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b. Docket number and title for electronic filing are: Docket 140059-EM -- In re: Notice of New Municipal Electric Service Provider and Petition for Waiver of Rule 25-9.044(2), F.A.C. by Babcock Ranch Community Independent Special District

c. The name of the party on whose behalf the document is filed: Lee County Electric Cooperative, Inc.

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April 11, 2014

Via E-mail [filings@psc.state.fl.us]

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0810

Re: In re: Notice of New Municipal Electric Service Provider and Petition for Waiver of Rule 25-9.044(2), F.A.C., by Babcock Ranch Community Independent Special District, Docket No. 140059-EM

Dear Ms. Cole:

Lee County Electric Cooperative, Inc. ("LCEC"), pursuant to Section 120.542, Florida Statutes, and Rule 28-104.003, Florida Administrative Code, submits its initial comments to the "Notice of New Municipal Electric Service Provider and Petition for Waiver of Rule 25-9.044(2), Florida Administrative Code" (the "Notice and Petition") filed by Babcock Ranch Community Independent Special District (the "District") on March 24, 2014. Because the Notice and Petition includes a request for waiver of a Commission rule, notice of the request for rule waiver was published in the Florida Administrative Register on March 28, 2014, with instructions that comments to the waiver request be filed within fourteen (14) days of publication. LCEC files its comments and concerns pursuant to those instructions.[1]

SUMMARY

The request for waiver of Rule 25-9.044(2) is part of an unauthorized and unprecedented effort by the District to unilaterally seize LCEC's exclusive service area established by territorial agreements approved by the Commission as far back as 1965. This ill-conceived effort is based on a fundamentally flawed interpretation of the special act which created the District—a

[1] LCEC intends to file a formal motion to dismiss the Notice and Petition, which will further amplify its legal concerns, within the time permitted by the Uniform Rules of Procedure.

mistaken interpretation that (i) conveniently forgets that nothing in the special act authorizes the District to operate as an electric utility, or to provide electric distribution services in a fashion that would infringe upon LCEC's exclusive service area, and (ii) ignores the plain language in the special act which subordinates the District's asserted powers to the Commission's exclusive jurisdiction over, and pre-existing approval of, longstanding territorial agreements. Furthermore, the District's distorted interpretation of the special act (if adopted by the Commission) would render the act itself unconstitutional, since it would trigger a taking of LCEC's exclusive service area without compensation and an impermissible impairment of LCEC's territorial agreement with Florida Power and Light Company ("FPL"). Moreover, allowing a non-utility to unilaterally seize LCEC's exclusive service area is not good public policy. Taking an exclusive service area away from an existing utility that has served (and remains willing and able to serve), and relegating that area to a non-utility that does not have the ability to serve, would hinder-- not help-- economic development.

The District's request for waiver of Rule 25-9.044(2) is just as flawed. The District claims that it should be excused from an electric utility's normal obligation to file its rates with the Commission within 30 days of a change of ownership because it has no actual, current ability to operate as an electric utility. In other words, while the District desperately argues that it should be considered as an electric utility, it simultaneously signals that it wants nothing to do with the service obligations that go along with being a utility. Such circular reasoning cannot justify a waiver of Rule 25-9.044(2). Further, the District's request fails to even mention the appropriate standards for such waiver, much less identify how the District qualifies under those standards as required by Section 120.542(2), Florida Statutes.

The Commission should deny the District's petition for rule waiver, and bring to a halt the District's ill-advised attempt to seize LCEC's exclusive service area and abrogate the Commission's exclusive jurisdiction over territorial agreements.

THE DISTRICT'S NOTICE AND PETITION IS FATALLY FLAWED BECAUSE IT IS BASED ON A COMPLETELY ERRONEOUS INTERPRETATION OF THE SPECIAL ACT

The District, situated in Charlotte County, Florida, was created in 2007 by Chapter 2007-306, Laws of Florida (the "Special Act"). Now, almost seven years later, the District for the first time comes before this Commission on the basis of its "Special Power" under the Special Act "[t]o provide electricity and related infrastructure and to enter into public-private partnerships and agreements as may be necessary to accomplish the foregoing." Special Act at §6(7)(u). Extrapolating from this provision, the District bluntly announces "there is no doubt as to the *primacy* of the District's right to provide service within District boundaries *over* the rights of FPL and LCEC under their ... Territory Agreement." Notice and Petition at 6 (emphasis added). The District's distorted interpretation of the Special Act is completely unfounded.

