

Eric Fryson

From: Robert Hartsell <Robert@hartsell-law.com>
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Subject: Case 120054 Re-filing of Appendix to Initial brief of Proposed Intervener Putney on the Merits of Subject Matter Jurisdiction
Attachments: 120054 - em Appendix to initil brief.pdf

Good Afternoon,

The person filing this document is:

Robert N. Hartsell, Esq.

Robert N. Hartsell, P.A.
Federal Tower
1600 South Federal Highway, Suite 921
Pompano Beach, Florida 33062
(954) 778-1052
Facsimile: (954) 941-6462
www.hartsell-law.com
Fla Bar No. 636207

DOCKET NUMBER: 120054-EM

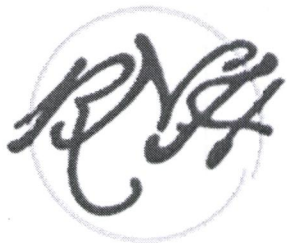
Appendix to Initial Brief of Proposed Intervener Putney on The Merits of Subject Matter Jurisdiction

Filed on Behalf of Alicia Putney

Total number of pages (including attached documents): 22 pages

Robert N. Hartsell, Esq.

Robert N. Hartsell, P.A.
Federal Tower
1600 South Federal Highway, Suite 921
Pompano Beach, Florida 33062
(954) 778-1052
Facsimile: (954) 941-6462
www.hartsell-law.com



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02090 APR 22 2013

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Robert D. Reynolds)
and Julianna 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.)
_____)

DOCKET NO. 120554-EM
DATE FILED: APRIL 19, 2013

**APPENDIX TO INITIAL BRIEF OF PROPOSED INTERVENER PUTNEY
ON THE MERITS OF SUBJECT MATTER JURISDICTION**

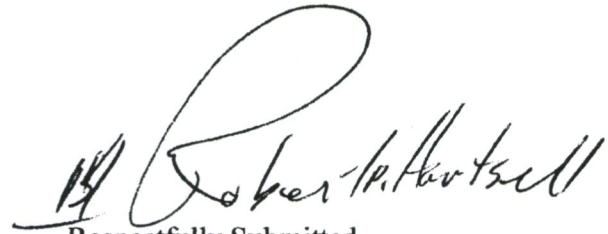
ROBERT N. HARTSELL
Florida Bar No. 0636207
Robert@Hartsell-Law.com

SARAH M. HAYTER
Florida Bar No. 0083823
Sarah@Hartsell-Law.com

Robert N. Hartsell, P.A.
Federal Tower Building
1600 South Federal Highway, Suite 921
Fort Lauderdale, Florida 33062
(P) 954-778-1052 (F) 954-941-6462

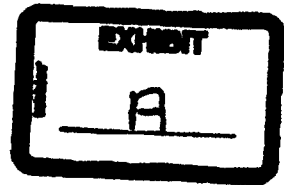
DEBRA A. SWIM
Florida Bar No. 336025
1105 Cherokee Drive
Tallahassee, Florida 323015762
(P) 850-656-0448
daswim@gmail.com

Counsel for Intervenor Putney


Respectfully Submitted
Robert N. Hartsell


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02090 APR 22 2013
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APPENDIX A



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.)

DOCKET NO. 910765-EU
ORDER NO. 25127
ISSUED: 9-27-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DERSON
MICHAEL McK. WILSON

NOTICE OF PROPOSED AGENCY ACTION

ORDER APPROVING TERRITORIAL AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

On July 10, 1991, Florida Keys Electric Cooperative (FKEC) and City Electric System (CES) filed with this Commission a joint petition seeking approval of a territorial agreement executed by the parties on June 17, 1991. The joint petition was filed pursuant to Rules 25-6.0439 and 25-6.0440, Florida Administrative Code. The territorial agreement including its terms and conditions and the identity of the geographic areas to be served by each utility are shown in Appendix A. There will be no facilities exchanged or customers transferred as a result of the agreement.

The service areas of the parties with the unique topography of the Florida Keys affords a rational for the boundary between the parties. Neither party has any distribution facilities located in the territory of the other party, and neither party will construct, operate, or maintain distribution facilities in the territory of the other party.

