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Subject: Electronic Filing - Docket No. 120054-EM
Attachments: 120054.MC-MTD.2ndAmendedComplaint.4-1-13.pdf

a. Person responsible for this electronic filing:
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b. 120054-EM
In Re: Complaint of Robert D. Reynolds and Julianne C. Reynolds Against Utility Board of the City of Key West, Florida Regarding Extending Commercial Electrical Transmission Lines to each Property Owner of No Name Key, Florida.

c. Document being filed on behalf of the Monroe County, Florida.

d. There are a total of 16 pages.

e. The document attached for electronic filing is Monroe County's Motion to Dismiss Second Amended Complaint.
(see attached file: 120054.MC-MTD.2ndAmendedComplaint.4-1-13.pdf)

Thank you for your attention and assistance in this matter.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Robert D. Reynolds And Julianne C. Reynolds Against Utility Board of the City of Key West, Florida Regarding Extending Commercial Electrical Transmission Lines to each Property owner of No Name Key, Florida.	)	DOCKET NO. 120054-EM
	)	FILED: APRIL 1, 2013

MONROE COUNTY'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Monroe County, Florida, a political subdivision of the State of Florida and an intervenor party in this docket, pursuant to Rule 28-106.201, Florida Administrative Code ("F.A.C."), hereby moves to dismiss the Second Amended Complaint filed in this case by Robert and Julianne Reynolds on March 13, 2013. In summary, the Reynoldses' claimed basis for standing, the Territorial Agreement between Keys Energy Services ("KES") and Florida Keys Electric Cooperative ("FKEC"), is negated by the express terms of that Agreement, and they have failed to articulate a statutory basis upon which their requested relief can be granted. Accordingly, because it appears from the face of their Second Amended Complaint that they can neither establish standing nor state a claim upon which relief can be granted, the Commission should dismiss their Second Amended Complaint with prejudice.

PROCEDURAL BACKGROUND

Monroe County, a political subdivision of the State of Florida, is responsible for enforcing its lawful ordinances, including its ordinances and regulations that relate to building permits and preservation of environmentally sensitive systems. The Monroe County Code prohibits the extension of public utilities, including electric lines, to or through any lands

designated as a unit of the Federal Coastal Barrier Resources System (CBRS) and the County's CBRS Overlay District, in which No Name Key is located. See Monroe County Code § 130-122.

While it is true that the issue of preservation vs. electrification of No Name Key has been disputed by numerous residents over the past ten years or more, that issue has, thus far, been resolved properly by Monroe County, through appropriate legal processes and pursuant to separate statutory authority, administered by a sister state agency and implemented by Monroe County, the purpose of which is to protect sensitive areas of the Florida Keys, an Area of Critical State Concern.

This docket was initiated on March 5, 2012 by the filing of the Reynoldses' original complaint. Monroe County petitioned to intervene on April 23, 2012, and its petition was granted by Commission Order No. PSC-12-0247-PCO-EM, issued on May 22, 2012. Because parallel litigation was pending in the Florida courts, by informal agreement, this docket was held in abeyance while the court proceedings continued. The court litigation was initiated by Monroe County in 2011 by its filing of a complaint for declaratory relief regarding its ability to enforce certain of its ordinances and regulations; the trial court dismissed the County's complaint, holding that the Commission has the exclusive jurisdiction to resolve the claims raised by the parties to that case. Monroe County v. Utility Board of the City of Key West d/b/a Keys Energy Services, Case No. 2011-CA-342-K, Order of Dismissal with Prejudice, slip op. (Circuit Court of the 16th

Judicial Circuit in and for Monroe County, January 30, 2012).

Another party to the case, Alycia Roemmele-Putney, appealed the trial court's decision to the Third District Court of Appeal, and the County participated in oral argument before that Court. On February 6, 2013, the Third District issued its opinion affirming the trial court's dismissal, stating, among other things, the following:

> Concluding that the Florida Public Service Commission has the exclusive jurisdiction to decide the issues raised by the appellants, we affirm the circuit court judgment dismissing the complaint with prejudice for lack of jurisdiction.
>
> * * *
>
> Any claim by the County or by the appellant homeowners that the PSC does not have jurisdiction may be raised before the PSC and, if unsuccessful there, by direct appeal to the Florida Supreme Court.
>
> * * *
>
> The statutory authority granted to the PSC would be eviscerated if initially subject to local governmental regulation and circuit court injunctions of the kind sought by Monroe County in the case at hand. The appellants do retain, however, the right to seek relief before the PSC, and we express no opinion as to the merits of any such claims by the appellants in that forum.

