



**Progress Energy**

**ORIGINAL**

**JAMES A. MCGEE**  
ASSOCIATE GENERAL COUNSEL  
PROGRESS ENERGY SERVICE COMPANY, LLC

January 23, 2004

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

RECEIVED TFCO  
01 JAN 23 PM 3:34  
COMMISSION  
CLERK

Re: Docket No. 031128-EU

Dear Ms. Bayó:

Enclosed for filing in the subject docket on behalf of Progress Energy Florida, Inc., are an original and fifteen copies of its Response in Opposition to WREC's Petition for Declaratory Statement.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. A 3½ inch diskette containing the above-referenced documents in Word format is also enclosed. Thank you for your assistance in this matter.

Very truly yours,

RECEIVED & FILED

*Oh*  
FPSC-BUREAU OF RECORDS

*James A. McGee*  
James A. McGee

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
MMS \_\_\_\_\_  
SEC \_\_\_\_\_  
OTH \_\_\_\_\_

JAM/scc  
Enclosures

cc: Parties of record

DOCUMENT NUMBER-DATE

100 Central Avenue (33701) • Post Office Box 14042 (33733) • St. Petersburg, Florida  
Phone: 727.820.5184 • Fax: 727.820.5519 • Email: james.mcgee@pgnmail.com

01060 JAN 23 3

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

---

In re: Petition for Declaratory Statement  
of Withlacoochee River Electric  
Cooperative, Inc. regarding a territorial  
dispute with Progress Energy Florida,  
Inc. in Hernando County, Florida.

---

Docket No. 031128-EU

Submitted for filing:  
January 23, 2004

**PROGRESS ENERGY FLORIDA'S RESPONSE IN OPPOSITION  
TO WREC'S PETITION FOR DECLARATORY STATEMENT**

Progress Energy Florida, Inc. (Progress Energy or the Company), pursuant to Rule 28-106.203, F.A.C., hereby responds in opposition to the Petition for Declaratory Statement filed by Withlacoochee River Electric Cooperative, Inc. (WREC), and in support hereof, states as follows.

**Summary**

WREC's petition is fatally flawed by its misuse of and failure to comply with the provisions for requesting a declaratory statement contained in the Territorial Agreement and Section 120.565, F.S., and by its request for affirmative relief that cannot be granted through a declaratory statement. WREC's request for a unilateral modification of the territorial boundary is devoid of support for such relief and would seriously undermine the Commission's well established policy of encouraging and preserving territorial agreements between regulated utilities. For these and other reasons explained herein, the Commission should deny WREC's petition for declaratory statement, or alternatively, enter an order declaring that Progress Energy is entitled to serve the property located in its approved service that is the subject matter of this proceeding.

DOCUMENT NUMBER-DATE

01060 JAN 23 8

## Background

1. WREC and Progress Energy are parties to a territorial agreement approved by Commission Order No. 25309, issued November 7, 1991 in Docket No. 910940-EU (the Territorial Agreement or the Agreement), which establishes their respective retail service areas in Hernando County. Of particular significance to this proceeding is Section 2.2 of the Agreement, entitled "Service to New Customers", which contains four paragraphs that prescribe distinct aspects of the requirements and procedures for serving new customers: Paragraph 1 provides that neither utility will serve new customers located in the service territory of the other; paragraph 2 provides an exception for temporary service under certain conditions that are not relevant here; paragraph 3 requires a utility who receives a request for service from a new customer located in the other utility's service territory to refer the customer to the other utility; and paragraph 4 provides a procedure to determine whether the utility has correctly applied the Agreement when the customer renews its initial service request after referral to the other utility. Under this procedure, the utility must present the disputed service request for the Commission's review in a petition for declaratory statement "requesting the Commission to apply this Agreement to the facts presented." The origin of this proceeding occurred when WREC received a request for service that it determined to be subject to the referral provision of paragraph 3 which, when the request was subsequently renewed, triggered the requirement for WREC to file its petition for declaratory statement.

