BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA POWER CORPORATION to resolve a territorial dispute with TRI-COUNTY ELECTRIC COOPERATIVE, INC.	DOCKET NO. 890465-EI ORDER NO. 23037 ISSUED: 6-06-90

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
BETTY EASLEY
GERALD L. GUNTER

ORDER ADOPTING RECOMMENDED ORDER

BY THE COMMISSION:

As discussed in the Preliminary Statement contained in the hearing officer's recommended order, Florida Power Corporation (FPC) filed its petition on April 3, 1989, seeking resolution of a territorial dispute with Tri-County Electric Cooperative (TCEC). FPC requested transfer of certain customers under the terms of a 1977 territorial agreement, and further requested the award of damages in the form of lost revenues. The docket was referred to the Division of Administrative Hearings (DOAH), after which a hearing was held before Hearing Officer P. Michael Ruff on August 28, 1989. The Commission participated in the case as an intervenor, but did not sponsor a witness. All parties, including the Commission, submitted proposed findings of fact and conclusions of law with DOAH. On March 5, 1990, Hearing Officer Ruff filed his recommended order. No exceptions were filed regarding the findings of fact contained in the recommended order.

Pursuant to Rule 28-5.405(2), Florida Administrative Code, we must issue our final order within 90 days of receipt of the recommended order. The recommended order must be considered at a public meeting confined to the record submitted to the Commission, together with the recommended order. That is, we may not conduct a de novo review.

Section 120.57(10), Florida Statutes, states that state agencies may adopt a hearing officer's recommended order as the final agency order. Further, the agency may

> reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

As discussed in the attached recommended order, the hearing officer found that TCEC was obligated by the terms of a 1977 territorial agreement to transfer certain customers to FPC during the time period in question, (1977 to 1981) but that TCEC failed to transfer at least 15 or 20 customers during that time period. We believe that these findings are supported by competent substantial evidence in the record.

TCEC argued that a 1980 amendment to the 1977 territorial agreement (which took effect in 1981) ultimately relieved it of any responsibility to transfer customers prior to that time because it contained language which "deleted in its entirety" the earlier territorial agreement. The hearing officer concluded that the admittedly ambiguous language of the amendment did not permit TCEC to retain the customers in question, and ordered that they be transferred. He further concluded that we do not have authority to award damages to FPC.

Upon review of the record and the recommended order submitted by the hearing officer, we adopt the hearing officer's recommended order.

We note that the hearing officer recommended that TCEC be ordered to identify all accounts initiating service during the period July 25, 1977 to August 31, 1981, in areas awarded to FPC under the 1977 territorial agreement, and that TCEC immediately transfer to FPC all customers meeting the criteria of Section 2.2 of the 1977 agreement. Therefore, this docket shall remain open for three months after the issuance of this order so that staff can monitor compliance. If FPC has not complained of non-compliance during that time period, this docket should then be closed.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that the Recommended Order of the Hearing Officer of the Division of Administrative Hearings in its Case No. 89-2263, dated March 5, 1990, is hereby adopted in its entirety. It is further

ORDERED that this docket shall remain open for 90 days from this date so that compliance can be monitored. Should we receive no complaint of non-compliance during the 90 day period, and should no Motion for Reconsideration or Notice of Appeal be timely filed, this docket shall be closed ninety days from this date.

By ORDER of the Florida Public Service Commission this 6th day of JUNE, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAP

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

NDATION

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POWER CORPORATION, Petitioner, vs. TRI-COUNTY ELECTRIC CORPORATION, Respondent, and FLORIDA PUBLIC SERVICE COMMISSION, Intervenor.	)	CASE NO. 89-2263

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding before P. Michael Ruff, a duly-designated Hearing Officer of the Division of Administrative Hearings, on August 28 and 29, 1989.

APPEARANCES

For Petitioner: Phillip D. Havens, Esquire
Post Office Box 14042
St. Petersburg, FL 33733

For Respondent: Ernest M. Page, Jr., Esquire
Post Office Drawer 90
Madison, FL 32340

For Intervenor: Marsha Rule, Esquire
Michael Palecki, Esquire
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

STATEMENT OF ISSUES

The issues to be resolved in this proceeding concern whether Tri-County Electric Cooperative (TCEC) should be required

to identify and transfer certain customer accounts for which it provided service between July 25, 1977 and August 31, 1981 to Florida Power Corporation (FPC) or whether the 1981 territorial agreement entered into between Petitioner and Respondent allows TCEC to continue to serve those customers it did not transfer between July 25, 1977 and August 31, 1981, as required by the terms of the 1976 territorial agreement. It must be also determined whether TCEC should pay to FPC certain revenues attributable to those customers.

