

IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC COOPERATIVE, )  
 INCORPORATED, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 JOHN R. MARKS, et al., in the )  
 official capacity as and constituting )  
 the FLORIDA PUBLIC SERVICE COMMISSION, )  
 )  
 Appellee. )  
 )  
 )  
 )

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CASE NO. 68,346

ANSWER BRIEF OF APPELLEE  
FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF THE CASE

By petition dated July 18, 1985, Lee County Electric Cooperative, Incorporated (LCEC), filed its third petition against Florida Power and Light Company (FP&L) seeking to resolve a territorial dispute. By Order No. 15452 issued December 16, 1985, the Florida Public Service Commission (PSC) granted FP&L's motion to dismiss with prejudice. In its order, the PSC stated that it had granted leave to amend "for the purpose of specifically alleging facts demonstrating a violation of the two page territorial agreement in effect between the utilities" (R-79). The PSC found that LCEC merely alleged the same facts as before and that the facts, even if accepted as true, failed to constitute a breach of the territorial agreement. The PSC therefore dismissed the petition with prejudice (R-80).

On December 31, 1985, LCEC filed a petition for reconsideration of Order No. 15452. By Order No. 15625 issued February 4, 1986, the petition for reconsideration was denied (R-95). LCEC filed its notice of appeal on February 16, 1986 (R-97).

### STATEMENT OF THE FACTS

This matter arose as a result of a utility customer's desire to lessen the costs associated with its purchase of electric services. The customer, Florida Mining and Materials Corporation (FMM), surveyed the market and determined that it was being charged substantially higher rates for service from LCEC than it would have been charged had it been a customer of FP&L. FMM asked FP&L to provide electric service to it, although it was within the service area of LCEC. FP&L denied the request. FMM then evaluated the costs of its constructing a private power line to a point of presence within FP&L's service area. It determined that the savings from lower cost electricity would justify the acquisition of right of way and the construction of the line. It discussed the proposition with FP&L and asked whether FP&L would provide service to FMM in the event of the construction of the line.

FP&L filed a declaratory statement with the PSC requesting a determination of its right and obligations to serve a customer who constructs a private transmission line into its service area (R-34). This request alleged that the customer was physically located within the service area of another utility and the line would be constructed by the customer across the boundary line established in an agreement between FP&L and LCEC (R-78). The PSC considered FPL's Petition for a Declaratory Statement at its December 4, 1984 agenda conference.

As noted earlier, LCEC had filed its first petition, alleging a territorial dispute on November 19, 1984 (Docket No. 840444-EI).

LCEC mistakenly alleged that FP&L was going to construct a line into LCEC's service territory to provide service to FMM. Therefore, LCEC sought an order from the PSC restraining FP&L from constructing such a line. Sometime prior to December 3, 1984, LCEC became aware of FPL's request for declaratory statement (Docket No. 840414-EI). Petitions for declaratory statements are noticed in the Florida Administrative Weekly pursuant to the provisions of section 120.565, Florida Statutes. FPL's Petition was noticed on November 10, 1984 in Vol. 10 No. 48 at 5152, Fla. Admin. Weekly. On December 3, 1984, LCEC filed a motion to consolidate its petition to resolve a territorial dispute with FP&L's petition for declaratory statement. The PSC denied the motion to consolidate because the questions presented were different (PSC Order No. 13998; Appellants Brief App. p. 1). LCEC took a voluntary dismissal of its petition when the PSC offered to grant the relief LCEC requested (R-34). The PSC noted that "LCEC was represented by counsel at the December 4 agenda conference and was offered intervenor status in FPL's declaratory statement but declined the same" (R-34). The PSC declared that because the potential customer (FMM) acquired an ownership interest in property clearly within FP&L's service territory and requested FP&L deliver power to that point: "We find that FPL has an obligation to serve the customer." (PSC Order No. 13998; Appellants Brief App. p. 2).

LCEC filed another petition to resolve a territorial dispute with FP&L. Upon review of the petition, the PSC determined that the allegations failed to establish a breach of the territorial

agreement (R-35). Therefore, the motion to dismiss was granted and LCEC was granted leave to amend.

