BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	DOCKET NO. 120054-EM ORDER NO. PSC-13-0207-PAA-EM ISSUED: May 21, 2013

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

NOTICE OF PROPOSED AGENCY ACTION
ORDER RESOLVING COMPLAINT
AND
ORDER DENYING MOTION FOR STAY AND MOTION TO DISMISS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein determining jurisdiction, approving the provision of electric service, and resolving the complaint is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

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. (Attachment A) 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. 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 customer owned solar panels and generators. At present there are approximately 43 residences on No Name Key, many of which were constructed in the 1950's, '60's, and '70's. Further development is not expected because No Name Key is designated a critical barrier island, and much of the island is federally protected land, home to Key Deer and other endangered species.

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 to extend the necessary distribution facilities to the island across a bridge from nearby Big Pine Key. After some delay caused by Keys Energy's uncertainty whether Monroe County (County) could prohibit Keys Energy from providing service to the island, Keys Energy began construction of the facilities, and completed the project in July 2012.

On March 5, 2012, Robert D. Reynolds and Julianne C. Reynolds, the owners of residential property on No Name Key, Florida, filed a complaint against Keys Energy for failure to provide electric service to their residence as required by the terms of the Territorial Agreement that we approved in 1991. The Reynolds filed an amended complaint against Keys Energy on March 13, 2013, to reflect the fact that Keys Energy had installed electric facilities on No Name Key but had not yet provided service to customers because the County refused to issue building permits to the customers to connect their homes to the Keys Energy facilities.[1] The amended complaint asserts that we have exclusive jurisdiction to interpret the territorial agreement we approved and determine that property owners on No Name Key are entitled to electric service from Keys Energy. Keys Energy filed a Response and Affirmative Defenses to the Reynolds' Amended Complaint on April 8, 2013, in which it asserted that it had entered into a contract with the Association for the construction of facilities to provide electric service to the island. Keys Energy also asserted that the facilities had been constructed and were ready to provide service. Monroe County filed a Motion to Dismiss the amended complaint on April 1, 2013,[2] and the Reynolds filed their opposition to the Motion to Dismiss on April 8, 2013.[3]

The controversy over whether No Name Key property owners should receive electric service from Keys Energy began long before the Reynolds filed their complaint with this Commission. Most recently, the County filed a complaint for a declaratory judgment and injunctive relief against Keys Energy and the No Name Key property owners in the 16th Judicial Circuit Court for Monroe County.[4] The County asked the Circuit Court to determine whether the County could preclude Keys Energy from providing electric service to the island. The Circuit

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[1] The Reynolds filed a second amended complaint to correct a scrivener's error on March 20, 2013.

[2] Monroe County was granted intervention in the docket on May 22, 2012, by Order No. PSC-12-0247-PCO-EM. The No Name Key Property Owners Association was granted intervention on September 11, 2012, by Order No. PSC-12-0472-PCO-EM, and its renewed petition to intervene was granted on April 19, 2013, by Order No. PSC-13-0159-PCO-EM. Ms. Alicia Roemmele-Putney's amended petition to intervene was denied on April 19, 2013, by Order No. PSC-13-0161-PCO-EM.

[3] The Association filed a Notice of Joinder in the Reynolds' opposition on April 10, 2013.

[4] Monroe County v. Utility Board of the City of Key West d/b/a Keys Energy Services, Case No. 2011-CA-342-K

Court allowed us to file an *Amicus Curiae* brief in the case, in which we suggested to the Court that we have exclusive jurisdiction to resolve the issue, or at the very least we have jurisdiction to determine the scope of our jurisdiction in the first instance. The Circuit Court dismissed the County's action with prejudice, holding that we do have exclusive jurisdiction to determine whether Keys Energy should provide electric service to No Name Key property owners. 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. 3d DCA 2013). We were permitted to file a similar *Amicus Curiae* brief in that appeal. In its opinion, the Third District Court of Appeal stated that we are to determine the scope of our own jurisdiction over the No Name Key controversy. The Third District also stated that:

> The appellees and the PSC also have argued, and we agree, that KES's existing service and territorial agreement (approved by the PSC in 1991) relating to new customers and 'end use facilities' is subject to the PSC's statutory power over all 'electric facilities' and any territorial disputes over service areas, pursuant to section 366.04(2)(e), Florida Statutes (2011). The PSC's jurisdiction, when properly invoked (as here) is 'exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties.'

Shortly after the Third District issued its decision, the Circuit Court in Monroe County dismissed another complaint for declaratory judgment and injunctive relief filed by the County regarding essentially the same subject matter as the first complaint. This time the Circuit Court dismissed the complaint without prejudice, stating that once we have decided the matters within our jurisdiction, the Circuit Court would be available to address any remaining issues. The Circuit Court quoted State v. Willis, 310 So. 2d 1, 3 (Fla. 1975), as follows:

> Where the Public Service Commission, or this Court (Florida Supreme Court) on review, has disposed and completed a matter coming within the Commission's jurisdiction, subsequent unresolved claims or causes arising against the affected regulated carrier or utility which are not statutorily remediable by the Commission and lie outside its jurisdiction may be litigated in the appropriate civil courts.

After the Third District issued its decision confirming that we have jurisdiction to determine whether the No Name Key customers are entitled to receive electric service from Keys Energy, the Prehearing Officer issued an Order Establishing Schedule for Briefs on Certain Legal Issues.[5] The Prehearing Officer determined that two legal issues were fundamental and central to the resolution of this case, and our decision on those issues would facilitate the identification of any factual disputes in an evidentiary hearing to follow, if one would be necessary at all after the legal issues were resolved.[6] The Reynolds, Monroe County, and Ms. Roemmele-Putney filed briefs on the issues on April 19, 2013. The Association filed a Notice of Joinder adopting the Reynolds' brief on April 23, 2013. The issues were:

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[5] Order No. PSC-13-0141-PCO-EM, issued March 25, 2013.

[6] In his order denying Ms. Roemmele- Putney intervention as a full party to the proceeding, the Prehearing Officer ruled that she could file a brief on the legal issues if she chose to do so.

1. Does the Commission have jurisdiction to resolve the 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. 25127 approving the 1991 territorial agreement between Keys Energy and the Florida Keys Electric Cooperative?

In addition to the issues identified above, we addressed Ms. Roemmele-Putney's Motion for Stay Pending Appellate Review of the Prehearing Officer's order denying her intervention at our May 14, 2013 Agenda Conference. We also addressed the County's Motion to Dismiss the Complaint, and the ultimate resolution of the Reynolds' complaint. We heard presentations from attorneys for the Reynolds, the Association, the County, and Ms. Roemmele-Putney. We also heard public testimony from Ms. Roemmele-Putney herself, No Name Key property owners, Mary Frances Bakke, Jim and Ruth Newton, and from interested persons Shaw Stiller and Charles Pattison. We denied Ms. Roemmele-Putney's motion for stay and the County's motion to dismiss. We found that we have exclusive jurisdiction to resolve the Reynolds' complaint. We also found that Order No. 25127 approving the 1991 territorial agreement controls the disposition of the complaint, and under the terms of the territorial agreement the Reynolds and No Name Key property owners are entitled to electric service from Keys Energy. The reasons for our determination are set out in detail below.

We have jurisdiction over this matter pursuant to Section 366.04 and 366.05, Florida Statutes (F.S.).

DECISION

The Motion for Stay

On May 7, 2013, pursuant to Section 120.68(3), F.S., and Rule 9.190(e)(2), Florida Rules of Appellate Procedure (Fla.R.App.P.), Ms. Roemmele-Putney filed a Motion for Stay of this proceeding pending judicial review of the Prehearing Officer's denial of her petition to intervene in the docket. Contemporaneously, Ms. Roemmele-Putney filed a Petition for Expedited Review of Non-Final Action by Public Service Commission Hearing Officer with the Florida Supreme Court. In her Motion for Stay, Ms. Roemmele-Putney asserts that: (1) a stay will minimize unnecessary expenditure of the parties' and the Commission's resources; (2) she will be prejudiced if the case proceeds without her participation as an intervenor to establish a proper record, and; (3) no parties will be prejudiced by a stay because no final order may be issued with an appeal of a non-final order pending. Oral argument was not requested.

