BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling.	DOCKET NO. 881326-EI ORDER NO. 20808 ISSUED: 2-24-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

DECLARATORY STATEMENT REGARDING
WHEELING BY FLORIDA POWER AND LIGHT COMPANY

BY THE COMMISSION:

By petition filed October 11, 1988, Florida Power and Light Company (FPL) sought a declaratory statement regarding a request for wheeling.

Background

FPL has provided and currently provides electric service to the Union Carbide Linde Division air products plant at Mims, Florida. The plant is located in an area served by FPL. By letter dated August 11, 1988, Union Carbide Corporation (Union Carbide) advised FPL of its request to Florida Power Corporation (FPC) to provide interruptible service to the Mims plant and requested FPL to wheel the interruptible power from FPC. Both FPL and FPC informed Union Carbide they could not accede to the request.

On October 11, 1988, FPL filed a petition for declaratory statement with the Commission. Essentially, the request asked for a statement that said that Union Carbide's request of FPL to wheel power from FPC's territory to the Union Carbide plant in FPL's territory would be inconsistent with the State statutes governing the regulation of electric service to retail customers and with a territorial agreement approved by the Commission in Order No. 3799.

On November 14, 1988, Union Carbide filed a Motion to Dismiss the Petition of FPL. In summary, that motion urged the Commission to dismiss the petition for the following reasons: that it would be an abuse of the Commission's discretion to issue the statement given the pendency of a related anti-trust proceeding in United States District Court, Union Carbide Corporation v. Florida Power & Light Company and Florida Power Corporation, Civil Action 88-1622-CIV-T-13C (M.D. Fla., amended complaint filed October 18, 1988); that the petition asked the Commission to take action which was beyond the scope of its jurisdiction; and that the petition failed to allege Union Carbide's transmission request would produce the harmful effects arguably sought to be prevented by the statutory provisions which FPL invoked.

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On November 29, 1988, FPL filed a Response to Union Carbide's Motion to Dismiss. That response stated: the pendency of the Union Carbide antitrust action underscores the need for Commission action on FPL's request for declaratory statements; Federal regulation of the rates and terms and conditions of wheeling does not affect this Commission's authority to act on FPL's petition; and FPL has properly invoked this Commission's declaratory statement jurisdiction.

On January 12, 1989, Union Carbide filed a Motion for Leave to File Reply to Response of FPL to Motion to Dismiss, and filed a Reply and a Request for Oral Argument. Union Carbide contended that FPL's response made it clear that the petition's real purpose is to secure this agency's involvement in resolving matters pending before a federal district court and this would constitute Commission "interference" with federal court responsibilities. Union Carbide also asserted that FPL's petition "would have this Commission attempt to obstruct the flow of power in interstate commerce by declaring that the requested transmission cannot occur unless certain state policies are satisfied." Union Carbide went on to argue that FPL's petition transgresses the "bright line" which separates federal and state jurisdiction; that FPL's Response, like its Petition, failed to show how Union Carbide's request could possibly harm any of the interests arguably protected by the statutes, and that FPL had to present evidence demonstrating a causal link between Union Carbide's request and reasonably expected impacts upon FPL. Union Carbide contended that FPL did not explain how the loss of interruptible load such as Union Carbide's could possibly affect the utility planning function, "particularly since a utility does not include interruptible demand in deciding whether to build new generation;" and that the territorial service agreement upon which FPL relies is itself the subject of a pending lawsuit in federal district court.

Other procedural actions in this case are the following:

--FPC filed an Amended Notice of Intervention on November 9, 1988, and requested that the Commission expedite these proceedings;

--Union Carbide filed a Response to FPC's Amended Notice on November 21, 1988;

--FPL filed a Motion for Extension of Time to Respond to Union Carbide's Motion to Dismiss on November 18, 1988;

--FPC filed on November 21, 1988, a Transcript of Hearing resulting in Commission Order 3799 approving territorial agreement;

--Union Carbide filed a Motion to Intervene January 18, 1989;

--FPC filed an Amended Notice of Supplemental Authority January 19, 1989.

