

I. Meeting Packet



State of Florida
Public Service Commission
INTERNAL AFFAIRS AGENDA

Wednesday, May 9, 2012

9:30 am

Betty Easley Conference Center, Room 140

1. Approve March 27, 2012, Internal Affairs Meeting Minutes. (Attachment 1)
2. *Amicus Curiae* Participation in *Alicia Roemmele-Putney, et al. v. Robert D. Reynolds, et al.*, Third DCA Case No. 3D12-333. (Attachment 2)
3. Legislative Update. (No Attachment)
4. Executive Director's Report. (No Attachment)
5. Other Matters.

BB/css

OUTSIDE PERSONS WISHING TO ADDRESS THE COMMISSION ON
ANY OF THE AGENDAED ITEMS SHOULD CONTACT THE
OFFICE OF THE EXECUTIVE DIRECTOR AT (850) 413-6463.



State of Florida
Public Service Commission
INTERNAL AFFAIRS MINUTES

Tuesday, March 27, 2012

10:46 am – 10:56 am

Betty Easley Conference Center, Room 140

COMMISSIONERS PRESENT: Chairman Brisé
Commissioner Edgar
Commissioner Graham
Commissioner Balbis
Commissioner Brown

STAFF PARTICIPATING: Baez, Hill, Kiser, Miller, Casey, Fogleman, Pennington

1. Approve March 14, 2012, Internal Affairs Meeting Minutes.

The minutes were approved.

Commissioners participating: Brisé, Edgar, Graham, Balbis, Brown

2. Draft Comments in Response to the Federal Communications Commission Further Notice of Proposed Rulemaking on Lifeline and Link-Up Reform and Modernization released February 6, 2012. Approval is sought.

Commissioners approved submittal of Comments of the Florida Public Service Commission to the Federal Communications Commission.

Commissioners participating: Brisé, Edgar, Graham, Balbis, Brown

3. Draft Reply Comments regarding Subscriber Line Charges and Access Recovery Charges. Approval is sought.

Commissioners approved submittal of Reply Comments of the Florida Public Service Commission with modifications discussed at the Internal Affairs meeting.

Commissioners participating: Brisé, Edgar, Graham, Balbis, Brown

4. Legislative Update.

Ms. Pennington advised that there was no additional update to report at this time.

Commissioners participating: Brisé, Edgar, Graham, Balbis, Brown

5. Executive Director's Report.

Mr. Baez advised that there is nothing to report at this time.

Commissioners participating: Brisé, Edgar, Graham, Balbis, Brown

6. Other Matters.

There were no other matters to consider at this time.



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 1, 2012

TO: Braulio L. Baez, Executive Director

FROM: Pamela H. Page, Attorney, Office of the General Counsel *PH*
Samantha M. Cibula, Attorney Supervisor, Office of the General Counsel *S.M.C.*

RE: *Amicus Curiae* Participation in *Alicia Roemmele-Putney, et al. v. Robert D. Reynolds, et al.*, Third DCA Case No. 3D12-333.

CRITICAL INFORMATION: Please place on May 9, 2012, Internal Affairs.
Commission direction is sought regarding *amicus curiae* participation in court case.

Alicia Roemmele-Putney, et al. v. Robert D. Reynolds, et al., Florida Third District Court of Appeal Case No. 3D12-333, is an appeal of a Final Order by the 16th Judicial Circuit in Monroe County, Florida, that dismissed a Complaint for Declaratory Judgment based on the Court's finding that the Commission, not the Circuit Court, has the exclusive jurisdiction to resolve the matters at issue in the Complaint. Staff is seeking the Commission's permission to petition the Third District Court of Appeal to participate as *amicus curiae* in the case.

