BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

120054-EM -BM

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: MAY 2, 2013

ALICIA ROEMMELE-PUTNEY'S MOTION FOR STAY OF PROCEEDINGS

Alicia Roemmele-Putney, moves for an order staying this proceeding pursuant to §120.68(3) Florida Statutes and §9.190(e)(2) Florida Rules of Appellate Procedure, and in support thereof state:

1. Today Alicia Roemmele-Putney filed a Petition for Expedited Review of Non-Final Agency Action with the Supreme Court of Florida seeking to reverse this Hearing Officer's Order Denying Petition to Intervene. Attachment A.

2. Staying this proceeding for the duration of the review proceedings of the Supreme Court of Florida will minimize the unnecessary expenditure of the parties' and PSC resources, and will advance the interests of justice. *See* Hathaway v. Munroe, 97 Fla. 28, 32 (Fla. 1929).

3. Ms. Putney will be prejudiced if the case were to continue without her participation as an Intervenor to establish a proper record.

4. No parties will be prejudiced by a stay of the proceedings as no final order may be granted with a pending appeal of a non-final order. Citizens Property Ins. Corp. Scylla Properties, LLC, 946 So.2d 1179 (Fla1st DCA 2006).

WHEREFORE, Ms. Putney respectfully request this Hearing Officer stay the proceedings in this case until such time as the Supreme Court of Florida rules on Proposed Intervener's Petition for Expedited Review of Non-Final Agency Action.

RESPECTFULLY SUBMITTED this 6th day of May, 2013.

By: _____
Robert N. Hatsell, Esq.
Florida Bar No. 99456

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served to the Clerk, Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850; and a copy furnished via E-Mail to the following parties listed below on this 6th day of May, 2013.

_____
Robert N. Hartsell, Esq.
Florida Bar No. 636207
Robert@Hartsell-Law.com
Sarah M. Hayter, Esq.
Florida Bar No. 83823
Sarah@Hartsell-Law.com
ROBERT N. HARTSELL, P.A.
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
(954) 778-1052
Fax (954) 941-6462

Martha Carter Brown
Curt Kiser
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
mcbrown@psc.state.fl.us

Andrew M. Tobin
P.O. Box 620
Tavernier, FL
tobinlaw2@gmail.com
tobinlaw@terranova.net

Barton W. Smith
Barton Smith, P.L.
624 Whitehead Street
Key West, Florida 33040
Bart@bartonsmithpl.com

Robert D. Reynolds & Julianne C. Reynolds
2160 Bahia Shores Road
No Name Key, Florida 33042

J.R. Kelly
Office of Public Counsel
c/o the Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
KELLY.JR@leg.state.fl.us

Dale Z. Finigan
Keys Energy Services
P.O. Drawer 6100
Key West, Florida 33041-6100
dale.finigan@keysenergy.com

Nathan E, Eden
Nathan E. Eden, P.A.
302 Southard Street, Suite 205
Key West, Florida 33040
dedenkwf@bellsouth.net

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALICIA ROEMMELE-PUTNEY,

Petitioner,

FLSC Case No. _____
PSC Docket No. 120054-EM

vs.

PUBLIC SERVICE COMMISSION,
EDUARDO E. BALBIS,
Hearing officer,

Respondents,

_____/

PETITION FOR EXPEDITED REVIEW OF NON-FINAL ACTION BY PUBLIC SERVICE COMMISSION HEARING OFFICER
Fla.R.App.P. 9.100(a)

INDEX TO PETITIONERS' PETITION

Page

I. Table of Authorities

CASES

Florida Supreme Court Cases

Florida Appellate Cases

Florida Circuit Court Cases

Monroe County Decisions

FLORIDA STATUTES

FEDERAL STATUTES

FLORIDA RULES

II. Introduction, Jurisdiction and Venue

Pursuant to Art. V, Section 3(b)(2), Fla. Const., Section 120.68(1) Fla. Stat. and Fla.R.App.P. 9.100(a), Petitioner Alicia Roemmele-Putney respectfully petitions the Supreme Court for expedited review of Hearing Officer Eduardo Balbis' (Hearing Officer Balbis) April 19, 2013 Order Denying Petition to Intervene. App. 1. Expedited review of this non-final order in Public Service Commission Docket No. 120054-EM is necessary because review of the final agency action after completion of the proceeding below would not provide adequate remedy and would deny Petitioner Roemmele-Putney the opportunity to establish a record upon which it can appeal, as well as factually establishing appellate standing.

Denial of a motion to intervene by an administrative agency such as the PSC is a non-final order subject to immediate appellate review. The scope of review of

a non-final order is similar to that of certiorari review. Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651, 652-53 (Fla. 3rd DCA 2012); CNL Resort Hotel, L.P. v. City of Doral, 991 So. 2d 417, 419-20 (Fla. 3rd DCA 2008). The order denying Roemmele-Putney's motion to intervene in the present case is subject to immediate appellate review.

This Petition is timely under Rule 9.100(c) because it is filed within 30 days of rendition of the order to be reviewed. App. 1 at 3. Rule 9.100(c) provides that the following shall be filed within 30 days of rendition of the order to be reviewed: [...] (3) A petition to review non-final agency action under the Administrative Procedures Act. An order is rendered when a signed, written order is filed with the clerk of the lower tribunal. Rule 9.020(h), Fla. R. App. P. The order on review was "rendered" by the clerk on April 19, 2013.

The order states that "any party adversely affected party by the order, which is preliminary, procedural or intermediate in nature, may request ... judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility." App. 1, p. 4. Judicial review of this administrative action is commenced appropriately under Rule 9.190, 9.100(a) and (c), and 9.030(a)(3), Fla. R. App. P. Petitioners seek a review of a non-final agency action under the Administrative Procedure Act Section 120.68(1) Fla. Stat. quashing the order denying intervention rendered by Hearing Officer Balbis and challenged by the Petitioners.

III. Facts on Which Petitioner Relies

The Parties to the Proceeding and Interested Parties

Alicia Roemmele-Putney ("Roemmele-Putney") resides on and owns real property on No Name Key at 2150 No Name Drive, No Name Key, Florida. Roemmele-Putney filed a Petition to Intervene in the Public Service Commission proceeding Docket No. 120054-EM. The issue of preservation v. central-grid-supplied electrification of No Name Key has been disputed by numerous residents over the past decade or more and has been the subject of several previous law suits. Roemmele-Putney, and her late husband Dr. Snell Putney during his lifetime, were named Intervenor Parties to just about every single action on the same issues before the PSC today including Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, 16th Judicial Circuit, Monroe County, Case No. 99-819-CA-19 (June 13, 2003) (App. 2), Monroe County v. Utility Board of the City of Key West d.b.a. Keys Energy Services, et al., 2011-CA-342-K (Circuit Court of the 16th Judicial Circuit in and for Monroe County (Jan. 30, 2012) (App. 3), Roemmele-Putney v. Reynolds, 106 So.3d 78 (Fla. 3rd DCA 2013) (App. 4) and Monroe County v. Utility Board of the City of Key West d.b.a. Keys Energy Services, et al., 2012-CA-549-K (Circuit Court of the 16th Judicial Circuit in and for Monroe County (Feb. 21, 2013) (App. 5).

Complainants before the PSC below, Robert D. Reynolds and Julianna C. Reynolds ("Reynolds"), own and maintain real property located at 2160 Bahia Shores Road, No Name Key, Florida 33042 ("Property"). The Property is located on an island in Monroe County, Florida, commonly known as No Name Key. The Reynolds' desire to obtain central-grid-supplied commercial electric but are prohibited by the duly adopted Monroe County Comprehensive Plan and Land Development Regulations.

Defendant before the PSC below, Utility Board of the City of Key West, Florida, d.b.a. Keys Energy Services ("KES"), is a Florida electric utility duly organized and existing under the laws of the State of Florida with its principal place of business at 1001 James Street, Key West, Florida, which is located in Monroe County, Florida. KES at all times relevant, has been engaged in the business of providing electricity to customers located south of the Seven Mile Bridge in Monroe County.

Intervenor Monroe County is a political subdivision of the State of Florida and was designated as an Area of Critical State Concern ("ACSC") in 1979. Monroe County has a statutory duty to adopt, maintain and strictly enforce its comprehensive plan and land development regulations. §§ 163 *et. seq.*, 380.05 and 380.0552, Fla. Stat. (2012).

Intervenor No Name Key Property Owners Association, Inc., is a Florida not for profit ("NNKPOA"). NNKPOA is made up of several property owners who own property on No Name Key, Florida and want to connect to central-grid-supplied commercial electrical service.

Florida Keys Electric Cooperative Association, Inc. ("FKEC") is a rural electric cooperative duly organized and existing under the laws of the State of Florida with its principal place of business at 91630 Overseas Highway, Tavernier FL 33070, which is located in Monroe County, Florida. FKEC at all times relevant, has been engaged in the business of providing electricity to customers located north of the Seven Mile Bridge in Monroe County. FKEC and KES are the sole parties to a June 17, 1991 Territorial Agreement discussed herein. FKEC is not a Party to the litigation.

The Florida Public Service Commission ("Commission") is the independent state agency vested with regulatory authority over utilities, including "electric utilities", such as KES and FKEC (and "public utilities", such as Florida Power and Light), in three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues. The Commission consists of five commissioners, each appointed by the Governor of the state of Florida. The Commission is a creature of statute and arm of the legislative branch of government.

Commissioner Eduardo E. Balbis is the Florida Public Service Commissioner assigned to adjudicate pre-hearing matters in the present docket, In re: complaint of Robert D. Reynolds and Julianne C. Reynolds against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida, including the Order at issue in this appeal, Order No. PSC-13-0161-PCO-EM denying Alicia Roemmele-Putney's amended petition to intervene. Commissioner Balbis has served on the Commission since November 2010, and his current term expires January 1, 2015.

The Land

No Name Key is a small island within the Florida Keys that is connected via bridge to the East end of Big Pine Key in Monroe County. The Florida Keys are designated Area of Critical State Concern under Section 380.05 Fla. Stat. and No Name Key is specifically subject to protection under the Florida Keys Protection Act, Section 380.0552, F.S. There are 43 lots of developed properties on No Name Key. These homes are operated with off-grid, typically solar, energy sources. *See* Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, Case No. 99-819-CA-19.

Coastal Barrier Resource Act

No Name Key lies within the federally-designated Coastal Barrier Resources System ("CBRS") unit FL-50 under the Coastal Barrier Resources Act. 16 U.S.C. 3501 *et. Seq.* CBRS units were designated to protect human life and conserve natural resources. Specifically, the Coastal Barrier Resources Act states:

> "The Congress declares that it is the purpose of this Act to **minimize the loss of human life**, wasteful expenditure of Federal revenues, and the **damage to fish, wildlife, and other natural resources associated with the coastal barriers** along the Atlantic and Gulf coasts and along the shore areas of the Great Lakes by restricting future Federal expenditures and financial assistance which have the **effect of encouraging development of coastal barriers**, by establishing the John H. Chafee Coastal Barrier Resources System, and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved." 16 U.S.C. 3501 (b) *(Emphasis added).*

The Monroe County Comprehensive Plan

Recognizing the importance of protecting human life and protecting natural resources, particularly the life and property of the CBRS residents, including the residents of No Name Key, Monroe County adopted specific Comprehensive Plan Policies (Comp Plan) and Land Development Regulations, pursuant to § 163.3177, Fla. Stat.. The Comp Plan includes the following policies:

> **"Policy 103.2.10:** Monroe County shall take immediate actions to discourage private development in areas designated as units of the Coastal Barrier Resources System. (See Objective 102.8 and related policies.)";

> **"Policy 215.2.3:** No public expenditures shall be made for new or expanded facilities in areas designated as units of the Coastal Barrier Resources System, saltmarsh and buttonwood wetlands, or offshore islands not currently accessible by road, with the exception of expenditures for conservation and parklands consistent with natural resource protection, and expenditures necessary for public health and safety";
>
> **"Policy 1301.7.12:** By January 4, 1998, Monroe County shall initiate discussions with the FKAA and providers of electricity and telephone service to assess the measures which could be taken to discourage or **prohibit extension of facilities and services to Coastal Barrier Resource Systems units.**" (*Emphasis added*).

Monroe County Code § 130-122

Monroe County Code ("MCC") § 130-122 prohibits the extension of various public utilities including electricity within a certain area of the County designated as the CBRS Overlay District. As directed by Chapter 163, F.S., this section of the code implements the policies of the County's comprehensive plan – in this instance by adopting by reference the federally-designated boundaries of the CBRS Overlay District on current flood insurance rate maps approved by the Federal Emergency Management Agency.

The pertinent section of MCC § 130-122(b) reads: "Within this overlay district, the transmission and/or collection lines of the following types of public utilities shall be prohibited from extension or expansion: central wastewater treatment collection systems; potable water; electricity, and telephone and cable."

The Territorial Agreement

An agreement was made on June 17, 1991 between KES and FKEC. The agreement delineates the territorial boundaries of the utility parties. App. 6. The boundary was established at the Seven Mile Bridge, such that KES would serve those areas south from Pigeon Key and FKEC would serve those areas north from Knight Key. App. 6. The Territorial Agreement was approved by the Public Service Commission as required by law on September 27, 1991. In Re: Joint Petition of Florida Keys Electric Cooperative and Utility Board of the City of Key West for Approval of a Territorial Agreement, Docket No. 910765-EU, Order No. 25127 (Fla. Pub. Serv. Comm'n 1991). App. 6.

Territorial agreements exist to prevent the uneconomic duplication of electric facilities and to protect utilities against unnecessary, expensive competitive practices. The PSC's oversight and approval of such agreements to divide territory provide utility parties to such agreements with the benefit of protection against antitrust liability, which liability would otherwise exist if utility companies were to divide up service areas in restraint of competition.

Previous Litigation Regarding Electrification of No Name Key

The issue of preservation versus central-grid-supplied electrification of No Name Key has been disputed by numerous residents over the past decade or more. The commercial central-grid-supplied electrification of No Name Key has been the subject of a previous law suit. In 1999, the Taxpayers For The Electrification of

No Name Key, Inc. (predecessor organization to No Name Key Property Owners Association) filed a Complaint in the Sixteenth Judicial Circuit seeking, *inter alia*, declaratory relief that they had a statutory or property right to have central-grid-supplied electric power extended to their homes on No Name Key. Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, 16th Judicial Circuit, Monroe County, Case No. 99-819-CA-19 (June 13, 2003). Alicia Roemmele-Putney was an intervening Defendant in that case. App. 2. In 2002, the Court in Taxpayers denied the requested relief, holding that plaintiff property owners did not have a "statutory or property right to have electric power extended to their homes, which are operated with alternative, typically solar, energy sources." App. 2. The Court further concluded, "Section 366.03, Fla. Stat. does not apply to Defendants Monroe County or Keys Energy Service (KES). 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." App. 2 at 3.

The most recent legal dispute began when the County filed a complaint for declaratory judgment and injunctive relief against KES and the No Name Key property owners in the 16th Judicial Circuit for Monroe County, naming Roemmele-Putney as a Defendant. The County asked the Circuit Court to determine whether the County could, based on the provisions of the legally

promulgated Comprehensive Plan, preclude Keys Energy from providing electric service to the island. In the fall of 2012, despite the pendency of the ongoing litigation, Line Extension #746 to and through No Name Key was completed and energized despite the efforts of the County and Roemmele-Putney to enjoin the activity. The Circuit Court dismissed the action with prejudice, holding that the Commission has exclusive jurisdiction to determine whether KES should provide electric service to No Name Key property owners. App. 3. Intervenor Roemmele-Putney appealed this Circuit Court's decision to the Third District Court of Appeals where the Florida Public Service Commission submitted an amicus brief and the Circuit Court's decision was affirmed. Alicia Roemmele-Putney et. al. v. Robert D. Reynolds, et. al., 106 So.3d 78, 82 (Fla. 3rd DCA 2013). The Third District Appellate Court held that the Commission is to determine the scope of its own jurisdiction over the No Name Key controversy. App. 4.

The present docket, In re: complaint of Robert D. Reynolds and Julianne C. Reynolds against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida, was initiated on March 5, 2012 when the Reynolds filed a Complaint against Keys Energy Services for failure to provide electric service to their residence. The Reynolds filed an Amended Complaint on March 13, 2013, and a Second Amended Complaint to correct a scrivener's error

on March 20, 2013. The Reynolds filed a Third Amended Complaint on May 1, 2013.

On March 25, 2013, the Commission issued Order No. PSC-13-0141-PCO-EM requesting that the parties to the proceeding file briefs addressing the legal issues laid out therein, specifically:

> 1. Does the Commission have jurisdiction to resolve Reynolds' complaint?
>
> 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. 251727 approving the 1991 territorial agreement between Keys Energy and the Florida Keys Electric Cooperative?

Those briefs were due on April 19, 2013.

On the morning of April 19, 2013, before any such briefs were filed (and before the 3rd amended complaint was filed on May 1, 2013), Petitioner Roemmele-Putney was informed via telephone call from the Commission's Counsel that the hearing officer was denying Petitioner Roemmele-Putney's Petition to Intervene and that an Order was soon be forthcoming. Additionally, Petitioner Roemmele-Putney was informed that the Petition to Intervene on behalf of the No Name Key Property Owners Association was being granted. The subject of this Petition, Order No. PSC-13-0161-PCO-EM denying Alicia Roemmele-Putney's Amended Petition to Intervene, was issued on April 19, 2013. App. 1.

IV. Nature of Relief Sought

Petitioner seeks review of Order No. PSC-13-0161-PCO-EM denying Alicia Roemmele-Putney's amended petition to intervene and reversal insofar as it would permit Petitioner Roemmele-Putney to intervene and be an official party in the Public Service Commission proceeding of In re: Complaint of Robert D. Reynolds and Julianne C. Reynolds against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services regarding extending commercial electric transmission lines to each property owner of No Name Key, Florida. At issue in the case below is the Commission's jurisdiction to order the extension of grid-connected central power to an undeveloped island -- even though such extension is prohibited by a state-approved locally adopted comprehensive plan and ordinance that is based on a federally-designated system to protect undeveloped coastal barriers for economic and environmental policy purposes.

Petitioner also seeks a stay of proceedings below and is filing a separate Motion for Stay with the Public Service Commission contemporaneously with the instant petition.

V. Argument in Support of the Petition

The Public Service Commission departed from the essential requirements of law where it denied intervention to Petitioner Roemmele-Putney. App 1.

A. Petitioner meets the Agrico Test for Standing

The Public Service Commission relies on the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981). The test requires that the intervenor show that (1) she will suffer injury in fact which is of sufficient immediacy to entitle her to a Section 120.57 Fla. Stat. hearing, and, (2) the substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury while the second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai Alai Players Assn. v Florida Pari-Mutuel Commission, 561 So.2d 1224 1225-26 (Fla. 3rd DCA 1990).

