

State of Florida



Public Service Commission

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COMMISSION  
CLERK

DATE: 10/3/2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &  
ADMINISTRATIVE SERVICES (BAYO)

FROM: OFFICE OF THE GENERAL COUNSEL (MOORE) *CTM DS*  
DIVISION OF ECONOMIC REGULATION (BREMANN) *RS WBM* *JDS*

RE: DOCKET NO. 020829-EC - PETITION FOR DECLARATORY STATEMENT  
CONCERNING URGENT NEED FOR ELECTRICAL SUBSTATION IN NORTH  
KEY LARGO BY FLORIDA KEYS ELECTRIC COOPERATIVE  
ASSOCIATION, INC., PURSUANT TO SECTION 366.04, FLORIDA  
STATUTES.

AGENDA: 10/15/02 - REGULAR AGENDA - DECISION ON DECLARATORY  
STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S  
DISCRETION

CRITICAL DATES: 10/28/02 - BY STATUTE, ORDER MUST BE ISSUED BY  
THIS DATE

SPECIAL INSTRUCTIONS: SHOULD NOT BE DEFERRED

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020829.RCM

CASE BACKGROUND

By petition filed July 29, 2002, Florida Keys Electric  
Cooperative Association, Inc., ("FKEC") requested a declaratory  
statement pursuant to Section 120.565, Florida Statutes, and Rule  
28-105.002, Florida Administrative Code. FKEC asks the Commission  
to declare that it:

shall promptly construct a new electric  
substation at the Site, no later than December  
31, 2002, to prevent power failures, to ensure  
adequate and reliable electric service to the  
residents of the Ocean Reef community in the  
North Key Largo area, to remedy an inadequacy

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in the energy grid, and to resolve safety concerns.

Petition, p. 9. Notice of the petition was published in the Florida Administrative Weekly on August 23, 2002.

### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission issue a declaratory statement that FKEC shall construct a new electric substation at a certain site no later than December 31, 2002?

**RECOMMENDATION:** No. The Commission should decline to issue the declaratory statement that FKEC requests. FKEC's declaratory statement petition does not meet the threshold requirements for a declaratory statement. There is no uncertainty or question about the applicability of law for the Commission to answer, nor will granting the petition resolve a controversy or serve the purpose of avoiding litigation. In addition, a proceeding that addresses the same subject matter is pending before the Florida Division of Administrative Hearings. Staff recommends that the Commission direct FKEC to file a report by December 31, 2002, on the status of its actions and plans to restore reliability.

### **STAFF ANALYSIS:**

#### Facts and Circumstances<sup>1</sup>

FKEC is the electric utility that provides power to the Ocean Reef and Anglers Club area of North Key Largo in Monroe County, Florida. A 1990 engineering study by FKEC's consulting engineering firm to determine FKEC's facility needs determined that the 12-mile long distribution line serving Ocean Reef was insufficient to meet the area's growing needs and that a new substation would need to be built. According to FKEC, at the time of the 1990 recommendation,

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<sup>1</sup>Unless specifically noted otherwise, all of the facts and circumstances that give rise to this declaratory statement proceeding are taken from FKEC's petition and attachments.

the line load in the year 2000 was projected to be 10,876 kW. The load on the Ocean Reef line reached 10,970 kW by 1995 and a high of 17,992 kW in December, 2000. Line losses from the 12-mile long distribution line exacerbate the already limited capacity of the line. Engineering reports since 1990 have recommended construction of a new substation closer to Ocean Reef to serve that area.