2. The request for service that lead to WREC's petition was made by Majestic Oaks Partners, LLC, the owner and developer of a 425-acre tract of land in Hernando County. The property will be developed in multiple phases, the first and largest of which is scheduled for completion in 2006 and is located entirely within the service territory of Progress Energy. When completed, the entire Majestic Oaks development will contain approximately 625 residential lots, over 70 percent of which will be located in Progress Energy's service territory. As a point of clarification, the developer has frequently been referred to as the "customer". Majestic Oaks is actually only a nominal customer who will receive temporary "saw pole" service for construction purposes while the property is under development. The true end-use customers will be the individuals who purchase and reside on the 625 lots in Majestic Oaks. By the same token, the developer's "request for service" is more accurately a request to install distribution service facilities in the development which will be used to serve these end-use customers when they submit an actual request for service.

### **Argument**

A. WREC has misused the declaratory statement provisions of the Agreement to seek an impermissible modification of the territorial boundary line.

3. As described above, Section 2.2 of the territorial Agreement required WREC to seek confirmation from the Commission that it had correctly applied the Agreement to the developer's request for service through a petition for declaratory statement "requesting the Commission to apply this Agreement to the facts presented." This language in Section 2.2 specifying the request to be made

of the Commission is consistent with the language in Section 120.565(1), F.S., regarding the request to be made of an agency when seeking a declaratory statement:

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. (Emphasis supplied.)

4. WREC purports to have filed its petition pursuant to Section 120.565, F.S., as required by the provisions in Section 2.2 of the Territorial Agreement. The petition, however, goes well beyond "requesting the Commission to apply this Agreement to the facts presented" as Section 2.2 specifies, and is similarly beyond the request for "an agency's opinion as to the applicability of a[n] ... order of the agency," allowed by Section 120.565(1). Instead, WREC's petition requests the Commission to issue a declaratory statement that grants WREC affirmative relief in the form of a unilateral modification of the Territorial Agreement. The petition states on pages 1 and 2:

"Specifically, WREC requests an order declaring that, pursuant to the Order: . . . (4) the service territory boundaries indicated in the Service Territory Agreement be amended to provide for WREC's authority to provide service to [the] customer's entire property."

5. In seeking to obtain affirmative relief under the guise of a declaratory statement petition required by Section 2.2, WREC has misused this straight-forward procedure for providing the Commission an opportunity to determine whether a utility had, in fact, properly applied the Agreement when it concluded that a customer's request for service could not be granted. Rather than using this procedure in Section 2.2 as a means to interpret the Agreement, WREC has

attempted to use it as a means to change the Agreement. Only then, under the premise that the Agreement would be modified, did WREC give lip service to Section 2.2's procedure and request the Commission to apply that agreement to the developer's request for service.<sup>1</sup>

6. WREC similarly misuses the provisions of Section 120.565, F.S., by seeking relief that the statute does not authorize a petitioner to request and does not authorize the Commission to grant through a declaratory statement. In accordance with Section 120.565(1) quoted above, a declaratory statement provides "an agency's opinion" on the applicability of law to facts. WREC's petition for declaratory statement did not request the Commission's opinion, but instead asked the Commission to grant affirmative relief through a unilateral modification of the Territorial Agreement. Nothing in Section 120.565, F.S., authorizes an agency to grant affirmative relief through a declaratory statement. Any doubt that WREC improperly used the declaratory statement provisions of Section 120.565 is removed by Uniform Rule 28-105.001, F.A.C., which states in pertinent part:

"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." (Emphasis added.)

---

<sup>1</sup> See item 3 of the prayer for relief in WREC's petition. It asks the Commission to declare that: "WREC has the exclusive right and obligation under the Service Territory Agreement, as amended by the granting of this Petition, to provide end use electric service to the entirety of the Customer's Property".