Agrico was not intended as a barrier to the participation in proceedings under Chapter 120, Fla. Stat., by persons who are affected by the potential and foreseeable results of agency action. Rather, —[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings. Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

Standing is a forward-looking concept and cannot disappear based on the ultimate outcome of the proceeding. When standing is challenged during an

administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests —could reasonably be affected by . . . [the] proposed activities. Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d at 1078(citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2nd DCA 2009); Hamilton County Bd. of Cnty. Comm'rs v. State, Dep't of Envtl. Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) (Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.).

Agrico First Prong – Real and Immediate Injury

With respect to the first prong of the Agrico test, Petitioner Roemmele-Putney has demonstrated an injury in fact that is real and immediate. As described in her Petition to Intervene, No Name Key, as well as the entire Florida Keys, are environmentally sensitive areas and therefore protected by both State and Federal Law. App. 7. Specifically, No Name Key is a federally protected National Key Deer Wildlife Refuge and lies with federal Coastal Barrier Resources System. Monroe County's development ordinances appropriately contemplate the No Name

Key's unique environmental vulnerabilities and has designed their comprehensive plan accordingly. App. 8.

It is an established, well-known fact that extending such commercial power to an area undoubtedly increases the commercial desirability and property values of that area. The Monroe County Planning Commission recognizes that expanding infrastructure availability by extending central-grid-supplied commercial electricity to No Name Key will increase the development expectations of the owners of vacant land on the island.[1] See App. 8. This is so even where such electric power is only provided to already developed lots. See App. 8, App. 9. In a recent Order of appeal regarding an individual No Name Key property owner's application for a building permit to connect a newly built power line held:

> "The Findings of Fact stated in Resolution No. P17-99 [App. 8] generally remains true and accurate today as they did back in 1999. Appellant presented no evidence to negate the findings that (a) No Name Key's community and environmental character is unique; (b) there is a causal relationship between the availability of utility infrastructure and new development; and (c) those that seek to live among an alternative energy community in Monroe County have fewer choices than those that prefer a conventional energy community." App. 8, pp. 6-7.
>
> [...]
>
> "Allowing a landowner on No Name Key to connect to a commercial power grid would lead to an increase in development expectations of

[1] This is recognized by the Monroe County Planning Director's complete testimony that is attached in part by the Reynolds' Complaint in the action below. See also App. 9.

the owners of vacant lands on the island, and this would be in contravention of public health safety and welfare." (*Emphasis added*). App. 8, p. 8.

Furthermore, development alone has a wide array of adverse impacts on any community, much less an environmentally sensitive community such as No Name Key. Historically, Monroe County has strictly prohibited extension of commercial utilities onto No Name Key, specifically, in order to inhibit development, and the adverse impacts that follow development, as well as protecting and enhancing the natural environment and the six federally listed endangered species with habitat in No Name Key. App. 8, p. 8. "The overall intent of the Comprehensive Plan is to discourage the provision of utilities, including electricity, to or through lands within a Coastal Barrier Resources System unit, including those on No Name Key, and discourage development in environmentally sensitive areas." App. 8, p. 8.

Roemmele-Putney's interests are in line with and rely upon the objectives that Monroe County has defined in recognizing that No Name Key is not suitable for high density development, and therefore should not have the extension of commercial power. App. 8. If the public welfare concerns of Monroe County in protecting No Name Key were not substantial, they would not be incorporated into the County's development ordinances. Most importantly, Petitioner Roemmele-Putney is a resident of No Name Key, and therefore her safety, property and quality of life interests are substantial in a proceeding that may, if the PSC asserts

jurisdiction, determine whether commercial power will be extended to the island upon which she maintains her permanent residence.

The Order incorrectly states that Roemmele-Putney has not demonstrated an injury in fact that is real and immediate. App. 1, p. 3. On the contrary, the fact that Roemmele-Putney will not be *required* to connect to the central power grid, if it were extended to No Name Key, does not negate her actual injury. The mere presence of central-grid-connected commercial electric power on No Name Key is her injury, as demonstrated by the fact that, read as a whole, the Monroe County comprehensive plan prohibits the exact situation. App. 8; See also Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 208 (Fla. 4th DCA 2001) ("Every citizen in the community is intangibly harmed by a failure to comply with the Comprehensive Plan, even those whose properties may not have been directly diminished in value."). Thus, it is recognized and understood that the fragility of the Florida Keys and No Name Key requires specific protections, and if commercial electric power is extended to No Name Key, the potential for injury to the island, and its inhabitants, is certain and real.

Moreover, the presence of a central power grid on the historically off grid island of No Name Key inexorably changes the community character of the island. As determined by the Monroe County Planning Commission during a hearing on the same matter, allowing a landowner on No Name Key to connect to a

commercial power grid would negatively impact, perhaps destroy, the alternative energy character of the island, and this would be in contravention of the public welfare. App. 8, p. 8. Thus, hearing officer Balbis was incorrect in finding that Petitioner Roemmele-Putney, being a resident of the solar community of No Name Key, will suffer no actual injury by the allowance of *other* No Name Key property owners to be served commercial-grid electricity by KES. App. 1, p. 3. On the contrary, Petitioner Roemmele-Putney's position will not remain the same even if she does not request service from KES because *any* such commercial-grid electric service to No Name Key destroys the alternative energy character of her community.

The Order grossly misstates that "suppositions that Ms. Roemmele-Putney's quality of life will be adversely affected or that commercial power infrastructure in the island would degrade her enjoyment of property are too speculative to confer standing." App. 1, p. 3. On the contrary, it is an outcome that has already been anticipated and planned for by Monroe County. If the County, following the federal government's work in designating the Coastal Barrier Resources System, had not designed and implemented such strict laws prohibiting extension of utility power, water and sewer lines, Ms. Roemmele-Putney's alleged injury might be considered speculative, but the fact is that the laws exist to prevent this exact sort of result. App. 8.

Agrico Second Prong – Substantial Interest the Proceeding is Designed to Protect

With respect to the second prong of the Agrico test, the Order incorrectly states that Petitioner Roemmele-Putney has not alleged an interest that this proceeding is designed to protect. App. 1, p. 3. Agrico being the established test for standing in this proceeding, it is necessary to examine the discussion of the court in that opinion. The underlying proceeding in Agrico pertained to an environmental permitting application under Chapter 403, Fla. Stat. and the Petitioner, who was not the applicant, claimed an injury that was purely economic in nature. In denying standing to Petitioner, the court stated:

> "Chapter 403 simply was not meant to redress or prevent injuries to a competitor's profit and loss statement. Third-party protestants in a chapter 403 permitting procedure who seek standing must frame their petition for a section 120.57 formal hearing in terms which clearly show injury in fact to interests protected by chapter 403. If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing and proceed on the permit directly with the applicant." 406 So.2d 478, 482.

Thus, Agrico recognizes that a party to the proceeding must show substantial interests that all of Chapter 403, Fla. Stat., is designed to protect, not merely the permitting provisions of Chapter 403. The Order denying Intervention in this case states:

> "Ms. RoemmelePutney has not alleged an interest that this proceeding is designed to protect. This proceeding is conducted pursuant to the

> authority granted to the Commission by the terms of Sections 366.04(2) and (5) over territorial agreements between electric utilities, to facilitate the planning development, and maintenance of a coordinated electric power grid throughout Florida." App. 1, p. 3-4.

In conflict with Agrico, the order narrowly assumes that these specific jurisdictional provisions control the entire intent of Chapter 366, Fla. Stat., and the Commission, and ignore the legislative declaration made at the outset of Chapter 366, which states as follows:

> "The regulation of public utilities as defined herein is declared to be in the *public interest* and this chapter shall be deemed to be an exercise of the police power of the state for the *protection of the public welfare* and all the provisions hereof shall be *liberally construed for the accomplishment of that purpose*." (*Emphasis added*).

Thus, assuming the Commission even has jurisdiction to decide the Reynolds' complaint, any exercise of power to regulate utilities within Monroe County must be in protection of the public welfare of Monroe County citizens, as well as the entire State of Florida.

The hearing officer erroneously interprets Petitioner Roemmele-Putney's interests as self-serving and not in the public interest as a whole. The record of the multiple legal proceedings over the past fourteen years clearly shows that Petitioner Roemmele-Putney's participation in this matter has always been in support of Monroe County and in upholding Monroe County's lawfully adopted planning ordinances, which are specifically designed to protect the unique and

endangered resources of the Florida Keys. While it is true that the continued enforcement of Monroe County's comprehensive plan will protect Petitioner Roemmele-Putney's interests in the environment on No Name Key, quality of life on No Name Key and her property on No Name Key, this is the purpose for which it serves. Planning ordinances are law and the citizens of Monroe County are fully entitled to rely on them for their protection. See 163.3161(6), Fla. Stat. (2012). The hearing below seeks to answer the question of whether the Monroe County comprehensive plan and land development regulations that which Roemmele-Putney relies to protect her interests applies to Keys Energy Services.

In Fla. Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253 (Fla. 1990) this honorable Court held that "the PSC must be allowed to act when it has at least a colorable claim that the matter under its consideration falls within the exclusive jurisdiction as defined by statute." It would lead to an absurd result if under the broad subject matter jurisdiction authority granted, the PSC narrowly granted standing to participate. The result, as here, leaves Roemmele-Putney without a forum to protect her interest. In the previous appeal in Roemmele-Putney v. Reynolds, the Third DCA recognized this possibility and held that "any claim by the County or by the appellant homeowners [Roemmele-Putney] 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." 106 So.3d 78, 81 (Fla. 3rd DCA

2013). App. 4. The Court concluded "the appellants [Roemmele-Putney and County] do retain, however, the right to seek relief before the PSC, and we express no opinions as to the merits of any such claims by the appellants in that forum. Id. at 81. App 5.

Furthermore, Monroe County's Comprehensive Plan was adopted pursuant to the "Community Planning Act," Chapter 163, Fla. Stat., which clearly expresses intent that growth management be in the public interest, in order to protect the resources of our state:

> It is the intent of this act that local governments have the ability to preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions. (2012).

The mere fact that Petitioner Roemmele-Putney benefits from the general intent of growth management, and specifically Monroe County's well designed environmentally protective comprehensive plan, does not in effect invalidate her interests as an individual resident and property owner.

Lastly, the hearing officer's reliance on the holding in Order No. PSC-06-0956-PCO-GU, in Docket No. 060635-EU, In re: Petition for Determination of need for electrical power in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee, issued November 16, 2006, is entirely misplaced. App. 1, p. 4. As the Order states, "in that proceeding, the Commission denied intervention to an individual member, [Ms. Towles-Ezzel], of the Sierra Club who had a general interest in the environmental impacts of fossil fuel generation." App. 1, p. 4. Although many, the essential difference between Ms. Towles-Ezzel's interests and Ms. Roemmele-Putney's interests is that, unlike Ms. Towles-Ezzel, who alleges a *general interest* in advocacy for the expansion of renewable and clean energy in North Florida and generally throughout the state, Ms. Roemmele-Putney, as a property owner, resident and named defendant in the declaratory action filed by Monroe County, has alleged *specific interests* in maintaining the status quo in her community of 43 homes, on an island which is only 1,109 acres, with the character of an off-grid community that lies entirely within the jurisdictional boundaries of the National Key Deer Refuge, and where the effects of the slightest changes in community character are noticed.

Additionally, although the relevance to Ms. Roemmele-Putney's ability to intervene isn't clear, Hearing Officer Balbis also notes that "in the order the

Commission noted that the Sierra Club had been granted intervention in the case, and the individual petitioner would have the benefit of representation through that organization." App. 1, p. 4. If denied standing in this case, Ms. Roemmele-Putney does not benefit from the representation of any organization or any other party for that matter including Monroe County. As a property owner and resident of No Name Key, Ms. Roemmele-Putney's interests are unique to her own circumstances.

B. <u>If Roemmele-Putney Does Not Have Standing None of the Parties to Docket No. 120054-EM Have Standing to Challenge a Territorial Agreement</u>

The Order states that "the proceeding is conducted pursuant to the authority granted to the Commission by the terms of Sections 366.04(2) and (5) over territorial agreements between electric utilities, to facilitate the planning development, and maintenance of a coordinated electric power grid throughout Florida." App. 1, p. 3-4. Sections 366.04(2) and 366.04(5) are separate and independent paragraphs under the Chapter 366 Section (4) which defines the jurisdiction of the Public Service Commission. Subsection 366.04(2) lays out the Commission's specific jurisdiction over *electric* utilities. Although not specified in the Order, the only subsection with any conceivable relevance to this proceeding appear to be (2)(e), which relate to territorial agreements, and which state:

"(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. (*Emphasis added*).

The statute is expressly clear that the PSC's jurisdiction to resolve any complaint brought under this subsection is limited to complaints *brought by an actual utility*. Moreover, the Commission's rule 25-6.0441, F.A.C. substantiates the statute: "A territorial dispute proceeding may be initiated *by a petition from an electric utility* requesting the Commission to resolve the dispute." (*Emphasis added*).

Neither KES or FKEC filed the complaint in the action below, and at present, niether KES nor FKEC are parties to this proceeding. Thus, if this proceeding was in fact a proceeding to resolve a dispute related to the Territorial Agreement, the governing statute and rule is abundantly clear that, at present, no party to the proceeding in fact has standing to participate.

Furthermore, if the Order is correct in finding that Petitioner Roemmele-Putney fails to meet the second prong of the Agrico test, because her interests

aren't those that the statute is designed to protect, then no party other than the parties to the agreement, KES or FKEC, would in theory, meet the requirements of the Agrico zone of interests test.

Moreover, the Order's reliance on Section 366.04(5), the Commission's "grid bill" authority and "jurisidiction over the planning, development and maintenance of a coordinated electric power grid through out Florida", is entirely misplaced. The relevance of this provision of the statute is grounded in the Commission's original approval of the territorial agreement in 1991 between KES and FKEC. See App. 6. ("the agreement satisfies the intent of Subsection 366.04(5), Florida Statues.").

Lastly, no party has standing to enforce this specific section of the statute because 366.04(5), Fla. Stat., doesn't confer rights on a customer to demand power from a utility. By neither its express terms or implied intent, 366.04(5), Fla. Stat. does not create any obligation on an electric utility to serve a propsective customer, nor any prospective customer's right to service. Had the legislature wanted to impose an affirmative obligation to serve on "electric utilities" such as KES and FKEC, it would have been extremely easy to do so, and had it been the legislatures

intent, it presumably would have done so.[2] Accordingly, without any such authority, no party would have standing to enforce such a provision in order to demand electric service. Not the Reynolds, the No Name Key Property Owners Association, nor any other prospective customer in the state of Florida.

C. The Public Service Commission is Petitioner Roemmele-Putney's Exclusive Forum, as Determined by 16th Judicial Circuit and the 3rd District Court of Appeals

As described above, over the course of the extensive litigation relating to the commercial electrification of No Name Key, each court has denied to rule on the merits, holding that the exclusive forum for this matter is the Public Service Commission. Specifically, the Third District Court of Appeal's decision in *Roemmele-Putney* has limited the forum in which this dispute can be resolved to exclusively the Public Service Commission. App. 4. The parties and claims in the PSC case are the same as those brought by Monroe County in *Roemmele-Putney*, albeit the Reynolds are seeking declaratory relief that will require that Monroe County to allow them to connect to the electric grid, whereas Monroe County was seeking to enforce its ordinances that prohibit the same. Although the Reynolds seek a different outcome, it is unjustifiable to deny Ms. Roemmele-Putney from

[2] For example, the Legislature could have accomplished this purpose by simply using the term "electric utility" instead of the defined term "public utility" in Section 366.0, F.S.

her day in court after being refused adjudication in both the Sixteenth Judicial Circuit and the Third District Court of Appeal.

D. The Order Departs from the Essential Requirements of Law Because it Relies on Facts Not in Evidence

Florida Statute section 120.68(7), sets out the grounds for reversal of agency action under the Administrative Procedure Act:

> The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
>
> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact [...] (2012).

The order states the requirements for an interested party to intervene in the proceeding below:

> Pursuant to Rule 25-22.039, F.A.C., persons other than the original parties to a pending proceeding, who have substantial interest in the proceedings and who desire to become parties, may petition for leave to intervene. Petitions for leave to intervene must [...] include *allegations* sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding." App. 1, p. 2. (*Emphasis added*).

As discussed in section I. above, Petitioner Roemmele-Putney makes several allegations, to the satisfaction of the Agrico test, of substantial interests which entitle her to be a party to the proceeding and no competent substantial evidence to the contrary has been presented to rebut those allegations. Ms. Roemmele-Putney's assertions that commercial power will attract development to No Name Key are not refuted by competent substantial evidence in the Complainants petition but instead merely branded as "unfounded", "opinionated" and "irrational paranoia". App. 10, pp. 10, 12. Complainants simply do not provide evidence to controvert Petitioner Roemmele-Putney's allegations. Furthermore, Complainants do not dispute Roemmele-Putney's allegations that the extension of commercial power to No Name Key will increase the value of the property on No Name Key. App. 10, p. 11. Logically, Complainants would be better served by denying this fact since it serves to support the fact that commercial power on No Name Key makes it more desirable of a place to live and therefore more susceptible to development pressure. Yet, they do not and instead take the opportunity to ridicule Petitioner Roemmele-Putney for not desiring an economic benefit from residing in the alternative energy community of No Name Key.

Nonetheless, based on the docket filings, the hearing officer is not presented with any competent substantial evidence to the contrary of Petitioner Roemmele-Putney's allegations. Therefore, this Court must quash the Order.

Robert D. Reynolds & Julianne C. Reynolds
2160 Bahia Shores Road
No Name Key, Florida 33042

J.R. Kelly
Office of Public Counsel
c/o the Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
KELLY.JR@leg.state.fl.us

Dale Z. Finigan
Keys Energy Services
P.O. Drawer 6100
Key West, Florida 33041-6100
dale.finigan@keysenergy.com

Nathan E, Eden
Nathan E. Eden, P.A.
302 Southard Street, Suite 205
Key West, Florida 33040
dedenkwf@bellsouth.net

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALICIA ROEMMELE-PUTNEY,

Petitioners,

FLSC Case No. _____
PSC Docket No. 120054-EM

vs.