(Emphasis supplied.)

Following the Third District's decision, the Reynoldses filed their Amended Complaint on March 13, 2013, and on March 20, 2013, the Reynoldses filed their Second Amended Complaint.[1] The

[1]The Second Amended Complaint only differs from the Amended Complaint in that it corrects a scrivener's error in a footnote. This motion to dismiss is directed to the Reynoldses' Second Amended Complaint, but it is equally applicable to the Amended Complaint.

County hereby moves to dismiss the Second Amended Complaint, with prejudice, for the reasons set forth herein.

SUMMARY OF ARGUMENT

The Reynoldses lack standing to bring their claim as pled, because they assert that their standing arises from the Territorial Agreement between KES and FKEC, which Agreement has been approved by this Commission; however, the specific terms of that Agreement, as approved by this Commission, expressly provide that the Territorial Agreement shall not be construed to "give to any person other than the Parties . . . any right, remedy, or claim under or by reason of this Agreement, or any provision or conditions thereof." Moreover, there is no territorial dispute present in this case. Further, the Reynoldses have not stated a claim upon which relief can be granted, in that their attempts to rely on statutes are founded on legislative acts (specifically Chapter 69-1191, Laws of Florida, which authorized the predecessor of Keys Energy Services, and Chapter 163, Florida Statutes) that are not under the Commission's jurisdiction. Accordingly, because the Reynoldses' claimed foundation for standing is negated by the Territorial Agreement and the Commission's order approving that Agreement, and because they cannot cite to any statute that imposes an affirmative obligation to serve on Keys Energy Services, the Second Amended Complaint should be dismissed with prejudice. Finally, the Reynoldses failed to comply with the basic pleading requirements of Rule 28-106.201, F.A.C. While most of their failures were procedural

(e.g., no statement of disputed issues of material fact and no concise statement of ultimate facts alleged), their Second Amended Complaint fails substantively because it does not include the explanation required by Rule 28-106.201(2)(f), F.A.C., of how their alleged facts relate to, and support the relief requested under, any of the statutes to which they referred in their Second Amended Complaint.

ARGUMENT

I. The Reynoldses Lack Standing to Bring Their Second Amended Complaint Before the Florida Public Service Commission.

Contrary to the Reynoldses' numerous assertions and citations to the Territorial Agreement between KES and FKEC, that Territorial Agreement simply does not provide any basis for the Reynoldses' requested relief nor for their standing to bring their complaint before this Commission. In fact, the Territorial Agreement, by its express terms, negates the standing of the Reynoldses and of any person or entity other than KES and FKEC to bring an action under that Agreement before the Commission. Following the principle that the approved Territorial Agreement is part of the Commission's Order No. 25127,[2] by virtue of the Commission's approval, that Order itself bars the Reynoldses from bringing any action under the Territorial Agreement.

[2] See City Gas Co. v. Peoples Gas Co., 182 So. 2d 429, 436 (Fla. 1965); Public Service Comm'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) (citing Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E. 2d 812, 817 (1961)).

A. Neither the Territorial Agreement Between KES and FKEC, Nor the Commission's Order Approving That Territorial Agreement, Provides Any Basis for Standing for the Reynoldses.

The Reynoldses' claim that the Territorial Agreement provides the basis for their Second Amended Complaint, and for their requested relief, is best exemplified by their assertion, at Paragraph 42 of the Second Amended Complaint, that:

> The present dispute arises under the Territorial Agreement's terms of service which require KES to extend and maintain power to all property owners within the Territorial Service Area.

Additional references to the Territorial Agreement as providing the basis for the Reynoldses' requested relief are found in in Paragraphs 7, 12, 13, 16, 17, 18, 44, 45, and 46 of the Second Amended Complaint. While some of their assertions are true, as far as they go - e.g., the PSC surely does have jurisdiction to enforce territorial agreements as between the utility parties to such agreements - neither their claims nor the Territorial Agreement provide any basis for their standing in this docket.