Finally, on February 3, 1989, Union Carbide filed notice of its Withdrawal of the Motion to Intervene and its Request for Oral Argument. In doing so, Union Carbide asked that its Motion to Dismiss and its Reply to FPL's Response be treated by the Commission as amicus submissions and that the Commission "may consider or not consider then as it deems appropriate." The basis for Union Carbide's withdrawal, as stated in the Notice, was a concern that the "limited nature" of Union Carbide's intervention was ignored or misunderstood. Union Carbide had "consistently argued that the federal antitrust court is the only proper forum

to adjudicate the issues raised by FPL and FPC, and it has simply sought the opportunity to argue the limited jurisdictional issues to the Commission."

The Commission acknowledges Union Carbide's Notice of Withdrawal of Intervention. As requested by Union Carbide, we will still take cognizance of the points raised and essentially will treat the filings as amicus submissions. Our ruling on the Petition effectively denies Union Carbide's Motion to Dismiss.

FPC's Intervention

We find it appropriate to allow FPC to intervene. Therefore, we will treat FPC's Notice of Intervention as a motion and grant the motion. Section 120.565, Florida Statutes, states that a declaratory statement sets out the agency's opinion as to the applicability of a specified statutory provision of any rule or order of the agency "as it applies to the petitioner in his set of circumstances only." Thus, there is some question as to the need to allow intervention. Yet, here, FPC is part of the equation in the territorial agreement.

FPC, in its Amended Notice of Intervention, stated that on June 28, 1965, this Commission issued its Order No. 3799 approving a territorial agreement between FPL and FPC. That Order established service areas for the two utilities in certain geographic areas in which their service areas had begun to overlap. The FPC notice also described the Commission's active supervision of these service areas since their initial approval. Among other things, Order No. 3799 was modified by Commission Order No. 5255, dated October 29, 1971, to exclude from its effect the sale of bulk power supply for resale. Order No. 3799 was again modified by Commission Order No. 6184 dated June 28, 1974, to provide for minor adjustments to the boundary between the service territories in the Sanford, Seminole County, area. FPC points our that Union Carbide has not requested this Commission to modify Order No. 3799 to allow FPC to provide retail electric service to Union Carbide's Mims plant in Brevard County. Such action, in the absence of an appropriate modification to the terms of Order No. 3799, would "not only violate existing provisions of that Order, but would also create an unreasonable preference or advantage to Union Carbide in violation of Section 366.03, Florida Statutes," says FPC. FPC also urged the Commission to expedite these proceedings.

Union Carbide's response to FPC's Notice was that FPC's request should be dismissed because only the federal court can address and resolve the question of whether FPL and FPC are required to provide the service requested by Union Carbide.

FPC is appropriately before the Commission in this matter. Both the territorial agreement and the request for wheeling have a direct impact on FPC. However, there is no need to expedite these proceedings because this declaratory statement is independent of the federal case.

Commission's Discretion to Issue Declaratory Statement

In its Motion to Dismiss, Union Carbide raised several arguments as to why the Commission should not issue the statement. We believe that the Commission -- while it has the discretion to refuse to entertain the Petition -- is also not precluded from doing so.

There is an actual present practical need for the declaratory statement. Union Carbide has requested that FPC provide power to

it and that FPL wheel the power to Union Carbide because FPC has no transmission facilities to serve Union Carbide. FPL's request is that the Commission clarify its rights and obligations under Florida law in responding to Union Carbide's, its customer's, stated intention of seeking service from another utility.

Union Carbide alleges that any harm FPL would face is merely speculative and that this "discrete transaction" would produce no harm. This allegation ignores the impact this transmission -- if repeated -- would have on the current regulatory scheme and the long-term harm to other utility ratepayers it would produce. As the Florida Supreme Court observed in Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), the allowance of a customer's proposal might appear to benefit a few, but "the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful to the utility, its stockholders, and the great mass of its customers."