PUBLIC SERVICE COMMISSION,
EDUARDO E. BALBIS,
Hearing officer,

Respondents,
_____/

Appendix to Petition for Expedited Review of Non-Final Agency Action by Public Service Commission Hearing Officer

App 1	April 19, 2013 Order No. PSC-13-0161-PCO-EM, Docket No. 120054-EM, Order Denying Petition to Intervene, Document No. 02079-13
App 2	Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, 16th Judicial Circuit, Monroe County, Case No. 99-819-CA-19 (June 13, 2003)
App 3	Order of Dismissal with Prejudice, slip op. Monroe County v. Utility Board of the City of Key West d.b.a. Keys Energy Services, et al., 2011-CA-342-K (Circuit Court of the 16th Judicial Circuit in and for Monroe County (Jan. 30,2012)
App 4	Roemmele-Putney v. Reynolds, 106 So.3d 78 (Fla. 3rd DCA 2013)
App 5	Monroe County v. Utility Board of the City of Key West d.b.a. Keys Energy Services, et al., 2012-CA-549-K (Circuit Court of the 16th Judicial Circuit in and for Monroe County (Feb. 21, 2013)

App 6	In Re: Joint Petition of Florida Keys Electric Cooperative and Utility Board of the City of Key West for Approval of a Territorial Agreement, Docket No. 910765-EU, Order No. 25127 (Fla. Pub. Serv. Comm'n 1991)
App 7	Alicia Roemmele-Putney's First Amended Petition to Intervene, PSC Docket No. 120054-EM, Document No. 01355-13
App 8	Monroe County, Florida Planning Commission Resolution No. P44-2012 (November 28, 2012)
App 9	Transcript excerpts, Monroe County Planning Commission Meeting, In Re: James Newton 2047 Bahia Shores Road, No Name Key, Mile Marker 33, pp. 56-57, 61 (Thursday, October 18, 2012)
App. 10	Reynolds' Opposition to Alicia Roemmele-Putney's first amended motion to intervene, PSC Docket No. 120054-EM, Document No. 01459-13

Respectfully submitted,

Robert N. Hartsell, Esq.
Florida Bar No. 636207
Robert@Hartsell-Law.com
Sarah M. Hayter, Esq.
Florida Bar No. 83823
Sarah@Hartsell-Law.com
ROBERT N. HARTSELL, P.A.
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
(954) 778-1052
Fax (954) 941-6462

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served by E-Filing and e-mail on this 6th day of MAY, 2013 on the following:

Robert N. Hartsell, Esq.
Florida Bar No. 636207
Robert@Hartsell-Law.com
Sarah M. Hayter, Esq.
Florida Bar No. 83823
Sarah@Hartsell-Law.com
ROBERT N. HARTSELL, P.A.
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
(954) 778-1052
Fax (954) 941-6462

Martha Carter Brown
Curt Kiser
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
mcbrown@psc.state.fl.us

Andrew M. Tobin
P.O. Box 620
Tavernier, FL
tobinlaw2@gmail.com
tobinlaw@terranova.net

Barton W. Smith
Barton Smith, P.L.
624 Whitehead Street
Key West, Florida 33040
Bart@bartonsmithpl.com

Robert D. Reynolds & Julianne C. Reynolds
2160 Bahia Shores Road
No Name Key, Florida 33042

J.R. Kelly
Office of Public Counsel
c/o the Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
KELLY.JR@leg.state.fl.us

Dale Z. Finigan
Keys Energy Services
P.O. Drawer 6100
Key West, Florida 33041-6100
dale.finigan@keysenergy.com

Nathan E, Eden
Nathan E. Eden, P.A.
302 Southard Street, Suite 205
Key West, Florida 33040
dedenkwf@bellsouth.net

APPENDIX 1

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 d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida.	DOCKET NO. 120054-EM ORDER NO. PSC-13-0161-PCO-EM ISSUED: April 19, 2013

ORDER DENYING PETITION TO INTERVENE

Background

On March 5, 2012, Robert D. Reynolds and Julianne C. Reynolds (the Reynolds), the owners of residential property on No Name Key, Florida, filed a complaint against the Utility Board of the City of Key West, Florida, d.b.a. Keys Energy Services (Keys Energy), for failure to provide electric service to their residence as required by the terms of a Territorial Agreement, which the Commission approved in 1991.[1] The Reynolds filed an amended complaint against Keys Energy on March 13, 2013, and a second amended complaint to correct a scrivener's error on March 20, 2013. The amended complaint asserts that the Commission has exclusive jurisdiction to interpret the territorial agreement it approved and determine whether property owners on No Name Key are entitled to electric service from Keys Energy. Essentially, the amended complaint asks the Commission to order Keys Energy to provide electric service to the Reynolds, as well as other No Name Key property owners who request it, and to determine that Monroe County (County)[2] cannot prevent provision of commercial electric service to No Name Key by the application of its local comprehensive plan or other ordinances.

Amended Petition to Intervene

After the Reynolds filed their amended complaint, Ms. Alicia Roemmele-Putney filed an Amended Petition to Intervene on March 18, 2013. Ms. Roemmele-Putney claims that she has a substantial interest in this proceeding. She alleges that she expended additional funds to install solar panels and alternative plumbing fixtures when she constructed her house on No Name Key upon assurances that the electrical and water supply would not be extended to the island. She states that she was willing to incur the additional expenses:

> in order to obtain the peace, tranquility and lessened development pressures that the lack of electrical and water supply infrastructure on an island within the National Key Deer Wildlife Refuge would promote.

[1] Order No. 25127, issued September 9, 1991, in Docket No. 910765-EU, In re: Joint Petition of Florida Keys Electric Cooperative Association, Inc. and the Utility Board of the City of Key West for approval of a territorial agreement.

[2] Monroe County was granted intervention in this proceeding on May 22, 2012, by Order No. PSC-12-0247-PCO-EM.

Amended Petition to Intervene, p.3.

Ms. Roemmele-Putney asserts that her quality of life, the environment on No Name Key, and the "solar community" on the island would be adversely affected by the introduction of commercial electricity to the island.

> The extension of commercial power infrastructure to No Name Key would promote secondary growth impacts on the island by rendering the land thereon more valuable and more attractive to development The resulting development would, in turn, lead to the fragmentation of wildlife habitat, increased mortality to endangered species including the Key Deer, and other negative environmental impacts. Thus, commercial power infrastructure would directly impact Intervenor's use and enjoyment of No Name Key.

Amended Petition to Intervene, p.4.

Ms. Roemelle-Putney argues that since the No Name Key Property Owners Association (Association) has been granted standing in this proceeding, she should be granted standing as well. Ms. Roemelle-Putney also relies upon the Third District Court of Appeal's opinion in Alicia Roemelle-Putney, et. al., v. Robert D. Reynolds, et. al., 106 So. 3d 78, 82 (Fla. 3d DCA 2013), where she was an appellant. In its opinion, the Court stated: "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." Ms. Roemelle-Putney also relies on the land development code and comprehensive plan of Monroe County that she believes preclude the provision of electric service to the island by Keys Energy. She states in conclusion:

> Intervenor spent years acquiring permission to build her home on No Name Key, spent monies upwards of $34,000 beyond the cost of construction to comply with No Name Key's Land Codes, has personally enjoyed the natural area of No Name Key for over 20 years; and because proposed Intervenor's quality of life, safety, property interest and investment-backed expectations will be directly affected by the Commission's decision, Intervenor qualifies as a substantially affected person.

Amended Petition to Intervene, p. 4.

Objections to Amended Petition to Intervene

On March 19, 2013, the Association filed a Renewed Opposition to Putney's Motion to Intervene, and on March 25, 2013, the Reynolds filed their Opposition to Alicia Roemmele-Putney's First Amended Motion to Intervene. The Association and the Reynolds both argue that Ms. Roemmele-Putney does not have standing to intervene in this case because she has not shown either that she has a substantial interest of sufficient immediacy to entitle her to a formal administrative hearing, or that her alleged injury is of the type this proceeding before the Commission is designed to protect. They assert that she will not be required to obtain electric

service from Keys Energy and thus she will not suffer an injury in fact and has failed to demonstrate "that she will be directly or indirectly affected if electricity is provided to her neighbors." Association's Renewed Opposition, p.4. They also argue that Ms. Roemmele-Putney has "failed to show that this administrative hearing is designed to protect her investment in solar power, the value of her home, or the quality of her life." Association's Renewed Opposition, p. 4.

Ruling

Pursuant to Rule 25-22.039, Florida Administrative Code (F.A.C.), persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties, may petition for leave to intervene. Petitions for leave to intervene must be filed at least five days before the evidentiary hearing, conform with Rule 28-106.201(2), F.A.C., and include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981). The intervenor must show that (1) she will suffer injury in fact which is of sufficient immediacy to entitle her to a Section 120.57, F.S., hearing, and (2) the substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

With respect to the first prong of the Agrico test, Ms. Roemmele-Putney has not demonstrated an injury in fact that is real and immediate. If Keys Energy is permitted to serve electric power to No Name Key property owners who request it, and if the property owners connect to Keys Energy's facilities, Ms. Roemmele-Putney will suffer no actual injury. She will not be required to take electric service from Keys Energy. She will be able to continue relying solely on alternative sources of energy on her property, and thus her position will remain the same whether or not others receive service from Keys Energy. See, Ameristeel Corporation v. Clark, 691 So. 2d 473, 478 (Fla. 1997). Suppositions that Ms. Roemmele-Putney's quality of life will be adversely affected or that commercial power infrastructure on the island would degrade her enjoyment of her property are too speculative to confer standing.

With respect to the second prong of the Agrico test, Ms. Roemmele-Putney has not alleged an interest that this proceeding is designed to protect. This proceeding is conducted pursuant to the authority granted to the Commission by the terms of Sections 366.04(2) and (5), F.S., over territorial agreements between electric utilities, to facilitate the planning, development,

and maintenance of a coordinated electric power grid throughout Florida. It is designed to protect interests associated with those statutes. It is not designed to protect environmental interests, quality of life interests, and property interests. These are the interests Ms. Roemmele-Putney has alleged will be harmed. See, Order No. PSC-06-0956-PCO-GU, in Docket No. 060635-EU, In re; Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee, issued November 16, 2006, where the Commission denied intervention to an individual member of the Sierra Club who had a general interest in the environmental impacts of fossil fuel generation. In that Order the Commission noted that the Sierra Club had been granted intervention in the case, and the individual petitioner would have the benefit of representation through that organization.

Conclusion

Ms. Roemmele-Putney's petition to intervene does not meet the legal standard for intervention as a full party in this proceeding and, therefore, I deny the petition. I note, however, that Monroe County has been granted intervention to defend its ordinances precluding electric service to No Name Key. These are the same ordinances Ms. Roemmele-Putney relies upon in her petition, and Ms. Roemmele-Putney will have the benefit of the County's participation in the case. I also note that briefs are due to be filed on April 19, 2013, on certain legal issues identified in Order No. PSC-13-0141-PCO-EM, issued March 25, 2013, which the Commission will consider at its May 14, 2013 Agenda Conference. Although Ms. Roemmele-Putney has been denied intervention, she shall be permitted to file a brief on the legal issues, if she so chooses. Also, the Commission has the discretion to hear from interested persons at its Agenda Conferences, and I will recommend to the Commission that Ms. Roemmele-Putney be permitted to address it on May 14th.

Based on the foregoing, it is

ORDERED by the Eduardo E. Balbis, as Prehearing Officer, that Ms. Alicia Roemmele-Putney's Amended Petion to Intervene is denied.

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 19th day of April, 2013.

EDUARDO E. BALBIS
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

APPENDIX 2

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.

APPENDIX 3

IN THE CIRCUIT COURT OF THE 16TH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR MONROE COUNTY

CASE NO: 2011-CA-342-K

MONROE COUNTY, a political
Subdivision of the State of Florida,

Plaintiff

Vs.

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

Defendants

_____/

ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER came before the Court upon the Motion to Dismiss of Defendants herein, and the Court, having reviewed the Motion, the Response thereto, and the motion of the Florida Public Service Commission for leave to participate as Amicus Curiae regarding subject matter jurisdiction, having conducted oral argument in this matter on January 26, 2012, and being otherwise fully informed in the premises, hereby finds and Orders as follows:

1. This action is a lawsuit by Plaintiff MONROE COUNTY, a political subdivision of the State of Florida, against Defendants UTILITY BOARD OF THE CITY OF KEY WEST, and 43 property owners of properties located on No Name Key, Florida. The Complaint seeks declaratory relief as to KEYS ENERGY SERVICE, (Count I), Declaratory Relief against the No Name Residential Property Owners (Count

II), and injunctive relief to enforce any declaratory judgment entered by the Court in Counts I and II (Count III).

2. The Complaint seeks a declaration from this Court as to whether the Defendant UTILITY BOARD OF THE CITY OF KEY WEST is required to obtain a development permit from Monroe County, for the extension of a power line to No Name Key, or whether the issue of the provision of electrical service to residents of No Name Key is an issue vested by law in the Public Service Commission, as suggested by Defendants and the Florida Public Service Commission itself, through its Motion for Leave to Participate as amicus curiae. Second, the lawsuit seeks to determine whether the portion of the Monroe County Code which prohibits the extension of public utilities, including electricity within the Coastal Barrier Resources System Overlay District (M.C.C. Section 130-122) prohibits the extension of utility lines to the Defendant residents, or whether that ordinance has been preempted by state law, to wit, the authority granted to the Public Service Commission in Chapter 366, Florida Statutes.

3. The Court has carefully reviewed pertinent portions of Chapter 366, Florida Statutes, as well as the Territorial Agreement between the municipal utility of the City of Key West (Keys Energy) and the Florida Keys Rural Electric Cooperative, approved by the Public Service Commission on September 27, 1991, and has determined that issues regarding interpretation and enforcement of territorial agreements of this sort are exclusively vested in the Florida Public Services Commission ("PSC"), and therefore the PSC is the proper forum for hearing the issues presented in this case. Accordingly, the questions posed by Plaintiff

MONROE COUNTY regarding the extension of electrical power line to No Name Key residents, which would constitute providing service pursuant to the Territorial Agreement, as well as any question regarding whether owners of property on No Name Key may lawfully connect to Keys Energy Service service lines, pursuant to the Territorial Agreement, despite the provisions set forth in Monroe County Code Section 130-122, are all properly presented to the PSC for resolution.

4. Section 366.04(1), Florida Statutes expressly confers jurisdiction on the PSC to regulate and supervise each public utility with respect to its rates and service. This jurisdiction is "exclusive and superior to that of all . . . municipalities . . . or counties, and, in case of conflict therewith, all lawful acts, orders, rules and regulations of the Commission shall in each instance prevail." (Section 366.04(1), Florida Statutes).

5. By order issued May 12, 2003, in re: Petition by City of Parker for Declaratory Statement, etc., Docket No: 030159-EU, Order numbered FPSC-03-0598-DS-EU, the PSC denied a motion to dismiss which had been predicated on the argument presented by Monroe County in the instant case, that the PSC did not have authority to resolve the issues of statutory analysis and balancing of state supremacy claims as against local or regional land use plans. In that order, the PSC specifically found that its subject matter jurisdiction reached the question of whether the jurisdiction of the Florida Public Service Commission preempted the City of Parker's application of its comprehensive plan, land development regulations, and city codes and ordinances to Gulf Power Company's proposed aerial power transmission line.

6. That order of the Public Service Commission determined that the PSC has subject matter jurisdiction, and is also the appropriate forum, in cases of this sort, because it describes and denotes jurisdiction which is exclusive pursuant to Section 366.04(2)(c) and (2)(d), Florida Statutes.

7. This legal conclusion is reinforced by the holding of the Florida Supreme Court in Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). In Fuller, the City of Homestead filed an action in the Dade County Circuit Court seeking a declaration of rights and a construction of a Territorial Agreement, regarding rights and obligations of the parties thereto. Although Fuller deals with an attempt to terminate the Territorial Agreement by the City, not enforcement or interpretation or limitation of the agreement with regard to the provision of electrical services to persons who claim to be eligible for such services under the agreement, the logic of Fuller applies to the instant case. The narrow interpretation suggested by Plaintiff MONROE COUNTY, which would limit the exclusive statutory jurisdiction of the PSC to disputes regarding the boundary created by the agreement, and related issues, is clearly at odds with the broad grant of legislative authority set forth in Florida Statutes, and the language used by the Florida Supreme Court in Fuller, supra.

8. The service agreement grants to the UTILITY BOARD OF THE CITY OF KEY WEST

> "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, improve, finance and re-finance the electric public utility now owned by the said city, . . . "

Furthermore, pursuant to Section 11 of the Agreement, the UTILITY BOARD 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. . ." This Court specifically finds that the purpose of the action brought by MONROE COUNTY before this Court is to interpret and/or modify the territorial agreement set forth above, by seeking to interpret, modify or limit the service agreement and authority of the UTILITY BOARD OF THE CITY OF KEY WEST thereunder.

Accordingly, pursuant to the clear mandate of Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989), this Court finds that exclusive subject matter jurisdiction is vested in the Florida Public Service Commission, and that the PSC is the correct forum for hearing the issues herein, and this action is accordingly DISMISSED WITH PREJUDICE.

DONE and ORDERED at Key West, Monroe County, Florida, this 30th day of January, 2012.

CONFORMED COPY
JAN 3 0 2012

DAVID DAKUDLIN JR.
CIRCUIT JUDGE
CHIEF JUDGE

cc: Robert B. Shillinger, Esq.
Robert Hartsell, Esq.
Lawrence R. Dry, Pro Se
Nathan E. Eden, Esq.
Andrew M. Tobin, Esq.

Barton W. Smith, Esq.
Martha C. Brown, Esq.

APPENDIX 4

manded that "the court shall first make a specific factual determination as to whether either party has an actual need for alimony," and, if so, the court "shall consider all relevant factors," including those specified by statute. § 61.08(2). In addition to complying with this statutorily mandated directive, such findings immeasurably aid the reviewing court on appeal. *See Orloff v. Orloff*, 67 So.3d 271, 275 (Fla. 2d DCA 2011) (ordering that if, on remand, the court decides to award alimony, "it shall also make sufficient findings of fact as required by section 61.08(2) to support that award in order to facilitate further appellate review"). We are hampered in our review by the trial court's lack of specific findings on the issue of alimony.

[1, 2] First, although the trial court's determination is reviewed under an abuse of discretion standard, its discretion is not without borders. *See Udell v. Udell*, 998 So.2d 1168, 1170 (Fla. 2d DCA 2008) (holding that even in a situation where the trial court has "broad" discretion, such discretion is not unlimited); *see also Coltea v. Coltea*, 856 So.2d 1047, 1052 (Fla. 4th DCA 2003) (holding that in proceedings under chapter 61, a trial court's discretion is not unlimited or to be applied mechanically). Here, assuming an annual income of $52,000 per year to the husband, an award of $100 per month in alimony to the wife, where that amount admittedly fails to meet the her needs, is woefully insufficient and beyond the pale. *See Gilbert v. Gilbert*, 447 So.2d 299, 305 (Fla. 2d DCA 1984) (Lehan, J., concurring in part and dissenting in part). We conclude that an award of $100 a month—where this payor is recognized to have imputed income and future prospects—is an award that no reasonable court would impose and is thus an abuse of discretion.