While WREC would obviously be entitled to serve the entire property if an amended Agreement placed all of it in WREC's territory, it is the existing Agreement that is currently before the Commission for interpretation. And by clear implication, this circular request concedes that if the Commission were "to apply this Agreement to the facts presented", consistent with Section 2.2, a different result would be reached.

7. By misusing the declaratory statement provisions in Section 2.2 of the Agreement and Section 120.565, F.S., in this manner, WREC has attempted to obtain inappropriate and improper relief that is not authorized by the Agreement and that cannot be granted in a declaratory statement issued pursuant to Section 120.565. WREC's petition should be denied on that basis alone.

B. There is no dispute over the location of the territorial boundary line or the portion of the developer's property located within the service territory of Progress Energy.

8. To give the correct effect to Section 2.2 of the Agreement the Commission need only "apply this Agreement to the facts presented." The task is not complicated, since both the Agreement and the facts are clear and undisputed. With respect to the Agreement, it is clear and undisputed that the first paragraph of Section 2.2 provides that neither party will "serve any New Customer whose end-use facilities are located within the Territorial Area of the other Party," except for temporary service provisions not relevant here. With respect to the facts, it is also clear and undisputed that the developer of Majestic Oaks has requested WREC to serve a significant portion of the development located in the service territory of Progress Energy. Going beyond these essential points is unnecessary. WREC's petition was filed pursuant to Section 2.2 of the Agreement and the purpose of Section 2.2 is to have the Commission confirm the territorial boundary line, not change it.

9. The fact that a developer prefers to have one utility serve a portion of its property located in the service area of another utility does not establish an

exception to the utility's obligation imposed by the Agreement and the Commission's approval order to refrain from serving customers in the other utility's territory. If such an exception could be established every time a customer or developer wanted a utility to disregard a territorial boundary line, the obligation of utilities to serve only within their Commission-approved territories would be rendered essentially meaningless. Accordingly, the Commission should apply the Agreement to the facts presented and either deny the declaratory statement requested by WREC, or declare that Progress Energy is entitled to serve the developer's property located within its service area.

C. WREC's request to amend the Territorial Agreement by modifying the boundary line is devoid of support on the merits.

10. Even if affirmative relief could be properly granted in a declaratory statement proceeding, which it cannot, WREC's request to amend the Agreement by modifying the territorial boundary line would still require denial for the reason that its petition fails to provide even minimal support for the significant relief requested from the Commission. The only reason provided in WREC's petition for modifying the territorial boundary line is the single, unsupported allegation in the petition's last paragraph, which states: "Failure to grant the declaratory relief requested in this Petition is likely to result in the uneconomic duplication of facilities by WREC and Progress." Based on nothing more than this conclusory allegation, WREC asks the Commission to issue a declaratory statement that amends the Agreement's territorial boundary line by placing the entire



development in WREC's service area. Suffice it to say that in requesting the Commission to take an action that would significantly and adversely affect Progress Energy's substantial interests, WREC must provide considerably more support than the single sentence contained in its petition.

D. WREC's petition demonstrates no material change in circumstances or compelling public interest that would justify modifying the territorial boundary line in a proper proceeding.

11. Progress Energy recognizes the Commission's authority to modify territorial agreements when necessary to protect the public interest. However, the Commission has always been cautious in exercising this authority because of the counter-productive effect such modifications can have on its long-standing policy to encourage and preserve territorial agreements, which themselves are in the public interest. In this case, balancing these potentially competing objectives will weigh heavily in favor of preserving the territorial agreement. This is because WREC has alleged no change in the circumstances on which the Territorial Agreement was originally approved by the Commission, nor any facts which demonstrate a detriment to the public interest as a result of the Agreement. Likewise, Progress Energy is aware of no such changed circumstances or other conditions detrimental to the public interest. In the absence of either changed circumstances or the need to protect the public interest, principles of administrative finality and the Commission's well established policy of encouraging and preserving territorial agreements require denial of WREC's request to modify the territorial boundary line.

