duval County.

AmeriSteel has a direct, immediate, and substantial interest in the outcome of this proceeding because it affects its potential for receiving electric service from JEA. As an electricity consumer situated within the Jacksonville municipal limits, AmeriSteel has a right to seek electric service from the municipal electric utility. Further, due to the large quantities of electricity AmeriSteel's recycling process consumes, the existing rate differentials between JEA and FPL and FPL's refusal to address competitive pricing concerns, AmeriSteel has a substantial stake in the outcome of the PSC docket as well.

The PSC provides the exclusive administrative forum for addressing utility territorial boundary issues, but its authority in this area does not extinguish a municipality's prerogative to provide electric service within its boundaries or the right of city residents to seek service from the municipal electric system. Accordingly, the PSC cannot preclude resident electricity customers from having any forum to address their interests in service by the municipal electric system and other pertinent concerns. Yet that is precisely what the PSC has done in this case. The PSC's refusal to allow AmeriSteel the opportunity to participate as a party in this docket was clear error.

The PSC further erred by failing to require JEA and FPL to provide public notice that their settlement discussions would encompass matters beyond the scope of JEA's complaints concerning customer accounts in St. Johns County. Failure to provide any notice of this intent precluded any customers or interested parties from intervening until all issues of consequence had been settled by the

utilities and preliminarily approved by the PSC. The secretive process employed here denied basic due process protection to all affected customers.

Because public notice of the issues in this proceeding was inadequate and a party with a substantially affected interest was improperly denied the opportunity to intervene and participate in this docket, the Final Order of the PSC is not based on substantial, competent evidence.

AmeriSteel requests that the Court reverse and remand the PSC's Final Order with direction to allow AmeriSteel and similarly situated interested parties a meaningful opportunity to participate in the proceeding as parties.

ARGUMENT 1

The PSC Erred In Denying AmeriSteel's Motion To Intervene Because It Constituted An Abuse Of The Agency's Discretion and Effectively Violated AmeriSteel's Equal Protection And Due Process Rights

The Commission's rules allow a "substantially affected " party to protest its proposed action to approve a territorial settlement agreement, and the PSC may institute hearings pursuant to Section 120.57, Fla. Stat. (1995), to address the concerns raised in such a protest. The PSC has unreasonably adopted the view that only customers the utilities actually propose to exchange are "substantially affected" by the territorial agreement. The PSC's policy is an abuse of discretion that unreasonably prohibits the input from electric consumers that live within the municipal bounds of a city that is served by a municipal electric system.

A. AmeriSteel has a substantially affected interest in the outcome of the territorial dispute docket.

The PSC must grant AmeriSteel standing to intervene in the territorial docket if AmeriSteel demonstrates it has substantial interests that will be affected by the PSC's decision in that docket.³ *Calder Race Course v. Department of Business and*

³ The PSC's rules invite interested customers to offer oral or written comments on proposed territorial settlements, and customers having a substantially affected interest may intervene as a party to the Commission's proceedings. Intervening as a party permits a customer to request public hearings, to conduct discovery, to offer testimony and cross-examine witnesses at hearings, to participate in settlement negotiations and otherwise participate fully in matters relating to the docket.

Professional Regulation, 664 So. 2d 297 (Fla. 3d DCA 1995); *Gregory v. Indian River County*, 610 So. 2d 547 (Fla. 2d DCA 1993); *Royal Palm Square Association v. Sevco Land Corporation*, 623 So. 2d 533 (Fla. 2d DCA 1993); *Sullivan v. Northwest Florida Water Management District*, 490 So. 2d 140 (Fla. 1st DCA 1986). Further, an agency may not deny standing to a person having a substantially affected interest by unreasonably narrowing the focus of its inquiry. See *Fairbanks v. Department of Transportation*, 635 So. 2d 58, 60 (Fla. 1st DCA 1994).

