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**ORIGINAL  
FILE**

June 1, 1995

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

Re: Docket No. 950307-EU

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Jacksonville Electric Authority are the following documents:

- ACK 1. Original and fifteen copies of Jacksonville Electric Authority's Motion to Dismiss Florida Power & Light Company's Counter-Petition; and
- AFA \_\_\_\_\_
- APP 2. A disk in Word Perfect 6.0 containing a copy of the
- CAF document entitled "JEA.2Mot."

CC: Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

*Kenneth A. Hoffman*  
Kenneth A. Hoffman

KAH/rl

cc: All Parties of Record

RECEIVED & FILED

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FPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

05238 JUN-1 1995

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Jacksonville )  
Electric Authority to Resolve a )  
Territorial Dispute with Florida )  
Power & Light Company in St. Johns )  
County )

Docket No. 950307 EU

Filed: June 1, 1995

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JACKSONVILLE ELECTRIC AUTHORITY'S  
MOTION TO DISMISS  
FLORIDA POWER & LIGHT COMPANY'S COUNTER-PETITION

Jacksonville Electric Authority ("JEA"), by and through its undersigned attorneys, and pursuant to Rules 25-22.037(2) and 25-22.0375, Florida Administrative Code, and Rule 1.140(b), Florida Rules of Civil Procedure, hereby moves to dismiss the Counter-Petition filed by Florida Power and Light Company ("FPL") in its Second Amended Answer to JEA's Petition to Resolve Territorial Dispute in St. Johns County. In support thereof, JEA states as follows:

1. On March 20, 1995, JEA filed a Petition to Resolve Territorial Dispute asking the Commission to enforce Order No. 9363, which is the Order approving the existing territorial agreement between JEA and FPL. FPL filed its Answer and Affirmative Defenses on April 13, 1995. FPL then filed an Amendment to its Answer and Affirmative Defenses on April 18, 1995. Subsequently, on May 12, 1995, per stipulation of counsel, FPL filed its Second Amended Answer to JEA's Petition.

2. FPL's Second Amended Answer includes a Counter-Petition that states two prayers for relief from Order No. 9363. However, the Counter-Petition does not assert any authority for the PSC's jurisdiction to grant such relief nor does the Counter-Petition

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FPSC-RECORDS/REPORTING 77

state a cause of action to permit such relief.

3. Pleadings filed with the Commission must state a cause of action and must contain a statement of the ultimate facts showing that the pleader is entitled to the relief requested. Fla. Admin. Code R. 25-22.0375(1); Fla.R.Civ.P. 1.110(b). FPL's Counter-Petition must be dismissed for failure to state a cause of action as it fails to set forth ultimate facts necessary to support the relief it seeks.

4. FPL's Counter-Petition requests the Commission to modify the existing territorial agreement between JEA and FPL by transferring a portion of JEA's existing territory to FPL, or in the alternative, that the Commission cancel the existing territorial agreement and order the utilities to negotiate a new agreement.

5. FPL's attempt to state a cause of action for territorial relief is bottomed on two allegations. First, FPL alleges that Section 1.1 of the existing territorial agreement with JEA authorizes FPL to seek modification or cancellation of the agreement.<sup>1</sup> Second, in sole support of its request for modification or cancellation, FPL offers only the conclusory allegation that "the best interests of existing and future customers of both utilities will be served" if the agreement is modified.<sup>2</sup>

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<sup>1</sup>See paragraph 31 of FPL's Counter-Petition which quotes a portion of Section 1.1 of the JEA-FPL territorial agreement.

<sup>2</sup>See paragraph 34 of FPL's Counter-Petition.

6. FPL's right to seek territorial relief from this Commission pursuant to Section 1.1 of the existing territorial agreement in no way eliminates the legal requirement imposed on FPL, like any other petitioner or complainant, to state a legal cause of action for such relief.

7. FPL's right to seek territorial relief from this Commission in any area covered by the existing territorial agreement may be exercised in one of two ways. First, FPL could have sought to re-draw the existing territorial boundary line by alleging the existence of a territorial dispute between FPL and JEA and the ultimate facts supporting a determination that FPL should serve the customers, locations or areas in dispute. A "territorial dispute" is defined by Commission rule as "a disagreement as to which utility has the right and the obligation to serve a particular geographic area." Fla. Admin. Code R. 25-6.0439(1)(b). FPL chose not to make such allegations in its Counter-Petition in apparent recognition that the territorial agreement between JEA and FPL, approved and adopted by the Commission in Order No. 9363, specifically and unambiguously confirms the rights and obligations of JEA and FPL to provide service in their respective territories as delineated in the territorial agreement. Having failed to allege the existence of a territorial dispute, FPL's Counter-Petition must be dismissed unless the Counter-Petition states a legal cause of action for modification of the existing territorial agreement under Florida law. Clearly, it does not.

