Eric Fryson

From: Greg <greg@bartonsmithpl.com>
Sent: Monday, April 08, 2013 3:31 PM
To: 'Deniece Eden'; Filings@psc.state.fl.us; neecourtdocs@bellsouth.net
Cc: Martha Brown; 'Barton Smith, PL.'; tobinlaw@terranova.net; 'Shillinger-Bob'; jlavia@gbwlegal.com; 'Robert Hartsell'
Subject: RE: DOCKET NUMBER 120054-EM - Opposition to Motion to Dismiss
Attachments: Reynolds' PSC Opposition to Monroe County's Motion to Dismiss.pdf

Good Afternoon,

The person filing this document is:

Barton W. Smith, Esq.
SMITH | OROPEZA, P.L.
138-142 Simonton Street
Key West, Florida 33040

DOCKET NUMBER: 120054-EM

This Opposition to Monroe County's Motion to Dismiss is being filed on behalf of Robert Reynolds and Julianne Reynolds.

Total number of pages (including attached documents): 17

Gregory S. Oropeza, Esq.

SMITH | OROPEZA, P.L.
138-142 Simonton Street
Key West, FL 33040
Office:(305) 296-7227
Fax:(305) 296-8448
Greg@bartonsmithpl.com
www.bartonsmithpl.com

BEFORE THE STATE OF FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS,

Complainants,

v.

UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d.b.a KEYS ENERGY SERVICES, et al.,

Docket No. 120054-EM

Respondents,

and

MONROE COUNTY, a political subdivision of the State of Florida, NO NAME KEY PROPERTY OWNERS ASSOCIATION, INC.,

Interveners.

COMPLAINANTS, ROBERT D. REYNOLDS AND JULIANNE C. REYNOLDS' OPPOSITION TO MONROE COUNTY'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Complainants, ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS (collectively, "Reynolds"), by and through undersigned counsel and pursuant to the Florida Administrative Code, file their opposition to MONROE COUNTY's ("Monroe County") Motion to Dismiss Second Amended Complaint ("Motion to Dismiss"), and in support thereof, state as follows:

PRELIMINARY STATEMENT

In its Motion to Dismiss, Monroe County argues that the Reynolds do not have standing because of Section 7.2 of the Territorial Agreement applicable to No Name Key. Furthermore, Monroe County argues that the Reynolds have failed to state a claim upon which relief can be granted. These arguments are specious and should be summarily denied. First, the Reynolds are

not arguing that they have standing as parties to the applicable Territorial Agreement, instead, they have invoked the Florida Public Service Commission pursuant to Rule 25-22.036, F.A.C., complaining of an act or omission by an entity subject to the PSC's jurisdiction which affects the Reynolds' substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order. Second, the Reynolds have stated claims upon which relief can be granted because the Commission's authority over territorial service agreements and the electric grid are absolute and exclusive. Finally, Monroe County's Motion to Dismiss ignores that the Third District Court of Appeal has already held that the Florida Public Service Commission has exclusive jurisdiction over the issues raised in Reynolds' complaint. Thus, Monroe County's Motion to Dismiss should be denied.

FACTUAL AND PROCEDURAL HISTORY

1. On March 5, 2012, Reynolds has filed the above-styled action with the Florida Public Service Commission ("PSC") against Respondent, UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d/b/a/ KEYS ENERGY SERVICES ("KES"), because KES had refused or failed to provide power to Reynolds and other similarly situated property owners located on No Name Key. *See* Reynolds' Complaint ¶¶ 1, 15 – 16, 21 – 34, previously filed in this action and incorporated herein by reference. Reynolds' Complaint alleged that the PSC approved a territorial agreement dated June 17, 1991, Order No. 25127, by and between KES and the Florida Keys Rural Electric Cooperative Association, Inc. ("Territorial Agreement"), wherein KES is the exclusive provider of commercial electric service to the lower Florida Keys, including No Name Key, where the Reynolds' home is located. *Id.* at 12 – 13. A true and correct copy of the Territorial Agreement is attached to the Reynolds' Complaint as Exhibit A, previously filed in the above-styled action, and is incorporated herein by reference.

