IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS,
INDIAN RIVER COUNTY, FLORIDA,

Appellant(s),

vs.

ART GRAHAM, ETC., ET AL.

Appellee(s).
_____/

Supreme Court Case Nos.:
SC15-504 & SC15-505
Lower Tribunal Nos.:
140142-EM & 140244-EM

FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.'s AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF INTEREST

The Florida Electric Cooperatives Association, Inc., ("FECA") is a not-for-profit trade association and the service organization for fifteen of the sixteen electric distribution cooperatives that sell retail electricity directly to their member customers in Florida, and for two generation and transmission electric cooperatives that generate, purchase, and transmit electricity for sale to their member distribution cooperatives at wholesale.[1] FECA's member cooperatives are nonprofit membership corporations organized under chapter 425, Florida Statutes, for the purpose of supplying reliable electric energy to their member customers at the lowest possible cost, and are defined and regulated by the Florida Public Service Commission ("Commission") as "electric utilities" under section 366.02(2), Florida Statutes (2014). Florida's electric cooperatives currently serve approximately 2.4 million customers in 57 counties throughout Florida.

The issues raised by the Appellant in this appeal are of great interest to FECA and its member electric cooperatives. The Appellant sought a declaration

[1] FECA's members include the following electric cooperatives: Central Florida Electric Cooperative, Inc., CHELCO, Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenoke Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., PowerSouth Energy Cooperative, Seminole Electric Cooperative, Inc., Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., and Withlacoochee River Electric Cooperative, Inc.

on 14 questions, most of which relate to the effect of the expiration of a franchise agreement between a non-charter county and a municipal electric utility and whether Indian River County's ("County" or "the Board") authority to choose its electric supplier is superior to the Commission's jurisdiction. The Commission granted FECA amicus curiae status (R. 262-64) and FECA filed written comments in opposition to the Board's Petition (R. 229-39) that are based upon the Commission's "exclusive and superior" jurisdiction pursuant to section 366.04(1), Florida Statutes (2014), and the need for electric utilities to utilize long term planning to efficiently provide reliable and affordable electric service to Floridians. Subsequently, the City of Vero Beach ("COVB") filed a petition for declaratory statement asking the Commission to determine that the expiration of the franchise agreement would have no effect on its right and obligation to provide service in the areas of unincorporated Indian River County where the City presently serves. The Commission granted FECA amicus curiae status (R. 869-71) and FECA filed written comments in support of COVB's petition. FECA also participated in the oral argument for both petitions. (R. 579-88) FECA believes the decision in this consolidated appeal could have far-reaching impacts on the ability of electric utilities to utilize long term planning to efficiently provide reliable and affordable electric service to Floridians.

SUMMARY OF THE ARGUMENT

On appeal are two Commission orders dealing with requests for declaratory statements, one requested by the Board and the other by COVB. From FECA's perspective, the key underlying issue in both requests is whether the Commission or a non-charter county has the ultimate authority to determine which electric utility will serve within certain areas of unincorporated Indian River County when the existing franchise agreement between the COVB and the Board (the "Franchise Agreement") expires. Based upon the Commission's orders approving the territorial agreement between COVB and Florida Power & Light Company, which will remain in effect after the Franchise Agreement expires, and upon its "exclusive and superior" jurisdiction granted by the Legislature[2] to resolve territorial issues, the Commission issued its Order No. PSC-15-0102-DS-EM (the "Order") declaring "that Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in Territorial Orders upon expiration of the Franchise Agreement." (R. 1050). The Commission's Order is consistent with the clear language of section 366.04, Florida Statutes (2014), and with this Court's decisions regarding the Commission's jurisdiction to determine which utility shall serve a particular area or customer. The Order also is consistent with the need for electric utilities to rely on Commission-approved territorial

[2] § 366.04(1), Fla. Stat.

agreements to define the service areas they must plan to serve now and in the future. Moreover, the Order is entirely consistent with the Board's statement that "the expiration of the Franchise Agreement, by itself, has no direct effect on the territorial agreements or the Territorial Orders." (Initial Br. at 11)

In its Petition, the Board essentially argues that its authority to select a utility provider is superior to that of the Commission because the Board can require COVB to vacate the County's right-of-ways once the Franchise Agreement expires, and "[w]ithout the legal authority of the Franchise to provide service and the Board's permission to utilize the roads, rights of way, and other County property within the Franchise Area, COVB will not be able to lawfully deliver electricity within the Franchise Area." (R. 33) This argument fails for numerous reasons, including the obvious flaw identified on page 15 of the Amicus brief filed by Escambia County et al., that "electric utilities, even municipally owned ones, are not required to use county property to operate their businesses or proprietary activities."

