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BEFORE THE STATE OF FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. REYNOLDS and JULIANNE C.  
REYNOLDS,

Complainants,

v.

UTILITY BOARD OF THE CITY OF KEY WEST,  
FLORIDA d.b.a KEYS ENERGY SERVICES, et  
al.,

Docket No. 120054-EM

Respondents,

and

MONROE COUNTY, a political subdivision of the  
State of Florida, NO NAME KEY PROPERTY  
OWNERS ASSOCIATION, INC.,

Interveners.

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**COMPLAINANTS, ROBERT D. REYNOLDS AND JULIANNE REYNOLDS'S BRIEF  
IN COMPLIANCE WITH FLORIDA PUBLIC SERVICE COMMISSION'S ORDER  
ESTABLISHING SCHEDULE FOR BRIEFS ON CERTAIN LEGAL ISSUES DATED  
MARCH 25, 2013**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i-ii

TABLE OF AUTHORITIES.....iii-iv

PRELIMINARY STATEMENT.....1-2

STATEMENT OF THE CASE.....2

STATEMENT OF UNDISPUTED FACTS.....3-5

SUMMARY OF ARGUMENT.....6

ARGUMENT.....6-23

STANDARD OF LAW.....6-7

**I. The PSC has jurisdiction to resolve the Reynolds’ Complaint.....7-13**

**A. The holding of *Roemmele-Putney v. Reynolds* and the existence of Rule 25-22.036(2), F.A.C., provide the PSC jurisdiction to resolve the Reynolds’ complaint.....7-10**

**B. The PSC should be collaterally estopped from denying that it has jurisdiction after entering an Amicus Brief asserting that jurisdiction was proper and exclusive before the PSC.....10-13**

**1.The PSC has previously argued that it has jurisdiction over substantially similar claims advanced by Monroe County.....11-12**

**2.The elements of the doctrine of collateral estoppel have been met.....12-13**

**II. Reynolds and No Name Key property owners are entitled to receive electric power from KES under the terms of the PSC’s Order No. 25127 approving the 1991 Territorial Agreement.....13-23**

**A. Under the Territorial Agreement, KES is obligated to furnish electric service to the Reynolds’ Property.....14-18**

**B. The installation of power lines and connection to such lines by end users on No Name Key do not constitute development under Florida law...18-21**

**C. Notwithstanding the Territorial Agreement, the Reynolds and the property owners on No Name Key are entitled to electric power pursuant to the Grid Bill.....22-23**

CONCLUSION.....23

CERTIFICATE OF SERVICE.....24

## TABLE OF AUTHORITIES

### Cases

<i>Ameristeel Corp. v. Clark</i> , 691 So.2d 473, 477 (Fla.1997).....	6-7
<i>Atlantic Shores Resort, LLC v. 507 South Street Corp.</i> , 937 So.2d 1239 (Fla. 3d DCA 2006)....	10
<i>Bd. Of County Com'rs of Monroe County v. Dep't of Cmty. Affairs</i> , 560 So.2d 240 (Fla. 3d DCA 1990).....	19-20
<i>Brown v. Department of Prof'l Regulation</i> , 602 So.2d 1337 (Fla. 1 <sup>st</sup> DCA 1992).....	11
<i>Cook v. State</i> , 921 So.2d 631 (Fla. 2d DCA 2005).....	12
<i>Deep Lagoon Boat Club, Ltd. v. Sheridan</i> , 784 So.2d 1140 (Fla. 2d DCA 2001).....	11
<i>Florida Power Corporation v. Seminole County and City of Lake Mary</i> , 579 So.2d 105 (Fla. 1991).....	15-16
<i>Florida Public Service Commission v. Bryson</i> , 569 So.2d 1253 (Fla. 1990).....	7
<i>Goodman v. Aldritch &amp; Ramsay Enters., Inc.</i> , 804 So.2d 544 (Fla. 2d DCA 2002).....	12
<i>Gulf Coast Elec. Coop., Inc. v. Johnson</i> , 727 So.2d 259 (Fla.1999).....	6
<i>Husky Indus., Inc. v. Griffith</i> , 422 So.2d 996 (Fla. 5 <sup>th</sup> DCA 1982).....	10
<i>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.</i> , In the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, Case No. 2011-CA-342-K.....	4, 8, 12
<i>National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma</i> , 468 U.S. 85, 104 S.Ct. 2948 (1984).....	18
<i>Parker v. Brown</i> , 317 U.S. 341, 63 S.Ct. 307 (1943).....	17
<i>Praxair, Inc. v. Florida Power &amp; Light Co.</i> , 64 F.3d 609 (11 <sup>th</sup> Cir. 1995).....	18
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).....	18
<i>Roemmele-Putney v. Reynolds</i> , 106 So.3d 78 (Fla. 3d DCA 2013).....	5, 7-13
<i>State v. McBride</i> , 848 So.2d 287 (Fla. 2003).....	10
<i>Thomson v. Dep't. of Env'tl. Regulation</i> , 511 So.2d 989 (Fla. 1987).....	11