On July 18, 1985, LCEC filed an amended petition against FP&L to resolve a territorial dispute. In Order No. 15452, the PSC found that LCEC had realleged the same ultimate facts previously raised. LCEC had failed to allege sufficient facts to demonstrate a violation of the territorial agreement between itself and FP&L. Therefore, the PSC, by Order No. 15452, granted motions to dismiss with prejudice (R-78-80).

In this proceeding, after FMM contacted FP&L concerning obtaining electric service from FP&L, LCEC elected to pursue the matter before the Commission as a territorial dispute (and refused to participate in the Declaratory Statement). Throughout the various proceedings, the PSC afforded LCEC every opportunity to participate. LCEC had all its procedural due process rights. The Appellant proceeded in the manner of its own choosing.

PRELIMINARY STATEMENT

The Appellant's brief addresses matters not directly part of the order under review. As such, this Appellee has restated the point which is properly the issue in this proceeding: "Whether the PSC has, in some manner deprived the Appellant of due process." All of the issues raised by the Appellant revolve around this key contention. If this issue is decided in favor of the PSC all other points are substantially eliminated. However, the PSC, in discussing the alleged deprivation of due process, will cover the other issues raised by the Appellant.

### SUMMARY OF ARGUMENT

The Commission has no jurisdiction to regulate the activities of a customer. The Commission's jurisdiction only extends to the regulation of utilities within the jurisdiction conferred by the legislature in Chapter 366, Florida Statutes. During this proceeding, LCEC was given the opportunity to participate in FP&L's request for a declaratory statement. Instead, the Cooperative insisted that FP&L was violating a territorial agreement despite the fact that the customer was intending to construct a power line to obtain service from outside the LCEC service area. The Commission repeatedly offered to allow the Cooperative to amend its pleading. The Commission declined to consolidate the proceeding in which FP&L was seeking a declaratory statement with LCEC's territorial dispute because the facts as alleged were different.

The record clearly supports the Commission's findings and conclusions. The Commission even expressed the view that the outcome was not necessarily the preferred course but that the jurisdictional limitations on the actions of customers precluded any different result.

The Appellant's arguments relative to the exclusivity of service area are inapplicable in Florida. In Florida, electric utilities do not have certificated service areas in which they have the exclusive rights to serve. Nor does this case involve a situation where a municipality has granted an exclusive right to serve within the municipal boundary.

This case deals with a situation where a customer moves it's

point of service delivery from one utility's service area to another utility's service area. Tampa Electric Co. v. Withlacoochee River Electric Coop., 122 So.2d 471 (Fla. 1960) is inapplicable to this proceeding in that in Withlacoochee, one utility was building its service lines into the service area of another utility. It was a case dealing with a territorial intrusion by one utility into the service area of another utility. Those are not the facts in this case. Here the Commission's jurisdiction was clearly limited. This is not a case where a utility was intruding into the service area of another utility. A utility customer was leaving the service area seeking lower rates from another utility and the Commission could not regulate the activities of a customer.

POINT I

THE PSC PROVIDED THE APPELLANT PROCEDURAL DUE  
PROCESS AT ALL POINTS IN THE PROCEEDING.

The PSC's jurisdiction over territorial disputes and the resolution of competition for service areas extends only to utilities regulated by the PSC (§ 366.04 (2), Fla. Stat.). The PSC has no jurisdiction to directly regulate the conduct of utility customers. The PSC may direct that a company discontinue service to a customer in the event that certain conditions are not met (Rule 25-6.105, Fla. Admin. Code); it may prescribe rates to be charged customers (§ 366.05 and 366.07, Fla. Stat.); and other conditions (see: Rule 25-6.97, 25-6.100 and 25-6.101, Fla. Admin. Code). However, those powers are conferred on the PSC, the exercise of which applies to the utilities regulated by the PSC.

The PSC is without jurisdiction to prohibit the construction of a private transmission line on private property by a consumer for his own private use. Even the PSC's jurisdiction over the siting of transmission lines does not extend to consumers.

§ 403.501, et seq., Fla. Stat.