2. On March 17, 2012, KES approved Line Extension #746 ("Line Extension") with the No Name Key Property Owner's Association ("NNKPOA") for the extension of electrical service to No Name Key. *See* Reynolds' Second Amended Complaint, ¶31.

3. On April 23, 2012, Monroe County entered its Petition to Intervene in the above-styled action. Monroe County's Petition to Intervene has been previously filed in the above-styled action and is incorporated herein by reference.

4. On or about July 26, 2012, pursuant to the Territorial Agreement and Line Extension, KES completed and energized the electrical lines installed during the Line Extension. *See* Reynolds' Second Amended Complaint, ¶31.

5. On March 11, 2013, Reynolds filed their Amended Complaint against KES and Monroe County, along with Intervener, NO NAME KEY PROPERTY OWNERS ASSOCIATION, INC. ("NNKPOA"), because of the changed circumstances on No Name Key, specifically, KES' installation of the energized electric distribution line on No Name Key and the denial by Monroe County of Reynolds' application for an electric permit to install a 200 AMP Electric Service and Subfeed in order to connect to the electric distribution line outside of their home located on No Name Key. Reynolds' Amended Complaint has been previously filed in the above-styled action and is incorporated herein by reference.

6. The Amended Complaint requested that the PSC: (1) Exercise jurisdiction over this action and the parties thereto; (2) Issue an Order declaring the PSC's jurisdiction preempts Monroe County's enforcement of Ordinance 043-2001 as it applies to KES, KES' territorial agreement and enabling legislation; (3) Issue an Order finding the commercial electrical distribution lines KES extended to No Name Key, Florida are legally permissible and properly installed; (4) Issue an Order finding that Monroe County cannot unreasonably withhold building

permits from KES' customers based solely on their property location being on the island of No Name Key and mandate that Monroe County may not prevent the connection of a homeowner on No Name Key to the coordinated power grid; (5) Award reasonable attorney's fees and costs; and (6) Award such other and supplemental relief as may be just and necessary.

7. On March 18, 2013, Reynolds served their Second Amended Complaint, correcting a scrivener's error in one of the footnotes of the Amended Complaint. Reynolds' Second Amended Complaint has been previously filed in the above-styled action, and is incorporated herein by reference.

8. On April 1, 2013, Monroe County served its Motion to Dismiss, arguing that Reynolds' Second Amended Complaint should be dismissed because: (1) Reynolds lack standing to bring their Second Amended Complaint before the Florida Public Service Commission ("PSC"); and (2) Reynolds failed to state a claim upon which relief can be granted. Monroe County's Motion to Dismiss has been previously filed and is incorporated herein by reference.

9. This Opposition to Monroe County's Motion to Dismiss has been timely filed and served.

MEMORANDUM OF LAW IN OPPOSITION TO MONROE COUNTY'S MOTION TO DISMISS

I. Standard of Law.

"It is well established that a motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action." *See In re Lake Utility Services, Inc.*, 1999 WL 246832 (1999) (citing *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993)). The standard to be applied in determining the merits of a motion to dismiss is whether, assuming all of the allegations in the complaint are true, the petition states a cause of action upon which relief may be granted. *Id.* When making this determination, only the petition

can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.* Consequently, the PSC is bound by the four corners of the complaint and the attachments thereto, and all ambiguities and inferences drawn from the recitals in the complaint, together with the exhibits attached, must be construed in the light most favorable to the plaintiff. *See Lonestar Alternative Solution, Inc. v. Leview-Boymelgreen Soleil Developers, LLC*, 10 So.3d 1169 (Fla. 3d DCA 2009).

II. Argument.

Monroe County's Motion to Dismiss should be denied because its arguments ignore the applicable law, including the recent decision of *Roemmele-Putney v. Reynolds* by the Third District Court of Appeal, rules of statutory construction, and, finally, that the ambiguities and inferences drawn from the applicable law must be construed in the light most favorable to the Reynolds.

