SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO.: 91,820
	)	
JULIA L. JOHNSON, etc., et . al.,	)	Public Service Commission Case No.: 970022-EU
	)	
Appellees.	)	
	)	

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AMENDED ANSWER BRIEF OF APPELLEE, FLORIDA POWER & LIGHT COMPANY

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FEBRUARY 22, 1999

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STATEMENT OF CASE AND FACTS

The City of Homestead, Florida ("Homestead" or "City") appeals Order Number PSC-97-1132-FOF-EU (October 21, 1997) of the Florida Public Service Commission ("PSC" or "Commission") ordering that the City transfer electrical service to two commercial customers situated within appellee, Florida Power and Light Company's ("FP&L" or "the Company") exclusive service territory from the City to FP&L. FP&L had petitioned the Commission for such an order after learning that the City was providing electrical service to one of the two customers based upon the City's assertion that the long standing, and court-tested, territorial agreement between the City and FP&L allowed Homestead to provide electric service to private enterprises located within FP&L's exclusive service territory , when the City owned and leased to private commercial enterprises the underlying real property. The commercial enterprises here are a beer distributorship and boat manufacturing facility (R - 92-95).

This Court is quite familiar with the 1967 territorial agreement between FP&L and the City ("Territorial Agreement" or "Agreement") in as much as the Court has been called upon to render several decisions involving or predicated upon the Agreement.[1] The Agreement was approved by the Commission on

[1] Storey v. Mayo, 217 So. 2d 304 (Fla. 1968)(Court upheld agreement challenged by consumers transferred from FP&L to the City pursuant to that agreement); Accursio v. Mayo, 389 So.

December 1, 1967. Florida Public Service Commission Order No. 4285 (Docket 9056-EU). Paragraph 8 of the Agreement provides as follows:

> Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (SW. 137th Avenue) is within the service area of the City, including any additions to or extensions of said facilities of the Homestead Housing Authority. ***The City's right to furnish service to the City-owned facilities, or those owned by agencies deriving their power through and from the City (including but not limited to the Homestead Housing Authority) may be served by said City, notwithstanding that the said facilities are located within the service area of (FPL).***[2] (Emphasis supplied) (R - 89).

On or about July 22, 1993, the City and Silver Eagle Distributors, Ltd. ("Silver Eagle") entered into a contractual agreement concerning certain real property located within FP&L's exclusive service territory ("Contract") (R - 200). The agreement, cast as a "lease" by the parties provided, among other things, that Silver Eagle was to: construct, at its sole cost, the building located on the City's property; pay the City all normal fees, submit all plans

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2d 1002 (Fla. 1980) (Court denied certiorari thereby upholding implementation of agreement when challenged by customers); Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989) (Court found exclusive jurisdiction of Commission to consider territorial agreements and amendments thereto after City sought declaratory action in Circuit Court); City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992) (Court denied attempt by City to construe territorial agreement as terminable at will).

[2] Paragraph 6 of the Agreement essentially provides that new annexations of areas by the City do not affect FP&L's right to serve those areas.

and comply with all regulations of the City concerning the building; obtain and maintain liability, hazard, fire, and flood insurance; and assume responsibility for all remodeling and all alterations to the building. (R - 200-210). Additionally the City granted Silver Eagle an option to purchase the underlying real property, not the building constructed thereon – as the building already would have been paid for by Silver Eagle pursuant to the Contract.[3] (R - 212).

The City's ulterior motives in casting the Contract as a "lease" are revealed by Subsection 6 (h) of the Contract:

> The [City] may have a dispute ("the FPL Dispute") with Florida Power and Light as to whether [the City] or FPL has the right to be the exclusive provider of electrical services to the Property. The FPL Dispute may take many months for resolution, ***and the outcome probably depends on whether, for purposes of FPL's territorial allocation agreement with [the City], [the City] is deemed to be the owner of the Property.*** [The City] will indemnify and hold harmless [Silver Eagle] from any and all claims, damages, or losses which [Silver Eagle] may suffer or incur by reason of the FPL dispute, including without limitation all attorney's fees and costs (whether or not suit is filed) and losses from any interruption of electrical service to the Property and any fine, penalty, service fee or similar sum which is due to FPL with respect to any provision of electrical services by [the City] to the Property, or any conversion of electrical services from [the City] to FPL. (R - 204). (Emphasis supplied).