The Reynolds' Opposition to the Motion for Stay

On May 8, 2013, the Reynolds filed an opposition to the motion, arguing that it should be denied because Ms. Roemmele-Putney has been permitted to participate fully in the proceeding, including participation in all informal conference calls, submitting an initial brief, and participation in the upcoming Agenda Conference, and therefore she has not been prejudiced. The Reynolds also argue that a stay of an action during interlocutory review is discretionary, and the Commission should consider the expenses that all the parties will incur to attend the May 14, 2013 Agenda Conference, which will be wasted and cause the parties financial hardship if the Commission stays a decision on the substantive issues.

Standard of Review

Section 120.68(3), F.S., provides that the filing of a petition for judicial review of an agency action does not itself stay enforcement of the agency decision, but Rule 9.190(e)(2)(A), Fla.R.App.P. provides for a stay under Chapter 120, F.S., the Administrative Procedures Act, as follows:

> A party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed. The filing of the motion shall not operate as a stay. The lower tribunal or court may grant a stay upon appropriate terms. Review of orders entered by lower tribunals shall be by the court on motion.

Our Rule 25-22.061(2), F.A.C., Stay Pending Judicial Review, provides our criteria for considering whether to grant a stay:

> . . . [A] party seeking to stay a final or nonfinal order of the Commission pending judicial review may file a motion with the Commission, which has authority to grant, modify, or deny such relief. A stay pending review granted pursuant to this subsection may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions relevant to the order being stayed, or both. In determining whether to grant a stay, the Commission may, among other things, consider:
>
> (a) Whether the petitioner has demonstrated a likelihood of success on the merits on appeal;
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> (b) Whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted;
>
> (c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.

Analysis

In her Motion for Stay, Ms. Roemmele-Putney has not demonstrated a likelihood of success on appeal or a likelihood of sustaining irreparable harm. Ms. Roemmele-Putney does not address these criteria in her motion to stay, other than to say she will be prejudiced if the stay is not granted. Our review of the criteria, however, indicates that Ms. Roemmele-Putney's Petition for Expedited Review of Non-Final Action denying her intervention has very little likelihood of success before the Court, and she will not be irreparably harmed because she will have an adequate remedy on appeal when the case is finished.

This is the primary principle governing judicial consideration of nonfinal agency action: whether or not the petitioner would have an adequate remedy on appeal of the final agency action. Section 120.68(1), F.S., clearly articulates this principle:

> A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final action would not provide an adequate remedy.

Procedural orders denying intervention are properly reviewable by appeal of the final agency action, not before. Charter Medical-Jacksonville, Inc. v. Community Psychiatric Centers of Florida, Inc., and Department of Health and Rehabilitative Services, 482 So. 2d 437 (Fla. 1st DCA 1985). In that case, the appellant sought interlocutory review of the Department of Health's denial of its petition for intervention. The First District Court of Appeal held that the appellant was not entitled to immediate review because the appellant did not show that review after final agency action would provide inadequate relief. The Court did say that the appellant could seek review after final agency action. See also, Ameristeel Corporation, f/k/a Florida Steel Corporation v. Clark, 691 So. 2d 473 (Fla. 1997), where the Supreme Court considered our denial of Ameristeel's petition to intervene on appeal from our final order approving a modification to a territorial agreement between Florida Power & Light Company and Jacksonville Electric Authority. The Court had previously denied Ameristeel's request for interlocutory review in Florida Steel Corporation v. Clark, 675 So. 2d 927 (Fla. 1996). Ms. Roemmele-Putney is also not likely to succeed on the merits of her challenge to Order No. PSC-13-0161-PCO-EM denying intervention, because that Order complied with the essential requirements of law. It appropriately applied the standard for intervention prescribed in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), finding Ms. Roemmele-Putney suffered no injury in fact of a kind this proceeding was designed to protect.

We believe that there will be substantial harm to the parties and interested persons who expended considerable resources to participate in our proceedings if the stay is granted. Several Monroe County attorneys, the Reynolds' attorney, the Association's attorney and its president, a representative from Keys Energy, and residents of the island travelled to our offices in Tallahassee to appear before us on this matter. Conversely, we believe that Ms. Roemmele-Putney will not be irreparably harmed by our consideration of the substantive issues of the case.

As the Reynolds point out, Ms. Roemmele-Putney has participated fully in the case, and she participated at the Agenda Conference as well. Considering that Ms. Roemmele-Putney's petition for interlocutory relief before the Court is not likely to succeed, further delay of this case is harmful and unnecessary, and we therefore deny Ms. Roemmele-Putney's Motion for Stay.

The Motion to Dismiss

As noted above, the County filed its Motion to Dismiss the Reynolds' Amended Complaint on April 1, 2013. The Reynolds filed a Response to the Motion to Dismiss on April 8, 2013. Oral argument was not requested.

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition. The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Vanes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flyer v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

The Reynolds' Complaint

In their complaint the Reynolds assert that property owners on No Name Key have tried to bring about the extension of commercial electric service to No Name Key for decades without success. They state that the overwhelming majority of the 43 potential customers on the island desire service from Keys Energy:

> because of the high costs associated with using alternative energy sources, and the inability to dispose of by-products of alternative energy, including exhausted batteries and damaged or worn propane tanks. More so, the use of large diesel fuel generators produces large amounts of environmental and noise pollutants, affecting all aspects of the ecosystem unique to No Name Key. By connecting to commercial electrical power, the combined use of the existing solar capability together with commercial grade power would result in positive net solar metering producing a net positive impact on the environment. The net positive impact would far exceed the negative impacts which currently exist as a result of the current pollutants emitted to power the homes on No Name Key.

Amended Complaint, pps. 5-6.

The Reynolds allege that Keys Energy has failed to provide electric service to them and to other property owners on No Name Key pursuant to the terms of Keys Energy's own charter and the territorial agreement between Keys Energy and Keys Electric Rural Cooperative that we

approved in 1991.[7] They assert that the territorial agreement provides that the utility parties to the agreement have an obligation to initiate electric service to customers in their respective service areas delineated in Section 6.1 of the agreement. The Reynolds further assert that they and other property owners have paid for the construction and installation of distribution lines to their properties, and Keys Energy has now constructed the facilities to provide service. Keys Energy has not yet provided service, however, because Monroe County claims that its comprehensive plan and land development ordinances prohibit the extension of utility service to No Name Key, and preclude No Name Key customers from connecting to Keys Energy's facilities.[8] The Reynolds claim that Monroe County has refused to issue building permits to install a 200 AMP Electric Service and Subfeed to their home, which they need in order to receive electric service from Keys Energy.

The Reynolds contend that we have exclusive jurisdiction to determine whether they are entitled to receive electric service under the terms of the 1991 territorial agreement, and to implement and enforce that agreement against Keys Energy. They cite the territorial agreement itself, and Section 366.04, F.S., as support for their position. That statute provides that we have authority "[t]o require electric power conservation and reliability within a coordinated grid throughout Florida for operational and emergency purposes," Section 366.04(2)(c), F.S.; "[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)(d), F.S.; and "shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." Section 366.04(5), F.S. The statute further 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.

The Reynolds ask us to: exercise jurisdiction over the subject matter of this action, determine that our jurisdiction preempts Monroe County's enforcement of Ordinance 043-2001 as it applies to Keys Energy's provision of electric service to No Name Key customers, determine that the commercial electrical distribution lines Keys Energy extended to No Name Key customers are legally permissible and properly installed, and determine that the Reynolds are entitled to receive electric power from Keys Energy.[9]

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[7] See Order No. 25127, attached to the Complaint as Exhibit A, which attaches the Territorial Agreement and incorporates it by reference.

[8] See Monroe County Ordinance 043-2001, adopted December 19, 2001, attached to the Complaint as Exhibit B, and the Monroe County Planning Commission Resolution No. P 61-01, adopted September 26, 2001, attached to the Complaint as Exhibit C.

[9] The Reynolds' Third Amended Complaint, filed May 1, 2013, amending the relief requested.

Monroe County's Motion to Dismiss

The County argues that the Reynolds' complaint should be dismissed with prejudice because they lack standing to bring an action under the Territorial Agreement that we approved in Order No. 25127.[10] According to the County, Section 7.2 of the Territorial Agreement expressly provides that it does not confer or give any benefits to any person other than Keys Energy and Florida Keys Electric Cooperative. Section 7.2 reads as follows:

> 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.

