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May 27, 1997

ORIGINAL FILE COPY

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
Room 110, Betty Easley Conference Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 970022-EU (In Re: Petition of Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU, which approved a territorial agreement and established boundaries between the Company and the City of Homestead)

Dear Ms. Bayó:

Enclosed for filing are the original and fifteen (15) copies of Florida Power & Light Company's Memorandum in Response to the city of Homestead's Motion for Judgment on the Pleadings. Please acknowledge receipt and filing of the above by stamping the copy of this letter attached and returning same to me.

Yours truly,

Wilton R. Miller

WRM:lms
Enclosures
CC: Lorna R. Wagner, Esquire
Frederick M. Bryant, Esquire

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL FILE COPY

In Re: Petition by Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU, which approved a territorial agreement and established boundaries between the Company and the City of Homestead.

DOCKET NO. 970022-EU

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM IN RESPONSE TO THE CITY OF HOMESTEAD'S MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now, Petitioner, Florida Power & Light Company ("FPL"), by and through its undersigned attorneys, and files its Memorandum in Response to the City of Homestead's Motion for Judgment on the Pleadings, and as grounds therefor states:

FPL does not agree with the City's assertion that the City has the right to serve the buildings, improvements and fixtures on real property the City owns. The agreement does not give the City permission to provide electrical service to all that the City owns within the service territory of FPL. On the contrary, it provides an exception only for City-owned facilities. A city or government facility may be located in city or government-owned real estate or in real estate leased by the city or government from the private sector. Ownership of the freehold does not change the nature or ownership of the facility.

While FPL agrees that the Lessor (the City) owns the soil and the buildings thereon, it does not agree that it owns or has any management or control over the fixtures, chattels and other

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personalty which constitute the facilities at issue that facilitate the Lessees' businesses of manufacturing boats and distributing beer.

> Whether or not a chattel when attached to real estate becomes a fixture and thus part of the realty is a complex problem. While the question has been seldom addressed in Florida, a trade fixture exception to the general fixture rule at common law has been established. In 1941, the Florida Supreme Court recognized that trade fixtures placed upon land by a tenant for purposes of his trade were to be regarded as personalty rather than realty and might be removed by the tenant at the end of his term, provided that removal did not substantially injure the freehold. *Meena v. Drousiotis*, 146 Fla. 168, 200 So. 362 (1941). Based upon principles of public policy, the trade fixture rule was designed to encourage trade and manufacturing, *Wetjen v. Williamson*, 196 So.2d 461 (Fla. 1st DCA 1967), having its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property under the circumstances. *Cameron v. Oakland County Gas & Oil Co.*, 277 Mich. 442, 269 N.W. 227 (1936).
>
> [1-3] Where the relationship of landlord-tenant exists, the presumption is in favor of the right of a tenant to remove structures or articles he has placed on the leased property for his own purpose, even in the absence of an express stipulation. *Wetjen*, 196 So.2d at 464. Nothing short of the clearest expression of an agreement by the parties to that effect can justify the extension of the grasp of the landlord so as to cover chattels, or personal property brought upon the premises by the tenant, in pursuance of the business for which the premises were leased. *Lindsay Bros. v. Curtis Pub. Co.*, 236 Pa. 229, 84 A. 783 (1912). For in the absence of an express contract as to trade fixtures, there is an implied contract permitting the tenant to remove them at the proper time and in a proper manner. *McClintock & Irvine Co. v. Aetna Explosives Co.*, 260 Pa. 191, 103 A. 622 (1918). It has also been held that trade fixtures are removable regardless of the provisions of an express agreement between the parties. *Ray v. Young*, 160 Iowa 613, 142 N.W. 393 (1913). Thus, in disputes between the landlord and the tenant there is a presumption that the tenant, by annexing the fixtures, did so for his own benefit and not to enrich the freehold, and the law accordingly construes the tenant's right to remove his annexations liberally, at least where removal may be

effected without material injury to the freehold. *Empire Building Corp. v. Orput & Assoc's*, 32 Ill.App.3d 839, 336 N.E.2d 82 (App. 2d Dist.1975).

Sweeting v. Hammons, 521 So.2d 226 (Fla.App.3 Dist. 1988).

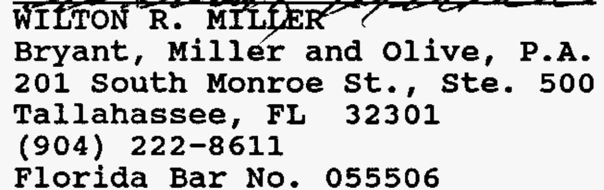
Absent a statutory provision defining the meaning of words used within the context of a statute, the plain and commonly-used meaning should apply in interpreting agreements and contracts. It is interesting to note, however, that in all the statutory definitions set forth in the City's Exhibit "A" to its Motion, it is the nature of the activity and who directs and manages that activity that defines facility. Ownership of the realty is never a requisite. For example, all seven of the sections in Chapter 266, Florida Statutes, cited by the City in defining facility provides the following criteria "... which is leased, managed, or operated by the board." Thus, the defining criteria is not who owns the realty but who manages the facility.

Thus, the City's contention that it owns the fixtures or the distribution and manufacturing facilities is clearly contrary to Florida law.

FPL does agree that there are no material issues of fact and this cause is ripe for a decision on the pleadings and that as a matter of law, FPL is entitled to the relief it demands and urges

this Commission to enforce its Order according to the law and the plain meaning of the words of its Order.

Respectfully submitted,



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Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen copies of the foregoing Memorandum in Response to the City of Homestead's Motion for Judgment on the Pleadings have been filed with the Florida Public Service Commission, Division of Records and Reporting, Room 110, Betty Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that a true and correct copy has been furnished by hand delivery to Lorna R. Wagner, Esquire, Division of Legal Services, Florida Public Service Commission, Room 370, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that a true and correct copy has been furnished by United States Mail, postage prepaid, to Frederick M. Bryant, Esquire, 306 East College Avenue, Tallahassee, FL 32301, Attorney for the City of Homestead, this 27th day of May, 1997.

WILTON R. MILLER

J:\FPL\010005\Memorandum