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June 8, 1995

VIA HAND DELIVERY

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

RE: 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

Dear Ms. Bayo:

Enclosed please find an original and 15 copies of Florida Power & Light Company's Memorandum in Opposition to Jacksonville Electric Authority's Motion to Dismiss. Also enclosed is a copy of the Memorandum in Opposition on disk in WP5.1 format.

Very truly yours,

Mark K. Logan

ACK ✓
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
MAS 4
OPC
RCH
SEC 1
WAS
OTH

MKL/skr

Enclosures

cc: Bruce Page, Esquire
Kenneth A. Hoffman, Esquire
Edward Tancer, Esquire
Beth Culpepper, Esquire

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DOCUMENT NUMBER-DATE
05346 JUN-8 95
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 8, 1995

FLORIDA POWER AND LIGHT'S MEMORANDUM IN OPPOSITION TO JACKSONVILLE ELECTRIC AUTHORITY'S MOTION TO DISMISS

Florida Power & Light Company ("FPL"), pursuant to Rule 25-22.037, Fla. Admin. Code, files this Memorandum in Opposition to Jacksonville Electric Authority's ("JEA's") Motion to Dismiss FPL's Counterpetition and states:

I. INTRODUCTION

JEA's Motion to Dismiss FPL's Counterpetition, in essence, suggests that the parties and the Commission must prosecute this docket in some sort of vacuum where the actions of one party are magically not considered when evaluating the actions of another. The Commission does not operate in such a vacuum. Here, given JEA's motion, it is critical to remember the following uncontroverted facts: JEA filed the initial pleading in this docket alleging the existence of a territorial dispute; FPL filed a responsive pleading in its answer to the Petition as well as responses to certain JEA discovery requests; and FPL filed a Counterpetition seeking modification of the territorial agreement pursuant to the clear and unambiguous provisions of the FPL/JEA territorial agreement specifically approved by this Commission in Order No. 9363. FPL submits that its Counterpetition, when

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reviewed in the context of a docket initiated by JEA, not FPL, should not be dismissed and that JEA should be required to file its answer to the same.

II. FPL's COUNTERPETITION IS SUFFICIENT TO INFORM JEA OF THE CLAIM AGAINST IT.

The function of a complaint, or here a petition, is to notify the defendant, or here respondent, of the claim against it so that the defendant may intelligently respond to the claim. Dyson v. Dyson, 483 So. 2d 546 (1st DCA 1986); Dawson v. Blue Cross Association, 293 So. 2d 90, 92 (1st DCA 1974); Cohn v. Florida-Georgia Television Company, 218 So. 2d 787,788 (1st DCA 1969). Where a complaint contains sufficient allegations to acquaint the respondent of the claim against it, it is error to dismiss on the grounds that more specific allegations are required. Fontainbleau Hotel Corp. v. Walters, 246 So. 2d 563 (Fla. 1971).

FPL's petition clearly puts JEA on notice of the claim against it as well as the basis for that claim. The petition alleges: that FPL and JEA entered into a territorial agreement (Paragraph 29); that the agreement was ratified and affirmed by this Commission pursuant to Commission Order No. 9363 (Paragraph 30); that this Commission has jurisdiction pursuant to the agreement and Order No. 9363 (Paragraph 32); that the agreement expressly provides for a right of either FPL or JEA to unilaterally institute an action to modify or cancel the agreement upon the passage of 15 years (Paragraph 31); and that a specific new boundary proposed by FPL (Paragraph 33) best serves the interests of all affected customers within the region at issue (Paragraph 34). These

allegations alone clearly communicate the content of FPL's claim against JEA. Nowhere in JEA's motion is there any claim that they cannot intelligently respond to the allegations contained in the Counterpetition.

Even assuming, arguendo, that the literal words contained in FPL's Counterpetition do not convey enough information such that JEA understands the petition and can adequately respond, the Counterpetition is still sufficient to withstand JEA's motion to dismiss. FPL is not required to plead inferences or facts necessarily implied from other facts stated, as to matters within the knowledge of JEA. Ferrell Jewelers of Tampa, Inc. v. Southern Mill Creek Products Company, Inc., 205 So. 2d 657 (1967). Simply put, and as shown below, an examination of the logical inferences drawn from the allegations contained in FPL's Counterpetition more than adequately supports the Counterpetition against a Motion to Dismiss.