12. No facts have been alleged by WREC that demonstrate a change in the circumstances contemplated by the Territorial Agreement at the time it was approved. Growth in areas that were undeveloped at that time was clearly contemplated by the Agreement when it provided in the frequently referenced Section 2.2 that the parties may not serve new customers in the service territory of the other party. Nor could a credible claim be asserted that neither the parties nor the Commission contemplated the possibility that the territorial boundary line might cross the property of a customer. Not only is it intuitively obvious that this was inevitable over the 15-year term of the Agreement, it had in fact occurred with at least several residential developments covered by other territorial agreements between WREC and the Company prior to the current Agreement.

13. Likewise, WREC's petition does not allege any facts demonstrating that the public interest will be harmed if the entire Majestic Oaks development is not placed within its service territory. As it relates to Majestic Oaks itself, the public interest relates primarily to the electric customers who will ultimately reside in the development. Unlike these customers, the interests of the developer are both short-term and largely unrelated to electric service, other than temporary construction service, focusing instead on the costs associated with developing the property. With respect to the costs and reliability of electric service these future customers will experience, nothing in WREC's petition suggests any benefit to them by receiving service from WREC, much less a benefit of such significance as to require changing a boundary line in Territorial Agreement found by the Commission to be in the public interest.

14. In addition to the absence of facts demonstrating harm to the future electric customers in Majestic Oaks, WREC's petition fails to allege any facts that would demonstrate harm to the Company's customers in general. However, subsequent to the filing of its petition, WREC submitted a map of the area surrounding the development that included several gratuitous, self-serving additions<sup>2</sup> which, if not addressed here, could indirectly provide unwarranted support for WREC's claim that it should serve the entire development. A less cluttered, more conveniently sized map of the Majestic Oaks development and the territorial boundary line is attached to this response.<sup>3</sup>

15. The addition to WREC's map that Progress Energy feels compelled to address are six "possible service points" from which WREC apparently contends it could provide service to the portion of the development in Progress Energy's service area. In contrast, WREC chose to show only two "possible service points" for Progress Energy, which happen to be located at a considerably greater distance from the development. To the extent this presentation creates, or is intended to create, the impression that WREC is able to extend service facilities to this portion of the development at a significantly lower cost than Progress Energy, two points need to be made. First, based on information currently available,

---

<sup>2</sup> One of these additions to the map is a depiction of the adjacent Brooksville Golf and Country Club as a part of the Majestic Oaks development. This is incorrect, as the records of the Hernando County Planning Department confirm. By showing the two developments combined, the map creates the impression that the portion of the development in WREC's service area is nearly the same size as the portion in Progress Energy's service area, which, in turn, makes WREC's claim to the entire development appear to be less inequitable and over-reaching.

<sup>3</sup> As noted earlier, over 70 percent of the lots in the overall development are within Progress Energy's service territory, as well as the entirety of Phase 1.

Progress Energy believes it can extend service to the development as cost-effectively as WREC and is confident that any difference in the respective costs of WREC and Progress Energy will not be appreciable. Second, and more importantly, absent an inordinate cost disparity that rises to the level of adversely affecting the public interest, cost considerations of this kind do not provide a sound or proper basis for modifying a boundary line established by a territorial agreement that the Commission has found to be in the public interest.