The agreement does not, and is not intended to prevent either party from providing bulk power supply to wholesale customers for resale wherever they may be located.

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Having reviewed the joint petition, the Commission finds that it satisfies the provisions of Subsection 366.04(2)(d), Florida Statutes and Rule 25-6.0440, Florida Administrative Code. We also find that the agreement satisfies the intent of Subsection 366.04(5), Florida Statutes to avoid further uneconomic duplication of generation, transmission, and distribution facilities in the state. We, therefore, find that the agreement is in the public interest and should be approved.

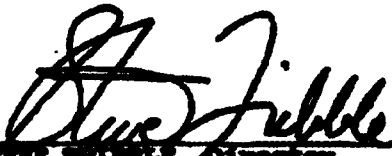
In consideration of the above, it is

ORDERED by the Florida Public Service Commission that the joint petition for approval of the territorial agreement between Florida Keys Electric Cooperative and City Electric System is granted. It is further

ORDERED that the territorial agreement and attachment are incorporated in this Order as Appendix A. It is further

ORDERED that this Order shall become final unless an appropriate petition for formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission, this
27th day of SEPTEMBER, 1991.



Steve Fiddle, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on 10/18/91.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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AGREEMENT

Not Public Utility

Section 0.1: THIS AGREEMENT, made and entered into this 17th day of JUNE, 1991 by and between the Utility Board of the City of Key West, using the trade name "City Electric System," (referred to in this Agreement as "CES") organized and existing under the laws of the State of Florida and ~~as defined in Chapter 366.02(2) Florida Statutes~~ as defined in Chapter 366.02(2) Florida Statutes; and Florida Keys Electric Cooperative Association, Inc. (referred to in this Agreement as "FKEC"); ~~organized and existing under Chapter 425, Florida Statutes, and Title 7, Chapter 31, United States Code and as an electric utility as defined in Chapter 366.02(2), Florida Statutes, each of whose retail service territories are subject to regulation pursuant to Chapter 366, Florida Statutes and which are collectively referred to in this Agreement as the "Parties";~~

WHEREAS

Section 0.2: WHEREAS, the Parties are authorized, empowered and ~~incorporated~~ by their corporate charters and the laws of the State of Florida ~~and the laws of the United States~~ ~~and are~~ ~~authorized~~ ~~to~~ ~~provide~~ ~~electric~~ ~~service~~ ~~to~~ ~~persons~~ ~~residing~~ ~~within~~ ~~their~~ ~~respective~~ ~~service~~ ~~areas~~ and

Section 0.3: WHEREAS, each of the Parties presently

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Section 8.4: WHEREAS, although the respective service areas of the Parties are contiguous, their respective areas have an existing and natural boundary between Knight Key and Little Duck Key, which boundary is intersected by the Seven Mile Bridge, and

Section 8.5: WHEREAS, the unique geographic location of the service areas of the Parties and the unique topography of the Florida Keys affords a natural and non-controversial boundary between the Parties, and

Section 8.6: WHEREAS, the Parties desire to minimize their costs to their respective rate payers by avoiding duplication of generation, transmission, and distribution facilities, and by avoiding the costs of litigation that may result in territorial disputes; and

Section 8.7: WHEREAS, the Parties desire to avoid adverse ecological and environmental consequences that may result when competing utilities attempt to expand their service facilities into areas where other utilities have also constructed service facilities; and

Section 8.8: WHEREAS, The Florida Public Service Commission (referred to in this Agreement as the "Commission"), has previously recognized that duplication of facilities results in needless and wasteful expenditures and may create hazardous situations, detrimental to the public interest; and

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Section 9.9: WHEREAS, the Parties desire to avoid and eliminate the circumstances giving rise to potential duplication of facilities and hazardous situations, and toward that end have established a Territorial Boundary Line to delineate their respective retail Territorial Areas; and

Section 9.10: WHEREAS, the Commission is empowered by Section 366.04(2)(c), Florida Statutes, to approve and enforce territorial agreements between electric utilities, has recognized the wisdom of such agreements, and has held that such agreements, subject to Commission approval, are advisable in proper circumstances, and are in the public interest;

Section 9.11: NOW, THEREFORE, in consideration of the promises aforesaid and the mutual covenants and agreements herein set forth the Parties agree as follows:

ARTICLE I

DEFINITIONS

Section 1.1: Territorial Boundary Line. As used in this Agreement, the term "Territorial Boundary Line" shall mean the boundary line shown on the map attached hereto as Exhibit "A", which differentiates and divides the FKEC Territorial Area and the CBS Territorial Area.

