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IN THE SUPREME COURT
STATE OF FLORIDA

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AmeriSteel Corporation)	Case No. 88,427
f/k/a Florida Steel Corporation,)	
)	
Appellant,)	
)	
-v-)	
)	
Susan F. Clark, et al.,)	Appeal from Public Service
)	Commission Docket No. 950307-EU
Appellee.)	

**REPLY BRIEF OF APPELLANT
AMERISTEEL CORPORATION**

*Accepted
as is
S.-J.W.*

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TABLE OF CONTENTS

JURISDICTION 1

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW IN REPLY BRIEF 2

STATEMENT OF THE CASE AND OF THE FACTS 2

SUMMARY OF REPLY ARGUMENTS 3

ARGUMENT 1 5

The Commission Abused its Discretion in Denying
AmeriSteel's Request to Intervene in the Territorial
Dispute Docket 5

A. The Territorial Agreement Causes AmeriSteel
Immediate Injury In Fact 5

B. The Decision in *Storey v. Mayo* Directly Supports
AmeriSteel's Position 6

C. The Appellees Concede That The "Grid Bill"
Does Not Extinguish A Municipality's Power To Serve
City Residents 8

D. The PSC's Process Unreasonably Precludes
Meaningful Public Input Into Its Determination
of Whether the Territorial Agreement is in the
Public Interest 9

ARGUMENT 2 14

JEA's Authority To Enter Into A Territorial Agreement
Has No Bearing On AmeriSteel's Standing 14

ARGUMENT 3 15

The PSC Did Not Ensure That Adequate Public Notice
Was Given in Light of The Substantial Matters 15

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

STATUTES

Florida Statutes (1995):	
§ 366.04.	8, 9

RULES

Florida Administrative Rules:	
Fla. Admin.Code R. 25-6.0440(2).	9, 11
Fla. Admin Code R. 25-22.026(2).	16, 17

CASES

<u>Agrico Chem Co. v. Department of Environmental Regulation,</u> 406 So. 2d 478 (Fla. 2d DCA 1981).	5
<u>Storey v. Mayo,</u> 217 So. 2d 304, 307-308 (Fla. 1968).	6, 7, 8, 13
<u>U.S. Sprint Communications Co. v. Nichols,</u> 534 So. 2d 698 (Fla. 1988).	6
<u>Utilities Commission of New Smyrna Beach</u> <u>v. Florida Public Service Commission,</u> 469 So. 2d 731 (Fla. 1985).	9
<u>Lee County Elec. Coop. v. Marks,</u> 501 So. 2d 585 (Fla. 1987).	9, 10, 11
<u>Fairbanks v. Department of Transportation,</u> 635 So.2d 58, 60 (Fla. 1 st DCA 1994).	11
<u>Florida Power Corp.v. Public Service Commission,</u> 487 So. 2d 1061 (Fla. 1986).	11

ORDERS OF THE FLORIDA PUBLIC SERVICE COMMISSION

Order No. PSC-92-0058-FOF-EU. 8
Order No. PSC-04-0909-PCO-EU, 94 PSC 340 (1994). 10

OTHER REFERENCES

H.B. 1863. *See Ballack, Richard C. and Martha Carter
Brown, Drawing the Lines: Statewide Territorial
Boundaries for Public Utilites in Florida*, 19 Fla. St. U.
L.Rev. 407, (1995). 8

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 Honorable 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. References to JEA, FPL, and the PSC, jointly, will be made as “Appellees”. “IB at ____” refers to a specific page in AmeriSteel’s Initial Brief; “JEA at ____” refers to a specific page in JEA’s Answer Brief; “FPL at ____” refers to a specific page in FPL’s Answer Brief; “PSC at ____” refers to a specific page in PSC’s Answer Brief.

ISSUES PRESENTED FOR REVIEW IN REPLY BRIEF

The Appellant stated the issues for this Honorable Court's review in its Initial Brief. The issues set forth in this Reply Brief are responsive to the arguments set forth in the three Appellees' Briefs filed by the Public Service Commission, the Jacksonville Electric Authority, and Florida Power & Light Corporation. These issues are set forth below as follows:

1. Whether the Commission abused its discretion in denying AmeriSteel's request to intervene in a territorial dispute docket?
2. Whether JEA's authority to enter into a Territorial Agreement has any bearing on AmeriSteel's standing in the Docket?
3. Whether the PSC insured adequate public notice was given considering the substantial matters at stake?

