

FLORIDA PUBLIC SERVICE COMMISSION
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SEPTEMBER 11, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (PAUGH) *AVE FOR LTP*
DIVISION OF ELECTRIC AND GAS (TEW) *KJ* *JDJ*

RE: DOCKET NO. 970022-EU - PETITION BY FLORIDA POWER & LIGHT
COMPANY FOR ENFORCEMENT OF ORDER 4285, WHICH APPROVED A
TERRITORIAL AGREEMENT AND ESTABLISHED BOUNDARIES BETWEEN
THE COMPANY AND THE CITY OF HOMESTEAD

AGENDA: 09/23/97 - REGULAR AGENDA - PROPOSED AGENCY ACTION-
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\970022EU.RCM

CASE BACKGROUND

On December 1, 1967, the Commission approved the Territorial Agreement between Florida Power & Light Company (FPL or Company) and the City of Homestead (City), Order No. 4285, Docket No. 9056-EU. On January 6, 1997, Florida Power & Light Company filed a Petition For Enforcement of Order 4285. The Petition requests Commission interpretation and enforcement of the terms of the Territorial Agreement. FPL asserts that the City is violating the Agreement by serving two for-profit businesses in FPL service territory.

The Territorial Agreement (Agreement) entered into on August 7, 1967, delineates the respective service areas of the utilities and provides for the transfer of customers. Two paragraphs of the Agreement are the subject of the current dispute. Paragraph 6 states that if the City limits are extended through annexation into FPL's service territory, FPL would continue to serve the area,

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notwithstanding that the area would then be within the City. Paragraph 8 carves out the service exception that is the subject of this proceeding. Paragraph 8 states:

Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Homestead Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (S.W. 137th Avenue) is within the service area of the City, including any additions to or extensions of said facilities of the Homestead Housing Authority. The City's right to furnish service to City-owned facilities, or those owned by agencies deriving their power through and from the City (including but not limited to the Homestead Housing Authority) may be served by the said City, notwithstanding that the said facilities are located within the service area of the Company.

The Agreement's delineation of the utilities' service territories anticipated the City's expansion of its corporate limits by allotting the City an area approximately twice the size of the 1967 corporate limits. The City is now attempting to expand its service territory through ground leases to private enterprises in a corporate park located within FPL's service territory. The City acquired the Park of Commerce with grant money subsequent to Hurricane Andrew.

In 1993, the City leased vacant real property in the Park of Commerce to a beer distributor, Silver Eagle Distributors, Ltd. The beer distributor has since constructed a warehouse, office and distribution facility on the property. In 1996, the City leased vacant real property adjacent to the beer distributor in the Park of Commerce to a boat builder, Contender Boats. According to the Petition, Contender was commencing construction on its facility in early 1997. The Park of Commerce is quite a distance from the former Housing Authority Labor Camp and is clearly within the service territory of FPL.

Extensive pleadings have been filed in this docket. Subsequent to the Petition For Enforcement filed by FPL, the City filed a Motion For Leave To Intervene which was granted. In addition, the City filed three motions to dismiss; one for lack of subject matter jurisdiction, one for failure to join indispensable

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parties, and one failure to state a cause of action. The City also filed two motions to strike FPL's request for attorneys fees and a request for oral argument. All of the City's motions were denied by the Prehearing Officer except the motion to strike FPL's request for attorneys fees. In response to the favorable ruling on attorneys fees, FPL filed an Amended Petition For Enforcement Of Order which was substantially the same as the original Petition but included more specific allegations with respect to its request for attorneys fees. Subsequently, the City filed a response to the Amended Petition and a Motion For Judgment On The Pleadings. FPL filed a Memorandum In Response To The City's Motion For Judgment on the Pleadings. A ruling by the Prehearing Officer on the City's Motion for Judgment on the Pleadings is anticipated prior to the Agenda Conference.

FPL's position in these proceedings is that the service exception contained in paragraph 8 for city-owned facilities does not apply to the Park of Commerce businesses because the businesses are not proprietary municipal functions. The City's position is that to qualify under the service exception, all that is required is for the City to own the underlying realty. Based on our analysis of the pleadings, and application of the rules of construction, staff believes that FPL is entitled to serve these customers.