As a general proposition, customers often construct power lines in order to obtain service from a given utility. After construction, the customer generally contributes those facilities to the utility. These assets appear in the utility's records as contributions-in-aid-of-construction. The PSC clearly has jurisdiction to order the provision of electric service to a customer who constructs such a private transmission line to the service area of regulated utility (§ 366.03, Fla. Stat.); Rule

25-6.95, Fla. Admin. Code.

The issue in this proceeding is whether the PSC denied the Appellant due process in reviewing its claimed territorial dispute petition. The answer is that the PSC provided the Appellant the opportunity to participate in all of the proceedings. The Appellant proceeded in the manner of its own choosing. Due process was provided.

The PSC at every critical point in the proceedings ruled on the pleadings provided by the parties. What LCEC really complains of is that the PSC did not reconstruct LCEC's pleadings to anticipate what LCEC was seeking. The issues in a proceeding are ordinarily limited to those raised by the pleadings (73A C.J.S. 123). In an analogous situation, a trial court does not commit error where it fails to award the plaintiff an opportunity to amend his complaint in the absence of a request to amend; Dade County Police v. Metro Dade County, 452 So.2d 6, 8 (Fla. 3d DCA 1984); citing Nesbitt v. City of Miami, 314 So.2d 806 (Fla. 3d DCA 1975); and Pletts v. Pletts, 258 So.2d 297 (Fla. 3d DCA 1972). In this case, when LCEC contended that FP&L was going to build a transmission line into LCEC's service area, the PSC indicated its willingness to grant LCEC's request for an order prohibiting that construction. When LCEC learned that its facts were in error, it withdrew its request and voluntarily dismissed the petition.

LCEC then filed another petition seeking the resolution of a territorial dispute. Under the statute, a territorial dispute is a disagreement between two utilities regulated by the PSC. § 366.04(2)(e), Fla. Stat. Here, there was no disagreement

between two utilities on the facts. After several amendments to the filings the parties ostensibly agreed to the facts. LCEC's petition to resolve a territorial dispute was dismissed by Order No. 15452 issued December 16, 1985. Both FP&L and FMM had filed motions to dismiss on the grounds that LCEC had failed to allege sufficient facts, which, when assumed true, failed to demonstrate a breach of the two page territorial agreement between LCEC and FP&L. The PSC agreed and granted the motion to dismiss. The dispute, if one wishes to so characterize the facts, was between LCEC and one of its customers. FP&L was taking a safe conservative approach, asking for clarification of its rights and obligations without doing any act which may have constituted a breach of its duty or be repugnant to the orders of the PSC and this Court.

On November 14, 1984, FP&L filed its petition for a declaratory statement seeking a determination whether it had a statutory obligation to serve a customer (FMM) located in another utilities service territory (LCEC) if that customer constructed a transmission line into FP&L's service territory and requested service (Docket No. 840414-EI). LCEC refused to intervene in that proceeding.

In its brief, by way of explanation, LCEC states it did not intervene in the declaratory statement proceeding because it would:

[H]ave to take the case as it found it, proceed without a chance to prepare, and waive all due process rights of notice.

Based upon LCEC's own statements, it found the case at the PSC agenda in the initial pleadings stage, prior to any significant activity occurring, e.g.: an evidentiary hearing. LCEC sat on its rights and declined to accept intervenor status in the declaratory statement proceeding. There is no way to know whether the PSC would have deferred ruling on December 4; whether an evidentiary hearing would have been held, based upon the request of a party; or, whether the declaratory statement order would have been resolved differently. LCEC would not accept party status and in so doing declined an opportunity to influence the declaratory statement order.

LCEC had every opportunity to intervene in the request declaratory statement proceeding and assert its position and rights. Instead, it claims that if it had intervened, it would have taken the case as it found it, and that would somehow have deprived it of due process. If LCEC had intervened, it would have had the right to appeal. Instead, it waived that right. LCEC chose to boycott the very proceeding in which it should have participated.