PRELIMINARY STATEMENT

On April 3, 1989, Florida Power Corporation (FPC) filed a petition with the Florida Public Service Commission (Commission), seeking to resolve a territorial dispute. In its petition, FPC alleged that Tri-County Electric Cooperative (TCEC) had violated a territorial agreement with FPC by allegedly failing to transfer certain "new customers" to FPC after existing customers terminated service and the new customers applied for service for the same location, between July 25, 1977 and August 31, 1981. Specifically, FPC alleges that customers meeting the definition of "new customers," under the 1977 agreement approved by the Public Service Commission (FPC) in territorial areas awarded to FPC have been served by TCEC without the knowledge or permission of FPC in violation of the terms of that agreement. The agreement was purportedly amended effective August 31, 1981, (approved by Commission order), and no violation of the purported amended agrement is alleged by FPC. The parties agree that TCEC and FPC are complying with the terms of that later agreement.

TCEC denied the allegations made in the petition and asserted that the parties' 1981 territorial agreement rendered any customers obtaining service from TCEC, in FPC's territory, between 1977 and 1981, pursuant to the preexisting agreement of July 25, 1977, to be "existing customers", which the terms of the August 31, 1981 agreement did not require to be transferred to FPC. Additionally, TCEC has asserted that the Commission has no authority to award damages or lost revenues to FPC.

The cause came on for hearing as noticed. The Petitioner presented the testimony of Grant Houston, an employee of FPC. The Respondent presented the testimony of Daniel Lamar Nichols and M. C. Burnett, employees or former employees of TCEC. Additionally the Petitioner presented the testimony of Wally Wagner, an FPC employee, in rebuttal. The Petitioner introduced exhibits numbered 1-6, all of which were admitted. These exhibits consist of a territorial agreement signed in 1976, Commission Order No. 7912 approving that agreement, the territorial agreement effective August 31, 1981 (Commission Order No. 10362), maps of the respective utilities territories, the amended territorial agreement and a clarification of the first agreement. Respondent presented six exhibits which were admitted into evidence, consisting of a map of the Tri-County territory pursuant to the 1977 territorial agreement; a map showing FPC's territory; a Jefferson County map; a map showing FPC and Tri-County territory pursuant to the 1981 territorial agreement; a Taylor county map related to the 1977 agreement and another Taylor county map related to the 1981 territorial agreement. The Intervenor introduced no exhibits.

The parties elected to have the proceedings transcribed at the conclusion of the hearing and availed themselves of the right to file proposed findings of fact and conclusions of law in the form of Proposed Recommended Orders (as well as briefs and memoranda). The parties requested, by agreement, an extended briefing schedule which was approved. Additionally, the parties, by later joint motion, extended that briefing schedule by approval of the Hearing Officer. The proposed findings of fact have been addressed in this Recommended Order and in the Appendix attached hereto and incorporated by reference herein. The requirements of Rule 28-5.402, Florida Administrative Code, have been waived.

FINDINGS OF FACT

1. FPC is a public utility subject to the Commission's jurisdiction pursuant to Chapter 366, Florida Statutes. TCEC is subject to the jurisdiction of the Commission pursuant to Section 366.04(2), Florida Statutes.

2. On August 5, 1976, the Petitioner and Respondent entered into a territorial agreement which assigned exclusive retail electric service territories to each of those utilities in Madison, Jefferson and Taylor counties. That agreement was approved by the Florida Public Service Commission effective July 25, 1977, by Order no. 79-12, issued in docket no. 760664-EU.

3. The agreement provided in pertinent part at Article II, Section 2.2, as follows:

> Neither party shall hereafter serve or offer to serve a new retail customer located in the territorial area of the other party, unless on a temporary basis

> such other party shall request it in writing to do so. . . . any such temporary service shall be discontinued when the party in which service area it is located shall provide such service.