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DISCUSSION OF ISSUES

ISSUE 1: Pursuant to Order No. 4285, in Docket No. 9056-EU, issued December 1, 1967, should the Commission require the City of Homestead to transfer electric service for Silver Eagle Distributors, Ltd. and Contender Boats to Florida Power and Light Company?

RECOMMENDATION: Yes. The service territory exception contained in paragraph 8 of the Agreement pertains only to city proprietary functions occurring on the site of the Homestead Housing Authority Labor Camp and not to private, for-profit businesses. Therefore, electric service for Silver Eagle Distributors, Ltd. and Contender Boats should be transferred from the City of Homestead to Florida Power and Light Company. In addition, the parties should negotiate in good faith to develop a plan for this transfer and the plan should be brought back to the Commission for approval.

STAFF ANALYSIS: The purpose of the Agreement was to settle a prolonged dispute between the parties for service to the area around Homestead.

I get the impression from the record the private electric company yielded to the demands of the municipality to surrender the subject suburban territory in order to 'keep peace' with the City, since there had been wrangling between the two utilities concerning which should provide utility service in the subject area for a number of years.

Storey v. Mayo, 217 So.2d 304, 309 (Fla. 1968) Justice Ervin's dissent.

Unfortunately, the attempted dispute resolution was unsuccessful. Various aspects of the Agreement have been the subject of four Supreme Court actions.

An overview of the previous litigation regarding the Agreement is instructive in analyzing the positions of the parties in the instant proceedings. The first case, Storey v. Mayo, was an action brought by consumers who had been transferred from FPL to the City challenging the Commission's approval of the Territorial Agreement. According to the Courts's opinion, 12 commercial and 66 residential customers were transferred from the City to FPL and 35 commercial

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and 363 residential customers were transferred from FPL to the City. The customers alleged that the rates and service of FPL were superior to that of the City. In upholding the Commission's decision, the Court found that the Agreement reasonably resolved years of competition between the utilities and that the Commission's decision was based on competent, substantial evidence. Twelve years later, FPL customers again opposed implementation of the Agreement but the Commission found insufficient basis to reconsider the matter and the Supreme Court denied certiorari. Accursio v. Mayo, 389 So. 2d 1002 (Fla. 1980).

In Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989), the Commission petitioned for a writ of prohibition to the Circuit Court of Dade County to prevent that court from conducting proceedings initiated by the City to modify the Agreement. The City had notified FPL in writing of its intent to unilaterally terminate the Agreement. FPL responded by filing a Petition for Declaratory Statement with the PSC and the City countered by filing a declaratory judgment action in circuit court. The question to be resolved in that proceeding was whether the PSC had exclusive jurisdiction to modify or terminate a territorial agreement that had been approved pursuant to an order of the Commission. The Court found that the purpose of the underlying action was to change the boundaries of the Territorial Agreement. Id. at 1212. The Supreme Court ruled that the Agreement merged with and became a part of Order 4285, that the purpose of the circuit court action was to modify the Agreement and that any modification or termination of the Order must first be made by the PSC.

Following the Fuller decision, the City filed a Petition To Acknowledge Termination or in the Alternative, Resolve Territorial Dispute with the Commission. The Commission granted FPL's motion to dismiss and the City appealed. City of Homestead v. Beard, 600 So.2d 450 (Fla. 1992). In this proceeding, the City was continuing its attempt to modify the Agreement by contending that since the Agreement did not contain an express statement regarding duration, it was terminable at will. Employing the rule of law which holds that, absent an express statement, the court should determine the intent of the parties by examining the surrounding circumstances and by reasonably construing the agreement as a whole, the Court found that the Agreement was intended to be perpetual. The Agreement was executed in order to end the unsatisfactory effects of expensive, competitive activity, not to delay disputes until one

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of the parties decides it is advantageous to begin competing again.
Id. at 454.

In the instant agreement, FPL refrained from competing with the City for twenty years, transferred a large number of its customers to the City, and made investments in territories in which it believed it had an exclusive franchise. The detriment to FPL as a result of these acts cannot be undone and it is unlikely that FPL intended to place itself in a position in which the City could unilaterally deprive it of its franchised areas under the agreement and, thus, impair its investment in those areas.

Id.

The following is a summary of the parties' positions on the substantive issues.