Tellingly, Monroe County restricts its review of the Territorial Agreement to §7.2 of said Agreement, and ignores Reynolds' Complaint, PSC Order 25127 which approved the Territorial Agreement and found that said Agreement satisfies Fla. Stat. §366.04(5). Furthermore, Monroe County ignores other provisions contained within the Territorial Agreement which contradict Monroe County's interpretation. Ultimately, Monroe County fails to reconcile Rule 25-22.036(2), F.A.C., the basis of Reynolds' jurisdiction, with its argument that no law or rule furnishes standing to the Reynolds to pursue this action. Because of these failings, Monroe County's Motion to Dismiss should be denied.

A. Monroe County ignores the holding of *Roemmele-Putney v. Reynolds* and the existence of Rule 25-22.036(2), F.A.C. in its arguments that only the parties to the Territorial Agreement can bring an action before the PSC.

Monroe County bases its entire "lack of standing" argument on the false premise that the Reynolds brought their complaint pursuant to the Territorial Agreement or under Fla. Stat §366.04(e). The Reynolds did not do so. Rule 25-22.036(2), F.A.C. provides: "A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order." The jurisdiction section of Reynolds Complaint, namely ¶¶8 – 13, makes it abundantly clear that the Complaint is brought pursuant to Rule 25-22.036(2), F.A.C., wherein the Reynolds are complaining of an act or omission of KES, an entity that, without question, is subject to the PSC's jurisdiction pursuant to Order 25127. Moreover, Monroe County fails to address that the Third District Court of Appeals has specifically held that enforcing the terms of the Territorial Agreement and interpreting regulations as to whether electrical power may be extended to No Name Key is within the PSC's jurisdiction. *See Roemmele-Putney v. Reynolds*, 106 So.3d 78 (Fla. 3d DCA 2013). Thus, the Reynolds have properly invoked the jurisdiction of the PSC.

Any discussion of standing and jurisdiction in the instant matter must begin with a thorough discussion and analysis of *Roemmele-Putney v. Reynolds*, which involved these parties in substantially the same claims advanced by Monroe County in seeking declaratory and injunctive relief barring the extension of commercial electrical power to No Name Key. First, in *Roemmele-Putney*, the Third District Court of Appeals defined the issue as follows:

> The legal issue presented to the circuit court and here is whether the County and private landowners may obtain judicial (declaratory and injunctive relief) establishing that the prospective electricification of No Name Key is regulated – or even precluded – by the Coastal Barrier Resource Act and the County's

policies and procedures adopted pursuant to that Act.

Id., at 79.

This issue is that same one sought to be addressed in the above-styled action. The Reynolds are seeking declaratory relief from the PSC that will enable a connection to the energized electrical transmission lines on No Name Key. The Third District Court of Appeals held as follows with regards to this issue:

> Concluding that the Florida Public Service Commission has exclusive jurisdiction to decide the issues raised by the appellants, we affirm the circuit court judgment dismissing the complaint with prejudice for lack of jurisdiction.

Id., at 79.

In order to understand the Third District Court of Appeal's holding in *Roemmele-Putney,* it must be first understood that Monroe County was an appellant, and the issues raised by Monroe County here were contained in its complaint, Case No. 2011-CA-333-K, which was dismissed with prejudice. *See* Monroe County Complaint, Case No. 2011-CA-333-K, In the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida ("Monroe County Complaint"). In its Complaint, Monroe County "asked the circuit court to determine whether KES has the authority to extend the utility lines to the residences on No Name Key (Count I), and whether the property owners have the right to connect their homes to the KES lines despite an express prohibition in the Monroe County Code (Count II).[1]" *See Roemmele-Putney supra* at 79 – 80; *see also* Monroe County Complaint, ¶¶25 – 37.

[1] "Monroe County Code § 130–122 (purporting to prohibit the extension of electric utilities to properties within the Coastal Barrier Resources System overlay)." It is interesting that the Third District Court of Appeal placed such as footnote to describe Monroe County Code § 130–122 as "purporting to prohibit the extension of electric utilities" as the term "purport" does not mean it does prohibit but means "claiming" as in Monroe County is "claiming to prohibit", as if the Third District Court of Appeal is establishing the Ordinance may not prohibit the extension of electric utilities and it is the PSC's decision.

