BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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Executive Secretary
Ga. Public Service Commission

DOUGLAS COUNTY ELECTRIC MEMBERSHIP CORPORATION (n/k/a/ GREYSTONE POWER CORPORATION),	)	
Petitioner,	)	
v.	)	DOCKET NO. 3686-U
GEORGIA POWER COMPANY,	)	
Respondent.	)	

ORDER ON REMAND FROM FULTON COUNTY SUPERIOR COURT

On May 11, 1987 Douglas County Electric Membership Corporation ("Douglas EMC") filed a petition with the Commission against Georgia Power Company ("Georgia Power") alleging that Georgia Power was violating the Georgia Territorial Electric Service Act ("Territorial Act"), O.C.G.A. Section 46-3-1, et seq. Specifically, Douglas EMC alleged that Georgia Power was illegally providing electric service to the Metromont Materials Corporation ("Metromont") plant located in Douglas EMC's assigned service territory. In response, Georgia Power contended that it was authorized to serve the Metromont facility because the facility had a connected load at the time of initial full operation of 900 kilowatts or greater and therefore met the customer choice provisions of the Act. O.C.G.A. Section 46-3-8(a).

The matter was assigned to the Commission's Hearing Officer pursuant to the provisions of the Georgia Administrative Procedure Act and the matter came on for an evidentiary hearing

on February 29, 1988. After briefing by the parties, the Hearing Officer issued an Initial Decision on June 8, 1988 denying the petition. The Initial Decision concluded that the Metromont Plant had been designed and planned so that when fully operational it would have a connected load in excess of 900kw. Although the plant had commenced partial operations in March 1987, the evidence established that Metromont intended to complete the plant construction within one to two years and that the plant would not be fully operational until the completion of construction. Based upon those facts, it was concluded that since the electric load of the premises at the time of initial full operation would be 900kw or greater, the premises constituted a customer choice location that could lawfully be served by Georgia Power.

Douglas EMC timely filed an application for review and request for oral argument with the Commission. The Commission denied the application and a subsequent motion for rehearing was denied on February 21, 1989. On March 21, 1989 Douglas EMC filed their petition for judicial review in the Fulton County Superior Court. At the time of the filing of its petition Douglas EMC requested leave to present additional evidence.

By Order dated September 28, 1989 the Fulton County Superior Court granted Douglas EMC's motion for leave to present additional evidence and remanded the case to the Commission with the following instructions:

> Therefore, this case is REMANDED to the Commission with the direction that it consider the proposed evidence as well as any additional evidence the Commission may then

> require. The Commission is further directed that it may modify its findings and decision by reason of the additional evidence. The Commission shall file that evidence and any modifications, new findings, or decisions with this court.

Douglas County Electric Membership Corporation v. Georgia Power Company, Civil Action File No. D64470 (September 28, 1989).

The Superior Court based its remand order on the Commission's finding that initial full operation of the Metromont facility was expected to begin within the year. In the Initial Decision the Hearing Officer had concluded that the term "initial full operation of the premises" "means the load to be furnished the customer at the time the customer commences full operation of the facility as designed." Initial Decision at p. 8. This definition is consistent with the Territorial Act definition of the term "premises," which provides that a premises is "the building structure or facility to which electricity is being or is to be furnished." O.C.G.A. Section 46-3-3(6) (emphasis added).

In this case the evidence established that the plant was designed so that it would be constructed over a period of one to two years and that while the plant would commence operations during the construction period, it would not be operating at designed capacity until construction was completed. In an effort to narrow the scope of the decision and to ensure that the "as designed" language would not be subject to abuse, the Initial Decision noted that "in a situation with a greater time period and where the plans are less precise, a different conclusion might be reached." Initial Decision p. 8, fn. 1.

In the Superior Court proceeding Douglas EMC sought to present evidence that notwithstanding the Commission's conclusion that construction would be completed within one to two years, that more than three years after the commencement of operations the additional construction had not taken place. The Superior Court found that Douglas EMC had good reason for not presenting this evidence to the Commission and that the evidence was relevant on the issue of whether Metromont's plans were in fact sufficiently firm that it met the Commission's definition of "initial full operation." The Court therefore remanded the case to the Commission for the taking of further evidence and the modification of the Initial Decision, if warranted by the evidence.