Florida Power & Light

FPL's Petition alleges that the City is supplying electricity to private, for-profit companies in the Park of Commerce in contravention of the 1967 Territorial Agreement and Order No. 4285. FPL does not dispute that the real property is owned by the City. However, FPL asserts that Silver Eagle and Contender Boats are not "city-owned facilities" as contemplated by the exception to the service area contained in Paragraph 8 of the Agreement. First, FPL submits that "the City cannot legitimately...contend that Silver Eagle's...distribution...facility in the Park of Commerce qualifies as a "city-owned facility"... because all electricity-consuming structures and equipment on the site are owned by, and are the sole responsibility of, Silver Eagle." (Pet., para. 9) Second, FPL argues that the consistent statutory definition of "facility" is not the real estate but rather the activity or purpose that is being performed on the property. (Pet., para. 11) FPL cites 20 Florida Statutes definitions as well as Black's Law Dictionary and an English language dictionary to demonstrate its point. (Amended Pet., para. 11) Finally, citing State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952) FPL supports its argument that the Park of Commerce businesses are not "city-owned facilities" because the City exercises "no control or dominion over the distribution of beer or the manufacturing of boats since neither is a legitimate exercise of municipal power and would,

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therefore, be an *ultra vires* act violative of the Florida Constitution." (Pet., para. 12)

In addition to contesting the legitimacy of considering beer and boat businesses as city-owned facilities, FPL alleges that the City has deliberately violated the purpose of the Agreement by engaging in uneconomic duplication. The City has constructed electrical infrastructure that is adjacent to FPL facilities in order to serve the Park of Commerce.

[T]he City built a new feeder extending approximately one-half mile from City-owned distribution facilities located to the east of the Park of Commerce. The City has apparently also installed an underground loop along the perimeter of the Park of Commerce. Both the feeder and underground facilities are uneconomic duplication of FPL facilities located immediately adjacent the Park of Commerce.
(Pet., para. 5)

Finally, FPL alleges that the terms of the lease between the City and Silver Eagle are tantamount to a contractual admission against interest insofar as the lease recognizes both the probability of a dispute with FPL over electric service and the autonomy of the Silver Eagle's construction and operation. FPL's abbreviated summary of portions of the lease discloses the "unconvincing nature of the City's scheme." Silver Eagle must apply for all city permits, licenses and other approvals and conform to all applicable ordinances and regulations and fee payments. The cost of constructing the 53,000 square foot warehouse is solely the responsibility of Silver Eagle and the Silver Eagle is to maintain all insurance on the premises. (Pet., para. 7) FPL also quotes from the indemnity section of the Silver Eagle lease:

The [City] may have a dispute (the "FPL Dispute") with Florida Power and Light ("FPL") as to whether [the City] or FPL has the right to be the exclusive provider of electrical services to the Property. The FPL Dispute may take many months for resolution, and the outcome probably depends on whether, for purposes of FPL's territorial allocation agreement with [the City], [the City] is deemed to be the owner of the Property. Lessor will indemnify and hold harmless the Lessee from any and all

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claims, damages or losses which Lessee may suffer or incur by reason of the FPL Dispute....

(Pet., para. 6)

City of Homestead

The City's pleadings contain two primary substantive arguments. First, the City alleges that the Commission lacks jurisdiction to decide the matter. The City states that the Commission has no statutory authority over the lease agreements between the City and Silver Eagle Distributors and Contender Boats. The City also states that the determination of the ownership of the facilities built on City property is a matter for the courts and not the Commission. Likewise, the City asserts that the constitutional issue of the city's *ultra vires* activities raised by FPL is a matter for the courts. (Motion To Dismiss For Lack of Jurisdiction Over the Subject Matter, paras. 4, 6 & 7) The City's jurisdictional arguments were resolved against the City by the Prehearing Officer in Order No. PSC-97-0487-PCO-EU, issued April 28, 1997. No motion for reconsideration was filed by the City in response to the Order.

