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Initial Brief of Proposed Intervener Putney on The Merits of Subject Matter Jurisdiction

Filed on Behalf of Alicia Putney

Total number of pages (including attached documents): 28 pages

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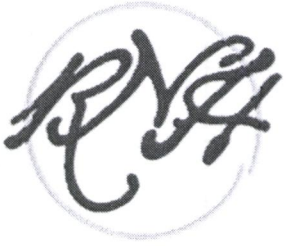

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Robert D. Reynolds and Julianna C. Reynolds against utility Board of the City of Key West Florida d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida.	)	DOCKET NO. 120554-EM DATE FILED: APRIL 19, 2013

INITIAL BRIEF OF PROPOSED INTERVENER PUTNEY ON THE MERITS OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

This brief is filed on behalf of Proposed Intervener Alicia Roemmele-Putney[1] on the issues outlined by the Public Service Commission in Order No. PSC-13-0141-PCO-EM, issued March 25, 2013, requesting that the parties to In re: complaint of Robert D. Reynolds and Julianne C. Reynolds against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services regarding extending commercial electrical transmission lines to each property owner of No Name Key, Florida file briefs addressing the legal issues laid out therein, specifically:

1. Does the Commission have jurisdiction to resolve Reynolds' complaint?

2. Are the Reynolds and No Name Key property owners entitled to receive electric power from Keys Energy under the terms of the Commission's Order No. 251727 approving the 1991 territorial agreement between Keys Energy and the Florida Keys Electric Cooperative?

STATEMENT OF THE CASE AND FACTS

The Parties to the Proceeding and Interested Parties

Complainants, Robert D. Reynolds and Julianna C. Reynolds ("Reynolds"), own and maintain real property located at 2160 Bahia Shores Road, No Name Key, Florida 33042 ("Property"). The Property is located on an island in Monroe County, Florida, commonly known as No Name Key.

Utility Board of the City of Key West, Florida, d.b.a. Keys Energy Services ("KES"), is a Florida electric utility duly organized and existing under the laws of the State of Florida with its principal place of business at 1001 James Street, Key West, Florida, which is located in Monroe

[1] Proposed Intervenor Putney was advised on the day of this filing, April 19, 2013, that an order would be forthcoming from the Commission denying Proposed Intervener Putney's Motion to Intervene. This brief is submitted in anticipation of filing a Motion for Reconsideration of said Final Order.

County, Florida. KES at all times relevant, has been engaged in the business of providing electricity to customers located south of the Seven Mile Bridge in Monroe County.

Intervener Monroe County is a political subdivision of the State of Florida.

No Name Key Property Owners Association, Inc., is a Florida not for profit ("NNKPOA"). NNKPOA is made up of members who own property on No Name Key, Florida and are desirous of connecting to commercial electrical service. NNKPOA has filed a Petition to Intervene in this proceeding.

Alicia Roemmele-Putney ("Putney") resides on full time and owns real property on No Name Key at 2150 No Name Drive, No Name Key, Florida. R. 13. Putney and her late husband Dr. Snell Putney were named Parties to Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, Case No. 99-819-CA-19. Putney has filed a Petition to Intervene in this proceeding.

Florida Keys Electric Cooperative Association, Inc. ("FKEC") is a rural electric cooperative duly organized and existing under the laws of the State of Florida with its principal place of business at 91630 Overseas Highway, Tavernier FL 33070, which is located in Monroe County, Florida. FKEC at all times relevant, has been engaged in the business of providing electricity to customers located north of the Seven Mile Bridge in Monroe County. R. 103. FKEC and KES are the sole parties to a June 17, 1991 Territorial Agreement discussed in detail herein.

The Land

No Name Key is a small island within the Florida Keys that is connected via bridge to the East of Big Pine Key in Monroe County. The Florida Keys are an Area of Critical State Concern within the meaning of Section 380.05 F.S. and No Name Key is specifically subject to protection under the Florida Keys Protection Act, Section 380.0552, F.S. There are 43 lots of developed

properties on No Name Key. These homes are operated with alternative, typically solar, energy sources[2]. *See* Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, Case No. 99-819-CA-19.

Coastal Barrier Resource Act

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

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

The Monroe County Comprehensive Plan

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

---

[2] The claim in Reynolds' Second Amended Complaint that "the overwhelming majority of No Name Key property owners desire commercial electric service" is wholly unsupported by fact and patently untrue. Moreover, although the Reynoldes owns property on No Name Key, unlike proposed Intervenor Putnam, No Name Key is not their primary residence, as their homestead is located in Plantation, Broward County, Florida.