Order No. 25127, p. 13. The County contends that under the principle that territorial agreements merge into and become part of Commission orders, Order No. 25127 itself bars the Reynolds from seeking relief under that Agreement.

The County also argues that the Reynolds have failed to state a claim upon which we can grant relief, because none of the statutory provisions the Reynolds cited confers a right to service on customers of Keys Energy or imposes an affirmative obligation to serve on Keys Energy itself. According to the County, the bases for relief in the Complaint "are grounded almost entirely on two separate legislative acts, Chapter 163, Florida Statutes, and Chapter 69-1191, Laws of Florida," and those laws do not impose upon Keys Energy an obligation to serve or confer a right to service from Keys Energy "on any would-be customer." Motion to Dismiss p. 7. The County also points out that neither Chapter 163, F.S., nor Chapter 69-1191, Laws of Florida, Keys Energy's enabling legislation, confer any jurisdiction on the Commission.

Next the County contends that our "Grid Bill" authority imposes no obligation to serve or right to service from Keys Energy. The County asserts that the Reynolds' attempt to invoke Section 366.04, F.S., as the basis for their claims "is at best over-reaching and misplaced, for the simple reason that the referenced statute does not address any utility's obligation to serve or any customer's right to service. . . ." Motion to Dismiss, p. 11.

For the above reasons, the County asserts that the Reynolds' complaint does not pass the Agrico[11] test for standing because they have failed to show a substantial interest of a type this proceeding is designed to protect. The County asserts that "they cannot articulate any statutory basis for the claimed relief. Without a statutory basis for the claimed relief, the Agrico 'zone of

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[10] The County made this same argument in its Opposition to the Association's Renewed Petition to Intervene. The Prehearing Officer granted intervention to the Association subject to the Commission's decision on the County's Motion to dismiss the Complaint.

[11] Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478. Under that standard, a party must show that they will suffer an injury in fact to a substantial interest the proceeding is designed to protect.

interest' test cannot be satisfied," and "they fail to provide the required explanation of how the relief requested is supported by the statutes invoked." Motion to Dismiss, pps. 12, 13.

The Reynolds' Response in Opposition to the Motion

The Reynolds state that in the instant case, they have asked us to determine that Keys Energy can extend its electric lines to customers on No Name Key. According to the Reynolds, the Motion to Dismiss should be denied because the County has ignored the Third District Court of Appeal's decision in the Roemmele-Putney case,[12] other pertinent provisions of the Territorial Agreement, and the complaint provisions of our Rule 25-22.036, F.A.C.

According to the Reynolds, the District Court held that the subject matter of their complaint was within our exclusive jurisdiction, and thus the District Court's decision limited the forum in which the Reynolds can raise their claims for electric service from Keys Energy to our proceeding. The District Court, the Reynolds claim, found that Keys Energy's existing service, relation to new customers, and its end use facilities were all subject to our statutory power over "electric utilities."

> The Third District's holding is grounded in the conclusion that Fla. Stat. 366.04(5) has granted the [Commission] jurisdiction over the planning, development, maintenance of the electric grid.[13] This is one of the bases of approving the Territorial Agreement by and between [Keys Energy] and the Florida Keys Electric Co-op. *See* PSC Order 25127 ('the agreement satisfies the intent of Subsection 366.04(5), Florida Statutes').

Reynolds' Response, p. 8. The Reynolds assert that the Third District Court's decision is also supported by Section 366.05(8), F.S.,[14] because:

> As part of the 'Grid Bill', the [Commission] was given the authority over electric utilities to require expansion of electric utilities in order to correct inadequacies in the reliability of the energy grid. The logical justification of the [Commission] to require installation of necessary facilities is to ensure service to utility customers that are not served or unreliably served.

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[12] Supra. at p. 2.

[13] Section 366.04(5), F.S. provides:

> The commission shall further have exclusive jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

[14] Section 366.04(8), F.S. provides:

> If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, including inadequacies in fuel diversity or fuel supply reliability, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance.

Reynolds' Response, p. 9.

The Reynolds claim that they filed this complaint subject to our jurisdiction found in Section 366.04, F.S., and pursuant to Commission Rule 25-22.036, F.A.C., which provides that a person may file a complaint before the Commission complaining of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests, and which violates a statute enforced by the Commission, or any Commission rule or order. According to the Reynolds, they did not file the complaint as a party to the Territorial Agreement, but as a person complaining of Keys Energy's failure to comply with the Commission's Order approving Keys Energy's service territory.

Analysis

As discussed above, Rule 25-22.036(2), F.A.C., provides that:

> 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. . . .

Rule 25-22.036(3)(b), F.A.C., provides that each complaint shall contain the rule, order, or statute that has been violated, the actions that constitute the violation, the name and address against whom the complaint is lodged, and the specific relief requested. The complaint filed under this rule complies with its provisions. It alleges failure to comply with a Commission order. It alleges that Keys Energy, named as the respondent in the complaint, has failed to provide customers in its service territory with electric service. It requests that we provide relief by holding that the customers are entitled to electric service and ordering Keys Energy to provide it.

The County seems to argue that because the Reynolds are not a direct party to the territorial agreement between Keys Energy and Florida Keys Electric Cooperative that became an order of the Commission, section 7.1 of the agreement precludes them from invoking the terms of the agreement and our jurisdiction over it in any fashion. We disagree with this position for substantive reasons, but would note in passing that the County is not a party to the territorial agreement either, and under the County's reasoning has no right to defend Keys Energy's interests under it. We would also note that the County's argument is purely academic at this juncture, since Keys Energy has voluntarily contracted with the No Name Key property owners to provide service, and has constructed the necessary electric lines.

Section 6.1 of the territorial agreement, page 12, states:

> 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.

These provisions demonstrate, first, that the territorial agreement was developed and executed subject to the regulatory jurisdiction granted to us by Section 366.04, F.S., and it remains subject to that jurisdiction. It is not a private contract. If it were it would be unlawful as a horizontal division of territory, a *per se* violation of the Sherman Act, 15 U.S.C. § 1. Our order approving the agreement is an exercise by the state of its police power for the public welfare. Peoples Gas system Inc. v City Gas Co.,167 So.2d 577 (Fla. 3d DCA 1964), aff'd 182 So. 2d 429 (Fla. 1965). Second, we ourselves may review the territorial agreement as we see fit on our own motion, or at the behest of an interested member of the public, in this case a customer of Keys Energy seeking service under the agreement. The Supreme Court said in Peoples Gas v. Mason, 187 So. 2d. 187, 189 (Fla. 1966):

> Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.

Certainly if we may withdraw or modify our approval of a service area agreement, we may also interpret and enforce its terms. See also West Florida Electric Cooperative Association, Inc. v. Jacobs, 887 So. 2d 1200, 1206 (Fla. 2004), (a territorial dispute case where the Court said: "A territorial dispute is a disagreement over which utility will serve a geographic area. Service to an area necessarily means service to a customer.") Likewise, a territorial agreement establishing service to a geographic area necessarily means service to customers in that area.

The Reynolds' complaint shows that they will suffer, and in fact are suffering, an injury of sufficient immediacy to entitle them to a Section 120.57, F.S. proceeding. They have also shown that their injury, Keys Energy's failure to provide them electric service, is an injury this proceeding, brought pursuant to our jurisdiction under Section 366.04, F.S., is designed to protect. The complaint contains sufficient allegations to establish a cause of action that falls within our jurisdictional purview. Taking all allegations as true, and interpreting them in the light most favorable to the Reynolds, the complaint states a cause of action upon which we can grant relief. We deny the County's Motion to Dismiss.

Jurisdiction

Introduction

On April 19, 2013, the Complainants the Reynolds, Monroe County, and Alicia Roemmele-Putney filed briefs in response to the Prehearing Officer's Order Establishing Schedule for Briefs on Certain Legal Issues, Order No. PSC-13-0141-PCO-EM. The No Name Key Property Owner's Association filed a Notice of Joinder in the Reynolds' brief. The individual briefs' responses to those issues are summarized below, to avoid repetition.