LCEC kept amending its petition to resolve a territorial dispute attempting to get the facts correct. Finally, it structured the facts the same as the facts in the request for a declaratory statement. Once it had accomplished that, the PSC recognized that it had already decided the issue raised by LCEC. It is unfortunate that LCEC decided not to intervene in the proceeding in which those facts were considered. However, it was LCEC and LCEC alone that made the decision that precluded in from

participating in the appropriate forum to decide this controversy.

Estoppel by judgment is applicable where, although two causes of action differ, the result is that the judgment in the first suit estops the parties in a second suit from relitigating issues which were actually adjudicated in the first action. Gordon v. Gordon, 59 So.2d 40, 44 (Fla. 1952). Here, the parties were not the same in the declaratory statement and in the petition to resolve a territorial dispute, based upon LCEC's refusing the invitation to intervene in the declaratory statement. However, when LCEC amended its petition and the facts were squarely within those alleged by FP&L in the declaratory statement there is no argument that the issue LCEC wished to litigate was the same issue the PSC had ruled on in the declaratory statement. Therefore, the effect of the declaratory statement order is similar to estoppel by judgment.

The PSC decided that it has no jurisdiction to prevent a customer from constructing an electric transmission line into the territory of a neighboring electric utility and when that customer requests service at a point of presence within the utility's territory, the utility has an obligation to provide electric service.

In his concurring opinion, Commissioner Cresse stated he would have preferred to be able to advise FP&L not to serve, but he was convinced that the law in Florida required FP&L to serve customer who requests delivery in its service territory. FP&L is not required to determine where the customer will use the electricity.

It is firmly established that orders of the Commission are

"clothed with the presumption of validity." Citizens of Florida v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982).

Also this court has stated:

[W]e will not overturn an order of the Commission because we would have arrived at a different result had we made the initial decision; something more is needed. (emphasis supplied).

Shevin v. Yarborough, 274 So.2d 505, 509 (Fla. 1973).

POINT II

THE TERRITORIAL AGREEMENT BETWEEN LCEC AND FP&L IS NOT BREACHED WHERE THE POINT OF DELIVERY IS WITHIN THE AGREED UPON SERVICE TERRITORY, EVEN THOUGH THE ELECTRICITY WILL BE USED AT A GEOGRAPHICAL LOCATION THAT IS WITHIN THE OTHER UTILITIES SERVICE TERRITORY.

Legislation has been introduced that would have required the electric utilities, like their counterparts in the telephone industry, to seek certificates of public convenience and necessity (see H.B. 30 and S. 451, introduced during 1985 Legislative Session). Those certificates would define with specificity the areas to be served by the utilities. In addition, the certificates would grant a license to serve with exclusivity all of the customers within a given geographic area. The legislation has not been enacted. The rights of exclusivity of service in a certificated service areas does not exist in Florida with regard to electric utilities. See § 366.04, Fla. Stat.

This distinction is crucial for a determination of the applicability of precedent from other states. The cases cited by the Appellant deal with a determination of rights between two electric utilities in states (Arkansas, Iowa, Mississippi) having certificated service areas. For example see, e.g., Southwestern Electric Power Co. v. Carroll Electric Cooperative Corp., 261 Ark. 919, 554 S.W.2d 308 (1977); O'Brien County Rural Electric Cooperative v. Iowa State Commerce Commission, 352 N.W.2d 264 (Iowa 1984); Capital Electric Power Association v. Mississippi Power & Light Co., 218 So.2d 707, 713 (Miss 1968). In addition, precedent dealing with the crossing of municipal boundaries are

equally distinguishable in that municipalities have similar defined legal rights to areas within city charters. See e.g., Baizen v. Board of Public Works of Everett, 1 Mass. App. Ct. 602, 304 N.E.2d 586, 588 (1973); Town of Coushatta v. Valley Electric Membership Corp., 139 So.2d 822, 829 (La. Ct. App. 1961).

Therefore, neither line of precedent applies here. In addition, no such license or definition of service territories has been created for investor owned utilities by law in Florida.