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

"Policy 215.2.3: No public expenditures shall be made for new or expanded facilities in areas designated as units of the Coastal Barrier Resources System, saltmarsh and buttonwood wetlands, or offshore islands not currently accessible by road, with the exception of expenditures for conservation and parklands consistent with natural resource protection, and expenditures necessary for public health and safety";

"Policy 1301.7.12: By January 4, 1998, Monroe County shall initiate discussions with the FKAA and providers of electricity and telephone service to assess the measures which could be taken to discourage or prohibit extension of facilities and services to Coastal Barrier Resource Systems units."

Monroe County Code § 130-122

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

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

The Territorial Agreement

An agreement was made on June 17, 1991 between KES and FKEC. The agreement delineates the territorial boundaries of the utility parties. Appendix A. The boundary was established at the Seven Mile Bridge, such that KES would serve those areas south from Pigeon

Key and FKEC would serve those areas north from Knight Key. Appendix A. The Territorial Agreement was approved by the Public Service Commission as required by law on September 27, 1991. In Re: Joint Petition of Florida Keys Electric Cooperative and Utility Board of the City of Key West for Approval of a Territorial Agreement, Docket No. 910765-EU, Order No. 25127 (Fla. Pub. Serv. Comm'n 1991). Appendix A. Territorial agreements exist to prevent the uneconomic duplication of electric facilities and to protect utilities against unnecessary, expensive competitive practices. The PSC's oversight and approval of such agreements to divide territory provide utility parties to such agreements with the benefit of protection against antitrust liability, which liability would otherwise exist if utility companies were to divide up service areas in restraint of competition.

Previous Litigation Regarding Electrification of No Name Key

The issue of preservation v. electrification of No Name Key has been disputed by numerous residents over the past decade or more. The commercial electrification of No Name Key has been the subject of a previous law suit. In 1999, the Taxpayers For The Electrification of No Name Key, Inc. (predecessor organization to No Name Key Property Owners Association) filed a Complaint in the Sixteenth Judicial Circuit seeking, *inter alia*, declaratory relief that they had a statutory or property right to have electric power extended to their homes on No Name Key. Taxpayers For The Electrification of No Name Key, Inc., et. al. v. Monroe County, Case No. 99-819-CA-19. Alicia Roemmele-Putney was an intervening Defendant in that case. Appendix B. In 2002, the Court in Taxpayers denied the requested relief, holding that plaintiff property owners did not have a "statutory or property right to have electric power extended to their homes, which are operated with alternative, typically solar, energy sources." Appendix B. The Court further concluded, "Section 366.03, Fla. Stat. does not apply to Defendants Monroe

County or Keys Energy Service (KES). Even if it did apply here, Section 366.03, Fla. Stat., does not provide a right to commercial electric service if such service would be inconsistent with Chapters 163 and 380 or the Monroe County Comprehensive Plan." Appendix B at 3.

The most recent legal dispute began when the County filed a complaint for declaratory judgment and injunctive relief against KES and the No Name Key property owners in the 16th Judicial Circuit for Monroe County.[3] The County asked the Circuit Court to determine whether the County could, based on the provisions of the legally promulgated Comprehensive Plan, preclude Keys Energy from providing electric service to the island. The Circuit Court dismissed the action with prejudice, holding that the Commission has exclusive jurisdiction to determine whether KES should provide electric service to No Name Key property owners. Intervener Putney appealed this Circuit Court's decision to the Third District Court of Appeals where the Circuit Court's decision was affirmed in Alicia Roemmele-Putney et. al. v. Robert D. Reynolds, et. al., 106 So.3d 78, 82 (Fla. 3rd DCA 2013). The Appellate court held that the Commission is to determine the scope of its own jurisdiction over the No Name Key Controversy.

The present case was initiated on March 5, 2012 when the Reynolds filed a Complaint against the Keys Energy for failure to provide electric service to their residence. The Reynolds filed an Amended Complaint on March 13, 2013, and a Second Amended Complaint to correct a scrivener's error on March 20, 2013. The Reynolds have been granted leave to amend the Complaint for a third time however the Third Amended Complaint has yet to be filed. Additionally, as of the date of filing this brief, there are several pending issues on this docket, including Monroe County's Motion to Dismiss Second Amended Complaint, Monroe County's

[3] Throughout the course of litigation, Intervener Putney has adopted the position of Monroe County and hereby adopts the positions asserted by the County in its brief and incorporates its argument as their own, with the exception of any argument that would prohibit Intervener Putney's standing in this matter.