There is also a present ascertained state of facts with which the Commission should deal. Union Carbide has requested FPC provide power to it. Both FPC and FPL contend Union Carbide is located within FPL's territory, which territory they contend was allocated to FPL in a territorial agreement approved by this Commission. FPL wants to know whether, under Florida law, it can be required to give up a customer within its territory. Further, can it be required to provide transmission service to Union Carbide in order for the customer to purchase electricity from another utility? Union Carbide has made a request for retail wheeling service from FPL. FPL wants to know if it can be compelled to provide that wheeling.

The declaratory statement would in no way "interfere with" a Federal District Court action or "trespass upon federal agency jurisdiction," as Union Carbide suggests. Here, the Commission is asked to interpret Florida statutes and Florida cases regarding territorial agreements which have long been established, monitored, and supported in this state. Federal law itself preserves this jurisdiction to states. As provided in FPC's Amended Notice of Supplemental Authority, 16 U.S.C. Section 824j(a), (b), (c)(3), and (4) provide that no order may be issued by FERC regarding certain wheeling authority which is "inconsistent with any State law which governs the retail marketing areas of electric utilities; and no order may be issued by FERC under this section providing for the transmission of electric energy directly to an ultimate consumer.

While the Federal District Court suit does involve the question of whether Union Carbide can get service from FPC rather than FPL, the suit asks for relief under federal anti-trust law, not Florida regulatory law. Such a federal issue would surely take years to make its way to the ultimate forum at the U.S. Supreme Court and would not be finally decided until that point. In the meantime, this Commission is being asked to address the interpretation and enforcement of the current regulatory scheme; a matter within its express statutory authority.

Here, we are presented questions that are entirely within our purview. We see no pre-emption by the Federal Energy Regulatory Commission over the retail delivery of energy to a Florida utility's customer. Also, the Commission is not being asked to address federal anti-trust issues. We believe it is appropriate for the Commission to proceed with clarifying the rights and obligations of the petitioner under Florida law. We do so independently and regardless of the federal suit.

Substantive Issues Raised by FPL's Petition

Specifically, FPL requests the issuance of declaratory statements that: FPL should not wheel power as requested because Union Carbide's proposal is inconsistent with section 366.04(3), and section 366.05(1), Florida Statutes (1987); Union Carbide's proposal is inconsistent with section 366.03, Florida Statutes (1987); the service contemplated by Union Carbide's proposal is inconsistent with the rights and obligations of FPL under its territorial agreement with FPC, with Order No. 3799 approving that agreement and with sections 366.04(2) and 366.05(1), Florida Statutes (1987); and FPL should not provide the retail wheeling services requested by Union Carbide unless it is cost-effective to FPL and its general body of ratepayers. Basically, FPL is seeking a statement that FPL is not required to wheel FPC's power to Union Carbide under Florida law and pursuant to its territorial agreement with FPC; and that Union Carbide's request is inconsistent with the State statutes governing the regulation of electric service to retail customers.

We determine that pursuant to the applicable Florida statutes and case law, FPL is not required to wheel the power as requested by Union Carbide when such wheeling contravenes the territorial agreement in effect between FPL and FPC, which has been approved by this Commission.

The statutory sections which provide the authority for territorial agreements and for the Commission's role in such agreements are: Sections 366.03, 366.04(3), 366.05, and 366.04(2)(c), and (d), Florida Statutes. Section 366.03, Florida Statutes, sets forth the general duties of a public utility. These include the mandate that no public utility give "any undue or unreasonable preference or advantage" to any person or locality, or subject any person "to any undue or unreasonable prejudice or disadvantage." The Commission's jurisdiction over the "grid bill" is provided in section 366.04(3), Florida Statutes. It states that the Commission has authority over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida for the avoidance of further uneconomic duplication of generation, transmission, and distribution." Section 366.05, Florida Statutes, provides the Commission's power "to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary ... to secure adequate service." Section 366.04(2), Florida Statutes, describes the Commission's authority to require electric power conservation and reliability within a coordinated power grid, and to approve territorial agreements.

