

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED-FPSC
12 JUN -7 AM 9:08
COMMISSIONER
CLERK

DATE: June 7, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brown, Harris) MCB JSC DM CRB
Division of Economic Regulation (Rieger) SOR, JO

RE: Docket No. 120054-EM -- Complaint of Robert D. Reynolds and Julianne C. Reynolds against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida.

AGENDA: 06/19/12 – Regular Agenda – Motion to Dismiss – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120054.RCM.DOC

Case Background

On March 7, 2012, Robert D. Reynolds and Julianne C. Reynolds (the Reynolds), residents of No Name Key, Florida, filed a formal complaint and request for administrative hearing against the Utility Board of Key West, Florida, d/b/a Keys Energy Services (Keys Energy). The Reynolds allege that Keys Energy has failed to provide them electric service pursuant to the terms of the territorial agreement between Keys Energy and Keys Electric Rural Cooperative, which the Commission approved in 1991.¹ They assert that the territorial agreement

¹ Order No. 25127, issued September 27, 1991, in Docket No. 910765-EU, In re: Joint petition of Florida Keys Electric Cooperative Association, Inc. and the utility board of the City of Key West for approval of a territorial agreement.

DOCUMENT NUMBER-DATE
03708 JUN-7 12
FPSC-COMMISSION CLERK

provides that the utility parties to the agreement have an obligation to serve customers in their respective service areas delineated in the agreement. The territorial agreement places No Name Key in Keys Energy's service area.

On March 28, 2012, Keys Energy filed its Response to Complaint and Motion to Dismiss, asserting that the complaint was effectively moot because the Keys Energy Board had voted on March 7, 2012, to provide electric service to the residents of No Name Key who requested it, and it had executed a service agreement with the No Name Key Property Owners Association to that effect. Keys Energy has indicated that it expects to complete the provision of service to No Name Key in August.

The Reynolds filed a response in opposition to Keys Energy's motion to dismiss on April 2, 2012. While Keys Energy had not filed a request for oral argument along with its motion to dismiss pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.), the Reynolds did file a separate request. They asserted that because of the brevity of the motion to dismiss and the complexity of the issues in the case, oral argument would assist the Commission in its deliberations. The Reynolds contend that their complaint is not moot and the motion to dismiss does not meet the appropriate standard of review.²

This recommendation addresses Keys Energy's motion to dismiss and the Reynolds' opposition to that motion. The Commission has jurisdiction over this matter pursuant to Sections 366.04 (2) and (5), Florida Statutes (F.S.)

² Staff notes that Monroe County, Florida filed a Petition to Intervene in this docket on April 23, 2012, which was granted by Order No. PSC-12-0247-PCO-EM, issued May 22, 2012.

Discussion of Issues

Issue 1: Should the Commission entertain oral argument on Keys Energy's Motion to Dismiss?

Recommendation: Yes. The Commission should entertain oral argument on the motion to dismiss. (Brown, Harris)

Staff Analysis: Rule 25-22.0022, F.A.C., provides, in pertinent part:

(1) Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

The Reynolds assert that Keys Energy's response and motion to dismiss was unusually brief, and incorporated facts and documents not contained in the four corners of the complaint or in existence when the complaint was filed. They argue that oral argument would allow clarification and additional discussion of the facts and issues raised in the complaint, which the Reynolds believe will show that their complaint states a cause of action and has not been rendered moot. The Reynolds suggest 30 minutes per side for argument. Keys Energy did not file an objection to the Reynolds' request for oral argument.

Staff recommends that the Commission grant the request for oral argument. The dispute surrounding the provision of commercial electric service to the property owners on No Name Key is a complicated one, with a long and convoluted procedural history, and involves issues regarding enforcement and implementation of territorial agreements that the Commission has not been called upon to address before. Staff believes oral argument will assist the Commission in understanding and evaluating the issues raised by the motion to dismiss and the response in opposition.

Staff recommends that the Commission allot 10 minutes per side for the argument.

Issue 2: Should the Commission deny the Motion to Dismiss?