<i>Union Electric Co. v. City of Crestwood</i> , 499 S.W.2d 480 (Mo. 1973).....	16-17
<i>Walley v. Florida Game &amp; Fresh Water Fish Comm'n</i> , 501 So.2d 671 (Fla. 1 <sup>st</sup> DCA 1987).....	11
<i>West Florida Elec. Co-op Ass'n, Inc. v. Jacobs</i> , 887 So.2d 1200 (Fla. 2004).....	14
<u>Florida Public Service Commission</u>	
<i>In re City of Parker</i> , 2003 WL 21436985 (Fla.P.S.C. 2003).....	15-17
Public Service Commission Order No. 25127.....	1-3, 6, 9, 13, 14, 17, 23
<u>Florida Statutes</u>	
Fla. Stat. §366.04.....	9, 16
Fla. Stat. §366.05.....	13, 22
Fla. Stat. §380.04.....	18-19
<u>Florida Administrative Code</u>	
Fla.Admin.Code 25-6.002.....	21
Fla Admin.Code 25-6.075.....	21
Fla.Admin.Code 25-6.076.....	21
Fla.Admin.Code 28-106.211.....	1
<u>County Ordinances and Resolutions</u>	
Monroe County Code Sec. 19-36.....	20
Monroe County Code Sec. 130-122.....	4, 15
<u>Supplemental Authority</u>	
§27, Restatement (Second) of Judgments.....	12
Chapter 69-1191, Laws of Florida (1969).....	14

## PRELIMINARY STATEMENT

This Brief is entered pursuant to the Florida Public Service Commission's Order Establishing Schedule for Briefs on Certain Legal Issues dated March 25, 2013. The Order Establishing Schedule for Briefs on Certain Legal Issues dated March 25, 2013 shall be referred to in this Brief as the "Order." The Order was issued pursuant to the authority granted to the Public Service Commission by Rule 28-106.211, F.A.C., and ordered the filing of briefs by the Parties to the following questions:

1. Does the Commission have jurisdiction to resolve the Reynolds' complaint?

And

2. Are the Reynolds and No Name Key property owners entitled to receive electric power from Keys Energy under the terms of the Commission's Order No. 25127 approving the 1991 territorial agreement between Keys Energy and the Florida Keys Electric Cooperative?

The Complainants, ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS, shall be referred to collectively in this Brief as the "Reynolds". The Respondent, UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d.b.a. KEYS ENERGY SERVICES, shall be referred to in this Brief as "KES". The Respondent/Intervener, MONROE COUNTY, a political subdivision of the State of Florida, shall be referred to in this Brief as "Monroe County". Intervener, NO NAME KEY PROPERTY OWNERS ASSOCIATION, INC., shall be referred to in this Brief as the "NNKPOA".

That certain Territorial Agreement dated June 17, 1991, by and between the Utility Board of the City of Key West, and the Florida Keys Electric Cooperative Association, Inc., and approved by the PSC in Order No. 25127, shall be referred to in this Brief as the "Territorial Agreement". That certain Public Service Commission Order No. 25127 approving the Territorial Agreement shall be referred to in this Brief as "Order 25127. Reynolds' real property situated at

2160 Bahia Shores Road, No Name Key, Florida 33042 shall be referred to in this Brief as the "Property".

The Coastal Barrier Resource System will be referred to as the "CBRS". The Coastal Barrier Resources Act will be referred to as the "CBRA". Monroe County's Comprehensive Plan will be referred to as the "Comp. Plan". Monroe County's Land Development Regulations will be referred to as the "LDRs".

### **STATEMENT OF THE CASE**

This is an action that arose from KES' failure to provide commercial electric service to the Property as required by the terms of the Territorial Agreement, which was approved by the PSC in 1991 by Order 25127, and Monroe County's refusal to allow the extension of commercial electrical power to the properties situated on No Name Key. As the PSC noted in the Order, this controversy over whether property owners on No Name Key should receive electric service from KES began long before this action was initiated by the Reynolds.

In their Second Amended Complaint, the Reynolds request that the PSC: (1) Exercise jurisdiction over this action and the parties hereto; (2) Issue an Order declaring the PSC's jurisdiction preempts Monroe County's Enforcement of Ordinance 043-2001 as it applies to KES, KES' territorial agreement and enabling legislation; (3) Issue an Order finding the commercial electrical distribution lines KES extended to No Name Key are legally permissible and properly installed; and (4) Issue an Order finding that Monroe County cannot unreasonably withhold building permits from KES' customers based solely on their property location being on the island of No Name Key and finding that Monroe County may not prevent the connection of a homeowner on No Name Key to the coordinated power grid.



### STATEMENT OF UNDISPUTED FACTS

1. The Property is located on No Name Key, in Monroe County, Florida, in a platted subdivision off of Old State Road 4A. *See* Warranty Deed dated October 5, 2005 for the Property, as recorded in Official Records Book 2158, pg. 1981, Public Records of Monroe County, Florida, a true a correct copy of which has been filed contemporaneously with this Brief in the Appendix to Complainants' Brief in Compliance Florida Public Service Commission's Order Establishing Schedule for Briefs on Certain Legal Issues dated March 25, 2013, and is incorporated herein by reference. *See also*, Amended Plat of Bahia Shores Plat No. 1, as recorded in Plat Book 6, Page 115, Public Records of Monroe County, Florida, a true and correct copy of which has been filed contemporaneously with this Brief in the Appendix to Complainants' Brief in Compliance Florida Public Service Commission's Order Establishing Schedule for Briefs on Certain Legal Issues dated March 25, 2013, and is incorporated herein by reference.