In arguing that the Special Act has "primacy" over the Commission's regulation and approval of an existing territorial agreement, the District deliberately omits significant constraints on its "Special Powers" that appear in the Special Act's limiting provision (the "Limiting Provision"). This Limiting Provision specifically governs the section where the District's right to "provide electricity" is conferred and defeats the District's misguided interpretation on its face. The Limiting Provision states that:

> SPECIAL POWERS.—The district shall have, and the board may exercise, the following special powers to implement its lawful and special purpose and to provide, pursuant to that purpose, systems, facilities, services, improvements, projects, works, and infrastructure, each of which constitutes a lawful public purpose when exercised pursuant to this charter, subject to, and not inconsistent with, the regulatory jurisdiction and permitting authority of all other applicable governmental bodies, agencies, and any special districts having authority with respect to any area included therein, and to plan, establish, acquire, construct or reconstruct, enlarge or extend, equip, operate, finance, fund, and maintain improvements, systems, facilities, services, works, projects, and infrastructure, including, without limitation, any obligations pursuant to a development order or agreement....

Special Act at §6(7) (emphasis added). As such, the Special Act's grant of authority for the District to "provide electricity" is expressly subordinate and subject to the Commission's existing and exclusive regulatory jurisdiction over territorial agreements.

This is certainly not to say that there is no means by which the District could "provide electricity" as authorized by the Special Act. For example, the District could "provide electricity" through wholesale generation or transmission without violating existing orders of the Commission approving LCEC's territorial agreement. The District simply cannot, however, operate as a "utility" and engage in the retail distribution of electric power in a manner that would violate longstanding, Commission-approved territorial agreements and exclusive service areas. To do so would be "inconsistent with the regulatory jurisdiction" of the Commission and contravene the express language of Special Act's Limiting Provision. Special Act at §6(7). Thus, the District's arguments for "primacy" cannot stand.

The failure of the District's "primacy" arguments is especially apparent in light of the Commission's exclusive "regulatory jurisdiction" under Florida's Grid Bill, which was passed in 1974 to give the Commission the jurisdiction to centrally supervise the "planning, development, and maintenance of a coordinated power grid throughout Florida." § 366.04(5), Fla. Stat. The Commission's jurisdiction under the Grid Bill expressly includes its jurisdiction to approve territorial agreements and establish exclusive service areas. *See, e.g.,* § 366.04(2)(d) & (e), Fla. Stat. Furthermore, the Florida Legislature made it clear that the Commission's jurisdiction under the Grid Bill, including its jurisdiction to approve territorial agreements and establish exclusive service areas, "shall be exclusive and superior to that of all other boards, agencies, political

subdivisions, municipalities, towns, villages, or counties, and, in the case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail." § 366.04(1), Fla. Stat. There can be no doubt that the Commission's jurisdiction under the Grid Bill to approve territorial agreements and establish exclusive service areas is "exclusive and superior to" that of the District.

The inadequacy of the District's assertions of "primacy" over these matters is particularly striking given that the Grid Bill expressly empowers the Commission to ensure that all electric power within the State's power grid is available when and where needed. Consistent with the Commission's duties to ensure availability of service, LCEC not only has been given a right, but also an obligation to serve all of the customers in the franchise service areas that the Commission has awarded to it through its approval territorial agreements. Here, the District admittedly has no ability to serve, but asks the Commission to accept its contention that an operational and long-serving utility, LCEC, should no longer have the right to serve this area. Highlighting the absurdity of this pleading, the District asks that the Commission carve out the customers in the service area who need service currently, so that these customers can receive such service from LCEC—as opposed to being left with no options for service from the District. Acceptance of the District's argument would plainly frustrate the purposes of the Grid Bill.

