

WILLIAMS, BRYANT, GAUTIER & DONOHUE, P.A.
ATTORNEYS AT LAW

ORIGINAL
FILE COPY

FREDERICK M. BRYANT
JOHN H. DELOACH
JAMES M. DONOHUE
RUSSELL D. GAUTIER
Board Certified
Real Estate Lawyer
JAMES E. SORENSON*
F. PALMER WILLIAMS
L. LEE WILLIAMS, JR.
Board Certified
Civil Trial Lawyer

306 East College Avenue (32301)
Post Office Box 1169
Tallahassee, Florida 32302

Telephone: (904) 222-5510
Facsimile: (904) 561-6226
E-Mail: wbgandd@aol.com

May 20, 1997

*Also Admitted in Georgia

Ms. Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

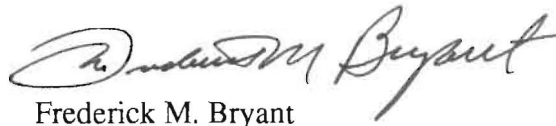
RE: Docket No. 970022-EU
In re: Petition of Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU

Dear Ms. Bayó:

Please find enclosed an original and 15 copies of The City of Homestead's Motion for Judgment on the Pleadings for filing in the above-referenced docket. Please acknowledge your receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to the undersigned.

Thank you for your assistance in this matter.

Sincerely,


Frederick M. Bryant

- ACK
- AFA _____
- APP _____
- CAF _____ FMB/km
- CMU _____ Enclosures
- CTR _____
- EAG 1
- LEG _____
- LIN 5
- OPC _____
- RCH _____
- SEC 1
- WAS _____
- OTH _____

c:\wpdocs\fmb\homestead\fp\Bayo.ltr

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
05059 MAY 20 97
FPSC-RECORDS/REPORTING

ORIGINAL
FILE COPY

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power & Light
Company for Enforcement of
Order No. 4285 in Docket No.
9056-EU.

Docket No. 970022-EU

**THE CITY OF HOMESTEAD'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Comes now, the City of Homestead (the "City"), pursuant to Rule 1.140(c), Fla. R. Civ. P., and moves for the entry of a judgment on the pleadings in its favor.¹ The grounds upon which this motion is based and the substantial matters of law in support of this motion are set forth below.

As stated in this Commission's Order of April 28, 1997, the purpose of this proceeding is to resolve a territorial dispute between Florida Power & Light Company ("FPL") and the City. FPL's Petition and the Memorandum FPL has filed in this cause raises, as the sole and only issue, the meaning to be given to the term "city-owned facilities" contained in Paragraph 8 of the Territorial Agreement. A copy of the Territorial Agreement is attached as Exhibit "B" to FPL's Petition.

In ruling on this Motion, this Commission need not and, in fact, must not consider anything but the pleadings. Spolski General Contractor, Inc. v. Jett-Aire Corp. Aviation Management of Central Florida, Inc., 637 So.2d 968 (Fla. 5th DCA 1994). For this Motion to be granted, the pleadings must reveal there are no facts to be resolved by the trier of fact and all well-pled facts must be accepted as true. Bradham v. Hayes Enterprises, Inc., 306 So.2d 568 (Fla. 1st DCA 1975), and

¹This motion references FPL's Petition. Because of the deficiencies in the demand for attorney's fees in the Petition, FPL has recently filed an Amended Petition which only differs from the Petition in its request for attorney's fees. That change has no effect on this motion, and, therefore, this motion can be considered directed to both the Petition and the Amended Petition.

Wilcox v. Lang Equities, Inc., 588 So. 2d 318 (Fla. 3d DCA 1981). This, however, does not extend to the numerous conclusions of law that are pled in the Petition. Yunkers v. Yunkers, 515 So. 2d 419 (Fla. 3d DCA 1987). These conclusions of law include FPL's suggestions of how the phrase, "city-owned facilities" should be interpreted.

I. The only correct meaning that can be given the phrase "city-owned facilities" is one of law and set forth herein.

The Territorial Agreement is nothing more than a written document which determines, between FPL and the City, who will be the provider of electrical services in the geographical area covered by the agreement. FPL specifically and unequivocally agreed that the City would be the exclusive provider of electrical services to "city-owned facilities," regardless of their location. FPL admits in paragraph 11 of the Petition that the City owns the real property in question. It is black letter law that the City therefore owns all buildings, improvements and fixtures situate on the City's real property since "all buildings and fixtures actually or constructively annexed to the freehold become part of it...." Burbridge v. Therrell, 148 So. 204 (Fla. 1933). Also see, Greenwald v. Graham, 130 So. 608 (Fla. 1930). This is also made clear in Florida Statutes, one of which is quoted in the footnote below.² Thus, any court or commission must conclude that FPL and the City agreed that the City is to be the provider of electrical services to all buildings and fixtures in the Park of

²196.012 Definitions. - For the purpose of this chapter, the following terms are defined as follows, except where the context clearly indicates otherwise:...

