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IN THE FLORIDA SUPREME COURT

LEE COUNTY ELECTRIC COOPERATIVE, INC.,

Appellant,

vs.

JOHN R. MARKS, ET AL.,

Appellees.

FILED
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CASE NO. 68,346

On Appeal From the Florida Public Service
Commission, Order #15452, Docket #850129-EU,
John R. Marks, Chairman

ANSWER BRIEF OF APPELLEE,
FLORIDA POWER & LIGHT COMPANY

Filed on behalf of Florida
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PRELIMINARY STATEMENT

The parties in this case may be referred to herein as follows: Appellant, Lee County Electric Cooperative, Inc. ("LCEC"); Appellee, Florida Power & Light Company ("FPL"); Appellee, Florida Mining and Materials Corporation ("FMM"); and Appellee, Florida Public Service Commission ("PSC" or the "Commission").

References to the record on appeal will be denoted by the letter "R" followed by the appropriate page number of such record. References to the appendix of this brief will be denoted by the letter "AA" followed by the appropriate identification number of such item in the appendix.

Appellee/Florida Power & Light Company respectfully requests that the Court take judicial notice of the following documents which are public records of the Public Service Commission and which have been included in the appendix to this brief:

- (1) Order No. 3799 approving territorial agreement between Appellee/Florida Power & Light Company and Appellant/Lee County Electric Cooperative, Inc.; Docket #7424-EU, dated April 28, 1965. (AA-19)*
- (2) Two-page letter dated October 8, 1964, of Mr. Spencer to Mr. Homer T. Welch, Jr., Manager of Appellant/Lee County Electric Cooperative, Inc., which is the territorial agreement approved. (AA-23)
- (3) The petition of the Appellee/Florida Power & Light Company for declaratory statement; Docket #840414-EI, dated November 14, 1984. (AA-25)

*Page 4 of this document is in its severed condition because the mechanical device printing from microfilm could not accommodate printing of an 11x14-inch document.

- (4) Commission Order #13998, issued January 11, 1985, and Order #13998-A amendatory thereof. (AA-28)
- (5) Sheet No. 5.020, effective August 18, 1962, of Florida Power & Light Company Tariff filed with the Public Service Commission. (AA-33)
- (6) Sheet No. 6.020, Florida Power & Light Company Tariff filed with the Public Service Commission. (AA-34)

STATEMENT OF CASE AND FACTS

On July 18, 1985, Lee County Electric Cooperative, Inc. ("LCEC"), filed its amended petition requesting that the Florida Public Service Commission ("PSC") resolve a territorial dispute between LCEC and Florida Power & Light Company ("FPL"). (R-37) (AA-1) On December 16, 1985, the PSC found that, even if the allegations of LCEC's petition were all taken to be true, LCEC failed to demonstrate a violation of the territorial agreement and dismissed LCEC's amended petition with prejudice. (R-78) The PSC subsequently denied LCEC's petition for rehearing and it is from that order that this appeal is taken.

The foregoing essentially represents all of the facts in the PSC docket from which this appeal is taken; however, since the Appellant has interwoven other dockets and other matters before the PSC into its appeal and brief and since this Court has declined to strike the Appellant's brief upon motion of Appellees, we, therefore, consider it prudent to recite the history of the events leading up to this controversy in order that the Court may more fully understand the PSC's decision to dismiss LCEC's amended petition with prejudice.

The relevant history is precisely set forth in the PSC's order of December 16, 1985 (R-78), and, at this point, we borrow heavily from that document, making only the most minor changes in order to further enlighten this Court as to the nature of the dispute.

On November 15, 1984, FPL filed a petition in Docket No. 840414-EI requesting a declaratory statement on whether it had a statutory obligation to serve a customer, physically located in another utility's service territory, if that customer constructed a transmission line into FPL's service territory and demanded service. (AA-25)

On November 19, 1984, LCEC filed a petition in Docket No. 840444-EU to resolve a territorial dispute between itself and FPL alleging similar facts to those contained in FPL's request for declaratory relief with the significant difference that LCEC alleged that FPL was building its transmission line into LCEC's territory.

On November 27, 1984, Florida Mining and Materials Corporation ("FMM") filed a Petition to Intervene in Docket No. 840414-EI alleging that it was the customer in question and, further, that the PSC's response to the declaratory statement would affect its rights and substantial interests. FMM asserted that FPL had an obligation to serve it under the facts stated in the declaratory statement. On December 3, 1984, LCEC filed several matters including a motion to consolidate its docket with FPL's petition for declaratory statement.