Recommendation: Yes. The Commission should deny the Motion to Dismiss. The Reynolds' complaint adequately states a cause of action upon which relief can be granted. The Commission should treat Keys Energy's pleading as a response and affirmative defense, to be addressed in the context of full consideration of the complaint. (Brown, Harris, Rieger)

Staff Analysis:

The Reynolds' Complaint

As stated above, the Reynolds allege that Keys Energy has failed to provide electric service to them and to other property owners on No Name Key pursuant to the terms of Keys Energy's own charter and the territorial agreement between Keys Energy and Keys Electric Rural Cooperative that the Commission approved in 1991. They assert that the territorial agreement provides that the utility parties to the agreement have an obligation to serve customers in their respective service areas delineated in Section 6.1 of the agreement. The Reynolds further assert that even though they and other property owners have paid for the construction and installation of transmission and distribution lines to their properties, Keys Energy has still not provided service, because Monroe County has indicated that its comprehensive plan and land development ordinance, which prohibits the extension of utility service to No Name Key precludes Keys Energy from providing, and the property owners from connecting to, Keys Energy electric facilities.

The Reynolds contend that the Commission has exclusive jurisdiction to determine whether they are entitled to receive electric service under the terms of the 1991 territorial agreement, and to implement and enforce that agreement against Keys Energy. They cite the territorial agreement itself, and Section 366.04, F.S., as support for their position. That statute provides that the Commission has the jurisdiction "[t]o require electric power conservation and reliability within a coordinated grid throughout Florida for operational and emergency purposes," Section 366.04(2)(c), F.S.; "[t]o approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction," Section 366.04(2)(d), F.S.; and "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" Section 366.04(5), F.S. The statute further provides that:

[t]he jurisdiction conferred upon the commission shall be exclusive and superior to that of all boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in each case of conflict therewith, all lawful acts, orders, rules and regulations of the commission shall in each instance prevail.

Section 366.04(1), F.S.

The Reynolds ask the Commission to: conduct an evidentiary hearing on the issues raised in the complaint; order Keys Energy to provide electric service to No Name Key; impose any

applicable fines or penalties upon Keys Energy for failure to comply with the Commission's Order incorporating the 1991 territorial agreement; and find that Monroe County cannot unreasonably withhold building permits from Key Energy's customers solely because the customers' property is on No Name Key.

Keys Energy's Motion to Dismiss

In its motion to dismiss, Keys Energy states that since the filing of the Reynolds' complaint, it has executed a Line Extension Agreement with the Reynolds and other No Name Key property owners in order to provide electric service to the island. Keys Energy attached a copy of the Line Extension Agreement and a copy of the minutes of the Keys Energy Board meeting at which the agreement was approved. On the basis of the agreement and the Board meeting minutes, Keys Energy claims that the Reynolds' complaint has been effectively rendered moot and should therefore be dismissed.

The Reynolds' Response in Opposition to the Motion

The Reynolds argue that the motion to dismiss should be denied because it was not timely filed, as Rule 28-106.204(2), F.A.C., provides that unless otherwise provided by law motions to dismiss shall be filed no later than 20 days after service of the complaint or petition. They assert that no other provision of law changes that time frame. The Reynolds also argue that Keys Energy's brief motion to dismiss relies solely on facts and documents not incorporated within the four corners of the complaint, and therefore it does not meet the standard of review for granting a motion to dismiss. The Reynolds argue that Keys Energy has not provided any basis for the Commission to find that the actual allegations in the complaint fail to state a cause of action. Finally, even if the Keys Energy board has voted to provide power to No Name Key, the Reynolds argue, a contract to provide electric service is not the same as the provision of electric service, and until Keys Energy actually provides the service to the Reynolds, the complaint is not moot and should not be dismissed.

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition. The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

Analysis

Timeliness

With respect to the Reynolds' argument that the motion to dismiss was not timely filed, it is staff's understanding that Keys Energy's motion was first presented to the Commission Clerk's office on Monday, May 26, 2012, 20 days after service of the Reynolds complaint on March 5, 2012, and within the time frame established in Rule 28-106.204(2), F.A.C. The Clerk's office held the motion until it received clarification that the filing did not contain confidential information, because the email cover page contained a standard assertion that information was confidential. Keys Energy's attorney's assistant was out of the office on Tuesday, March 27, 2012, and did not open the Clerk's message requesting clarification until Wednesday, March 28, 2012. She immediately refiled the motion, clarifying that no information was confidential. The Clerk filed the motion on that day.