Second, the City disputes FPL's interpretation of the phrase "city-owned facilities." The City argues that there can be only one definition of the phrase and that definition relates solely to ownership of the underlying realty. Citing Burbridge v. Therrell, 148 So. 204 (Fla. 1933) the City declares that "[i]t is black letter law that the City therefore owns all buildings, improvements and fixtures situate on the City's real property since 'all buildings and fixtures actually or constructively annexed to the freehold become part of it....'" The City opines that since the Agreement specifically and unequivocally excludes any "city-owned facilities", regardless of their location, therefore "the only logical interpretation of the Territorial Agreement is that the City is to be the sole provider of electrical services to the Park of Commerce." (City's Motion For Judgment on the Pleadings, pgs. 2 & 3)

In addition to its exclusive definition argument, the City takes issue with FPL's interpretation of the word "owned." The City accuses FPL of expanding the contractual use of the word "owned" to "owned and operated" "There is nothing mysterious, complicated or ambiguous about the word "owned." [T]he words in a

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contract must be given their natural and most commonly accepted meaning.... Courts simply are not at liberty to "rewrite, alter, or add to the terms of a written agreement between parties...." (Motion For Judgment of the Pleadings, pg.3 citing Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976))

Analysis

Based on the arguments advanced by FPL and based on the rules of construction, it is apparent that the meaning of the phrase "city-owned facility" implies a requirement of city proprietary function at the facility in order to qualify for the service exemption. Several of the rules of construction aid in discerning the meaning of the ambiguous language relative to the service exception. First, an assessment of the evil to be prevented in entering into the Agreement aids in clarification of the phrase. Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). The purpose of the Agreement was to end the unsatisfactory effects of expensive, competitive activity between the parties. City of Homestead v. Beard, 600 So.2d at 454. If the service area exception were read to allow the City to encroach upon FPL's service territory any time it purchases real property for any purpose, it would only promote expensive, competitive activity, a race to serve, and uneconomic duplication. This result is clearly contrary to the purpose of the Agreement and the Commission's mandate, pursuant to Section 366.04, Florida Statutes, to minimize uneconomic duplication.

Second, the rules of construction relating to general and specific terms aid in the interpretation of the Agreement. It is a fundamental principle of construction that the mention of one thing implies the exclusion of another. Thayer v. State, 335 So.2d 815 (Fla. 1976); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). The Homestead Housing Authority Labor Camp is specifically named in paragraph 8 as a type of city-owned facility that is to be served by the City notwithstanding its location in FPL's territory. Likewise, the specific location of the Labor Camp is delineated in the Agreement and the supporting maps. Interpreted based on the rule that specific terms imply exclusion of other terms, the meaning of paragraph 8 is that the Labor Camp site, if utilized by the City for a proprietary function, may be served by the City.

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Similarly, the rule of construction which states that the meaning of particular terms may be ascertained by reference to words associated with them, reaches the same conclusion as set forth in the preceding paragraph. "General and specific words that are capable of an analogous meaning when associated together take color from each other." 49 Fla Jur 2d, Statutes § 127. Thus, the general phrase "city-owned facility" is restricted to the narrower meaning of "city-owned facility with a municipal, proprietary function" by the analogous phrase "Homestead Housing Authority Labor Camp." This conclusion is supported by the case law. Orange County Audubon Soc. v. Hold, 276 So.2d 542 (4th DCA 1973).

Finally, the rule of construction that requires harmonizing the different provisions of the Agreement in order to give effect to all portions thereof, supports the interpretation that the location and use of the service exception site are limited. With respect to statutes, courts presume that laws are passed with knowledge of prior laws and will favor a construction that gives a field of operation to both rather than construe one as being meaningless. Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). In the instant case, acceptance of the City's interpretation of the meaning of "city-owned facility" renders paragraph 6 of the Agreement meaningless. Paragraph 8 is, by its terms, a specific exception to paragraph 6. Paragraph 6 states that if the City limits are extended beyond the service area of the City and into the service area of the Company, the City agrees that the Company will continue to serve such area though it would then be within the City. Acceptance of the City's position that any city-owned land in any location used for any purpose negates the operation of paragraph 6 as well as the purpose of the Territorial Agreement.

In sum, the City of Homestead is attempting to expand its service area by asserting that private, corporate enterprises located in Florida Power & Light's territory are city facilities by virtue of the fact that they are located on city property, the Park of Commerce. Staff believes that the City's interpretation is not supported by the language of the Agreement or the law of construction and that the City should be ordered to transfer service of Silver Eagle, Ltd. and Contender Boats to Florida Power & Light. The parties should be directed to negotiate in good faith to develop a plan for the transfer of customers and the sale of facilities, if appropriate, from the City to FPL, and this plan should be brought back to the Commission for its final approval.

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ISSUE 2: Should Florida Power & Light be awarded attorneys fees in this proceeding?

