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May 8, 1997

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 Enforce-
ment 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 Amended Petition for Enforcement
of Order. 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

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- WPM: lms
- EAG _____
- LEG _____
- LIN _____
- OPC _____
- RCH _____
- SEC _____
- WAS _____
- OTH _____

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

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DOCUMENT NUMBER-DATE

04589 MAY-86

FPSC-RECORDS/REPORTING

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

AMENDED PETITION FOR ENFORCEMENT OF ORDER

Comes now, Petitioner, Florida Power & Light Company ("FPL"), by and through its undersigned attorneys, and petitions the Commission to enforce its Order No. 4285, issued on December 1, 1967, in Docket No. 9056-EU, a copy of which was attached as Exhibit A to the Petition for Enforcement of Order filed herein on January 6, 1997, and is by reference made a part hereof. Petitioner is the applicant identified in said Order. This Petition is necessary as the City of Homestead (the "City") is willfully and intentionally violating the terms of said Order to the economic detriment of the Petitioner.

The Petitioner, through its attorneys, has notified the City and has met with City officials and counsel. The City takes the position that it is not in violation of Order No. 4285 because the City owns the real estate where retail electric service is being provided and, in the City's view, the premises constitute a "city-owned facility" within the meaning of an exemption contained within

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the Order. Further efforts to negotiate would, in the opinion of the Petitioner, be fruitless.

In further proof and in support of this Petition, FPL offers the following for the Commission's review and consideration:

1. By Order No. 4285 (Exhibit A) issued on December 1, 1967, in Docket No. 9056-EU, the Commission approved a territorial agreement (the "Territorial Agreement") dated as of August 7, 1967, between FPL and the City. A copy of the Territorial Agreement was attached as Exhibit B to the Petition for Enforcement of Order filed herein on January 6, 1997, and is by reference made a part hereof.

2. Paragraph 8 of the Territorial Agreement provides as follows:

Notwithstanding the provisions of paragraph 6¹ hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (SW. 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 [FPL]. (Emphasis added)

¹Paragraph 6 of the Territorial Agreement provides that new annexations of areas by the City do not affect Florida Power & Light Company's right to serve those areas.

3. As the Commission is aware, the City has on several occasions attempted unsuccessfully to invalidate the Territorial Agreement. In May 1988, the City notified FPL that the City was terminating the Territorial Agreement effective August 7, 1988, claiming that the lack of a specified term (i.e., duration) in the Territorial Agreement made it terminable by either party upon giving reasonable notice to the other. FPL objected, and sought a declaratory statement from this Commission with respect to the parties' rights and obligations under the Territorial Agreement. Shortly thereafter, the City filed a declaratory judgment action in Dade County Circuit Court regarding the Territorial Agreement. The Commission sought a writ of prohibition from the Florida Supreme Court against the judge in the Dade County Circuit Court action. Although declining to issue the writ (expressing confidence that the circuit judge would abide by the Court's ruling), the Florida Supreme Court in Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (1989) concluded in material part:

We conclude 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 find that the agreement has no existence apart from the PSC order approving it and that the territorial agreement merged with and became a part of Florida Public Service Commission Order No. 4285. Any modification or termination of that order 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.

4. Subsequently, in September 1990, the City filed a petition with this Commission seeking, alternatively, to have the Commission either acknowledge termination of the Territorial Agreement, or resolve a claimed territorial dispute. When the Commission granted FPL's motion to dismiss, the City appealed to the Florida Supreme Court. In City of Homestead v. Beard, 600 So.2d 450, 455 (1992), the Supreme Court ruled that "the ... [A]greement is not terminable at will by the parties and may only be modified or terminated by the [Commission] in a proper proceeding . . .," reasoning (600 So.2d at 454):

The purpose behind settlement agreements is to end the dispute, not to delay the dispute until one of the parties decides it is advantageous to begin competing again. The benefit of territorial agreements is the elimination of competition and the unnecessary duplication of facilities and services. (Citation omitted) If a party could terminate the agreement as soon as it was favorable to do so, the benefit to the public interest, as well as to the parties, would be impaired.

5. FPL has recently learned that the City, in its process of developing a commercial tract called the Homestead "Park of

Commerce" - a tract which is within the City's corporate boundaries but unquestionably within FPL's service territory - has, in violation of the Territorial Agreement and Order No. 4285, provided electric utility service to one tenant since late 1993 and has similarly offered to provide service to prospective tenants, in deliberate violation of the Territorial Agreement² and the Commission's orders approving and enforcing same. To enable it to do so, the City built a new feeder extending approximately one-half mile from City-owned distribution facilities located to the east of the Park of Commerce. The City has apparently also installed an underground loop along the perimeter of the Park of Commerce. Both the feeder and underground facilities are uneconomic duplication of FPL facilities located immediately adjacent to the Park of Commerce.