In the case at bar, Reynolds has asked the PSC to find that KES can extend the utility lines to No Name Key homeowners and that Monroe County cannot prohibit their homes from connecting to KES' distribution line. Reynolds is requesting that the PSC determine the same subject matter that the Third District Court of Appeal and Sixteenth Judicial Circuit held was within the PSC's exclusive jurisdiction. Therefore, the PSC has already been found to have jurisdiction over the subject matter subject to the Reynolds' Amended Complaint.

Moreover, in *Roemmele-Putney*, the Third District Court of Appeal found that "KES's existing service . . . relating to new customers and 'end use facilities' is subject to the PSC's statutory power over all "electric utilities"." *Id.* at 80. By finding that KES' existing service, its relation to new customers, and the "end use facilities" are all subject to the PSC's statutory power over "electric utilities", the Third District Court of Appeal held that the PSC has jurisdiction over this issue. The Third District's holding is grounded in the conclusion that Fla. Stat. 366.04(5) has granted the PSC jurisdiction over the planning, development, maintenance of the electric grid. This is one of the bases of approving the Territorial Agreement by and between KES and the Florida Keys Electric Co-op. *See* PSC Order 25127 ("the agreement satisfies the intent of Subsection 366.04(5), Florida Statutes").

The Third District Court of Appeal's decision in *Roemmele-Putney* limits the forum in which Reynolds' claims can be brought to the PSC. The parties and claims in the above-styled action are substantially the same as those brought by the County in *Roemmele-Putney*, the Reynolds simply seek a different conclusion. The Reynolds would be barred by the doctrines of judicial estoppel and *res judicata* from bringing these claims before any other Court, having already successfully argued before the Sixteenth Judicial Circuit and the Third District Court of Appeal that the County's claims on this exact issue must be brought before the PSC and having

the County's claims dismissed with prejudice for this self-same reason.

The Third District Court of Appeal's opinion that the PSC has jurisdiction relating to new customers and "end use facilities" is bolstered by Fla. Stat. §366.05(8) which provides:

> If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, including inadequacies in fuel diversity or fuel supply reliability, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance.

See Fla. Stat. §366.05(8).

An analysis of the Third District Court of Appeal's statement that this matter is within the PSC's statutory power over electric utilities and Fla. Stat. §366.05(8) is logically connected. As part of the "Grid Bill", the PSC was given the authority over electric utilities to require expansion of electric utilities in order to correct inadequacies in the reliability of the energy grid. The logical justification of the PSC to require installation of necessary facilities is to ensure service to electric utility customers that are not served or unreliably served.[2]

Monroe County has previously asserted in its oral argument to the Third District Court of Appeal that under Fla. Stat. §366.05(8), the PSC can only require the installation of generating plants and transmission facilities, but cannot require electric utilities to install distribution lines or require connections to customers. Monroe County's assertion was categorically rejected in the Third District's finding above. Moreover, Monroe County's interpretation and reading of Fla. Stat. §366.05(8) is erroneous and defies the rules of statutory construction.

Fla. Stat. §366.05(8) states the PSC can "require installation or repair of necessary

[2] It was the intent of the Legislature when enacting the grid bill to ensure that customers would not be denied electricity.

facilities" which includes "generating plants and transmission facilities". This provision states the PSC can require installation or repair of necessary facilities. The term "necessary facilities" means it includes any necessary facilities, which would encompass distribution lines and infrastructure to connect customers. Fla. Stat. §366.05(8)'s specific inclusion of generating plants and transmission facilities is not a limitation on what are necessary facilities to just generating plants and transmission facilities, but rather, is identifying two types of facilities that are included within a larger list of facilities the PSC can require to be installed by an electric facility. If the legislature intended to limit the PSC's ability to only be allowed to require electric utilities to install generating plants and transmission facilities it could have expressly limited it to these facilities, but the legislature did not and gave the PSC the authority to require the installation of necessary facilities. Logically, the reason these two facilities are included is due to their extraordinary expense and size as generating plants and transmission facilities are quite costly facilities to be required to be installed by the PSC.