16. Any inference based on the map submitted by WREC that it has a significant cost advantage in extending its facilities is unfounded. The map discloses nothing about what a "possible service point" means or what costs would be involved in making it an "actual service point". For example, a close reading of the map's small print and electrical symbols appears to indicate that all but one of WREC's six "possible service points" are fed by single-phase distribution lines, in which case major upgrading would be required to serve the development. In addition, before deciding that Progress Energy had only two "possible service points", WREC did not consult with Progress Energy about its various options for extending service to the development. Among these options, but not shown as a possible service point on WREC's map, is a three-phase primary voltage feeder line located just to the west of Majestic Oaks, with more than adequate capacity to serve the development's load. When all is said and done, there is nothing in WREC's map which establishes that Progress Energy cannot extend service to the development as readily and cost-effectively as WREC. In any event, and as noted above, there is no reason whatsoever to

believe that any cost differences which may exist between the two utilities will be so extraordinary as to raise a public interest justification for modifying the territorial boundary line.

E. The Commission's well established policy favoring territorial agreements would be undermined if boundary line modifications could be justified by a finding that the cost of the extra-territorial utility to extend service facilities is lower than the incumbent utility, irrespective of how much lower.

17. WREC's efforts in preparing its map to create the impression that it is in a position to extend service to the portion of Majestic Oaks in Progress Energy's service territory at a lower cost, whether or not that is actually the case, suggests that WREC may well assert that the existence of a cost differential, irrespective of magnitude and public interest considerations, is sufficient to justify modification of the territorial boundary it has requested. In addition to its negative impact on the proper disposition of this case, such a standard for unilateral territorial agreement modifications would have serious and widespread policy implications on the continued viability of territorial agreements in general. Making territorial agreements subject to repeated modification based on the relative costs of two utilities that will vary from case to case depending on the vagaries where a new customer chooses to locate and where each utility's facilities happened to be situated in relation to the customer demeans the important role of territorial agreements. While the Commission may already be sensitive to the pitfalls such a standard for modifying territorial agreements, the issue is of sufficient importance that the Company believes it should be more fully addressed here.

18. From the Commission's policy perspective of encouraging territorial agreements, there is good reason for concern about a standard for modifying territorial boundaries based on the premise that a utility is entitled to serve customers in the territory of another utility if it can show any level of cost advantage in extending service. While utilities' relative costs to extend service may be a valid consideration for the resolution of territorial disputes in the absence of a territorial agreement, using these costs as a basis for modifying existing boundaries established by approved territorial agreements would set the stage for countless boundary modifications and disputes, and seriously undermine the ability of utilities to rely on Commission-approved territorial agreements for planning and operational purposes.

19. The serious, wide-spread nature of this problem stems from the fact that Progress Energy and the other electric utilities operating under approved territorial agreement have literally thousands of miles of territorial boundary lines. At almost every point along the way, one utility has service facilities closer to the boundary line than the utility on the other side, and in many cases, closer to new customers who locate near but on the other side of the boundary line. Under a criterion for modifying territorial boundaries based on the lowest cost to provide service, such a utility would be entitled to serve these new customers irrespective of the territorial boundary line that place them in the service area of the other utility. In the end, this criterion inherent in WREC's petition for modifying territorial boundaries would make these boundaries more of a fuzzy band than a distinct line and send the utilities an unintended signal to picket fence their

boundaries with distribution lines. Limiting the exercise of the Commission's inherent authority to modify territorial agreement to those instances where a change in circumstances requires a modification to protect the public interest is sound regulatory policy, and, as applied to this case, requires denial of WREC's petition.

F. The preference of the developer in this case is not a proper or appropriate basis for modifying the territorial boundary line.

20. Under the declaratory statement provisions in Section 2.2 of the Agreement, the developer has already played a large role in the initiation of this case. In fact, the developer's persistence in requesting WREC to serve property outside of its authorized service territory is the only reason WREC's petition is now before the Commission is because. While this is a proper basis to petition for a declaratory statement pursuant to Section 2.2, all that would be required under that section to resolve such a petition is to confirm whether the service requested by the developer can be provided under the existing Agreement, which is a straight-forward task given the clear and undisputed nature of this issue. However, WREC has not requested the Commission to simply confirm WREC's prior interpretation of the Agreement consistent with Section 2.2, it has instead asked the Commission to modify the territorial boundary line to accommodate the developer's request. Simply because the developer prefers an outcome different than provided by the Agreement is insufficient to provide the public interest justification needed to unilaterally change the Agreement's territorial boundary line that the Commission has previously determined to be in the public interest.