Standing to intervene in Florida administrative proceedings has been measured by the two prong test articulated in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). The *Agrico* test requires a person to show that:

- 1) he will suffer injury in fact that is sufficient in immediacy to warrant scheduling a §120.57 hearing; and
- 2) the injury is of a type or nature the proceeding is designed to protect.

In this case, AmeriSteel has a clearly identified interest, *i.e.*, its entitlement under the Jacksonville City Charter as an electric consumer located within the Jacksonville municipal limits to seek service from JEA if it is economic and practical for JEA to provide it. This interest is immediately and permanently affected by the PSC's decision opposing the territorial settlement. Further, because the high rates charged by FPL place AmeriSteel's Jacksonville mill at a serious economic disadvantage and threatens the economic viability of the mill, AmeriSteel has a substantial and immediate interest in the territorial boundary line between JEA and

FPL in Duval County. Thus, AmeriSteel's request to intervene satisfies the first portion of the *Agrico* test.

As to the second prong of *Agrico*, the Grid Bill expressly authorizes the Commission to approve territorial agreements and resolve territorial disputes between investor owned utilities and municipal electric systems such as JEA. The territorial agreement between JEA and FPL will determine which utility serves AmeriSteel's Jacksonville mill. Thus, AmeriSteel is directly affected by the outcome of the PSC's proceeding.

B. The PSC failed to consider AmeriSteel's interest as a resident of Jacksonville.

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. In denying AmeriSteel standing to intervene, the Commission completely failed to address AmeriSteel's right as a city resident to seek service from JEA.

In *Storey v. Mayo*, this court found that an electricity customer located outside a city's municipal limits did not have the prerogative of choosing between an investor owned utility and the municipal electric system. *Storey v. Mayo*, 217 So. 2d 304 (Fla. 1968). At the same time, this Court specifically recognized that city residents do possess such an entitlement.

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.

Id. at 307-308 (emphasis supplied). This docket squarely presents the latter circumstance -- an electric consumer located within the municipal limits that seeks to challenge the municipal electric system's decision not to provide service to the customer directly but rather to delegate that task to another utility. AmeriSteel thus has a right to be heard on these issues.

C. The Grid Bill does not extinguish a municipality's prerogative to provide electric service within its municipal limits.

In vesting authority with the PSC to address territorial issues, the Grid Bill did not extinguish a municipal resident's right to raise its concerns. In 1993, the Florida legislature considered and rejected a bill that would have established state certificated retail service areas. Although supported by FPL, the bill was roundly opposed by municipal and other interests in large part because it also would have stripped municipalities of their statutory and constitutional power to provide electric service within their municipal limits and to condemn the facilities of electric utilities if necessary to do so.⁴ The debate over this bill, however, tacitly acknowledged that existing law, including the 1974 Grid Bill, did not extinguish the rights of

⁴ H.B. 1893. See, Bellack, Richard C. and Martha Carter Brown, *Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, 19 Fla. St. Univ. L.R. 407, (1995).

municipalities to displace investor owned utilities within their municipal limits. Thus, the PSC must grant AmeriSteel standing to intervene because the PSC is the proper forum for hearing a resident customer's claims. The Commission's refusal even to allow AmeriSteel's participation in the docket constitutes a clear abuse of the agency's discretion, denies AmeriSteel its due process rights and equal protection safeguards. The order denying AmeriSteel standing is a reversible error on its face.

D. The PSC failed to take into consideration the interests of all ratepayers.

Under the Grid Bill, the PSC's charge when reviewing a territorial agreement is to determine whether the proposed agreement "works no detriment to the public interest." *Utilities Commission of the City of New Smyrna Beach v. Florida Public Service Commission*, 469 So. 2d 731 (Fla. 1985). The PSC is required to consider the interests of all ratepayers of the utilities involved, and cannot limit itself to the effect of the agreement on transferred customers. 469 So. 2d at 732. The Commission's process in this docket, however, provided that only transferred customers were given notice and the opportunity to intervene. The Commission cannot reasonably consider the interests of all ratepayers of the utilities involved if it will grant standing to participate only to customers the utilities propose to transfer.