Section 1.2: FKEC Territorial Area. As used in this Agreement, the term "FKEC Territorial Area" shall mean the geographic areas of Monroe County shown on Exhibit "A" designated

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FEBC, and the balance of the geographic area of Monroe County, not shown on Exhibit "A" which lies North by Northeast of the Territorial Boundary Line.

Section 1.3: CES Territorial Area. As used in this Agreement, the term "CES Territorial Area" shall mean the geographic areas of Monroe County, shown on Exhibit "A", designated "CES", and the balance of the geographic area of Monroe County, not shown on Exhibit "A" which lies South by Southwest of the Territorial Boundary Line.

Section 1.4: Transmission Line. As used in this Agreement, the term "Transmission Line" shall mean any Transmission Line of either Party having a rating of 69 KV or greater.

Section 1.5: Distribution Line. As used in this Agreement, the term "Distribution Line" shall mean any Distribution Line of either Party having a rating of up to, but not including 69 KV.

Section 1.6: Person. As used in this Agreement, the term "Person" shall have the same inclusive meaning given to it in Section 1.01(3), Florida Statutes.

Section 1.7: New Customer. As used in this Agreement, the term "New Customer" shall mean any Person that applies to either FEBC or CES for retail electric service after the effective date of this Agreement.

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Section 1.8: Existing Customer. As used in this Agreement, the term "Existing Customer" shall mean any Person receiving retail electric service from either PESC or CES on the effective date of this Agreement.

Section 1.9: End Use Facilities. As used in this Agreement, the term "end use facilities" means those facilities at a geographic location where the electric energy used by a customer is ultimately consumed.

ARTICLE 2

AREA ALLOCATIONS AND NEW AND EXISTING CUSTOMERS

Section 2.1: Territorial Allocations. During the term of this Agreement, PESC shall have the exclusive authority to furnish retail electric service for end use within the PESC Territorial Area and CES shall have the exclusive authority to furnish retail electric service for end use within the CES Territorial Area.

Section 2.2: Service to New and Existing Customers. The Parties agree that neither of them will knowingly serve or attempt to serve any New or Existing Customer whose end-use facilities are or will be located within the Territorial Area of the other Party.

Section 2.3: Bulk Power for Resale. Nothing herein shall be construed to prevent either Party from providing a bulk power supply for resale purposes to any other electric utility

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regardless of where each other electric utility may be located. Further, no other Section or provision of this Agreement shall be construed as applying to a bulk power supply for resale purposes.

Section 2.4: Service Areas of Other Utilities. This Agreement between FERC and CES does not constitute an agreement or allocation of any geographic area of Monroe County, that is currently being provided electric service by electric utilities not parties to this agreement.

Section 2.5: CES Facilities in FERC Territorial Area. The Parties agree that the location, use, or ownership of transmission facilities by CES (or the use or right to the use of FERC's transmission facilities) in FERC's Territorial Area as defined herein, shall not grant CES any right of authority, now or in the future, to serve any consumers whose facilities are, or will be, located in FERC's Territorial Area.

Section 2.6: Distribution Facilities. Neither Party has any distribution facilities located in the territorial area of the other Party, and neither Party shall construct, operate, or maintain distribution facilities in the Territorial Area of the other Party.

Section 2.7: No Transfer of Customers. Neither Party has any customers located in the Territorial Area of the other Party as of the date of this Agreement, and no customers will be transferred from one Party to the other by virtue of this Agreement.

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ARTICLE 3

OPERATION AND MAINTENANCE

Section 3.1: Facilities to Remain. Electric facilities which currently exist or are hereafter constructed or used by a Party in conjunction with its electric utility system, which are directly or indirectly used and useful in service to its customers in its Territorial Area, shall be allowed to remain where situated and shall not be subject to removal or transfer hereunder except as provided in the Transmission Agreement dated February 6, 1985 between the Parties or as provided in any successor agreement; provided, however, that such facilities shall be operated and maintained in such a manner as to minimize interference with the operations of the other Party.