2. On September 27, 1991, the PSC approved the Territorial Agreement, delineating the service territory for KES' and the Florida Keys Electric Cooperative. *See* Order 25127, previously filed in the above-styled action as Exhibit A to the First Amended Complaint, and incorporated herein by reference.

3. KES' territorial service area includes the island of Key West and extends beyond the City of Key West's limits for approximately thirty-five (35) miles East through the Lower Florida Keys, terminating at Pigeon Key, Monroe County, Florida. *See* Territorial Agreement, §1.3 and Ex. A. KES' territorial service area includes the entirety of No Name Key. *See* Territorial Agreement, §1.3 and Ex. A.

4. Part of No Name Key is located within a CBRS, and a part of the island is not. Reynolds' Property is not located within a CBRS. See CBRS maps, true and correct copies of which have been filed contemporaneously with this Brief in the Appendix to Complainants' Brief in Compliance Florida Public Service Commission's Order Establishing Schedule for Briefs on Certain Legal Issues dated March 25, 2013, and is incorporated herein by reference.

5. Monroe County's Comp. Plan contains provisions discouraging the extension of utilities to No Name Key. Specifically, Policy 102.8.5, Policy 103.2.10, Policy 215.2.3, Policy 217.4.2, Policy 1301.7.12, Policy 1401.2.2, and Objective 209.3, all discourage, but do not prohibit, the extension of utilities to or development on No Name Key.

6. Monroe County Code Sec. 130-122 prohibits the extension of public utilities, including electricity, to No Name Key.

7. For decades, property owners on the island of No Name Key have attempted to secure the extension of utilities to their properties on No Name Key. These attempts began prior to the adoption of Monroe County's Comp. Plan and LDRs.

8. In 2011, No Name Key property owners were in the final stages of negotiation with KES for the construction of power lines to No Name Key, and plans had been created to connect the overwhelming majority of property owners on No Name Key.

9. In its efforts to stop the extension of power lines, Monroe County instituted the case styled as *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.*, In the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, Case No. 2011-CA-342-K, requesting that the Circuit Court determine Monroe County's ability to regulate the extension of power lines to No Name Key.

10. Upon motion of the Reynolds, who were co-defendants in that case with KES and forty-two (42) other No Name Key property owners, the Circuit Court dismissed Monroe County's action with prejudice, holding that the exclusive jurisdiction to resolve the issues contained in Monroe County's Complaint rested with the PSC. Several property owners who desire to keep commercial electricity from all property owners on No Name Key, appealed the Circuit Court's holding and were subsequently joined in that appeal by Monroe County.

11. On appeal, in the case of *Roemmele-Putney v. Reynolds*, 106 So.3d 78 (Fla. 3d DCA 2013), the Third District Court of Appeal affirmed the Circuit Court's holding and held that the PSC has exclusive jurisdiction over Monroe County's claims.

12. During the time period between the Circuit Court's dismissal with prejudice and the Third DCA's affirmation of that holding, Reynolds instituted the above-styled action.

13. During the pendency of this case, KES installed electric distribution lines to provide commercial electric power to No Name Key. The distribution lines were constructed on Old State Road 4-A's right-of-way which was deeded to the County by the State,<sup>1</sup> and extends to Bahia Shores Road, a platted subdivision to Reynolds' Property. *See* Amended Plat of Bahia Shores Plat No. 1. After KES installed the distribution lines, the distribution lines were and are energized.

14. However, KES has not allowed any property owners to connect to the energized lines and Monroe County has either revoked or denied electrical permits for 200 AMP Subfeed boxes that property owners would need to install to be able to connect to the energized lines.

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<sup>1</sup> Old State Road 4-A was formerly known as the Overseas Highway and was the state road that traveled to Key West prior to the completion of the Seven Mile Bridge.

## SUMMARY OF THE ARGUMENT

The PSC's Order requests the parties to brief whether (1) the PSC has jurisdiction over the Reynolds' Complaint; and (2) No Name Key property owners are entitled to receive electric power from KES under the Territorial Agreement approved by PSC Order 25127. The answer to both of these questions is a resounding "Yes".

The question of whether the PSC has jurisdiction over the Reynolds' Complaint has been extensively litigated by the Parties to this action in multiple forums, and even the PSC has previously entered amicus briefs arguing that the PSC has jurisdiction over the matters contained in the Reynolds' Complaint. The PSC has jurisdiction to resolve the Reynolds' Complaint, and the PSC should be collaterally estopped from denying jurisdiction.

The question of whether No Name Key property owners are entitled to receive electric power from KES under the Territorial Agreement approved by Order 25127 must also be answered in the affirmative because (1) Reynolds' property is located within KES' designated service area over which KES has a monopoly on commercial electric service; (2) the facilities constructed do not constitute "development" as defined by the PSC and the laws of Florida; and (3) notwithstanding the terms of the Territorial Agreement, the Grid Bill provides the PSC with the authority necessary to require the connection of the No Name Key properties to the coordinated electric grid.