RECOMMENDATION: No. Pursuant to Section 120.69(7), Florida Statutes, attorneys fees may only be awarded, if at all, in a final order. Because the action taken herein is preliminary in nature, attorneys fees are not available until the action becomes final.

STAFF ANALYSIS: Section 120.69(7), Florida Statutes, provides:

In any final order on a petition for enforcement the court may award to the prevailing party all or part of the attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.

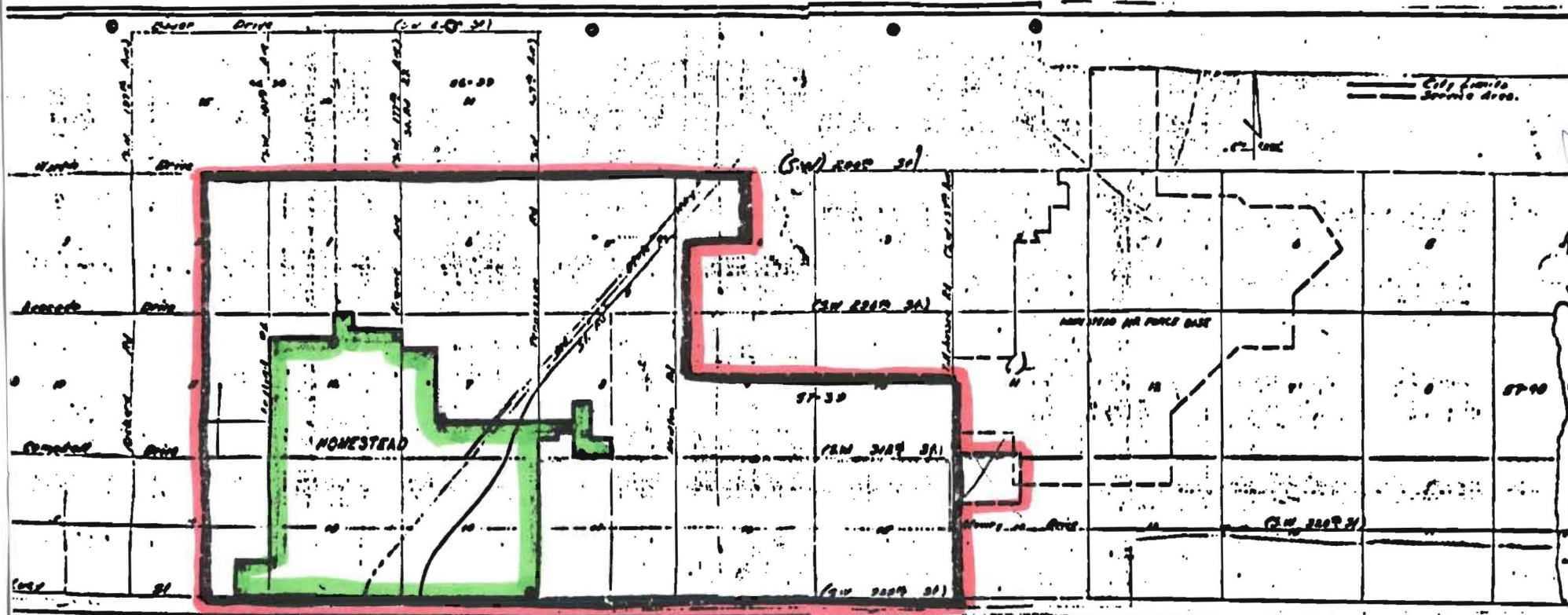
Without reaching the question of whether or not the Commission has jurisdiction to award fees and costs pursuant this statute, such an award is premature. This order will be issued as proposed agency action. Assuming staff's recommendation on Issue 1 is approved, FPL may file a petition for attorneys fees, costs, and expert witness fees after the order in this docket becomes final. The petition should be supported by affidavits and other evidence as required by the enabling statute.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. If no person whose substantial interests are affected by the Commission's proposed agency action timely files a protest within twenty-one days of the issuance of the order, this docket should be closed.

STAFF ANALYSIS: Pursuant to Rule 25-22.029(4), Florida Administrative Code, any person whose substantial interests are affected by the Commission's proposed agency action shall have 21 days after issuance of the order to file a protest. If no timely protest is filed, the docket should be closed.