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and of the Facts set forth in its Initial Brief are accurate. Accordingly, AmeriSteel adheres to its original Statement of the Case and of the Facts.

SUMMARY OF REPLY ARGUMENTS

The Appellees acknowledge that each City of Jacksonville resident is entitled to electric service from the Jacksonville Electric Authority (JEA) unless JEA properly delegates that responsibility to another utility through a territorial agreement approved by the PSC. While JEA is empowered to enter into a territorial agreement with FPL, the applicable case law confirms that every city resident served by FPL rather than JEA has a right to question and challenge JEA's basis for not serving that resident.

Once JEA and FPL modified the scope of the St. Johns County territorial dispute to include the territorial boundary line passing through the Jacksonville municipal limits in Duval County, the PSC docket that is the subject of this appeal became the proper regulatory forum for city residents to be heard. It is immaterial that JEA and FPL agreed to confirm the historic boundary line. Whether JEA and FPL agreed to confirm the existing boundary or shift the line 100 feet or 2 miles in either direction, JEA and FPL placed the location of the boundary line through the city as an issue to be resolved in the docket before the PSC. The PSC has jurisdiction over these issues pursuant to the Grid Bill. The Commission unreasonably and impermissibly narrowed the scope of its factual review in this docket and prevented the participation of a city resident, AmeriSteel, from participating as a party in the proceeding.

The PSC also erred by disregarding the economic effect of its decision. The Commission unreasonably excluded customer concerns from its required inquiry to determine whether the proposed new territorial agreement would serve the "public

interest". The PSC's disregard for economic and customer concerns in the docket below is directly at odds with competitive pricing and economic development issues that the PSC is confronting daily in dockets that pervade its regulatory agenda calendar. Further, the PSC's reasoning in dismissing the interests of customers as irrelevant succeeds only in describing a process suited solely to the convenience of the utilities, where public input into what constitutes the public interest is affirmatively discouraged. This is a clear abuse of the PSC's discretion.

Finally, the Appellees' arguments on standing presume the outcome on the merits of matters AmeriSteel was never afforded an opportunity to pursue. The Commission erred in refusing to allow AmeriSteel to intervene as a party in this docket. The PSC cannot correct that error by presuming AmeriSteel's participation would not have altered the course of the proceeding or the terms of the proposed settlement. Because of these errors, the PSC's order should be reversed and remanded. AmeriSteel should be allowed to participate fully in all further PSC proceedings in this docket.

ARGUMENT 1

The Commission Abused its Discretion in Denying AmeriSteel's Request to Intervene in the Territorial Dispute Docket

There is no dispute that absent a territorial agreement, JEA would be obliged to serve AmeriSteel. Thus, AmeriSteel has a legal entitlement to seek service from JEA. The Appellees admit that entitlement is eliminated by the proposed territorial settlement because the new territorial agreement prohibits JEA from serving AmeriSteel. This constitutes injury in fact to AmeriSteel. This injury is substantial because there are significant rate differentials between FPL and JEA, as well as materially different policies regarding economic development. These factors go to the heart of the economic viability of AmeriSteel's Jacksonville mill today. AmeriSteel has demonstrated that it meets the criteria set forth in *Agrico Chem Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), to establish standing to intervene in the territorial dispute docket. The PSC's order denying standing was, therefore, an abuse of discretion and denied AmeriSteel its due process and equal protection rights.

A. The Territorial Agreement Causes AmeriSteel Immediate Injury In Fact

The PSC, FPL and JEA assert that AmeriSteel is not substantially affected, because the new territorial agreement does not change AmeriSteel's electric supplier, *i.e.*, AmeriSteel currently is a customer of FPL and would remain a customer of FPL under the new territorial agreement (PSC at 10-11). At the same time, the Appellees concede that the new territorial agreement prohibits JEA from serving AmeriSteel by prohibiting cross-territorial boundary service arrangements

(JEA at 21). None of the Appellees attempt to explain how a new territorial agreement that cuts off a city resident's right to service from a municipal electric utility avoids affecting the vested interest of that consumer.