## ARGUMENT

### Standard of Law

Commission orders are clothed with the presumption that they are reasonable and just. *See Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So.2d 259, 262 (Fla.1999). A party challenging such an order must show a departure from the essential requirements of law. *See Ameristeel*

*Corp. v. Clark*, 691 So.2d 473, 477 (Fla.1997). The Florida Supreme Court will approve the commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous. *Id.*

**I. The PSC has jurisdiction to resolve the Reynolds' Complaint.**

The issue of whether the PSC has jurisdiction to resolve the Reynolds' Complaint has been extensively litigated by the Parties to this action, the other property owners on No Name Key, and the PSC itself. The PSC is an agency of the State of Florida with regulatory and police powers to regulate public utilities and electric utilities throughout the State. As the State entity charged by law with planning and regulating the generation and transmission of electrical power throughout Florida, the PSC is to determine its own jurisdiction. *See Roemmele-Putney v. Reynolds*, 569 So.2d 78, 80 (Fla. 3<sup>rd</sup> DCA 2013), *see also, Florida Public Service Commission v. Bryson*, 569 So.2d 1253, 1255 (Fla. 1990).

“The [PSC] has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly.” *Id.* “The PSC must be allowed to act when it has at least a colorable claim that the matter under its consideration falls within its exclusive jurisdiction as defined by statute.” *Id.* Here, the PSC has more than a colorable claim and has a duty to protect prospective customers from being denied utility service from Monroe County.

**A. The holding of *Roemmele-Putney v. Reynolds* and the existence of Rule 25-22.036(2), F.A.C., provide the PSC jurisdiction to resolve the Reynolds' complaint.**

Any discussion of jurisdiction in the instant matter must begin with a thorough discussion and analysis of *Roemmele-Putney*, which involved the parties to this action in substantially the same claims advanced by Monroe County in seeking declaratory and injunctive relief barring the extension of commercial electric power to No Name Key.

First, in *Roemmele-Putney*, the Third District Court of Appeal defined the issue as follows:

... whether the County and private landowners may obtain judicial (declaratory and injunctive relief) establishing that the prospective electrification of No Name Key is regulated – or even precluded – by the Coastal Barrier Resource Act and the County’s policies and procedures adopted pursuant to that Act.

*Id.*, at 79.

The issue to be decided in the instant action is the same as addressed by the County in *Roemmele-Putney*, albeit the Reynolds are seeking the extension of commercial electricity where Monroe County was seeking to bar such extension. Specifically, the Reynolds are seeking declaratory relief that will enable them to connect to the energized electrical distribution line that has been installed in front of their home on No Name Key. The Third District Court of Appeal held as follows with regards to this issue:

Concluding that the Florida Public Service Commission has 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.

*Id.*

In its Complaint, Monroe County “asked the circuit court to determine whether KES has the authority to extend the utility lines to the residences on No Name Key (Count I), and whether the property owners have the right to connect their homes to the KES lines despite an express prohibition in the Monroe County Code (Count II).” *See Roemmele-Putney supra* at 79 – 80; *see also* Monroe County Complaint, ¶¶25 – 37.

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<sup>2</sup> “Monroe County Code § 130–122 (purporting to prohibit the extension of electric utilities to properties within the Coastal Barrier Resources System overlay).” It is interesting that the Third District Court of Appeal placed such as footnote to describe Monroe County Code § 130–122 as “purporting to prohibit the extension of electric utilities” as the term “purport” does not mean it does prohibit but means “claiming” as in Monroe County is “claiming to prohibit”, as if the Third District Court of Appeal is establishing the Ordinance may not prohibit the extension of electric utilities and it is the PSC’s decision.

In the case at bar, Reynolds has asked the PSC to find that KES can extend the utility lines to No Name Key homeowners and that Monroe County cannot prohibit the homeowners' homes from connecting to KES' distribution line. The Reynolds are requesting that the PSC determine the same subject matter that the Third District Court of Appeal and Sixteenth Judicial Circuit held was within the PSC's exclusive jurisdiction. Therefore, the PSC has already been found to have jurisdiction over the subject matter subject to Reynolds' Amended Complaint.

Moreover, in *Roemmele-Putney*, the Third District Court of Appeal found that "KES's existing service . . . relating to new customers and 'end use facilities' is subject to the PSC's statutory power over all "electric utilities"." *Id.*, at 80. By finding that KES' existing service, its relation to new customers, and the "end use facilities" are all subject to the PSC's statutory power over "electric utilities", the Third District Court of Appeal held that the PSC has personal jurisdiction over the parties to this issue. The Third District's holding is grounded in the conclusion that Fla. Stat. 366.04(5) has granted the PSC jurisdiction over the planning, development, maintenance of the electric grid. This is one of the bases of approving the Territorial Agreement by and between KES and the Florida Keys Electric Co-op. *See* PSC Order 25127 ("the agreement satisfies the intent of Subsection 366.04(5), Florida Statutes").

The Third District Court of Appeal's decision in *Roemmele-Putney* has limited the forum in which Reynolds' claims can be brought exclusively to the PSC. Reynolds cannot file a complaint in the Sixteenth Judicial Circuit in and for Monroe County because the same subject matter has been dismissed with prejudice. The parties and claims in the above-styled action are the same as those brought by the County in *Roemmele-Putney*, the Reynolds simply seek a different conclusion. The Reynolds would be barred based on collateral estoppel from bringing these claims before any other Court, having already successfully argued before the Sixteenth

Judicial Circuit and the Third District Court of Appeal that the Sixteenth Judicial Circuit does not have jurisdiction over the claim and having the claim dismissed with prejudice.