In addition, it must be noted that the District's filing concedes that LCEC has a right to provide retail electric service within the District's boundaries, and acknowledges that LCEC's right to serve is founded upon a territorial agreement which LCEC has entered into with FPL, which the Commission first approved in 1965.[2] Section 2.1 of that territorial agreement provides that LCEC and FPL "shall each have the right to provide retail electric service to all customers within their respective territorial area." Under Florida law, the territorial agreement, and the exclusive service areas established therein, were merged into, and became part of the Commission orders approving the territorial agreement. Thus, contrary to the District's assertions, the relevant "primacy" granted by the Legislature in this instance belongs to the Commission, not the District.

The District's Reliance on the Reedy Creek Proceedings is Misplaced

The District fails in its attempt to equate its situation with that of the Reedy Creek Improvement District ("Reedy Creek"), created in 1967 pursuant to a special law in Chapter 67-764 (the "Reedy Creek special act"). The proceedings related to Reedy Creek are readily distinguishable. For example:

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[2] Paragraph 8 of the Petition specifically alleges that "[t]he Commission previously approved a territory agreement between [FPL] and LCEC (the 'FPL/LCEC Territory Agreement'), certain areas of which overlap with the boundaries of the Babcock Ranch District. The FPL/LCEC Territory Agreement was first approved by the Commission in 1965 by Order 3799 (Docket No. 7424), and has subsequently been amended by Order 20817 issued February 28, 1989 and Order No. 93-0705 issued May 10, 1993."

- Reedy Creek was expressly authorized to operate a "public utility" and engage in the "distribution" of electric power. In stark contrast, the Babcock Special Act says nothing about the Babcock District being authorized to operate as an electric "utility" or a "public utility."[3] Nor does the Babcock Special Act make any mention of the District having authority to engage in the "distribution" of electric power within its boundaries, unlike the Reedy Creek special act. Instead, as described above, the Babcock Special Act simply mentions that the District has the special power "to provide electricity and related infrastructure" but only if such power is exercised "subject to, and not inconsistent with, the regulatory jurisdiction" of the Commission. For the same reasons explained above, authorizing the District to "provide electricity" does not authorize it to operate as a "public utility" or to provide electric power "distribution" services. The Reedy Creek special act confirms that the Legislature knows how to provide such authority when it chooses to. It has not granted that authority here.

- Reedy Creek's powers with respect to operating a public utility were not constrained by the sort of Limiting Provision which confines the District.

- The Reedy Creek proceedings did not involve an attempt to override a pre-existing territorial agreement, as does the District's filing here.

The District's Proposed Reading of the Special Act Would Yield Unconstitutional Results

Finally, the District's distorted interpretation of the Special Act (if adopted by the Commission) would render the Act itself unconstitutional, since it would trigger a taking of LCEC's property rights without compensation and an unconstitutional impairment of LCEC's contract rights. Florida courts have made it clear that statutes are to be construed to effect a constitutional outcome whenever possible. Thus, the unconstitutional interpretation of the Special Act advanced by the District should be rejected.

THE PETITION FOR RULE WAIVER FAILS TO SATISFY ANY REQUISITE STANDARD UNDER SECTION 120.542

As the final component of its efforts to circumvent the Commission's exclusive jurisdiction and abrogate LCEC's rights, the District asks for a waiver of the rule with regard to the timing of its filing rates as a new utility, specifically Rule 25-9.044(2), Florida Administrative Code. Rule 25-9.044(1) and (2) provide in pertinent part:

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[3] In fact the only reference to the term "the utility" in the Special Act appears in the context of water and wastewater utilities. Special Act at § 6(7)(b)1.

> (1) In case of change of ownership or control of a utility which places the operation under a different or new utility, or when its name is changed, the company which will thereafter operate the utility business must adopt and use the rates, classifications and regulations of the former operating company (unless authorized to change by the Commission), and shall, within ten (10) days, issue and file a notice adopting, ratifying, and making its own all rates, rules, classifications and regulations of the former operating utility on file with the Commission and effective at the time of such change of ownership or control.
>
> (2) New utility. Within thirty (30) days after the filing of such adoption notice by a public utility which then had no tariff on file with the Commission, said utility shall issue and file in its own name the tariff of the predecessor utility then in effect and adopted by it, or make application to the Commission for such other tariff as it may propose to put into effect in lieu thereof.