[3] Furthermore, we question whether the trial court's determination that the alimony be durational rather than permanent is appropriate. Durational alimony is to be awarded by statute, where "permanent periodic alimony is inappropriate." *See* § 61.08(7). Here, the trial court found that the Wife has limited income potential, that the marriage's duration was 16 years and 10 months, that the Wife was 49 years of age at the time of the final judgment and the Husband was 52 years of age, and that virtually all of the parties' income came from the Husband's investments. In light of these circumstances and the final judgment's lack of factual findings that an award of permanent alimony is inappropriate, we reverse for further proceedings. On remand, the trial court is directed to determine pursuant to section 61.08(7) whether the Wife merits permanent periodic alimony; further, any type of alimony awarded must be of a legally sufficient amount. In doing so, to ensure meaningful appellate review—should one be necessary—the trial court must set forth its rationale for any award.

Appeal no. 2D11–6432 affirmed in part, reversed in part, and remanded for further proceedings; appeal no. 2D11–6479 affirmed.

CRENSHAW and BLACK, JJ., Concur.

Alicia ROEMMELE–PUTNEY, et al., Appellants,

v.

Robert D. REYNOLDS, et al., Appellees.

No. 3D12–333.

District Court of Appeal of Florida, Third District.

Feb. 6, 2013.

Background: County brought action against electric utility and homeowners in

area seeking determination of whether prospective electrification of area by electric utility was regulated or precluded by Coastal Barrier Resources Act and county regulations adopted pursuant to that Act. The Circuit Court, Monroe County, David J. Audlin, Jr., J., dismissed complaint with prejudice for lack of jurisdiction. County appealed.

Holding: The District Court of Appeal, Salter, J., held that state Public Service Commission had exclusive jurisdiction to decide issues raised by county.

Affirmed.

Electricity ⇐8.1(4)

Circuit court lacked jurisdiction over county's action against electric utility and homeowners in area seeking determination of whether prospective electrification of area by electric utility was regulated or precluded by Coastal Barrier Resources Act and county regulations adopted pursuant to that Act; homeowners had properly invoked jurisdiction of state Public Service Commission (PSC) through filing administrative complaint seeking extension of electrical transmission lines to area, and PSC's jurisdiction over electric utilities was exclusive. 16 U.S.C.A. § 3501–3510; West's F.S.A. § 366.04.

Robert N. Hartsell, Fort Lauderdale; Robert Wright, Tallahassee; Richard Grosso, Ft.Lauderdale; Derek V. Howard, Assistant County Attorney, Monroe County Attorney's Office, Key West; Andrew M. Tobin, Tavernier, for appellants.

Barton W. Smith and Gregory S. Oropeza, Key West, for appellees.

S. Curtis Kiser, General Counsel, and Martha C. Brown, Senior Attorney, and Pamela H. Page, Attorney, Tallahassee, as Amicus Curiae for the Florida Public Service Commission.

Before SUAREZ, LAGOA and SALTER, JJ.

SALTER, J.

The appellants are certain individual property owners on No Name Key in Monroe County, and the County itself. Other No Name Key property owners and the Utility Board of the City of Key West (doing business as "Keys Energy Services") are the appellees. The legal issue presented to the circuit court and here is 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 Resources Act [1] and the County's policies and regulations adopted pursuant to that Act. 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.

The Complaint and Motion to Dismiss

In the complaint, Monroe County sued Keys Energy Services (KES) and the individual owners of forty-three developed properties on No Name Key. The County alleged that KES had the exclusive power and authority to extend electric service to the residences on No Name Key owned by the individual defendants, and that a number of the property owners and KES were nearly ready to move from the design stage to actual installation. The County asked the circuit court to determine

1. 16 U.S.C. §§ 3501–3510.

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).[2] In Count III of its complaint, the County sought temporary and permanent injunctive relief prohibiting KES and the property owners from "expending any funds or taking any steps toward the extension of electric service to No Name Key," in furtherance of the declaratory judgments sought in Counts I and II.

The individual appellees, homeowners on No Name Key, were among the defendant property owners who applied to KES for electrical service. These appellees moved for the dismissal of Monroe County's complaint on grounds that the Florida Public Service Commission (PSC) has exclusive jurisdiction to enforce, regulate, and resolve the issues raised by the County. The motion was briefed,[3] argued, and ultimately granted (with prejudice) by the circuit court. This appeal followed.

Analysis

Although KES is not a "public utility" within the definition of section 366.02(1), Florida Statutes (2011), it is an "electric utility" under the subsection which follows, section 366.02(2). Section 366.04, "Jurisdiction of commission," in subsection (5), grants the PSC jurisdiction over "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." To that end, the homeowner appellees filed an administrative complaint with the PSC seeking the extension of electrical transmission lines to the No Name Key property owners.[4]

As a threshold matter, and 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. *Fla. Pub. Serv. Comm'n v. Bryson*, 569 So.2d 1253 (Fla.1990). Although *Bryson* involved a public utility, the case holds that "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.* at 1255. 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. Art. V, § 3(b)(2), Fla. Const.

The appellees and the PSC also have argued, and we agree, that KES's existing service and territorial agreement (approved by the PSC in 1991) relating to new customers and "end use facilities" is subject to the PSC's statutory power over all "electric utilities" and any territorial disputes over service areas, pursuant to section 366.04(2)(e), Florida Statutes (2011). The PSC's jurisdiction, when properly invoked (as here), is "exclusive and superior to that of all other boards, agencies, political subdivisions, municipali-

2. Monroe County Code § 130–122 (purporting to prohibit the extension of electric utilities to properties within the Coastal Barrier Resources System overlay).

3. The PSC was allowed to participate as amicus curiae in the circuit court and here.

4. *In re: Complaint of Reynolds v. Utility Bd. of the City of Key West, Fla., etc.*, PSC Docket No. 1210054–EI.

ties, towns, villages, or counties." § 366.04(1). Section 4.1 of the 1991 KES territorial agreement approved by the PSC expressly acknowledges the PSC's continuing jurisdiction to review in advance for approval or disapproval any proposed modification to the agreement.

Conclusion

The Florida Legislature has recognized the need for central supervision and coordination of electrical utility transmission and distribution systems. 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.

The circuit court's order dismissing the County's complaint with prejudice is affirmed.

Yanelly MORALES, Appellant,

v.

FLORIDA REEMPLOYMENT ASSISTANCE APPEALS COMMISSION, et al., Appellees.

No. 3D12-50.

District Court of Appeal of Florida, Third District.

Feb. 6, 2013.

Background: Claimant sought review of decision of Reemployment Assistance Appeals Commission finding claimant ineligible for unemployment compensation.

Holding: The District Court of Appeal, Logue, J., held that claimant's crying during dispute with her supervisor did not constitute misconduct which would preclude entitlement to unemployment benefits.

Reversed.

1. Unemployment Compensation ⇐61, 68

Although a claimant's actions may justify discharge from employment, the same conduct does not necessarily preclude entitlement to unemployment benefits; a single instance of insubordination that reflects at most an isolated error in judgment, without more, does not amount to disqualifying misconduct under the statute. West's F.S.A. § 443.101.

2. Unemployment Compensation ⇐68

Misconduct which would disqualify a claimant from unemployment benefits usually involves repeated violations of explicit policies after several warnings. West's F.S.A. § 443.101.

3. Unemployment Compensation ⇐66

Claimant's crying during dispute with her supervisor did not constitute misconduct which would preclude entitlement to unemployment benefits, even if claimant also cried during two other incidents at work, where there was no evidence of conscious or deliberate disregard of employer's interests. West's F.S.A. §§ 443.036(30)(a), 443.101.

Legal Services of Greater Miami, Inc., and Mandy L. Mills, for appellant.

Louis A. Gutierrez, Senior Attorney, and Thomas R. Persely, Jr., Florida Reemploy-

APPENDIX 5

IN THE CIRCUIT COURT OF THE 16TH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR MONROE COUNTY

CASE NO: 2012-CA-549-K

MONROE COUNTY, a political subdivision
of the State of Florida,
Plaintiff

v.

UTILITY BOARD OF THE CITY OF
KEY WEST, FLORIDA, d/b/a
KEYS ENERGY SERVICES,

Defendant

ALICIA ROEMMELE-PUTNEY,
NO NAME KEY PROPERTY OWNERS'
ASSOCIATION, INC., ROBERT REYNOLDS
And JULIANNE REYNOLDS,

Intervenors
_____/

ORDER GRANTING MOTIONS TO DISMISS THE COMPLAINT, WITHOUT PREJUDICE

Intervenors Robert Reynolds and Julianne Reynolds, and No Name Key Property Owners Association, Inc. (NNKPOA), having moved, in separate motions, for dismissal of the first amended complaint in this action, the Court, having examined the record, the applicable law, and being otherwise informed in the premises, finds as follows:

This action is the most recent of a series of actions generated by a dispute over bringing electric service to certain property owners on No Name Key in Monroe County. As expressed by the Third District Court of Appeal after this Court dismissed a previous action, "[t]he legal issue presented to the circuit court and here is 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 Resources Act, and the County's policies and regulations adopted pursuant to that Act." [1] This Court had dismissed the complaint, with prejudice, because it had determined that the Florida Public Service Commission (PSC) had exclusive jurisdiction to decide the issues. The Third DCA affirmed this Court's order.

Monroe County has brought a second action seeking a declaratory judgment to determine its rights pursuant to 1995 Grant of Easement and 1973 Quit Claim Deed to exclude the construction of an electric transmission line over land it owns. A second count in the amended complaint sought injunctive relief, and the third count alleged a cause of action for aerial trespass due to the presence of power lines suspended over its land.

Though at first blush the issues raised by the parties on this motion to dismiss appear complex, because of the guidance given in the opinion by the Third

---

[1] Roemmele-Putney v. Reynolds, et al., (3D12-333) (Fla. 3rd DCA 2013).

DCA in the previous case, the complexities fall away. Citing *Fla. Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253 (Fla. 1990), the DCA observed that "[a]s 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." The District Court further found that the jurisdiction of the PSC is extensive, as the PSC, under §366.05(1) of Chapter 366 of the Florida Statutes, the PSC has the power "to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and to enforcement of its orders and requirements."

Though jurisdiction of the PSC is extensive, it is not all encompassing, and matters not within the jurisdiction of the PSC (the County claims that this Count can presently rule on the issues it has presented) *can* be heard by this Court but not by the avenue the County has chosen. "Where the Public Service Commission, or this Court (Florida Supreme Court) on review, has disposed and completed a matter coming within the Commission's jurisdiction, subsequent unresolved claims or causes arising against the affected regulated carrier or utility which are not statutorily remediable by the Commission and lie outside its jurisdiction may be litigated in the appropriate civil courts." *State v. Willis*, 310 So.2d 1 (Fla. 1975).

The court finds that the issues in this case are sufficiently related to the regulation and planning of electrical generation and transmission lines, that the

issues should first be addressed and determined by the PSC. It would serve no purpose to speculate as to what matters the PSC will address, and what matters, if any, will be left for this Court's determination.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that the motions to dismiss are **GRANTED**, without prejudice, to the commencement of a new action addressed to claims not resolved by the PSC, after the PSC hearing and all appeals therefrom have been completed.

All other pending motions are DENIED as moot.

ORDERED in chambers in Key West, Monroe County, this the 21st day of February, 2013.

David J. Audlin, Jr.

David J. Audlin, Jr.
Chief Judge

Copies furnished to:

Andrew M. Tobin, Esq.
P.O. Box 620
Tavernier, FL 33070

Barton W. Smith, Esq.
Gregory S. Oropeza,Esq.
624 Whitehead St.
Key West, FL 33040

Nathan Eden, Esq.

302 Southard St., Suite 205B
Key West FL 33040

Robert N. Hartsell, Esq.
1451 West Cypress Creek Road,
Suite 300
Fort Lauderdale, FL 33205

Robert B. Shillinger, Esq.
Derek v. Howard, Esq.
Monroe County Attorney's Office
1111 12th St., Suite 408
Key West, FL 33040

Lawrence Harris, Esq.
Martha C. Brown, Esq.
Office of the General Counsel
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

APPENDIX 6

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 DEASON
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 typography 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.

EXHIBIT A

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 TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MRC:bmi
910765.bmi

EXHIBIT A

AGREEMENT

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 an electric utility as defined in Chapter 366.02(2) Florida Statutes, and Florida Keys Electric Cooperative Association, Inc. (referred to in this Agreement as "FKEC"), a rural electric cooperative organized and existing under Chapter 425, Florida Statutes, and Title 7, Chapter 31, United States Code and 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";

WITNESSETH:

Section 0.2: WHEREAS, the Parties are authorized, empowered and obligated by their corporate charters and the laws of the State of Florida to furnish electric service to persons requesting such service within their respective service areas; and

Section 0.3: WHEREAS, each of the Parties presently

EXHIBIT A

Section 0.4: 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 0.5: WHEREAS, the unique geographic location of the service areas of the Parties and the unique topography of the Florida Keys affords a rational and non-controversial boundary between the Parties, and

Section 0.6: 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 0.7: 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 0.8: 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

EXHIBIT A

Section 0.9: 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 0.10: WHEREAS, the Commission is empowered by Section 366.04(2)(d), 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 0.11: NOW, THEREFORE, in consideration of the premises aforesaid and the mutual covenants and agreements herein set forth the Parties agree as follows:

ARTICLE 1

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 CES 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

EXHIBIT A

"FKEC", 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 FKEC or CES for retail electric service after the effective date of this Agreement.

EXHIBIT A

Section 1.8: Existing Customer. As used in this Agreement, the term "Existing Customer" shall mean any Person receiving retail electric service from either FKEC 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, FKEC shall have the exclusive authority to furnish retail electric service for end use within the FKEC 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

regardless of where such 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 FKEC and CES does not constitute an agreement on 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 FKEC 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 FKEC's transmission facilities) in FKEC's Territorial Area as defined herein, shall not grant CES any right or authority, now or in the future, to serve any consumers whose end use facilities are, or will be, located in FKEC'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.

EXHIBIT A

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 Parties' 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

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

EXHIBIT A

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.

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, 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.

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

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 Manger
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.

EXHIBIT A

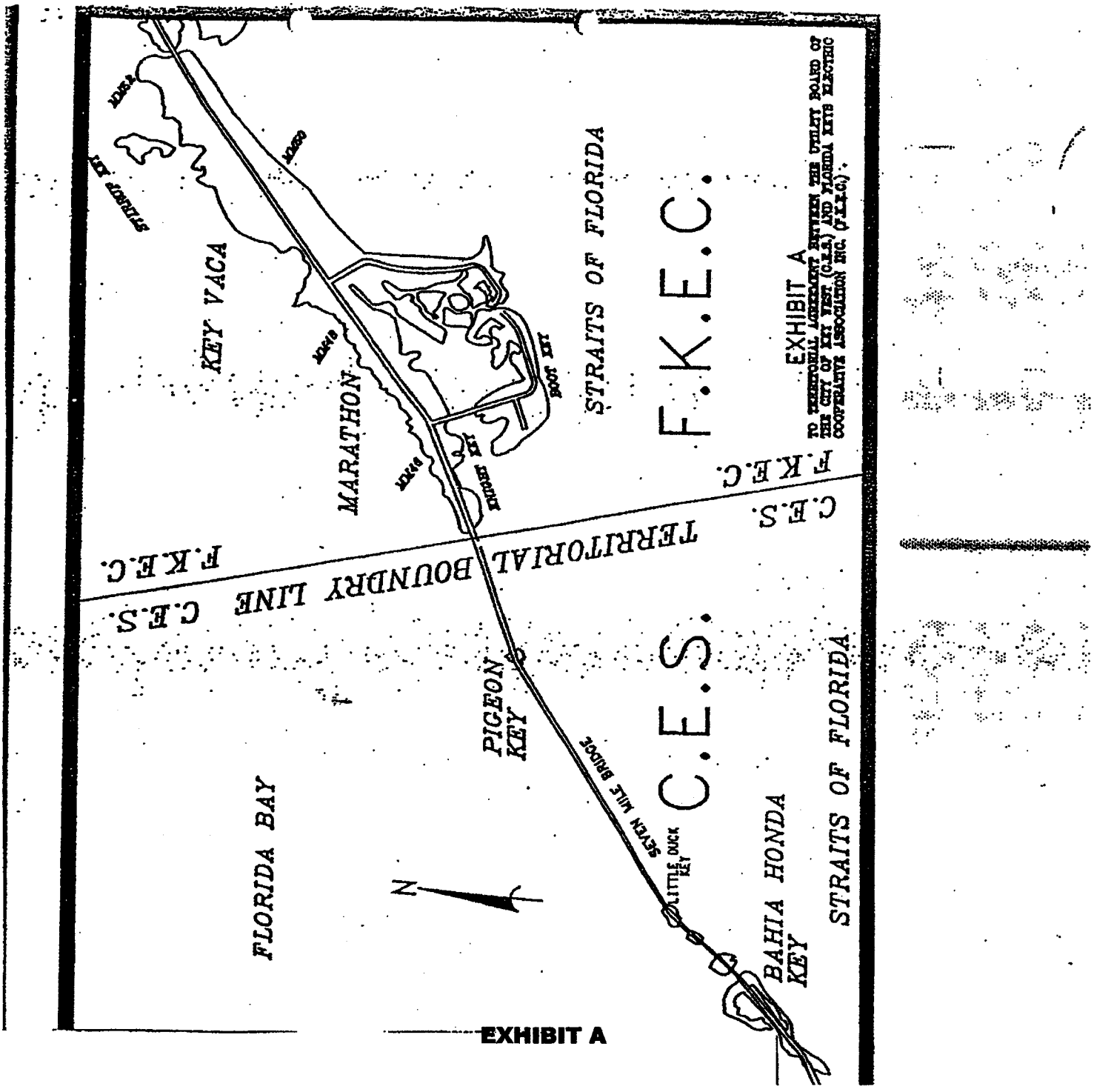
EXHIBIT A
TO TERRITORIAL AGREEMENT BETWEEN THE UTILITY BOARD OF THE CITY OF KEY WEST (C.E.S.) AND FLORIDA KEYS ELECTRIC COOPERATIVE ASSOCIATION INC. (F.K.E.C.).
F.K.E.C.
C.E.S.
TERRITORIAL BOUNDARY LINE
C.E.S.
F.K.E.C.
F.K.E.C.
C.E.S.
STRAITS OF FLORIDA
KEY VACA
MARATHON
PIGEON KEY
SEVEN MILE BRIDGE
LITTLE DUCK KEY
BAHIA HONDA KEY
FLORIDA BAY
STRAITS OF FLORIDA
N

EXHIBIT A

APPENDIX 7

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Robert D. Reynolds and Julianne Reynolds against Utility Board of the City of Key West, Florida d/b/a Key Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida.	DOCKET NO. 120054

ALICIA ROEMMELE-PUTNEY'S FIRST AMENDED PETITION TO INTERVENE

Intervenor, Alicia Roemmele-Putney ("Intervenor "), pursuant to Chapters 120 and 366, Florida Statutes, and Rules 25-22.039, 28-106.201, and 28- 106.205, Florida Administrative Code ("FAC"), hereby petitions the Florida Public Service Commission ("the Commission") to intervene in the above-styled matter, and states as follows:

INTRODUCTION

On March 11, 2013, Robert D. Reynolds and Juliane C. Reynolds filed an Amended Complaint against the Utility Board of the City of Key West, Florida d.b.a. Keys Energy Services ("KES") and Monroe County ("County"). The Amended Complaint seeks the following from this honorable Commission:

1. A Commission Order stating that KES must connect customers located on No Name Key who request service and meet Florida electrical safety code requirements of the Florida Building Code bypassing the County's local restrictions on such connections in environmentally sensitive areas of the County.
2. A determination that the PSC has exclusive jurisdiction over the KES territorial agreement, including enforcement of its terms.
3. PSC's jurisdiction over the territorial agreement preempts Monroe County's Ordinance 043-2001 as it pertains to KES and its electric lines.

