

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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-EI
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)	Filed: May 8, 2014
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FLORIDA POWER AND LIGHT'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL COMMENTS ON THE NOTICE OF NEW MUNICIPAL ELECTRIC SERVICE PROVIDER AND PETITION FOR WAIVER OF RULE 25-9.044(2), FLORIDA ADMINISTRATIVE CODE, FILED BY BABCOCK RANCH COMMUNITY INDEPENDENT SPECIAL DISTRICT

Florida Power & Light Company, Inc. ("FPL") hereby submits this Motion for Leave to File Supplemental Comments on the Notice of New Municipal Electric Service Provider and Petition of Waiver of Rule 25-9.044(2), Florida Administrative Code ("F.A.C."), filed by Babcock Ranch Independent Special District ("the District"). FPL's Supplemental Comments are attached as Exhibit 1 to this Motion. In support of the Motion, FPL states as follows:

1. On March 24, 2014, the District filed its Notice of New Municipal Electric Service Provider and Petition of Waiver of Rule 25-9.044(2), F.A.C. ("Notice and Petition"), identifying the District a new municipal electric service provider to operate within the District's boundaries in Charlotte County, Florida, and requesting a temporary waiver of Rule 25-9.044(2), F.A.C.
2. On March 28, 2014, the Commission published public notice of the Notice and Petition in the Florida Administrative Register, (the "public notice") which provided an opportunity for comments within 14 days of publication. FPL provided comments on April 11, 2014.
3. On April 15, 2014, LCEC file its Motion to Dismiss the District's Notice and Petition ("Motion to Dismiss"). On April 22, 2014, the District filed its Response to LCEC's Motion to Dismiss ("Response").

4. LCEC's Motion to Dismiss and the District's Response raise a number of issues beyond those addressed in the original Notice and Petition. Those issues include the following:

- a. Whether the Special Act authorizes the District to operate as an electric utility;
- b. Whether the Special Act subordinates the District's asserted powers to the Commission's exclusive jurisdiction over, and pre-existing approval of, existing territorial agreements;
- c. If the Special Act does override the Commission's authority over existing territorial agreements, whether the Special Act is unconstitutional in triggering a taking of utility service areas without compensation; and,
- d. Whether the District has met the requirements for waiver under Section 120.542, F.S. from the requirements of Rule 25-9.044(2), Florida Administrative Code ("F.A.C.").

5. The ultimate determination of these additional issues clearly could affect FPL's interests. The District is attempting to assert the right to provide electric service in an area that includes a portion of FPL's service territory, and that would alter the boundaries established in FPL's Commission-approved territorial agreement with LCEC.¹ More broadly, the issues raised by LCEC and the District, if decided by the Commission, could set precedent which has significant impacts on FPL and other utilities in Florida. Therefore, it is appropriate for FPL to be permitted to file additional comments in this proceeding addressing new issues raised in LCEC's Motion to Dismiss and the District's Response.

6. No one will be prejudiced by FPL's filing supplemental comments, as Staff is not scheduled to issue its recommendation in this docket until June 27, 2014 and the Commission is not scheduled to consider the recommendation until the July 10, 2014 agenda conference. To the

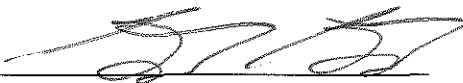
¹ See Order No. PSC-97-0527-FOF-EU, Docket No. 970105, issued May 7, 1997, in which the Commission approved the most recent modification to the territorial agreement.

contrary, by providing its supplemental comments this far in advance of the Staff recommendation and agenda conference, all interested persons as well as staff will benefit from having ample advance notice of FPL's positions.

7. FPL has conferred with counsel for the District and LCEC concerning this Motion and is authorized to state that they do not object to FPL's request for leave to submit supplemental comments.

WHEREFORE, FPL hereby requests leave to submit the supplemental comments on the Notice and Petition that are attached hereto as Exhibit 1.