(6) ... For purposes of determination of "ownership," buildings and other real property improvements which will revert to the airport authority or other governmental unit upon expiration of the term of the lease shall be deemed "owned" by the governmental unit and not the lessee.

Commerce.³ Thus, the only logical interpretation of the Territorial Agreement is that the City is to be the sole provider of electrical services to the Park of Commerce.

II. FPL's Suggested Interpretations are incorrect.

A. FPL suggests that "City-owned facilities" should be expanded to the phrase "City-owned and city-operated facilities".

There is nothing mysterious, complicated or ambiguous about the word "owned". Since the words in a contract must be given their natural and most commonly accepted meaning, expansion of the word "owned" to the phrase "owned and operated" would be error. Royal Inv. & Dev. Corp. v. Monty's Air Conditioning Serv., Inc., 511 So.2d 419 (Fla. 4th DCA 1987). Further, neither a court nor the Commission may give the clear and unambiguous language of a contract any meaning other than that expressed. Hamilton Constr. Co. v. Board of Public Instruction of Dade County, 65 So.2d 729 (Fla. 1953). If FPL and the City had wanted to add the phrase "and city-operated" to paragraph 8 of their agreement, they could have done so, however, they chose not to. Since the meaning of the word "owned" is well known, neither a court nor the Commission should modify it by interpretation.⁴ Pafford v. Standard Life Ins. Co. of Indiana, 52 So.2d 910 (Fla. 1951). Courts simply are not at liberty to "rewrite, alter, or add to the terms of a written agreement between parties...." Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976).

³To suggest as FPL does, that notwithstanding the City's right to serve the buildings and fixtures, FPL has the right to provide service to the typewriters and other equipment, places an absurd construction on the agreement contrary to well established law. For example see Harris v. Carolina Life Ins. Co., 233 So.2d 833 (Fla. 1970). It also violates the Commission's well established policy against duplication of services.

⁴While the Territory Agreement may be a Commission Order, it is also a contract between FPL and the City. There are Federal and State Constitutional limitations on the impairment of contractual rights and obligations in Article I, Section 10 of both the United States Constitution and the Florida Constitution. The substantive law also prohibits such state action. For example see Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) and Manning v. Travelers Ins. Co., 250 So.2d 872 (Fla. 1971).

B. FPL suggests that “City-owned facilities” excludes equipment and therefore FPL should be allowed to serve the equipment.

Pursuant to the Territorial Agreement, which FPL must accept, the City has the unequivocal right to serve electricity to the buildings, the improvements and fixtures on real property the City owns. FPL contends, however, that it should be permitted to serve the equipment within the buildings on City-owned property. This places an absurd and an unreasonable construction on the agreement which is contrary to the law. Harris v. Carolina Life Ins. Co., 233 So.2d 833 (Fla. 1970). Additionally, allowing FPL to provide electric service to the equipment, while the City serves the buildings, improvements and fixtures, is not only impracticable, but would result in a violation of this Commission’s well established policy against the duplication of services.

FPL argues that the term “facilities” equates to equipment because, FPL claims, Florida Statutes consistently define “facilities” as equipment. FPL cites numerous Florida Statutes for that proposition. However, Florida Statutes, including the statutes cited by FPL, not only fail to support FPL’s argument, they overwhelmingly support the City’s position. Florida Statutes define facilities as that term is commonly understood, i.e., to include buildings and improvements. The attached Exhibit “A” summarizes numerous Florida Statutory definitions of “facilities.” Throughout, buildings and fixtures are included in the statutory definitions of “facility” or “facilities.” These statutory definitions are consistent with the ordinary understanding of a facility as “something (like a hospital) that is built, installed, or established to serve a particular function.” Websters New Collegiate Dictionary, 410 (3d ed. 1975). Florida substantive law also interprets “facilities” as including “spring training headquarters, group homes, grounds, detention buildings, and publicly owned stadiums.” See Brandes v. City of Deerfield Beach, 186 So.2d 6 (Fla. 1966); Life Concepts, Inc. v. Harden, 562

So.2d 726 (Fla. 5th DCA 1990); Decker v. State, 279 So.2d 50 (Fla. 2d DCA 1973); and City of Miami v. Rosenthal, 208 So.2d 495 (Fla. 3d DCA 1968).