The Reynolds' Brief

The Reynolds assert that we have exclusive jurisdiction to resolve their complaint against Keys Energy. Relying upon the Third District Court of Appeal's decision in Roemmele-Putney, *supra,* the Reynolds assert that the question of whether we have jurisdiction to resolve their complaint was affirmatively resolved in that case. There the Third District determined that declaratory and injunctive relief was not available to the County and private landowners to establish "that the prospective electrification of No Name Key is regulated – or even precluded – by the Coastal Barrier Resource Act and the County's policies and procedures adopted pursuant to the Act." Roemmele-Putney *Id.*, at 79. The Court concluded that we have exclusive jurisdiction to determine whether Keys Energy should provide electric service to the island, and affirmed the Circuit Court's dismissal of the County's claim on the same grounds.

The Reynolds also assert that the Roemmele-Putney decision and the Circuit Court's decision before it limit the forum in which they may raise their complaint for electric service to our proceedings:

> Reynolds cannot file a complaint in the Sixteenth Judicial Circuit in and for Monroe County because the same subject matter has been dismissed with prejudice. The parties and claims in the above-styled action are the same as those brought by the County in Roemmele-Putney, the Reynolds simply seek a different conclusion. The Reynolds would be barred based on collateral estoppel from bringing these claims before any other Court, having already successfully argued before the Sixteenth Judicial Circuit and the Third District Court of Appeal that the Sixteenth Judicial Circuit does not have jurisdiction over the claim. . . .

Reynolds Brief, pps 9-10.[15]

[15] The Reynolds also claim that we are estopped from determining that we do not have jurisdiction over this subject matter, because it argued in favor of its exclusive jurisdiction as *Amicus Curiae* before the Sixteenth Judicial Circuit and the Third District Court of Appeal in *Roemmele-Putney.* This claim has no merit. We were not a party litigant in those proceedings. As we argued before those Courts, and as the Third District found, we have jurisdiction to determine our jurisdiction in the first instance. We are the court (tribunal) of competent jurisdiction to decide this case, and we cannot be precluded from a full review of all the issues before us. Florida Public Service Commission v. Bryson, 569 So. 2d 1253. (Fla. 1990).

The Reynolds claim that they and No Name Key property owners are entitled to receive electrical power from Keys Energy under the terms of Order 25127 approving the 1991 Territorial Agreement, and they are currently being denied access to commercial electric power from Keys Energy. They assert that there is no question that Keys Energy's service area includes No Name Key, and they assert, citing West Florida v. Jacobs, *supra,* that Keys Energy's service area is more than simply lines on a map. It is made up of Keys Energy's current and potential customers.

Referring to Section 6.1 of the Territorial Agreement, the Reynolds state that:

> It is the policy of the State of Florida to (1) actively regulate and supervise the service territories of electric utilities; (2) supervise the planning, development, and maintenance of a coordinated electric power grid throughout Florida; (3) avoid uneconomic duplication of generation, transmission and distribution facilities; and (4) to encourage the installation and maintenance of facilities necessary to fulfill electric utilities' respective obligations to serve the citizens of the State of Florida within their respective service areas.

Reynolds Brief, p. 15. The Reynolds assert that these policies conflict with Monroe County's ordinance purporting to prohibit the extension of electric lines to No Name Key. They believe that if the Ordinance prevails, and county and municipal governments can prohibit extension of electric facilities to certain locales, we would be unable to actively supervise a coordinated power grid and the service territories of utilities. They refer to Florida Power Corporation v. Seminole County and City of Lake Mary, 579 So. 2d 105, 107 (Fla. 1991), where the Supreme Court reasoned that if each local government had authority to dictate the location of electric lines then the Commission's statewide supervision and control would be nullified:

> In the State of Florida there are approximately 100 CBRS [Coastal Barrier Resource System] areas, many of which power lines already travel through or connect to homes in a CBRS unit. By way of example, Saint Joseph Bay, near Tallahassee, is located entirely within a CBRS unit. A determination that Monroe County can prohibit a customer's connection on No Name Key would set a precedent allowing Gulf County to prohibit extension of utilities to homeowners in Saint Joseph Bay without the oversight of the Commission.

Reynolds Brief, p. 17. The Reynolds also contend that if we do not police the Territorial Agreement we approved in Order No. 25127 and enforce its terms, and instead allow Keys Energy to deny service due to the County's ordinance, then we would not be actively supervising territorial agreements as antitrust law requires. According to the Reynolds, the County's argument that we can only settle a territorial boundary dispute between the utility parties to the agreement is contrary to the intent of the antitrust laws, which is to protect the consumer. If we can only police boundaries, then consumers within those boundaries are not protected.

Next the Reynolds argue that the installation of power lines and connection to the lines by customers on No Name Key does not constitute "development" as the County asserts. According to the Reynolds, Section 380.04, F.S., delineates operations or uses of land that are

not considered development under that statute. Specifically, they say, "work by any utility and other persons engaged in the transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-or-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like" is not development. Section 380.04(3)(b), F.S. The Reynolds also cite the County's Local Development Regulations (LDRs) governing permits for construction, installation or maintenance of any public or private utility. According to County Ordinance §19-36(6) "It is not the intent of this section to restrict a public or private utility in any way from performing its service to the public as required and regulated by the public service commission or the applicable state statutes."

The Reynolds conclude with the argument that notwithstanding the Territorial Agreement, they and the property owners on No Name Key are entitled to electric power under the Grid Bill pursuant to Section 366.05(8), F.S. They argue that Section 366.05(8), F.S., which provides that we can require installation or repair of necessary facilities where we believe inadequacies exist in the energy grids developed by the electric industry, includes distribution facilities:

> When, as here, the residents of an entire geographic area are being denied access to the electric grid, the PSC has the authority, under the Grid Bill, to require that the necessary facilities be constructed in order to tie that area into the State's power grid.

Reynolds brief, p. 23. The Reynolds conclude their brief with the assertion that we have jurisdiction over their complaint, and they and No Name Key property owners are entitled to receive electric power from Keys Energy under the provisions of Order No. 25127.

The County's Brief

In the introduction to its brief, the County states that No Name Key is an Area of Critical State Concern within the meaning of Section 380.05, F.S. Parts of No Name Key are within the Key Deer Refuge managed by the United States Fish & Wildlife Service, which regulates development on the island pursuant to the Endangered Species Act. According to the County, its 2010 Comprehensive Plan (Comp. Plan), adopted in 1996 and approved by the Department of Community Affairs (DCA) in 1997, includes specific provisions to protect the Keys, including No Name Key. The County has adopted ordinances and regulations implementing the Comp. Plan that prohibit the extension of electric lines and other public utilities to or through any lands designated as a unit of the Federal CBRS and the County's CBRS Overlay District where No Name Key is located. Monroe County Code § 130-122 (b) provides: "Within the 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 County explains that it filed its complaint for declaratory relief in the Sixteenth Judicial Circuit regarding its ability to enforce its ordinances, including this one, against Keys Energy and all the property owners on No Name Key with existing residences. As described in the case background above, the Circuit Court dismissed that action with prejudice, holding that we have exclusive jurisdiction to resolve the issues raised in that case. The Circuit Court's opinion was upheld by the appellate court in Roemmele-Putney.

The County states that it is responsible for the enforcement of state and local laws and its own ordinances. It argues that we have no statutory authority under Chapter 366 to impose an obligation to serve on an "electric utility" like Keys Energy as we do have over privately owned "public utilities." The County refers to the Complaint of Lee County Electric Cooperative v. Seminole Electric Cooperative, Inc.,[16] where we stated that:

> This Commission's powers and duties are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of a particular power compels us to resolve that doubt against the exercise of such jurisdiction.

County Brief, p. 9.

As it argued in its Motion to Dismiss the Reynolds complaint, the County claims that the Territorial Agreement is a contract exclusively between Keys Energy and the Florida Keys Electric Cooperative and excludes any other party from asserting any rights under it. The County asserts that there is no justiciable issue between the two utilities, and there is no territorial dispute to resolve, and therefore we do not have jurisdiction to resolve the complaint.

> In this instance Monroe County is not, in any way, seeking to usurp the PSC's jurisdiction: the County is not attempting to regulate the service territories of KES or FKEC, or any other matter within the PSC's jurisdiction. Rather, the County is attempting to protect the Florida Keys, an Area of Critical State Concern, from the adverse impacts of development and to protect 'the public health, safety, and welfare of the citizens of the Florida Keys and maintaining the Florida Keys as a unique Florida resource,' Section 380.552(7)(n), F.S.