4. The term "new customers" as used in that agreement includes applicants for electric service at existing points of delivery, where an existing customer had terminated service. A clarification to that effect was stipulated into the record by the parties as Exhibit 6. That agreement and its clarification thus means that a new customer is any retail electric consumer applying for service to either company or cooperative after the date of entry of the Public Service Commission's order of July 25, 1977, including a new electric service consumer applying for a structure, building, or dwelling never before served, or a consumer or member applying for service at the same structure, building or dwelling previously utilized by an existing customer who terminated service for various reasons. The term does not include spouses of former customers nor other relatives who obtain title or possession of a dwelling or other structure by will or the law of intestate succession and who seek or wish continued the electric service.

5. On September 30, 1980, the parties entered into an "Amended Agreement" (in evidence as Petitioner's exhibit 5) which provides in pertinent part as follows:

> SECTION 0.4 Whereas, the parties have heretofore entered into an agreement dated August 5, 1976 for the purposes of avoiding the duplication of electric service facilities which would otherwise result from their contiguous and overlapping service areas in said counties; and

SECTION 0.5 Whereas, the parties are now desirous of amending said agreement by redefining the allocation of their respective retail service areas and the terms and conditions applicable thereto in order to facilitate and further the purposes of said agreement, subject, however, to the approval of the Florida Public Service Commission to Chapter 366, Florida Statutes;

SECTION 0.6 Now, therefore, in fulfillment of the purposes and desires aforesaid, and in consideration of the mutual covenants and agreements herein contained, which shall be construed as being interdependent, the parties do hereby agree to amend said agreement dated August 5, 1976, by deleting said agreement in its entirety and restating the same as follows:

* * *

SECTION 1.6 NEW CUSTOMERS- As used herein, the term 'new customers' shall mean all retail electric consumers applying for service to either the company or the cooperative after July 25, 1977, and located within the territorial area of either party at the time such application is made; provided, however, that the term "new customers" shall not include any such applicant for service who was residing in the structure, building or dwelling for which application for service is made at the time an existing customer terminated service.

* * *

SECTION 1.7 EXISTING CUSTOMERS - As used herein, the term "existing customers" shall mean all retail electric consumers receiving service on or before the effective date of this Amended Agreement from either party, and whose point of service is located in the territorial area of the other party.

* * *

SECTION 2.2 NEW CUSTOMERS - The parties shall each have the right and the responsibility to provide retail electric service to all new customers within their respective territorial areas. Neither party shall hereafter serve or offer to serve a new customer located in the territorial area of the other party, except on an interim basis as provided in Section 2.3 below.

* * *

SECTION 2.5 EXISTING CUSTOMERS - This Agreement is intended to apply to new customers and nothing in this Agreement shall be interpreted to preclude either party from continuing to service its existing customers.

* * *

SECTION 4.3 PRIOR AGREEMENT - This Agreement shall amend, restate and supercede the Agreement between the parties dated August 5, 1976, upon the approval hereof by the Florida Public Service Commission as set forth in Section 4.1 above. Prior to such approval, or in the event such approval is not obtained, said Agreement dated August 5, 1976, shall remain in full force and effect."

6. The Agreement referenced as that one dated August 5, 1976, is the same Agreement finally approved by Order of the Florida Public Service Commission on July 25, 1977, which became its effective date.

7. That amended Agreement was finally approved by Order of the Commission of August 31, 1981

8. Mr. Grant M. Houston, northern district manager for FPC testified that he personally discussed with TCEC representatives the fact that customers had not been transferred between 1977 and 1981. Mr. Burnett of TCEC acknowledged that there

were customers who had not been transferred during that period. Mr. Houston established that this discussion concerned only those customers who were properly subject to transfer under the earlier Agreement, where there had been a change of ownership of the residence involved. The record established, through party admission and testimony of Mr. Houston, that there were 15 or 20 and potentially more customers, who should have been transferred by TCEC to FPC, as existing customers terminated service and new customers applied for service at that residence or service point, or as new homes were constructed in areas assigned to FPC pursuant to the 1977 Agreement, during the period July 25, 1977 to August 31, 1981.