JEA asserts that FPL's Counterpetition should be dismissed for a failure to allege ultimate facts establishing four purportedly different conclusions (paragraph 11 of JEA's Motion to Dismiss). The first conclusion (paragraph 11.a.) states that FPL failed to allege ultimate facts showing that modification of the territorial agreement is necessary because of changed conditions or other circumstances. This statement is presumably founded upon the Florida Supreme Court's 1966 decision, Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) where the Court, in quashing a Commission order abrogating a previously approved territorial

agreement, stated:

> "Nor can there be any doubt that the commission may withdraw or modify approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing , and upon a specific finding that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified."

Id., at 339.

An examination of FPL's Counterpetition, as well as JEA's specific knowledge based upon information readily drawn from the pleadings filed in this docket to date, establishes the existence of changed conditions or other circumstances satisfying the requirements of Mason. Based upon FPL's answer to JEA's Petition, FPL's Counterpetition, and discovery responses filed by FPL prior to JEA's Motion to Dismiss, it is clear that FPL contends it has historically, as well as currently, abided by the terms of its territorial agreement with JEA. Moreover, it is clear that FPL asserts it has certain rights to serve customers in St. Johns County pursuant to that agreement. Customers JEA expressly requested FPL to serve. Given those rights and the historical record of service by FPL in St. Johns County -- clearly a changed condition or circumstance since the approval of the agreement in 1980 -- it is now appropriate to modify the territorial agreement with a new boundary as proposed by FPL. These changed conditions or other circumstances alone give FPL the right to seek

modification of the agreement.

JEA also conveniently ignores the most obvious and specific allegation contained in FPL's Counterpetition; namely the expiration of more than 15 years from the date the territorial agreement was "first written". The occurrence of that condition precedent to either party's ability to seek modification of the territorial agreement is, in and of itself, a changed condition or other circumstance as required by Mason. Obviously the provision allowing modification or cancellation after 15 years was expressly agreed to by JEA when its officers signed the document and, when ratified and approved by the Commission pursuant to Order No. 9363, became part of that Order itself. Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla 1989). Having agreed to that provision in 1979, JEA cannot avoid it 15 years later.

JEA's relies upon the Mason decision and its progeny, including a case involving FPL (In Re: Territorial Agreement between the City of Homestead and Florida Power and Light Company, in Dade County, Florida, Docket No. 900744-EU), for the notion that Section 1.1 of the agreement alone does not allow the parties to seek modification or cancellation of this agreement. JEA apparently believes that the Homestead decision is so persuasive that it attached a copy of a Motion to Dismiss and the ensuing Commission order granting that Motion to its own Motion to Dismiss in this docket. As already shown, above, FPL has conclusively met the Mason requirements. FPL suggests, however, that even absent FPL's meeting those requirements, JEA's reliance upon those

decisions is misplaced.

JEA fails to recognize that in Homestead, as well as the other authorities cited by it in the Motion to Dismiss, there was absolutely no express termination or modification provision included in the territorial agreement at issue, as is the case in the instant docket. Therefore, there was no express Commission order ratifying, incorporating and approving the ability of either party to seek modification or termination of the agreement under appropriate circumstances. In Homestead the City attempted to unilaterally seek termination of an agreement that had no termination provision. The City relied solely upon notions of pure contract law, an assertion that this Commission rightly rejected. A copy of the territorial agreement at issue in the Homestead docket is attached hereto as Exhibit "A". Here, of course, Section 1.1 of the agreement conclusively establishes such a right. Since that right is ratified by the Commission, JEA cannot now pretend it has no effect.

Additionally, in Homestead, it was also abundantly clear that there were, in fact, no changed circumstances giving rise to a modification proceeding. The territorial agreement between FPL and the City contained a provision pertaining to the expansion of the City's limits. That provision provided that FPL would serve any customers in the City's expanded territory. Despite this provision, Homestead sought to modify the agreement on the grounds that the City was, in fact, expanding its limits. That was not a changed condition or circumstance, but merely an outgrowth

expressly contemplated by the parties at the time of the agreement. Here, not only are there changed conditions or circumstances but an express provision providing an avenue to modify the agreement when those circumstances occur.

JEA's remaining three conclusions (paragraph 11.b, c., and d.) can be disposed of as one. Paragraphs 33 and 34 of FPL's Counterpetition contain allegations with respect to a new territorial boundary and the service of the best interests of both JEA's and FPL's customers. Implicit in those paragraphs is the overriding statutory duty that the any Commission approval of either a modification or cancellation of the agreement must be predicated upon a Commission determination that uneconomic duplication will be avoided, that a coordinated power grid is maintained and promoted and that the people are well-served. Indeed, it is incumbent on both parties to ultimately prove that there is no conflict with the fundamental axioms guiding this Commission; as the Commission could otherwise not approve any agreement or resolution that abrogates such principles. Here, FPL has proposed a specific boundary which it asserts will meet all applicable Commission requirements and therefore has met its burden to sustain the Counterpetition against a motion to dismiss.