County Brief, p. 6.

The County argues that no provision of our enabling statutes, Chapter 366, F.S., preempts the County Comprehensive Plan and its ordinances implementing it. According to the County, Sections 366.01 and 366.04(1), F.S., only apply to public utilities, not electric utilities and thus provide no statutory basis for preempting the County's ordinances. The County also argues that preemption is not applicable in this case because:

> The PSC's authority under the Grid Bill is limited to the 'planning, development and maintenance of a coordinated electric grid' and the prevention of 'uneconomic duplication of generation, transmission and distribution facilities' neither of which are at issue in this case and because there is no territorial dispute at issue in this case.

County Brief, p. 15.

The County asserts that its enforcement of its ordinances will not impair our ability to actively supervise utilities subject to our regulatory jurisdiction for the purpose of preventing

[16] Order No. PSC-01-0217-FOF-EI, issued January 23, 2001, affirmed in Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 300 (Fla. 2001).

anti-competitive behavior and preserving state action immunity. According to the County, the ordinances do not prohibit us from enforcing territorial agreements between the parties or inhibit us from resolving any real territorial dispute. The County also argues that Commission Rule 25-6.105, F.A.C., contemplates that a utility may refuse to provide service where doing so would involve "violation of any state or municipal law or regulation governing electric service." According to the County:

> It is obvious on its face that the Commission would not have adopted a rule that would have vitiated its ability to supervise utilities for antitrust purposes, and the cited PSC rule thus demonstrates that compliance with a valid state or local government law governing electric service cannot impair the PSC's ability to fulfill its antitrust law obligation.

The County concludes by stating that we should respect its Comprehensive Plan and LDRs and dismiss the Reynolds' complaint with prejudice.

Ms. Roemmele-Putney's Brief

Ms. Roemmele-Putney's positions in her brief are consistent with the County's positions. She contends that we do not have jurisdiction to resolve the Reynolds' complaint because the relief requested, that it order Keys Energy to provide service, is not within our statutory authority. According to Ms. Roemmele-Putney, our jurisdiction is not a basis for exercising jurisdiction over the complaint, because there is no dispute regarding the area the parties to the agreement are to serve, and we have no statutory authority to require a municipal utility such as Keys Energy to provide service to customers. According to Ms. Roemmele-Putney the utility parties to the agreement cannot confer authority on us by contract. United Telephone Co. of Florida v. Public Service Comm'n, 496 So. 2d 116 (Fla. 1986).

Ms. Roemmele-Putney also argues, as the County does, that no customer has standing under the Territorial Agreement to demand electric service. Ms. Roemmele-Putney cites an earlier case involving the proposed electrification of No Name Key, 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 (Fla. 16th Cir. June 11, 2003), which held that the plaintiffs had no statutory or property rights to have electric power extended to their homes.[17]

Like the County, Ms. Roemmele-Putney argues that a finding by us that we do not have jurisdiction to resolve the Reynolds' complaint does not place Keys Energy or the Florida Keys Electric Cooperative in jeopardy of antitrust liability, because:

> 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

[17] We note that Ms. Roemmele-Putney indicates in her citation to Taxpayers for Electrification that the Court's decision was subsequently vacated on agreed motion of the parties.

> ordinances that were enacted to protect a designated environmentally sensitive area from the adverse consequences of additional development. Thus the 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 [Keys Energy] and [Florida Keys Electric Cooperative] present in the instant complaint.

Roemmele-Putney Brief, p. 14. Ms. Roemmele-Putney concludes that we should deny the Reynolds' complaint with prejudice.

Analysis

The Reynolds, property owners on No Name Key, have filed this complaint asking us to find that they are entitled to receive electric service from Keys Energy under the terms of the territorial agreement approved by Order No. 25127. Clearly No Name Key lies in Keys Energy's service area under the agreement. As the case has progressed, Keys Energy, with assurances from the United States Department of the Interior Fish and Wildlife Service (Attachment B), has constructed facilities to No Name Key to fulfill its obligation to serve, but has been unable to connect because the County has resisted. The County asserts that its ordinances prohibit electric lines on the island and it has refused to issue building permits to No Name Key customers to hook up to Keys Energy's facilities. The question becomes who has jurisdiction to decide whether the current residents of No Name Key can receive electric service from Keys Energy: this Commission, or the County? We find that we have exclusive jurisdiction to make this determination, and that jurisdiction is preemptive.

We are the administrative agency authorized by the Florida Legislature, through Chapter 366, F.S., to oversee the provision of electric service throughout the state of Florida. The Legislature has stated that the regulatory authority granted us 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. Our powers under Chapter 366 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.

Both the Sixteenth Judicial Circuit (twice) and the Third District Court of Appeal have ruled that we have jurisdiction to decide this question. In Roemmele v. Putney, *supra* at 83, the Third District stated:

> The appellees and the PSC also have argued, and we agree, that KES's existing service and territorial agreement (approved by the PSC in 1991) relating to new customers and 'end use facilities' is subject to the PSC's statutory power over all 'electric utilities' and any territorial disputes over service areas, pursuant to section 366.04(2)(e), Florida Statutes (2011). The PSC's jurisdiction, when properly invoked (as here), is 'exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties.' §366.04 (1). Section 4.1 of the 1991 KES territorial agreement approved by the PSC expressly acknowledges the PSC's continuing jurisdiction to review in advance for approval or disapproval any proposed modification to the agreement.

The Third District concluded:

> The Florida Legislature has recognized the need for central supervision and coordination of electrical utility transmission and distribution systems. The statutory authority granted to the PSC would be eviscerated if initially subject to local governmental regulation and circuit court injunctions sought by Monroe County.

The Third District's decision is supported by a long line of Florida Supreme Court cases holding that we have exclusive jurisdiction over electric service territorial agreements between all utilities, which become part of our orders approving them. See, e.g. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965) ("In short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission."); City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992). As the Supreme Court held in Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) any interpretation, modification or termination of an order approving a territorial agreement:

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

Our order approving the agreement is an exercise by the state of its police power for the public welfare. Peoples Gas system Inc. v City Gas Co., 167 So.2d 577 (Fla. 3d DCA 1964), aff'd 182 So. 2d 429 (Fla. 1965). We may review the territorial agreement as it sees fit on its own motion, or at the behest of an interested member of the public, in this case a customer of Keys Energy seeking service under the agreement. The Supreme Court said in Peoples Gas v. Mason, 187 So. 2d. 187, 189 (Fla. 1966):

> Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.

Certainly if we may withdraw or modify our approval of a service area agreement, we may also interpret and enforce its terms.

It is important that we have, and fully exercise, our jurisdiction over electric service territorial agreements, not just to approve them in the first instance as a simple geographical boundary, but to actively supervise their implementation and enforce their terms. 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 our extensive control over the validity and effect of territorial agreements indicated active state supervision of the agreements. If we cannot decide who can receive electric service in territory covered by a territorial agreement, and in contravention of its terms, it could be argued that we are without power to enforce our own orders and actively supervise the agreements we have approved. This result could place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability.

The County and Ms. Roemmele-Putney dismiss this concern with the argument that there is no anticompetitive behavior demonstrated by Keys Energy and Florida Keys Electric Cooperative in this case, but our charge under antitrust law extends beyond the policing of any particular anticompetitive behavior. We must demonstrate continued, meaningful, active supervision of the State's policy to displace competition between electric utilities throughout the state by approving – and enforcing – territorial agreements and resolving disputes. An

agreement and Order that we cannot enforce in any substantive way will not satisfy the state action immunity doctrine under Parker v. Brown and Midcal.[18]

For the reasons explained above, we find that the Territorial Agreement we approved in Order No. 25127 was developed and executed subject to our regulatory jurisdiction granted by Section 366.04, F.S., and it remains subject to that jurisdiction. It, and our order approving it, govern the issue of whether the Reynolds and No Name Key Property Owners are entitled to receive electric power from Keys Energy, and we have exclusive jurisdiction to make that determination.