9. In this connection Mr. M. C. Burnett, who was manager of TCEC for twenty years, until he retired May 25, 1989, acknowledged that as manager of TCEC, he refused to transfer customers to FPC from 1977 to 1981. Mr. Burnett established, however, that he did transfer customers to FPC where property had changed hands after the effective date of the Agreement of 1981, and it was established that TCEC has abided by the 1981 Agreement from its effective date forward to the present time. Those 15 or 20 identified customers were connected by TCEC to its service, without the knowledge or approval of FPC. The 1977 Agreement required the transfer of these accounts to FPC.

10. The operative language of the Amendment to the Agreement as approved by the Florida Public Service Commission in 1981 was not truly intended by the parties to discharge TCEC's

responsibility to transfer those customers, under the original 1977 Agreement, who requested service for residences or locations where existing customers had terminated services and/or had applied for service for a new home constructed in areas assigned to FPC under the 1977 Agreement. Section 1.6 of the Amended Agreement of 1981 describes, "new customers" (those subject to transfer to the utility in whose territory they reside means all retail electric consumers applying for service to either utility or the cooperative after July 25, 1977. This would seem to affirm the obligation by TCEC to make transfers of any such new customers from July 25, 1977 forward, if those new customers resided in the territory assigned to FPC. That 1981 Amended Agreement is ambiguous, however, because the term "existing customers" contained therein, describes existing customers as those served by either the utility or the cooperative on or before the effective date of the Amended Agreement, (1981). That is in August or October, 1981, which definition might be interpreted to include those customers otherwise identified in the same Agreement as new customers to the extent they began service after July 25, 1977. In any event, TCEC has failed to transfer those customers identified as initiating service between July 25, 1977 and August 31, 1981. FPC has demanded that all such accounts be transferred.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes (1989).

ION

The issue to be resolved herein involves whether TCEC should be required to identify and transfer to FPC all customer accounts in areas assigned to FPC which meet the definition of "new customer" pursuant to the subject 1977 Agreement, and which were connected after July 25, 1977 and before August 31, 1981. FPC has alleged that TCEC has violated that 1977 Agreement, and PSC Order 79.12, which approved that territorial agreement, and which awarded certain territories to TCEC and FPC as their exclusive service areas under conditions specified therein. FPC has alleged that customers meeting the definition of "new customers" under the 1977 Agreement in areas awarded to FPC in that Agreement, have been served by TCEC without knowledge or permission of FPC in violation of the terms of that Agreement. It is stipulated between the parties that the Amended Agreement effective August 31, 1981, has been complied with by both parties since that date.

FPC has specifically identified approximately 20 customers or service locations in areas awarded to it by the 1977 Agreement which have been served by TCEC and which meet the definition of "new customers" in the 1977 Agreement because they initiated electric service, or the properties involved changed ownership, after July 25, 1977 and before August 31, 1981. None of these customers were referred to FPC by TCEC. TCEC has taken the position that the words "deleted in its entirety" as used in the 1980 Amendment to the Agreement which ultimately took effect August 31, 1981, should be construed to mean that all rights and obligations of the parties under the prior Agreement, from the date

of its inception to the date of the effective date of the Amendment, are discharged.

The Amended Agreement does not show any such waiver on its face. In fact, the Amendment language concerning the 1977 Agreement being "deleted in its entirety" also included language indicating that the 1980 Agreement (effective August 31, 1981) was an amendment and a restatement of the 1977 Agreement. (In fact, Section 4.3 of the Amended Agreement in reference to the prior agreement states, "This Agreement shall amend, restate, and supercede the Agreement between the parties dated August 5, 1976, . . . In the event such approval is not obtained, said Agreement dated August 5, 1976, shall remain in full force and effect." This language, considered together, does not evince any intent by the parties that all rights and obligations of the parties under the prior Agreement were automatically discharged. Use of words like, "amend" and "restate", can be taken to mean that certain rights and obligations of the parties to the earlier Agreement can continue under the aegis of the Amended Agreement. In fact, the Amended Agreement, if construed one way, contradicts TCEC's position. Its contention is that the language in Section 2.5 and 1.7 of that Amended Agreement authorizes each utility to continue to service "existing customers" and defines existing customers as those being served by either utility on the effective date of the Amended Agreement (August 31, 1981). This would, at best, create a patent inconsistency between the terms of the Amendment, with respect to those customers identified by FPC who also meet the definition of

"new customer" in the same agreement, (initiating permanent service after July 25, 1977). The amended agreement would mandate in Section 2.3 that this customer be referred to the other utility for service, and in Section 2.5 would mandate that the customer remain with the serving utility.