Justice Ervin warned in *Storey v. Mayo*,⁵ that the Commission's process for resolving territorial issues must assess the public interest rather than the convenient interests of the utilities. That warning has not been heeded. The Commission rulings in this docket indicate that customer input into what constitutes the public interest is not particularly welcome. The PSC abused its discretion in denying AmeriSteel the opportunity to intervene.

Further, the Commission's refusal to consider the effect that price differentials between FPL and JEA may have on local manufacturing and the Jacksonville economy constitutes a clear abuse of discretion. The Commission must determine if the territorial settlement agreement works as a detriment to the public interests. The factors it can, and should, consider are **not limited** by the items listed in the Grid Bill.⁶ Its basic charge is to consider any factors that are pertinent in determining if the public interest requires its disapproval of a proposed territorial agreement. Issues to be considered cannot simply be limited to avoiding uneconomic duplication of facilities and adequacy of service. Once informed that economic competitiveness of businesses within the city municipal limits were, or could be, significantly affected by FPL and JEA rate differentials, the PSC had an obligation at least to allow these matters to be explored on the record.

⁵ *Storey v. Mayo*, 217 So. 2d 304, 308 (Ervin, J. dissenting).

⁶ §336.04 F.S., see Rule 25-6.0441(2).

Moreover, while these concerns would be pertinent issues at any time, the trend toward increasing competition and customer choice in the electric industry⁷ makes the effects of these price differences a pressing matter today.

Finally, the standing of a resident customer to participate in agency proceedings concerning the service area of the municipal electric system within municipal limits is not a matter requiring special regulatory expertise. The Commission's ruling on standing, therefore, should receive no deference from the court.

⁷ The Edison Electric Institute lists Florida as one of 44 states that have undertaken legislative or regulatory initiatives to consider allowing retail customer choice. Further, in July 1996, Representative Dan Schaefer introduced a bill before the House Energy and Power Subcommittee to require retail choice of power suppliers for all electricity consumers by the year 2001 (H.R. 3790 "The Electric Consumers Power to Choose Act").

ARGUMENT 2

The PSC's Final Ruling is not Supported by Competent, Substantial Evidence and the PSC's Failure to Require Notice of the Changed Scope of the Territorial Dispute Docket Denied AmeriSteel and Similarly Situated Customers Their Due Process Safeguards Protected by Florida Law

The JEA petition that initiated this docket addressed only FPL's encroachment into areas in St. Johns County reserved to JEA under the 1979 territorial agreement approved by the Commission in Order No. 9363 (R.1-12). This territorial dispute, therefore, originally did not raise issues of consequence to AmeriSteel because JEA's petition complained only of FPL's cross territorial service to customer accounts in St. Johns County.

FPL's response and the subsequent pleadings in the docket in the ensuing six months addressed only the contested St. Johns County customer accounts and facilities described in JEA's petition. No notice was given that other customers, boundary lines in other counties between the utilities, or other facilities were in any way the subject of this docket until a new territorial agreement had been reached.

In June, 1995, JEA and FPL jointly petitioned for a delay in the case schedule. They stated that they had already undertaken settlement discussions and that the public interest, and those of the utility parties, would be best served by extending the established filing dates by a month or more in order to concentrate on settlement negotiations (R.92). The utilities gave no indication that matters beyond the St. Johns dispute were being discussed.

On August 16, 1995, JEA filed another motion to extend the filing dates in the case in which it asserted that the utilities were very close to an agreement on "this matter" (*i.e.*, JEA's petition concerning the St. Johns dispute) (R.143). Again, absolutely no indication was given that additional, non-St. Johns County matters were topics for discussion. In short, no notice was given that the scope of the proceeding had changed.