The 20 day time frame in Rule 28-106.204(2) is not a jurisdictional deadline, and no party suffered harm from what amounted to a misunderstanding between the Clerk's office and Keys Energy. The failure to meet the time frame amounts to a "mistake, inadvertence, or excusable neglect" recognized as an exception to the 20 day time frame in Order No. PSC-99-0488-PCO-WU, issued March 8, 1999, in Docket No. 960444-WU, In re: Application for rate increase and for increase in service availability charges in Lake County by Lake Utility Services, Inc. and in Hamilton v. Board of County Commissioners v. FDER, 587 So. 2d 1378, 1389-90 (Fla. 1st DCA 1991). Staff recommends that the motion to dismiss should not be denied for untimeliness under these circumstances.

Four corners of the complaint

It is clear that Keys Energy's motion to dismiss relies entirely on facts and documents not contained in the Reynolds' complaint to reach the conclusion that the case should be dismissed. It does not challenge the legal sufficiency of the facts alleged within the four corners of the complaint, and does not demonstrate how those allegations fail to state a cause of action upon which relief can be granted. As such, the motion does not meet the appropriate standard of review. Reviewing only the facts and documents alleged in the complaint, and considering them in the light most favorable to the Reynolds, staff believes that the complaint does state a cause of action for enforcement of the territorial agreement, over which the Commission arguably has jurisdiction to require the provision of electric service by Keys Energy to the Reynolds' property on No Name key. Staff believes the motion to dismiss should be denied on this ground.

Mootness

The dispute over the provision of commercial electric service to property owners on No Name Key has a long, litigious history. Presently, two lawsuits filed by Monroe County for declaratory judgment regarding commercial electric service to No Name Key are pending. Monroe County, a political subdivision of the State of Florida v. Utility Board of the City of Key West, Florida d.b.a. Keys Energy Services, et. al. Case number 2011-CA-342, in the Circuit Court of the Sixteenth Judicial Circuit, was dismissed with prejudice by the Court on the grounds

that this Commission has exclusive jurisdiction over the subject matter of the case.³ That case is presently on appeal to the Third Circuit Court of Appeal. The Commission intends to participate as *Amicus Curiae* in that appeal. Also, on May 16, 2012, Monroe County filed another complaint against Keys Energy for declaratory judgment regarding commercial electric service to No Name Key in the Sixteenth Judicial Circuit.⁴ It will still take some time just to determine what governmental entity has jurisdiction to decide the issue of commercial power to No Name Key property owners, let alone determine whether and to what extent Keys Energy must provide it. The Commission continues to assert that at the outset it has a colorable claim to jurisdiction over the matter, and is entitled to determine its jurisdiction. See, Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla. 1990)

In light of the continuing uncertainty over the issues, staff recommends that the Reynolds' complaint is not moot, and the Commission should continue to exercise its jurisdiction to resolve the matter. Black's Law Dictionary, Ninth Edition, defines a "moot case" as: "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." As the Reynolds point out, Keys Energy has not provided power to their property at this time, and it is clear that considerable controversy still exists. Staff recommends that the factual assertions and documents in Keys Energy's Response and Motion to Dismiss be included in the docket and treated as a response and affirmative defense, to be addressed in the context of full consideration of the complaint. The motion to dismiss should be denied.

³ The Commission participated as *Amicus Curiae* in the case.

⁴ Monroe County, a political subdivision of the State of Florida, v. Utility Board of the City of Key West, Florida, d.b.a. Keys Energy Services, CA K 12-549. As the issues in the case once again call the Commission's jurisdiction into question, we intend to participate as *AmicusCuriae* in this case as well.

Docket No. 120054-EM
Date: June 7, 2012

Issue 3: Should this docket be closed?

Recommendation: If the Commission denies the motion to dismiss in Issue 2, the docket should remain open to address the complaint. If the Commission grants the motion to dismiss in Issue 2, the docket should be closed. (Brown, Harris)

Staff Analysis: If the Commission denies the motion to dismiss in Issue 2, the docket should remain open to address the complaint. If the Commission grants the motion to dismiss in Issue 2, the docket should be closed.