The City extended a distribution feeder to the Silver Eagle

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[3] A similar arrangement was discovered by a FP&L concerning the City and a tenant adjacent to the Silver Eagle facility. That private concern is Contender Boats ("Contender"). That "lease" was apparently under negotiation at the time FP&L filed its Petition and Amended Petition to Enforce Order and is not a part of this record. (R - 95).

facility in order to provide electrical service to Silver Eagle. (R - 92). As foresaged by the Contract between the City and Silver Eagle, upon discovery that the City was providing service to a customer clearly within FP&L's exclusive service territory, FP&L filed with the PSC a Petition, then an Amended Petition, to Enforce the Commission's original order of December 1, 1967. (Order Number 4285). (R - 1, 88).[4]

In response to FP&L's Petition, the City intervened as an interested party, filed several pleadings, which ultimately included a response to the Amended Petition. (R - 102). The City then filed a Motion for Judgment on the Pleadings, to which FP&L timely responded. (R - 122). The Commission's Prehearing Officer assigned to this docket, on September 23, 1997, issued an order denying the City's Motion. Florida Public Service Commission Order No. PSC-97-1111-PCO-EU. The City did not avail itself of any procedural avenues available to it with respect to that Order, including a Motion for Reconsideration, or an appeal to this Court.

On that same day (September 23, 1997), the full Commission met and voted unanimously at a duly noticed agenda conference to approve its staff recommendation providing that FP&L had the right to serve the customers at issue. (R - 29). On September 29, 1997,

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[4] The only difference in the Amended Petition differed is that the claim for Attorney's fees was altered. The issue of the Commission's jurisdiction to award attorney's fees is addressed in Section IV. of this brief.

the Commission issued its Notice of Proposed Agency Action reflecting the Commission's decision. Florida Public Service Commission Order No. PSC-97-1132-FOF-EU. Although the Commission's action was a proposed agency action, the City did not request a formal administrative hearing as provided by Section 120.57(1), Florida Statutes (1997) and Rule 25-22.029 (4), Florida Admin. Code. Instead, the City waited until after the September 29, 1997 Order became final on October 20, 1997 and then, on November 6, 1997, filed a Notice of Administrative Appeal with this Court. (R - 241).

During the time period subsequent to the Commission staff filing its recommendation and prior to the September 23, 1997 Agenda conference, the City filed a Motion for Judgment for Final Summary Judgment (R - 139). The Prehearing Officer assigned to the FP&L - City of Homestead docket issued an Order Disposing of the Motion for Final Summary Judgment on December 10, 1997. Florida Public Service Commission Order No. PSC- 97 - 1552 - PCO - EU. The Prehearing Officer found the motion to be moot by issue of the final agency action of October 20, 1997, as well as untimely.[5] Again, the City did not take any further action with respect to this Commission Order.

[5] Final in that the proposed agency action was not protested by the City during the statutory time period and thus became final on October 20, 1997. Order No. PSC-97-1552-PCO-EU at p. 1-2.

The City's sole attempt to seek any review whatsoever of the Commission's action, the Notice of Administrative Appeal filed with respect to the Notice of Proposed Agency Action, was dismissed by this Court on November 24, 1997. (R - 256). Ultimately, the Court reinstated the City's appeal and ordered briefs on the merits of this case. (R - 313).

SUMMARY OF ARGUMENT

By its failure to timely petition the Commission for an administrative hearing on the Commission's proposed agency action dated September 29, 1997, the City has waived its right to prosecute an appeal of that Order to this Court. This Court was originally correct when it dismissed the City's Notice of Administrative Appeal as being untimely. The City could have requested a full hearing pursuant to Section 120.57(1), Florida Statutes, (1997). Instead it attempted to circumnavigate Chapter 120 and proceed directly to Supreme Court review of the Commission's ***proposed*** agency action. Homestead has waived its rights by virtue of its failure to exhaust available administrative remedy prior to initiating judicial review.

The City's Motion for Judgment on the Pleadings and Motion for Final Summary Judgment are not before this Court for review. The City never appealed the Commission's specific orders disposing of these motions and cannot now, under the guise of review of the Commission's Proposed Agency Action, resurrect review of the same.