The territorial agreement ultimately proposed by JEA and FPL in October, 1995, however, opened for discussion and proposed to resolve issues concerning the boundary line in Duval County. AmeriSteel's interests as an electric consumer situated within the Jacksonville municipal limits were placed in issue when the Duval County line became a settlement issue. Customers located within the Jacksonville municipal limits were never notified that the scope of the docket had changed unless, under the agreement, the utilities proposed to exchange them.

Public policy favors observing traditional due process rights in Commission proceedings. See, *Citizens v. Mayo*, 333 So. 2d 1 (Fla. 1976) (addressing basic procedural rights of parties in rate cases). Adequate public notice of the substance and scope of Commission dockets is a basic requirement. Non-statutory parties, especially electricity consumers, must be able to determine if a regulatory matter warrants the time and expense of their participation. They can do this only if fair notice is given of the issues under consideration in a docket. Such notice obviously never occurred in this case.

The PSC has an affirmative obligation to notify any persons whose substantial interests may be affected by a determination in its dockets.⁸ Thus, the Commission must allow a customer having interests that could be substantially affected by its determination in a docket to intervene as a party in the docket, and it should seek out potentially affected persons if the scope of the docket changes. In this case, no effort was made to disclose the expanded scope of the territorial dispute docket to city residents until the utilities had settled all matters of substance.

The notice and publication requirements of the Florida Administrative Code are intended to inform interested parties and the public at large of regulatory proceedings that may affect their interests. Indeed, their very purpose is to prevent unannounced actions such as that proposed by these utilities and sanctioned by the PSC in this docket.

Further, the ability to file a protest does not resolve the underlying notice failure in this case. Any party allowed to participate for the first time following the proposed Commission approval order faces a serious uphill battle because the utilities have already ironed out a package that the PSC has tentatively blessed. Had adequate notice of the scope of the matters in issue been given, AmeriSteel or other interested parties may have moved to intervene far earlier in the proceeding, conducted discovery that would have supported testimony and a record upon which the PSC could have rendered a decision based on competent,

⁸ Fla. Admin. Code R. 25-22.025(2) provides:

if it appears that the determination of the rights of parties will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer should notify the persons and give them an opportunity to be joined as a party of record.

substantial evidence and could have participated in the settlement discussions. In any event, in this case, as discussed above, the notice error was compounded by the Commission's refusal to grant AmeriSteel intervenor status and, subsequently, the denial of AmeriSteel's protest on standing grounds. The failure of adequate notice after the material expansion of the areas affected by the agreement, however, provides separate grounds for reversing the Commission's Final Order.

Finally, if this Court determines that the PSC properly denied AmeriSteel standing to intervene in the territorial dispute proceeding, AmeriSteel will have been precluded from any forum capable of addressing its concerns. AmeriSteel requests this Court hold that the PSC's authority to resolve territorial dispute does not preclude AmeriSteel from pursuing remedies in the Courts to protect its interests in receiving electric service from JEA.

CONCLUSION

For the reasons stated herein, AmeriSteel requests this Court to reverse the order of the PSC with directions to allow AmeriSteel and similarly situated customers an opportunity to participate as parties in hearings to be held concerning the territorial boundary between JEA and FPL, or, in the alternative, rule that AmeriSteel is not precluded from pursuing remedies in the courts to protect its interests in receiving electric service from JEA.

Respectfully submitted,

FLORIDA STEEL CORPORATION

By: _____

Richard J. Salem
Florida Bar No. 152524
Marian B. Rush
Florida Bar No. 373583
Salem, Saxon & Nielsen, P.A.
Suite 3200, One Barnett Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602
Phone: (813) 224-9000
Fax: (813) 221-8811

Peter J.P. Brickfield
James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
Eighth Floor, West Tower
Washington, DC 20007
Phone: (202) 342-0800
Fax: (202) 342-0807

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of AmeriSteel Corporation's Initial Brief on the Merits has been furnished via Federal Express on the 12th day of September, 1996, to the following:

Robert D. Vandiver, Esq. and
David E. Smith, Esq.
Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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

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

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


MARIAN B. RUSH

F:\CL\FLSTEEL\intbrief.2