The Reynoldses' claim to standing is based on the Territorial Agreement between KES and FKEC. However, that Agreement expressly provides that it does not confer or give any benefits to any person other than KES and FKEC. Specifically, Section 7.2 of the Territorial Agreement states:

> Nothing in this Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person other than the Parties hereto, or their respective successors or assigns, any right, remedy, or claim under or by reason of this Agreement, or any provision or condition hereof; and all of the provisions, representations, covenants, and conditions herein contained shall inure to the sole benefit of the Parties or their respective successors or assigns.

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, PSC Docket No. 910765-EU, FPSC Order No. 25127, Order Approving Territorial Agreement (Fla. Pub. Serv. Comm'n, September 27, 1991) at 13 (emphasis supplied).

Thus, the Territorial Agreement by its own terms denies and negates any standing for the Reynoldses - or for the No Name Key Property Owners Association, or for any entity other than KES or FKEC - to seek any relief whatsoever under that Agreement. Moreover, the Commission, in approving the Agreement in its Order No. 25127, expressly approved this standard "no third party benefits" provision of the Agreement, and therefore, by the principle that territorial agreements merge into the Commission's orders, the Commission's Order No. 25127 itself bars the Reynoldses from seeking relief under that Agreement. Accordingly, the Reynoldses' Second Amended Complaint should be dismissed, with prejudice.

II. The Reynoldses Have Failed to State a Claim Upon Which Relief Can Be Granted, Because None of the Statutory Provisions To Which They Have Cited Either Confers a Right To Service on Customers of KES Or Imposes An Affirmative Obligation To Serve on KES Itself.

The Reynoldses' claimed bases for relief in the "laws of the State of Florida" are grounded almost entirely on two separate legislative acts, Chapter 163, Florida Statutes, and Chapter 69-1191, Laws of Florida. Neither of these laws imposes either an affirmative obligation to serve on KES or confers a right to

service from KES on any would-be customer. Moreover, neither of these laws is part of the Public Service Commission's statutes. In fact, no Florida statute, law or rule imposes such an obligation on KES.

A. Chapter 163, Florida Statutes, Neither Confers Jurisdiction Over the Reynoldses' Complaint on the Commission nor Imposes an Obligation to Serve on KES.

Chapter 163, and specifically Section 163.01(15), Florida Statutes, gives entities such as KES the permissive authority to "plan, finance, acquire, construct, reconstruct, own, lease, operate, maintain, repair, improve, extend, or otherwise participate jointly in one or more electric projects" consistent with terms specified in that statute. Neither this provision, nor any other provision of Chapter 163, however, imposes any affirmative obligation to serve on KES or on any other utility. Moreover, there are only two references to the Public Service Commission in Chapter 163, neither of which even hints at giving the Commission the jurisdiction that the Reynoldses wish it had. The first reference, at Section 163.01(7)(g)1., Florida Statutes, provides as follows:

> (g)1. Notwithstanding any other provisions of this section, any separate legal entity created under this section, the membership of which is limited to municipalities and counties of the state, and which may include a special district in addition to a municipality or county or both, may acquire, own, construct, improve, operate, and manage public facilities, or finance facilities on behalf of any person, relating to a governmental function or purpose, including, but not limited to, wastewater facilities, water or alternative water supply facilities, and water reuse facilities, which may serve populations within or outside of the members of the entity. Notwithstanding s. 367.171(7), any separate legal entity created under

> this paragraph is not subject to Public Service Commission jurisdiction. The separate legal entity may not provide utility services within the service area of an existing utility system unless it has received the consent of the utility.

(Emphasis supplied.)

The second reference to the Commission, at Section 163.3209, Florida Statutes, provides that local governments may develop written plans for vegetation management so long as such plans are not "inconsistent with the minimum requirements of the National Electrical Safety Code as adopted by the Public Service Commission."