The District is unabashed in explaining why it needs to be excused from this rule—that is to say, it has no ability to serve and therefore has no rates. In other words, in the same breath that the District desperately argues that it should be considered as an electric utility, it also signals that it wants nothing to do with the service obligations that go along with being a utility. Such self-contradictory reasoning cannot justify a waiver of Rule 25-9.044(2). Moreover, the District principally ignores the applicable standards for entitlement to such waiver, presumably because it recognizes they do not apply to a non-utility.

Section 120.542(2), Florida Statutes, sets forth the standards that must be met before the Commission can grant a rule waiver:

> Variances and waivers shall be granted when the *person subject to the rule* demonstrates that the *purpose of the underlying statute will be or has been achieved by other means* by the person and *when application of a rule would create a substantial hardship or would violate principles of fairness*. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(Emphasis added.) Thus, to be entitled to the requested rule waiver, the District must demonstrate that (i) it is a "utility" subject to the rule, (ii) it can achieve the purpose of the statute underlying the rule by other means, and (iii) compliance with the rule could cause the District to suffer substantial hardship or violate principles of fairness. The Commission has repeatedly applied these standards, which the District has largely ignored, to analyze and deny requested rule waivers. *See, e.g.,* Order No. PSC-09-0484-PAA-EI (July 6, 2009); Order No. PSC-02-

1623-PAA-EI (Nov. 25, 2002); Order No. 99-0232-FOF-EI (Feb. 9, 1999); Order No. PSC-99-1091-PAA-EI (May 28, 1999); Order No. 98-0011-FOF-TL (Jan. 5, 1998).

As described below, the District has failed to satisfy any of the requisite standards for a rule waiver.

The District Is Not A Utility Subject To The Rule

Fundamentally, the cited rule facially applies only to a "utility." Rule 25-9.044(2), Fla. Admin. Code. Put simply, and as explained above, the District is not authorized to operate as a "utility," and therefore is not a "person subject to the rule" entitled to seek waiver under Section 120.542(2), Florida Statutes. The requested waiver should be denied on this basis alone.

The Requested Waiver Does Not Achieve Any Statutory Purpose, But Instead Undermines It

Second, assuming for sake of argument that the District were subject to the rule, it would need to show that "the purpose of the underlying statute[4] will be or has been achieved by other means by the" District. § 120.542(2), Fla. Stat. The District does not acknowledge, much less allege any facts, to meet this standard. The subject rule is plainly intended to provide for orderly transition between utility providers and ensure that the Commission can meet its regulatory obligation in ensuring availability of electric service. Here, the District cannot provide service, and asks for a waiver of the normal rate filing requirements because it cannot provide service—unlike LCEC, which can provide service and has been providing service. Allowing the District to avoid the steps needed for it to be able to serve would completely contravene an orderly transition between utilities.

The Requested Waiver Is Not Supported By A Valid "Hardship" Or By Any Principle Of Fairness

The District also fails to identify any valid "hardship" it would suffer or any principle of fairness that would be violated if it were not excused from the rule. It is certainly not a "hardship" that, in the seven years since passage of the Special Act, the District still has no ability to serve as a utility. The inability to serve is a fundamental reason the District should *not* be granted a rule waiver, or be granted any other recognition or relief which it claims. The District's purported difficulty in meeting the requirements of the rule is the District's own doing—it has trouble complying with the rule because it is not and was never intended to be an electric utility. Again, that is not a "substantial hardship" that would serve to excuse compliance with the rule. Nor would any principle of fairness be violated by requiring the District, if it seeks to be a utility, to act like one. Indeed, the only potential violation of fairness here is rooted

[4]The subject rule cites the following as its underlying statutory authority: "350.127(2), 364.335, 367.121 FS."

in the District's effort to nominate itself as a "utility" without being subject to the same fundamental service and regulatory requirements that *actual* utilities, like LCEC, must satisfy.

CONCLUSION

The Notice and Petition is an extraordinary attempt to seize LCEC's existing rights based on distorted interpretations of the Special Act and Commission precedent. The misleading interpretation of the Special Act would also invite an unprecedented unraveling of territorial agreements to the detriment of stable and reliable electric service statewide. The District fails to articulate, must less allege, any element that would qualify it for the unprecedented rule waiver which it requests. The District's petition for rule waiver should be rejected.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May, Jr.

DBM:kjg

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