The Commission was correct in finding that the Territorial Agreement precludes the City from serving private commercial facilities that are located on City-owned property when there is no evidence of any municipal function or activity undertaken on such property. The Territorial Agreement must be read in the context of the purpose for which it was executed. That purpose was to avoid

unnecessary and uneconomic duplication of facilities. The plain language of paragraph 8 of the Agreement clearly limits the City to serving municipally-owned facilities, and does not allow the City to serve privately-owned facilities resident on municipally-owned land. To adopt the City's construction of paragraph 8 of the Territorial Agreement would frustrate the very purpose of the Agreement in that such an interpretation would allow the City to extend service anywhere within FP&L's exclusive service territory simply by purchasing the underlying property – without regard to the use or ownership of the facilities of the end user. Such a construction is at odds both with the plain language of the Territorial Agreement and with the manifest intent and purpose of the Agreement.

The Commission has jurisdiction to award attorney's fees in this case pursuant to Section 120.69, Florida Statutes (1997). FP&L should not have to venture into Circuit Court, once obtaining an order from the Commission enforcing its previous order, when the Commission is already vested with exclusive jurisdiction to enforce and administer territorial agreements. In this case, the issue of attorney's fees is premature as FP&L has not yet submitted the supporting information required by the Commission to reach a determination as to whether to award the same. Accordingly it is not necessary for this Court to rule on the matter of attorney's fees at this time.

ARGUMENT

I. The City's Failure to Timely Petition the Florida Public Service Commission for an Administrative Hearing on the Commission's Proposed Agency Action Wrests the Court of Jurisdiction to Consider the City's Appeal on the Merits.

While this Court has entered an order allowing the City to proceed with its brief on the merits of the case, FP&L respectfully asserts that the Court was originally correct when it dismissed the City's notice of appeal as untimely on November 24, 1997. FP&L did not submit argument to the Court in response to the City's Motion to Reinstate the Appeal as that issue is principally the Commission's; however, in this regard, FP&L supports the position taken by the Commission in the record. The record is clear that the City did not request a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes (1997) on the Commission's proposed agency action. Having failed to avail itself of the clear opportunity to initiate formal agency proceedings, the City effectively waived its rights to appeal to this Court. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 935 (Fla. 1st DCA 1990).

II. The Motion for Judgment on the Pleadings and Motion for Final Summary Judgment are not Before the Court for Review.

While this Court has allowed the City to proceed with argument on the alleged merits of its appeal, nowhere in the Court's order of November 16, 1998 reinstating the appeal is there any mention of an appeal of the Commission's determinations with respect to the City's Motion for Judgment on the Pleadings and Motion for Final Summary Judgment. Moreover, the City never filed a Notice of Appeal, or any other pleading in response to Commission Orders No. PSC-97-1111-PCO-EU (September 23, 1997) (Order Denying Motion for Judgment on the Pleadings) and PSC-97-1552-PCO-EU (December 10, 1997) (Order Disposing of Motion for Final Summary Judgment). Of course, the time to appeal or contest these orders has come and gone.

Nevertheless, the City has offered up the bulk of its Initial Brief as a challenge to the adverse rulings it received from the Commission on these two motions. However the order it appealed contains no ruling on those motions. That order, the Proposed Agency Action of the Commission, dealt with the merits of the only real issue in this case; namely how to apply Paragraph 8 of the Territorial Agreement to the contractual arrangement between the City and Silver Eagle. However, the order is not written under a stricture of review as a Motion for Summery Judgment or Judgment on the Pleadings (e.g., must be no facts to be resolved by the trier

of fact or well-pled facts must be accepted as true).[6]

Absent specific appeal of the Commission orders denying the City's Motions for Summary Judgment and Judgment on the Pleadings, this Court does not have substantive jurisdiction to decide whether the Commission correctly or incorrectly denied those motions.[7] FP&L also respectfully asserts, that on appeal, the City is entitled to no presumptions procedurally attached to review of either a Motion for Judgment on the Pleadings or a Motion for Final Summary Judgment. Finally, FP&L also asserts that the Court should give the affidavits attached to the City's Motion for Final Summary Judgment no more weight than they were accorded during the Commission's arrival at the proposed agency action which is under review. That weight was essentially zero as the Commission found the Motion for Final Summary Judgment moot and untimely. (R- 286).

III. The Commission was Correct in Determining FP&L was Entitled to Serve Silver Eagle and Contender Boats.

Procedural issues aside, the order actually appealed by the City in this case comes to this Court "clothed with the statutory

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[6] In fact, the Order under review specifically notes that the City's Motion for Judgment on the Pleadings had already been denied by the Prehearing officer. Florida Public Service Commission Order No. PSC 97-1132-FOF-EU at p. 3.