8. FPL relies on its right to seek modification of the

territorial agreement per Section 1.1. That right is not absolute. FPL's right to seek modification still requires allegations of ultimate facts sufficient to state a cause of action as defined by and consistent with Florida law.

9. In Peoples Gas Systems, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), the Supreme Court of Florida outlined the threshold requirements which a petitioner must satisfy to support modification or cancellation of an existing territorial agreement. Those requirements are:

[A] specific finding based on adequate proof that such modification or withdrawal of approval is necessary because of changed conditions or other circumstances not present in the proceedings which led to the order being modified.

Id., at 339.

The rationale for requiring a utility to demonstrate "changed circumstances" in order to modify or cancel an existing territorial agreement was articulated by the Court in City of Homestead v. Beard, 600 So.2d 450, 454 (Fla. 1992):

The purpose behind settlement (territorial) agreements is to end the dispute, not to delay the dispute until one of the parties decides it is advantageous to begin competing again.

10. A petitioner seeking to modify or cancel an existing territorial agreement approved by the Commission also must demonstrate how the modification or cancellation carries out the Commission's "express statutory purpose." In other words, the petitioner must demonstrate how the modification or cancellation avoids the uneconomic duplication of facilities and impacts the

Commission's duty to plan, develop and maintain a coordinated electric power grid throughout the State of Florida. Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989); §366.04(5), Fla. Stat. (1993); In Re: Petition to acknowledge termination or, in the alternative, to resolve territorial dispute between the CITY OF HOMESTEAD and FLORIDA POWER & LIGHT COMPANY, 91 F.P.S.C. 1:24, 25 (1991).

11. Here, FPL's attempt to state a cause of action to modify the existing territorial agreement must fail as FPL's Counter-Petition fails to allege ultimate facts showing:

a. that modification of the territorial agreement is necessary because of changed conditions or other circumstances;

b. how modification of the territorial agreement will serve to avoid the uneconomic duplication of facilities;

c. the impact of a modification on the Commission's duty to plan, develop and maintain a coordinated electric power grid; and,

d. how the best interests of the existing and future customers of both utilities will be served by re-drawing the territorial boundary line in the manner requested by FPL.

Accordingly, FPL's request for modification of the existing territorial boundary line included in the existing territorial agreement (adopted and approved in Order No. 9363) fails to state a cause of action and must be dismissed.

12. In paragraph 35 of its Counter-Petition, FPL requests the Commission to cancel the existing territorial agreement between JEA

and FPL and to order the utilities to negotiate a new agreement. FPL's request for uneconomic electric service chaos should be rejected. As the Supreme Court of Florida stated in Lee County Electric Co-Op. v. Marks, 501 So.2d 585, 587 (Fla. 1987):

This Court has repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities "racing to serve," (citations omitted) ....

In this case, FPL's request for an order cancelling the existing agreement and requiring negotiation of a new agreement invites the "races to serve" and uneconomic duplication of facilities the 1974 Grid Bill<sup>3</sup> was intended to prevent.

13. FPL's request for cancellation also infers that negotiations between FPL and JEA cannot take place unless the existing agreement is cancelled. Such is not the case. In any event, FPL's Counter-Petition does not allege any fact which demonstrates the necessity of such drastic action as cancellation of the agreement nor ultimate facts showing how cancellation of the agreement meets the legal pleading requirements for cancellation of the agreement discussed in paragraphs 9 through 11 above. As such, paragraph 35 of the Counter-Petition fails to state a cause of action for cancellation of the agreement.

14. The substantive grounds for dismissal of FPL's Counter-Petition are substantially the same as those articulated successfully by FPL before this Commission in securing a dismissal of a territorial dispute petition filed by the City of Homestead.

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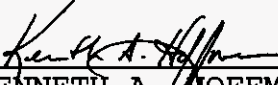
<sup>3</sup>See Ch. 74-196, Laws of Florida; §366.04(2)(c), (d) and (e) and 366.04(5), Fla. Stat. (1993).

See copy of FPL's Motion to Dismiss and Order No. 23955 Granting Motion to Dismiss in Docket No. 900744-EU attached hereto as Composite Exhibit "A". FPL should not now be permitted to take an inconsistent position before this Commission and should be bound by the Court and Commission precedent, discussed supra, that it helped to establish.

15. This proceeding was initiated by the filing of JEA's Petition on March 20, 1995. FPL has amended its responsive pleading on two prior occasions, most recently adding a request for affirmative relief via its Counter-Petition. JEA's prefiled direct testimony is due June 7, 1995. FPL has had sufficient time and opportunities (to amend) to file a legally sufficient Counter-Petition. A third opportunity to amend would be unreasonable and unduly prejudice JEA which must file its testimony by June 7, 1995.