John T. Butler
Assistant General Counsel – Regulatory
Scott A. Goorland
Principal Attorney
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: (561) 691-7101
Facsimile: (561) 691-7135

By: 
Scott A. Goorland
Florida Bar No. 0066834

CERTIFICATE OF SERVICE
Docket No. 140059-EI

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic delivery this 8th day of May, 2014, to the following:

Brian P. Armstrong/William C. Gardner
Nabors Giblin & Nickerson, P.A.
1500 Mahan Drive
Suite 200
Tallahassee, FL 32308
Email: barmstrong@ngnlaw.com

D. Bruce May, Jr./Kevin Cox
Holland & Knight
Post Office Drawer 810
Tallahassee, FL 32302-0810
Email: bruce.may@hklaw.com

John A. Noland
Henderson, Franklin, Starnes & Holt, P.A.
1715 Monroe Street
P.O. Box 280
Fort Myers, FL 33902
Email: John.Noland@henlaw.com

By: 

Scott A. Goorland
Florida Bar No. 0066834

EXHIBIT 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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-EI
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**FLORIDA POWER AND LIGHT'S
SUPPLEMENTAL COMMENTS ON THE NOTICE OF NEW
MUNICIPAL ELECTRIC SERVICE PROVIDER AND PETITION FOR WAIVER OF
RULE 25-9.044(2), FLORIDA ADMINISTRATIVE CODE, FILED BY BABCOCK
RANCH COMMUNITY INDEPENDENT SPECIAL DISTRICT**

Florida Power & Light Company, Inc. ("FPL") hereby submits supplemental comments regarding the Notice of New Municipal Electric Service Provider and Petition of Waiver of Rule 25-9.044(2), Florida Administrative Code ("F.A.C."), filed by Babcock Ranch Independent Special District ("the District"), and states:

I. BACKGROUND

1. On March 24, 2014, the District filed its Notice of New Municipal Electric Service Provider and Petition of Waiver of Rule 25-9.044(2), F.A.C. ("Notice and Petition"), identifying the District as a new municipal electric service provider to operate within the District's boundaries in Charlotte County, Florida, and requesting a temporary waiver of Rule 25-9.044(2), F.A.C.
2. On March 28, 2014, the Commission published public notice of the Notice and Petition in the Florida Administrative Register, (the "public notice") which provided an opportunity for comments within 14 days of publication. FPL provided comments on April 11, 2014 which noted that the boundaries identified by the District in its Notice and Petition fall within existing FPL and the LCEC service territories which are subject to a territorial agreement approved by the Commission. FPL also observed that the Notice and Petition does not seek formal

Commission approval, authorization or other substantive action with respect to the District's assertion that Section 6(7)(u) of Chapter 2007-306, Laws of Florida (the "Special Act") authorizes the District to provide electric service within its boundaries; rather, the Notice and Petition asks the Commission to "acknowledge the District as a new municipal electric service provider with the authority to provide electric service" within its boundaries. Because it is unclear to FPL what procedural or regulatory significance the District would attribute to this "acknowledgement" by the Commission, FPL took no position at that time on the District's assertions; instead, FPL reserved the right to participate in this proceeding and to present its position on such issues as may be relevant to the disposition of District's request. Finally, subject to the reservation of rights and opportunity to participate in the proceeding noted above, FPL indicated it has no objection to the District's request for a temporary waiver of Rule 25-9.044(2), F.A.C.

3. On April 15, 2014, LCEC filed its Motion to Dismiss the District's Notice and Petition ("Motion to Dismiss"). In its Motion to Dismiss, LCEC raised a number of issues and provided arguments in support of its assertion that both the District's Notice of New Municipal Electric Service Provider and the District's Petition for Waiver of Rule 25-9.044(2), F.A.C. should be dismissed.