I. Proceedings Before the 16th Judicial Circuit Court

Monroe County filed a Complaint for Declaratory Judgment against the Utility Board of the City of Key West and 43 owners of property located on No Name Key, Florida seeking a declaration by the Circuit Court as to: (1) whether the Utility Board of the City of Key West is required to obtain a development permit from Monroe County for extension of a power line to No Name Key; and (2) whether the portion of the Monroe County Code prohibiting the extension of public utilities also prohibits the extension of utility lines to the residents of No Name Key. Two defendants to the lawsuit, Robert and Julianne Reynolds, filed a motion to dismiss, asserting that the Commission, not the Circuit Court, was the proper forum to resolve the issues in the dispute. The Commission's Office of the General Counsel filed a motion for leave to participate as *amicus curiae* in the Circuit Court proceeding. As *amicus curiae*, the Commission supported the Reynolds' motion to dismiss and advised the Court that subject matter jurisdiction over the issues in the proceeding rested with the Commission, not the Circuit Court. A copy of the Commission's Motion to Participate as Amicus Curiae in the Circuit Court proceeding is appended as Attachment A.

The Circuit Court dismissed the Complaint, with prejudice, finding that exclusive subject matter jurisdiction is vested with the Commission and that the Commission is the correct forum

for hearing the issues raised in the proceeding.¹ The Court based its decision on its review of Chapter 366, Florida Statutes, and the Territorial Agreement between the Utility Board of the City of Key West and the Florida Keys Rural Electric Cooperative, approved by the Commission in September 1991. The Court determined that issues regarding interpretation and enforcement of territorial agreements are exclusively vested in the Commission, and any questions posed by Monroe County regarding the extension of an 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 lines, pursuant to the Territorial Agreement, despite the provisions set forth in Monroe County Code Section 130-122, are all within the Commission's exclusive jurisdiction. A copy of the Circuit Court's Final Order Dismissing the Complaint is appended as Attachment B.

On February 4, 2012, Alicia Roemmele-Putney, Robert and Carol C. Barber and Elizabeth and Anthony C. Harlacher appealed the Final Order to the Third District Court of Appeal. On April 18, 2012, Monroe County's Motion to Join as an Appellant in the appeal was granted by the Court. Robert and Julianne Reynolds are Appellees in the appeal.

II. Commission Participation as *Amicus Curiae* in the Third District Court of Appeal

As the Circuit Court recognized in granting the motion to dismiss filed in the Circuit Court, staff believes the Commission has exclusive jurisdiction under Chapter 366, Florida Statutes, to resolve issues regarding the interpretation and enforcement of territorial agreements. Moreover, the Commission is the proper forum for determining the issue of whether the Monroe County ordinance that prohibits the extension of utility lines to residents on No Name Key is preempted by the jurisdiction of the Commission. *See In re: Petition of City of Parker for Declaratory Statement*, Order No. PSC-03-0598-DS-EU, issued May 12, 2003, in Docket No. 030159-EU (finding that the Commission has subject matter jurisdiction to determine whether the Commission's jurisdiction 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).

Staff requests the Commission's permission to petition the Third District Court of Appeal to participate as *amicus curiae* in support of Appellees', Robert and Julianne Reynolds', position that the Circuit Court correctly dismissed the complaint and that the Commission is the exclusive forum for resolving issues regarding the interpretation and enforcement of territorial agreements. The Commission's participation as *amicus curiae* in support of the Reynolds' position would be consistent with the Commission's participation before the Circuit Court.

As *amicus curiae*, the Commission would not be a full party to the proceeding, but would be a "friend of the court." As such, the Commission could provide the Third District Court of

¹ After the Circuit Court issued its order granting the motion to dismiss, the Reynolds filed a Complaint against the Utility Board of the City of Key West with the Commission on March 7, 2012. The Complaint was assigned Docket No. 120054-EI. The Utility Board of the City of Key West filed a Response to the Complaint and Motion to Dismiss on March 28, 2012. Monroe County filed a Petition to Intervene on April 23, 2012. The Complaint, Motion to Dismiss, and Petition to Intervene are all pending before the Commission.

Internal Affairs Memorandum
May 1, 2012

Appeal with its opinion on the Commission's jurisdiction over the matter, as well as advise the Court as to the impact a decision contrary to the Circuit Court could have on Florida's electric grid and the Commission's regulatory authority. If the Commission chooses to seek the Court's permission to participate as *amicus curiae*, the Office of the General Counsel will make all necessary filings in the case.

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

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

Plaintiff,

v.

CASE NO.: 2011-342-K

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

Defendants.

