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September 28, 2012

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Ms. Ann Cole, Director
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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Fl 32399-0850

RECEIVED-FPSC
12 SEP 28 PM 4:43
COMMISSION
CLERK

Re: Complaint and request for expedited relief of Mosaic Fertilizer LLC against Peace River Electric Cooperative and Tampa Electric Company for single source electric supplier; Docket No. 120225-EU

Dear Ms. Cole:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Peace River Electric Cooperative's Response to the Complaint of Mosaic Fertilizer LLC.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



Martin P. McDonnell, Esq.

MPM/vp
Enclosures

COM _____
AFD _____
APA _____ cc: All Parties of Record (w/enc.)
ECO 3
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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mosaic Fertilizer LLC
Against Peace River Electric Cooperative
and Tampa Electric Company For Single
Source Electric Supplier.

Docket No. 120225-EU

Filed: September 28, 2012

**MOTION TO HOLD COMPLAINT IN ABEYANCE
OR IN THE ALTERNATIVE
MOTION TO DISMISS COMPLAINT**

COMES NOW, Peace River Electric Cooperative ("PRECO") and pursuant to Rule 28-106.204, Florida Administrative Code, moves for an order holding in abeyance the Complaint and Request for Expedited Relief (the "Complaint") filed herein by Mosaic Fertilizer LLC ("Mosaic"), for a period of two weeks during the parties' ongoing settlement discussions and to allow the utilities to file with the Commission a variance to their territorial agreement as further described herein. In the alternative, PRECO moves to dismiss the Complaint for the reason set forth below.

Background

1. The contact information for PRECO and its counsel are:

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2. Respondent PRECO and Respondent Tampa Electric Company ("Tampa Electric") are parties to a territorial agreement that sets forth their respective boundaries for the

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FPSC-COMMISSION CLERK

provision of electric service in southwestern Polk County and southeastern Hillsborough County, Florida. The agreement was approved by the Commission in Order No. 17585, issued in Docket No. 870303-EU on May 22, 1987, *In Re: Joint Petition of Tampa Electric Company and Peace River Electric Cooperative, Inc. for Approval of a Territorial Agreement*.

3. Complaining party Mosaic is a retail electric customer with phosphate mining operations in Hillsborough and Manatee counties that will require transmission level (69 kv) electric service. Mosaic asserts that beginning early next year, it plans to conduct mining operations in two separate and distinct areas that traverse the PSC-approved territorial boundary between Tampa Electric's service territory in Hillsborough County and PRECO's service territory in Manatee County, and that it may require electric service to these areas as early as January 1, 2013.¹

4. Although part of its planned operations will fall within PRECO's service territory and part of its operations will fall within Tampa Electric's service territory, Mosaic asserts that for each of its two separate mining operations, it requires transmission level service from a single provider.

5. Despite assertions in the Complaint to the contrary, PRECO will be fully capable of providing timely and technically sufficient transmission level service to Mosaic as described in the territorial variance agreement below.

MOTION TO HOLD COMPLAINT IN ABEYANCE

6. After Mosaic advised PRECO and Tampa Electric of its upcoming plans, the utilities have worked together to negotiate an appropriate resolution that will timely provide

¹ Although Mosaic stated in the Complaint that it may need service by November, 2012, at the informal conference September 25, 2012, Mosaic clarified that the earliest date it may need service is January 1, 2013. The parties recognize the need to commence build-out for the service prior to January, 2013.

electric service to meet Mosaic's needs in a safe and efficient manner, without uneconomic duplication of facilities.

7. The negotiations between PRECO and Tampa Electric have resulted in an agreement between the two utilities for a temporary territorial variance (the "territorial variance") to the Commission approved service territories. The utilities have kept Mosaic informed and advised regarding the territorial variance. The territorial variance addresses the provision of electric service at transmission voltage to the two Mosaic phosphate loads as follows:

- a. **The F1 Clay Settling Area (which contains approximately 100 acres in Tampa Electric's territory in Hillsborough County and 600 acres in PRECO's Territory in Manatee County)**

For the term of the territorial variance, PRECO shall serve all of the transmission level production mining load within the F1 Clay Settling Area.

- b. **Mining Unit 20E (which contains approximately 600 acres in Tampa Electric's territory in Hillsborough County and 100 acres in PRECO's territory in Manatee County)**

For the term of the territorial variance, Tampa Electric shall serve all of the transmission level production mining load within the Mining Unit 20E area.

Both PRECO and TECO agree that the service assignments described above are economically sound for all affected persons and are consistent with good engineering practices.

Undersigned has been advised that PRECO and Tampa Electric are executing the above described territorial variance on this date, and are awaiting signatures from Florida Power and Light and Progress Energy, two related entities. Once the related entities sign off on the agreement, it will be submitted to this Commission for approval. The territorial variance will ensure that the two Mosaic transmission level production mining loads described above will each

be served by a single utility, thereby satisfying Mosaic's specific request in that regard. PRECO can technically and efficiently provide the service described in the territorial variance within the time frames requested by Mosaic.

8. PRECO therefore requests that the Commission hold the Complaint in abeyance for fourteen (14) days to allow the utilities to file the fully executed territorial variance for Commission approval and continue to engage in the ongoing settlement negotiations with Mosaic.

PRECO has discussed this request with Tampa Electric who advised it has no objection to the relief requested herein so long as Commission Staff is in agreement. Counsel has not yet received a response from Mosaic regarding this request.