Finally, in *Roemmele-Putney*, the Third District concludes:

> The Florida Legislature has recognized the need for central supervision and coordination of electrical utility transmission and distribution systems. The statutory authority granted to the PSC would be eviscerated if initially subject to local governmental regulation and circuit court injunctions of the kind sought by Monroe County in the case at hand. The appellants do retain, however, the right to seek relief before the PSC, and we express no opinion as to the merits of any such claims by the appellants in that forum.
>
> *Id.*

The Third DCA's opinion in *Roemmele-Putney* does not, at any point, state the PSC may or may not have jurisdiction, but rather, specifically holds from the very beginning that the PSC has jurisdiction. *Id.*, at 79. The Third District has unequivocally expressed that it is within the PSC's exclusive jurisdiction to decide this case on its merits, but has not expressed any opinion

as to the merits of the County's complaint or Reynolds' complaint before the PSC. It is clear that the Third District Court of Appeal, as well as the Sixteenth Judicial Circuit, has determined that the issues present in the above-styled action are properly raised before the PSC by Reynolds, and that Reynolds has standing to bring this Complaint.

B. Monroe County's legal status as any area of critical concern and state review of its Comp. Plan and Land Development Regulation amendments does not grant to Monroe County's Ordinance a superior status over the jurisdiction of the PSC.

Nonetheless, even in light of the Third District Court of Appeal's opinion in *Roemmele-Putney,* Monroe County asserts that its ordinances are superior to the jurisdiction of the PSC because said ordinances are reviewed and approved by the Department of Economic Opportunity ("DEO").[3] There is no legal support for this argument and, in direct contradiction to this assertion, the Third District Court of Appeal expressly stated "[t]he PSC's jurisdiction, when properly invoked (as here) is 'exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties." §366.04(1). *Id.* at 80 – 81 (Emphasis added). With this statement, the Third District Court of Appeal expressly held the PSC's jurisdiction was properly invoked by Reynolds, and that the PSC's jurisdiction over this matter is exclusive and superior to any County ordinance.

Monroe County baldly asserts that somehow, because the DEO reviews Monroe County's ordinances due to it being an area of critical concern, Monroe County's ordinance are no longer County ordinances. There is no basis in law for this assertion. Chapter 380, Florida Statutes, which governs areas of critical concern, does not create any exception to the PSC's superior jurisdiction over the issue at hand. Fla. Stat. §380.05, which governs adoption of Comp. Plan amendments, and Land Development Regulation amendments within an area of critical concern,

[3] Formerly known as the "Department of Community Affairs."

simply requires DEO review for consistency with Monroe county's Comp. Plan and approve the adoption of Monroe County's Comp. Plan and LDR amendments. Monroe County's Comp. Plan and LDRs are not given any heightened status by this state review and are inferior to the PSC's jurisdiction.

Reynolds has filed a complaint subject to PSC's jurisdiction and pursuant to Rule 25-22.036(2), F.A.C., has complained that Keys Energy has failed to connect their home to the distribution line, an act or omission that is within the PSC jurisdiction which jurisdiction is superior to Monroe County's adopted ordinance.

C. PSC's jurisdiction to interpret and enforce territorial agreements approved by PSC Order

Once it is understood that Reynolds is invoking the PSC's jurisdiction pursuant to Rule 25-22.036(2), F.A.C. the discussion must turn to the PSC's jurisdiction to interpret Order 25127. The PSC has exclusive jurisdiction to interpret and enforce its Order approving the terms of the 1991 Territorial Agreement. In its Motion to Dismiss, Monroe County advances a very narrow interpretation of the Territorial Agreement, arguing that the PSC only has jurisdiction to enforce territorial agreements between the utility parties to such agreements. However, this narrow interpretation ignores other key provisions of the Territorial Agreement, as well as a very important fact regarding territorial agreements, namely, that without active PSC enforcement, such agreements are *per se* illegal under the Sherman Anti-Trust Act and Florida Statutes Chapter 542.