FKEC asserts that it has been diligent in its attempt to correct a substandard electrical supply system that has been growing worse and that it has worked with federal, state, and local environmental agencies to find the most desirable site for construction of the electrical substation interchange, a site meeting the system design criteria and where construction would have a minimal impact on the environment. FKEC further asserts that it evaluated 12 sites, chose the most suitable site (which is located in a wildlife hammock), and received approval by the Monroe County Planning Commission for construction on that site. Since the approval in July, 2001, however, issuance of the permit to construct the substation has been delayed by litigation initiated by the Florida Izaak Walton League.<sup>2</sup>

FKEC is concerned that very hot or very cold weather during peak demand periods are likely to result in blackout conditions and the inability to restore service for significant periods of time. On the basis of these facts, FKEC asks the Commission to declare that it must build a substation on its chosen site before December

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<sup>2</sup>Staff has learned that the Upper Keys Citizens Association and the Florida Keys Chapter of the Izaak Walton League of America filed an action in the nature of appellate review at the Florida Division of Administrative Hearings (DOAH), challenging the County's issuance of the permit to construct the electric substation. Upper Keys Citizens Association and Florida Keys Chapter of Izaak Walton League of America, Appellants v. Monroe County and Florida Keys Electric Cooperative, Inc., Appellees, DOAH Case No. 01-3914. In status reports filed at DOAH July 12 and September 3, 2002, the appellants reported they are engaged in settlement discussions with the appellees, they have identified an alternate site for the substation, and have requested that the DOAH proceedings be held in abeyance. A third status report is due September 26, 2002. The other litigation alluded to in FKEC's petition, an appeal to the Third District Court of Appeal, was dismissed by the court on June 19, 2002.

31, 2001, in order to assure an adequate and reliable source of energy to Ocean Reef's residents.

Threshold Requirements for Issuance of a Declaratory Statement

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Uniform Rule of Procedure, Rule 28-105.001, Florida Administrative Code, further explains that:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

Thus, a basic requirement for a declaratory statement is that there is uncertainty on the part of the petitioner about a provision of statute, rule or order of the agency, or that a declaratory statement will resolve a controversy. Further, the purpose of a declaratory statement is to resolve an ambiguity in the law, to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.

Novick v. Department of Health, Board of Medicine, 816 So. 2d 1237 (Fla. 5<sup>th</sup> DCA 2002); Friends of Florida v. Florida Department of Community Affairs, 760 So. 2d 154 (Fla. 1<sup>st</sup> DCA 2000), Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1<sup>st</sup> DCA 1998).

A declaratory statement should not be issued where another proceeding is pending that addresses the same question or subject matter. Suntide Condominium Association, Inc. v. Division of Land Sales, Condominiums and Mobile Homes, Department of Business Regulations, 504 So. 2d 1343 (Fla. 1<sup>st</sup> DCA 1987); Couch v. State, 377 So. 2d 32 (Fla. 1<sup>st</sup> DCA 1979); Novick v. Department of Health, Board of Medicine, 816 So. 2d 1237 (Fla. 5<sup>th</sup> DCA 2002) (a declaratory statement is not an appropriate remedy where there is related pending litigation); Fox v. State Board of Osteopathic Medical Examiners, 395 So. 2d 192 (Fla. 1<sup>st</sup> DCA 1981) ( Couch "is dispositive on the point that declaratory statement proceedings, by analogy to Chapter 86, Florida Statutes, are not properly filed on issues simultaneously litigated in judicial or other administrative proceedings of the character here involved.")

#### Staff Analysis

FKEC has cited several subsections of section 366.04, Florida Statutes, as applicable to its circumstances. In pertinent part, they provide:

(1) In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; . . . The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes: . . . (c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(6) The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities.

Staff does not believe that section 366.04(1) is applicable to the circumstances presented by FKEC. FKEC cites section 366.04(1) for the proposition that the Commission's power is superior to all other governmental authorities, and that if the Commission issues the declaratory statement that is requested, FKEC would have to immediately build its electric substation. In order to reach that result, however, section 366.04(1) must be rewritten.