4. A determination that Monroe County does not have jurisdiction over No Name Key customers' connection to KES and;
5. Monroe County cannot prohibit KES customers from connecting to the electric utility.

Alicia Roemmele-Putney (hereinafter, "Intervenor") owns a single-family residence located at 2150 No Name Drive, No Name Key, Florida. Intervenor and her now deceased husband, Dr. Snell Putney, purchased property in Key Largo, Florida in 1983. Shortly thereafter, Key Largo experienced an explosion in growth and development, and the quality of life experienced by Intervenor became negatively impacted by the noise, light pollution and congestion that accompanied the development. In response to these negative impacts, Intervenor and her now deceased husband sought another location to reside in the Florida Keys that would possess and retain a tranquil character.

This search led Intervenor and her now deceased husband to consider the purchase of a lot and the construction of a single-family residence on No Name Key. Following assurances that electrical and water supply infrastructure would not be extended to No Name Key, Intervenor along with her now deceased husband in 1989 purchased Lot 23/24 of the Dolphin Harbour Subdivision. On January 27, 1990, Intervenor and her now deceased husband applied for a building permit to construct a single-family home on Lot 23/24. As part of the application process and in order to satisfactorily meet existing electrical and plumbing codes, Intervenor and her now deceased husband were required to submit building plans that envisioned the construction of alternative power and water sources.

In order to comply with these requirements and confident that others who sought to build on No Name Key would be subject to similar requirements, Intervenor and her now deceased

husband submitted plans that envisioned the use of solar power for electricity and the use of a cistern for fresh water. The installation of the solar energy system added between $18,000 and $19,000 to the construction cost of the residence. The installation of the cistern water system added between $16,000 and $17,000 to the construction cost. Furthermore, given the general public's lack of understanding of photovoltaic technology in 1990 and lack of such amenities, the market value of Intervenor's property was reduced. Intervenor was willing to incur these increased costs and decreased property values in order to obtain the peace, tranquility and lessened development pressures that the lack of electrical and water supply infrastructure on an island within the National Key Deer Wildlife Refuge would promote. These values therefore underlie the reasonable investment-backed expectations of Intervenor.

Intervenor respectfully submits that the quality of life in which she has invested substantial resources and the environment upon which this quality of life depends would be adversely and irreparably impacted by the extension of commercial electricity to No Name Key. The extension of commercial electricity itself would negatively impact the environment and quality of life enjoyed by Intervenor. The extension of commercial electricity would undermine the shared values of the solar community of No Name Key. No Name Key is a community organized around a low-impact and solar-based lifestyle, around the conservation of natural resources and the protection of the National Key Deer Wildlife Refuge, and characterized by customs of mutual assistance and a strong sense of unique identity. Additionally, the installation of poles, wires and streetlights would adversely affect the scenic beauty, wildlife and view of the night sky on No Name Key. Thus, commercial electricity would eradicate the current No Name Key lifestyle and customs, and would render this unique community indistinguishable from other developed communities where such infrastructure is present. Further, the extension of

commercial electricity would not only result in the irretrievable loss of the financial and emotional investments of Intervenor and those similarly situated members of The Solar Community of No Name Key, but also would represent the destruction of a unique community found nowhere else in the State of Florida or this nation.

The extension of commercial power infrastructure to No Name Key would promote secondary growth impacts on the island by rendering the land thereon more valuable and more attractive to development. The resulting development would, in turn, lead to the fragmentation of wildlife habitat, increased mortality to endangered species including the Key Deer, and other negative environmental impacts. Thus, commercial power infrastructure would directly impact Intervenor's use and enjoyment of No Name Key.

Intervenor relies on the Monroe County Comprehensive Plan and its implementing code to protect her life, property and the natural resources she uses and enjoys. Intervenor's reliance includes, but is not limited to, Monroe County Code Section 130-122 *et. seq.* and Comprehensive Plan Policies 103.2.10; 215.2.3 and 1301.7.12. These are the same Code and Plan requirements Reynold's seeks this Commission to prohibit the County from enforcing.

The issue now before this commission- the commercial electrification of No Name Key- has been the subject of a previous law suit. In 1999, the Taxpayers For The Electrification of No Name Key, Inc. filed a Complaint in the Sixteenth Judicial Circuit seeking, *inter alia*, declaratory relief that they had a statutory or property right to have electric power extended to their homes on No Name Key. Taxpayers For The Electrification of No Name Key, Inc., Et. Al. v. Monroe County, Case No. 99-819-CA-19. Alicia Roemmele-Putney was an intervening Defendant in that case. In 2002, the Court in *Taxpayers* concluded that plaintiff property owners did not have a "statutory or property right to have electric power extended to their homes, which

are operated with alternative, typically solar, energy sources." The Court further concluded, "Section 366.03, Fla. Stat. does not apply to Defendants Monroe County or Keys Energy Service ("KES"). 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."

Subsequent to Taxpayers, on or about April 4, 2011, Monroe County initiated an action in circuit court seeking declaratory relief as to KES and a declaration as to whether Monroe County's Comprehensive Plan and Land Development Code provisions could preclude the extension of and connection to commercial utility lines on No Name Key. Monroe County, *et al* v. Keys Energy Services, *et al*, Case No. 2011-CA-342-K. Alicia Roemmele-Putney was a named party Defendant in that action and this honorable Commission was granted Amicus status.

Ultimately, on or about January 31, 2012, the Circuit Court in and for Monroe County concluded that the Commission was the Proper forum to hear the issues presented by the County and summarily dismissed the case with prejudice. On or about February 6, 2012, Alicia Roemmele-Putney and Monroe County appealed the lower court's decision and were named appellants in the case. Alicia Roemmele-Putney, *et al.* v. Robert D. Reynolds, *et al.*, 2013 Fla. App. LEXIS 1756 (Fla. 3rd DCA. Feb. 6, 2013).

While the appeal remained pending, Robert D. Reynolds petitioned this Commission in the instant case for a hearing on the issues presented to the Circuit Court in Monroe County, *et al* v. Keys Energy Services, *et al*, Case No. 2011-CA-342-K. Intervenor is explicitly referred to by name in the Reynolds' complaint at paragraphs 22, 23, 24, and 30. Subsequently, Monroe County and No Name Key Property Owners Association (an association of pro-commercial

power property owners)("NNKPOA") intervened in the instant matter.

On July 24, 2012, despite the pending litigation before both this commission and the Third District Court of Appeals, KES moved forward with the installation of sixty two (62) commercial utility poles at the insistence and sole expense of NNKPOA. KES was indemnified of all risk and legal fees by operation of a line extension agreement between NNKPOA and KES.

Despite the adamant objection by Monroe County, the commercial power lines extend over and trespass onto conservation lands owned by Monroe County. On or about May 6, 2012 as a result of this trespass, Monroe County filed a civil action against KES. Monroe County, *et al.* v. Key Energy Services, *et al.*, Case No. 2012 CA K 549. Alicia Roemmele-Putney was granted intervention as a Plaintiff in that action as well.

On February 6, 2013, without reaching the merits, the Third District Court of Appeals affirmed the lower court's decision in Monroe County, *et al* v. Keys Energy Services, *et al*, Case No. 2011-CA-342-K, concluding that the Commission is the proper forum to hear the case and **"appellants [Alicia Roemmele-Putney and Monroe County] do retain, however, the right to seek relief before the PSC...".** Alicia Roemmele-Putney, *et al.* v. Robert D. Reynolds, *et al.*, 2013 Fla. App. LEXIS 1756 (Fla. 3rd DCA. Feb. 6, 2013) *emphasis added.* Along the same line of reasoning, on February 21, 2013, the circuit court dismissed the claims of trespass on the grounds that when the jurisdiction of the Commission is invoked, the Commission must first pass on the jurisdiction prior to the Circuit Court taking any action in the matter.

In accordance with the aforementioned decisions, Alicia Roemmele-Putney comes to this honorable Commission requesting intervention as a full party. Alicia Roemmele-Putney has a direct interest in the subject matter of the instant case. To the extent Reynolds' and the

NNKPOA would have standing to participate in this case with a desire to connect to commercial power, Intervenor would have standing to participate in this case with sufficient demands to prohibit the extension of commercial electricity on No Name Key.

It is clear that intervention in this proceeding is necessary to protect Intervenor's interests. Intervenors quality of life within No Name Key's low impact solar-only community will be destroyed if the Commission grants the Complainant's requests. Furthermore, this issue comes to the Commission from the trial court and Third District Court of Appeal, where Intervener held full party status. Minus the Supreme Court of Florida, this Commission is Intervener's last chance to protect her substantial interests in this matter. Therefore, this type of administrative proceeding and issue to be discussed before the Commission is in fact the type of proceeding designed to protect Intervener's interest.

Therefore participation of Intervenor in this proceeding and the consideration of her rights by the Commission would therefore further the ends of justice. *See* Union Cent. Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507 (Fla. 1992). Under the "Agrico Test", to demonstrate standing to intervene as a party in an administrative proceeding, Intervenor must show "1) that [s]he will suffer injury in fact which is of sufficient immediacy to entitle h[er] to a[n] [Administrative Procedure Act] section 120.57 hearing, and 2) that h[er] substantial injury is of a type or nature which the proceeding is designed to protect." Agrico Chem. Co. v. Dep't of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Concerning the instant matter, Intervenor satisfies both prongs of the "Agrico Test".

Accordingly, Intervenor has a substantial interest in this matter and should be granted full party status to protect her interest. In further support of this Petition to Intervene, Intervenor states as follows:

1. **The Petitioner.** The name, address, and telephone number of the Petitioner are as follows:

Alicia Roemmele-Putney
2150 No Name Drive
No Name Key, Florida 33043-5202
(305) 872-8888

2. **Petitioner's Representative.** All pleadings, orders and correspondence should be directed to Petitioner's representative as follows:

Robert N. Hartsell, Esq.
Robert N. Hartsell, P.A.
Counsel for Alicia Roemmele-Putney
(Fla Bar No. 0636207)
Federal Tower Office Building
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062

3. **Affected Agency.** The agency affected by this Petition to Intervene is:

Florida Public Service Commission
2450 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

4. **Statement of Affected Interests.** Intervenor is directly affected by the Commission's decision as stated above. Intervenor chose to reside on No Name Key because it was not served by commercial electricity or a centralized water distribution system, and therefore the threat of development was minimal. In order to build a single family home on No Name Key and comply with Monroe County's building permit, Intervenor spent between $34,000 and $36,000 on top of construction costs in order to have a solar power sole alternative energy source and rainwater as a alternative potable water source. Additionally, because No Name Key lacks those amenities, the value of Intervenors property is decreased. The decreased property value, and increased construction costs were costs the Petitioner was willing to accept in order to obtain the peace and tranquility that No Name Key provides. Monroe County's prohibition of the

extension of commercial utilities on No Name Key inhibits development and enhances the protection of Intervenor's life and property within this Coastal Barrier Resource System unit. Furthermore, having lived on No Name Key, Intervenor frequently enjoys the Key's wildlife, having studied the plant and animals of the Key. This Commission's decision will directly affect Intervenor's enjoyment of No Name Key and more quantifiably, Petitioner's reasonable investment-backed expectations. Furthermore, Intervenor is a "party" as defined by Section 120.52(13)(b), Fla. Stat..[1]

5. **Disputed Issues of Material Fact.** None at this time. Intervenor reserves all rights to raise additional issues in accordance with the Commission's rules and the anticipated Order Establishing Procedure in this case.

6. **Statement of Ultimate Issue.** Intervenor, Alicia Roemmele-Putney, by and through its undersigned counsel asserts that based on the law of the State of Florida, the following is the ultimate conclusion that the Public Service Commission should reach in this docket: The PSC does not have exclusive jurisdiction over this entire matter. There is no provision in Chapter 366 that would, other things being equal, give the Commission the authority to authorize a municipal utility such as KES to provide service to an applicant in violation of a Monroe County's Comprehensive Plan and Land Development Regulations. This is critical because the PSC "derives its powers solely from the legislature." United Telephone Co. of Florida v. Public Service Comm'n, 496 So. 2d 116, 118 (Fla. 1986). Lacking the specific power to authorize a municipal utility to serve, the Commission could not order KES to provide service: as the Florida Supreme Court stated in United Telephone, **"If there is a reasonable doubt as to**

[1] Section 120.52(13)(b), Fla. Stat., defines "party" as "Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party."

the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *empahasis added.* Id. at 118 (*citing* Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So. 2d 577, 582 (Fla. 1965)). Allow Monroe County to enforce its Local Code and Comprehensive Plan under Home Rule to prohibit the unlawful extension of commercial distribution lines on No Name Key. Declare that the PSC lacks any colorable jurisdiction over whether or not building permits can be authorized for connection of a customer to a commercial power line in violation of a County Comprehensive Plan and Land Development Regulations under Monroe County's constitutional Home Rule powers. Wilson v. Palm Beach County, 62 So. 3d 1247, 1252 (Fla. 4th DCA 2011).

7. **Substantial Interests Affected.** Intervenor, Alicia Roemmele-Putney, seeks intervention to participate as a party in this docket as defined by Section 120.52(13)(b), Fla. Stat.. Section 120.52(13)(b) allows intervention of any person "whose substantial interests will be affected by proposed agency action . . . ." Additionally, Rules 25-22.039, 28-106.201, and 28-106.205, FAC, similarly provide that persons whose substantial interests are subject to determination in agency proceeding are entitled to intervene in such proceeding.

Because the Third District Court of Appeals concluded Intervenor has **the right to seek relief before the PSC.** Alicia Roemmele-Putney, *et al.* v. Robert D. Reynolds, *et al.*, 2013 Fla. App. LEXIS 1756 (Fla. 3rd DCA. Feb. 6, 2013). Intervenor has an interest and relies upon the land development code and comprehensive plan language Reynold's seeks to have this honorable Commission mandate the County violate; Intervenor spent years acquiring permission to build her home on No Name Key, spent monies upwards of $34,000 beyond the cost of construction to comply with No Name Key's Land Codes, has personally enjoyed the natural area of No Name

Key for over 20 years; and because proposed Intervenor's quality of life, safety[2], property interest and investment-backed expectations will be directly affected by the Commission's decision, Intervenor qualifies as a substantially affected person.

CONCLUSION

WHEREFORE, Intervenor requests that this Commission: a) grant her leave to intervene in this cause with full party status; b) direct the clerk to amend the style in this case to reflect the intervention; and c) grant such other relief this Commission may deem just and proper.

RESPECTFULLY SUBMITTED this 10 day of March, 2013.

Robert Hartsell, Esq.
(Fla Bar No. 0636207)
Robert N. Hartsell, P.A.
Federal Tower Office Building
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
Robert@Hartsell-Law.com
(954) 778-1052 – Phone
(954) 941-6462 - Fax

[2] The majority of No Name Key is located within the Coastal Barrier Resources System (CBRS), a federal designation that restricts federal spending and financial assistance to discourage the development of coastal barriers. In passing the Coastal Barrier Resources Act in 1982, Congress **aimed to reduce the loss of human life, wasteful spending of federal money, and damage to fish, wildlife, and other natural resources associated with coastal barriers** along the Atlantic and Gulf of Mexico coasts. Monroe County Code § 130-122 prohibits the extension of public utilities including electricity within the Coastal Barrier Resources System Overlay District. This section of the code seeks to implement the policies of the County's comprehensive plan by adopting by reference the federally designated boundaries of a CBRS district on current flood insurance rate maps approved by the Federal Emergency Management Agency.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served by Electronic and U.S. Mail this 18th day of March, 2013 on the following:

Robert B Shillinger, Esq.
Derek Howard, Esq.
Monroe County Attorney's Office
1111 12th Street, Suite 408
Key West, Florida 33040
Howard-derek@monroecounty-fl.gov
Dastugue-laurie@monroecounty-fl.gov
(305) 292-3470
(305) 292-3516 – facsimile

Nathan E. Edan, Esq.
Nathan E. Edan, P.A.
302 Southard Street, Suite 205
Key West, Florida 33040
neecourtdocs@bellsouth.net
(305) 294-5588

Barton W. Smith, Esq. and Gregory S. Oropeza, Esq.
Barton Smith, P.L.
624 Whitehead Street
Key West, Florida 33040
bart@bartonsmithpl.com
greg@bartonsmithpl.com
tiffany@bartonsmithpl.com

Andrew M. Tobin, Esq.
Andrew M. Tobin, P.A.
P.O. Box 620
Tavernier, Florida 33070
tobinlaw@terranova.net
tobinlaw2@gmail.com

Robert Hartsell, Esq.
(Fla Bar No. 0636207)
Robert N. Hartsell, P.A.
Federal Tower Office Building

1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
Robert@Hartsell-Law.com
(954) 778-1052 – Phone
(954) 941-6462 - Fax

APPENDIX 8

MONROE COUNTY, FLORIDA
PLANNING COMMISSION RESOLUTION NO. P44-2012

A RESOLUTION BY THE MONROE COUNTY PLANNING COMMISSION DENYING THE ADMINISTRATIVE APPEAL OF JAMES B. NEWTON AND UPHOLDING THE ADMINISTRATIVE DECISION BY TOWNSLEY SCHWAB, SENIOR DIRECTOR OF PLANNING & ENVIRONMENTAL RESOURCES, AND JEROME SMITH, BUILDING OFFICIAL, TO REVOKE BUILDING PERMIT #121-1527 RELATED TO INSTALLATION OF A 200 AMP ELECTRICAL SERVICE ON PROPERTY LOCATED AT 2047 BAHIA SHORES ROAD, NO NAME KEY, LEGALLY DESCRIBED AS LOT 14, DOLPHIN HARBOUR AMENDED PLAT, (PB6-116), HAVING REAL ESTATE NUMBER 00319492.001400

WHEREAS, during a specially scheduled public meeting held on October 18, 2012, the Monroe County Planning Commission conducted the review and consideration of an administrative appeal filed by James B. Newton ("Appellant") in accordance with §102-185 of the Monroe County Code; and

WHEREAS, the Appellant filed an appeal to the Planning Commission concerning an administrative decision made by Townsley Schwab, in his capacity as Senior Director of Planning & Environmental Resources ("Planning Director"), and by Jerome Smith, Building Official, which were set forth in a letter to the Appellant on June 12, 2012 ; and

WHEREAS, the precise decision appealed was that of the Building Official and Planning Director to revoke, by letter dated June 12, 2012, building permit #121-1527 (Building Permit) in Building Department file 121-1527. The decision was made in accordance with §130-122, §6-101 and §6-104 of the Monroe County Code, Policy 102.8.5, Objective 101.11 of the Monroe County 2010 Comprehensive Plan as mentioned in the letter and the attachments A through D to the aforementioned letter; and

WHEREAS, the property for which the permit was issued is located at 2047 Bahia Shores Road, No Name Key, and is legally described as Lot 14, Dolphin Harbour Amended Plat, (PB6-116) (PB1-135), Monroe County, Florida, having real estate 00319492.001400 (subject property); and

WHEREAS, the Planning Commission was presented at the October 18, 2012, hearing with Appellant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or in the Alternative Transfer Venue, which was opposed by Monroe County and denied; and

WHEREAS, the Planning Commission was presented with a Petition to Intervene on behalf of Petitioners No Name Key Property Owner's Association, Inc., and its individual members, and with a Petition to Intervene on behalf of Alicia Roemmele-Putney, both of which were opposed by the parties to the appeal, and which were unanimously denied; and

WHEREAS, Appellant was represented by Barton Smith, Esq. and Greg Oropeza, Esq., Monroe County was represented by Assistant County Attorneys Derek Howard, Esq. and Susan Grimsley, Esq., and the Planning Commission was represented by John Wolfe, Esq.; and

WHEREAS, the Planning Commission was presented with the following documents and other information relevant to the request, which by reference is hereby incorporated as part of the record of said hearing:

1. Administrative Appeal to the Planning Commission application (Planning & Environmental Resources Department File #2012-096), received by the Monroe County Planning & Environmental Resources Department on July 2, 2012, and associated attachments and exhibits provided by the appellant for the appeal;
2. Letter from Jerry Smith, Building Official, and Townsley Schwab, Senior Director of Planning & Environmental Resources, to James Newton, dated June 12, 2012, and attachments thereto;
3. Staff report and attachments by Christine Hurley, AICP, Director of Growth Management dated October 9, 2012;
4. Sworn testimony of the Monroe County Director of Growth Management, Christine Hurley;
5. Sworn testimony of the Monroe County Building Official, Jerry Smith;
6. Sworn testimony of the Appellant;
7. Sworn Testimony by Donald Craig, expert witness for the appellant;
8. Sworn Testimony by Randall Mearns, electrician , the qualifier signing the building permit application;
9. Sworn testimony of the general public;
10. Documents provided by the public and attorneys for members of the public; and

WHEREAS, based upon the information and documentation submitted, the Planning Commission makes the following Findings of Fact:

1. The subject property is located within the Land Use District of Improved Subdivision (IS) and within the Future Land Use Map (FLUM) designation of Residential Medium (RM).