**B. The PSC should be collaterally estopped from denying that it has jurisdiction after entering an Amicus Brief asserting that jurisdiction was proper and exclusive before the PSC.**

First, but for the PSC's Order requiring the parties to submit briefs regarding the PSC's jurisdiction in this matter, Monroe County and KES would be collaterally estopped from arguing the PSC does not have jurisdiction over the instant matter. Monroe County, KES, and Reynolds were all parties to *Roemmele-Putney*, and Monroe County and KES took the position that the Circuit Court, and not the PSC, had jurisdiction over the subject matter of the complaint. The Circuit Court and Third District Court of Appeal both found the PSC has jurisdiction over this matter. Thus, Monroe County and KES are collaterally estopped from arguing that the PSC does not have jurisdiction over this matter. Nonetheless, the PSC has requested the jurisdictional issue be briefed.

In the case at bar, the Reynolds have asked the PSC to find that KES can extend the utility lines to their properties, defined in the Territorial Agreement as "End Use Facilities". The PSC has jurisdiction, and has claimed so in its Amicus Brief entered in the *Roemmele-Putney* case.

The doctrine of collateral estoppel precludes consideration of an issue when the identical issue has previously been fully litigated and determined between the same parties in a context that resulted in a final decision by a court of competent jurisdiction. *See Atlantic Shores Resort, LLC v. 507 South Street Corp.*, 937 So.2d 1239 (Fla. 3d DCA 2006) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003); *Husky Indus., Inc. v. Griffith*, 422 So.2d 996, 999 (Fla. 5<sup>th</sup> DCA 1982)).



Collateral estoppel, like *res judicata*, is applicable to administrative proceedings. See *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001) (citing *Thomson v. Dep't. of Env'tl. Regulation*, 511 So.2d 989 (Fla. 1987); *Brown v. Department of Prof'l Regulation*, 602 So.2d 1337 (Fla. 1<sup>st</sup> DCA 1992); *Walley v. Florida Game & Fresh Water Fish Comm'n*, 501 So.2d 671 (Fla. 1<sup>st</sup> DCA 1987)).

**1. The PSC and Reynolds have previously argued that the PSC has jurisdiction over substantially similar claims advanced by Monroe County.**

In its Amicus Curiae Brief in Support of Appellees Robert D. Reynolds and Julianne Reynolds, the PSC argued that it had exclusive jurisdiction under Chapter 366, Fla. Stat., to resolve issues regarding the interpretation and enforcement of territorial agreements. See Amicus Curiae Brief of the Florida Public Service Commission in Support of Appellees Robert D. Reynolds and Julianne Reynolds (“Amicus Brief”), pg. 1. The PSC asserted that it is the only proper forum with exclusive jurisdiction for determining the issue of whether power lines should be extended to residents of No Name Key. *Id.*

The PSC asserted unequivocally that “The Commission has exclusive jurisdiction to interpret and enforce its Order approving the terms of the 1991 Territorial Agreement and to determine whether, to what extent, and under what terms and conditions the residents of No Name Key are entitled to receive electric service from Keys Energy.” *Id.*, at 6. The PSC concluded that “The Circuit Court was correct to dismiss the Complaint, with prejudice, as exclusive subject matter jurisdiction is vested with the Commission and the Commission is the correct forum for hearing the issues raised in the proceeding below.” *Id.*, at 9.

There is no equivocation in the PSC’s Amicus Brief as the PSC asserts unreservedly that it has jurisdiction to decide whether No Name Key Residents may receive electric power from

KES. While the PSC does not endorse a specific outcome, it does conclude that the PSC is the only forum in which the issues present in the above-styled action may be heard.

**2. The elements of the doctrine of collateral estoppel have been met.**

For the doctrine of collateral estoppel to apply to bar re-litigation of an issue, five factors must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. *See Cook v. State*, 921 So.2d 631 (Fla. 2d DCA 2005) (citing *Goodman v. Aldritch & Ramsay Enters., Inc.*, 804 So.2d 544, 546-47 (Fla. 2d DCA 2002); Restatement (Second) of Judgments §27 (1982)). In the present action, the five elements needed for collateral estoppel are all present.

First, this case implicates the same issue of whether the PSC has jurisdiction as *Roemmele-Putney*. The sole issue in *Roemmele-Putney* was whether the PSC had exclusive subject matter jurisdiction for determining whether power lines should be extended to the residents of No Name Key. There was no other issue addressed in that appeal, and the Third District held that the PSC did have exclusive subject matter jurisdiction over the issues. The PSC has raised the same issue in requesting the present Brief.

Second, the issue of the PSC's jurisdiction was central to *Roemmele-Putney* because no other issue was litigated before the Sixteenth Circuit and the Third District Court of Appeal. The Complaint in the lower court did not survive Reynolds' Motion to Dismiss. Thus, the issue of PSC jurisdiction was critical to *Roemmele-Putney*. Additionally, determination of jurisdiction is always a critical and necessary part of prior determinations.

Third, the parties had a full and fair opportunity to litigate the issue of the PSC's jurisdiction because there were motions, amicus briefs, oppositions, and a hearing in the lower court. Furthermore, before the Third District Court of Appeal, an Initial Brief, Answer Brief, Reply Brief and Amicus Brief were all entered, and oral argument was conducted prior to a decision being reached. The issue of whether the PSC has jurisdiction over this dispute has been extensively litigated, thereby satisfying the third element of the collateral estoppel test.