ARTICLE 4

PREREQUISITE APPROVAL

Section 4.1: Commission Approval and Continuing Jurisdiction. ~~The provisions of and the continued performance of this Agreement are subject to the regulatory authority of the Commission.~~ Approval by the Commission of the provisions of this Agreement shall be an absolute condition precedent to the validity, enforceability and applicability hereof. This Agreement shall have no effect whatsoever until Commission approval has been obtained, and the date of the Commission's

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order granting Commission approval of this Agreement shall be deemed to be the effective date of this Agreement. Any proposed modification to this Agreement shall be submitted to the Commission for prior approval. In addition, the Parties agree to jointly petition the Commission to resolve any dispute concerning the provisions of this Agreement or the Parties' performance of this Agreement. The Parties recognize that the Commission has continuing jurisdiction to review this Agreement during the term hereof, and the Parties agree to furnish the Commission with such reports and other information as requested by the Commission from time to time.

Section 4.2: No Liability in the Event of Disapproval. In the event approval of this Agreement pursuant to Section 4.1 hereof is not obtained, neither Party will have any cause of action against the other arising under this document.

Section 4.3: Supersedes Prior Agreements. Upon its approval by the Commission, this Agreement shall be deemed to specifically supersede any and all prior agreements between the Parties defining the boundaries of their respective Territorial Areas in Monroe County.

ARTICLE 5

DURATION

Section 5.1: This Agreement shall continue and remain in effect for a period of thirty (30) years from the date of the

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Commission's initial Order approving this Agreement, and shall be automatically renewed for additional thirty (30) year periods unless either Party gives written notice to the other of its intent not to renew at least six (6) months prior to the expiration of any period; provided, however, that each such renewal of this Agreement shall require prerequisite approval of the Commission with the same effect as the original Commission approval of this Agreement as required and provided for in Article 4 hereof.

ARTICLE 6

CONSTRUCTION OF AGREEMENT

Section 6.1: Intent and Interpretation. It is hereby declared to be the purpose and intent of the Parties that this Agreement shall be interpreted and construed, among other things, to further the policy of the State of Florida to: actively regulate and supervise the service territories of electric utilities; supervise the planning, development, and maintenance of a coordinated electric power grid throughout Florida; avoid uneconomic duplication of generation, transmission and distribution facilities; and to encourage the installation and maintenance of facilities necessary to fulfill the Parties' respective obligations to serve the citizens of the State of Florida within their respective service areas.

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ARTICLE 7
MISCELLANEOUS

Section 7.1: Negotiations. Regardless of any other terms or conditions that may have been discussed during the negotiations leading up to the execution of this Agreement, the only terms or conditions agreed upon by the parties are those set forth herein, and no alteration, modification, enlargement or supplement to this Agreement shall be binding upon either of the Parties hereto unless the same shall be in writing, attached hereto, signed by both of the parties and approved by the Commission in accordance with Article 4, Section 4.1 hereof.

Section 7.2: Successors and Assigns; for Benefit Only of Parties. This Agreement shall be binding upon the Parties hereto and their respective successors and assigns. Nothing in this Agreement, expressed or implied, is intended, nor shall be construed to deprive upon or provide any party 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.

Section 7.3: Notices. Notices given hereunder shall be deemed to have been given to FKEC if mailed by certified mail, postage prepaid to

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General Manager
Florida Keys Electric Cooperative Association, Inc.
91605 Overseas Highway
Tavernier, Florida 33070

and to CES if mailed by certified mail, postage prepaid to:

General Manager
City Electric System
P. O. Box 6100
Key West, Florida 33041-6100

The person or address to which such notice shall be mailed may, at any time, be changed by designating a new person or address and giving notice thereof in writing in the manner herein provided.

Section 7.4: Petition to Approve Agreement. Upon full execution of this Agreement by the Parties, the Parties agree to jointly file a petition with the Commission seeking approval of this Agreement, and to cooperate with each other and the Commission in the submission of such documents and exhibits as are reasonably required to support the petition.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed in duplicate in their respective corporate names and their corporate seals affixed by their duly authorized officers on the day and year first above written.