This is consistent with the ordinary understanding of “facility.” When one asks the question: Does FSU have good athletic facilities? Does TCC have good facilities? Does the school have good facilities? These questions all have in mind buildings, structures, stadiums, as well as equipment.

As demonstrated, the phrase “city-owned facility” is not ambiguous⁵ and, therefore, it must be given its natural meaning or its most commonly understood meaning. Hamilton Constr. Co. v. Board of Public Instruction of Dade County, 65 So.2d 729 (Fla. 1953); and Royal Inv. & Dev. Corp. v. Monty’s Air Conditioning Service, Inc., 511 So.2d 419 (Fla. 4th DCA 1987).

As shown, the issue raised by FPL’s Petition is a matter of law for this Commission to decide. This Commission should, therefore, issue its Order dismissing the Petition and the Amended Petition with prejudice.



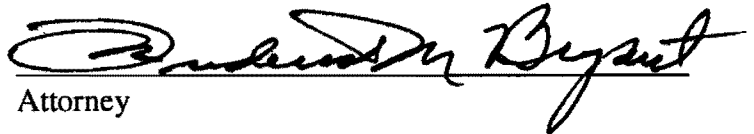
FREDERICK M. BRYANT
Fla. Bar No. 0126370
Williams, Bryant, Gautier & Donohue, P.A.
306 E. College Avenue
P.O. Box 1169
Tallahassee, FL 32302
(904) 222-5510

Attorneys for the City of Homestead

⁵It would be ambiguous only if one were to consider that FPL and the City contemplated two utilities, i.e., that both FPL and the City would provide electrical service to the same buildings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 15 copies of the foregoing The City of Homestead's Motion for Judgment on the Pleadings were filed with **Ms. Blanca S. Bayó, Director, Division of Records and Reporting, Florida Public Service Commission, Room 110, Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850**; and that a true and correct copy of the foregoing was furnished by Hand Delivery to **Lorna R. Wagner, Esquire, Division of Legal Services, Florida Public Service Commission, Room 370, Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850**; and that true and correct copies of the foregoing were furnished by regular U.S. mail to **Wilton R. Miller, Esquire, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, FL, 32301**; and **David L. Smith, Esquire, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100** on this 20th day of May, 1997.


Attorney

c:\wpdocs\homestead\p\judge.mot

EXHIBIT "A"

The following Florida Statutes, cited by FPL, define the word "facility" or "facilities," to include buildings and/or everything on a parcel of property. In other words, these definitions show FPL's requested interpretation of the Territory Agreement is erroneous.

152.02 Definitions. - As used in this part the following words and terms shall have the following meanings unless some other meaning is plainly indicated:...

(7) The word "facility" shall mean such water systems, sewage disposal systems, water system improvements and/or sewer improvements or additions thereto as are defined by this chapter.

252.60 Radiological emergency preparedness.-...

Definitions. - For the purposes of this section, the following terms shall have the meanings indicated:

(a) "Facility" means a commercial nuclear electric generating reactor operated for the purpose of providing heat to produce electricity for sale to persons other than the owner of the facility.

266.0002 Definitions. -As used in ss. 266.001-266.0008, the term:...

(4) "Facility" means a historic site, object, or facility for exhibition which is rented, leased, managed, or operated by the board.

266.0012 Definitions. - As used in ss. 266.0011-266.0018, the term:...

(4) "Facility" means a historic site, object, or landmark for exhibition which is leased, managed, or operated by the board.

266.0022 Definitions. - As used in ss. 266.0021-266.0028, the term:...

(4) "Facility" means a historic site, object, or landmark for exhibition which is leased, managed, or operated by the board.

266.0032 Definitions. - As used in ss. 266.0031-266.0038, the term:...

(4) "Facility" means a historic site, object, or landmark for exhibition which is leased, managed, or operated by the board.

266.0042 Definitions. - As used in ss. 266.0041-266.0048, the term:...

(4) "Facility" means a historic site, object, or landmark for exhibition which is leased, managed, or operated by the board.

266.0052 Definitions. - As used in ss. 266.0051-266.0058, the term:...

(4) "Facility" means a historic site, district, object, or landmark for exhibition which is leased, managed, or operated by the board.

266.0062 Definitions. - As used in ss. 266.0061 - 266.0068, the term:

(4) "Facility" means a historic site, district, object, or landmark for exhibition which is leased, managed, or operated by the board.

