BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of new municipal electric service provider and petition for waiver of Rule 25-9.044(2), F.A.C., by Babcock Ranch Community Independent Special District.	DOCKET NO.: 140059-EM DATE: April 15, 2014

LEE COUNTY ELECTRIC COOPERATIVE INC.'S MOTION TO DISMISS THE NOTICE OF NEW MUNICIPAL ELECTRIC SERVICE PROVIDER AND PETITION FOR WAIVER OF RULE 25-9.044(2), FLORIDA ADMINISTRATIVE CODE, FILED BY BABCOCK RANCH COMMUNITY INDEPENDENT SPECIAL DISTRICT

Lee County Electric Cooperative, Inc. ("LCEC"), pursuant to Rule 28-106.204(2), Florida Administrative Code, moves to dismiss the "Notice of New Municipal Electric Service Provider and Petition for Waiver of Rule 25-9.044(2), Florida Administrative Code" (the "Notice and Petition") filed by Babcock Ranch Community Independent Special District (the "District") on March 24, 2014.[1] Relying solely on a flawed interpretation of the special act that created the District, the Notice and Petition seeks to preemptively extinguish LCEC's right to serve an area subject to a territorial agreement approved under the exclusive jurisdiction of this Commission. Because there is no legal basis for the District's assertions and erroneous interpretation of law, the Notice and Petition must be dismissed with prejudice for failure to state a claim on which any relief can be granted.

I. Summary

The District's Notice and Petition constitutes an unauthorized and unprecedented effort to unilaterally seize LCEC's exclusive service area established by territorial

[1]LCEC has already made its appearance for purposes of making comments to the portion of the District's request for a rule waiver. This Motion is being filed to address the full scope of the District's extraordinary request for relief. LCEC is specifically named throughout the Notice and Petition, and its substantial interest would no doubt be determined since granting the District's requested relief would effectively extinguish

agreements approved by the Commission as far back as 1965. This ill-conceived effort is based on a fundamentally flawed interpretation of the special act that created the District—a mistaken interpretation that (i) conveniently fails to mention that nothing in the special act authorizes the District to operate as an electric utility, or provide electric distribution services that would infringe upon LCEC's exclusive service area, and (ii) ignores the plain language in the special act that subordinates the District's asserted powers to the Commission's exclusive jurisdiction over, and pre-existing approval of, longstanding territorial agreements. Furthermore, the District's distorted interpretation of the special act (if adopted by the Commission) would render the act itself unconstitutional, since it would trigger a taking of LCEC's exclusive service area without compensation and an impermissible impairment of LCEC's territorial agreement with Florida Power and Light Company ("FPL"). Moreover, the District's attempt to unilaterally seize LCEC's exclusive service area would not lead to good public policy. Taking an exclusive service area away from an existing utility that has served (and remains willing and able to serve), and relegating that area to a non-utility that does not have the ability to serve, would hinder—not help—economic development.

The District's request for waiver of Rule 25-9.044(2) is just as flawed. The District claims that it should be excused from an electric utility's normal obligation to file its rates with the Commission within 30 days of a change of ownership because, as the District concedes, it has no actual, current ability to operate as an electric utility. In other words, while the District desperately argues that it should be considered as an electric utility, it simultaneously signals that it wants nothing to do with the service obligations that go along

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LCEC's right to serve the area. LCEC therefore has standing to make this appearance as a party without need to formally seek leave to intervene. *See* Rule 28-106.205(3), Fla. Admin. Code.

with being a utility. Such circular reasoning cannot justify a waiver of Rule 25-9.044(2). Further, the District's request fails to even mention the appropriate standards for such waiver, much less identify how the District qualifies under those standards as required by Section 120.542, Florida Statutes.

The Commission should dismiss the District's Notice and Petition with prejudice, in order to bring to a halt the District's ill-advised attempt to seize LCEC's exclusive service area and abrogate the Commission's exclusive jurisdiction over territorial agreements.

II. Legal Standards

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition.[2] The standard to be applied in disposing of a motion to dismiss is whether, with all factual 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. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); *Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958), *overruled on other grounds*, 153 So. 2d 759, 765 (Fla. 1st DCA 1963). Legal conclusions, however, are not deemed admitted on a motion to dismiss. *See, e.g., Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 1000 (Fla. 3d DCA 1998) ("Whether a prima facie case has been pled depends on the sufficiency of the plaintiff's allegations of fact, excluding the bare

[2]LCEC remains at a loss to procedurally characterize the inventive but improperly framed Notice and Petition. However, to the extent the "Notice" can be treated as a request for relief, including a request that the Commission "acknowledge" the District as a "new municipal electric service provider" (Notice and Petition at 11, ¶34a), LCEC will proceed against the entire pleading under the standards for a motion to dismiss.

conclusions of the plaintiff.") (citing *Frank v. Lurie*, 157 So. 2d 431, 433 (Fla. 2d DCA 1963)); *Am. Can Co. v. City of Tampa*, 14 So. 2d 203, 208 (Fla. 1943) ("Allegations of legal conclusions are not admitted by a motion to dismiss. Only matters well pleaded are so admitted."). Legal questions that can be resolved by interpreting a statute are appropriately decided on a motion to dismiss. *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 374 (Fla. 1984); *Sattler v. Askew*, 295 So. 2d 289, 291 (Fla. 1974).