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ATTEST:

UTILITY BOARD OF THE CITY OF
KEY WEST, "CITY ELECTRIC SYSTEM"

R. H. P. Palm
Robert H. Palm,
Secretary

By: *William T. Cates*
William T. Cates

Title: Chairman

(SEAL)

ATTEST:

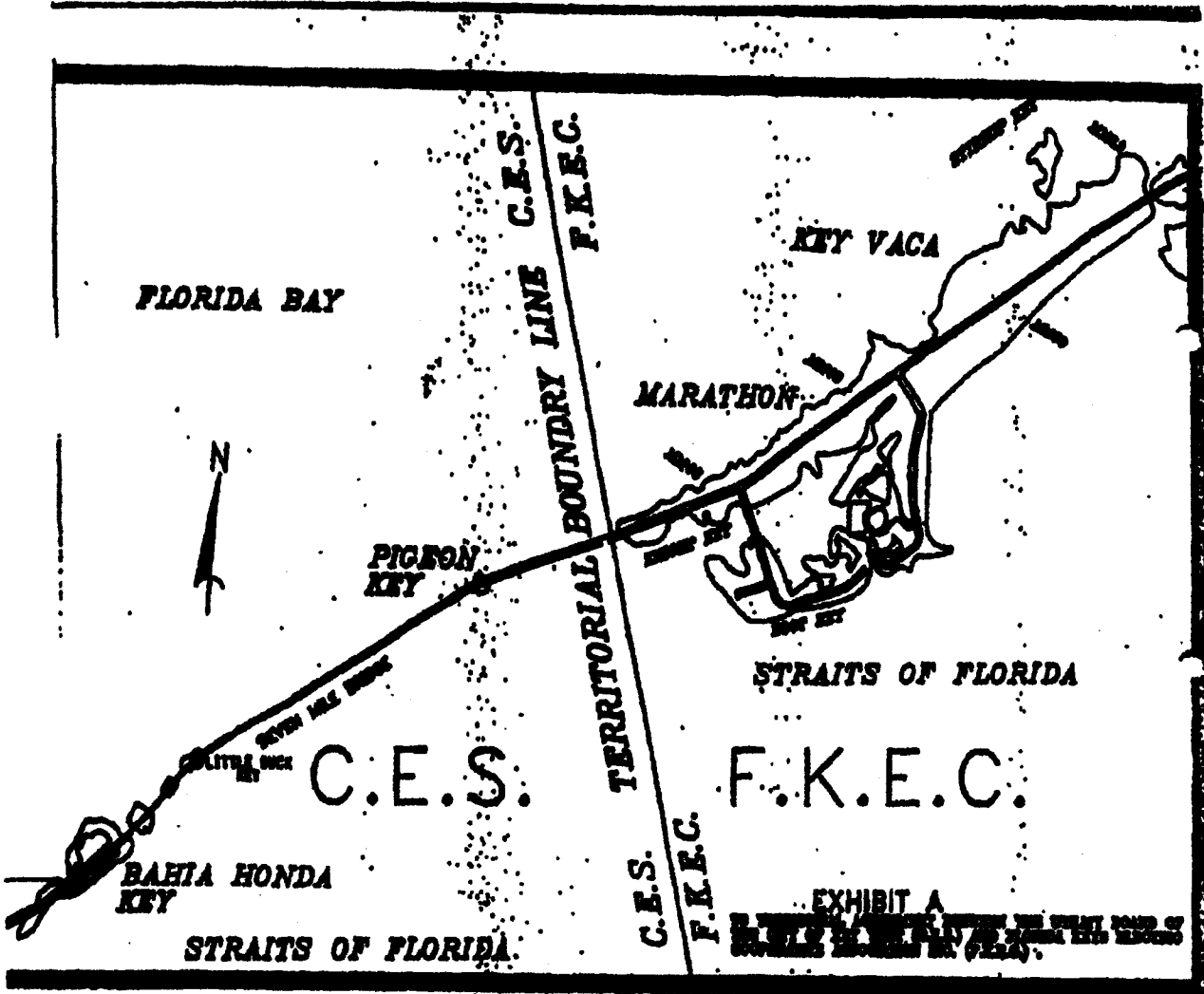
FLORIDA KEYS ELECTRIC COOPERATIVE
ASSOCIATION, INC.