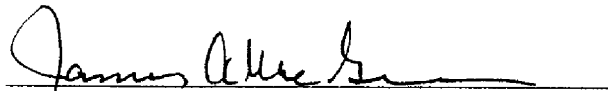
21. In territorial dispute cases, a particularly free-form proceeding with little or no pre-existing service rights or presumptions, the preference of end-use customers can be given consideration only "if all other factors are substantially equal." In proceedings involving previously approved territorial agreements, where the scope of issues is considerably more limited, the preference of end-use customers is even less relevant. In this case, the developer is not even an end-use customer. Having reached the bottom of a peaking order that is low to begin with, the developer's preference is clearly not a proper consideration in resolving WREC's attempt to modify the Agreement's territorial boundary line.

22. The fact that the Agreement's territorial boundary line crosses a proposed development is not an uncommon occurrence and certainly should not be considered a problem of such significance as to require the boundary line's modification. It is inherent in the nature of a territorial boundary line, and commonplace in developed areas, that customers on one side of the boundary line will be served by a different utility than their neighbors on the other side of the line. Progress Energy has installed service facilities in its portion of a number of significant developments that straddle a territorial boundary line without objection from the developer or the ultimate end-use customers, including several such developments co-served by WREC. The Majestic Oaks developer may prefer working with only one utility for reasons of convenience or other reasons, but the public interest does not require the modification of a Commission-approved territorial boundary line to satisfy this preference.



WHEREFORE, for the reasons described above, Progress Energy respectfully requests that the Commission deny WREC's petition for declaratory statement, or alternatively, enter an order declaring that, pursuant to an application of the Territorial Agreement to the facts presented, Progress Energy is entitled to serve the property of the developer located in the Company's service territory established by the Agreement.