Order No. 25127 and the 1991 Territorial Agreement

As mentioned above, under established law, a territorial agreement between two electric service providers becomes part and parcel of our order approving it, because otherwise it would be a purely private contract, a horizontal division of territory violative of the Sherman Antitrust Act. As discussed in our analysis of the County's Motion to Dismiss, we do not believe Section 7.1 of the territorial agreement precludes the Reynolds and the No Name Key Property Owners from invoking its terms in their complaint for electric service from Keys Energy. The Territorial Agreement is not, and cannot be a purely private contract between the utilities. We may review the territorial agreement as we see fit on our own motion, or at the behest of an interested member of the public, in this case a customer of Keys Energy seeking service under the agreement. While case law holds that an electric utility customer does not have a right to receive electric service from the service provider of his or her choosing,[19] it says nothing about a customer seeking the initiation of service under a territorial agreement in the first place. As Peoples Gas v. Mason, *supra* indicates, we may withdraw or modify our approval of a service area agreement where the public interest requires, and similarly, we may also interpret and enforce its terms. Section 4.1 of the Territorial Agreement specifically contemplates our continuing review of its implementation.

While the County and Ms. Roemmele-Putney dismiss the language of Section 6.1 of the Territorial Agreement as "surplussage," in that section the parties clearly acknowledge an obligation to provide service in their respective territories. Section 6.1 states:

> 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

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[18] We also disagree with the argument that Rule 25-6.105(5), F.A.C., somehow protects utilities from antitrust liability. The rule states, in pertinent part:

> As applicable each utility may refuse or discontinue service under the following conditions;
> (a) For non-compliance with or violation of any state or municipal law or regulation governing electric service.

The rule does not include county ordinances. If it did, it would say so.

[19] *See*, Storey v. Mayo, *supra.*; Lee County Electric Co. v. Marks, 501 So. 2d 1159 (Fla. 1976).

> 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.

As the Third Circuit Court of Appeal held in Roemmele-Putney, the Territorial Agreement is subject to our regulatory authority under Section 366.04, F.S. The language of Section 6.1, which we incorporated in our Order No. 21257 indicates that Keys Energy will provide service to the citizens of the State of Florida within its service territory. We find that a plain reading of that section demonstrates that the Reynolds and No Name Key property owners are entitled to receive electric power from Keys Energy by the terms of our Order No. 25127.

Resolution of the Reynolds' Complaint

As stated above, the Territorial Agreement we approved in Order No. 25127 controls the disposition of the Reynolds complaint for electric service from Keys Energy. It provides in clear and direct terms that Keys Energy will provide service to customers within the territory approved in the Order. Keys Energy has complied with the terms of Order No. 25127. It has constructed the facilities needed to provide electric service to No Name Key, in accordance with its contract for service with the No Name Key property owners, and in accordance with the direction of the United States Fish and Wildlife Commission. It holds itself out as ready, willing and able to serve, and it should be permitted to do so, as we have authorized.

Order No. 25127 is an exercise of our jurisdiction under our enabling statutes in Chapter 366, F.S. The Legislature has declared that jurisdiction to be "exclusive and superior to that of all other boards, agencies political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail."[20] Section 364.01, F.S. This would include the County's Comprehensive Plan and any local ordinances implementing it.

We would point out that the United States Fish and Wildlife Service has indicated that the Key Deer and other endangered species will not be harmed by the installation of power lines on No Name Key, if constructed properly. We would also emphasize that this Order does not authorize further development on No Name Key. That is within the County's purview, which has several means at its disposal to discourage further development on the island other than the prohibition of electric service to existing homes there.

For the reasons explained above, we grant the Reynolds complaint, and we find that they and the No Name Key property owners are entitled to receive electric service from Keys Energy.

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[20] The County and Ms. Roemmele-Putney imply that the express preemption language in Section 366.04(1), F.S., applies only to the Commission's jurisdiction over investor-owned public utilities. The language applies to all jurisdiction granted to the Commission in Section 366.04, F.S., and Chapter 366, F.S., generally.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the 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 is granted. It is further

ORDERED that the Reynolds and the No Name Key property owners are entitled to receive electric service from Keys Energy. It is further

ORDERED that the provisions of this Order determining our jurisdiction, interpreting the provisions of the territorial agreement we approved in 1991, and resolving the Reynolds' complaint, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that the Motion to Stay this proceeding is denied. It is further

ORDERED that the Motion to Dismiss the complaint is denied. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 21st day of May, 2013.

DOROTHY E. MENASCO
Commission Deputy Clerk II
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

As identified in the body of this order, our action determining our jurisdiction, interpreting the provisions of the territorial agreement we approved in 1991, and resolving the Reynolds' complaint is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code.This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 11, 2013. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

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.

Any party adversely affected by the Commission's procedural or intermediate action in this matter may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	DOCKET NO. 910765-EU ORDER NO. 25127 ISSUED: 9-27-91

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.

Attachment A

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

Attachment A

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.

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

Attachment A

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

Attachment A

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

Attachment A

"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.

Attachment A

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

Attachment A

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.

Attachment A

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

Attachment A

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

Attachment A

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.

Attachment A

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

Attachment A

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 Manager
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.

Attachment A

ATTEST:

Robert R. Padron,
Secretary

(SEAL)

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

By: William T. Cates

Title: Chairman

ATTEST:

R. L. Barnes, Secretary

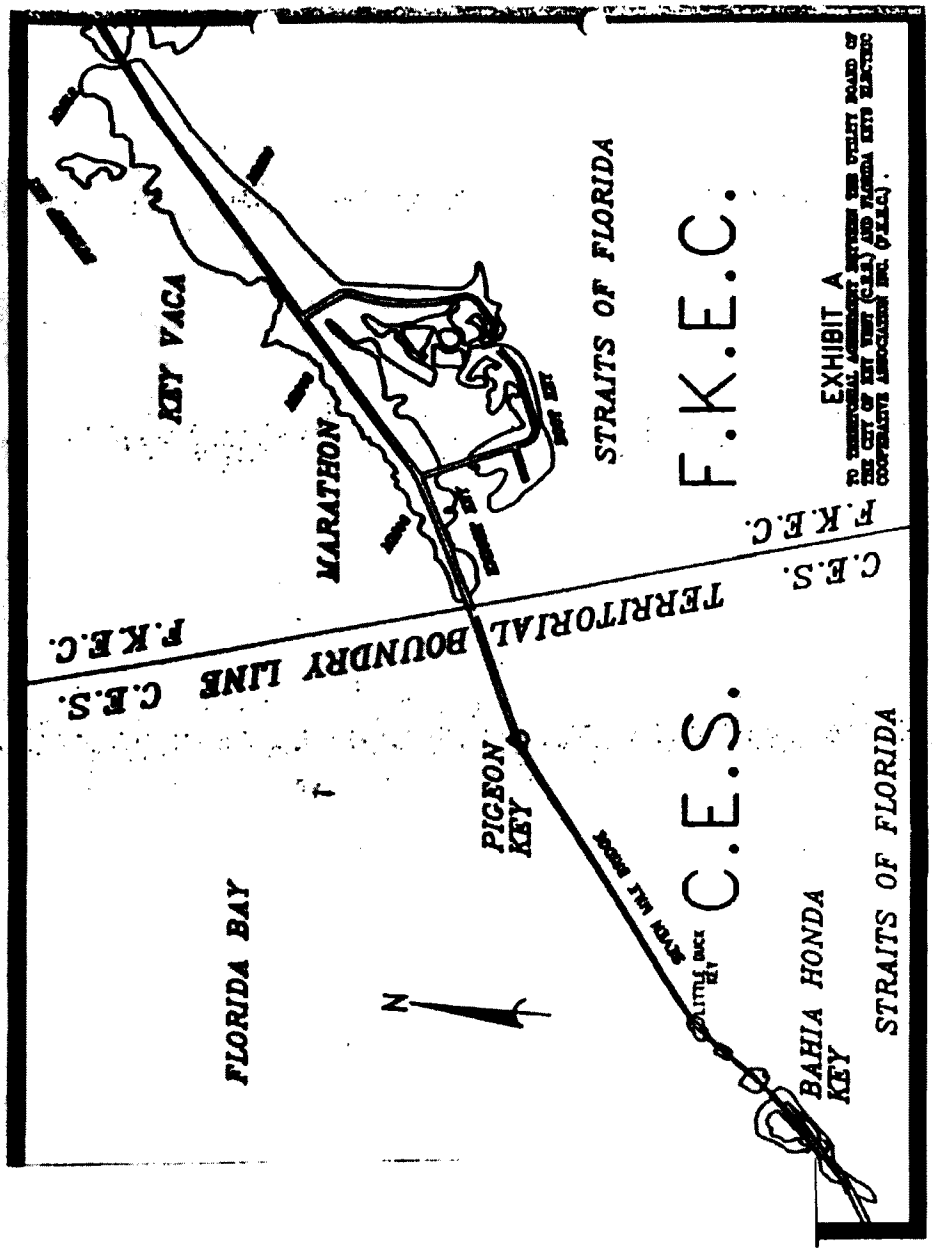
(SEAL)

FLORIDA KEYS ELECTRIC COOPERATIVE
ASSOCIATION, INC.