III. FPL IS NOT REQUIRED TO STATE AN EXPRESS CAUSE OF ACTION

JEA claims that FPL has failed to articulate a cause of action as required by Rule 1.110(b) Fla. R. Civ. P. While FPL asserts that it has met this burden within the four corners of its Counterpetition and the logical inferences drawn therefrom, it also

suggests that, under the existing FPL/JEA territorial agreement, it is not necessary for FPL to state a cause of action in order to initiate a petition to modify the agreement. Commission Rule 25-22.0375, Fla. Admin. Code provides that all pleadings filed before the Commission shall substantially conform to the Florida Rules of Civil Procedure as to content, form, signature and certifications. The rule does not require identical conformance with the Florida Rules of Civil Procedure.

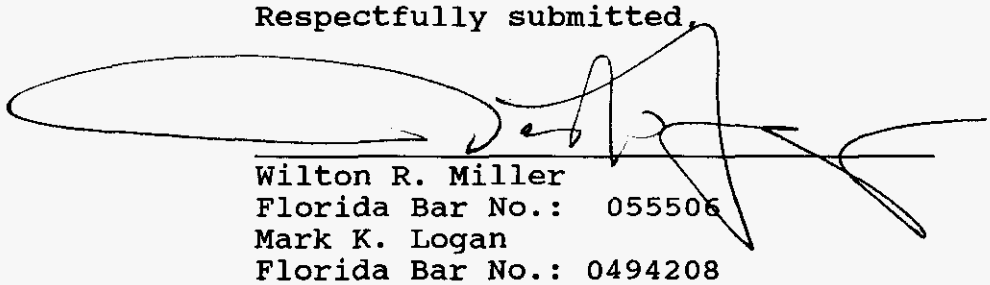
Here, FPL seeks modification of the FPL/JEA agreement pursuant to a Commission-approved section of the agreement that allows either party to invoke the continuing jurisdiction of the Commission. This is analogous to a Circuit Court maintaining jurisdiction over a matter such as a marriage dissolution or a settlement agreement; allowing a party to re-constitute the original proceedings upon appropriate motion. Accordingly, the current proceedings relate back to the initial pleading of the action that led to the agreement. Under such circumstances, FPL suggests that the full articulation of a formal cause of action is unnecessary and redundant.

IV. JEA INCORRECTLY ASSERTS THAT FPL'S MOTION SHOULD BE DISMISSED WITH PREJUDICE

The only ground asserted by JEA to support a dismissal of FPL's Counterpetition with prejudice is the testimony deadline of June 7, 1995. The Joint Motion filed both JEA and FPL on the June 7, 1995, seeks the postponement of that date until July 10, 1995. Therefore, even assuming, arguendo, that allowing FPL to amend after JEA has filed testimony constitutes prejudice, there is now

simply no situation where prejudice would result. In any event, dismissal of an action with prejudice is an extreme remedy that should only be used in extreme situations. Marin v. Batista, 639 So. 2d 630 (3rd DCA 1994). As Rule 1.170 Fla. R. Civ. P. requires that FPL bring any claim arising out of the territorial agreement at this time it must be afforded every opportunity to state such a claim.

Respectfully submitted,



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(407) 625-7241
Florida Bar No.: 509159

Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by the method indicated to the parties listed below on this 8th day of June, 1995.

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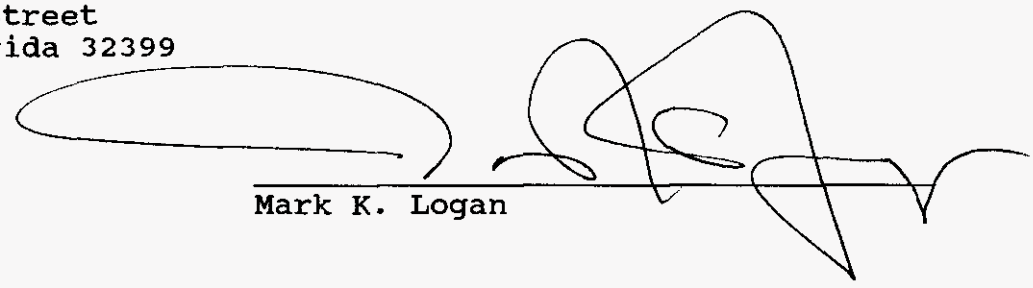