The Commission and the Florida Supreme Court have long recognized the value of territorial agreements because the agreements best serve the public interest in preventing duplication of facilities between electric utilities, and allow the utilities to make economical long-range plans for expansion of electric facilities necessary to serve customers in a geographically defined area.

As the Commission stated in Order No. 3799 issued in 1965, page 3:

> The advantages of having a territorial agreement are manyfold: If there is no agreement, there will be duplications of service as a result of unrestrained competition, which in turn has several

> undesirable results. Unrestrained competition leads to attempted preemption of areas by the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment and, in effect, must be subsidized by other customers of the utility. It means duplication of facilities in the same public ways which results in neither utility being able to get a full return on its investment, to the detriment of other customers who, in effect also subsidize such uneconomical operations. It requires more employees to be constantly in the competitive areas and consumes more time and energy in efforts to "out-sell" the competing utility. It makes for unsatisfactory customer relations in that the customer, being betwixt competing utilities, is drawn involuntarily into the competitive squabbles and must suffer the resulting service inefficiencies. It prevents the full development of the customer potential in the competitive area since knowledge that a full return is unobtainable tends to divert the activities necessary for such development to more profitable areas, all to the detriment of the customer, and accordingly, not in the public interest.

Policy and Practical Implications

While this declaratory statement deals with the petitioner in his particular set of circumstances, there are nevertheless policy and practical implications to the intention of a customer to choose its utility. We will describe these briefly.

Each utility within the State is under a statutory obligation to provide adequate generation, transmission, and distribution facilities to serve its existing customers and any future customers it can reasonably identify in a planning horizon.

The Commission has long recognized that in order to have effective planning each utility must identify the customers it is obligated to serve. Territorial agreements set the boundaries that establish which utility is obligated to serve a new customer.

The relevant territorial agreement between FPL and FPC was approved by the Commission in Docket No. 7420-EU, Order No. 3799. FPL has been serving Union Carbide for sometime. To have Union Carbide switch to FPC would invite rate shopping throughout the state. This would create confusion as to who has the obligation to serve and how much generation each utility must maintain. This would limit the Commission's ability to maintain a coordinated electric power grid.

Florida Supreme Court Cases and Florida Statutes Regarding Territorial Agreements and Commission Authority

More than one statutory section has been relied on by the Florida Supreme Court in upholding these territorial agreements and in affirming the Commission's role in approving the agreements.

Storey v. Mayo, supra, is the seminal case in Florida in which the Florida Supreme Court held that a territorial agreement between two electric utilities was not invalid as being in restraint of trade, contrary to the public interest, or violative of equal protection.

The Court decried the situation created prior to territorial agreements. Prior to the agreement, the FPL and the City of Homestead actively competed for customers in the suburban areas. The Court noted, "This, of course, required duplicating, paralleling, and overlapping distribution systems in the affected areas." The duplication of lines, poles, transformers, and other equipment not only marred the appearance of the community but also increased the hazards of servicing the area.

The Court continued:

> Such overlapping distribution systems substantially increase the cost of service per customer because they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient. Obviously, neither system receives maximum benefit from its capital invested in the area. The ultimate effect of this is that the rates charged in the affected areas are necessarily higher, or alternatively, the customers in some other part of the system must help bear the added cost. Id. at 306.

In order to end the "unsatisfactory effects of this type of expensive, competitive activity," the City and the Company executed the service agreement which established areas of service around the City in the suburban territory.

The Court explained that service areas are not specifically controlled by requirement of certificates of public necessity and convenience:

> However, in some measure, the Commission does control the areas served by the companies by virtue of its prescribed powers, including the specified power ". . . to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto . . .". Fla. Stat. § 366.05 (1967), F.S.A. The regulatory powers of the Commission, as announced in the cited section, are exclusive and, therefore, necessarily broad and comprehensive. (Emphasis supplied).
>
> The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law. 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. While in particular locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers. (Emphasis supplied). Id. at 307.