By: B. L. Schwartz

Title: President

Attachment A



United States Department of the Interior

FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

October 15, 2010

Dale Finigan
Keys Energy Services
1001 James Street
Post Office Box 6100
Key West, Florida 33040-6100

Service Federal Activity Code: 41420-2009-TA-0539
Date Received: August 12, 2010
Project: No Name Key Extension of Electrical Service
County: Monroe

Dear Mr. Finigan:

The Fish and Wildlife Service (Service) has reviewed your biological assessment and letter dated, July 9, 2010 and August 11, 2010, respectively, and other information submitted by the Keys Energy Services (KES), on behalf of various property owners on No Name Key, for the project referenced above. We understand Monroe County (County) has advised KES the project requires our review in accordance with the Big Pine Key Habitat Conservation Plan (HCP).

PROJECT DESCRIPTION

According to your documents, KES is proposing to extend electrical services to No Name Key, Monroe County, Florida, via overhead power lines. The project would include 61 concrete utility poles and an electrical system line placed within existing right of way (ROW) owned by the County or private land. Placement of power poles will occur largely on existing scarified ROW and will be set back 6 feet from roadways. No clearing of native vegetation will occur as a result of the proposed project; however minimal trimming of overhead tree limbs may occur during initial system installation. No ancillary facilities will be developed on No Name Key. This design would be able to provide power for up to 43 potential residential customers and a single commercial customer. However, Monroe County has stated no new developments are anticipated on No Name Key as a result of this additional electricity.

THREATENED AND ENDANGERED SPECIES

In your Biological Assessment, KES has determined the project may affect, but is not likely to adversely affect, the endangered Key deer (*Odocoileus virginianus clavium*), endangered Lower Keys marsh rabbit (*Sylvilagus palustris hefneri*), endangered silver rice rat (*Oryzomys palustris natator),* threatened eastern indigo snake (*Drymarchon corais couperi*), threatened Stock Island tree snail (*Orthalicus reses),* endangered Key tree cactus (*Pilosocereus robinii*) and threatened

Garber's spurge *(Chamaesyce garberi)*. In addition, KES has made a determination the project may affect, but is not likely to adversely affect designated critical habitat for the silver rice rat.

During an August 4, 2010, site visit to No Name Key, KES and Service staff discussed a number of avoidance and minimization measures that will be implemented throughout construction and long-term maintenance to further reduce the proposed project's impact on listed species, as follows:

1. Poles will be placed near paved roads to avoid and minimize disturbance to native habitats.
2. The project was designed to allow for flexibility in pole placement. The distance between poles was extended to the maximum practical amount in order to reduce total pole count. In addition, pole locations in all areas (except corner poles) are flexible to allow the individual poles to be placed so as to avoid the permanent removal of native vegetation and minimize trimming.
3. This flexibility will greatly reduce potential impacts to Garber's spurge, which has been documented along the roadsides of Old State Road 4A as recently as 2008. Surveys conducted by KES in April and May 2010 did not locate the plant on at each proposed pole location or in the immediate vicinity of each pole. However, even at the time of installation KES has agreed to reposition the pole locations in order to avoid the species should it be encountered. Therefore the avoidance measures detailed in the *Garber's Spurge Protection Plan* (see attached) will be conducted by a qualified biologist during system installation and all pole maintenance. If the plant is encountered, the pole will be repositioned.
4. The poles that will be employed are taller than normal residential poles thereby allowing power line placement to occur above the vegetation. Pole heights of 45 feet will be used to minimize initial and yearly re-occurring tree trimming.
5. No vegetative trimming will be conducted until all poles are placed and the power lines are strung. This will allow KES to trim only those branches that will actually obstruct the power lines, thereby minimizing vegetation removal to the maximum extent.
6. The only self-sustaining population of the Stock Island tree snail with long-term viability in the Lower Florida Keys is located in the hardwood hammock south of Old State Road 4A on the eastern side of No Name Key, and may occur on trees within the ROW. Therefore the avoidance measures detailed in the *Stock Island Tree Snail Protection Plan* (see attached) will be conducted by a qualified biologist, during system installation and all pole maintenance.
7. Poles will only be placed at residences that have requested power, thereby reducing the scope of the overall project.
8. High strength concrete poles, storm-rated at 148 MPH, will be employed to reduce replacement intervals and subsequent maintenance.
9. Best management practices for construction impacts will be implemented, including placement of silt fence around all pole location area, removal of all spoils off-site, securing trash, and minimal staging of construction equipment and supplies.

10. KES will conduct pre-construction training with all contractors and KES staff working on the project regarding the presence of listed species. Training will be provided by a qualified biologist familiar with lower keys wildlife and environmental regulations.

11. *Standard Protection Measures for the Eastern Indigo Snake* (see attached) will be implemented during construction activities.

12. Best management practices will be implemented to prohibit feeding of key deer either intentionally or unintentionally by work crews during construction activities and lunch breaks, as well as traffic control measures to avoid deer-vehicle collisions during construction activities.

Based on the best currently available scientific and commercial information, as well as the avoidance and minimization measures outlined above and within the biological assessment, the Service concurs with your view that the proposed extension of electrical service to No Name Key is not likely to adversely affect the Key deer, Lower Keys marsh rabbit, silver rice rat, eastern indigo snake, Stock Island tree snail, Key tree cactus, or Garber's spurge and formal consultation is not required.

Reinitiation of consultation may be necessary if: (1) modifications are made to the project; (2) additional information involving potential effects to listed species becomes available; or (3) a new species is listed, or if critical habitat is designated that may be affected by the project.

Thank you for your cooperation in the effort to protect federally listed species. If you have any questions regarding this project, please contact Mark Salvato at 772-562-3909, extension 340.

Sincerely yours,

Paul Souza
Field Supervisor
South Florida Ecological Services Office

Enclosures

cc: w/o enclosures (electronic only)
Florida Keys Aqueduct Authority, Key West, Florida (Jim Reynolds)
Monroe County Government, Key West, Florida (Roman Gastesi, Suzanne Hutton, Mark Rosch)
Service, Washington, DC (Katie Niemi)
Service, Big Pine Key, Florida (Anne Morkill)
Service, Atlanta, Georgia (Cynthia Bohn)
FDCA, Tallahassee, Florida (Rebecca Jetton)

STANDARD PROTECTION MEASURES FOR THE EASTERN INDIGO SNAKE

1. An eastern indigo snake protection/education plan shall be developed by the applicant or requestor for all construction personnel to follow. The plan shall be provided to the Service for review and approval at least 30 days prior to any clearing activities. The educational materials for the plan may consist of a combination of posters, videos, pamphlets, and lectures (*e.g.*, an observer trained to identify eastern indigo snakes could use the protection/education plan to instruct construction personnel before any clearing activities occur). Informational signs should be posted throughout the construction site and along any proposed access road to contain the following information:

    a. a description of the eastern indigo snake, its habits, and protection under Federal Law;
    b. instructions not to injure, harm, harass or kill this species;
    c. directions to cease clearing activities and allow the eastern indigo snake sufficient time to move away from the site on its own before resuming clearing; and,
    d. telephone numbers of pertinent agencies to be contacted if a dead eastern indigo snake is encountered. The dead specimen should be thoroughly soaked in water and then frozen.