MOTION OF THE FLORIDA PUBLIC SERVICE COMMISSION
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE
TO INFORM THE COURT OF ITS POSITION REGARDING JURISDICTION

The Florida Public Service Commission (Commission), by and through its undersigned attorney, requests leave of Court to participate as Amicus Curiae in this case, in order to inform this Court of its position on the matter of subject matter jurisdiction raised by the Motion to Dismiss filed by Defendants, Robert D. and Julianne C. Reynolds. The Commission believes that it is uniquely situated to inform this Court of the nature and extent of its jurisdiction, and believes that it can assist the Court in its deliberation on the issue. In particular, the Commission believes that it is best able to inform the Court of the adverse effect this case could have on the Commission's regulatory responsibilities.

In support of its motion, the Commission states the following:

1. The Commission is the administrative agency authorized by the Florida Legislature, through Chapter 366, Florida Statutes (F.S.), to oversee the provision of electric service throughout the state of Florida.

2. The Legislature has stated that the regulatory authority granted to the Commission in Chapter 366 is:

. . . 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.

Section 366.01, F.S.

3. The powers of the Commission include the jurisdiction “[t]o require electric power conservation and reliability within a coordinated grid throughout Florida for operational and emergency purposes”, and “[t]o approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.” Section 366.04(2)(c) and (d), F.S. The statute provides that:

[t]he jurisdiction conferred upon the commission shall be exclusive and superior to that of all boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in each case of conflict therewith, all lawful acts, orders, rules and regulations of the commission shall in each instance prevail.

Section 366.04(1), F.S.

4. On September 27, 1991, the Commission approved a Territorial Agreement (Agreement) between the municipal utility of the City of Key West, presently d/b/a. Keys Energy Services (Keys Energy), and the Florida Keys Rural Electric Cooperative (Cooperative), by Order No. 25127, 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. The Agreement was attached to the Order and incorporated therein. It delineated the service territories for the two utilities operating in the Florida Keys, and established a 30-year term. By the terms of the Agreement, and the map included in it, the Cooperative agreed to provide electric service to customers from Key Largo to Knight Key, and

Keys Energy agreed to provide electric service to customers from Key West to Pigeon Key. See Attachment A to this motion.

5. Section 6.1 of the Agreement, page 12, affirms the parties' obligation to serve customers in their assigned service areas:

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 territories.

Section 4.1 of the Agreement states, at page 11:

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.

6. As the Commission understands the facts of this case, the residents of No Name Key, which lies within Keys Energy's service territory, do not currently receive electric service from the utility. Electric power is provided by solar panels and generators. At present there are approximately 43 residences on No Name Key, the majority of which were constructed in the 1950's. No further development is expected because No Name Key is designated a critical barrier island, and most of the island is federally protected land, home to Key Deer and other endangered species.

7. Some of the property owners on No Name Key have asked Keys Energy to provide electric service to their property, and they have agreed to pay Keys Energy approximately \$700,000 in Contributions in Aid of Construction (CIAC) to extend the necessary distribution facilities to the island across a bridge from nearby Big Pine Key. The request for

electric service has been delayed by the Keys Energy Board due to uncertainty regarding whether Monroe County (County) can prohibit Keys Energy from providing service to the customers who have requested it.

8. On April 1, 2011, the County filed this declaratory judgment action, asking this Court to determine whether the County has authority under its ordinances to prohibit Keys Energy from using county rights of way to provide electric service to the No Name Key residents. The County has also requested a ruling on whether it has the authority to prevent the No Name Key residents from receiving electric service by refusing to issue building permits to the residents to connect their residences to Keys Energy's distribution lines.

9. Defendants Robert D. and Julianne C. Reynolds, property owners on No Name Key, filed a Motion to Dismiss the County's complaint on the grounds that the Commission has exclusive jurisdiction to determine whether or not the residents of No Name Key are entitled to receive electric service from Keys Energy. The Commission agrees that the Territorial Agreement approved by the Commission in 1991, and Section 366.04, F. S., support Defendants' position, and that the established case law, cited in their Motion, confirms the Commission's jurisdiction as exclusive and preemptive.