Upon remand to the Commission the matter was set for further evidentiary proceedings before the Hearing Officer. On August 23, 1990 an evidentiary hearing was held in Atlanta, Georgia. Mr. Steve Weatherby, Departmental Manager for Economic Development for Douglas EMC was the only witness to testify. In addition, Douglas EMC took a post hearing deposition of the Honorable Ford B. Spinks, a former member of the Commission, for the purpose of preservation of testimony. The parties have also briefed the issues on remand and the Hearing Officer has carefully considered the evidence and the briefs of the parties. Based upon the order of the Fulton County Superior Court, the Initial Decision of June 8, 1988, which became the final decision of the Commission, is hereby modified as follows:

FINDINGS OF FACT

1.

On February 29, 1988, the date of the first hearing in this matter, construction of the second crane bay at the Metromont facility had not yet commenced. Aerial photographs taken in March 1989 and introduced into evidence at the second hearing showed that the facility looked substantially the same in terms of buildings and structures as it did in February 1988.

2.

Mr. Steve Weatherby, Departmental Manager for Economic Development for Douglas EMC, testified that he visited the site in September of 1989 and noted no changes from the way the plant site looked in February 1988. Mr. Weatherby further testified that he visited the sight on August 22, 1990, the day before the hearing, and observed an extension to the first crane bay being constructed. However, no construction had commenced on the second crane bay and the facility was producing products utilizing only one crane bay as it was doing in February 1988.

CONCLUSIONS OF LAW

1.

Douglas EMC offered the deposition testimony of former Commissioner Ford B. Spinks for the purpose of establishing a definition of "initial full operation of the premises" as contained in the Territorial Act. Douglas EMC asserts that in previous informal interpretations the Commission has utilized a different definition from the definition adopted by the Hearing Officer and affirmed by the Commission in this case.

Former Commissioner Spink's deposition testimony is not admissible and will not be considered in this proceeding. The testimony of a former member of an administrative body exercising quasi-legislative and judicial powers is not admissible to determine the meaning of a statutory term. Nor is this testimony admissible in an effort to show that Douglas EMC somehow relied upon previous informal interpretations of the Commission since Douglas EMC has not raised any claim of detrimental reliance. In addition, Douglas EMC does not seek to rely upon prior Commission decisions but rather upon the opinion of one former Commissioner and informal opinion letters he wrote. However, it is well established that the authority conferred on an administrative agency can only be exercised by a majority of the members of the agency, and not by a single member. See, 2 Am. Jur. 2d Administrative Law, Section 196, pp. 28-30; 73 CJS Public Administration Law and Procedure, Section 20, pp. 390-92; Federal Trade Commission v. Flotill Products, Inc., 389 US 179 (1967). This common law rule is codified in O.C.G.A. Section 1-3-1(5) which provides that "a joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared."

In addition, the Rules of the Commission prohibit a single member of the Commission from making a decision in advance of a case that would in any way bind the Commission. Commission Rule 515-2-1-.01 provides that:

> Every member of the Commission will, in all cases, reserve his opinion and in no way commit himself in advance touching the merits of any matter or question to be passed upon by the Commission or that should be dealt with by

> it, until the facts and evidence are all submitted and the Commission considers the same in administrative session.

Also see, Commission Rule 515-2-1-.12(4) which provides that the Commission may respond to informal requests as a body.

Finally, it must be pointed out that the full Commission has adopted the definition of "initial full operation" as set forth in the decision in this case when it denied the motion for reconsideration. That definition has also been adopted by the Commission in numerous other cases. See, Excelsior Electric Membership Corporation v. Georgia Power Company, Docket No. 3895-U (Initial Decision June 7, 1990); Okefenokee Rural Electric Membership Corporation v. Georgia Power Company, Docket No. 3870-U (Initial Decision January 4, 1990); Georgia Power Company v. Central Georgia Electric Membership Corporation, Docket No. 3885-U (Initial Decision February 26, 1990); Cobb Electric Membership Corporation v. Georgia Power Company, Docket No. 3874-U (Initial Decision February 13, 1990); Georgia Power Company v. Jackson Electric Membership Corporation, Docket No. 3926-U (Initial Decision January 14, 1991). The Commission has therefore established by numerous decisions its current definition of the term in question.

2.

The Fulton County Superior Court has directed the Commission to take additional evidence concerning the current status of the Metromont facility. The Hearing Officer notes that in this and in previous cases the Commission has held that the Territorial Act contemplates that a determination of the load to be furnished a facility can be prospective in nature. A prospective

determination is frequently required by sound engineering and financial practice because unless a utility can make an estimate of load to be furnished a premises, it cannot determine the size and nature of the electric facilities, including lines, transformers and substations, necessary to serve the new load. In a situation where it is necessary to construct transmission or distribution facilities to provide service to a new facility, any other interpretation of the Act would require a customer to wait until the premises are completed and ready to begin operation before obtaining electric service. This is both an impractical result and one not required by the Act. Therefore, the Commission must make its decisions based upon the evidence that is presented at the hearing and cannot, as a matter of sound administrative practice, reopen decisions to take evidence as to what in fact occurred in the future. Much of utility regulation involves making judgments as to what might occur in the future and those judgments are frequently incorrect. It would create chaos and uncertainty if parties could come back and reopen decisions based upon subsequent events.

