

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power & Light  
Company for Enforcement of  
Order No. 4285 in Docket No.  
9056-EU.

Docket No. 970022-EU

**MOTION TO DISMISS  
FOR FAILURE TO STATE A CAUSE OF ACTION**

Comes now the CITY OF HOMESTEAD ("City"), by and through its undersigned attorneys, and moves pursuant to Rule 1.140, Florida Rules of Civil Procedure, that the Petition for Enforcement of Order ("Petition") filed by Florida Power & Light Company ("FPL") be dismissed for failure to state a cause of action. The grounds upon which this motion is based and the substantial matters of law intended to be argued are set forth herein.

1. FPL states in its Petition that pursuant to the terms of the Territory Agreement between FPL and the City, that the City has the right to furnish services to city-owned facilities and that these city-owned facilities may be served by the City, notwithstanding that the facilities are located within the service area of FPL. However, FPL goes on to state in the Petition that "the City

ACK \_\_\_\_\_ cannot legitimately assert or contend that Silver Eagle's warehouse, distribution and office facility  
AFA \_\_\_\_\_  
APP \_\_\_\_\_ in the Park of Commerce qualifies as a 'city-owned facility' entitling the city to provide electrical  
CAF \_\_\_\_\_ service to it because all electricity-consuming structures and equipment on the site are owned by and  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_ are the sole responsibility of Silver Eagle." (emphasis supplied) The common law rule is that all  
EAG \_\_\_\_\_ buildings become a part of the land as soon as they are placed on the freehold. See, George W.  
LEG 1  
LIN S Thompson, Commentaries on the Modern Law of Real Property, Sec. 1140 (1980). Structures  
OPC \_\_\_\_\_  
RCH \_\_\_\_\_ placed on the land become a part of the land as each stone or brick is fastened to the structure. See,  
SEC 1  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

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FPL 1-1-85

Thompson, Sec. 1140. The Florida courts have relied on the common law rule that ownership of permanent improvements constructed on land vest in the owner of the land. Burbridge v. Therrell, 148 So. 204 (1933). Improvements made by a lessee to real property, absent any agreement by the parties otherwise, by reason of their annexation to the land become a part of the reality and cannot be removed by the lessee. Crawford v. Gulf Cities Gas Corp., 387 So.2d 933 (Fla. 2 DCA 1980).

2. There is no provision in the lease cited by FPL which states that Silver Eagle (the lessee) is the owner of the improvements (facilities) or has the right to remove the improvements (facilities) on the real property owned by the City. In fact, the Option to Purchase referred to in the Petition and attached thereto as Exhibit "D" specifically recognizes that the City is the owner of all the improvements (facilities) and that Lessee has an option to purchase the land "together with all improvements now or hereafter existing hereon and all related furniture, fixtures and equipment (the 'Improvements'). The Land and the Improvements, together with all rights, easements, privileges and appurtenances pertaining or belonging thereto, are together hereinafter called the 'Property'." Therefore, under common law and Florida case law, the improvements (facilities) constructed on the real property leased by the City to Silver Eagle and Contender Boats becomes affixed to and becomes a part of the real property as soon as the improvements (facilities) are constructed thereon. Therefore, the City is the owner of the improvements (facilities) and, pursuant to the terms of the Territory Agreement, the City is entitled to serve Silver Eagle and Contender Boats.

3. FPL has failed to allege facts that, under common law and Florida case law, would establish the City is not the owner of the facilities located on the real property leased by the City to Silver Eagle and Contender Boats. "A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law supporting a claim of the sort made,

or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defat the claim." Martin v. Highway Equipment Supply Co., 172 So.2d 246, 248 (Fla. 2d DCA 1965).

WHEREFORE, based upon the above authorities, the Petition must be dismissed by the Commission for failure to state a cause of action in that FPL has failed to allege facts and supporting law that would establish that the City is not the owner of the facilities located on the real property leased by the City to Silver Eagle and Contender Boats.



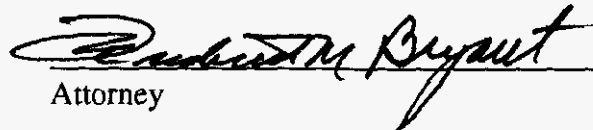
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FREDERICK M. BRYANT  
Fla. Bar No. 0126370  
Williams, Bryant, Gautier & Donohue, P.A.  
306 E. College Avenue  
P.O. Box 1169  
Tallahassee, FL 32302  
(904) 222-5510

Attorneys for the City of Homestead

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that an original and 15 copies of the foregoing Motion to Dismiss for Failure to State a Cause of Action were filed with **Ms. Blanca S. Bayó, Director, Division of Records and Reporting, Florida Public Service Commission, Room 110, Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850**; and that a true and correct copy of the foregoing was furnished by Hand Delivery to **Lorna R. Wagner, Esquire, Division of Legal Services, Florida Public Service Commission, Room 370, Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850**; and that true and correct copies of the foregoing were furnished by regular U.S. mail to **Wilton R. Miller, Esquire, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, FL, 32301**; and **David L. Smith, Esquire, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100** on this 21<sup>st</sup> day of January, 1997.

  
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Attorney

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