Motion to Strike [irrelevant and unauthorized requests for relief in paragraphs c and e of the "relief requested" in the Reynolds' second amended complaint], Alicia Roemmele-Putney's First Amended Petition to Intervene and No Name Key's Petition to Intervene.

ARGUMENT

I. The Commission does not have jurisdiction to resolve Reynolds' Amended Complaint because the relief requested, that the Commission order KES to provide service to No Name Key, is not within the statutory authority of the Commission.

Neither the Florida Statutes nor the Territorial Agreement imposes an obligation to serve on electric utilities when such service violates a state-approved county-adopted ordinance adopted to implement the county's comprehensive plan under the authority of Chapter 163, F.S. Similarly, a resident within the PSC-approved service area of a utility has no right to receive electric service when such service is prohibited by law. Accordingly, the Commission lacks statutory authority to order KES to provide electric service to No Name Key since such service is prohibited by law.The Commission must decline to decide the Reynolds' complaint because the Commission lacks statutory authority to grant the relief that Reynolds' Amended Complaint requests.

A. The Commission's exclusive jurisdiction over territorial agreements is not a basis for exercising jurisdiction over Reynolds' Amended Complaint.

The Commission has exclusive jurisdiction over Territorial Agreements but anything beyond the purpose of the Territorial Agreement exceeds the Commission's underlying statutory authority. In the instant case, the Commission's territorial dispute jurisdiction does not apply to the Amended Complaint because, first, there is simply no dispute regarding the territory in which

either party to the Territorial Agreement is to serve (*See* Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968); Gulf Coast Elec. Co-op, Inc. v. Johnson, 727 So.2d 259, 264 (Fla. 1999)). If any utility is to serve, it would be KES, but the present issue is not one arising out of the Territorial Agreement or the Commission's territorial statutes, but rather a conflict between some customers' desire to be served by KES versus Monroe County's validly promulgated growth management ordinances. Second, the Commission has no statutory authority to require a municipal "electric utility" such as KES to provide electric service to any customer, and the parties to the Territorial agreement cannot give this power to the Commission by invoking a general policy of electrification. *See* United Telephone Co. of Florida v. Public Service Comm'n, 496 So.2d 116, 118 (Fla. 1986). Finally, by the express terms of the Territorial agreement itself, no customer has standing under the Territorial Agreement to demand electric service.

The Commission's limited jurisdiction over "electric utilities" is set forth in Section 366.04(2) of the Florida Statutes, which in its entirety provides as follows:

> (2) In the exercise of its jurisdiction, the Commission shall have power over electric utilities for the following purposes:
>
> (a) To prescribe uniform systems and classifications of accounts.
>
> (b) To prescribe a rate structure for all electric utilities.
>
> (c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.
>
> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.
>
> (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In

> resolving territorial disputes, the Commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.
>
> (f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.
>
> No provision of this chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby.

The only provisions that might relate to the instant matter are subsections (d) and (e), which grant the Commission authority to approve territorial agreements and to resolve territorial disputes. Territorial agreements delineate geographic service territories between commercial power companies for the purpose of avoiding the uneconomic duplication of electric facilities, no more - no less. City of Homestead v. Johnson, 760 So.2d 80, 83 (Fla. 2000). Because there is no territorial dispute of service boundaries between the electric utilities that provide commercial power to the Florida Keys, the PSC lacks jurisdiction through its statutory authority in this case to apply the Territorial Agreement.[4]

Moreover, the purpose of territorial agreements is to "protect the utility against unnecessary, expensive competitive practices," Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), and "to ensure the reliability of Florida's energy grid and to prevent needless uneconomic duplication of electric facilities." Gulf Coast Elec. Co-op, Inc. v. Johnson, 727 So.2d 259, 264 (Fla. 1999). However, there is no issue in the instant case of ensuring the reliability of Florida's

[4] Territorial disputes before the PSC may only be initiated by parties to the Agreement and may allow a substantially affected customer to intervene. By Rule, the Reynolds are neither parties to the agreement nor customers. Rules 24-6.0441, 24-6.0441 and 25-6.003(b) F.A.C.

electric grid, nor of preventing the uneconomic duplication of electric facilities. The reliability of the grid cannot be threatened where there are no facilities, and there is absolutely no threat of duplication because there is no doubt that, if service were to be provided, KES would provide it. For the same reason, there is no territorial dispute at issue here: if service were to be provided, it is undisputed that KES, rather than FKEC, would provide such service pursuant to the Territorial Agreement.