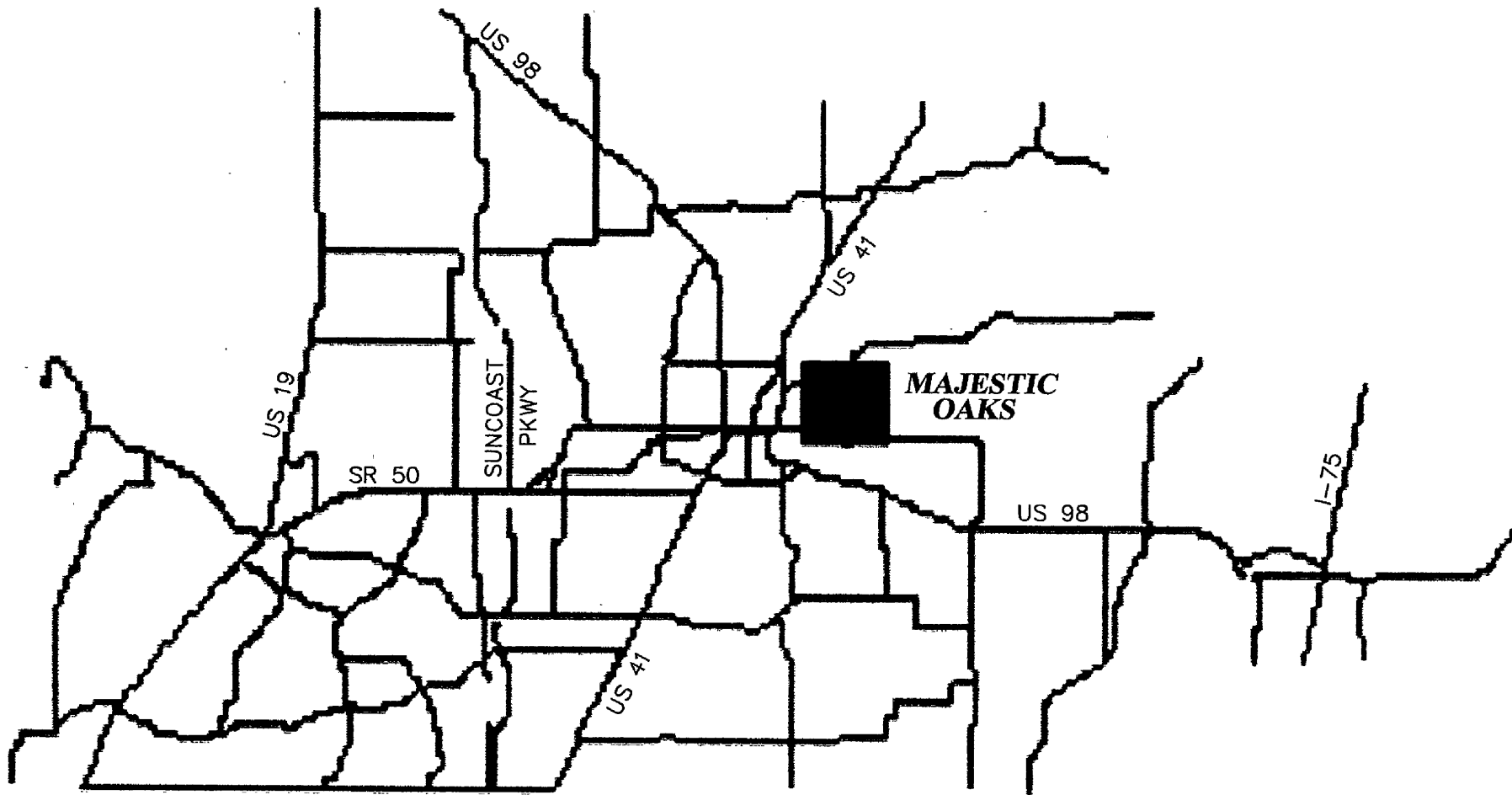
Respectfully submitted,



James A. McGee  
Associate General Counsel  
Progress Energy Service Company, LLC  
Post Office Box 14042  
St. Petersburg, Florida 33733-4042  
Telephone: 727-820-5184  
Facsimile: 727-820-5519  
Email: [james.mcgee@pgnmail.com](mailto:james.mcgee@pgnmail.com)