6. FPL has obtained copies of various publicly available documents which are illustrative of the City's violation of the Territorial Agreement. Attached to the Petition for Enforcement of Order filed herein on January 6, 1997, as Exhibit C, which is by reference made a part hereof, was a fifty-year-term "Lease

²Paragraph 2 of the Territorial Agreement provides:

The City and [FPL] 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 [FPL] or the City, as the case may be, shall refer the customer promptly to the other.

Agreement" (the "Lease"), dated July 22, 1993, between the City and Silver Eagle Distributors, Ltd. ("Silver Eagle"). Subsection 6(h) of the Lease provides:

The [City] may have a dispute (the "FPL Dispute") with Florida Power and Light ("FPL") as to whether [the City] or FPL has the right to be the exclusive provider of electrical services to the Property. The FPL Dispute may take many months for resolution, and the outcome probably depends on whether, for purposes of FPL's territorial allocation agreement with [the City], [the City] is deemed to be the owner of the Property. [The City] will indemnify and hold harmless [Silver Eagle] from any and all claims, damages or losses which [Silver Eagle] may suffer or incur by reason of the FPL dispute, including without limitation all attorneys' fees and costs (whether or not suit is filed) and losses from any interruption of electrical service to the Property and any fine, penalty, service fee or similar sum which is due to FPL with respect to any provision of electrical services by [the City] to the Property, or any conversion of electrical services from [the City] to FPL.

7. Subsection 6(h) of the Lease is a contractual admission on the City's part that it is, at the very least, highly questionable whether Silver Eagle's beer distribution facility located within the Park of Commerce qualifies under the "service to City-owned facilities" exception set forth in Paragraph 8 of the Territorial Agreement, and quoted above in paragraph 2 of this Petition. An abbreviated summary of portions of the Lease discloses the unconvincing nature of the City's scheme:

(i) Sections 1 and 2 - Silver Eagle is to construct a 53,000 square foot building on a ten-acre parcel of land located in the Park of Commerce and to be leased from the City.

(ii) Subsection 6(b) - Silver Eagle must apply for a building permit.

(iii) Subsection 6(f) - City permits, licenses and other approvals are contingent upon Silver Eagle's "proper application, submission of plans conforming to all applicable ordinances and regulations, and payment of customary fees."

(iv) Subsection 6(l) - The costs of constructing the 53,000 square foot warehouse, distribution and office facility, and any replacements thereof or additions thereto, are solely the responsibility of Silver Eagle.

(v) Section 9 - Silver Eagle is to obtain and maintain liability, hazard, fire and flood insurance.

(vi) Section 17F - All plumbing, electrical, air conditioning, etc. repairs, all remodeling and all alterations are to be at the sole expense of Silver Eagle.

8. In addition, Silver Eagle has been granted an exclusive option during the period from October 1, 1994, through July 1, 2014, to purchase the real property upon which its building sits. See the "Option Agreement" dated July 22, 1993, comprising Exhibit D which was attached to the Petition for Enforcement of

Order filed herein on January 6, 1997, and is by reference made a part hereof. Both the Lease and the Option Agreement were subsequently amended as of January 12, 1995, by a "First Amendment to Lease and Option Agreements," attached as Exhibit E to the Petition for Enforcement of Order filed herein on January 6, 1997, and by reference made a part hereof.

9. FPL submits that the City cannot legitimately assert or contend that Silver Eagle's warehouse, distribution and office facility in the Park of Commerce qualifies as a "City-owned facility" entitling the City to provide electrical service to it because all electricity-consuming structures and equipment on the site are owned by, and are the sole responsibility of, Silver Eagle. As such, the City is not entitled to serve, and is barred by Paragraph 2 of the Territorial Agreement (quoted earlier in footnote #2) from serving or offering to serve, Silver Eagle or other non-City-owned tenants within the Park of Commerce. FPL has in fact learned that the City has recently negotiated a lease with a second prospective tenant, Contender Boats, under terms very similar to those of the Lease with Silver Eagle. Groundbreaking for the Contender Boats facility is underway.

10. FPL is entitled to serve the disputed area under the express terms of the Territorial Agreement and the Commission's own Order No. 4285 approving the Territorial Agreement, and is fully capable of providing reliable electric service to Silver Eagle and to any and all future tenants within the Park of Commerce by means

of service extensions from an existing FPL distribution feeder which runs easterly along the south side of S.W. 328th Street and dead ends at Kingman Road (S.W. 152nd Avenue). FPL has a single phase lateral extending southward from S.W. 328th Street along Kingman Road. FPL estimates that this lateral would have to be upgraded to three phase to serve Silver Eagle and other future non-City-owned lessees/tenants within the Park of Commerce. A description and sketch of the anticipated facilities necessary to serve Silver Eagle, including certain underground ducts and cables plus a 300 kVA pad-mounted transformer, and their cost breakdown are set forth on Exhibit F to the Petition for Enforcement of Order filed herein on January 6, 1997, and by reference made a part hereof. As shown thereon, FPL currently estimates that it will incur costs of \$22,656 to serve Silver Eagle.