2. The subject property is located on No Name Key.

3. There is an existing single family home on the subject property which is owned by the Appellant and received a certificate of occupancy on July 24, 1997.

4. Monroe County has a long-standing policy against the commercial electrification of No Name Key that has been expressed in comprehensive plan and code provisions, as well as letters and other communications from the Growth Management Division.

5. Homes on No Name Key, including Appellant's home, are powered by alternative energy sources, including solar panels and generators.

6. Despite Monroe County's opposition to the electrification of No Name Key, Keys Energy Services (KES)—the public utility electrical service provider for the lower keys—began installing poles and power lines on No Name Key earlier this year (2012) for Line Extension #746 pursuant to a contract with the No Name Key Property Owners Association (NNKPOA).

7. Monroe County, KES, NNKPOA, and opponents of commercial electricity are involved in pending litigation in the judicial forum regarding Line Extension #746.

8. On April 3, 2012, the property owner applied for a building permit to install 200 amp electric service and subfeed to the house, which was issued as Permit #121-1527 (Building Permit) on May 15, 2012.

9. At the time the property owner submitted his application, KES was in the process of installing infrastructure on No Name Key for Line Extension #746.

10. The issued permit contained language as follows: (AS SHOWN)
PLANNING DEPARTMENT DID NOT REVIEW THIS APPLICATION. THERE MAY BE DEVELOPMENT AND/OR LAND USE ISSUES ON THE SITE THAT ARE NO LONGER IN COMPLIANCE WITH A COUNTY REGULATION(S) OR ESTABLISHED UNLAWFULLY WITHOUT THE BENEFIT OF PROPER APPROVALS. APPROVAL OF THIS PERMIT DOES NOT DEEM ALL DEVELOPMENT AS CONFORMING OR DEEM UN-LAWFUL DEVELOPMENT AS LAWFUL. THE GROWTH MANAGEMENT DIVISION RESERVES THE RIGHT TO REQUIRE THAT SUCH DEVELOPMENT BE BROUGHT INTO COMPLIANCE THROUGH THE PROPER APPROVAL PROCESS OR TERMINATED UPON FUTURE DISCOVERY.

11. County staff spoke to the Appellant following the submission of his application to verify the purpose and intent of the electrical work and based on that conversation, it was staff's understanding that Appellant intended to connect to the electrical line that was being extended to No Name Key by KES.

12. The Planning Director was notified of the permit issuance and determined that the permit was issued in error based upon policies and objectives of the Monroe County 2010 Comprehensive Plan and the Monroe County Code.

13. As set forth in §102-21(b)(2) h. of the Monroe County Code, the Planning Director has the authority and duty to render interpretations of the Monroe County 2010 Comprehensive Plan and the Monroe County Land Development Code.

14. The Monroe County Building Official revoked Building Permit 121-1527 pursuant to his authority in Monroe County Code Section 6-101 (c) and Section 6-104 which state:

> *6-101 (c) Permit issuance.* A building permit shall only be issued if the building official finds that it is consistent with the Florida Building Code and this chapter and is compliant with part II of this Code, as determined by the planning director.
> *Section 6-104. Revocation of permits.* The building official may suspend or revoke any building permit under any one of the following circumstances:
> (3) The permit was issued in error and, in the opinion of the planning director, the building official, or the fire marshal, the error would result in a threat to the health, safety or welfare of the public.

15. The revocation letter was sent to the Appellant on June 12, 2012, over the signature of the Planning Director and the Building Official.

16. On July 2, 2012, the Appellant filed an application for an administrative appeal to the Planning Commission, requesting that the Planning Commission overturn the decision by the Senior Director of Planning & Environmental Resources and the Building Official revoking the permit.

17. Section 102-185 of the Monroe County Code states:

> " The Planning Commission shall have the authority to hear and decide appeals from any decision, determination or interpretation by any administrative official with respect to the provisions of the Land Development Code and the standards and procedures hereinafter set forth, except that the Board of County Commissioners shall hear and decide appeals from administrative actions regarding the floodplain management provisions."

18. The subject parcel is located in a subdivision which is surrounded by a unit of the Coastal Barrier Resource System as defined in Sec. 101-1of the Monroe County Code.

19. A building permit is required for any electrical work pursuant to Sec. 6-100 of the Monroe County Code.

20. The subject property's connection to the electrical lines installed by KES would be a connection to electrical lines that pass to and through a unit of the Coastal Barrier Resource System.

21. The Monroe County 2010 Comprehensive Plan, along with other policies presented in the staff report by Growth Management Division Director Christine Hurley, states as follows:

Objective 101.11
Monroe County shall implement measures to direct future growth away from environmentally sensitive land and towards established development areas served by existing public facilities.

Objective 102.8
Monroe County shall take actions to discourage private development in areas designated as units of the Coastal Barrier Resources System.

Policy 102.8.1
Monroe County shall discourage developments which are proposed in units of [the] Coastal Barrier Resource System (CBRS).

Policy 102.8.5
Monroe County shall [make] efforts to discourage the extension of facilities and services provided by the Florida Keys Aqueduct Authority and private providers of electricity and telephone service to CBRS units. These efforts shall include providing each of the utility providers with:
1. a map of the areas of Monroe County which are included in CBRS units;
2. a copy of the Executive Summary in Report to Congress: Coastal Barrier Resources System published by the U.S. Department of the Interior, Coastal Barriers Study Group, which specifies restrictions to federally subsidized development in CBRS units;
3. Monroe County policies regarding local efforts to discourage both private and public investment in CBRS units.

22. The Monroe County Code Sec. 130-122 states as follows:

Sec. 130-122. - Coastal barrier resources system overlay district.

(a)Purpose.
The purpose of the coastal barrier resources system overlay district is to implement the policies of the comprehensive plan by prohibiting the extension and expansion of specific types of public utilities to or through lands designated as a unit of the coastal barrier resources system.
(b)Application.
The coastal barrier resources system overlay district shall be overlaid on all areas, except for Stock Island, within federally designated boundaries of a coastal barrier resources system unit on current flood insurance rate maps approved by the Federal

Emergency Management Agency, which are hereby adopted by reference and declared part of this chapter. Within this overlay district, the transmission and/or collection lines of the following types of public utilities shall be prohibited from extension or expansion: central wastewater treatment collection systems; potable water; electricity, and telephone and cable. This prohibition shall not preclude the maintenance and upgrading of existing public utilities in place on the effective date of the ordinance from which this section is derived and shall not apply to wastewater nutrient reduction cluster systems.

23. The position of the Monroe County Planning Department was previously set forth in the May 13, 1998, letter from Planning Director Tim McGarry to attorney Frank Greenman which stated that the electrification of No Name Key was inconsistent with both chapters 163 and 380 of the Florida Statutes and the Monroe County 2010 Comprehensive Plan; this position was upheld in Planning Commission Resolution P17-99 which was affirmed in the case of *Taxpayers for the Electrification of No Name Key, Inc., et. al. v. Monroe County* (Case No. 99-819-CA-19.

24. Appellant presented no evidence that the judicial determination rendered in *Taxpayers for the Electrification of No Name Key* was subsequently vacated or overturned.

25. KES installed Line Extension #746 without the County making any changes to the Monroe Code or Monroe County 2010 Comprehensive Plan.

26. Electric service could serve the house on the subject property if connected to the wiring located at the weatherhead shown on the Building Permit application with only a final inspection by the Building Department electrical inspector and Building Official , and a power release signed by the Building Official if requested by KES .

27. No further action or review by the Planning Department would be necessary in order to get the power release and connect to the power grid.

28. The Growth Management Director testified that if the Appellant wished to obtain the building permit for any purpose other than connecting to the power grid, the permit could be amended with conditions and reissued.

29. Appellant testified that he did not wish to receive a permit with conditions that connection to the power grid was prohibited.

30. The Growth Management Division Director recommended upholding the decision of the Building Official and the Senior Director of Planning & Environmental Resources.

31. The Findings of Fact stated in Resolution No. P17-99 generally remain true and accurate today as they did back in 1999. Appellant presented no evidence to negate the findings that (a) No Name Key's community and environmental character is

unique; (b) there is a causal relationship between the availability of utility infrastructure and new development; and (c) those that seek to live among an alternative energy community in Monroe County have fewer choices than those that prefer a conventional energy community.

32. Since the passage of Resolution No. P17-99, Monroe County has taken steps to address sea level rise and reduce carbon emissions.

33. The Growth Management Director testified that the County's adoption of the Tier System does not entirely alleviate development pressures on No Name Key that could be caused by electrification because infrastructure availability is among the criterion for tier designations, and Tier 1 parcels could be redesignated.

WHEREAS, based upon the information and documentation submitted, the Planning Commission makes the following Conclusions of Law:

1. The administrative appeal was properly filed in accordance with the provisions of §102-185 of the Monroe County Code.

2. The Building Permit at issue is for development as defined by the Monroe County Code Sec. 101-1, and the Planning Commission has jurisdiction over the subject matter of this appeal.

3. The interests of the persons who filed the motions to intervene were adequately represented by the parties to the appeal.

4. No due process violation is presented by having attorneys from the Monroe County Attorney's office advocate or present the position of the county staff when the Planning Commission is represented by separate counsel.

5. The work to be done under Building Permit #121-01527 is development and required a building permit.

6. The Building Official had the authority pursuant to Monroe County Code Sec. 6-101 and Sec. 6-104 to revoke the Building Permit based on the determination of the Planning Director.

7. The Monroe County 2010 Comprehensive Plan and the Monroe County Land Development Regulations (Part II of the Monroe County Code) set forth the goals, policies and objectives and regulations that provide for the health, safety and welfare of the public.

8. The Planning Director correctly found that the Building Permit was issued in violation of Part II of the Monroe County Code, specifically Section 130-122.

9. The Building Permit was issued in error.

10. The work to be done under the permit would result in a threat to the health, safety or welfare of the public as set forth in the Monroe County 2010 Comprehensive Plan and the stated purpose of the land development regulations Sec. 101-3 which states:

    (c) The board of county commissioners deems it to be in the best public interest for all development to be conceived, designed and built in accordance with good planning and design practices and the minimum standards set forth in this part II.

11. The work to be performed under the Building Permit would be in violation of the Monroe County 2010 Comprehensive Plan objectives and policies.

12. The Planning Commission must look at the Comprehensive Plan policies at issue in their aggregate, not individually.

13. The overall intent of the Comprehensive Plan is to discourage the provision of utilities, including electricity, to or through lands within a Coastal Barrier Resource System unit, including those on No Name Key, and discourage development in environmentally sensitive areas.

14. The historical position of the Planning Department, the Planning Commission and the Monroe County Board of County Commissioners has been to prohibit the electrification of No Name Key, and this serves as precedent for this Planning Commission's decision.

15. The Building Permit would allow the Appellant to connect to the electrical lines installed on No Name Key by KES without further review by the Planning Department.

16. Allowing a landowner on No Name Key to connect to a commercial power grid would lead to an increase in development expectations of owners of vacant lands on the island, and this would be in contravention of public health, safety and welfare.

17. Allowing a landowner on No Name Key to connect to a commercial power grid would negatively impact, perhaps destroy, the alternative energy character of the island, and this would be in contravention of the public welfare.

18. The revocation of the Building Permit was done to preserve the public health, safety comfort, and welfare of the public in accordance with the purposes of the Monroe County 2010 Comprehensive Plan and the Monroe County Land Development Regulations.

19. Based on the Monroe County Code, the Monroe County 2010 Comprehensive Plan, the information provided within the sworn testimony given at the Planning Commission public hearing, the staff report, revocation letter, and other

documentation provided by the parties and the public, the Building Permit should not have been issued and was properly revoked.

WHEREAS, at the public hearing, a motion was made to uphold the decision of the Senior Director of Planning & Environmental Resources and the Building Official to revoke the Building Permit;

NOW THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF MONROE COUNTY, FLORIDA, that the preceding Findings of Fact and Conclusions of Law support its decision to deny the administrative appeal and uphold the decision by Townsley Schwab, Senior Director of Planning & Environmental Resources and Jerome Smith, Building Official.

PASSED AND ADOPTED BY THE PLANNING COMMISSION of Monroe County, Florida, at a meeting held on the 18th day of October, 2012.

Chair Werling	YES
Vice-Chair Wall	NO
Commissioner Hale	YES
Commissioner Lustberg	YES
Commissioner Wiatt	YES

PLANNING COMMISSION OF MONROE COUNTY, FLORIDA

BY _____
Denise Werling, Chair

Signed this 28th day of November, 2012.

FILED WITH THE

NOV 28 2012

AGENCY CLERK

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM
Date: 11/28/12

APPENDIX 9

the comprehensive plan and revocation of the Newton permit based on Objective 101.11 is improper." They contend that the 200-amp electrical service and subfeed box does not give rise to new development.

The County's response to that is that Objective 101.11 is not applicable and the issuance of an individual building permit for electric connection to the newly installed electric system does not give rise to new development. Objective 101 states, "Monroe County shall implement measures to direct future growth away from environmentally sensitive land and toward established development areas served by existing public facilities."

The policy is not the only policy being utilized to deny the electric connection permit in the aggregate. The comprehensive plan policies and the land development regulations discourage extension of electric to No Name Key and connecting to the system that is prohibited by the code is at issue.

In the Planning Commission Resolution P-17-99 that was adopted previously when this was -- the decision on the electrification was heard by the Planning Commission, I highlighted two of the provisions in that resolution. Item Number 4 finds that "Infrastructure availability will increase the development expectations of the owners of vacant land. The comprehensive plan

specifically directs Monroe County to assess measures that can be taken to discourage or prohibit extension of facilities to No Name Key. Therefore, supporting such an action through the approval of this appeal would be a County action that is inconsistent with the 2010 plan."

And the Planning Commission at that time also found on Item Number 8, "It is not the direct impacts of commercially supplied power versus the direct impacts of power supplied by fossil-fueled generators on the Key deer that are at issue, but rather the secondary impacts associated with the risk of increased development expectations and the resulting vehicular trips and loss of habitat due to increased development."

Item Number 3 of the appellant's basis for appeal, "The Newtons' property is not located within a Coastal Barrier Resource System." We've already discussed that. The intent and purpose of the CBRA was not to prevent development in a CBRS unit, but to regulate development through free market enterprise by prohibiting the expenditure of federal funds in disaster and insurance related scenarios.

We agree, again, they are not within the CBRS unit. Again, the system has to pass to or through lands, and it was installed by doing that, which is in violation of the County's Section 130-122.

panel.

MS. HURLEY: You're right. But I think the reason why we're putting this on the record is there probably is going to be discussion about developed versus undeveloped and whether we can -- whether extending the utility to a developed house, that already has a house is against or in favor of the County's policies. And the Planning Commission found when it was previously considering this that by the utilities being extended it would cause vacant landowners to have more of an expectation of development.

VICE CHAIR WALL: Okay. Thank you.

MS. HURLEY: Okay. I've already gone over most of this response in previous items. So in the interest of time I'm not going to reiterate that.

Okay. Number 4 of the appellant's basis for appeal. "No determination was made, nor could it be reasonably made, that the Newton permit would result in a threat to the health, safety or welfare of the public." I did already talk about that. They also contend the County must also make a determination that the error would result in a threat to health, safety or welfare of the public. And as I stated earlier, the code purpose is that we are protecting the health, safety and welfare by utilizing the code. And the fact is, if you have something deemed not

APPENDIX 10

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,

Respondents.

Docket No. 120054

COMPLAINANTS, ROBERT D. REYNOLDS AND JULIANNE C. REYNOLDS' OPPOSITION TO ALICIA ROEMMELE-PUTNEY'S FIRST AMENDED MOTION TO INTERVENE

Complainants, ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS (collectively, "Reynolds"), by and through undersigned counsel and pursuant to the Florida Administrative Code, file their opposition to ALICIA ROEMELE-PUTNEY'S First Amended Petition to Intervene ("Amended Petition"), and in support thereof state as follows:

PROCEDURAL HISTORY

1. On March 5, 2012, Reynolds instituted the above-styled action in the Florida Public Service Commission ("PSC") against Respondent, UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d/b/a/ KEYS ENERGY SERVICES ("KES"), because KES had refused to provide power to Reynolds and other similarly situated property owners located on No Name Key. *See* Reynolds' Complaint ¶¶ 1, 15 – 16, 21 – 34, previously filed in this action and incorporated herein by reference. Reynolds' Complaint alleged that the Florida Public Service Commission ("PSC") approved a territorial agreement dated June 17, 1991 by and between KES and the Florida Keys Rural Electric Cooperative Association, Inc. ("Territorial Agreement"),

wherein KES is the exclusive provider of commercial electric service to the lower Florida Keys, including No Name Key, where the Reynolds home is located. *Id.* at 12 – 13. A true and correct copy of the Territorial Agreement is attached hereto and incorporated herein as Exhibit A.