The Appellees also contend that the AmeriSteel is not substantially affected because its rates would not change as a result of the new territorial agreement. This argument presumes the outcome of the proceeding would have been unchanged if AmeriSteel had been allowed to intervene as a party.¹ The PSC, however, cannot presume an outcome in order to deny standing to an interested party.

Further, as addressed more fully at pages 9-13 herein, AmeriSteel's claim of economic harm is neither speculative nor remote. As explained in its Motion to Intervene, AmeriSteel's Jacksonville facility currently faces a substantial electricity cost disadvantage compared to the company's facilities in other states and its competitors that are served by other utilities. (R. 353).

B. The Decision in *Storey v. Mayo* Directly Supports AmeriSteel's Position

The Appellees rely upon *Storey v. Mayo*, 217 So. 2d 304, 307-308 (Fla. 1968), for the proposition that individual customers do not have a constitutional, statutory or "organic" right to select an electric utility provider. However, this Court's decision in *Storey* squarely supports AmeriSteel's position. In *Storey*, FPL and the City of Homestead had been competing to serve non-municipal suburban areas

¹ The PSC's order approving this new territorial agreement completely reestablishes the service obligations of JEA and FPL in lieu of resolving the St. Johns County dispute on the merits or canceling the pre-existing territorial agreement in its entirety, as FPL requested in its Second Amended answer. (R. 76). Thus, the PSC reference to *U.S. Sprint Communications Co. v. Nichols*, 534 So. 2d 698 (Fla. 1988), a case involving the correction of a rate calculation error, is inapposite.

outside Homestead. *Storey*, 217 So. 2d at 304. The city and FPL reached a territorial agreement regarding service in these suburban areas. The Petitioners in *Storey* were opposed to being transferred from FPL to the Homestead municipally owned electric utility system. In holding that these customers did not have a right to compel service from the investor owned utility, the court expressly distinguished the rights of city residents to service by the city. The decision, cited and quoted by all parties to this appeal states, in pertinent part:

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.

Id. at 307 (emphasis supplied). Through the underscored statement, this Court in *Storey* expressly reserved the rights and entitlements of city residents, such as AmeriSteel, to be serviced by a municipal electric system. The PSC and other Appellees seek to ignore this right by dismissing this language as mere dicta. To the contrary, this underscored statement unmistakably preserves the constitutional and legal entitlement of city residents to compel such service. Id. at 308. The Appellees' efforts to rewrite the *Storey* decision must be rejected.

C. The Appellees Concede That The "Grid Bill" Does Not Extinguish A Municipality's Power To Serve City Residents

Each party discussed the applicability of the "Grid Bill", § 366.04, Fla. Stat. (1995), to the precedent established in *Storey v. Mayo*. See PSC at 14; FPL at 14-15; JEA at 13. When all is said and done, the Appellees ultimately concede that a municipality's power to provide electric service within municipal limits remain intact.² PSC at 13. In its Brief, the Commission observed only that this "right is not inviolable". (See, Order No. PSC-92-0058-FOF-EU). In plain English, this means that municipal acquisition of utility facilities within municipal bounds must be accomplished fairly and consistently, within the public interest parameters of the Grid Bill and pursuant to PSC review.³ As applied in the instant case, the PSC has jurisdiction to review the new territorial agreement in accordance with the public interest criteria in the Grid Bill, and, therefore the PSC's St. John's County Territorial Dispute docket provides the correct forum to hear AmeriSteel's claims and concerns.

The PSC incorrectly claims it is not the proper forum for hearing city residents' complaints. (PSC footnote at 16). By approving the new territorial

² Significantly, legislation was introduced in 1991 that would have eliminated the rights of local governments to condemn facilities of electric utilities in order to acquire the right to provide electric service within their governmental boundaries. (Fla. HB 1863 (1991)). This proposal died in committee due in part to the strong arguments of municipalities that a constitutional amendment was required to strip municipalities of this authority. See *Ballack, Richard C, and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, 19 Fla. St. U. L. Rev., 407, 422-427 (1991).