While it is true that territorial agreements approved by the Commission's orders are enforceable by the Commission in the event of future disputes thereunder, it is not true that the Commission has jurisdiction to enforce provisions of such agreements that are beyond the Commission's underlying statutory authority. The Second Amended Complaint relies on a provision inserted into the Territorial Agreement by KES and FKEC regarding their characterization of the State's policy of promoting electrification. Second Amended Complaint at 12. Article 6, Section 6.1 provides that:

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

Complainant interprets this provision as somehow conferring on the Commission the power to enforce that provision in such a way as to require either party to provide service to a party applying therefor. However, this provision only applies to the construction of the Territorial

Agreement as between the parties to the Agreement itself. It cannot apply to Monroe County, nor can it apply to any individuals such as the Reynolds.[5]

More importantly, the inclusion of this language by KES and FKEC cannot create jurisdiction in the Commission to order the provision of electric service where that jurisdiction does not exist in the Commission's regulatory statute, Chapter 366, Florida Statutes. In this regard, Section 366.03, Florida Statutes, provides that "Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the Commission." (*Emphasis supplied.*)[6]

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[5] *See also* Section 7.2 of the Agreement, by which KES and FKEC expressly provided, "Nothing in this Agreement, either 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 of 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."

[6] The Commission's authority to order service by a public utility subject to 366.03 must also assume that the service is otherwise lawful. In an earlier case involving the proposed electrification of No Name Key, the 16th Circuit specifically held:

> Plaintiffs have no statutory or property rights to have electric power extended to their homes, which are operated with alternative, typically solar, energy sources. Section 366.03, Florida Statutes, is not meant to apply to Defendants Monroe County or City Electric Service [now KES]. Even if the statutes were applicable, Section 366.03, Fla. Stat., does not provide a right to commercial electric service if such service would be inconsistent with Chapters 163 and 380 or the Monroe County Comprehensive Plan.

Taxpayers for the Electrification of No Name Key, Inc. v. Monroe County and City Electric Service, Case No. 99-819-CA-18, Amended Order Granting Summary Judgment at 3, para. 11 (Fla. 16th Cir. June 11, 2003) (subsequently vacated on an agreed motion of the parties).

In contrast, there is no corresponding provision in Chapter 366 that would, other things being equal, give the Commission the authority to order a municipal utility such as KES to provide service to an applicant therefor. This is critical because the Commission "derives its powers solely from the legislature." United Telephone Co. of Florida v. Public Service Comm'n, 496 So.2d 116, 118 (Fla. 1986). Lacking the specific power to order a municipal utility to serve, the Commission could not order KES to provide service: as the Florida Supreme Court stated in United Telephone, "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." Id. at 118 (*citing* Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 582 (Fla. 1965)).

Coincidentally, in United Telephone the issue was whether the Commission had jurisdiction over a contract between and among telecommunications companies, and the Court held that the Commission did not have such jurisdiction. Of particular relevance to the proposition that the Commission might somehow obtain the power or jurisdiction to order service by KES because of the pro-electrification policy recited in the Territorial Agreement, the United Telephone Court stated:

> The only other mention of jurisdictional authority in the Commission's order appears to imply that jurisdiction can be derived from the contracts themselves. After rejecting the applicability of section 364.07, the Commission's order continues:
>
> > We agree with that interpretation of what Section 364.07, Florida Statutes, states. However, that argument is not germane because the settlement contracts themselves contemplate the course of conduct taken by the Commission.
>
> It is true that the language of the contracts permits the commission to intervene. Parties to a contract, however, can never confer jurisdiction.

United Telephone, 496 So.2d at 118 (*emphasis supplied*).

Thus, the contractual provision between KES and FKEC that promotes electrification cannot create jurisdiction – i.e., the power to order an electric utility to provide service – in the Commission where there is no other statutory grant of that power. Accordingly, the Commission lacks the jurisdiction to order KES to provide service to the residents of No Name Key.