2. On March 17, 2012, KES approved Line Extension #746 ("Line Extension") with the No Name Key Property Owner's Association ("NNKPOA") for the extension of electrical service to No Name Key.

3. On April 23, 2012, MONROE COUNTY, a political subdivision of the State of Florida ("Monroe County"), entered its Petition to Intervene in the above-styled action. Monroe County's Petition to Intervene has been previously filed in the above-styled action and is incorporated herein by reference.

4.. On or about July 26, 2012, pursuant to the Territorial Agreement and Line Extension, KES completed and energized the electrical lines installed during the Line Extension.

5. On February 21, 2013, ALICIA ROEMMELE-PUTNEY ("Putney"), served her Petition to Intervene ("Petition") based on the assertion that commercial electricity will affect her "enjoyment of No Name Key and more quantifiably, Petitioner's reasonable investment-backed expectations." *See* Putney Petition, ¶ 5, previously filed in the above-styled action and incorporated herein by reference. Moreover, Putney asserted that her quality of life and enjoyment of the environment would be negatively impacted as result of the electrification of No Name Key. *See* Putney Petition, ¶ 4.

6. On March 11, 2013, Reynolds filed their Amended Complaint against KES and Monroe County, along with Intervener, NO NAME KEY PROPERTY OWNERS ASSOCIATION, INC. ("NNKPOA"), because of the changed circumstances on No Name Key, specifically, KES' installation of the electric distribution line on No Name Key and the denial by

Monroe County of Reynolds' application for an electric permit to install a 200 AMP Electric Service and Subfeed in order to connect to the electric distribution line outside of their home located on No Name Key. Reynolds' Amended Complaint has been previously filed in the above-styled action and is incorporated herein by reference. The Amended Complaint requested that the PSC: (1) Exercise jurisdiction over this action and the parties thereto; (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, Florida are legally permissible and properly installed; (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 mandate that Monroe County may not prevent the connection of a homeowner on No Name Key to the coordinated power grid; (5) Award reasonable attorney's fees and costs; and (6) Award such other and supplemental relief as may be just and necessary.

7. On March 18, 2013, Putney served her Motion for Leave to Amend Petition to Intervene, with the proposed Amended Petition attached thereto. Putney's Motion for Leave to Amend Petition to Intervene has been previously filed in the above-styled action, and is incorporated herein by reference.

8. Paragraph Eight (8) of Putney's Motion for Leave to Amend Petition to Intervene asserts: "Intervenor's counsel has consulted with counsel for all parties, they do not object to the filing of the Amended Petition although they may disagree as to whether the Petition should be granted." The undersigned counsel has not been contacted at any time by Putney's counsel as to the filing of the Amended Petition.

FACTUAL ALLEGATIONS

1. The overwhelming majority of residents of No Name Key maintain diesel generators and lead acid batteries as a primary means of providing energy services.

2. Reynolds maintain not only diesel and lead battery generation, but a substantial photovoltaic solar array for which Reynolds spent in excess of Twenty Thousand and 00/100 Dollars ($20,000.00).

3. KES' Territorial Agreement provides a Territorial Service Area for which KES has the exclusive right and authority to provide commercial electrical services to customers. Pursuant to the Territorial Agreement, KES is required to extend commercial electrical service to customers within its Territorial Service Area. The Territorial Agreement is a PSC Order enforceable solely by the PSC pursuant to the State of Florida's police power. The Territorial Service Area includes the island of No Name Key.

4. For several decades, property owners on No Name Key have sought the extension of commercial electrical service to No Name Key and have been in repeated discussions and negotiations with KES to provide for the extension of commercial electrical service to their properties on No Name Key.

5. An undisputed majority of No Name Key property owners desire commercial electrical service because of the high costs associated with using alternative energy sources, and the inability to dispose of by-products of alternative energy, including exhausted batteries and damaged or worn propane tanks. More so, the use of large diesel fuel generators produce large amounts of environmental and noise pollutants, affecting all aspects of the ecosystem unique to No Name Key. Disposal costs are exacerbated by the Florida Keys' unique geographic features and No Name Key's remoteness.

6. By connecting to commercial electrical power, the combined use of the existing solar capability together with commercial grade power would result in positive net solar metering, producing a net positive impact on the environment that exceeds the negative impacts which currently exist as a result of the current pollutants emitted to power the homes on No Name Key.

7. On August 12, 2010, the United States Department of the Interior, Fish and Wildlife Service ("USFW") issued a letter to KES confirming that the electrical services to No Name Key would not have an adverse impact on the endangered wildlife which maintain habitat on No Name Key. A true and correct copy of the USFW Letter to KES is attached hereto and incorporated herein as Exhibit B.

8. Putney has no legal obligation to connect to or utilize any commercial utility service provider on No Name Key. Putney is free to choose not to connect to the commercial electrical lines which are installed on No Name Key.

MEMORANDUM IN OPPOSITION TO ALICIA ROEMELLE-PUTNEY'S FIRST AMENDED PETITION TO INTERVENE

I. Putney should not be allowed to intervene in the above-styled action because she has not met the prongs of the *Accardi* test.

This proceeding is an action by residents in KES' Territorial Service Area to be allowed to connect to KES' power lines. Putney's Amended Petition should be denied because Putney cannot show that she will suffer an injury in fact in the above-styled action. Assuming, *arguendo*, that Putney can show an injury, it is not of a type or nature which this proceeding is designed to protect.

Putney claims that she has an interest in enforcing her desired lifestyle choice on every property owner on No Name Key merely because she purchased her property in 1989 with the

intent to pursue an off-the-grid existence. The majority of property owners on No Name Key do not share that desire with Putney. Any effect that a property owner on a different part of the island from Putney would supposedly have on Putney's preferred "lifestyle" is not an injury-in-fact. Additionally, whether Putney's lifestyle choice would even be affected by Reynolds connecting to the existing utility poles on No Name Key,[1] such an effect is not of the type or nature which this proceeding is designed to protect.

Pursuant to Florida Statute §120.52(13)(b), a Party is "any person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action." Fla. Stat. §120.052(13)(b); *see also* F.A.C. §25-22.039. The initiation of formal proceedings, as the Reynolds have done here, is "appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interest and which is a violation of a statute enforced by the Commission, or of any Commission rule or order." F.A.C. §25-22.036(2).

In the above-styled action, the parties are Reynolds, KES, Monroe County, and NNKPOA. These parties are either actively seeking to connect to power lines in the case of Reynolds and the NNKPOA, the owner of the lines in the case of KES, or the entity whose ordinances are causing KES to prevent the Reynolds' connection to the power lines in the case of Monroe County. Unlike the current parties to the action, Putney is not seeking to connect, does not own the power lines or the property on which the power lines are located, and is not a governmental entity and so; she has no legal interest which can be addressed by the PSC.

[1] None of which actually approach Putney's property.

To demonstrate standing to intervene as a party in an administrative agency proceeding, a petitioner must demonstrate: (1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing under the Administrative Proceedings Act ("APA"); and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. *See Accardi v. Department of Environmental Protection*, 824 So.2d 992, 996 (Fla. 4th DCA 2002) (quoting *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997); *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981)). The first element pertains to the degree of injury whereas the second deals with the nature of the injury. *See Mid-Chattahoochee River Users v. Florida Dept. of Environmental Protection*, 948 So.2d 794, 797 (Fla. 1st DCA 2006) (citing *Agrico. Chem. Co.*, at 482)). The intent of this test is to prevent parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues to be resolved in the administrative proceedings. *See Mid-Chattahoochee River Users*, at 797 (citing *Gregory v. Indian River County*, 610 So.2d 547, 554 (Fla. 1st DCA 1992)).

1. **Putney will not suffer an injury in fact if Reynolds are successfull in the above-styled action.**

Putney has failed to satisfy the first prong of the *Accardi* test, namely that she will suffer an injury in fact which is of sufficient immediacy to entitle her to a hearing under the APA. *See Accardi*, at 996. Black's Law Dictionary defines the term "injury in fact" as "[a]n actual or imminent invasion of a legally protected interest, in contrast to an invasion that is conjectural or hypothetical." Black's Law Dictionary, Second Pocket Ed., ©1996. In her Amended Petition, Putney asserts: "...the quality of life in which she has invested substantial resources and the environment upon which this quality of life depends would be adversely and irreparably impacted by the extension of commercial electricity to No Name Key." Amended Petition, pg. 3.

Further, Putney asserts: "...the installation of poles, wires and streetlights would adversely affect the scenic beauty, wildlife and view of the night sky on No Name Key." Amended Petition, pg. 3.

In this case, there is no legally protected interest that will be imminently invaded as a result of this case. First, Putney's allegations are unfounded and opinionated assertions as to the effect commercial electricity will have on her. She offers only anecdotal evidence of her and her "now deceased" husband's experience with Key Largo in 1983 as support for her assertion that No Name Key will experience a similar explosion upon the arrival of utility service to the island. However, the above-styled action is no longer an action to bring commercial power to No Name Key. Powered electric utility lines are and have been present on No Name Key since August, 2012. Instead, this is an action to allow a property owner to connect to the already-present lines and receive commercial electric power.

Putney is not the owner of the Property at issue, and the one parcel of property she owns on No Name Key is, in fact, on a completely different part of the island. She also does not own the properties of the members of the NNKPOA, all of which also wish to connect to commercial electric power. Despite her ownership of only one parcel out of forty-three (43), Putney clearly feels entitled to impose her own preferences upon the overwhelming majority of property owners on No Name Key who desire commercial electric power. She has no legal interest in the other owners' properties; she just does not want commercial power available on No Name Key. Her visions of doom and passionate pleas to prevent commercial electricity aside, she has no legal interest in the connection of Reynolds to KES' power lines, and, as such, will not be injured by Reynolds' desired connection to KES' power lines.

Furthermore, Putney argues that the extension of commercial power infrastructure to No Name Key would render property on No Name Key more valuable. *See* Amended Petition, pg. 4.[2] While Reynolds does not stipulate that Putney is correct in concluding that commercial electric power will make their property more valuable, Putney may be one of the few people in the country who views an increase in her property value as something injurious rather than beneficial.

Finally, Putney is not obligated to connect to commercial electrical service and therefore the existence of commercial electricity would not render Putney's solar investment a loss. Putney is, of course, fully capable of keeping her own property off of the grid. She just cannot require that everyone else on No Name Key do the same. Thus, the "injuries" presented in Putney's Amended Petition are not injuries in fact of sufficient immediacy to entitle her to a hearing before the PSC, and her Amended Petition should be denied.

2. Assuming, *arguendo*, that Putney is able to satisfy the first prong of the *Accardi* test, any such injury established is not of the type which the PSC is designed to protect against.

The alleged injuries and negative effect commercial electrical service will have on Putney is not the type of effected interest for which the Public Service Commission's complaint process and formal proceeding process were designed to protect. Nowhere in the enabling legislation of the PSC does it appear that scenic beauty and quality of life is a concern of the PSC. Rather, the rules and regulations of the PSC towards electric service by electric public utilities are intended to define and promote good utility practices and procedures, adequate and efficient service to

[2] "The extension of commercial power infrastructure to No Name Key would promote secondary growth impacts on the island by rendering the land more valuable and more attractive to development."

public at reasonable costs, and to establish the rights and responsibilities of both the utility and the customer. *See* F.A.C. §26-6.002(1).

Furthermore, the PSC is not intended to cater to the irrational paranoia of potential future development expressed by a single property owner on No Name Key, who is not even the owner of the property which is at issue in this matter. Instead, the purpose of the PSC is to ensure that Florida's consumers receive utility service in a safe, reasonable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in three key areas: (1) rate base/economic regulation; (2) competitive market oversight; and (3) monitoring of safety, reliability and service.

The above-styled action is an action seeking authority from the PSC to engage in activity subject to PSC jurisdiction and complaining of an act or omission by an entity subject to Florida PSC jurisdiction which affects Reynolds' substantial interests and which is in violation of statute enforced by the PSC and PSC order. This action is an action under the Territorial Agreement to require KES to allow Reynolds to connect to KES' power lines. Article 6 of the Territorial Agreement, Construction of Agreement, Section 6.1 of the Territorial Agreement expressly provides that:

> 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.** (**Emphasis** added).

Moreover, KES' obligation to serve the citizens of the State of Florida within its respective service area is expressly stated in the Territorial Agreement's Section 0.2 and its enabling legislation. KES' enabling legislation states:

> "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, mains, and all additions to and extension of the same . . ."
>
> *See* Chapter 69-1191, Laws of Florida (1969) (Emphasis added).

KES, pursuant to the State of Florida's enabling legislation, its Territorial Agreement and incorporated Territorial Service Area, has an affirmative obligation to provide electrical service to customers in its service area. This action is just to require KES to do so and Monroe County to cease its efforts to prevent KES from fulfilling its duties under the Territorial Agreement. Putney's desires to keep No Name Key in its current condition are not within the purview of the PSC.

Conclusion

Putney's Amended Petition to Intervene should be denied as Putney does not have a substantial interest in the instant matter, nor does the instant matter affect a substantial interest of Putney. Putney's Petition fails to provide sufficient evidence of an injury which would meet the standard set forth by the *Accardi* Court. As such, Putney has failed to establish that she will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and that her injury is of a type or nature which the proceeding is designed to protect.

WHEREFORE, Complainants ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS respectfully request the Commission enter an Order denying ALICIA ROEMELLE-PUTNEY'S Amended Petition to Intervene and granting such other, further relief the Commission may deem appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic Mail to the attached Service List this 25th day of March, 2013.

Respectfully submitted,

SMITH | OROPEZA, P.L.
138-142 Simonton Street
Key West, Florida 33040
Telephone: 305-296-7227
Facsimile: 305-296-8448
Primary Email: bart@smithoropeza.com
Secondary Email: greg@smithoropeza.com
keilina@smithoropeza.com

/s/ Barton W. Smith, Esq.
Barton W. Smith, Esq.
Florida Bar No. 20169
Gregory S. Oropeza, Esq.
Florida Bar No. 56649

SERVICE LIST

Robert B. Shillinger, Esq.
MONROE COUNTY ATTORNEY'S OFFICE
1111 12th Street, Suite 408
Key West, Florida 33040
Primary Email: Howard-derek@monroecounty-fl.gov
Secondary Email: Dastugue-laurie@monroecounty-fl.gov

Nathan E. Eden, Esq.
NATHAN E. EDEN, P.A.
302 Southard Street, 205
Key West, Florida 33040
Primary Email: neecourtdocs@bellsouth.net

Andrew M. Tobin, Esq.
ANDREW M. TOBIN, P.A.
P.O. Box 620
Tavernier, Florida 33070
Primary Email: tobinlaw@terranova.net
Secondary Email: tobinlaw2@gmail.com

Robert N. Hartsell, Esq.
ROBERT N. HARTSELL, P.A.
Federal Tower Office Building
1600 S. Federal Highway, Suite 921
Pompano Beach, Florida 33062
Primary Email: Robert@Hartsell-Law.com

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 DEASON
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 typography 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.

EXHIBIT A

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 TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MRC:bmi
910765.bmi

EXHIBIT A

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.

EXHIBIT A

AGREEMENT

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 an electric utility as defined in Chapter 366.02(2) Florida Statutes, and Florida Keys Electric Cooperative Association, Inc. (referred to in this Agreement as "FKEC"), a rural electric cooperative organized and existing under Chapter 425, Florida Statutes, and Title 7, Chapter 31, United States Code and 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";

WITNESSETH:

Section 0.2: WHEREAS, the Parties are authorized, empowered and obligated by their corporate charters and the laws of the State of Florida to furnish electric service to persons requesting such service within their respective service areas; and

Section 0.3: WHEREAS, each of the Parties presently

EXHIBIT A

Section 0.4: 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 0.5: WHEREAS, the unique geographic location of the service areas of the Parties and the unique topography of the Florida Keys affords a rational and non-controversial boundary between the Parties, and

Section 0.6: 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 0.7: 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 0.8: 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

EXHIBIT A

Section 0.9: 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 0.10: WHEREAS, the Commission is empowered by Section 366.04(2)(d), 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 0.11: NOW, THEREFORE, in consideration of the premises aforesaid and the mutual covenants and agreements herein set forth the Parties agree as follows:

ARTICLE 1

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 CES 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

EXHIBIT A

"FKEC", 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 FKEC or CES for retail electric service after the effective date of this Agreement.

EXHIBIT A

Section 1.8: Existing Customer. As used in this Agreement, the term "Existing Customer" shall mean any Person receiving retail electric service from either FKEC 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, FKEC shall have the exclusive authority to furnish retail electric service for end use within the FKEC 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

regardless of where such 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 FKEC and CES does not constitute an agreement on 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 FKEC 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 FKEC's transmission facilities) in FKEC's Territorial Area as defined herein, shall not grant CES any right or authority, now or in the future, to serve any consumers whose end use facilities are, or will be, located in FKEC'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.

EXHIBIT A

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 Parties' 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

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

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.

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, 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.

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

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 Manger
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.

ATTEST:

Robert R. Padron,
Secretary

(SEAL)

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

By: William T. Cates

Title: Chairman

ATTEST:

R. L. Barnes, Secretary

(SEAL)

FLORIDA KEYS ELECTRIC COOPERATIVE
ASSOCIATION, INC.