376.301 Definitions of the terms used in ss. 376.30-376.319, 376.70, and 376.75 - When used in ss. 376.30-376.319, 376.70, and 376.75, unless the context clearly requires otherwise, the term:

(3) "Bulk product facility" means a coastal waterfront location with at least one aboveground tank with a capacity greater than 30,000 gallons which is used for the storage of pollutants....

(8) "Drycleaning facility" means a commercial establishment that operates or has at some time in the past operated for the primary purpose of drycleaning clothing and other fabrics utilizing a process that involves any use of drycleaning solvents....

(10) "Drop-off facility" means any commercial retail store that receives from customers clothing and other fabrics for drycleaning or laundering at an offsite drycleaning facility and that does not clean the clothing or fabrics at the store utilizing drycleaning solvents.

(11) "Wholesale supply facility" means a commercial establishment that supplies drycleaning solvents to drycleaning facilities.

(12) "Facility" means a nonresidential location containing, or which contained, any underground stationary tank or tanks which contain hazardous substances or pollutants and have individual storage capacities greater than 110 gallons, or any aboveground stationary tank or tanks which contain pollutants which are liquids at standard ambient temperature and pressure and have individual storage capacities greater than 550 gallons. This subsection shall not apply to facilities covered by chapter 377, or containers storing solid or gaseous pollutants, and agricultural tanks having storage capacities of less than 550 gallons.

376.321 Definitions. - As used in ss. 376.320-376.326, the term:...

(4) "Facility" means any nonresidential location or part thereof containing an aboveground tank or aboveground tanks which contain specified mineral acids, which have an individual storage capacity greater than 110 gallons.

393.16 Intermediate care facilities; definition; trust fund. -

(1) As used in this section, "facility" means any residential intermediate care facility for persons with developmental disabilities which is operated by a corporation for profit or nonprofit corporation, by a partnership, or by a sole proprietorship; which is operated, approved, or contracted with under the authority of the department; and which houses no more than 15 persons with developmental disabilities.

* This statute was repealed, effective July 1, 1996.

394.455 Definitions. - As used in this part, unless the context clearly requires otherwise, the term:...

(10) "Facility" means any hospital, community facility, public or private facility, or receiving or treatment facility providing for the evaluation, diagnosis, care, treatment, training, or hospitalization of persons who appear to have a mental illness or have been diagnosed as having a mental illness. "Facility" does not include any program or entity licensed pursuant to chapter 400.

* Cited by Petitioner as (6), but has been modified in the revised statute to number (10).

(22) "Private facility" means any hospital or facility operated by a for-profit or not-for-profit corporation or association that provides mental health services and is not a public facility....

(26) "Receiving facility" means any public or private facility designated by the department to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment. The term does not include a county jail....

(30) "Treatment facility" means any state-owned, state-operated, or state-supported hospital, center, or clinic designated by the department for extended treatment and hospitalization, beyond that provided by a receiving facility, of persons who have a mental illness, including facilities in the United States Government, and any private facility designated by the department when rendering services to a person pursuant to the provisions of this part. Patients treated in facilities of the United States Government shall be solely those whose care is the responsibility of the United States Department of Veterans Affairs....

404.30 Southeast Interstate Low-Level Radioactive Waste Management Compact; party state....

Article II; Definitions. - As used in this compact, unless the context clearly requires a different construction, the term:...

(2) "Facility" means a parcel of land, together with the structures, equipment, and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage, or disposal of low-level radioactive waste.

415.102 Definitions of terms used in ss. 415.101-415.113 - As used in ss. 415.101-415.113, the term:...

(13) "Facility" means any location providing day or residential care or treatment for disabled adults or elderly persons. The term "facility" may include, but is not limited to, any hospital, training center, state institution, nursing home, assisted living facility, adult family care home, adult day care center, group home, or mental health treatment center.

509.502 Definitions. - As used in this act:...

(6) "Facilities" means all amenities offered in connection with a campground, including, but not limited to, camping sites, available rental trailers or cabins, if any, swimming pools, sport courts, recreation buildings, and trading posts or grocery stores.

651.011 Definitions. - For the purposes of this chapter, the term:...

(5) "'Facility' means a place in which it is undertaken to provide continuing care."

721.05 Definitions. - As used in this chapter, the term:...

(16) "Facility" means, any amenity, including any structure, furnishings, fixture, equipment, service, improvement, or real or personal property, improved or unimproved, other than the accommodation of the timeshare plan, which is made available to the purchasers of a timeshare plan. The term does not include an incidental benefit as defined in this section.