The Complainants' assertion that the Commission has jurisdiction over enforcement of a territorial Agreement is true as far as it goes, but the Agreement does not afford any basis for the Reynolds' requested relief, because the Agreement itself bars standing to seek relief to anyone other than KES or FKEC, and because there is no dispute – no case or controversy requiring or invoking the Commission's jurisdiction – between the parties to the territorial Agreement who are subject to the Commission's territorial jurisdiction.

B. Refusal by the Commission to grant jurisdiction to resolve Reynolds' Amended Complaint does not place KES or FKEC in jeopardy of antitrust liability.

Territorial agreements supervised by the Commission also protect parties to such territorial agreements from antitrust liability, which would otherwise exist if parties were to divide up service areas and agree not to compete in each other's areas. The existence of the Commission's regulatory oversight over territorial agreements and territorial disputes constitutes the ongoing state regulatory system that provides "state action immunity" from antitrust liability to the parties to such agreements. *See* Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609, 611 (11th Cir. 1995) (*citing* Parker v. Brown, 317 U.S. 341, 350 (1942)); *see also* Storey, at 307 (recognizing "the importance of the regulatory function as a substitute for unrestrained competition in the public utility field."). Just as there is no territorial dispute here, there is no potential antitrust claim here either, because no entity is attempting to restrain competition. The only "restraint" in this case results from the application of the County's lawful ordinances that

were enacted to protect a designated environmentally sensitive area from the adverse consequences of additional development. Thus, denial of jurisdiction in this case would not jeopardize the Commission's authority to approve, supervise, and enforce territorial agreements because there is no issue relating to the approval supervision, or enforcement of the Territorial Agreement between KES and FKEC present in the instant complaint.

C. The doctrine of judicial estoppel does not prevent the Commission from determining it does not have jurisdiction over Reynolds' Amended Complaint.

Reynolds' mistakenly asserts in its Amended Complaint that the Commission is judicially estopped from making a determination that it does not have jurisdiction to hear the instant matter because it stated in its amicus brief in the Appeal case "that is has the 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 resident of No Name Key are entitled to receive electric service from Keys Energy." Second Amended Complaint at 4.

The Complaint merely makes this claim without and explanation which is understandable because even a cursory look that the legal standard shows the insurmountable defects of the argument. The Florida Supreme Court has described the doctrine of judicial estoppel as follows:

> A claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.
>
> In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it to act in reliance upon it unjust to him to allow that first party to subsequently change his position. There can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an

> estoppel; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law. Blumberg v. USAA Cas. Ins. Co., 790 So.2d 1061, 1066 (Fla. 2001) (citing Chase & Co. v. Little, 116 Fla. 667, 156 So. 609, 610 (1934) (Emphasis supplied).

The Reynolds have not and cannot truthfully assert that they meet the legal requirements to claim that the Commission is judicially estopped from determining that they lack jurisdiction for several reasons. First and foremost, the Commission was never a party to the Appellate case, and their filing of the Amicus brief did not have the effect of raising the Commission's status to that of a party to the Appeal action. It is well accepted that an Amicus curiae, also referred to as a "friend of the court," is a person who is *not a party* to a lawsuit. *See* AMICUS CURIAE, Black's Law Dictionary (9th ed. 2009). Furthermore, the Commission is the arbitrator of the present case, not a party. Nevertheless, assuming *arguendo* that the Commission was a party to the Appellate case and is a party to the present case, the Reynolds never changed their position as to the issue of the Commission's jurisdiction. Throughout the litigation of electrification off No Name Key, the Reynolds have always claimed, and continue to claim, that the Commission has jurisdiction to mandate that KES provide electrical service to No Name Key. Lastly, there were no disputed issues of fact in the Appeal case, and all positions maintained in the action involved solely questions of law.

Furthermore, the amicus brief filed in the Appeal proceeding cannot be regarded as the position of the Commission regarding its jurisdiction over the Complaint in this matter because it is axiomatic that an agency speaks through its orders and the Commission has not issued an order applying Chapter 366, F.S. to the facts of this case. The Commission is not estopped from making a determination of lack of jurisdiction based merely on the Commission's counsel's

statements in an amicus brief in another proceeding in which the Commission wasn't even a party.

II. Reynolds and No Name Key property owners are not entitled to receive electric power from KES under the terms of the Commission's Order No. 25127 approving the 1991 territorial agreement between Keys Energy and the Florida Keys Electric Cooperative.