Subsection (1) of 366.04 addresses the Commission's jurisdiction over public utilities, the definition of which specifically excludes electric cooperatives. §366.02(1), Fla. Stat. Even if this provision of section 366.04(1) were applicable to electric utilities, defined to include electric cooperatives, the grant of exclusive and superior jurisdiction to the Commission extends only to the "jurisdiction conferred upon" it. That jurisdiction does not extend to directing the location of a substation in contravention of land use or environmental laws. Thus, to issue the declaratory statement FKEC requests would require rewriting the statute to apply to electric utilities and to expand the Commission's jurisdiction to land use and environmental matters.

Based upon the facts alleged by FKEC, the only impediment to FKEC's constructing an electric substation is litigation at DOAH initiated by the Upper Keys Citizens Association and the Florida Keys Chapter of Izaak Walton League of America. That litigation challenges Monroe County's authorization of the substation construction pursuant to land development regulations. A declaratory statement by this Commission will not eliminate that

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impediment. On the other hand, a decision in the DOAH proceeding could well render moot FKEC's petition to the Commission.

In addition, the case law cited on page 5 of this recommendation holds that declaratory statements should not be issued where another proceeding is pending that addresses the same question or subject matter. Suntide suggests that it would be improper to issue such a statement:

We do not view the declaratory statement provision as conferring upon an agency the obligation either to give advice as to the jurisdiction of a court to determine matters then pending before the court, or to issue opinions or decisions settling doubts or questions as to the outcome of controversies then pending in a court. We do view it as an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties. This is especially so when, as here, there is not the slightest hint that the relief sought by the opposing party in the court proceeding is available in any forum other than the circuit court.

Suntide Condominium Association, Inc. v. Division of Florida Land Sales, Condominiums and Mobile Homes, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987).

Although it appears that the legal issue before DOAH is different than the issue presented here, the subject matter of that proceeding, which is the construction site of an electric substation, is the same. Even if it were proper for the Commission to issue a declaratory statement while there is another proceeding pending that addresses the same subject matter, however, staff is unable to determine what valid purpose would be served by the Commission issuing the declaratory statement FKEC requests.

In a letter to staff subsequent to the petition filing, FKEC's counsel suggests that if the Commission chooses, it could issue the declaratory statement without taking a position on which site the substation should be located. (Attachment A.) Such an order would

declare that FKEC shall promptly construct a new electric substation no later than December 31, 2002. Staff is unsure what the purpose of such a declaratory statement would be, however, in that it does nothing to eliminate or resolve the DOAH appeal which is the only apparent impediment to FKEC's construction of a substation.

There are other reasons the Commission should decline to issue the declaratory statement even if a site is not specified. FKEC has not alleged an uncertainty about a provision of statute, rule or order of the Commission in compliance with Rule 28-105.001, Florida Administrative Code; nor will a declaratory statement serve the intended purpose of the statute authorizing such statements. FKEC did not seek the statement from the Commission until well after it alleges its reliability deteriorated, took the action to construct a substation, received approval, and became embroiled in litigation. As such, a declaratory statement by the Commission will not serve the purpose of giving FKEC the opportunity select a proper course of action in advance and avoid administrative litigation.

Moreover, the only uncertainty alleged by FKEC is:

The delay in construction caused by the FIWL creates great uncertainty as to whether FKEC can continue to provide the adequate and reliable power referred to in FLA. STAT. §§366.04(2)(c) and 366.04(5). Furthermore, the appeal prevents FKEC from acting to insure the safety of its facilities. Therefore, it is essential that the Commission take the steps to quickly resolve this uncertainty as described in FLA. STAT. §120.565.

(Petition p. 7-8) Thus, FKEC's uncertainty is not about the requirements of law. FKEC demonstrates in its petition that it knows its obligation is to provide adequate, safe and reliable service, that its service is below applicable standards, and that it must take action to remedy the deficiencies. The uncertainty, if any, has to do primarily with whether and when circumstances will arise such that the load will exceed FKEC's ability to serve, and secondarily, with the outcome of the litigation initiated by the citizens' groups. There is no action the Commission can take to resolve either uncertainty.