[7] Interestingly, the City's initial brief is entirely devoid of any argument in response to the Prehearing Officer's specific finding that, apart from being moot, the Motion for Final Summary Judgment was untimely. See Florida Public Service Commission Order No. PSC - 97-1552-PCO-EU at p. 2.

presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and ought to have been made." Florida Cable Television Association v. Deason, 635 So. 2d 1415 (Fla. 1994). The Commission's findings should be affirmed as long as they are based upon competent substantial evidence and are not clearly erroneous. Fort Pierce Utilities Authority v. Beard, 626 So. 2d 1356, 1357; PW Ventures v. Nichols, 513 So. 2d 281, 283 (Fla. 1988). As the City elected to attempt to appeal a Notice of Proposed Agency Action and not request a Section 120.57(1), Florida Statutes (1997) hearing, the record was devoid of oral testimony to weigh and review. Instead the Commission looked at the Territorial Agreement and the "lease" between the City and Silver Eagle. Based upon that information, the Commission rendered a just and reasonable interpretation of the Agreement's application to the City's desire to provide electrical service to those areas within FP&L's service territory. Here it is clear the City simply does not like the result that the Commission has reached in reviewing its actions with respect to Silver Eagle and Contender Boats. However this falls far short of the clearly erroneous standard applicable in review of the Commission's Order. FP&L submits that the City failed to demonstrate that the Commission's decision in its Order No. PSC-97-1132-FOF-EU is not based on competent substantial evidence and that is not "clearly erroneous".

The principal issue in this dispute is the application of the language contained in Paragraph 8 of the Territorial Agreement to the Silver Eagle Contract. As previously stated, paragraph 8 provides:

> Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (SW. 137th Avenue) is within the service area of the City, including any additions to or extensions of said facilities of the Homestead Housing Authority. ***The City's right to furnish service to the City-owned facilities, or those owned by agencies deriving their power through and from the City (including but not limited to the Homestead Housing Authority) may be served by said City, notwithstanding that the said facilities are located within the service area of (FPL).*** (Emphasis supplied). (R - 89).

FP&L agrees with the City that there is nothing mysterious, complicated or ambiguous about the operative language of paragraph 8. Authorities cited in support of the long-standing requirement that words in an contractual agreement be given their plain meaning are certainly applicable to the instant dispute. See. Royal Inv. & Dev. Corp. v. Monty's Air Conditioning Serv., Inc., 511 So. 2d 419 (Fla. 4th DCA 1987). Interestingly, despite the City's protestations of clarity in language, it is the attempt to pervert the term "City-owned facilities" contained in paragraph 8 of the territorial agreement via a sham "lease" that is the root of this case. Clearly, under the plain language of paragraph 8, the City is entitled to serve City-owned facilities. Note at the outset,

the language does not say facilities on City-owned property. If it did, there would be no dispute, because the City owned the underlying property where Silver Eagle constructed its facilities. See Thayer v. State, 335 So. 2d 815 (Fla. 1976) (fundamental principle of construction that the mention of one thing implies the exclusion of another). Instead, the language refers to City-owned facilities which necessarily implies some establishment of dominion and control over the operations of the same. See State v Town of North Miami, 59 So. 2d 779 (1952). To conclude otherwise would lead to the absurd result that the City could purchase any property within FP&L's service territory, without regard to the facilities on or use of that property, and then leverage the Territorial Agreement to extend electrical service to that property under the guise of it being a city-owned facility.

It is axiomatic that interpreting the language of a contractual agreement , here the Territorial Agreement, must be undertaken in light of the evils to be prevented by the Agreement in the first place. Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944). Here, that evil was the unsatisfactory effects of expensive, duplicative activity between the parties. City of Homestead v. Beard, 600 So. 2d 454 (Fla. 1982). Adoption of the City's interpretation of the paragraph 8 and the word "facility" would lead directly to the uneconomic duplication of facilities. Such a result is contrary to the

purpose of the Territorial Agreement itself as well as to the Commission's mandate pursuant to Section 366.04, Florida Statutes (1997), to minimize uneconomic duplication of facilities.

Clearly the intent of the Territorial Agreement was to allow the City to serve its own facilities, the Homestead Housing Authority and any other agency deriving it's power through and from the City. Reading the language in paragraph 8 in its entirety, and given the traditional principles of language construction previously discussed, requires that a logical inference of a municipal function must be applied to the exceptions to FP&L's exclusive service territory. Of course, in the instant dispute that municipal function is totally lacking.