A. No provision of the territorial agreement creates an affirmative obligation on KES to serve Reynolds.

The Amended Complaint mistakenly relies on the Territorial Agreement's Sections 6.1, Construction of Agreement provision, and Section 0.2, to claim that the Agreement creates an affirmative obligation on KES to serve the citizens of the State of Florida within its respective service area, specifically, No Name Key. Second Amended Complaint at 12. Article 6, Section 6.1 provides that:

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

As discussed above, Complainant interprets this provision as somehow conferring on the Commission the power to enforce that provision in such a way as to require either party to provide service to a party applying therefor. However, this provision only applies to the construction of the Territorial Agreement as between the parties to the Agreement itself. It cannot apply to Monroe County, nor can it apply to any individuals such as the Reynolds.[7]

[7] *See also* Section 7.2 of the Agreement, by which KES and FKEC expressly provided, "Nothing in this Agreement, either express or implied, is intended, or shall be construed, to

Reynolds also mistakenly relies on the recital clause in Section 0.2 of the Territorial agreement to assert that KES has an obligation to serve. Section 0.2 states:

> 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 electrical service to persons requesting such service within their respective service areas.

The argument that this recital somehow obligates KES to provide electrical service to No Name Key fails because recitals in a contract, such as whereas clauses are not binding obligations under the law. 17A C.J.A. Contracts S. 403 (2011) (Recitals in a contract generally do not create binding obligations unless the operating provisions of the agreement specifically references them.); 17A Am. Jur. 2d Contracts S. 383 (2011) (Since recitals indicate only the background of the contract, that is, the purpose and motives of the parties, they do not ordinarily form any part of the real agreement.); Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty., 105 So.3d 646, 648 (Fla. 5th DCA 2013) (the whereas clause is prefatory and not binding); Johnson v. Johnson, 725 So.2d 1209, 1212–13 (Fla. 3d DCA 1999) (holding that "whereas" clause is nonbinding on parties to contract and not operative provision of otherwise unambiguous agreement); Fidelity Bank v. Lutheran Mutual Life Insurance Company, 465 F.2d 211 (10th Cir. 1972) (Operative provisions of a contract, if clear and unambiguous, are not controlled by recitals.); Mozdzierz v. Accenture, LLP, 2010 W.L. 4273323 (E.D.Pa.) (It is standard contract law that a whereas clause cannot create a right beyond those arising from operative terms of the document); Ohio Farmers Insurance Company, et. al. v. Russel, et. al.,

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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 of 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."

2008 U.S. Dist. LEXIS 103685 (M.D. Tenn. Dec. 23, 2008) (In no sense will a recital be the basis of a legal and binding obligation of the parties.).

B. The express language of the territorial agreement bars Reynolds, or any other party aside from KES and FKEC, from benefitting from the Territorial Agreement.

Furthermore, the Territorial Agreement expressly provides that it does not confer or give any benefits to any person other than the parties to the Agreement, KES and FKEC. It is well settled law that the clear and unambiguous language of an agreement is controlling and the courts are prohibited from rewriting or giving terms a meaning other than that expressed in it. Jacksonville Terminal Co. v. Railway Exp. Agency, Inc., 296 F.2d 256 (5th Cir. 1961); Fuddruckers, Inc. v. Fudpucker's, Inc., 436 F. Supp. 2d 1260 (N.D. Fla. 2006); Barnes v. Diamond Aircraft Industries, Inc., 499 F. Supp. 2d 1311, 63 U.C.C. Rep. Serv. 2d 739 (S.D. Fla. 2007); Quantum Communications Corp. v. Star Broadcasting, Inc., 382 F. Supp. 2d 1362 (S.D. Fla. 2005); Churchville v. GACS Inc., So.2d 1212 (Fla. 1st DCA 2008); Barco Holdings LLC v. Terminal Inv. Corp., 967 So.2d 281 (Fla. 3rd DCA 2007); Clear Channel Metroplex, Inc. v. Sunbeam Television Corp., 922 So.2d 229 (Fla. 3rd DCA 2005); All-Dixie Ins. Agency, Inc. v. Moffatt, 212 So.2d 347 (Fla. 3rd DCA 1968); Paddock v. Bay Concrete Industries, Inc., 154 So.2d 313 (Fla. 2nd DCA 1963).