At the PSC's December 4, 1984, Agenda Conference, the PSC determined that the question presented by FPL's petition for declaratory statement could and should be answered independently from LCEC's territorial dispute complaint and, therefore, denied LCEC's motion to consolidate. LCEC was represented by counsel at

the December 4 Agenda Conference and was offered intervenor status in FPL's declaratory statement docket but declined the same.

As reported in Order No. 13998, the PSC determined that FPL would have a statutory obligation to serve a customer who acquired an ownership interest in property that was clearly located within FPL's service territory and had requested that FPL deliver power to a point on that property.

Subsequently, during oral argument on a motion to dismiss LCEC's petition to resolve a territorial dispute in Docket No. 840444-EU, the PSC offered to enter an order granting LCEC's prayed for relief; i.e., prohibiting FPL from building a transmission line into LCEC's service territory and from serving a customer in LCEC's territory. LCEC declined the PSC's offered relief and took a voluntary dismissal of its petition. (AA-36)

In its first petition in Docket No. 850129-EU (R-1), LCEC alleged that FMM would build a transmission line into FPL's territory, as opposed to its earlier allegation that FPL would build a line into LCEC's territory. LCEC alleged that FMM's construction of its transmission line was accomplished with the knowledge, approval and assistance of FPL and, further, that FPL did not consult with or obtain the consent of LCEC prior to signing an electric power contract with FMM. LCEC alleged that FPL's conduct constituted a clear violation of the territorial agreement between the two utilities and requested that the PSC, among other things:

- 1) determine that FPL was violating the territorial agreement by serving FMM, regardless of who actually built and owned the

transmission line; 2) rule that a customer may not avoid a territorial agreement or violate the historic service area of an electric utility by building a line into the service area of another utility; 3) rule that a utility may not avoid a territorial agreement by serving a customer whose electric-consuming facilities are located in the service area of another utility; and 4) enjoin FPL from serving FMM even if it is over lines actually owned by FMM.

Both FPL and FMM filed motions (R-20; R-23) to dismiss LCEC's initial complaint. FPL argued that whether an existing territorial agreement had been violated was a contract action that should be heard in the appropriate court. The PSC rejected this argument as being unsound, finding that territorial agreements, while contracts, are particularly amenable to the PSC's jurisdiction because they are between utilities and other entities subject to the PSC's regulation and are approved by the PSC's order, pursuant to authority granted to the PSC by statute.

FMM's motion to dismiss argued that LCEC's complaint alleged the same facts and the applicable law addressed by the PSC in FPL's petition for declaratory statement. FMM concluded that where the material facts are the same, and the governing law has not changed, LCEC's petition should be dismissed, not because the declaratory statement order is binding upon LCEC, but because the allegations of LCEC's complaint failed to establish a breach of the territorial agreement.

The PSC agreed, finding that LCEC's initial complaint in Docket No. 840444-EU alleged facts materially different from those contained in FPL's request for declaratory statement. Specifically, the PSC found it alleged that FPL was building a transmission line into LCEC's service territory. Based upon LCEC's own facts, its allegations and FPL's were not identical and there was no compelling necessity for consolidating the dockets. Although LCEC may have had an interest in the outcome of FPL's declaratory action, it had declined a specific invitation to intervene in that proceeding. By its first complaint in Docket No. 850129-EU, LCEC had alleged new facts that brought it squarely within the holding in FPL's declaratory action.

The PSC declined to reverse its decision in the declaratory case by forbidding FPL to serve where the PSC had previously found it had a statutory obligation to do so. While the PSC dismissed LCEC's petition, it did so with leave to amend for the purpose of specifically alleging facts demonstrating a violation of the two-page territorial agreement in effect between the utilities.

By its Amended Petition (R-37) (AA-1), LCEC realleged the same ultimate facts it had previously raised and specifically alleged that the agents of FPL and FMM conspired and acted in concert with one another to deprive LCEC of its rights under the territorial agreement. Once again, LCEC asked that the PSC declare its decision in the declaratory statement docket null and void and prohibit FPL from serving FMM through FMM's lines at a delivery point unquestionably located in FPL's service territory.