³ In *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, JEA attempted to displace Okefenoke Rural Electric Cooperative as the service provider to the Holiday Inn near the Jacksonville airport by switching meters and service connection without prior notice of any kind to the cooperative. In Order No. PSC-92-0058-FOF-EU, the PSC eventually approved JEA's complete displacement of the cooperative within Jacksonville city boundaries, but required that adequate compensation be paid.

agreement or entering an order resolving a territorial dispute, the PSC necessarily determined which residents JEA may and may not serve. The Commission's illogical disregard of the effect of its own order makes no sense, especially in light of its express authority under the Grid Bill.

D. The PSC's Process Unreasonably Precludes Meaningful Public Input Into Its Determination of Whether the Territorial Agreement is in the Public Interest

All parties agree that the PSC must determine if the agreement serves the public interest, applying the "no detriment" test articulated in *Utilities Commission of New Smyrna Beach v. Florida Public Service Commission*, 469 So. 2d 731 (Fla. 1985). Section 366.04 (2), Fla. Stat., and Fla. Admin. Code R. 25-6.0440 (2), expressly do not limit the factors the PSC may consider in attempting to determine where the public interest lies. In what is perhaps the most disturbing aspect of the PSC's decision, the Commission denies AmeriSteel standing by adopting an unconscionably narrow view of the factors it is willing to consider before approving territorial agreements. Indeed, the PSC has self-imposed such a limited scope of review that public (*i.e.*, non-utility) input in these dockets is actively discouraged.

The Appellees improperly seek to extend the holding of *Lee County Elec. Coop. v. Marks*, 501 So. 2d 585 (Fla. 1987), to read that customer concerns are not even germane in territorial dockets (PSC at 12). Such an extension would conflict with the public interest parameters in the Grid Bill. It is instructive that *Lee County* involved an instance where FPL attempted usurp one of the Lee County Cooperative's largest customers without notice or consultation with the cooperative. Florida Mining and Minerals Corporation (FMM), a customer of the cooperative

located within the cooperative's service area, constructed two miles of transmission lines to establish a connection point within FPL's service territory. With the new connection point, FPL sought to serve FMM as a new load within its service territory as if its territorial agreement with Lee County was unaffected by this action. *Lee County*, 501 So. 2d at 586. The PSC blessed this overt raid on the cooperative's service area, but was reversed by this Court. In so doing, this Honorable Court held that the PSC had misapplied the Grid Bill because it unreasonably found that Lee County failed to allege a violation of its territorial agreement with FPL. *Id.* This Court also stated in *Lee County* that individual customer interests may not outweigh the public interest, but did not hold that individual customers and their legitimate concerns are not entitled to a fair hearing in territorial boundary cases. Thus, the *Lee County* Court faulted the PSC for viewing its responsibilities under the Grid Bill too narrowly. The PSC's decision denying AmeriSteel standing to intervene unreasonably deems individual customer concerns irrelevant to where the public interest lies.

Further, the official yet inconsistent PSC policy is that customer concerns regarding rate differentials or dissatisfaction with service quality are not factors the PSC will consider in approving territorial agreements. *Petition of Florida Power and Light Company for Resolution of a Territorial Dispute with Fort Pierce Utilities Authority*, Order No. PSC-04-0909-PCO-EU, 94 PSC 340 (1994). In effect, any customer having the temerity to challenge utility plans to divvy up exclusive service areas is branded as self-serving and dismissed by the PSC.

The principal interests of electricity consumers concern price and service quality. These are, after all, the factors that are most immediately important to consumers. Indeed, it is for these reasons that customers who were slated to be transferred by this new territorial agreement were provided monthly bill comparisons to allow them to compare how rate differentials between the utilities would affect their monthly power costs for a given level of energy usage. (See, R. 162-63 and Notification Letters at R. 189-92). The economic interests of customers and the ramifications of rate differentials among the competing utilities must be considered by the PSC in its deliberations. Individual customer concerns may or may not be dispositive factors, but they must at least be taken into consideration.

Florida Laws and Florida Rules are not explicit regarding the PSC's consideration of rate differentials (JEA at 13). However, the Laws and Rules, such as Fla. Admin. Code. R. 25-6.0440(2), clearly intend that the PSC should consider any factors pertinent to a determination of the public interest. JEA contends that the PSC is entitled to great deference in the factors it considers (JEA at 13), but as explained in AmeriSteel's Initial Brief, it cannot adopt an unreasonably narrow scope of inquiry to deny a party standing. *Fairbanks v. Department of Transportation*, 635 So. 2d 58, 60 (Fla. 1st DCA 1994); see, *Florida Power Corp. v. Public Service Commission*, 487 So. 2d 1061 (Fla. 1986); see also, *Lee County*, 501 So. 2d 585.