Ironically, the Silver Eagle Contract itself provides one of the strongest indicators of the anomalous result the City desires this Court to reach via a tortured interpretation of the term City-owned facilities. The stated purpose of the contract is to provide a location for the lessee's business, not to provide the lessee with facilities. (R - 200). The terms of the lease indicate that the City has virtually no control, responsibility, ownership or any nexus whatsoever with the construction of facilities on the City's real property. (R - 203-207). That is because those facilities are owned by Silver Eagle.

Clearly, the City and Silver Eagle contemplated that the City's interpretation of the Territorial Agreement was far from

plain and unambiguous in as much as the parties expressly addressed the obvious problem associated with the City's novel position. Section 6(h) of the Silver Eagle Contract provides:

> The [City] may have a dispute ("the FPL Dispute") with Florida Power and Light as to whether [the City] or FPL has the right to be the exclusive provider of electrical services to the Property. The FPL Dispute may take many months for resolution, ***and the outcome probably depends on whether, for purposes of FPL's territorial allocation agreement with [the City], [the City] is deemed to be the owner of the Property.*** [The City] will indemnify and hold harmless [Silver Eagle] form and all claims, damages, or losses which [Silver Eagle] may suffer or incur by reason of the FPL dispute, including without limitation all attorney's fees and costs (whether or not suit is files) and losses from any interruption of electrical service to the Property and any fine, penalty, service fee or similar sum which is due to FPL with respect to any provision of electrical services by [the City] to the Property, or any conversion of electrical services from [the City] to FPL. (R - 204). (Emphasis supplied).

The very fact that the parties to this Contract contemplated the eventuality of dispute with FP&L over this issue belies the City's assertion that its position is based on the plain and unambiguous meaning of the language in paragraph 8.

Paragraph 6(h) of the Silver Eagle Contract uses the term property , not facilities. Thus, the City's interpretation of that Contract essentially ignores the very existence of the term facilities as expressly set forth in paragraph 8 of the Territorial Agreement. Electric service is provided to facilities, not to the underlying realty or dirt.

IV. The Commission has Jurisdiction to Award Attorney's Fees

FP&L respectfully asserts that it is premature for the Court to address the issue of awarding of attorney's fees as the Commission's own order refrained from doing so until such time as the proposed agency action becomes final and FP&L submits supporting affidavits and other information required by Section 120.69, Florida Statutes (1997). See Order PSC 97-1132-FOF-EU at p. 10. However, FP&L does agree with the Commission's finding that the Commission does in fact have jurisdiction to award such fees.

Section 120.69(7), Florida Statutes (1997) provides for the award of attorney's fees whenever a party is forced to petition for enforcement of an agency order. This is exactly what FP&L did here -- it petitioned the Commission to enforce its order. (R - 1, 88). The City argues that the statute only allows a court to issue such an order, but the cases cited in support of that proposition do not stand for the same. The Court in Doyal v. School Board of Liberty County, 415 So. 2d 791 (Fla. 1st DCA 1982) simply awarded fees pursuant to the statute. It did not, however, opine that Circuit Court was the only avenue available for such an holding. In State Ex Rel Pettengill v. Copelan, 466 So. 2d 1133 (Fla. 1st DCA 1985) the First District Court of Appeal denied a claim for attorney's fees as the action to seek enforcement was unsuccessful. Nowhere was there an express limitation on the Commission in enforcing its own orders. Moreover, to hold such would cause a party such as

FP&L to initiate a proceeding before the Commission which has exclusive jurisdiction over territorial matters, as opposed to Circuit Court. Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989). Then the party would have to jump to Circuit court in order to seek a monetary award for its attorney's fees. Common sense and the interest in judicial economy suggest the statute allows any party seeking enforcement of an agency order to seek attorney's fees. Thus, FP&L suggests the Commission does in fact have jurisdiction to consider and award, if appropriate, attorneys fees pursuant to Section 120.59(7), Florida Statutes (1997).

CONCLUSION

For the reasons set forth above, FP&L respectfully suggests that this court reject each and every argument of the City of Homestead on appeal and affirm the order of the Florida Public Service Commission in its entirety.

Respectfully submitted, on this _____ day of February 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amended Answer Brief of Appellee, Florida Power & Light Company has been furnished by U.S. Mail to the parties listed below on this _____ day of February, 1999. I also HEREBY CERTIFY the Amended Brief of Appellee, Florida Power & Light Company is in Courier New (Font 12), 10 characters per inch.

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