Therefore, no provision of Chapter 163, Florida Statutes, affords any statutory basis for either the Reynoldses' requested relief or for their standing to bring any action before the Florida Public Service Commission. No provision of Chapter 163 imposes any obligation to serve on KES (or on any other utility, for that matter), and no provision of Chapter 163 confers any jurisdiction on this Commission at all. Therefore, this law affords no statutory basis for the Reynoldses' requested relief, or for their standing to bring any action before the Florida Public Service Commission.

B. Chapter 69-1191, Laws of Florida, Neither Confers Jurisdiction Over The Reynoldses' Complaint On the Commission Nor Imposes an Obligation to Serve on KES.

The Reynoldses' other citations to the "State of Florida's enabling legislation" (see, e.g., Paragraphs 45, 46, and 48 of the Second Amended Complaint) are to Chapter 69-1191, Laws of Florida, which authorized the Utility Board of the City of Key West and later gave it the authority to use the trade name of

"Keys Energy Services." KES's enabling legislation gives KES the following powers:

> The Utility Board of the City of Key West, Florida shall have the full, complete and exclusive power and right to manage, operate, maintain, control, extend, extend beyond the limits of the City of Key West, Florida, in Monroe County, Florida, the electric public utility owned by said city, including the maintenance, operation, extension and improvement thereof, and including all lines, poles, wires, pipes, mains and all additions to and extensions of the same, and all buildings, stations, substations, machinery, appliances, land and property, real, personal and mixed, used or intended for use in or in connection with said electric public utility, and the Utility Board shall have all of the powers in connection with such other public utilities hereafter constructed or acquired by said board that are granted by this act to said board with respect to the electric public utility now owned by said city.

This law does indeed give KES the permissive power and authority to operate its electric system, presumably to the fullest extent allowed by and consistent with other applicable law. No provision of Chapter 69-1191, however, imposes an <u>obligation to serve</u> on KES, and no provision of this law confers a <u>right to service</u> on any would-be customer of KES. Moreover, as applicable to any possible claim that this law affords any basis for the relief requested by the Reynoldses, Chapter 69-1191 is a "special act" wholly outside this Commission's jurisdiction. Indeed, Chapter 69-1191 makes no mention of the Florida Public Service Commission at all. Therefore, this law affords no statutory basis for the Reynoldses' requested relief, or for their standing to bring any action before the Florida Public Service Commission.

C. The Commission's General "Grid Bill" Authority Likewise Imposes No Obligation to Serve on KES, Nor Does It Confer Any Right to Service on Potential Customers of KES.

Finally, although the Reynoldses fail to cite to the specific provision of the Commission's statutes, they do make a tangential reference to the Commission's general "Grid Bill" authority and "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida." (See, e.g., Paragraphs 18 and 42 of the Second Amended Complaint. As the Commission well knows, this provision is found at Section 366.04(5), Florida Statutes.) To the extent that they attempt to ground their request for relief in this statutory provision, however, such attempt is at best over-reaching and misplaced, for the simple reason that the referenced statute does not address any utility's obligation to serve or any customer's right to service; if the Legislature wanted to impose an affirmative obligation to serve on "electric utilities" such as KES and FKEC, it would have been extremely easy for the Legislature to do so,[3] and had that been the Legislature's intent, it presumably have done so.[4]

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[3] For example, the Legislature could have accomplished this purpose simply by using the term "electric utility" instead of the defined term "public utility" in Section 366.03, Florida Statutes.

[4] Although not directly relevant to the issues presented here, the County does not concede that, even if the utility in question were a public utility, the obligation to serve provisions of Section 366.03, Florida Statutes, would be superior to the County's valid growth management ordinances, which were promulgated pursuant to mandates of other provisions of the Florida Statutes and approved by a sister state agency, the former Florida Department of Community Affairs, in accordance with the terms of, and in furtherance of the purposes of, those statutes.

In summary, notwithstanding the Reynoldses' assertion that "KES . . . has an affirmative obligation to extend electrical lines to any party requesting such an extension" (Paragraph 46), they have failed to cite to any statutory provision that articulates any such "affirmative obligation." Accordingly, the Reynoldses' Second Amended Complaint should be dismissed, with prejudice.