Further, if it were ever true that rate differences among utilities did not matter in assessing the public interest, that certainly is not the case today. The singular topic of debate today in the electricity industry is increasing price competition. Florida utilities, like those throughout the country, have been preparing for greater price competition for five years or more. Federal and state rate regulators alike are

consumed with matters relating to restructuring of the electric industry and price competition. Rate differentials among utilities are the focal point of these debates.

In Florida, the PSC has been conducting a series of forums this year under the auspices of the Public Utility Research Center at the University of Florida to explore these issues. More importantly, in the last year the PSC has approved a series of flexible pricing tariffs for municipal electric systems⁴ and utilities⁵ and has established a generic docket on flexible pricing. These flexible pricing tariffs are intended to allow utilities to price electric services more aggressively in order to attract or retain customers that may move elsewhere. In July 1996, JEA announced it had negotiated a discounted ten year power supply agreement with the local naval base. More recently, JEA filed a new service rider with the PSC that models the JEA/Navy agreement by offering discounts that increase according to the years a customer commits to taking service from JEA.⁶

As a very large consumer of electricity that operates facilities in several states, AmeriSteel is very familiar with economic development rate plans available throughout the southeast. AmeriSteel was forced to close its Tampa facility in 1995 in large measure due to high energy costs. The cost of electricity at its Jacksonville mill is significantly higher than its own mills in other states and the prices paid by its principal competitors.

⁴ PSC Docket No. 960844-EM, City of Homestead; PSC Docket No. 960680-EM, City of Lakeland; PSC Docket No. 951255-EM, Ft. Pierce Electric.

⁵ PSC Docket No. 960950-EI, Generic Investigation into Load Retention and Load Building Rates for Investor-owned Electric Utilities.

⁶ JEA Multiple Account Load Improvement Rider Tariff, Docket No. 960789-EI.

The PSC's finding that the economic viability of one of the largest employers of skilled manufacturing employees in northeast Florida was irrelevant to its considerations, while it simultaneously has begun to permit *de facto* price competition for large customer loads, is alarmingly inconsistent. JEA's support for the PSC's ignoring AmeriSteel's economic viability is disingenuous at best, given JEA's parallel efforts to price electricity it sells to large customer loads more competitively through new tariff offerings.

Justice Ervin warned in *Storey* that the PSC's process for approving territorial agreements must not simply accommodate the convenience and economic self-interests of the utilities involved. *Storey*, 217 So. 2d at 309 (Ervin, J., dissenting). The new territorial agreement obviously serves the corporate self-interests of the utilities,⁷ but how this equates to serving the public interest has never been shown, probably because public input from affected parties such as AmeriSteel was not permitted into the PSC's decision-making process.

⁷ JEA has a constitutional right and a statutory duty to serve all city residents. AmeriSteel, as a city resident, has a legal right to seek service from JEA. Only FPL has no constitutional, statutory, or "organic" right to provide electric service to Jacksonville city residents. It has no right to demand to serve city residents at all except as secured from JEA through a territorial agreement. While FPL expresses certain expectations based on its historic presence, the utility's claim derives from a delegation from JEA as approved by the PSC.

ARGUMENT 2

JEA's Authority To Enter Into A Territorial Agreement Has No Bearing On AmeriSteel's Standing

Where a municipal electric system has limited authority to delegate service responsibility within the municipal boundaries to other utilities, compliance with those restrictions is a threshold issue for the PSC's public interest determination. In this case, the Jacksonville City Charter provides that JEA may delegate its service area responsibility within the city limits to FPL only if it is not practical and economic for JEA to provide this service. Compliance with these requirements of the City Charter is, therefore, an issue to be resolved in the PSC's docket.