FECA also takes exception to the Board's argument that it would have no control over a utility's use of the County's right-of-ways (Initial BR. at 8) and no ability to collect a franchise fee (Initial BR. at 16) or negotiate a new franchise agreement (id.) unless its authority to select a utility provider is superior to the Commission's. The Board's arguments are contradicted by the clear language in

section 337.401(1), Florida Statutes (2014), which allows local governments "to prescribe and enforce reasonable rules or regulations" for electric utilities that place facilities in the right-of-ways, and by this Court's holding in Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004).

ARGUMENT

I. THE EXISTENCE OR NONEXISTENCE OF A FRANCHISE AGREEMENT DOES NOT AFFECT AN ELECTRIC UTILITY'S SERVICE AREA

One of the Commission's Orders that is on appeal, Order No. PSC-15-0102-DS-EM, declares "that Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in Territorial Orders upon expiration of the Franchise Agreement." (R. 1050) The Order is squarely within the exclusive jurisdiction granted to the Commission by section 366.04, Florida Statutes, and is consistent with this Court's orders that address electric utility service areas. Appellant sets forth numerous allegations that would upend the well-established electric utility regulatory scheme - - if they had any merit. However, contrary to the Board's allegations, the Order does not alter the County's ability to regulate or charge a fee for COVB's use of the right-of-ways, and the Board cannot evict COVB from its right-of-ways without cause after the franchise agreement expires.

Florida's electric cooperatives provide electric service in numerous counties and cities throughout Florida. In most cases, and as is the case with COVB here, the cooperative's service territory is defined by a Commission-approved territorial agreement. A Commission order approving a territorial agreement requires the utility to provide service to anyone situated within the defined territory, but it also assures the utility that it will operate in that area without competition. Florida's electric utilities rely on Commission-approved territorial agreements and the territorial provisions in section 366.04, Florida Statutes, to define the service area that they must plan to serve now and in the future.

As early as 1968, this Court realized that defining the utility's service area allows the utility to utilize long term planning to more efficiently serve everyone in the service area and reduce the cost for all consumers. "Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices." Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968). This concept was codified in 1974 in the Grid Bill,[3] which gave the Commission jurisdiction over municipally-owned utilities and electric cooperatives for the first time, and which clarified the Commission's jurisdiction to define and control the service areas of all electric utilities in Florida in order to prevent the uneconomic duplication of

[3] Ch. 74-196, 1974 Fla. Laws 538, codified at §§ 366.04(2) and 366.05(7) and (8) Fla. Stat.

facilities. The Grid Bill includes comprehensive language granting the Commission authority to regulate electric utility service boundaries, and to determine which utility shall serve an area or an individual customer when service boundaries have not been clearly defined. Pursuant to section 366.04(1), Florida Statutes, the Commission's jurisdiction under the Grid Bill is "exclusive and superior" to that of a county, and the grant of exclusivity is clear and unequivocal:

> The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

The Legislature clearly intended that the Commission, not the County, shall be the exclusive authority to decide which utility or utilities shall provide electric service throughout a county.