The cases of City of Orlando vs. Murphy, 84 So.2d 531 (DCA Fla. 1936); Excelsior Insurance Company vs. Pamona Park Bar and Package Store, 369 So.2d 938 (Fla. 1969); Florida Power Corporation vs. City of Tallahassee, 19 So.2d 671 (Fla. 1944) indicate that courts will not adopt an interpretation of a contract which creates such inconsistencies. In any event, the only way such a customer should exist as a new customer under one provision of the amended agreement and an existing customer under another provision of that agreement is if one of the utilities involved had breached its prior 1977 agreement, during the time that it was solely in effect, by initiating service to a customer in an area assigned to the other utility and refusing to transfer that customer. This TCEC was shown to have done, with regard to the approximately twenty customers identified in the evidence by FPC.

The effect of TCEC's position is that the parties were presumed to have known the existence of such customers at the time of the entry of the 1980 amended agreement and that the prior breaches were intended to be excused by the terms of that amended agreement. If one takes the position that the parties intended to excuse the prior breach, it must be presumed that the parties were both aware of the customers in that category, and that the parties

inadvertently created an inconsistency in the language of the amendment addressing "new customers". It must also be presumed that the conflicting language in the amendment applicable to "existing customers," which would permit TCEC to preserve its breach and ignore the violation of the earlier agrement and PSC order, was intended to be applied.

FPC asserts, in effect, that there is no ambiguity or inconsistency between the two agreements if the 1980 amendment is construed to have merely established the criteria for governing the parties' actions from the date of the amendment forward. It asserts that the amendment contains no waiver of rights to enforce remedies for violations of the prior agreement and that the evidence adduced at hearing establishes that a waiver could not have been intended by the parties because the violations at issue were not discovered until well after the 1981 effective date of the amended agreement.

The amended agreement incorporates the same date used in the original agreement, July 25, 1977, as the date to be applied in determining "new customers" which were subject to transfer. If TCEC had been honoring the terms of the original agreement, there would have been no customers initiating permanent service with TCEC in an area awarded to FPC on or after July 25, 1977, and prior to August 31, 1981, who would have been subject to transfer at the time the 1981 amended agreement was executed because such customers would have been voluntarily transferred already. If this commitment under the 1977 agreement had been complied with by TCEC,

there would have been no customers to meet the conflicting definitions of "existing customers" as that term is defined in the 1981 amended agreement.

The case of Carolina Metal Products Corporation vs. Larson, 389 F.2d 490 (Ca Fla. 1968) holds that any contract may be discharged modified by subsequent agreement of the parties; but the intent of the parties to discharge rights existing under the prior contract must be proven by the party alleging the discharge, by establishing the consent of both parties and that the modification is supported by consideration. See Newkirk Construction Corporation v. Gulf County, 366 So.2d 813 (Fla. 1st DCA 1979).

Where a contract is modified by subsequent agreement, the rule is that the original contract remains in force, except as modified. Hauben v. Harmon 605 So.2d 921-25 (1970) citing 17 Am Jur 2d Contracts, Section 459. The party who alleges that the contract has been modified has the burden of proving it. Newkirk, supra. Evidence adduced by TCEC has not established any intent on the part of FPC and the Florida Public Service Commission (by virtue of its orders approving those agreements) that any breach by TCEC of the earlier contract should be excused. In fact, the parties were not aware of the breach by TCEC at the time the amended agreement was entered into. The facts and circumstances surrounding that amendment and the plain language of that agreement itself, considered together, demonstrate that FPC and the PSC did not know about or intend to excuse the prior breach of the 1977 agreement by TCEC to the extent that it did not transfer new

customers acquired in FPC's territory from July 25, 1977, to August 31, 1981.

A contract may consist of two or more documents which may be construed together to determine the rights of the parties. Maas Brothers v. Green, 182 So.2d 633 (Fla. 1966), and Hughes v. Professional Insurance Corporation, 104 So.2d 340 (1963). In construing a contract a court, (or hearing officer), must place itself, as near as possible, in the situation of the parties to the contract and, from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, determine the meaning and intent of the language employed in the agreement. When the intent is once ascertained, it should be effectuated unless forbidden by law. Underwood vs. Underwood, 64 So.2d 281 (Fla. 1953).