Under the Territorial Agreement, KES agreed to provide electric service to customers in its service area, including No Name Key. Under the Agreement, KES also affirmed its obligation to such customers and its recognition that the PSC has continuing jurisdiction to review the Territorial Agreement. *See* Territorial Agreement, §§4.1 and 6.1. Specifically, KES

is "obligated" to furnish electric service to persons requesting such service within its service area. *See* Territorial Agreement, §0.2. In return for these obligations, KES received the exclusive right to provide commercial electric power to this service area. *See* Territorial Agreement, §1.3.

Monroe County apparently forgot that territorial agreements are horizontal divisions of territory, and are considered *per se* Federal antitrust violations under the Sherman act, 15 U.S.C. §1. *See Parker v. Brown*, 317 U.S. 341, 350 (1942). Territorial agreements are only legal when they are sanctioned by the State. *Id.* When territorial agreements are State-sanctioned, they are entitled to state action immunity from liability. *Id.* However, this immunity requires that the State actively supervise its clearly articulated and affirmatively expressed state policy encouraging the activity, in this case, expansion of commercial electric service and maintenance of the coordinated electric grid. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980); *see also, Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995). While the County is desirous of deciding who can and cannot connect to commercial electrical service, such a decision would be in contravention of the Territorial Agreement. If the County were permitted to decide who receives electrical service, "it could be argued that the Commission is without power to enforce its own orders and actively supervise the agreements it has approved. This result would place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability." *See Amicus Curiae Motion for Leave to Participate as Amicus Curiae filed on behalf of the Public Service Commission in Monroe County v. Utility Board of Key West, Case Number 2011-422-K, pg. 6.*

Rule 25-22.036(2), F.A.C. applies to furnish standing to Reynolds, despite §7.2 of the Territorial Agreement. Rule 25-22.036(2), F.A.C., which states:

(2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

Under this Rule, all persons with interest that may be substantially affected will have an opportunity to initiate proceedings before the PSC. Here, the Reynolds have pled such an substantial affect on their interests, as for decades Keys Energy and the County have sought to prevent or refuse the electrification of the Reynolds home. The PSC must take the facts contained within the four corners of the Second Amended Complaint as true, which facts include the Reynolds assertions which give rise to events affecting their substantial interest. Thus, Rule 25-22.036(2) provides Reynolds with standing to bring this action.

D. Monroe County overlooks the effect of the laws applicable to the Reynolds' Second Amended Complaint.

For its second argument in support of its Motion to Dismiss, Monroe County asserts that Chapter 163, Fla. Stat., Chapter 69-1191, Laws of Florida, and the Grid Bill do not confer jurisdiction over the Reynolds' Complaint and do not impose an obligation to serve the Reynolds upon KES. Monroe County goes further and asserts that no Florida Statute, law or rule imposes an obligation on KES to serve "any would-be customer". *See* Monroe County's Motion to Dismiss, pgs. 7 – 8. When these laws are construed in the light most favorable to the Reynolds, they do provide a claim of relief to the Reynolds upon which relief can be granted.

Monroe County misunderstands this cause of action, *Roemmele-Putney v. Reynolds*, and Order 25127. As pled in Reynolds' Second Amended Complaint, this is a cause of action by the Reynolds, property owners within KES' service area, to determine that KES is required to provide them with commercial electrical power pursuant to Order 25127 and that the Reynolds have the right to connect to such commercial electrical power. *Roemmele* expressly held this is

within the PSC's jurisdiction. This is exactly the kind of relief that the PSC is designed to furnish. Without the oversight and enforcement of the PSC, the Reynolds would have no redress for the continued refusal to allow the electrification of No Name Key as the PSC has granted KES a monopoly.