4. On April 22, 2014, the District filed its Response to LCEC's Motion to Dismiss ("Response").

5. LCEC's Motion to Dismiss and the District's Response raise a number of issues that had not been raised prior to the end of the public comment period in this docket. Those issues include, but are not limited to:

- a. Whether the Special Act authorizes the District to operate as an electric utility;

- b. Whether the Special Act subordinates the District's asserted powers to the Commission's exclusive jurisdiction over, and pre-existing approval of, existing territorial agreements;
 - c. If the Special Act does override the Commission's authority over existing territorial agreements, whether the Special Act is unconstitutional in triggering a taking of utility service areas without compensation; and,
 - d. Whether the District has met the requirements for waiver under Section 120.542, F.S. from the requirements of Rule 25-9.044(2), Florida Administrative Code ("F.A.C.").
6. Because these issues had not been previously raised, FPL is providing these supplemental comments. These comments do not alter FPL's position set forth in its original comments.

II. FPL'S SUPPLEMENTAL COMMENTS

7. The Special Act provides the District the authority "To provide electricity and related infrastructure and to enter into public-private partnerships and agreements as may be necessary to accomplish the foregoing."¹ Based on this language, the District filed its Notice and Petition, asserting that it is a "new municipal utility" and seeking the acknowledgement of the Commission that the District has the authority to provide electric service within its boundaries as delineated in the Notice and Petition.

8. In its response to LCEC's Motion to Dismiss, the District now indicates quite clearly that through its Notice and Petition, the District is attempting to assume the right to serve in a territory that is currently part of both FPL's and LCEC's service territories. Putting aside whether this relief has been properly pleaded by the District, the apparent intended result of

¹ S. 6(7)(u), Chapter 2007-306, Laws of Florida

Commission approval of the Notice and Petition would be the establishment of a new service territory for the District, necessarily modifying FPL and LCEC's service territory boundaries and altering the terms of FPL's and LCEC's existing territorial agreement.

9. The District asserts that it is authorized by the Special Act to operate as an electric utility.² If this is true, then the District is subject to the Commission's exclusive jurisdiction to approve territorial agreements and resolve disputes over territorial boundaries between electric utilities. See §366.04(2)(d) and (e), F.S.; Gulf Coast Elec. Co-op., Inc., v. Johnson, 727 So. 2d 259 (Fla. 1999).³ As with any other utility, if the District wishes to serve an area that would impact the existing service territories and existing territorial agreements of other utilities, it needs to either (a) establish mutually agreeable boundaries with those other utilities and bring the resulting new and modified territorial agreements to this Commission for approval, or (b) if agreement cannot be reached, petition the Commission to resolve the territorial dispute. The District has done neither, and any decision at this stage on the District's entitlement to serve areas that are within the LCEC and FPL service territories is accordingly premature.

10. FPL submits that amicable resolution of service boundaries is always preferable to adjudication of a territorial dispute. Rather than attempting to decide issues that apparently were intended, but not actually requested, by the District to be resolved by the Motion to Dismiss and Response, FPL respectfully suggests that the Commission direct the affected parties (*i.e.*, the District, LCEC and FPL) to work toward a mutually acceptable arrangement for service to be

² The District's pleadings refer to it as both an "electric service provider" and a "municipal utility." FPL notes that the Special Act authorizes the District "to provide electricity and related infrastructure"; it does not declare the District to be a municipal electric utility. FPL is not at this point taking a position on whether or not the District is a municipal electric utility but rather observes that *if* the District is a municipal electric utility, then it has to play by the same rules governing the establishment of territorial boundaries as other utilities.

³ The District explicitly acknowledges this in the Notice and Petition. The District states, in paragraph 7 of the Notice and Petition, "As a new municipal electric utility, the District hereby acknowledges and submits to Commission regulation as provided in Section 366.04, Florida Statutes, and other Florida laws as may apply to municipal electric utility providers."

provided to facilities within the District. If an agreement results, it will be brought back to the Commission for approval, in conjunction with any other appropriate relief to facilitate the agreement. This is similar to the approach taken by the Reedy Creek Improvement District when it took responsibility for providing electric service under the terms of a special act in 1987. In re: Notice by Reedy Creek Utilities Company, Inc. of Intention to Transfer Utility Services to Reedy Creek Improvement District, Docket No. 870962-EU, Order No. 18224 (Issued September 30, 1987); and, In Re: Joint Stipulation and Petition for Approval of Territorial Agreement between Florida Power Corporation and Reedy Creek Improvement District, Docket No. 870963-EU, Order No. 18225 (Issued September 30, 1987)⁴. On the other hand, if no agreement can be reached, then any one of the parties could petition the Commission to resolve the territorial dispute.