EXHIBIT A



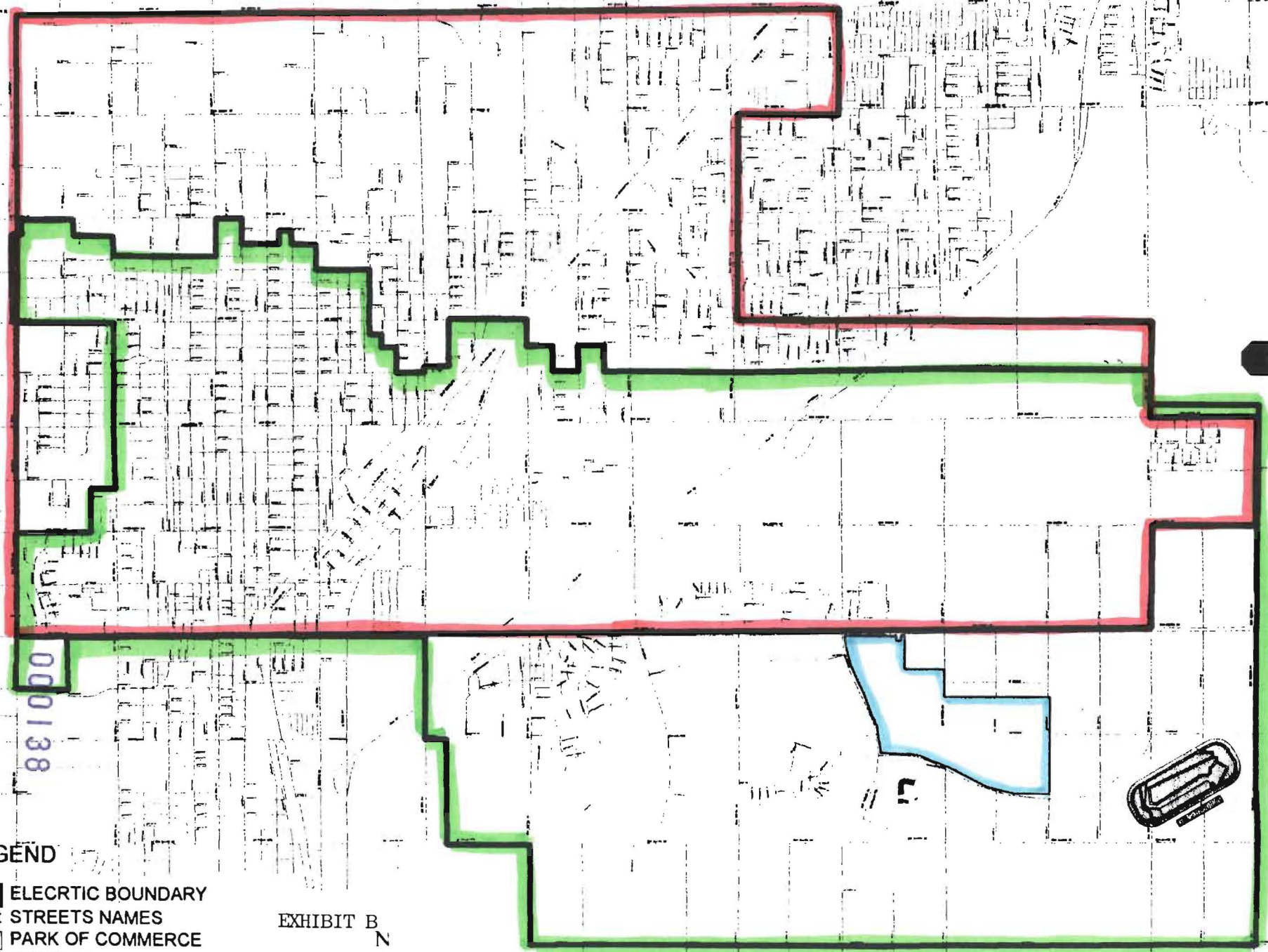
RED = Service Area Boundary

GREEN = City Limits

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ATTACHMENT
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CITY LIMITS AND ELECTRIC BOUNDARY



000138

LEGEND

-  ELECRTC BOUNDARY
- Text STREETS NAMES
-  PARK OF COMMERCE
-  STADIUM
-  MOTORSPORTS
-  HOMESTEAD STREETS
-  AIRBASE

EXHIBIT B



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