Mark K. Logan

AGREEMENT

THIS AGREEMENT, entered into this 1st day of August 1967, by and between the CITY OF HOMESTEAD, FLORIDA, a municipal corporation (herein called "City"), and FLORIDA POWER & LIGHT COMPANY, a Florida corporation (herein called "Company"):

WHEREAS, the City and Company have electric distribution systems which serve electricity to customers who are located close to each other, and

WHEREAS, heretofore there has been no definition of service areas of each of the parties, and

WHEREAS, as a result there have been and, if there is not now an agreement as to service areas, there will in the future continue to be uneconomical duplications of plant and facilities and expansion into areas served by the competing parties, which in turn result in avoidable economic waste and expense,

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree that:

1. There is attached, as a part hereof, a map of the City and surrounding areas, designated Exhibit "A". The service area of the City shall be the area within the heavy line marked in red on Exhibit "A", which area is the area bounded by :

> Beginning at the center lines of the intersection of Tallahassee Road (S.W. 137th Avenue) and North Canal Drive (S.W. 328th Street) and extending westward on North Canal Drive to the center line of Tower Road (S.W. 192nd Avenue), northward along said center line of Tower Road to the center line of Waldin Drive (S.W. 280th Street), eastward to the center line of Kingman Road (S.W. 152nd Avenue), southward to the center line of Biscayne Drive (S.W. 288th Street). From this point westward to the center line of Newton Road (S.W. 157th Avenue), southward to the center line of Kings Highway (S.W. 304th Street), eastward to the center line of Tallahassee Road (S.W. 137th Avenue), southward to the point of beginning at North Canal Drive (S.W. 328th Street).

TURNER & HODSON, ATTORNEYS-AT-LAW
[illegible] SOUTH KROME AVENUE
HOMESTEAD, FLORIDA

ATTACHMENT "A"

The service area of the Company shall be all of the area outside the boundaries of the service area of the City.

2. The City and the Company agree that each will not serve or offer to serve a customer outside its service area. Whenever a customer applies for service to the party not serving the area of the customer, it is agreed that the Company or the City, as the case may be, shall refer the customer promptly to the other.

3. The parties acknowledge that the Company is regulated by the Florida Public Service Commission and that it will have to apply to the Commission for the approval of this Agreement, but the parties, nevertheless, agree that this Agreement shall become effective on the date hereof and that the parties shall abide by the terms hereof and be bound hereby pending such approval.

4. Notwithstanding the provisions of Section 2, any applications for service in the service area of the other, which applications have been made before the date of this Agreement shall be acted upon by the party to whom the application was made. Such applications which are made after today and before final approval hereof by the Commission shall be reviewed and discussed by both parties and an agreement reached as to each application as to which party shall provide the service.

5. If an order of the Commission is entered approving this Agreement and the order becomes final, then as promptly as possible, each party shall transfer to the other those of its facilities which are serving customers located in the service area of the other. Each party agrees to purchase from the other all such facilities. Each party shall promptly make the appropriate connections, disconnections, extensions of facilities and other arrangements to accomplish these transfers so that all of the

customers and facilities therefor of one party which are located in the service area of the other party shall be transferred to and purchased by such other party, and vice versa. Each party agrees that from time to time upon the transfer of any facilities to it by the other party, it will promptly pay the other party the amount of the original cost of the facilities then transferred, less depreciation. Customers' deposits of customers who are to be transferred shall be refunded to the customer at the time of transfer. If any customer who is to be transferred should refuse to complete an application for service with the party to whom such customer is being transferred, such party shall, nevertheless, effect the transfer and serve such customer.

6. If at any time hereafter, the City limits of the City should be extended beyond the service area of the City and into the service area of the Company, the City agrees that the Company shall continue to serve such area and that it will continue to be in the service area of the Company under this Agreement, even though it would then be within the City.

7. The Company may continue to have its transmission lines and feeders located within the service area of the City, and the Company may, from time to time, locate substations and transformers and install transmission lines or feeders and other facilities in the service area of the City, so long as none of such facilities are used by the Company to provide service to customers located in the service area of the City.

8. Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Homestead Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (S.W. 137th Avenue) is within the service area of the City.

including any additions to or extensions of said facilities of the Homestead Housing Authority. [The City's right to furnish service to City-owned facilities, or those owned by agencies deriving their power through and from the City (including but not limited to the Homestead Housing Authority) may be served by the said City, notwithstanding that the said facilities are located within the service area of the Company.]

APPROVED:

City Attorney.

CITY OF HOMESTEAD, FLORIDA.

By W. T. Dubuson
Mayor

ATTEST:

Mabel M. Peluso
Deputy City Clerk

FLORIDA POWER & LIGHT COMPANY

By
Vice-President

ATTEST:

By
Secretary

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