The PSC's approval of a territorial agreement between two electric utilities defines the rights only as between those two entities. The two page territorial agreement (R- 7,8) designates areas FP&L and LCEC would serve. The parties agreed that neither would serve or offer to serve a customer outside its service area without first consulting and reaching an agreement with the other party. The situation that exists in this case do not appear to have been contemplated by the parties at the time of the contract. FP&L was not seeking to serve a customer technically within the service area of the cooperative. It was questioning whether it had an obligation to serve a customer who builds a transmission line into its territory. It is a distinction with a major difference. It goes directly to the heart of the case: whether the PSC's jurisdiction over utilities can be extended to regulate the activities of customers.

The territorial agreement, dated October 8, 1964, was submitted to the PSC for approval. In approving the agreement, the PSC stated, in Order No. 3799 issued April 28, 1965 as follows:

It is the intent of the Commission to approve only the geographical division of the territories involved in these agreements, and not to approve the agreements in any other regard....

In its order dismissing the complaint, the PSC found that the agreement did not address the situation where a customer builds a transmission line and effectively removes itself from the service territory of one utility and establishes a delivery point in a neighboring utilities service territory.

The PSC considered that delivery point was a key factor in determining whose territory a customer was located in. The Florida PSC does not have legislative authority to grant certificated territory to electric utilities. In other jurisdictions, public service commissions have the requisite legislative authority to grant certificated territory for electric utilities. The Florida PSC has no jurisdiction over customers and limited jurisdiction over rural electric utility cooperatives. FP&L is an investor owned utility subject to extensive regulation by the PSC. The PSC does not have jurisdiction to prohibit FMM from building a transmission line to establish a point of delivery within a neighboring utilities service territory.

In Tampa Electric Co. v. Withlacoochee River Electric Coop., 122 So.2d 471 (Fla. 1960), the Cooperative invaded the territory of Tampa Electric Company (TECO) and attempted to take away customers already served by TECO. TECO filed for a restraining order, which the Circuit Court granted. The Second District Court of Appeals reversed (115 So.2d 9 (1959)). On Certiorari to this Court, the Second District Court's order was quashed. This Court

found that the Cooperative's activity:

[V]iolates the plain language as well as the spirit of section 425.04, F.S.A.... we are in accord... that the cooperatives activities are tantamount to an unlawful injury or hinderance of Tampa Electric property rights.

122 So.2d 471, supra at 473.

Even if the utility has a certificate issued by the PSC to serve a specified territory: "[I]t is not property in any constitutional sense and conveys no vested interest...." Alterman Transport Lines Inc. v. State, 405 So.2d 456, 460 (Fla. 1st DCA 1981). By finding that TECO had "property rights" it came within the exception to the general rule established in St. Joseph Telephone & Telegraph Company v. Southeastern Telephone Company, 149 Fla. 14, 5 So.2d 55 (1941). Under the general rule, the State would have to file for judicial remedies to protect franchise authority granted to a public utility.

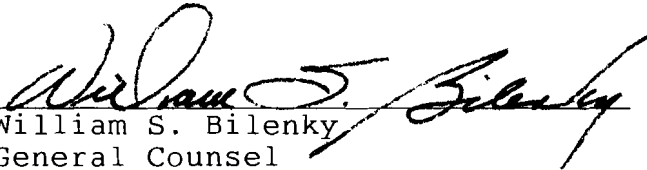
In this case FP&L did not invade LCEC's territory. The customer, who the PSC does not regulate, elected to leave LCEC's territory. When FMM established itself in FP&L's territory the Commission found FP&L had an obligation to serve. Any cause of action LCEC may have appears to be against the customer for leaving the territory.

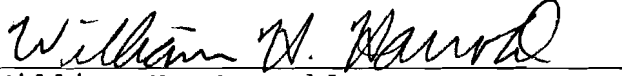
Based upon LCEC's failure to demonstrate a breach of the territorial agreement, the PSC had no alternative but to dismiss the petition.

CONCLUSION

The Commission granted procedural due process to the Appellant at all stages of the proceeding. The Commission exercised the jurisdiction conferred by the Legislature. The Commission declined to exercise jurisdiction it did not have. The decision of the Commission comports with the essential requirements of law and should therefore be affirmed.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 26th day of August, 1986 to the following:

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