As pled in the Second Amended Complaint, KES agreed to provide electric services to the service area including No Name Key and affirmed KES' obligation to serve the customers in its assigned territory. The PSC has exclusive jurisdiction to interpret and enforce its Order approving the terms of the 1991 Territorial Agreement. *See Roemmele-Putney v. Reynolds supra* at 80; *see also*, Amicus Curiae Brief of the Florida Public Service Commission in Support of Appellees Robert D. Reynolds and Julianne Reynolds, pg. 6 (citing *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968); *City of Homestead v. Beard*, 600 So.2d 450 (Fla. 1992)).

In the above-styled action, Reynolds is asking the PSC to interpret the terms of the Territorial Agreement. That is a cause of action explicitly provided for by Florida law. As the Florida Supreme Court has previously held, any interpretation, modification or termination of an order approving a territorial agreement:

> ... must first be made by the PSC. The subject matter of the order is within the particular expertise of the PSC, which has the responsibility of avoiding the uneconomic duplication of facilities and the duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida. The PSC must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.
>
> *Public Service Commission v. Fuller*, 551 So.2d 1210, 1212 (Fla. 1989).

This Commission has stated that it has the "exclusive jurisdiction under Chapter 366, Florida Statutes, to resolve issues regarding the interpretation and enforcement of territorial agreement." *See Amicus Curiae Brief of the Florida Public Service Commission in Support of*

Appellees Robert D. Reynolds and Julianne Reynolds, pg. 2. Furthermore, the "Commission has exclusive jurisdiction to interpret and enforce its Order approving the terms of the 1991 Territorial Agreement and to determine whether, to what extent, and under what terms and conditions the residents of No Name Key are entitled to receive electric service from Keys Energy. *See Amicus Curiae Brief of the Florida Public Service Commission in Support of Appellees Robert D. Reynolds and Julianne Reynolds, pg. 6* (citing *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968); *City of Homestead v. Beard*, 600 So.2d 450 (Fla. 1992)). There can be no doubt that the Reynolds' cause of action is authorized by Florida law. Monroe County's argument is specious and should be denied.

Conclusion

Monroe County's Motion to Dismiss ignores applicable law, including *Roemmele-Putney v. Reynolds*, which it was a party to, and completely misinterprets the cause of action pled by the Reynolds. As the Third District Court of Appeal has stated, the PSC has jurisdiction over this matter and the statutory authority granted to the PSC would be eviscerated if initially subject to local governmental regulation.

WHEREFORE, Complainants ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS respectfully request the Commission enter an Order denying the Respondent, MONROE COUNTY's Motion to Dismiss Second Amended Complaint, and granting such other, further relief the Commission may deem appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic Mail to the attached Service List this 8th day of April, 2013.

Respectfully submitted,

SMITH OROPEZA, P.L.
138-142 Simonton Street
Key West, Florida 33040
Telephone: 305-296-7227
Facsimile: 305-296-8448
Primary Email: bart@smithoropeza.com
Secondary Email: greg@smithoropeza.com
keilina@smithoropeza.com

/s/ Barton W. Smith, Esq.
Barton W. Smith, Esq.
Florida Bar No. 20169
Gregory S. Oropeza, Esq.
Florida Bar No. 56649

Service List

Robert B. Shillinger, Esq.
MONROE COUNTY ATTORNEY'S OFFICE
1111 12th Street, Suite 408
Key West, Florida 33040
Primary Email: Howard-derek@monroecounty-fl.gov
Secondary Email: Dastugue-laurie@monroecounty-fl.gov

Nathan E. Eden, Esq.
NATHAN E. EDEN, P.A.
302 Southard Street, 205
Key West, Florida 33040
Primary Email: neecourtdocs@bellsouth.net

Andrew M. Tobin, Esq.
ANDREW M. TOBIN, P.A.
P.O. Box 620
Tavernier, Florida 33070
Primary Email: tobinlaw@terranova.net
Secondary Email: tobinlaw2@gmail.com

Robert N. Hartsell, Esq.
ROBERT N. HARTSELL, P.A.
Federal Tower Office Building
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
Primary Email: Robert@Hartsell-Law.com