Fourth, the parties are identical because Reynolds and KES were the defendants in the lower court and the Appellees in the Third District Court of Appeal; and Monroe County was the Plaintiff in the lower court and one of the Appellants in the Third District Court of Appeal. Even the PSC was involved in both the lower court and before the Third District Court of Appeals, entering Amicus Briefs in both courts arguing that jurisdiction of the dispute belonging in the PSC.

Finally, the issues have actually been litigated because arguments were heard at every stage of the proceedings in *Roemmele-Putney*, and no appeal was entered to the Third District Court of Appeal's holding.

The doctrine of collateral estoppel applies in this case, and the PSC should be estopped from finding that jurisdiction over the Reynolds' Complaint does not rest in the PSC.

**II. Reynolds and No Name Key property owners are entitled to receive electric power from KES under the terms of the PSC's Order No. 25127 approving the 1991 Territorial Agreement.**

Reynolds and No Name Key property owners are entitled to receive electric power from KES under the terms of Order 25127, approving the 1991 Territorial Agreement. Notwithstanding the terms of Order 25127, pursuant to the provisions of Fla. Stat. §366.05(8),

the PSC has the necessary authority over KES to require the expansion of electric power to Reynolds and No Name Key property owners.

**A. Under the Territorial Agreement, KES is obligated to furnish electric service to the Reynolds' Property.**

The Territorial Agreement approved in Order 25127 provides that KES is obligated to furnish electric service to persons requesting such service within its service area. *See* Territorial Agreement, §0.2. Furthermore, KES' enabling legislation under the laws of Florida states that KES has:

...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, sub-stations, machinery, appliances, land and property, real, personal and mixed, used or intended for use in or in connection with said electric public utility...The said Utility Board shall have exclusive power and authority to determine what improvements shall be made to all such public utilities.

*See* Chapter 69-1191, Laws of Florida (1969).

There is no question that KES' service area includes No Name Key. *See* Territorial Agreement, §§1.2 and 1.3; *see also*, Exhibit A to Territorial Agreement. KES is the only electric company with authority to furnish retail electric service in its service area. *See* Territorial Agreement, §2.1.

However, KES' service area is more than simply lines on a map; it is made up of KES' customers, both current and potential. "Service to an area necessarily means service to customers." *See West Florida Elec. Co-op. Ass'n, Inc. v. Jacobs*, 887 So.2d 1200 (Fla. 2004). KES' service area cannot be separated from the customers. In this case, that means that the service area contains No Name Key property owners. These property owners are currently being

denied access to commercial electric power and KES is not providing its customers with electricity.

It is the policy of the State of Florida to (1) actively regulate and supervise the service territories of electric utilities; (2) supervise the planning, development, and maintenance of a coordinated electric power grid throughout Florida; (3) avoid uneconomic duplication of generation, transmission and distribution facilities; and (4) to encourage the installation and maintenance of facilities necessary to fulfill electric utilities' respective obligations to serve the citizens of the State of Florida within their respective service areas. *See* Territorial Agreement, §6.1.

These policies of the State of Florida conflict with Monroe County's 2001 adopted ordinance which purports to prevent the extension of electricity to No Name Key. Monroe County Code §130-122 prohibits the extension of public utilities, including electricity, to and through CBRS, thereby implementing the policies of the County's Comp. Plan to discourage extension of facilities and services to CBRS units. In any contest between a State policy and a County policy, the State policy should control because the State can preempt its subdivisions at any time. In this matter, the State's interest in ensuring that all of its citizens receive reliable, efficient, and affordable electric trumps one small county's special interest in restricting utilities to a small population. The State, through the PSC cannot actively supervise a coordinated power grid if county and municipal governments can forbid the extension of electric facilities to certain locales. *See In re City of Parker*, 2003 WL 21436985, 9 - 10 (Fla.P.S.C. 2003) (citing *Florida Power Corporation v. Seminole County and City of Lake Mary*, 579 So.2d 105, 107 (Fla. 1991)).

In the case of *In re City of Parker*, the PSC was asked whether its jurisdiction preempts the City of Parker's application of its Comprehensive Plan, LDRs, and City Codes and

Ordinances, to Gulf Power Company's proposed aerial power transmission line. *See In re Parker*, at 1. The PSC found that its jurisdiction preempted the City's application of its Comp. Plan, LDRS, and City Codes and Ordinances. *Id.*, at 10. The PSC reasoned that if each local government had authority to dictate the type and location of electric lines, costs could become unmanageable, and the statewide supervision and control of the PSC would be nullified. *Id.* (citing *Florida Power Corporation*, at 107)<sup>3</sup>. If the PSC orders that Monroe County's Comp. Plan and LDRs can limit where power can be extended, the precedence would allow other municipalities to create similar restriction or even more constraining ordinances which would infringe on the PSC's exclusive jurisdiction. The Supreme Court reasoned in *Seminole County* that if each local government had authority to dictate the location of electric lines then statewide supervision and control granted to the PSC would be nullified. *Id.* citing *Seminole County supra* at 107 (citing *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480, 483 (Mo. 1973)). If the authority of cities to adopt comprehensive plans superseded the PSC's authority then its exclusive jurisdiction over the planning, development, and maintenance of the coordinated power grid granted pursuant to Fla. Stat. §366.04(5) would be meaningless because a local government's comprehensive plan and land development regulations could supersede the PSC's jurisdiction.