In addition to these reasons to deny the petition, staff believes the specific substantive statute that would authorize the Commission to direct FKEC to construct distribution facilities contemplates that an evidentiary hearing will be held. That statute is section 366.05(8):

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, 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.

Staff believes that a section 120.57(1) formal hearing is the proper proceeding in which to make the findings required by this statute. A hearing would also allow the Commission to consider other factors as required under the provisions of section 366.04 that FKEC cites, such as electric power conservation, whether there will be further uneconomic duplication of distribution facilities, and determine the benefits and costs to FKEC and other utilities affected. Although an agency may hold a hearing to consider a petition for declaratory statement, it must be conducted in accordance with sections 120.569 and 120.57(2), Florida Statutes. Uniform Rule of Administrative Procedure 28-105.003, Florida Administrative Code. Thus, only an informal hearing in which the material facts are agreed upon is contemplated.

FKEC, in a letter dated September 13, 2002, asserts that a hearing is not necessary. (Attachment A.) Staff disagrees. Pursuant to Rule 28-105.003, Florida Administrative Code, the Commission may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. The statements of fact in FKEC's petition and its letter of August 30, 2002, support a conclusion that FKEC's service is unreliable and unsafe, and that it has taken some conservation measures. (Attachment B.) For the Commission to order the construction of a substation, however, it would first need to determine that a substation was the only technical option to improve reliability to the customers in the Ocean Reef area of

North Key Largo and to safeguard the grid. The Commission would consider conservation and generation options to provide timely reliable service. Which option is the best for the customers would be based on many factors. That determination should not be made without the Commission taking evidence, weighing the evidence, and employing its collective judgment to reach a reasoned decision.

The statute requires the Commission to make certain findings and to conduct a proceeding. Theoretically, FKEC could state that the Commission made the necessary findings, but that statement would be inaccurate. As FKEC acknowledges, any order based on inaccurate statements of fact would be of no benefit to the petitioner.

It is clear that a declaratory statement is not appropriate where there is no doubt or uncertainty concerning the applicability of statutory provisions, rules, or orders over which the agency has authority, and where the statement will not resolve any controversy. It is likewise inappropriate where another proceeding is pending that addresses the same subject; where resolution of another proceeding would render the petition for declaratory statement moot; or where the agency does not have the evidence to make the legal decision that is requested without an evidentiary hearing. All of these circumstances exist in this case, and therefore, staff recommends that FKEC's petition should be denied.

Staff recognizes that based upon the facts and circumstances alleged in the petition, there appears to be an urgent need for FKEC to improve the safety and reliability of its electric service to its customers in the Ocean Reef area of North Key Largo. Staff recommends that the Commission direct FKEC to file a report by December 31, 2002, on the status of its actions and its plans to restore reliability pursuant to sections 366.04(2) and 366.05(8), Florida Statutes. Staff will review FKEC's report and determine whether further action by the Commission is necessary to achieve reliable electric service to current and future customers in the North Key Largo area.

DOCKET NO. 020829-EC

DATE: 10/3/2002

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

**STAFF ANALYSIS:** A declaratory statement is issued as a final order and the docket may be closed.

CTM/

Attachments

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September 13, 2002

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Chris Moore, Esquire  
Office of General Counsel  
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Tallahassee, Florida 32399-0850

RE: Florida Keys Electric Cooperative Association, Inc.  
Petition for Declaratory Statement Regarding North Key Largo Substation  
Docket Number:

Dear Ms. Moore:

Following up on our prior telephone conversation regarding the Petition for Declaratory Statement filed by Florida Keys Electric Cooperative Association, Inc. ("FKEC"), I would like to address some additional matters to reinforce the utility's concern and position. FKEC's primary interest is in providing adequate and reliable service to all of its members, particularly those in the North Key Largo area who are at risk for loss of service as set forth in the Petition and attached documents. While the Petition suggests that the Commission order FKEC to build the substation at the site identified in the Petition, we understand that the Commission may be reluctant to be that specific. FKEC is willing to accept an order to construct the substation or whatever facilities are necessary to provide adequate and reliable service (if the Commission wishes to be more general) without taking a position on which site it should be located.