10. The declaratory judgment action is framed in terms of the interpretation and application of the County's ordinances, but the Commission believes that the underlying issue is whether the County has the jurisdiction to determine who can receive electric service in an electric utility's service territory and who cannot. This case thus calls into question the Commission's jurisdiction to implement, supervise, and enforce electric service territorial agreements in Florida, an issue that has implications for electric utility regulation statewide. If the County is permitted to use its ordinances to prevent residents of No Name Key from

receiving electric utility service from Keys Energy, the service provider designated in the territorial agreement, it would effectively interpret and modify the terms of the territorial agreement the Commission approved. All other counties in the state could then invoke their local ordinances to do the same, and the Commission's statewide statutory authority would be undermined. The Commission submits that Florida's statutory system of regulation of electric utilities, as outlined above, and the courts' interpretation of that system, as discussed in the motion to dismiss, show that the Commission's preemptive authority over electric service territories is intended to prevent that result.

11. This case also calls into question the Commission's ability to actively supervise electric service territorial divisions in the state. Territorial agreements are horizontal divisions of territory, considered to be per se Federal antitrust violations under the Sherman Act, 15 U.S.C. § 1. Parker v. Brown, 317 U.S. 341, 350 (1942) (a territorial agreement effective "solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate, would violate the Sherman Act.") When territorial agreements are sanctioned by the State, however, they are entitled to state action immunity from liability under the Sherman Act. 317 U.S. at 350; Municipal Utilities Board of Albertville v. Alabama Power Co., 934 F. 2d 1493 (11th Cir. 1991). Entitlement to state action immunity is demonstrated by a "clearly articulated and affirmatively expressed state policy" encouraging the activity in question, and "the policy must be actively supervised by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980). See also Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609 (11th Cir. 1995), where the Court held that two Florida electric utilities were entitled to state action immunity from antitrust liability for their territorial agreement because Chapter 366, F.S., demonstrated a clearly articulated and affirmatively expressed state policy to regulate retail

electric service areas, and the Commission's extensive control over the validity and effect of territorial agreements indicated active state supervision of the agreements. Again, if the County is permitted to decide who can receive electric service in territory covered by a territorial agreement, and in contravention of its terms, it could be argued that the Commission is without power to enforce its own orders and actively supervise the agreements it has approved. This result would place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability.

12. The Commission submits that it has the exclusive jurisdiction to interpret and enforce its Order approving the terms of the 1991 territorial agreement, and to determine whether, to what extent, and under what terms and conditions, the residents of No Name Key are entitled to receive electric service from Keys Energy. As the Florida Supreme Court said in Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989), also cited in the motion to dismiss, any interpretation, modification or termination of an order approving a territorial agreement:

. . . must first be made by the PSC. The subject matter of the order is within the particular expertise of the PSC, which has the responsibility of avoiding the uneconomic duplication of facilities and the duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida. The PSC must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.

551 So. 2d at 1212.

13. The Commission can initiate a review of the territorial agreement on its own motion, or by petition or complaint of any person whose interests are substantially affected by the agreement and its implementation. Section 120.569, F.S.; Rule 28-106.201, Florida

Administrative Code. See also the Commission's Rule 25-22.036 (2), Florida Administrative Code, Initiation of Formal Proceedings, which states:

(2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

All persons with interests that may be substantially affected will have an opportunity to participate in the Commission's proceedings.

WHEREFORE, the Florida Public Service Commission respectfully requests leave to participate as Amicus Curiae and asks this Court to dismiss or abate the instant action, thereby relinquishing jurisdiction to the Commission so that it may properly determine whether or not the residents of No Name Key are entitled to receive electric service under the terms of Commission Order No. 25127.

Respectfully submitted,

s/ Martha C. Brown
S. Curtis Kiser, General Counsel
Florida Bar No. 123700
Martha C. Brown, Senior Attorney
Florida Bar No. 261866
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Phone No. (850) 413-6199
Fax No. (850) 413-6847

Attorneys for the
Florida Public Service Commission

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition of Florida)	DOCKET NO. 910765-EU
Keys Electric Cooperative)	ORDER NO. 25127
Association, Inc. and the utility)	ISSUED: 9-27-91
board of the City of Key West for)	20 0
approval of a territorial)	2
agreement.)	