JEA deems it significant that AmeriSteel did not challenge JEA's authority to enter into the territorial agreement with FPL. JEA at 4. JEA's authority to sign a territorial agreement has no direct bearing on the issues in this appeal. AmeriSteel has acknowledged from the outset that JEA's charter permits it to delegate responsibility to serve some areas of the city to other utilities where it was not economic or practical for JEA to do so. (R. 417; IB at 3). However, JEA's authority to enter into a territorial agreement does not address AmeriSteel's right to intervene to challenge any or all portions of the new territorial agreement as not being in the public interest. The PSC docket serves to allow substantially affected parties to question whether or not the agreement entered into by JEA satisfies the public interest standard. Thus, JEA's authority to enter into the agreement has no bearing on AmeriSteel's standing to intervene and to question that agreement on the PSC docket.

ARGUMENT 3

The PSC Did Not Ensure That Adequate Public Notice Was Given in Light of The Substantial Matters

The PSC and the utility Appellees maintain that adequate public notice was given of matters in this docket, that AmeriSteel was not entitled to public notice of the changed scope of the proceeding, that subsequent pleadings filed by the parties (*i.e.*, FPL's Second Amended Answer) somehow constitutes public notice of the changed scope, and that the issuance of the Commission's Preliminary Agency Action approving the final settlement terms provided adequate public notice and an opportunity to intervene. None of these arguments reach the basic procedural defect that AmeriSteel has raised in this case.

The PSC docketed this matter entitled "**In Re. Petition Of Jacksonville Electric Authority To Resolve A Territorial Dispute With Florida Power & Light Company In St. Johns County, Docket No. 950307-EU.**" A party receiving notice of this docket that took the time to read JEA's petition would quickly see that the issues raised had absolutely no bearing on electric customers in Duval County. Appellees and the PSC concede that no notice was given of the material change in scope of the proceeding from a territorial dispute over service to customers in St. Johns County only to a comprehensive negotiation of a settlement of a territorial agreement involving all boundary lines between FPL and JEA, including specifically the dividing line through the City of Jacksonville in Duval County.

Nonetheless, the Commission maintains the public had the burden of figuring this out by reviewing every pleading in the St. Johns County docket. According to the PSC, it is the responsibility of an interested person to review every pleading and

paper filed in every docket before the Public Service Commission to ascertain when and where ones substantial interests are being affected (See PSC at 5). If tolerated, such an onerous burden would not remotely satisfy the requirements of public notice of the issues before the Commission.

Further, once an agreement was reached, the Commission says it had no obligation to look beyond that document in granting its approval. (PSC at 8). The combination of the lack of notice as to the real issues at stake and the Commission's summary review of the agreement creates a process where public participation is discouraged until a point has been reached where such participation is pointless.

The Commission notes that once the PAA was issued, AmeriSteel had an opportunity to file a protest and request to intervene.⁸ This argument, of course, misses the point raised in AmeriSteel's Initial Brief. By the time the PAA was issued, FPL and JEA had already addressed all outstanding issues in dispute, including the disposition of customer accounts in Duval County. Since AmeriSteel and any other intervenor would be forced, after issuance of the PAA, to "take the case as they find it," interested parties were materially disadvantaged by the PSC's failure to require public notice of the changed scope of the proceeding.

The Commission acknowledges that Fla. Admin. Code R. 25-22.026(2) provides that a prehearing officer may require notice to persons whose interest will

⁸ AmeriSteel filed such a protest, which the PSC dismissed for the reasons cited in its order denying AmeriSteel standing. If AmeriSteel had been granted standing, it would have been able to participate as a full party in the subsequent hearings.

necessarily be determined by the proceedings.⁹ PSC at 20. Clearly, this is an instance where the scope of the territorial dispute docket changed dramatically. Adequate notice should have been given to customers in counties other than St. Johns that the PSC was considering altering their vested rights.

The purpose of the Florida Administrative Procedure Act is to ensure that the public is made aware of regulatory actions that may affect the public. In this case, given the PSC's statement that it had no obligation to look beyond the agreement itself, the absence of the adequate public notice of the change in scope of the territorial docket, the PSC's process unreasonably and unlawfully precluded meaningful public participation by AmeriSteel.

⁹The Appellees' argument that Fla. Admin. Code R. 22-2206(2) is not applicable is arrived at by the PSC assuming that AmeriSteel could not show actual harm. This circular reasoning defies logic. The PSC cannot assume a result to justify its lack of notice. A presumed end cannot justify an illegal means.

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 interest in receiving electric service from JEA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant AmeriSteel Corporation has been furnished via U.S. Mail on the 1st day of November, 1996, to the following:

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