The County's assertion that it can abrogate the Commission's exclusive jurisdiction to implement, supervise, and supersede electric service territories and territorial agreements in Florida has serious implications for electric utility regulation and operation statewide. Planning for generation, transmission, and substations requires multi-decade forecasts and massive commitments of capital, and it is not uncommon for distribution facility planning to involve multi-decade forecasts. Forecasting is challenging enough when a utility knows the area that it will serve, but it would become a guessing game if a local government were

allowed to evict a utility from an area it serves and had planned to serve for decades. Such a result would undermine the clear language of the Grid Bill regarding the need for a coordinated grid and for the prevention of further uneconomic duplication of facilities. Moreover, under the Board's scenario, utilities' stranded costs[4] could quickly mount and rates would increase unnecessarily due to uneconomic duplication of facilities, which is exactly what the Grid Bill is supposed to prevent. Allowing local governments to be the ultimate decision-maker as to where a utility can serve would lead to an unacceptable outcome, and the Legislature clearly did not give local governments powers that are superior to the Commission's in this area.

II. THE BOARD'S OWNERSHIP OF ITS RIGHT-OF-WAYS DOES NOT TRUMP THE COMMISSION'S "SUPERIOR AND EXCLUSIVE JURISDICTION"TO DETERMINE UTILITY SERVICE AREAS AND TO SUPERVISE COORDINATED PLANNING AND SERVICES

The Grid Bill made it extremely clear that the Commission is the ultimate authority to determine which electric utility will serve in any area. Moreover, since there is a Commission-approved territorial agreement in place between the

[4] If utilities are forced to surrender or add service territory without a willing sale by the existing utility, even with advanced notice, there will be uneconomic duplication as the new utility will need to begin building its facilities to insure continued service when the existing utility begins to remove its facilities. In addition, a portion of the existing utility's facilities in the vicinity of the new territory line would become underutilized.

City of Vero Beach ("COVB") and Florida Power & Light Company ("FPL"), COVB must serve the area until such time that the Commission approves modifications to the agreement.[5] Clearly the COVB serves in the County pursuant to the Commission's territorial orders and in accordance with the Franchise Agreement, which is contrary to the Board's statement that the COVB serves "pursuant to this Franchise Agreement."[6] The COVB had authority to serve and did serve the area long before the Franchise Agreement even existed. The Board's argument that ownership of the right-of-ways determines who the ultimate selector of the electric utility is without merit, and it even conflicts with the Board's own statement that "the expiration of the Franchise Agreement, by itself, has no direct effect on the territorial agreements or the Territorial Orders." (Initial Br. at 11)

Despite the Legislature's grant to the Commission in section 366.04(1), Florida Statutes, of "exclusive and superior" jurisdiction over electric utility service areas, the Board maintains that it has the final say on which utility will serve because the Board can require COVB to vacate the County's right-of-ways once the franchise agreement expires, and

> [w]ithout the legal authority of the Franchise to provide service and the Board's permission to utilize the roads, rights of way, and other County property within the Franchise Area, COVB will not be able to lawfully deliver electricity within the Franchise Area.

[5] Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989).
[6] Initial Br. at 2.

(R. 33) Arguably this also would mean the Board could evict a utility at any time if there is no franchise agreement in place. However, this argument fails because it ignores the "exclusive and superior" jurisdiction granted by the Legislature[7] to approve territorial agreements, and the Board has not provided any authority that would allow it to force COVB to vacate the County's right-of-ways once the franchise agreement expires.[8] As set forth below, the argument also defies logic.

The Board lacks authority to force the COVB to remove its facilities from the County's right-of-ways, but even if the Board could, the COVB could relocate its facilities from the County's right-of-ways to private easements to continue providing service in its Commission-approved territory. Page 15 of the Amicus brief filed by Escambia County et al. recognizes that "electric utilities, even municipally owned ones, are not required to use county property to operate their businesses or proprietary activities." Of course relocating COVB's facilities to private easements would be expensive and would lead to much higher electric rates for the Board's constituents due to the cost of obtaining private easements and relocating the facilities, but private easements are an option. Ironically, this option

[7] § 366.04(2)(d), Fla. Stat. (2014).