WHEREFORE, JEA requests that the Commission dismiss FPL's Counter-Petition, with prejudice, for failure to state a cause of action.

Respectfully submitted,

  
\_\_\_\_\_  
KENNETH A. HOFFMAN, ESQUIRE  
WILLIAM B. WILLINGHAM, ESQUIRE  
Rutledge, Ecenia, Underwood,  
Purnell & Hoffman, P.A.  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by hand delivery (\*) and U. S. Mail this 1st day of June, 1995:

Mark A. Logan, Esq. (\*)  
Bryant, Miller & Olive  
201 South Monroe Street  
Suite 500  
Tallahassee, Florida 32301

Beth Culpepper, Esq.  
Florida Public Service Commission  
101 East Gaines Street  
Room 212  
Tallahassee, Florida 32399-0850

  
\_\_\_\_\_  
KENNETH A. HOFFMAN, ESQUIRE

JEA.2mot

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October 3, 1990

Mr. Steve Tribble, Director  
Division of Records & Reporting  
Public Service Commission  
Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida 32399-0870

900744-EL

Re: Territorial Agreement between the City of  
Homestead and Florida Power & Light Company,  
in Dade County Florida

Dear Mr. Tribble:

Attached please find original and 15 copies of Memorandum in Support of FPL's Motion to Dismiss and Appendix and Motion to Dismiss which I will appreciate your filing in the above styled case.

Sincerely,

*J. Christian Meffert*  
J. Christian Meffert

	ACK	_____
bbk	AFM	_____
enclosures	APP	_____
	CAF	_____
	CMU	_____
	CTR	_____
	EAG	_____
	LEE	<i>Lee</i>
	LIN	<i>Lin</i>
	OPC	_____
	RCH	_____
	SEC	<i>1</i>
	WAS	_____
	OTH	_____

COMPOSITE EXHIBIT "A"

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RESC-BUREAU OF RECORDS

*Motion*      *Memo in Support*  
DOCUMENT IN THE CASE DOCUMENT NO. 90-1000

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RECORDS ADMINISTRATION - 10001 00/REPORT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Territorial Agreement between )  
the City of Homestead and Florida ) Docket No. 900744-EU  
Power & Light Company, in Dade County )  
Florida )

MOTION TO DISMISS

Florida Power & Light Company (FPL), by and through its undersigned counsel, files this Motion to Dismiss the Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute filed by the City of Homestead (City) and as grounds therefore states as follows:

1. The City seeks to have the Commission "acknowledge termination" of what it refers to as the "AGREEMENT" as a matter of Florida contract law. This position flagrantly ignores, and is in direct conflict with, the directives of the Florida Supreme Court in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989), Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) and City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). These decisions recognize that once a territorial agreement is approved by the Commission, it becomes an order of the Commission which may be modified or terminated only in accordance with the Commission's express statutory purpose after proper notice and hearing before the Commission. See FPL's Memorandum in Support of FPL's Motion to Dismiss filed in support hereof for further discussion. Therefore, the relief requested by the City that the

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Commission "acknowledge as a matter of law that the AGREEMENT between HOMESTEAD and FPL is terminated" cannot, as a matter of law, be granted. Consequently, the City's Petition to Acknowledge Termination must be dismissed.


2. The City's Petition in the alternative seeks the resolution of a territorial dispute. However, no dispute has been alleged. Pursuant to Florida Administrative Code Rule 25-6.0439, Territorial Agreements and Disputes for Electric Utilities - Definitions, subparagraph (1)(b), "territorial dispute" is defined as "a disagreement as to which utility has the right and the obligation to serve a particular geographical area." The City's Petition fails to recognize that a territorial agreement, approved and adopted by the Commission in its Order No. 4285, specifically delineates which utility has the right and the obligation to serve the particular geographic area identified in the City's Petition. No ambiguity regarding the boundary or the terms and conditions exists regarding which utility is to serve with respect to the Commission's Order. Therefore, the Petition's alternative request for relief must also be dismissed.

3. Even considering the City's Petition as a petition to modify Commission Order No. 4285 on the basis that such "modification ... is necessary in the public interest because of changed conditions or other circumstances not present" when the

Commission's Order No. 4285 was adopted, the Petition fails to allege facts that would permit modification. See FPL's Memorandum in support of FPL's Motion to Dismiss for further discussion.

WHEREFORE, FPL hereby requests the Commission DISMISS in its entirety the City's Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute.