Specifically, Section 7.2 of the Territorial Agreement states:

> Nothing in this Agreement, either 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 of 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. (Emphasis supplied).

There is no dispute that the Reynolds are not a party to this agreement. Thus, the Territorial Agreement by its own terms denies and negates any legal right for the Reynoldses, or for any entity other than KES or FKEC – to seek any relief whatsoever under that Agreement. Moreover, the Commission, in approving the Agreement in its Order No. 25127, expressly approved this standard "no third party benefits" provision of the Agreement, and therefore, by principle that territorial agreements merge into the Commission's orders, the Commission's Order No.25127 itself bars the Reynoldses from seeking relief under that Agreement.

III. The Public Service Commission is Departing from its Quasi-Judicial Requirements.

Proposed Intervener Putney is compelled to point out that fundamental due process is not being provided in this matter and that the briefing is premature. First and foremost, there is no complaint upon which briefing arguments can be based. Second, the parties to the proceeding have yet to be determined by the Commission.

The Commission issued an Order granting Complainant Reynolds leave to amend the complaint, yet that Amended Complaint hasn't been filed. Nonetheless, the Commission has identified two issues for the parties to brief *sua sponte*, without knowledge of the contents of the final complaint. Thus, the Commission has determined the issues before there is even an actual complaint. The parties to the proceeding are now compelled to brief issues which may or may not be contained within the four corners of the complaint.

Additionally, on April 1, 2013, Monroe County filed a Motion to Dismiss, which is still pending. The entire purpose of such a motion is, in the interest of judicial economy, to dispose of one or more claims without need for further trial court proceedings. The bulk of the County's motion is directed towards Reynolds' standing to bring the matter in the first place. The

Commission's disposition of this motion could be dispositive of this case yet the Commission has not ruled on the motion and instead directed the parties to proceed with briefing on a fast track schedule. Furthermore, it is fundamental that a Court is to determine whether they have personal jurisdiction over parties to a case before determining whether they have jurisdiction over the substantive matters of the case.

Furthermore, if the Commission is addressing the previous Complaint, Monroe County has a pending Motion to Strike significant and critical portions of that Complaint. Disposition of this Motion could drastically change the basis of the matter, and therefore the fundamental issues before the Commission including those issues being briefed by the Parties.

Moreover, the Commission has yet to issue an Order on Intervener Putney and Intervener No Name Key Property Owners Association's Petitions to Intervene.[8] Without having a determination of standing either way, Putney is left with no choice but to proceed with briefing, despite the risk of being denied standing, and having wasted excessive resources to preserve her interests in the case.

Overall, the Commission's decision to set a fast track briefing schedule without having a complaint or a ruling on the Motion to Dismiss, Motion to Strike and Petitions to Intervene would result in a sham hearing, a denial of any indicia of due process and forced briefing by the parties in an action that is yet to be defined or noticed by a proper complaint.

> [T]he Administrative Procedures Act clearly directs that all proceedings conducted by any state agency, board, commission, or department for the purposes of adjudicating any party's legal rights, duties, privileges or immunities, must be conducted in a quasi-judicial manner in which the basic requirements of due process are accorded and preserved. Deel Motors, Inc. v. Dept. of Commerce, 252 So.2d 389, 394 (Fla. 1st DCA 1971).

[8] Although a Final Order has not been issued, Intervener Putney has been informed by counsel for the Commission that the hearing officer has concluded that Intervener Putney does not have standing.

Although, the amount of due process afforded a person before a quasi-judicial board falls short of that due someone in a strictly judicial proceeding, it is well established that an individual enjoys some modicum of due process in a quasi-judicial hearing. Hadley v. Department of Adm., 411 So.2d 184 (Fla. 1982); Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3rd DCA 1991).

CONCLUSION

As established by the aforesaid analyses, the Commission does not have jurisdiction to grant the relief requested by Reynolds' and order that KES to provide electric service to No Name Key. The Territorial Agreement, nor any provision of Chapter 366, F.S., nor any other provision of Florida statutes, imposes an obligation to serve on electric utilities, such as KES, confers a right to service on potential customers of electric utilities, or grants the Commission the power to mandate that electric utilities serve. The Commission must reject the Reynolds' complaint, with prejudice, for the reasons set forth in this brief and Monroe County's Brief, arguments of which are incorporated herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic mail, on this 19th day of April 2013.

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