11. Either way, however, it would be premature for the Commission to rule on appropriate territorial boundaries. The Commission has prescribed standards for the establishment of territorial boundaries. Rule 25-6.0440, F.A.C., provides that a review of territorial agreements shall take into consideration:

- a. The reasonableness of the purchase price of any facilities being transferred;
- b. The reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electrical service to the existing or future ratepayers of any utility party to the agreement; and,
- c. The reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.

FPL submits that none of those considerations can be adequately addressed at present, because

⁴ In the Reedy Creek proceedings, the Notice of Intention to Transfer Utility Services was filed with the Commission on September 10, 1987, one day prior to the filing of the Petition for Approval of Territorial Agreement. The Commission issued its decisions on both dockets on the same day, September 30, 1987.

there is insufficient information available and nothing before the Commission about how the area within the District's boundaries would be served, by whom, or at what price. Moreover, there is no immediate time pressure for the Commission to resolve the territorial issues: all customers within the District's boundaries are presently being served on reasonable terms by LCEC with no indication that any of them are complaining about that service, and the District has identified no new customers who require service at this time.

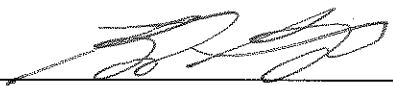
12. For these reasons, FPL urges the Commission not to make a substantive decision on the weighty issues raised by LCEC's Motion to Dismiss and the District's Response at this time. Rather, to the extent relief is proper at this time, based on the law, current facts, and what has been plead at this time, FPL believes it would be appropriate only to acknowledge that the District is an "electric service provider" under the Special Act⁵ and, to the extent necessary, grant it a waiver from the requirements of Rule 25-9.044(2), F.A.C. that the District promptly establish rates for service. The three affected parties should then be allowed time to work together toward an amicable resolution of territorial issues or, failing that, a more clear definition of where they disagree on how service should be provided so that the Commission can reasonably resolve the dispute consistent with its established standards.

13. In summary, FPL respectfully submits that: (1) Commission approval of an agreement or resolution of a dispute is a prerequisite to the District providing service in the affected area; (2) that such an issue is not before the Commission at this time; and (3) that any such request to approve an agreement or resolve a dispute, even if well pleaded by the District, would not be ripe for Commission decision until such time as Babcock alleges that it has the capability to serve and provides a description of existing and planned facilities to serve (Rule 25-6.0441, F.A.C.).

⁵ As discussed in Note 2 above. FPL does not take a position at this time as to whether the District is a municipal electric utility.

14. Finally, FPL expresses its willingness to meet with the parties individually or jointly in an effort to resolve any differences such that an amicable resolution of the issues can be brought to the Commission for a decision.

John T. Butler, Assistant General Counsel –
Regulatory
Scott A. Goorland, Principal Attorney
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: (561) 691-7101
Facsimile: (561) 691-7135

By: 

Scott A. Goorland
Florida Bar No. 0066834


CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on this 8th day of May, 2014, to the following:

Brian P. Armstrong/William C. Gardner
Nabors Giblin & Nickerson, P.A.
1500 Mahan Drive
Suite 200
Tallahassee, FL 32308
Email: barmstrong@ngnlaw.com

D. Bruce May, Jr./Kevin Cox
Holland & Knight
Post Office Drawer 810
Tallahassee, FL 32302-0810
Email: bruce.may@hkklaw.com

John A. Noland
Henderson, Franklin, Starnes & Holt, P.A.
1715 Monroe Street
P.O. Box 280
Fort Myers, FL 33902
Email: John.Noland@henlaw.com

By: 

Scott A. Goorland
Florida Bar No. 0066834