Respectfully submitted,



J. Christian Neffert, Esq.  
Bryant, Miller & Olive, P.A.  
201 South Monroe Street  
Suite 500  
Tallahassee, Florida 32302  
(904) 222-8611  
Fla. Bar No. 115558


Attorney for Florida Power &  
Light Company



K. Crandal McDougall, Esq.  
Florida Power & Light Company  
P. O. Box 029100  
Miami, Florida 33102-9100  
(305) 552-3921  
Fla. Bar No. 0763284

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing FPL Motion to Dismiss has been furnished to: Martha W. Barnett, D. Bruce May, Holland and Knight, P. O. Drawer 810, Tallahassee, Florida 32302; and Mike Watkins, P. O. Box 33090, Division of Legal Services, Florida Public Service Commission, 101 South Gaines Street, Tallahassee, Florida 32301 by mail this 3 day of October 1990.

  
K. Crandal McDougall, Esq.

Motion

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to acknowledge termination) DOCKET NO. 900744-EU  
or, in the alternative, to resolve } ORDER NO. 23955  
territorial disputes between the CITY OF } ISSUED: 1-3-91  
HOMESTEAD and FLORIDA POWER & LIGHT  
COMPANY

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman  
THOMAS M. BEARD  
BETTY EASLEY  
GERALD L. GUNTER  
FRANK T. MESSERSMITH

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

On September 4, 1990 the City of Homestead (Homestead) filed a Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute with the Florida Public Service Commission. (the Commission) In its Petition, Homestead sought to have the Commission, as a matter of contract law, acknowledge termination of a territorial agreement between Homestead and Florida Power & Light Company (FPL). This territorial agreement was approved by the Commission in Order No. 4285 issued on December 1, 1967. As an alternative to its request for acknowledgment of termination, Homestead requested that the Commission consider the matter a territorial dispute.

In response to Homestead's Petition, FPL filed a Motion to Dismiss on October 8, 1990. In its Motion, FPL asserted that, according to Florida case law, once a territorial agreement has been approved by the Commission, it becomes an order of the Commission which may only be modified or terminated in accordance with the Commission's express statutory purpose. See Florida Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989); Peoples Gas System, Inc. v. Hannon, 187 So.2d 335 (Fla. 1966); and City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). FPL further asserted that Homestead was attempting to modify the territorial agreement with FPL and in order to do so, Homestead must show the modification is necessary and in the public interest because of changed conditions or circumstances that were not present in the original proceedings.

ORDER NO. 23955  
DOCKET NO. 900744-EU  
PAGE 2

Finally, FPL stated that the matter should not be treated as a territorial dispute. Rule 25-6.0439 of the Florida Administrative Code defines a territorial dispute as a "disagreement as to which utility has the right and the obligation to serve a particular geographic area." According to FPL, there is no question as to who has the right and obligation to serve Homestead and the surrounding area. Order No. 4285 clearly outlines FPL's and Homestead's rights and obligations in the area. Therefore, there is no territorial dispute before the Commission.

During oral arguments held on December 11, 1990, Homestead consistently asserted that it was not asking the Commission to modify the territorial agreement embodied in Order No. 4285. Rather, it claimed that it wanted the Commission to acknowledge Homestead's right to "terminate" the agreement under Florida contract law. We decline to grant Homestead's request. In Florida Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989), the Florida Supreme Court held that, "the purpose of the action brought by the City of Homestead in the circuit court is to modify the territorial agreement between it and FPL." We also find that the purpose of the action brought by Homestead before this Commission is to modify its territorial agreement with FPL.

When a territorial agreement is approved by the Commission, it becomes embodied in the approving order which may only be modified or terminated in accordance with the Commission's express statutory purpose. See Fuller at 1212. Therefore, in order to withdraw or modify Order No. 4285, Homestead must make a showing that, "such modification or withdrawal of approval is necessary in the public interest because of changed conditions or circumstance not present in the proceedings which led to the order being modified." Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966) Homestead has failed to allege facts sufficient to support a modification of Commission Order No. 4285 consistent with Peoples Gas and Fuller. Consequently, we grant FPL's motion and dismiss Homestead's petition without prejudice.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power and Light Company's Motion to Dismiss the City of Homestead's Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute is hereby granted. It is further

ORDERED that the City of Homestead's Petition to Acknowledge Termination or, in the Alternative, Resolve Territorial Dispute is hereby dismissed without prejudice. It is further

ORDERED that the City of Homestead has 30 days from the date of this order to file an amended petition for modification of the territorial agreement with Florida Power and Light Company.

By ORDER of the Florida Public Service Commission, this 31<sup>st</sup> day of JANUARY, 1991.

  
STEVE TRIBBLE, DIRECTOR  
Division of Records and Reporting