R. L. Brown
R. L. Brown, Secretary

By: *B. L. Schwartz*
B. L. Schwartz

Title: President

(SEAL)



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APPENDIX B

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

TAXPAYERS FOR THE ELECTRIFICATION
OF NO NAME KEY, INC., *et al.*

Plaintiffs,

v.

CASE NO. 99-819-CA-18
Honorable Judge Sandra Taylor

MONROE COUNTY, a political subdivision
of the State of Florida, and CITY ELECTRIC
SERVICE,

Defendants

and

DR. SNELL PUTNEY and ALICIA ROEMMELE-PUTNEY,

Intervenors.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

THIS MATTER having come before the Court on Defendant Monroe County's Motion for Summary Judgment, Intervenor, Putney's Motion for Summary Judgment, various affidavits and attachments thereto, responses to requests for admissions and interrogatories filed with the court, Report and Recommendation of Special Master, and Defendant Monroe County's Exceptions to Report of Special Master, Intervenor Putney's Exceptions to Report and Recommendation of Special Master, the Court having reviewed the pleadings, heard argument of counsel, and being otherwise duly apprised, it is hereby:

ORDERED and ADJUDGED that the Report and Recommendation of Special Master is hereby REJECTED, Monroe County and Intervenors' Exceptions to said Report are hereby GRANTED and Defendant Monroe County's Motion for Summary Judgment is hereby GRANTED on the following grounds:

1. Plaintiffs' Equal Protection and Vested Rights claims are barred by res judicata. See *Verdi v. Metropolitan Dade County*, 684 So.2d 870 (Fla. 3d DCA 1996); *Key Haven Associated Enters. v. Board of Trustees*, 427 So.2d 153 (Fla. 1982). Plaintiffs failed to appeal Resolution P17-99 of the Monroe County Planning Commission to the Board of County Commissioners as provided in the County's Land Development Regulations. Plaintiffs are thus barred from re-litigating the factual findings and legal conclusions therein relative to the rational basis for the county's decision to deny the extension of electric service to No Name Key, the lack of a substantial and detrimental change of position based on the standard electric wiring requirements for the issuance of building permits, and the consistency of that decision with the county's Comprehensive Plan. The findings within Resolution P17-99 are dispositive of Plaintiffs' Equal Protection and Vested Rights claims. Therefore, summary judgment is granted, in favor of Defendants.

2. Plaintiffs have no statutory or property right to have electric power extended to their homes, which are operated with alternative, typically solar, energy sources. Section 366.03, Fla. Stat. does not apply to Defendants Monroe County or City Electric Service. Even if it did apply here, Section 366.03, Fla. Stat., does not provide a right to commercial electric service if such service would be inconsistent with Chapters 163 and 380 or the Monroe County Comprehensive Plan. *Utilities Commission of New Smyrna Beach v. Florida Public Service Commission*, 469 So.2d 731 (Fla. 1985); *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968); *Gulf Coast Electric Co-op., Inc. v. Johnson*, 727 So.2d 259 (Fla. 1999). This is particularly true given that utilities governed by this section are authorized to consideration of consistency with a local government comprehensive plans. See *City of Oviedo v. Clark*, 699 So.2d 316 (Fla. 1st DCA 1997). This negates a claim of a statutory entitlement to the receipt of electric power in a manner that is inconsistent with a local comprehensive plan.

3. Plaintiffs' Vested Rights claim fails as a matter of law because Plaintiffs fail to establish an affirmative government act of approval by Monroe County as to the expansion of commercial electric service to No Name Key. Plaintiffs' claim is based on an implied expectation and therefore fails to support a Vested Rights claim.

DONE and ORDERED in chambers located in Key West, Monroe County, Florida this

11th day of July, 2002.

RICHARD G. PAYNE

Honorable Richard Payne
CIRCUIT JUDGE

cc: Karen Cabanas, Esq.
Nathan Eden, Esq.
Frank Greenman, Esq.
Richard Grosso, Esq.