2. If not currently authorized through an Incidental Take Statement in association with a Biological Opinion, only individuals who have been either authorized by a section 10(a)(1)(A) permit issued by the Service, or by the State of Florida through the Florida Fish Wildlife Conservation Commission (FWC) for such activities, are permitted to come in contact with an eastern indigo snake.

3. An eastern indigo snake monitoring report must be submitted to the appropriate Florida Field Office within 60 days of the conclusion of clearing phases. The report should be submitted whether or not eastern indigo snakes are observed. The report should contain the following information:

    a. any sightings of eastern indigo snakes and
    b. other obligations required by the Florida Fish and Wildlife Conservation Commission, as stipulated in the permit.

Revised February 12, 2004

Stock Island Tree Snail and Garber's Spurge Impact Avoidance Procedures

Keys Energy Services Power Line Installation and Maintenance

No Name Key, Monroe County

Prepared for:

No Name Key Property Owners Association
32731 Tortuga Lane
No Name Key, Florida 33043

Prepared by:

Terramar Environmental Services, Inc.
1241 Crane Boulevard
Sugarloaf Key, Florida 33042
(305) 393-4200 FAX (305) 745-1192
terramar@bellsouth.net

August 9, 2010

Introduction

The Stock Island Tree snail (*Orthalicus reses reses*) is a Federally listed Endangered mollusk that occurs throughout the Florida Keys. A population of this snail was introduced onto No Name Key in 1996 from Key Largo, and that population may persist in areas of hardwood hammock. Garber's spurge (*Chamaesyce garberi*) is a small plant also Federally-listed as Endangered that occurs throughout South Florida, and occurs in pine rocklands, hardwood hammocks and also on disturbed roadsides. It is known to occur on No Name Key where it occurs on the limestone road shoulders.

Keys Energy Services (KEYS) is installing electrical power to No Name Key using concrete power poles and overhead electric lines. The proposed project consists of extending existing electrical service from Big Pine Key to No Name Key, where no electrical service currently exists. The project will employ a total of 61 utility poles located within existing right of way (ROW) owned by Monroe County or on private property. Power poles will be placed in the ROW within six feet of the edge of existing roadway pavement using an auger truck and lift. Trimming of tree branches will be required for the initial installation of the system and ongoing trimming will be required to maintain the system in perpetuity.

KEYS will implement measures specifically designed to avoid impacts to the Stock Island tree snail and Garber's spurge during the initial installation of the system as well as during the long-term maintenance phase of the project.

Stock Island Tree Snail Relocation Procedures

The Stock Island Tree snail may occur on lateral branches and tree trunks that may require trimming during initial installation of the system as well as during ongoing maintenance. The following procedures will be implemented by KEYS during all tree trimming activities throughout the life of the project. These procedures follow the procedures established by Deborah A. Shaw, Ph.D., Environmental Affairs Manager for the Florida Keys Electric Cooperative and are based on many years of experience relocating tree snails associated with the power distribution system on Key Largo.

General Requirements

All staff conducting tree trimming activities will be provided a copy of this protocol and be instructed on tree trimming procedures on No Name Key by a qualified biologist. A qualified biologist is someone with the appropriate combination of education and training that makes them competent to direct trimming in a manner that avoids adverse impacts to tree snails. A qualified biologist will have direct experience in the handling and relocation of tree snails in South Florida. All tree snails associated with the project will be relocated including members of the genus *Orthalicus* and *Liguus*.

All limbs will be cut using hand-held trimming equipment such as a chain saw, power pruner or hand-operated loppers. No trimming using mechanized equipment is authorized.

Equipment Needed

High-quality loppers, cooler with sealed lid; clean spray bottle (plant mister type); source of fresh, clean water; paper towels; plant clippers, bucket to carry snails.

Relocation Procedures

Tree branches will be trimmed and placed on the ground for inspection by a qualified biologist. Each branch will be carefully inspected for tree snails, and any snails identified will be relocated. No tree branches will be removed off-site or chipped until approved by the qualified biologist. The qualified biologist will work directly with KEYS during trimming operations to ensure any tree snails are relocated properly.

Tree snails identified during tree trimming operations will be in one of three conditions:

1) sealed on a branch, aestivating during dry and/or cold weather;
2) aestivating but detached from branch with protective seal broken;
3) active and moving about, normally in warm, wet weather;

Procedures for the three scenarios are discussed below.

Snails sealed on a branch or tree trunk:

As long as the protective seal is intact, the snail can be left on the branch for relocation. Clip the branch with the snail attached. Trim extra twigs and leaves off of the branch leaving a forked branch to use as a hanger. Removing the extra branches and twigs minimizes the wrong turns that the snail can make when it awakens and leaves its twig to climb onto the new host tree and it makes it easier to handle the cut branch.

The trimmed branch with snail still attached is then placed in an appropriate host tree and secured with bio-degradable cotton string as needed. If the snail is sealed onto a branch that is too large to handle and relocate, the snail will have to be removed from the tree bark. This can be done safely by spraying the snail with clean fresh water which will soften the adhesive seal. After the seal softens, gently peel the snail off the tree bark. This should be done by an experienced tree snail handler. The adhesive membrane (seal) will be broken in this process so the snail will then have to be awakened to be relocated. See procedures for detached snails below.

Tree snails detached from branch or with broken protective seals:

Aestivating tree snails with broken protective seals will die of desiccation unless they are awakened by being held in a warm, moist box for a period of time (usually a few hours). To awaken aestivating snails, place them in a tree snail holding pen (cooler). On the bottom of the cooler lay two layers of clean paper towels saturated with clean fresh water. Fill the cooler with cut fresh Pigeon plum, *Cocoloba diversifolia,* branches with leaves attached. Pigeon plum is a favorite host tree for tree snails and the leaves stay fresh

in the cooler for a long time. Spray the branches with water to keep the air in the cooler saturated. Spray the protective membrane of each snail with clean fresh water. As it softens, peel it off to hasten the snail's awakening. Keep the drain plug open and keep the cooler lid open slightly to allow good air flow, but do not allow snails to escape the cooler once they awaken. Once they are active, they can be placed in a new host tree using the same technique described in the next section on active snails. Between uses, the cooler should be thoroughly cleaned and dried as it will become contaminated with snail excrement and mucus.

Active snails:

If the weather is warm and humid, active tree snails can be easily relocated by simply spraying the bark of the new host tree with clean fresh water. Place the snail on the wet bark and support it until it gets a firm grip. The snail will climb up the tree and relocation is complete. If conditions are warm but dry, the snail can still be released as it will simply reseal itself on the new tree as soon as it perceives the dry conditions.

Garber's Spurge Avoidance Procedures

Based on pre-construction surveys conducted at surveyed pole locations, Garber's spurge is either not present or extremely rare at proposed pole locations. Regardless, specific procedures will be implemented during the installation of the 62 power poles that are designed to avoid impacting any individual plants. These procedures include the following:

All staff conducting pole installation activities will be provided a copy of this protocol and be instructed on pole installation procedures by a qualified biologist. A qualified biologist is someone with the appropriate combination of education and training that makes them competent to direct pole installation in a manner that avoids adverse impacts to Garber's spurge. A qualified biologist will have direct experience in the identification of Garber's spurge and relevant construction management experience.

At each pole location, the work area will be delineated using staked silt fencing. This silt fencing will be installed around the pole location to clearly identify the work area; no soil disturbance will occur outside the work area. Work areas will be approximately 10' x 10' and will encompass the proposed pole location with adequate room for installation and containment of spoils.

Once the work area has been staked, a qualified biologist will inspect each work area for the presence of Garber's spurge. If no plants are identified, work may proceed at that location. If a Garber's spurge is found within the work area, the pole location will be relocated by KEYS engineering staff to a suitable adjacent location that will not result in impacts to Garber's spurge. Once the new location has been identified, a new work area will be established at this site. Any spurge identified outside a work area will be marked using traffic cones and protected from impacts during the installation process.

All spoils from the auger process will be contained within the work area and be removed off-site for appropriate disposal. Following pole installation, the work area will be raked smooth to restore the original topography and the silt fence removed for disposal.

Staging of supplies will not occur on the roadsides on No Name Key. Staging of project materials will occur off-site at a KEYS facility and supplies will be transported to the island as-needed. KEYS will maintain control over contractors during pole installation to ensure that the roadsides on No Name Key are not adversely impacted by the proposed project.