[8] While section 337.403, Florida Statutes (2014), addresses the relocation of utility facilities that interfere with the government's use of its right-of-ways, there is no authority in chapter 337 for a local government to require a utility to simply remove its facilities from a right-of-way or for a local government to completely prohibit any utility from using its rights-of-ways under any circumstance without good cause.

would be contrary to one of the Board's stated reasons for this appeal, which is to lower electric rates.[9]

The Board's ill-conceived argument also has other serious flaws. It ignores the obvious gap in service or, alternatively, the prohibited uneconomic duplication of facilities[10] that would have to occur while COVB is removing its facilities and the new utility is building its facilities to serve the customers.[11] It also ignores the fact that the COVB probably uses right-of-ways to serve its customers that are owned or controlled by other governmental entities, including the Florida and United States Departments of Transportation. Under the Board's theory either Department of Transportation also could claim to be the ultimate authority to determine which utility will serve. There cannot be more than one ultimate authority to select the utility provider, and the Board's argument defies logic and is without merit.

[9] Initial Br. at 2.
[10] § 366.04(5), Fla. Stat. (2014).
[11] Apparently the Board assumes the COVB would simply abandon its facilities to be used by the subsequent utility, even though these facilities have significant value and can be reused in other areas.

III. THE LEGISLATURE'S GRANT OF "EXCLUSIVE AND SUPERIOR" JURISDICTION DOES NOT "EVISCERATE" THE COUNTY'S ABILITY TO REGULATE ITS RIGHT-OF-WAYS OR COLLECT A FRANCHISE FEE

The Legislature's grant of authority to the Commission to determine which utility will serve did not affect the Board's ability to regulate the use of its right-of-ways or its ability to require the utility to pay a fee to utilize the right-of-ways. On pages 8, 10, and 11 of its Initial Brief, the Board claims that the Commission's territorial orders requiring the COVB to continue serving after the Franchise Agreement expires "override the termination date of the Franchise Agreement and eviscerate any County authority with respect to the City electric utility's operations and use of County property in the unincorporated areas of the County." Clearly, the Grid Bill did diminish the value of a local government's franchise authority when it clarified that the Commission has exclusive jurisdiction to decide which utility will serve in the local government's jurisdiction. However, the Board's assertions about the impact of the Order on its ability to regulate and charge for the use of its right-of-ways is contrary to section 337.401(1), Florida Statutes, and to this Court's holding in Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004). Moreover, the Commission's Order has no impact whatsoever on the County's rights in or control over its property; such issues are simply not present here.

Section 337.401(1) authorizes local governments to "prescribe and enforce reasonable rules or regulations" for the placement of utility facilities in right-of-ways. Nothing in the Commission's Order or the Grid Bill prevents the Board from implementing and enforcing reasonable rules or regulations pertaining to COVB's use of its right-of-ways.

The franchise fee also is not eviscerated now or even immediately after the Franchise Agreement expires if COVB continues to utilize the County's right-of-ways. In City of Winter Park, this Court clearly held that Florida Power Corporation was operating as a holdover tenant by continuing to utilize a right-of-way after the franchise agreement expired, and under certain circumstances must continue to pay the fee set forth in the expired agreement while it continues to utilize the right-of-way.[12] Further, the County's ability to collect a reasonable fee for the use of its property is not affected by the Commission's Order even in the long run. Consistent with this Court's opinions in City of Winter Park and Alachua County v. State, 737 So. 2d 1065, 1067 (Fla. 1999), the County can negotiate a new franchise or it can impose "fees that are reasonably related to the

[12] Id. at 1240. This Court endorsed the district court's view that "if a franchisee and a governing body agree to a reasonable fee for access to the city's residents and the use of the public property to provide services during the term of the franchise then such a fee has not been 'unilaterally imposed' and will be enforced during a holdover period in which renegotiation occurs." Id.

government's cost of regulation or the rental value of the occupied land." City of Winter Park, 987 So. 2d at 1241 (citing Alachua County, 737 So. 2d at 1067).

CONCLUSION

Wherefore, the Florida Electric Cooperatives Association, Inc., respectfully requests this Court to affirm Commission Order No. PSC-15-0102-DS-EM, granting the City's requested declaratory statement and to also affirm Commission Order PSC-15-0101-DS-EM, denying the County's requested declaratory statement.

Respectfully submitted this 24th day of July,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2015, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal with notice furnished to all registered users, as indicated below:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that this Amicus Curiae Brief in Support of Appellee, Florida Public Service Commission was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

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