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.

DOCUMENT NUMBER-DATE
 09628 SEP 27 1991

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

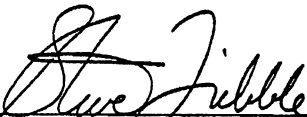
In consideration of the above, it is

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

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

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

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



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MRC:bmi
910765.bmi

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

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

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

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

APPENDIX A
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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

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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

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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

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"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.

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Section 1.8: Existing Customer. As used in this Agreement, the term "Existing Customer" shall mean any Person receiving retail electric service from either 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

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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.

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ARTICLE 3

OPERATION AND MAINTENANCE

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

ARTICLE 4

PREREQUISITE APPROVAL

Section 4.1: Commission Approval and Continuing Jurisdiction. The provisions of and the 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

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

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

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

ARTICLE 5

DURATION

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

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

ARTICLE 6

CONSTRUCTION OF AGREEMENT

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

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ARTICLE 7

MISCELLANEOUS

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

Section 7.2: Successors and Assigns; for Benefit Only of Parties. This Agreement shall be binding upon the Parties hereto and their respective successors and assigns. Nothing in this Agreement, 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

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

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

General 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.

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ATTEST:

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


Robert R. Padron,
Secretary

By: 
William T. Cates

Title: Chairman

(SEAL)

ATTEST:

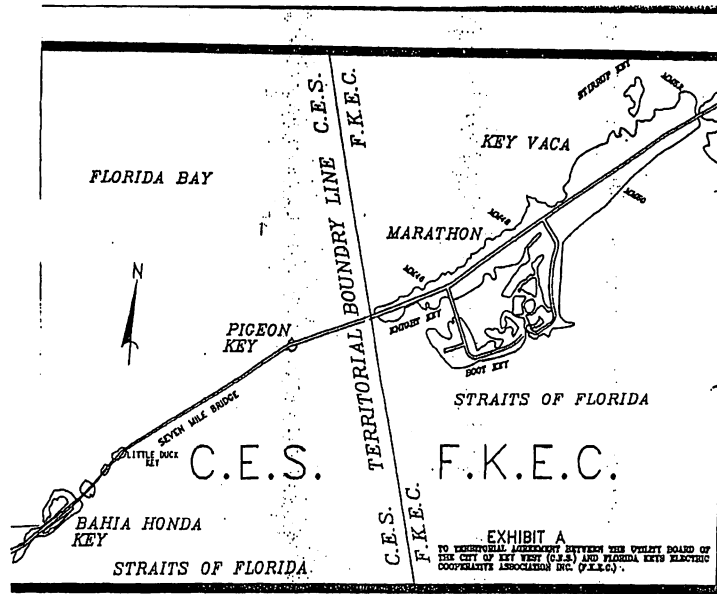
FLORIDA KEYS ELECTRIC COOPERATIVE
ASSOCIATION, INC.


R. L. Barnes, Secretary

By: 
B. L. Schwartz

Title: President

(SEAL)



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Certificate of Service

The undersigned certifies that a copy hereof has been furnished to the following by electronic and overnight mail on January 23, 2012:

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Respectfully submitted:

Florida Public Service Commission

By: s/ Martha C. Brown
S. Curtis Kiser, General Counsel
Florida Bar No. 123700
Martha C. Brown, Senior Attorney
Florida Bar No. 261866
2540 Shumard Oak Boulevard
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Phone No. (850) 413-6199
Fax No. (850) 413-6847

Attorneys for the
Florida Public Service Commission

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.

CONFIRMED COPY
JAN 30 2012
DAVID C. ANDERSON, JR.
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.

II. Outside Persons Who Wish to Address the Commission at Internal Affairs

***OUTSIDE PERSONS WHO WISH
TO ADDRESS THE COMMISSION AT***

***INTERNAL AFFAIRS
May 9, 2012***

Speaker

Representing

Item #

Schef Wright

Monroe County

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III. Supplemental Materials Provided During Internal Affairs

NOTE: The records reflect that there were no supplemental materials provided to the Commission during this Internal Affairs meeting.