III. The District's Notice and Petition is Fatally Flawed Because It is Based On a Completely Erroneous Interpretation of the Special Act

The District, situated in Charlotte County, Florida, was created in 2007 by Chapter 2007-306, Laws of Florida (the "Special Act"). Now, almost seven years later, the District for the first time comes before this Commission on the basis of its "Special Power" under the Special Act "[t]o provide electricity and related infrastructure and to enter into public-private partnerships and agreements as may be necessary to accomplish the foregoing." Special Act at §6(7)(u). Extrapolating from this provision, the District bluntly announces "there is no doubt as to the primacy of the District's right to provide service within District boundaries over the rights of FPL and LCEC under their … Territory Agreement." Notice and Petition at 6 (emphasis added). The District's distorted interpretation of the Special Act is completely unfounded.

In arguing that the Special Act has "primacy" over the Commission's regulation and approval of an existing territorial agreement, the District deliberately omits significant constraints on its "Special Powers" that appear in the Special Act's limiting provision (the "Limiting Provision"). This Limiting Provision specifically governs the section where the District's authority to "provide electricity" is conferred and defeats the District's misguided interpretation on its face. The Limiting Provision states that:

> SPECIAL POWERS.—The district shall have, and the board may exercise, the following special powers to implement its lawful and special purpose and to provide, pursuant to that purpose, systems, facilities, services, improvements, projects, works, and infrastructure, each of which constitutes a lawful public purpose when exercised pursuant to this charter, subject to, and not inconsistent with, the regulatory jurisdiction and permitting authority of all other applicable governmental bodies, agencies, and any special districts having authority with respect to any area included therein, and to plan, establish, acquire, construct or reconstruct, enlarge or extend, equip, operate, finance, fund, and maintain improvements, systems, facilities, services, works, projects, and infrastructure, including, without limitation, any obligations pursuant to a development order or agreement….

Special Act at §6(7) (emphasis added). As such, the Special Act's grant of authority for the District to "provide electricity" is expressly subordinate and subject to the Commission's existing and exclusive authority over territorial agreements. LCEC could not agree more with the District that "[t]he Legislature is presumed to know the meanings of the words and terms it uses to convey its intent." Notice and Petition at 6 (citing *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787 (Fla. 2nd DCA 2005)). LCEC likewise agrees with the District's citation to numerous authorities for the non-controversial premise that one should not ignore the express language of the statute, or read statutes in a manner that does not give effect to their purpose.[4] A plain reading of the Special Act requires the conclusion that the power to "provide electricity" must be read in a

[4]*See* Notice and Petition at 6 (citing *United Specialties of Am. v. Dep't of Revenu*e, 786 So. 2d 1210 (Fla. 5th DCA 2001); *Borden v. E.-European Ins. Co.*, 921 So. 2d 587 (Fla. 2006); *Smith v. Fla. Dep't of Corrections*, 920 So. 2d 638 (Fla. 1st DCA 2005), *rev. denied*, 923 So. 2d 1162 (Fla. 2006); *Greenberg v. Cardiology Surgical Ass'n*, 855 So. 2d 234 (Fla. 1st DCA 2003); *Prof'l Consulting Servs. Inc. v. Hartford Life &Accident Ins. Co.*, 849 So. 2d 446 (Fla. 2d DCA 2003); *P.D. v. Dep't of Children & Families*, 866 So. 2d 100 (Fla. 1st DCA 2004)). *See also K.J.F. v. State*, 44 So. 3d 1204 (Fla. 1st DCA 2010) (stating that "if a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the Court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent") (citation and quotation omitted); *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.").

manner not inconsistent with the Commission's pre-existing approvals of territorial agreements and the exclusive service areas established therein.

The District's filing concedes that LCEC has a right to provide retail electric service within the District's boundaries, and acknowledges that LCEC's right to serve is grounded upon a territorial agreement that LCEC has entered into with FPL, and which the Commission first approved in 1965.[5] Section 2.1 of that territorial agreement provides that LCEC and FPL "shall each have the right to provide retail electric service to all customers within their respective territorial area." Under Florida law, the territorial agreement, and the exclusive service areas established therein, were merged into, and became part of the Commission orders approving the territorial agreement. *See Homestead v. Beard,* 600 So. 2d 450, 453 (Fla. 1992); *Public Service Comm'n v. Fuller,* 551 So. 2d 1210, 1212 (Fla. 1989). Thus, contrary to the District's assertions, the relevant "primacy" granted by the Legislature in this instance belongs to the Commission, not the District.