Enclosed are copies of letters from the Ocean Reef Community Association ("ORCA") and the North Key Largo Utility Corporation ("NKLUC"). Both ORCA and NKLUC have expressed their concern regarding the necessity for a substation and the urgency of having it built as quickly as possible.

You also mentioned that perhaps the issues raised by FKEC would require an evidentiary hearing. I am unaware of any legal basis for a requirement of an evidentiary hearing. Section 28-105.003 of the Florida Administrative Code allows agencies to rely on the written statements of facts set out in the Petition rather than have a hearing to consider the Petition. Indeed, that would be consistent with the purpose of submitting a Petition for Declaratory Statement in the first place since it only applies to the factual situation identified by the Petitioner and it only applies to the Petitioner and not to any other entities who are not parties to the proceeding. If the factual situation specified in

Chris Moore, Esquire  
September 13, 2002  
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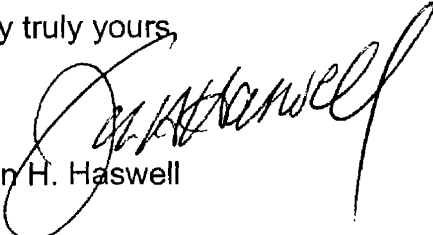
the Statement is inaccurate, then any order issued by the Commission would essentially be of no benefit to the Petitioner. Hence, it is to the Petitioner's benefit to state the precise factual situation.

We respectfully suggest that the Commission, in considering a Petition for Declaratory Statement, should rule on it assuming that all well pled allegations and facts are true. To that end, FKEC went to great lengths in providing the Commission with substantial amounts of information supporting its request including affidavits, reports, graphs, and maps.

It is FKEC's position that the Commission can in fact issue a Declaratory Statement based solely on the facts presented in the Petition without the necessity of any evidentiary hearing, nor is it necessary that the Commission order FKEC to build the substation on the particular site identified in the Petition. Indeed, the mere agreement of the Commission that a substation is urgently needed to provide adequate and reliable service to the North Key Largo area would be of great benefit to FKEC and the affected customers.

I am at your service if you have any further questions regarding this matter.

Very truly yours,

  
John H. Haswell

JHH/daj

cc: Tim Planer, CEO  
Florida Keys Electric Cooperative Association, Inc.  
Nicholas Mulick, Esquire

ATTACHMENT B

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August 30, 2002

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**VIA FACSIMILE**

RE: In Re: Petition of Florida Keys Electric Cooperative for a Declaratory Statement Concerning the Urgent Need for an Electric Substation in North Key Largo Pursuant to Section 366.04, FLA. STAT. Docket Number 020829-EC


Dear Chris:

To follow up on our telephone conversation yesterday, I wanted to add some additional information regarding conservation efforts by FKEC. At the Cooperative's Board Meeting on Monday, August 26, 2002, I asked the General Manager and CEO, Tim Planer, what conservation measures, if any, had been taken in the Ocean Reef area. He advised that there are 400 load management switches in place in the Ocean Reef area, energy audits are available to the residents, and the Cooperative has an agreement with North Key Largo Utilities for the use of its 750 kW generator to help shed load and/or to shave the peak on the Cooperative's system.

In the meantime, the Ocean Reef Community Association has expressed concern regarding the delays in constructing the substation. I am also advised that other interested parties in the North Key Largo area may wish to write letters to the Commission to express their concern and support of the Petition.

I understand that you will be out of your office for approximately two weeks. In the meantime, I will review some of the legal issues that you have raised and share my response with you on your return.

Very truly yours,



John H. Haswell

JHH/daj

cc: Tim Planer, CEO and General Manager  
Greg Goebel, President of Board of Directors