9. In the alternative, PRECO moves to dismiss Mosaic's Complaint as Mosaic lacks the requisite standing to raise the issues in its Complaint.

MOTION TO DISMISS COMPLAINT

The Complaint must be dismissed as Mosaic lacks the standing to initiate this administrative proceeding

10. It is well settled that in order to have standing in an administrative proceeding, a party must show that its substantial interests will be determined in the proceeding. *See*, section 120.569 (1), Florida Statutes. In *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 1st DCA 1981), the First DCA established the now generally held test for standing to participate in administrative proceedings. Before a party can be considered to have a substantial interest in the outcome of the proceeding, it must establish (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing; and, (2) that its substantial injury is of a type or nature which the proceeding is designed to protect.

11. When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that it does, in fact, have standing to participate in the case. *Department of Health and Rehabilitative Services v. Alice P.*, 367 So.2d 1045, 1052 (Fla. 1st DCA 1979). Mosaic wholly fails to meet either prong of the *Agrico* test.

12. The first prong of the test, the "immediacy" requirement has been held to preclude participation based on stated concerns that are speculative or conjectural. *See, International Jai Alia Players Association v. Florida Pari-Mutuel Commission*, 561 So.2d 1224 at 1225, 1226 (Fla. 3rd DCA 1990), and *Village Park Mobile Home Association, Inc. v. State Department of Business Regulation*, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. denied 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process).

13. Here, Mosaic fails to allege any potential injury in fact that is of any immediacy. By Mosaic's own admission, no service will be required for either of the Mosaic properties until at least January, 2013 at the earliest. Both utilities are capable and able to timely supply the requested service as described in the territorial variance. Therefore, Mosaic fails the first prong of the *Agrico* test.

14. The second prong of the *Agrico* test, the "zone of interest" requirement further limits standing to those persons that the Legislature intended to be protected by the administrative proceeding at issue. *Agrico*, 406 So.2d at 478. The Legislature did not include utility customers such as Mosaic in the protected "zone of interest" for filing complaints to the Commission regarding territorial disputes between electric utilities. Section 366.04(2)(e), F.S. grants the Commission certain jurisdiction over territorial disputes, and specifically states, in pertinent part:

(2) In the exercise of its jurisdiction, the Commission shall have power over electric utilities for the following purposes:

* * *

(e) to resolve, **upon petition of a utility or on its own motion, any territorial dispute involving service areas** between and among rural electric cooperatives, municipal electric utilities and other electric utilities under its jurisdiction. (emphasis added)

Thus, the Commission's jurisdiction to resolve territorial disputes can be triggered only by a petition of a utility or on its own motion. There is no authority for a customer, such as Mosaic, to invoke Commission jurisdiction to resolve such disputes. The Commission is a creation of the Florida Legislature and its jurisdictional authority is limited to that which has been granted. Any reasonable doubt regarding its regulatory power compels the Commission to resolve that doubt against the exercise of jurisdiction. See *City of Cape Coral v. GAC Utilities*, 281 So.2d 493, 496 (Fla. 1973).

15. Therefore as nothing in Chapter 366, Florida Statutes (or any other statute) confers standing to Mosaic to bring the instant complaint, Mosaic is not within the zone of interest and plainly fails the second prong of the *Agrico* test.²

16. When utilities enter into territorial agreements, individual customer requests for service from a provider have been rejected in Florida for over 40 years. In *Storey v. Mayo*, 217 So. 2d 304 (Fla. 1968), *cert. denied*, 395 U.S. 909 (1969), the Florida Supreme Court cogently stated: "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility just across his city limits line merely because he

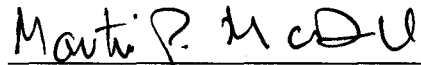
² PRECO recognizes that pursuant to s. 366.04(4), F.S. Mosaic may have some right to participate in a proceeding initiated by a utility or the Commission. However, s. 366.04(4), F.S. does not confer standing to Mosaic to initiate a complaint.

preferred that service.” *Storey*, 307-08. In 1987, the Florida Supreme Court reiterated the longstanding rule that the PSC does not have the authority to grant a customer request to select a provider as the PSC must honor the utilities’ service territories. “Larger policies are at stake than one customer’s self-interest and those policies must be enforced and safeguarded by the PSC.” *Lee County Electric Coop. v. Marks*, 501 So.2d 585, 587 (Fla. 1987).

As Mosaic lacks the requisite standing to bring the instant Complaint, the Complaint should be dismissed.³

Tampa Electric advised the undersigned that it takes no position on PRECO’s Alternative Motion to Dismiss.

WHEREFORE, for the foregoing reasons, PRECO requests that the Commission dismiss Mosaic’s Complaint for lack of standing.



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³ Dismissal of the Complaint does not mean the Commission should ignore the situation. There is presently a territorial variance agreement as described above that is to be filed for Commission approval that squarely addresses electric service to the two Mosaic areas. This will allow the Commission to evaluate the situation in view of the statutory requirements, applicable case law and the past dealings of the utilities. *See, e.g.*, Order No. 20883 issued March 13, 1989 in PSC Docket No. 881594-EU, *In Re: Complaint of C.T. Kempton v. City of Tallahassee*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided via U.S. Mail
this 28th day of September, 2012.

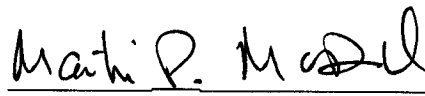
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