An amendment to an earlier agreement or an amended agreement such as this cannot be considered in a vacuum. As stated by the court in Treasure Salvors v. Unidentified Vessel, 556 F. Supp. 1319 (1983):

> A contract created by two parties is not made in a vacuum. To understand a contract, the court must view it in the context of the events and circumstances from which it arose. The court must, above all else, give effect to the parties' intentions. Penzoil Co. vs. Federal Energy Regulatory Commission, 645 S. 2nd 360-388 (5th Cir. 1981). Such intentions are to be drawn as much as possible from the language of the agreement, but where, as here, the agreement is silent on the issues, the court may turn to extrinsic evidence for support. Valley Cement Indus. v. Midco Equipment Company, 570 So.2d 1241, 1242 (5th Cir. 1978). The court must give due consideration to all surrounding circumstances including those

during the negotiations. Morris v. Federal Mutual Insurance Company, 497 So.2d 538, 540 (5th Cir. 1974).

A court must adopt that interpretation of the contract which avoids ambiguities. Quarnquesser v. Appliance Buyers Credit Corporation, 187 So.2d 662 (Fla. 3d DCA 1966). Here the ambiguity lies in the fact that existing customers are defined as all those served by either entity on or before August 31, 1981, while new customers are defined as those served by either entity from July 25, 1977 forward. Thus, customers who obtained service after July 25, 1977 could fit into either definition in the same agreement. It has thus been established that the original contract and the amended contract can only logically be interpreted without conflict or ambiguity, if each is interpreted as applicable to a separate period of time such that customers who obtained service from July 1977 through August 31, 1981 should be treated under the terms of the July 25, 1977, agreement. The case of McGhee Interests vs. Alexander National Bank, 102 Fla. 140, 135 S. 545 (1931) stands for the following proposition:

> Where the court is called upon to construe an instrument and that instrument refers to another instrument, the court will look to the instrument to which reference is made as an aid in determining the parties' intent. [Citation omitted] It follows that when there is a clear intent expressed in the first instrument, that intent will carry forward into the subsequent instrument unless there is shown a contrary or different intent in the second instrument.

The 1977 agreement was clearly intended by the parties to require the transfer of new customers as defined in that agreement and herein above. While the 1981 amended agreement indicates that

the 1977 agreement was "deleted in its entirety," it also is couched in terms of an amendment to that agreement and in terms of a "restatement." This fact, together with other facts and circumstances involved in this case, including the fact that FPC was unaware that TCEC had breached the 1977 agrement and failed to transfer the subject customers, shows that the parties never intended that TCEC could avoid its obligation to transfer those customers merely by entry into the amended agreement of 1981. There has been no showing that such a breach of the 1977 agreement was intended to be excused and waived by the entry of the 1981 agreement. Construing that agreement in a way so as to avoid ambiguity, as provided for under the authority quoted above, will allow the original intent of the parties to be carried out and the transfer of the appropriate customers to be made. This is a result which logically follows what the intent of the parties must be inferred to be, given the entire circumstances surrounding the entry of the two agreements and the actions and understandings of the parties (or lack thereof) as established by the preponderant evidence.

The uncontradicted evidence of record customers who meet the definition of "new customers" under the agreement and TCEC has failed to offer sufficient competent, substantial evidence to contradict FPC's claim that those customers should have been transferred under the 1977 agreement. TCEC has further failed to offer sufficient competent, substantial evidence to indicate that the original intent that those customers should be transferred has

ever been receded from or waived. Accordingly, in light of FPC's request that TCEC be required to comply with the terms of the 1977 agreement to that extent by identifying and transferring to FPC all customers meeting the definition of the 1977 agreement for the period of time involved should be granted. "The office of judges is always to make such construction as to suppress the mischief and advance the remedy; and to suppress subtle inventions and evasions for continuance of the mischief." Miller vs. Lykes Brothers, 467 So.2d 464 (1972), quoting from Heydon's case, through co. 7A, 7B, Magdalen College case, 11 Co. 66B, 73B.