The *Seminole County* Court found the decision of the Missouri Supreme Court involving a city and utility persuasive, and it should be here as well. In *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480, 483 (Mo. 1973), the Missouri Court invalidated the City of

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<sup>3</sup> "If the authority of cities to adopt comprehensive plan superseded our authority to regulate undergrounding of lines, we would have inconsistent requirements statewide, costs could be exorbitant, and our authority would be meaningless. That is, the costs of undergrounding will affect rates regardless of the line's location, and allowing local governments to dictate terms of undergrounding, in ROWs or on private property, will result in inconsistency, high costs, and erosion of the benefit of our statewide authority." *In re City of Parker*, at 10.

Crestwood's ordinance which prohibited the construction of overhead lines finding that if all cities could enact and enforce ordinances, the statewide authority granted to Missouri's Public Service Commission would be nullified.

In the State of Florida there are approximately 100 CBRS areas, many of which power lines already travel through or connect to homes located in a CBRS unit. By way of example, Saint Joseph Bay, near Tallahassee, is located entirely within a CBRS unit. A determination that Monroe County can prohibit a customer's connection on No Name Key would set a precedent allowing Gulf County to prohibit the extension of utilities to homeowners in Saint Joseph Bay without the oversight of the PSC. This is the exact issue that has been previously addressed in *In re Parker, Seminole County, and Union Electric*.

Currently, there is no question that the property owners on No Name Key are not receiving commercial electricity from KES. There are electrified power lines on the island, but no end use facilities have been connected due to Monroe County's intransigence and insistence that it has the authority and jurisdiction to regulate who can connect to KES' power lines on No Name Key. Monroe County is trampling upon grounds that only the PSC is permitted to tread. *See In re City of Parker, supra*.

Additionally, there are no other electric utilities from which the property owners on No Name Key can receive commercial electric power. The Territorial Agreement approved in Order 25127 prevents such competitors from offering services to No Name Key property owners. This restriction implicates the anti-trust protections of the Sherman Act. *See Parker v. Brown*, 317 U.S. 341, 350, 63 S.Ct. 307 (1943). If the PSC does not police the agreement, including enforcement of its terms, and permit the property owners on No Name Key to connect to the existing grid, the property owners will not have any recourse for receiving commercial electric

power, and will be denied the same rights of other property owners in Monroe County and the State. If the PSC allows KES to deny service due to Monroe County's ordinance and the PSC fails to enforce the provision within the Territorial Agreement requiring KES to provide service to KES, then the PSC is not actively policing its approved territorial agreement thereby opening all parties to anti-trust liability. *See Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 612 (11<sup>th</sup> Cir. 1995).

Monroe County's argument is that the PSC can only settle a dispute between two electric utilities that have a territorial boundary dispute. This defies the purpose of anti-trust regulations, which is to protect the consumer.<sup>4</sup> If the PSC's only purpose is to police boundaries, then the consumer is not protected from a municipal electric utility that services customers outside its municipal boundaries as is the case here. No Name Key residents cannot vote for KES board, but are still required by the Territorial Agreement to be serviced by KES.

**B. The installation of power lines and connection to such lines by end users on No Name Key do not constitute development under Florida law.**

One of Monroe County's justifications for denying permits to property owners on No Name Key is that the installation of electric distribution lines on No Name Key constitutes development and is subject to Monroe County's Comp. Plan which guides development and Monroe County's LDRs which implement the goals, policies and objectives of Monroe County's Comp. Plan.

Monroe County's attempt to define such work as development is contrary to law, and the property owners on No Name Key should not be denied access to commercial electricity based upon Monroe County's mistake. Fla. Stat. §380.04 and the Third District Court of Appeal's

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<sup>4</sup> "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 107, 104 S.Ct. 2948 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979)).



interpretation of Fla. Stat. §380.04 in *Bd. Of County Com'rs of Monroe County v. Dep't of Cmty. Affairs*, 560 So.2d 240 (Fla. 3d DCA 1990), provide the definition of development as it pertains to work performed within the boundaries of a right-of-way.

Fla. Stat. §380.04 defines development as the carrying out of any building activity or “the making of any material change in the use or appearance of any structure or land...” Fla. Stat. §380.04(1). In addition to providing examples of activities that constitute “development” under the definition, Section 380.04 lists operations or uses that are not considered “development.” Fla. Stat. Ann. § 380.04(3). Specifically, “work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like” is not “development.” Fla. Stat. § 380.04(3)(b).

In *Bd. of County Com'rs of Monroe County v. Dep't of Cmty. Affairs*, 560 So. 2d 240 (Fla. Dist. Ct. App. 1990), Monroe County appealed a decision by the Florida Department of Community Affairs (“DCA”) due to the DCA’s attempt to prohibit Monroe County from “any and all construction” on a road on Big Pine Key, a key also located in the National Key Deer Refuge. DCA based its prohibition on that fact that the road was in an Area of Critical Concern and on the erroneous presumption that the road work constituted “development” under Fla. Stat. § 380.04. The issue before the Court was whether the DCA lacked jurisdiction over the County’s road work because the County’s road work was not “development” as defined under § 380.04. *Bd. of County Com'rs of Monroe County v. Dep't of Cmty. Affairs* at 241. The Court held that the road work was not “development” because the definition of development under § 380.04 specifically excludes work by a highway or road agency for the maintenance or

improvement of a road if the work is carried out on land within the boundaries of the right-of-way. *Id.* Therefore, the work done by the County was not development when Monroe County was a “road agency” in charge of the maintenance of the road and performed all work within the right-of-way boundaries. *Id.*