The Court relied primarily on section 366.05, Florida Statutes, regarding the Commission's power to require repairs, improvements, etc. to the plant of any public utility and to secure adequate service as the primary broad authority for its role in territorial agreements.

In Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985), the Court reversed the Commission's use of a "substantial benefit to customers" standard in approving territorial agreements. However, the Court did not question the Commission's authority to approve territorial agreements. The Court relied on section 366.04(3), Florida Statutes, to conclude that the Commission has authority to determine these agreements based on a statutory mandate to avoid "further unecomonic duplication of generation, transmission, and distribution facilities," citing Gainesville-Alachua County Regional Electric, Water & Sewer Utilities Board v. Clay Electric Coop., 340 So.2d 1159, 1162 (Fla. 1976). The Court emphasized, "We do not relegate the PSC to a 'rubberstamp' role in approving territorial agreements."

The Florida Supreme Court's most recent pronouncement on territorial agreements is Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987). This case involved FPL's request for a declaratory judgment action to establish whether it had a statutory duty to serve a customer who constructed a transmission line to a point within FPL's territory. The Court re-emphasized the quote in Storey v. Mayo that "an individual has no organic, economic, or potential right to service by a particular utility merely because he deems it advantageous to himself." The Court added -- of great relevance to the matters at hand:

> Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC.

Thus, the Court again in 1987 looked to section 366.04(3), Florida Statutes, for the Commission's duty regarding territorial agreements and regarding the validity of such agreements. Under that section, the Commission's duty is to police

> the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic distribution facilities.

Lastly, the Commission's statutory authority to consider territorial agreements is derived, in part, from section 366.04(2)(c) and (d), Florida Statutes. These provide the following:

> (2) In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperatives and municipal electric utilities for the following purposes:
>
> (c) to require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.
>
> (d) to approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such an agreement.

Facility Planning and Interruptible Service

Union Carbide states that because its load is interruptible, its load is not included in planning decisions. This is technically correct; interruptible load is excluded when determining the timing for new generation facilities. However, for long-term system planning the utility includes this energy when deciding what type plant (oil, coal, nuclear, combined cycle, etc.) tc build. This is done to assure that an optimal mix is attained for the benefit of the utility's ratepayers, including the interruptible customer. The utility must also make a commitment based on the capacity factor of the unit to acquire its fuel contracts. We find nothing inherent in the nature of interruptible service that would make it fall outside of, or transcend, the coverage of a territorial agreement.

In the declaratory statement, the Commission need not address whether the retail wheeling request by Union Carbide should not be provided unless cost-effective to FPL and its ratepayers. Under the Commission-approved territorial agreement, FPL, not FPC provides service to Union Carbide. The issue of whether retail wheeling is cost-effective to FPL and its customers assumes that FPC has the authority and obligation to serve Union Carbide, which it does not have.

In summary, territorial agreements approved by the Commission are fundamental to the integrity and reliability of electric service provided to the consumers in the State. Where Union Carbide has requested service from a utility located in and servicing another territory and has requested the host utility to wheel such power in contravention of a territorial agreement, we find the host utility is precluded from implementing such a request. It is inconsistent with the above-mentioned case law and statutes. It also has poor policy implications. A customer simply has no fundamental right to choose his or her utility regardless of territorial boundaries. Every residential customer might like a similar opportunity. Yet, such an opportunity cannot exist, within the current regulatory structure, and still maintain the viability and reliability of electric service in the State.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement is approved and it is determined that FPL should not wheel power as requested when such wheeling is in contravention of the territorial agreement for the reasons set forth in the body of this Order; and

ORDERED that the Notice of Intervention by FPC is granted.

By ORDER of the Florida Public Service Commission, this 24th day of FEBRUARY, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

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