11. FPL does not contest the City's ownership of the real estate underlying the facilities located thereon and therein at the Park of Commerce; however, the City has surrendered its dominion or control over the real estate for so long as Silver Eagle performs under the terms of the Lease and will permanently relinquish such control if and when Silver Eagle exercises its option to purchase by paying a small purchase price. Ownership of the realty, however, is not the issue. Ownership of the facilities, an Anheuser-Busch beer distribution facility and a Contender Boats manufacturing facility, is the issue. Black's Law Dictionary 531 (rev. 5th ed. 1979) defines "facility" as follows:

Facility. Something that is built or installed to perform some particular function, but it also means something that promotes the ease of any action or course of conduct. *Raynor v. American Heritage Life Ins. Co.*, 123 Ga.App. 247, 180 S.E.2d 248, 250. See also **Facilities.**

In interpreting and enforcing its Orders, the Commission should also pay close attention to the plain meaning of the words. "Facilities" is defined by The Random House Dictionary of the English Language (Second Edition, Unabridged 1987):

facility -- 1. often, facilities. a. something designed, built, installed, etc., to serve a specific function affording a convenience or service: *transportation facilities; educational facilities; a new research facility.* b. something that permits the easier performance of an action, course of conduct, etc.: *to provide someone with every facility for accomplishing a task; to lack facilities for handling bulk mail.* 2. readiness or ease due to skill, aptitude, or practice; dexterity: *to compose with great facility.* 3. ready compliance: *her facility in organizing and directing made her an excellent supervisor.* 4. an easy-flowing manner: *facility of style.* 5. the quality of being easily or conveniently done or performed. 6. Often, facilities. *Informal.* A rest room, esp. one for use by the public, as in a theater or restaurant. 7. freedom from difficulty, controversy, misunderstanding, etc.: *facility of understanding.*

Similarly, Florida Statutes consistently define a "facility" not as the real estate but as the activity or purpose which is being facilitated by the operations within the premises. See Fla. Stat. §§ 509.502; 440.49; 153.02; 193.621; 252.60; 266.0002; 266.0012;

266.0022; 266.0032; 266.0042; 266.0052; 266.0062; 376.301(3), (8)-(12); 376.321(4); 393.16; 394.455(6); 404.30; 415.102; 651.011; 721.05. Ownership of the real estate is seldom, if ever, a factor.

12. It is abundantly clear that the City of Homestead exercises no control or dominion over either the distribution of beer or the manufacturing of boats since neither is a legitimate exercise of municipal power and would, therefore, be an *ultra vires* act violative of the Florida Constitution. State v. Town of North Miami, 59 So.2d 779 (Fla. 1952).

13. The City, in defining the purpose of the Lease in paragraph 1, states that "[t]he purpose of this lease is to provide a location for the reconstruction of the Lessee's business ... for use as a warehouse, distribution and office facility (the "Proposed Use")" (emphasis supplied). The Lease (Exhibit C) in paragraph 6(m) further gives Silver Eagle the right to remove all of its equipment, furniture and fixtures should Silver Eagle elect to terminate the Lease. These are the properties which facilitate the use of the premises and convert the premises to a beer distribution and office facility.

14. It was the intent of the drafters of the Territorial Agreement (Exhibit B) to exempt from its terms solely the Homestead Housing Authority Labor Camp and any other municipal agency performing a legitimate municipal function and to allow such municipal facilities to be served by the City's municipal utility, whether any such municipal facility was located on municipal or

private property. To construe a broader intent, one would have to believe that the drafters of the Territorial Agreement anticipated that the City would be engaged in illegal activities; i.e. activities which facilitate private for-profit purposes as opposed to municipal or governmental functions, in violation of the Florida Constitution and the oaths of the City's elected officials. Such a construction cannot merit serious consideration.

15. Counsel for the City has acknowledged that, if it is found that the facilities in question are not "City-owned facilities", then FPL is the appropriate utility to provide retail electrical service.

16. In view of the uncontroverted facts that neither facility (Silver Eagle and Contender Boats) is engaged in providing a municipal or governmental service; that neither is under the dominion or control of the City of Homestead; that both are engaged in the pursuit of private enterprise for private gain; and that these facilities could never be considered legitimate municipal facilities, FPL therefore requests the Commission to enforce its Order No. 4285 and direct an orderly transfer of retail electrical service to Silver Eagle and Contender Boats from the City of Homestead to Florida Power & Light Company in a manner which will not be injurious to the tenants.


17. In enforcing its Orders, the Commission is acting in its judicial capacity and has concurrent jurisdiction, along with the

circuit courts, to enforce its Orders. Section 120.69(7), Florida Statutes, provides as follows:

In any final order on a petition for enforcement the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.

Petitioner, therefore, requests that if the Commission finds the City's violation of Order No. 4285 was willful and intentional, that the Commission assess the City for Petitioner's reasonable attorneys' fees and such other penalties as the Commission deems appropriate.

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 Amended Petition for Enforcement of Order 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 8th day of May, 1997.


WILTON R. MILLER