However, in this case the Fulton Superior Court has directed that the Commission take evidence as to events that occurred after the hearing to determine whether in fact the testimony that the facility would be constructed over a period of one to two years, and would be fully operational at that time, was an accurate prediction of the future.

3.

The Commission has previously concluded that the term

"initial full operation of the premises" means the load to be furnished the customer at the time the customer commences full operation of the facility as designed. However, the Commission has also concluded that plans for future growth or hopes to expand a facility in the future such that the expanded facility might have a connected load of 900kw or greater does not qualify the facility as a large load exception under the provisions of O.C.G.A. Section 46-3-8(a). The evidence in this case, including the evidence taken following remand, establishes that the plans for the Metromont facility contemplated that when the facility was fully completed it would contain two crane bays and a metal fabrication facility and that when these facilities were completed and in full operation the connected load would exceed 900kw. Construction of the plant began in January 1986 and the plant commenced operations in 1987. However, construction of the second crane bay had not commenced as of the date of the remanded hearing. No evidence was offered by Georgia Power as to why the second crane had not been completed. In addition, no evidence was offered that the plant currently has a connected load in excess of 900kw. Since the evidence was uncontradicted that the plant had a connected load less than 900kw when it commenced operations in 1987, it must be assumed that the plant still has a connected load of less than 900kw. No evidence was offered as to what Metromont's plans are in terms of completing the facility.

4.

Based upon the state of the record, and considering the additional evidence presented, it is concluded that the Metromont

facility has commenced initial full operation and that it has a connected load of less than 900kw. This conclusion is based on the evidence that the facility has been in operation for over four years, that it has been producing product, and that it is operating up to its current potential. No evidence was offered that the facility has yet to achieve initial full operation.

5.

This case is not like the situation in Excelsior Electric Membership Corporation v. Georgia Power Company, Docket No. 3895-U (Initial Decision June 7, 1990) involving electric service to the Paulson Stadium at Georgia Southern College. In that case, both electric suppliers believed that the stadium would have a connected load in excess of 900kw when it commenced operations. This was based upon the belief of both the utilities and the stadium operator that lights would be installed at the stadium when it was completed. Electric service was extended to the facility in the good faith belief that lights would be installed and that the stadium would therefore have a connected load in excess of 900kw. Due to unforeseen events, no lights were ever installed and no complaint contesting the service until five years had elapsed.

In contrast, the evidence in this case establishes a clear dispute among the parties as to the connected load and what the load would be at initial operation. In addition, the facility here was to be completed in stages rather than at one time as in the Paulson Stadium situation. This case is analogous to those where the Commission has concluded that facilities may have been

built with the potential for expansion but are operating at existing capacity when operations commence. For example, in Georgia Power Company v. Central Georgia Electric Membership Corporation, Docket No. 3885-U (Initial Decision February 26, 1990) the Commission concluded that the Butts County water treatment plant did not constitute a customer choice location because even though the plant was designed for extra capacity, there was no specific time table by which additional capacity would be added nor was there any assurance that the plans would in fact come to fruition. In this case, the subsequent evidence fails to establish any time table for completion of the Metromont facility or any explanation as to why the facility has not been completed.

6.

It is therefore the decision of the Hearing Officer, based upon the direction and mandate of the Fulton County Superior Court and based upon the additional evidence presented, that the Metromont facility does not constitute a customer choice location because it did not have a connected load at the time of initial full operation of 900kw or greater. Douglas EMC's petition is therefore GRANTED.

Pursuant to the provisions O.C.G.A. Section 50-13-17(a), in the absence of an application to the Commission for review made within thirty days from the date of this decision, or an order by the Commission for review on its own motion, this decision shall, without further proceedings, become the final decision of the Commission.

Once this decision becomes the final decision of the Commission, it shall be filed with the Fulton County Superior Court as required by the court's order of September 28, 1989.

SO ORDERED this 6th day of May, 1990.

ROBERT B. REMAR, HEARING OFFICER
GEORGIA PUBLIC SERVICE COMMISSION