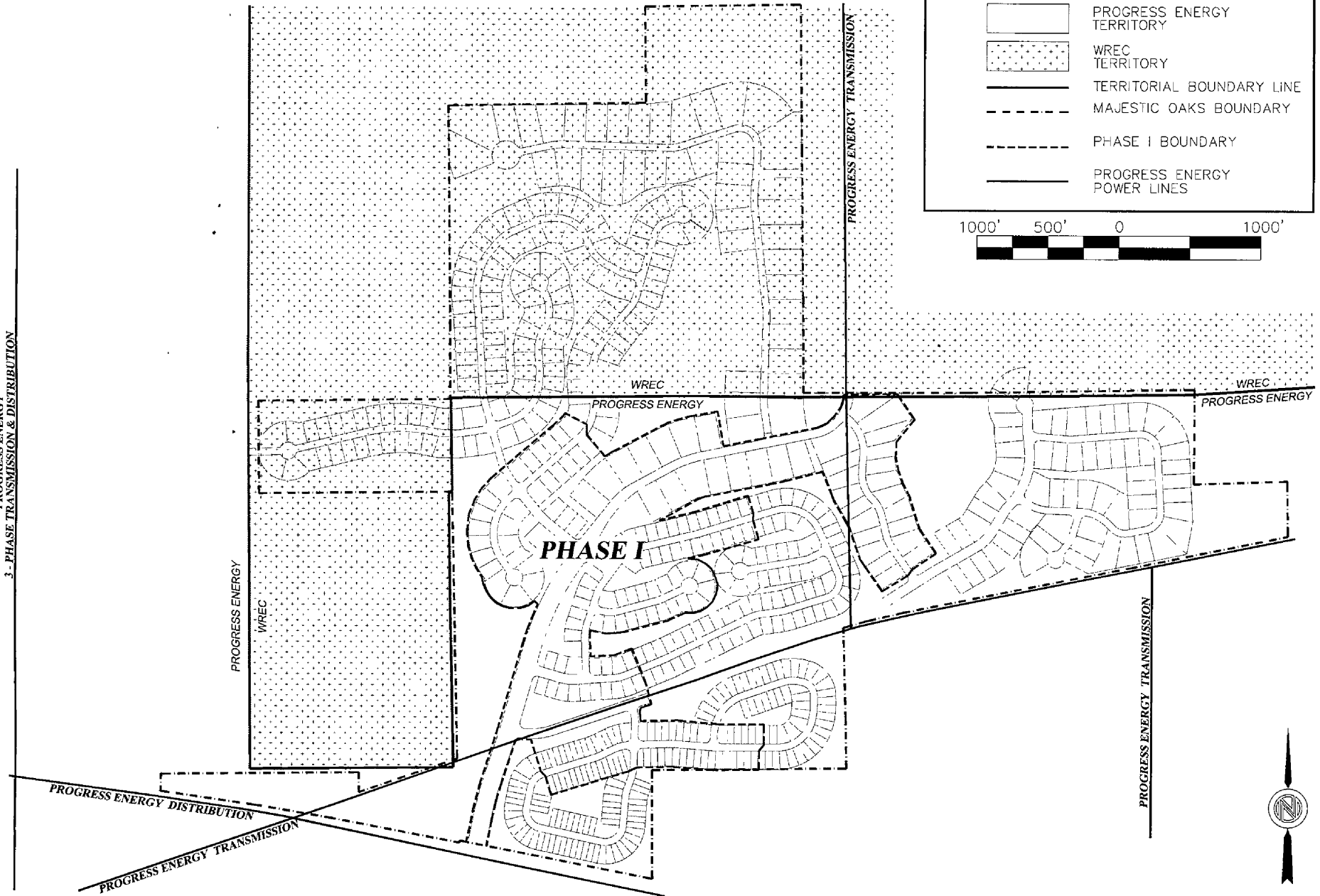
Attorney for  
PROGRESS ENERGY FLORIDA, INC.

# HERNANDO COUNTY, FL



HERNANDO COUNTY, FL

PROGRESS ENERGY  
3 - PHASE TRANSMISSION & DISTRIBUTION



	PROGRESS ENERGY TERRITORY
	WREC TERRITORY
	TERRITORIAL BOUNDARY LINE
	MAJESTIC OAKS BOUNDARY
	PHASE I BOUNDARY
	PROGRESS ENERGY POWER LINES



CERTIFICATE OF SERVICE

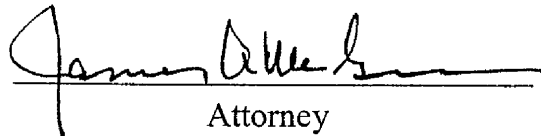
I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by regular U.S. Mail on the 23<sup>th</sup> day of January, 2004.

Martha Carter Brown, Esquire  
Office of the General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Brian P. Armstrong, Esquire  
Nabors, Giblin & Nickerson, P.A.  
1500 Mahan Drive, Suite 200  
Tallahassee, FL 32308

Duane Vann  
Withlacoochee River Electric Cooperative, Inc.  
P.O. Box 278  
Dade City, FL 33526-0278

Kenneth A. Hoffman, Esquire  
Rutledge, Ecenia, Purnell & Hoffman, P.A.  
P.O. Box 551  
Tallahassee, FL 32302

  
Attorney