By: B. L. Schwartz

Title: President

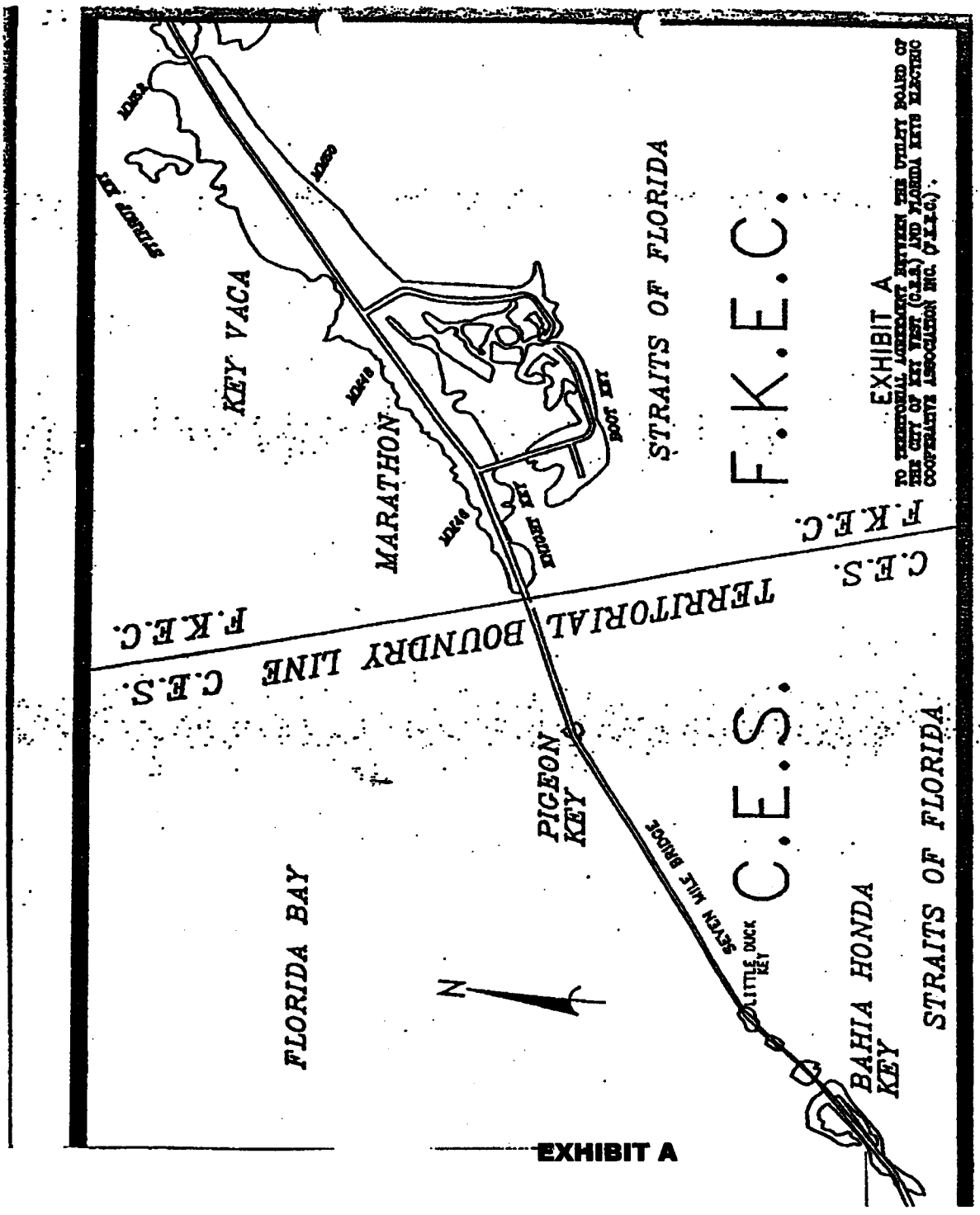
EXHIBIT A
TO TERRITORIAL AGREEMENT BETWEEN THE UTILITY BOARD OF THE CITY OF KEY WEST (O.U.B.) AND FLORIDA KEYS ELECTRIC COOPERATIVE ASSOCIATION INC. (F.K.E.C.).
F.K.E.C.
STRAITS OF FLORIDA
KEY VACA
MARATHON
BOOT KEY
KEY
KEY
F.K.E.C.
TERRITORIAL BOUNDARY LINE
C.E.S.
F.K.E.C.
C.E.S.
C.E.S.
PIGEON KEY
SEVEN MILE BRIDGE
LITTLE DUCK KEY
BAHIA HONDA KEY
STRAITS OF FLORIDA
FLORIDA BAY
N

EXHIBIT A

United States Department of the Interior

FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

October 15, 2010

Dale Finigan
Keys Energy Services
1001 James Street
Post Office Box 6100
Key West, Florida 33040-6100

Service Federal Activity Code: 41420-2009-TA-0539
Date Received: August 12, 2010
Project: No Name Key Extension of Electrical Service
County: Monroe

Dear Mr. Finigan:

The Fish and Wildlife Service (Service) has reviewed your biological assessment and letter dated, July 9, 2010 and August 11, 2010, respectively, and other information submitted by the Keys Energy Services (KES), on behalf of various property owners on No Name Key, for the project referenced above. We understand Monroe County (County) has advised KES the project requires our review in accordance with the Big Pine Key Habitat Conservation Plan (HCP).

PROJECT DESCRIPTION

According to your documents, KES is proposing to extend electrical services to No Name Key, Monroe County, Florida, via overhead power lines. The project would include 61 concrete utility poles and an electrical system line placed within existing right of way (ROW) owned by the County or private land. Placement of power poles will occur largely on existing scarified ROW and will be set back 6 feet from roadways. No clearing of native vegetation will occur as a result of the proposed project; however minimal trimming of overhead tree limbs may occur during initial system installation. No ancillary facilities will be developed on No Name Key. This design would be able to provide power for up to 43 potential residential customers and a single commercial customer. However, Monroe County has stated no new developments are anticipated on No Name Key as a result of this additional electricity.

THREATENED AND ENDANGERED SPECIES

In your Biological Assessment, KES has determined the project may affect, but is not likely to adversely affect, the endangered Key deer (*Odocoileus virginianus clavium*), endangered Lower Keys marsh rabbit (*Sylvilagus palustris hefneri*), endangered silver rice rat (*Oryzomys palustris natator*), threatened eastern indigo snake (*Drymarchon corais couperi*), threatened Stock Island tree snail (*Orthalicus reses*), endangered Key tree cactus (*Pilosocereus robinii*) and threatened

Garber's spurge *(Chamaesyce garberi)*. In addition, KES has made a determination the project may affect, but is not likely to adversely affect designated critical habitat for the silver rice rat.

During an August 4, 2010, site visit to No Name Key, KES and Service staff discussed a number of avoidance and minimization measures that will be implemented throughout construction and long-term maintenance to further reduce the proposed project's impact on listed species, as follows:

1. Poles will be placed near paved roads to avoid and minimize disturbance to native habitats.

2. The project was designed to allow for flexibility in pole placement. The distance between poles was extended to the maximum practical amount in order to reduce total pole count. In addition, pole locations in all areas (except corner poles) are flexible to allow the individual poles to be placed so as to avoid the permanent removal of native vegetation and minimize trimming.

3. This flexibility will greatly reduce potential impacts to Garber's spurge, which has been documented along the roadsides of Old State Road 4A as recently as 2008. Surveys conducted by KES in April and May 2010 did not locate the plant on at each proposed pole location or in the immediate vicinity of each pole. However, even at the time of installation KES has agreed to reposition the pole locations in order to avoid the species should it be encountered. Therefore the avoidance measures detailed in the *Garber's Spurge Protection Plan* (see attached) will be conducted by a qualified biologist during system installation and all pole maintenance. If the plant is encountered, the pole will be repositioned.

4. The poles that will be employed are taller than normal residential poles thereby allowing power line placement to occur above the vegetation. Pole heights of 45 feet will be used to minimize initial and yearly re-occurring tree trimming.

5. No vegetative trimming will be conducted until all poles are placed and the power lines are strung. This will allow KES to trim only those branches that will actually obstruct the power lines, thereby minimizing vegetation removal to the maximum extent.

6. The only self-sustaining population of the Stock Island tree snail with long-term viability in the Lower Florida Keys is located in the hardwood hammock south of Old State Road 4A on the eastern side of No Name Key, and may occur on trees within the ROW. Therefore the avoidance measures detailed in the *Stock Island Tree Snail Protection Plan* (see attached) will be conducted by a qualified biologist, during system installation and all pole maintenance.

7. Poles will only be placed at residences that have requested power, thereby reducing the scope of the overall project.

8. High strength concrete poles, storm-rated at 148 MPH, will be employed to reduce replacement intervals and subsequent maintenance.

9. Best management practices for construction impacts will be implemented, including placement of silt fence around all pole location area, removal of all spoils off-site, securing trash, and minimal staging of construction equipment and supplies.

10. KES will conduct pre-construction training with all contractors and KES staff working on the project regarding the presence of listed species. Training will be provided by a qualified biologist familiar with lower keys wildlife and environmental regulations.

11. *Standard Protection Measures for the Eastern Indigo Snake* (see attached) will be implemented during construction activities.

12. Best management practices will be implemented to prohibit feeding of key deer either intentionally or unintentionally by work crews during construction activities and lunch breaks, as well as traffic control measures to avoid deer-vehicle collisions during construction activities.

Based on the best currently available scientific and commercial information, as well as the avoidance and minimization measures outlined above and within the biological assessment, the Service concurs with your view that the proposed extension of electrical service to No Name Key is not likely to adversely affect the Key deer, Lower Keys marsh rabbit, silver rice rat, eastern indigo snake, Stock Island tree snail, Key tree cactus, or Garber's spurge and formal consultation is not required.

Reinitiation of consultation may be necessary if: (1) modifications are made to the project; (2) additional information involving potential effects to listed species becomes available; or (3) a new species is listed, or if critical habitat is designated that may be affected by the project.

Thank you for your cooperation in the effort to protect federally listed species. If you have any questions regarding this project, please contact Mark Salvato at 772-562-3909, extension 340.

Sincerely yours,

Paul Souza
Field Supervisor
South Florida Ecological Services Office

Enclosures

cc: w/o enclosures (electronic only)
Florida Keys Aqueduct Authority, Key West, Florida (Jim Reynolds)
Monroe County Government, Key West, Florida (Roman Gastesi, Suzanne Hutton, Mark Rosch)
Service, Washington, DC (Katie Niemi)
Service, Big Pine Key, Florida (Anne Morkill)
Service, Atlanta, Georgia (Cynthia Bohn)
FDCA, Tallahassee, Florida (Rebecca Jetton)

EXHIBIT B

STANDARD PROTECTION MEASURES FOR THE EASTERN INDIGO SNAKE

1. An eastern indigo snake protection/education plan shall be developed by the applicant or requestor for all construction personnel to follow. The plan shall be provided to the Service for review and approval at least 30 days prior to any clearing activities. The educational materials for the plan may consist of a combination of posters, videos, pamphlets, and lectures (*e.g.*, an observer trained to identify eastern indigo snakes could use the protection/education plan to instruct construction personnel before any clearing activities occur). Informational signs should be posted throughout the construction site and along any proposed access road to contain the following information:

    a. a description of the eastern indigo snake, its habits, and protection under Federal Law;
    b. instructions not to injure, harm, harass or kill this species;
    c. directions to cease clearing activities and allow the eastern indigo snake sufficient time to move away from the site on its own before resuming clearing; and,
    d. telephone numbers of pertinent agencies to be contacted if a dead eastern indigo snake is encountered. The dead specimen should be thoroughly soaked in water and then frozen.

2. If not currently authorized through an Incidental Take Statement in association with a Biological Opinion, only individuals who have been either authorized by a section 10(a)(1)(A) permit issued by the Service, or by the State of Florida through the Florida Fish Wildlife Conservation Commission (FWC) for such activities, are permitted to come in contact with an eastern indigo snake.

3. An eastern indigo snake monitoring report must be submitted to the appropriate Florida Field Office within 60 days of the conclusion of clearing phases. The report should be submitted whether or not eastern indigo snakes are observed. The report should contain the following information:

    a. any sightings of eastern indigo snakes and
    b. other obligations required by the Florida Fish and Wildlife Conservation Commission, as stipulated in the permit.

Revised February 12, 2004

EXHIBIT B

Stock Island Tree Snail and Garber's Spurge Impact Avoidance Procedures

Keys Energy Services Power Line Installation and Maintenance

No Name Key, Monroe County

Prepared for:

No Name Key Property Owners Association
32731 Tortuga Lane
No Name Key, Florida 33043

Prepared by:

Terramar Environmental Services, Inc.
1241 Crane Boulevard
Sugarloaf Key, Florida 33042
(305) 393-4200 FAX (305) 745-1192
terramar@bellsouth.net

August 9, 2010

EXHIBIT B

Introduction

The Stock Island Tree snail (*Orthalicus reses reses*) is a Federally listed Endangered mollusk that occurs throughout the Florida Keys. A population of this snail was introduced onto No Name Key in 1996 from Key Largo, and that population may persist in areas of hardwood hammock. Garber's spurge (*Chamaesyce garberi*) is a small plant also Federally-listed as Endangered that occurs throughout South Florida, and occurs in pine rocklands, hardwood hammocks and also on disturbed roadsides. It is known to occur on No Name Key where it occurs on the limestone road shoulders.

Keys Energy Services (KEYS) is installing electrical power to No Name Key using concrete power poles and overhead electric lines. The proposed project consists of extending existing electrical service from Big Pine Key to No Name Key, where no electrical service currently exists. The project will employ a total of 61 utility poles located within existing right of way (ROW) owned by Monroe County or on private property. Power poles will be placed in the ROW within six feet of the edge of existing roadway pavement using an auger truck and lift. Trimming of tree branches will be required for the initial installation of the system and ongoing trimming will be required to maintain the system in perpetuity.

KEYS will implement measures specifically designed to avoid impacts to the Stock Island tree snail and Garber's spurge during the initial installation of the system as well as during the long-term maintenance phase of the project.

Stock Island Tree Snail Relocation Procedures

The Stock Island Tree snail may occur on lateral branches and tree trunks that may require trimming during initial installation of the system as well as during ongoing maintenance. The following procedures will be implemented by KEYS during all tree trimming activities throughout the life of the project. These procedures follow the procedures established by Deborah A. Shaw, Ph.D., Environmental Affairs Manager for the Florida Keys Electric Cooperative and are based on many years of experience relocating tree snails associated with the power distribution system on Key Largo.

General Requirements

All staff conducting tree trimming activities will be provided a copy of this protocol and be instructed on tree trimming procedures on No Name Key by a qualified biologist. A qualified biologist is someone with the appropriate combination of education and training that makes them competent to direct trimming in a manner that avoids adverse impacts to tree snails. A qualified biologist will have direct experience in the handling and relocation of tree snails in South Florida. All tree snails associated with the project will be relocated including members of the genus *Orthalicus* and *Liguus*.

All limbs will be cut using hand-held trimming equipment such as a chain saw, power pruner or hand-operated loppers. No trimming using mechanized equipment is authorized.

EXHIBIT B

Equipment Needed

High-quality loppers, cooler with sealed lid; clean spray bottle (plant mister type); source of fresh, clean water; paper towels; plant clippers, bucket to carry snails.

Relocation Procedures

Tree branches will be trimmed and placed on the ground for inspection by a qualified biologist. Each branch will be carefully inspected for tree snails, and any snails identified will be relocated. No tree branches will be removed off-site or chipped until approved by the qualified biologist. The qualified biologist will work directly with KEYS during trimming operations to ensure any tree snails are relocated properly.

Tree snails identified during tree trimming operations will be in one of three conditions:

1) sealed on a branch, aestivating during dry and/or cold weather;
2) aestivating but detached from branch with protective seal broken;
3) active and moving about, normally in warm, wet weather;

Procedures for the three scenarios are discussed below.

Snails sealed on a branch or tree trunk:

As long as the protective seal is intact, the snail can be left on the branch for relocation. Clip the branch with the snail attached. Trim extra twigs and leaves off of the branch leaving a forked branch to use as a hanger. Removing the extra branches and twigs minimizes the wrong turns that the snail can make when it awakens and leaves its twig to climb onto the new host tree and it makes it easier to handle the cut branch.

The trimmed branch with snail still attached is then placed in an appropriate host tree and secured with bio-degradable cotton string as needed. If the snail is sealed onto a branch that is too large to handle and relocate, the snail will have to be removed from the tree bark. This can be done safely by spraying the snail with clean fresh water which will soften the adhesive seal. After the seal softens, gently peel the snail off the tree bark. This should be done by an experienced tree snail handler. The adhesive membrane (seal) will be broken in this process so the snail will then have to be awakened to be relocated. See procedures for detached snails below.

Tree snails detached from branch or with broken protective seals:

Aestivating tree snails with broken protective seals will die of desiccation unless they are awakened by being held in a warm, moist box for a period of time (usually a few hours). To awaken aestivating snails, place them in a tree snail holding pen (cooler). On the bottom of the cooler lay two layers of clean paper towels saturated with clean fresh water. Fill the cooler with cut fresh Pigeon plum, *Cocoloba diversifolia*, branches with leaves attached. Pigeon plum is a favorite host tree for tree snails and the leaves stay fresh

in the cooler for a long time. Spray the branches with water to keep the air in the cooler saturated. Spray the protective membrane of each snail with clean fresh water. As it softens, peel it off to hasten the snail's awakening. Keep the drain plug open and keep the cooler lid open slightly to allow good air flow, but do not allow snails to escape the cooler once they awaken. Once they are active, they can be placed in a new host tree using the same technique described in the next section on active snails. Between uses, the cooler should be thoroughly cleaned and dried as it will become contaminated with snail excrement and mucus.

Active snails:

If the weather is warm and humid, active tree snails can be easily relocated by simply spraying the bark of the new host tree with clean fresh water. Place the snail on the wet bark and support it until it gets a firm grip. The snail will climb up the tree and relocation is complete. If conditions are warm but dry, the snail can still be released as it will simply reseal itself on the new tree as soon as it perceives the dry conditions.

Garber's Spurge Avoidance Procedures

Based on pre-construction surveys conducted at surveyed pole locations, Garber's spurge is either not present or extremely rare at proposed pole locations. Regardless, specific procedures will be implemented during the installation of the 62 power poles that are designed to avoid impacting any individual plants. These procedures include the following:

All staff conducting pole installation activities will be provided a copy of this protocol and be instructed on pole installation procedures by a qualified biologist. A qualified biologist is someone with the appropriate combination of education and training that makes them competent to direct pole installation in a manner that avoids adverse impacts to Garber's spurge. A qualified biologist will have direct experience in the identification of Garber's spurge and relevant construction management experience.

At each pole location, the work area will be delineated using staked silt fencing. This silt fencing will be installed around the pole location to clearly identify the work area; no soil disturbance will occur outside the work area. Work areas will be approximately 10' x 10' and will encompass the proposed pole location with adequate room for installation and containment of spoils.

Once the work area has been staked, a qualified biologist will inspect each work area for the presence of Garber's spurge. If no plants are identified, work may proceed at that location. If a Garber's spurge is found within the work area, the pole location will be relocated by KEYS engineering staff to a suitable adjacent location that will not result in impacts to Garber's spurge. Once the new location has been identified, a new work area will be established at this site. Any spurge identified outside a work area will be marked using traffic cones and protected from impacts during the installation process.

All spoils from the auger process will be contained within the work area and be removed off-site for appropriate disposal. Following pole installation, the work area will be raked smooth to restore the original topography and the silt fence removed for disposal.

Staging of supplies will not occur on the roadsides on No Name Key. Staging of project materials will occur off-site at a KEYS facility and supplies will be transported to the island as-needed. KEYS will maintain control over contractors during pole installation to ensure that the roadsides on No Name Key are not adversely impacted by the proposed project.

EXHIBIT B