Under the County’s LDRs, a permit is required for “all construction or installation or maintenance of any public or private utility,” except for those projects which are exempted under Monroe County Ordinance §19-36. Monroe County Ordinance §19-36 provides that all public and private utilities are granted a general and continuing permit to perform maintenance and emergency repairs as may be required to maintain their service...” Section 19-36 also provides in relevant part:

....  
**(3) A permit will not be required when a public or private utility will perform work in the county right-of-way that will not cause damage to any county-owned or permitted feature within the right-of-way; provided, however, that the public works department is duly noticed in writing by the public or private utility that such work will be in progress and the anticipated time of completion.**

....  
**(6) It is not the intent of this section to restrict a public or private utility in any way from performing its service to the public as required and regulated by the public service commission or the applicable state statutes.** Local government entities have statutory authority to issue permits and prescribe and enforce reasonable rules or regulations pertaining to the use of those right-of-ways under their jurisdictional control. Public or private utilities granted the right to use the right-of-way have a duty and the county required that they restore a public road or public right-of-way to its original condition at the public or private utility's expense when such facility is damaged in the course of installing, repairing or maintaining physical plant by that utility.

*Id.* (**Emphasis added**).

The PSC has also provided the relevant rule regarding utility use of right-of-ways and also the definition of the term “subdivision”. The PSC rules are applicable to all electric public

utilities operating under its jurisdiction and are intended to define and promote good utility practices and procedures and adequate and efficient service to the public at reasonable costs, subject to the laws of the State of Florida. Rule 25-6.002(1), F.A.C. The PSC rules and regulations also establish the rights and responsibilities of both the utility and the customer. *Id.*

Also, the PSC rules provide:

Within the applicant's subdivision, the utility shall construct, own, operate and maintain distribution lines only along easements, public streets, roads, and highways which the utility has the legal right to occupy, and on public lands and private property across which rights of way and easements satisfactory to the utility may be obtained without cost or condemnation by the utility.

Rule 25-6.076, F.A.C. The term "subdivision" is defined by the PSC as a "tract of land which is divided into five (5) or more building lots or upon which five (5) or more separate dwelling units are to be located, or the land on which is to be constructed new multiple-occupancy buildings." Rule 25-6.075(6), F.A.C.

The properties on No Name Key satisfy the requirements of the PSC, and failing to allow these properties to connect to the coordinated power grid will deny these citizens of Florida adequate and efficient service. Instead, the property owners will have to continue to operate their diesel generators, supplemented by solar arrays. Any excess power these properties create will be wasted. Furthermore, the property owners will have to continue to produce the by-products of alternative energy, including exhausted batteries, damaged or worn propane tanks, and environmental and noise pollutants. By allowing the property owners on No Name Key to connect to the coordinated grid, the combined use of the existing solar capability, together with commercial grade power, could result in a positive net solar metering, thereby producing a net positive impact on the environment.

**C. Notwithstanding the Territorial Agreement, the Reynolds and the property owners on No Name Key are entitled to electric power pursuant to the Grid Bill.**

The Grid Bill was enacted to give the PSC the authority over electric utilities to require expansion of electric utilities in order to correct inadequacies in the reliability of the energy grid. The logical justification of the PSC to require installation of necessary facilities is to ensure service to electric utility customers that are not served or unreliably served. It was the intent of the Legislature when enacting the grid bill to ensure that customers would not be denied electricity. To that effect, Fla. Stat. §366.05(8) provides:

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, including inadequacies in fuel diversity or fuel supply reliability, 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.

*See Fla. Stat. §366.05(8).*

Fla. Stat. §366.05(8) states the PSC can “require installation or repair of necessary facilities” which includes “generating plants and transmission facilities”. This provision states the PSC can require installation or repair of necessary facilities. The term “necessary facilities” means it includes any necessary facilities, which would encompass distribution lines and infrastructure to connect customers. Fla. Stat. §366.05(8)’s specific inclusion of generating plants and transmission facilities is not a limitation on what are necessary facilities to just generating plants and transmission facilities, but rather, is identifying two types of facilities that are included within a larger list of facilities the PSC can require to be installed by an electric facility. If the legislature intended to limit the PSC’s ability to only be allowed to require electric utilities to install generating plants and transmission facilities it could have expressly limited it to these facilities, but the legislature did not and gave the PSC the authority to require the

installation of necessary facilities. Logically, the reason these two facilities are included is due to their extraordinary expense and size as generating plants and transmission facilities are quite costly facilities to be required to be installed by the PSC. Transmission facilities can carry electric currents over 230 kv an expensive endeavor and generating plants could include nuclear plants which cost in the billions of dollars.

When, as here, the residents of an entire geographic area are being denied access to the electric grid, the PSC has the authority, under the Grid Bill, to require that the necessary facilities be constructed in order to tie that area into the State's power grid. Thus, notwithstanding the provisions of the Territorial Agreement, pursuant to the Grid Bill, the No Name Key property owners are entitled to receive electric power from Keys Energy.

#### **CONCLUSION**

For the reasons stated previously in this Brief, the PSC has jurisdiction over the Reynolds' Complaint, and the Reynolds and No Name Key property owners are entitled to receive electric power from KES under the terms of Order 25127.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the attached Service List via email on this 19<sup>th</sup> day of April, 2013.

Respectfully submitted,

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