FPC has also asserted in its petition that TCEC be required to transfer to FPC all revenues not associated with variable costs which TCEC received from customers in violation of the 1977 agreement, (customers who should have been transferred). The PSC has statutory jurisdiction to adjudicate disputes between electric utilities pursuant to Chapter 366.04(2), quoted in relevant part as follows:

> In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperative and municipal electric utilities for the following purposes:
>
> * * *
>
> (b) To prescribe a rate structure for all electric utilities.
>
> * * *
>
> (d) To approve territorial agreements between and among rural electric cooperatives, and municipal electric utilities, and other utilities under its jurisdiction . . .

Chapter 366.05 provides in relevant part:

> In the exercise of such jurisdiction, the Commission shall have power to . . . prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.
>
> Chapter 356.04(2)(e) authorizes the PSC:
>
> To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise this jurisdiction.

Chapter 366.04(2), Florida Statutes, provides that the PSC has authority to:

> Approve territorial agreements between and among rural electric cooperatives, . . . and other electric utilities under its jurisdiction. . . . [A]nd to resolve any territorial disputes involving service areas between and among rural electric cooperatives, . . . and other electric utilities under its jurisdiction. . . .

FPC acknowledges that there is no specific statutorily granted authority to the Florida Public Service Commission to "adjust revenues" (or, in other words, to award damages), in the instant dispute between FPC and TCEC. FPC maintains, however, that there is an inherent power in the Commission to do so because of its power to approve the terms of the territorial agreement and to require "progress reports" and other data. It maintains the Commission has the inherent power to enforce the terms of territorial agreements and put the parties in the position they would have been if they had complied with approved agreements, or to "make them whole."

This position is incorrect. Firstly, administrative agencies have only those powers specifically granted them by the

legislature. Administrative Agencies are creatures of statute and the organic statutes by which the legislature sets forth the powers and duties of such agencies provide the entire universe of functions and powers such agencies can employ or implement, subject to congruent authority granted by the legislature to enact rules to further such statutory grants. In the instant situation, there is no statutory authority nor power granted in a rule enacted by the commission, pursuant to statute, which indicates that it can award monetary amounts, akin to damages, to re-dress the rights of a party who has suffered a breach of agreement such as the one involved herein; albeit that the agreement and the construction of it is within the jurisdiction of the Commission to interpret. The case of Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc., 291 So.2d 199 (Fla. 1974) is a decision in which the Supreme Court quite clearly held that the Commission does not have the authority to award damages in a case such as this. The Court held that award of such monetary amounts is a matter reserved to the circuit courts of Florida under Article V of the Florida Constitution, although it opined somewhat parenthetically, that the circuit court could employ the expertise of the Florida Public Service Commission to adjudicate issues concerning the substantive rights and responsibilities of the various parties to the dispute, preparatory to the court considering the damage issue. In any event however, FPC's claim for award of the lost revenues represented by TCEC's breach of the territorial agreement, by failing to transfer the required

customers, cannot be entertained in this forum and to that extent the petition should be denied.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record and the candor and demeanor of the witnesses, it is, therefore,

RECOMMENDED:

That the Respondent be ordered to identify all accounts initiating service during the period July 25, 1977 to August 31, 1981, in areas awarded to FPC under that 1977 agreement, and that all such customers meeting the criteria of Section 2.2 of the 1977 agreement be immediately transferred to FPC for service pursuant to the agreement.

DONE and ENTERED this 5th day of March, 1990, in Tallahassee, Florida.

P. MICHAEL RUFF, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of March, 1990.

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APPENDIX
CASE NO. 89-2263

Florida Power Corporation's Proposed Findings of Fact:

1-14. Accepted.

Intervenor's Proposed Findings of Fact:

1-6. Accepted.

Respondents's Proposed Findings of Fact:

1. Accepted.

2. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter.

3. Accepted but not as to its purported material import.

4. Rejected as contrary to the preponderant weight of the evidence and as subordinate to the Hearing Officer's findings of fact on this subject matter.

5. Rejected as contrary to the preponderant weight of the evidence and as subordinate to the Hearing Officer's findings of fact on this subject matter.

6. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter and as constituting, to some extent, a conclusion of law rather than a finding of fact.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power Corporation to resolve a Territorial Dispute with Tri-County Electric Cooperative, Inc. (DOAH CASE NO. 89-2263)	)	DOCKET NO. 890465-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Issue and Recommendation Summary, has been served by First Class U. S. Mail, postage prepaid, on this 20th day of April, 1990, to:

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