D. Agrico[5]

The standard test for a party's standing under Florida administrative law is the two-pronged test set forth in Agrico. However, in the instant case, there is no proceeding, nor any case or controversy, nor any dispute between the parties to the Territorial Agreement. The Reynoldses lack standing to bring a complaint under the Territorial Agreement, and they cannot articulate any statutory basis for their requested relief. Without a statutory basis for the claimed relief, the Agrico "zone of interest" test cannot be satisfied.

E. The Reynoldses Have Failed to Comply With Applicable Pleading Requirements Under the Rules Governing Administrative Proceedings.

The Reynoldses have not complied with the pleading requirements of Rule 28-106.201, F.A.C. While most of their failures are procedural, e.g., failing to include the required statement of disputed issues of material fact and failing to include the required statement of ultimate facts alleged pursuant

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[5] Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

to Rule 28-106.201(2)(d)&(e), F.A.C., the critical substantive failure of their Second Amended Complaint is that they fail to provide the required explanation of how the relief requested is supported by the statutes invoked. This is not surprising, however, because, as discussed above, none of the statutes or special acts cited by the Reynoldses provides any basis for either their standing or for the relief requested in their Second Amended Complaint.

The Reynoldses' assertions that the PSC has jurisdiction over enforcement of a Territorial Agreement (Paragraph 13 of the Second Amended Complaint) is true as far as it goes, but the Agreement does not afford any basis for the Reynoldses' requested relief, because the Agreement itself bars standing to seek relief to anyone other than KES or FKEC, and because there is no dispute - no case or controversy requiring or invoking the Commission's jurisdiction - between KES and FKEC, the parties to the Territorial Agreement who are subject to the Commission's territorial jurisdiction.

The Reynoldses' substantive failure to articulate any explanation as to how any of the statutes referenced in their Second Amended Complaint support their requested relief highlights their inability to do so. If they had a legitimate statutory basis for relief, they could make a plausible case for standing: however, they have no such basis, and they have articulated no such basis as required by the Florida Administrative Code, and accordingly, their Second Amended

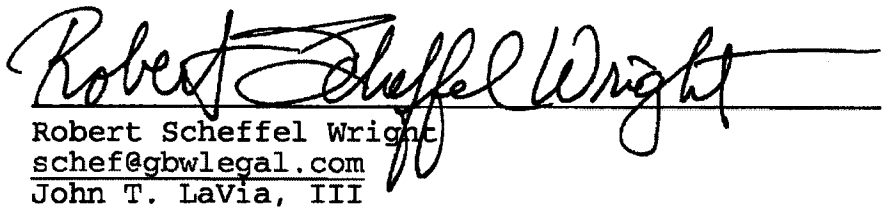
Complaint should be dismissed, with prejudice, for this reason as well.

CONCLUSION AND RELIEF REQUESTED

As explained in the body of this Motion to Dismiss, the Reynoldses have failed to establish their standing in that the Territorial Agreement between KES and FKEC, upon which they principally rely for their requested relief, expressly bars any party or entity other than KES and FKEC from having any rights under that Agreement, and since that Agreement has been merged into the Commission's Order No. 25127 approving it, the Commission's Order bars their claims thereunder. Moreover, although the Reynoldses assert, in numerous and various places in their Second Amended Complaint, that KES has "an affirmative obligation to extend" service to any person requesting it, they have utterly failed to cite to any statutory provision embodying any such obligation. Accordingly, the Reynoldses both lack standing to bring their Second Amended Complaint to this Commission and have failed to state a claim upon which relief can be granted, because the statutes that they have cited provide no basis for their requested relief. Accordingly, their Second Amended Complaint should be dismissed with prejudice, because it appears on its face that they cannot establish either standing or a statutory basis for the relief requested.

WHEREFORE, Monroe County respectfully moves the Commission to dismiss the Second Amended Complaint filed herein by the Reynoldses on March 13, 2013.

Respectfully submitted this 1st day of April 2013.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic mail, on this 1st day of April 2013.

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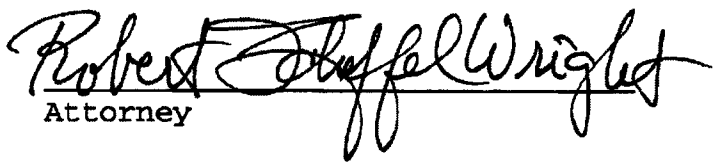

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