On August 5 and 8, 1985, respectively, FMM and FPL again filed motions to dismiss LCEC's petition. Essentially, both argued that LCEC had merely realleged the same facts that were the basis for the PSC's decision in the declaratory statement and that the decision in that case should govern. Furthermore, both argued that, even if accepted as true, LCEC's facts alleged to constitute a violation of the territorial agreement, did not do so.

The PSC agreed on both points. The territorial agreement between LCEC and FPL is a two-page document that is straightforward and concise. (AA-23) It establishes a boundary between the service areas of the two utilities and provides that neither shall serve a customer within the service area of the other without first consulting and receiving the approval of that utility. The PSC found that the allegations of LCEC's petition, even if taken to be true, fail to demonstrate a violation of the territorial agreement. (R-78)

SUMMARY OF ARGUMENT

The amended petition to resolve a territorial dispute filed by Appellant was properly dismissed by the Public Service Commission because the facts alleged in the amended petition (R-44) (AA-23), as a matter of law, failed to establish a violation of the territorial agreement between Appellant and Appellee/Florida Power & Light Company.

To the contrary, the petition alleged facts, all of which must be taken as true for purposes of a motion to dismiss. The petition alleges that Appellee/Florida Power & Light Company delivers electrical energy to a customer inside the area allocated to Florida Power & Light Company under its territorial agreement with Appellant.

All well-pleaded facts in the amended petition of Appellant are admitted to be true for the purpose of the motion to dismiss; thus, as a matter of law, no evidentiary hearing is available to petitioner. If Appellant had alleged facts upon which relief could be granted, it would have been entitled to and would have received an evidentiary hearing to prove the facts alleged.

Appellant's right to due process has not been abridged.

POINT I

THE FLORIDA PUBLIC SERVICE COMMISSION PROPERLY GRANTED APPELLEE/FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS APPELLANT'S AMENDED PETITION FOR FAILURE TO ALLEGE VIOLATION OF A TERRITORIAL AGREEMENT BETWEEN APPELLANT AND APPELLEE/FLORIDA POWER & LIGHT COMPANY.

The only issue before this Court is whether, as a matter of law, the Florida Public Service Commission properly granted Appellee/Florida Power & Light Company's Motion to Dismiss the amended petition of Appellant for failure to state a cause of action; i.e., a violation of the territorial agreement between Appellant and Appellee/Florida Power & Light Company. (AA-23)

In consideration of a motion to dismiss, all facts well pleaded are deemed true and when such facts state a cause of action on which the relief requested can be granted, the motion should be denied. Where, as in this case, assuming all facts properly pleaded to be admitted and correct, the petition as a matter of law fails to state a cause of action for violation of a territorial agreement between the parties, the motion must be granted and the petition dismissed. Carter v. Sterling Finance Co., 132 So.2d 430 (Fla. 1st DCA 1961).

Examination of the amended petition (R-34)(AA-1), on which the order appealed is based, fails to reveal a clear allegation of violation of the territorial agreement between Appellant and Appellee/Florida Power & Light Company. To the contrary, the amended petition alleges and admits that Appellee/Florida Power & Light Company delivers energy to a customer of Appellee/Florida

Power & Light Company within the service territory of Appellee/
Florida Power & Light Company.

The service agreement dated October 8, 1964, between Appel-
lant and Appellee/Florida Power & Light Company, and approved by
the Florida Public Service Commission, provides that:

It is agreed that neither [Appellant nor
Appellee/Florida Power & Light Company] will serve
or offer to serve a customer outside its service
area as shown on Exhibit A without first consult-
ing and reaching agreement with the other party.

(R-44) (AA-23)

In order for the Appellant to have been entitled to relief
from the Florida Public Service Commission, it would have had to
have alleged and ultimately proved that Florida Power & Light
Company was providing or offering to provide service to a cus-
tomer outside its own service area and within the service area of
Lee County Electric Cooperative, Inc. The Appellant not only
failed to allege that Florida Power & Light Company was providing
service or was offering to provide service to a customer within
Appellant's territory, but admitted on the face of the complaint
that Florida Power & Light Company was providing the service at a
point within Florida Power & Light Company's territory. It must
be assumed that the drafters of the contractual agreement between
Florida Power & Light Company and Lee County Electric Cooperative,
Inc., were aware of the legal significance of the words used in
the agreement and were, therefore, aware of the manner in which
the language would be interpreted and intended that it be enforced

accordingly. Section 25-6.03(6), F.A.C., defines "service" as follows:

The supply by the utility of electricity to the customer, including the readiness to serve and availability of electrical energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer. (Emphasis Supplied) (AA-35)

It is, thus, clear that, as a matter of law, when Florida Power & Light Company provides service at the customer's point of delivery and that point is located within the service area of Florida Power & Light Company as agreed to by both parties, provision of that service is clearly and specifically within the framework of the agreement and is neither violative of its intent or its plain meaning under the law. Those provisions, coupled with the mandate of Section 366.03, Florida Statutes (1985), of a public utility to furnish persons applying for service is no doubt the reason behind the Commission's determination in Order No. 13998 (AA-28) in which it issued its declaratory statement that Florida Power & Light Company would, indeed, have a duty to serve a customer requesting delivery of service at a delivery point within the service area of Florida Power & Light Company even though it was recognized that the customer, after purchasing the electricity at the point of delivery, could deliver that electricity over its own wires and facilities outside the service territory of Florida Power & Light Company. Thus, the Commission, in rejecting the Appellant's amended petition to resolve the territorial dispute, properly determined that, even if all of the

allegations of the petition were taken as true, no allegation constituted a violation of the service agreement between the utilities and that the Public Service Commission, therefore, had no jurisdiction to grant the relief requested and correctly dismissed the petition.

Appellee/Florida Power & Light Company's Electric Tariff, which is filed with and approved by the Commission, has the force and effect of law unless outrageous or unreasonable in operation. See Florida Power & Light Co. v. State, ex rel. Malcolm, 144 So. 657 (Fla. 1932); Florida Power Corp. v. Continental Testing Lab., Inc., 243 So.2d 195 (Fla. 4th DCA 1971). Appellee/Florida Power & Light Company's Tariff, at Section 2.3, Sheet No. 6.020 and Sheet No. 5.020, defines "point of delivery" as the point where the Company's wires or apparatus are connected with those of the customer. (AA-33; AA-34)

As a matter of law, delivery of electricity, as defined supra, to a customer at a delivery point within Appellee/Florida Power & Light Company's service area is not a violation of the territorial agreement. Thus, the Commission properly recognized and applied the applicable law and determined that Appellant did not allege facts which constitute a violation of the agreement and dismissed the amended petition.

CONCLUSION

The Public Service Commission properly dismissed Appellant's amended petition to resolve a territorial dispute since, as a

matter of law, the petition failed to state facts on which the requested relief could be granted.

POINT II

LEE COUNTY ELECTRIC COOPERATIVE, INC.'S RIGHT
TO DUE PROCESS HAS NOT BEEN ABRIDGED.

The only purpose of an evidentiary hearing is to receive evidence in support or opposition to the allegations of the complaining party. Where the court, as in this case, presumes all of the well-pleaded facts of the petitioner to be true, the petitioner cannot be benefited by an evidentiary hearing since its only purpose is to attempt to prove that which, for purpose of the motion to dismiss, is already accepted as true. If the Appellant had been able to allege facts upon which relief could be granted, then surely it would have been entitled to and would have received an evidentiary hearing for the purpose of trying to prove the allegations.

CONCLUSION

The amended petition of Appellant requested that the Public Service Commission make a determination that Florida Power & Light Company had violated the terms of a service agreement entered into between the two parties and approved by the Commission. The operative language of that contractual agreement is as follows:

It is agreed that neither [Appellant nor Appellee/ Florida Power & Light Company] will serve or offer to serve a customer outside its service area as shown on Exhibit A without first consulting and reaching agreement with the other party. (R-44) (AA-23)

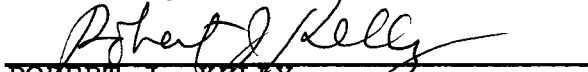
In order for the Appellant to have alleged a violation of the agreement between the two parties which would have entitled the Appellant to relief, the Appellant would have had to allege that Florida Power & Light Company was serving or offering to serve a customer outside of its service area as shown on Exhibit A to the agreement. The Appellant not only failed to allege that Florida Power & Light Company was serving or offering to serve a customer outside its service area, but, on the contrary, admitted that the delivery point of the service to the customer in question was inside the service area of Florida Power & Light Company as defined by the agreement.

Therefore, the Commission had no alternative but to dismiss the Appellant's amended petition and Appellee/Florida Power & Light Company respectfully requests that the decision of the Florida Public Service Commission be affirmed.

Respectfully submitted,



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