This is certainly not to say that there is no means by which the District could "provide electricity" as authorized by the Special Act. For example, the District could "provide electricity" to itself for its own consumption. *See, P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 284 (Fla. 1988) ("The legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation."). The District also could "provide electricity" by way of <u>wholesale</u> generation for resale to other utilities without violating existing orders of the

[5]Paragraph 8 of the Petition specifically alleges that "[t]he Commission previously approved a territory agreement between [FPL] and LCEC (the 'FPL/LCEC Territory Agreement'), certain areas of which overlap with the boundaries of the Babcock Ranch District. The FPL/LCEC Territory Agreement was first approved by the Commission in 1965 by Order 3799 (Docket No. 7424), and has subsequently been amended by Order 20817 issued February 28, 1989 and Order No. 93-0705 issued May 10, 1993." Minor modifications to the agreement were more recently approved by Order No. 97-0527-FOF-EU (May 7, 1997).

Commission approving LCEC's territorial agreement.[6] The District simply cannot, however, operate as a "utility" and engage in the retail distribution of electric power in a manner that would violate longstanding, Commission-approved territorial agreements and exclusive service areas. To do so would be "inconsistent with the regulatory jurisdiction" of the Commission under the Grid Bill and contravene the express language of Special Act's Limiting Provision. Special Act at §6(7). Thus, the District's arguments for "primacy" are fundamentally flawed. As such, the Notice and Petition should be dismissed because the District's erroneous legal interpretations cannot, as a matter of law, support a valid claim for any form of relief.

A. The Commission's Plenary, Exclusive Jurisdiction Over Territorial Agreements Derives From Its Obligation Under The Grid Bill To Ensure Availability Of Service Statewide

The failure of the District's arguments for "primacy" is especially apparent in light of the Commission's exclusive "regulatory jurisdiction" under Florida's Grid Bill,[7] which was passed in 1974 to give the Commission the jurisdiction to centrally supervise the "planning, development, and maintenance of a coordinated power grid throughout Florida." § 366.04(5), Fla. Stat.; *Lee County Elec. Co-op. v. Marks*, 501 So. 2d 585, 586 (Fla. 1987). The Commission's jurisdiction under the Grid Bill expressly includes its jurisdiction to approve territorial agreements and establish exclusive service areas. *See, e.g.*, § 366.04(2)(d) & (e), Fla. Stat.; *Roemmele-Putney v. Reynolds*, 106 So. 3d 78, 79 (Fla. 3d DCA 2013). Furthermore, the Florida Legislature and Florida's courts have made it clear that the Commission's jurisdiction under the Grid Bill, including its jurisdiction to

[6]Section 2.3 of LCEC's territorial agreement with FPL states that "no provision of this Agreement shall be construed as applying to bulk power supply for resale, or to facilities dedicated to such bulk power supply." *See* Order No. PSC-93-0705-FOF-EU at p. 10.
[7]Chapter 74-196, Laws of Fla.

approve territorial agreements and establish exclusive service areas, "shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in the case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail." § 366.04(1), Fla. Stat.; *Roemmele-Putney v. Reynolds*, 106 So. 3d at 80. There can be no doubt that the Commission's jurisdiction under the Grid Bill, and its orders approving LCEC's territorial agreement with FPL, are "exclusive and superior to" that of the District.

The inadequacy of the District's assertions of "primacy" over these issues is particularly striking given that the Grid Bill empowers the Commission to "ensure that all electric power within the state grid is available when and where needed." *Fla. Power & Light Co. v. Nichols*, 516 So. 2d 260, 261 (Fla. 1987). Consistent with the Commission's duties to ensure availability of service, LCEC not only has been given a right, but also an obligation to serve all of the customers in the franchise service areas that the Commission has awarded to it through its approval of its territorial agreement. *See e.g.*, Order No. 15210 (Oct. 8. 1985). Here, the District admittedly has no ability to serve, but asks the Commission to accept its contention that an operational and long-serving utility, LCEC, should no longer have the right to serve this area. Highlighting the absurdity of this pleading, the District asks that the Commission carve out the customers in the service area who actually need service currently, so that these customers can receive such service from LCEC—as opposed to being left with no options for service from the District. Notice and Petition at ¶ 11. Acceptance of the District's argument would plainly frustrate the purposes of the Grid Bill.[8]

[8]The District intimates that it is exempt from or otherwise immune from the Grid Bill. But even a municipality with "home rule" powers must exercise those powers in a manner consistent with the Grid Bill,

The purposes behind the Commission's exclusive jurisdiction under the Grid Bill are well-elaborated by the Legislature, and those purposes would be eviscerated here if the District were granted its claimed "primacy" and allowed to ignore the sanctity of longstanding Commission orders approving territorial agreements. *See Roemmele-Putney*, 106 So. 3d at 81. ("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…."). Moreover, the District's distorted interpretation of the Special Act, if adopted by the Commission, would "establish[ ] a policy which dangerously collides with the entire purpose of territorial agreements, as well as the PSC's duty to police 'the planning, development and maintenance of a coordinated power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission and distribution facilities.'" *Lee County Elec. Co-op. v. Marks*, 501 So. 2d at 587 (quoting § 366.04(3), Fla. Stat. (1985), which is now § 366.04(5), Fla. Stat. (2013)). In that case, the Supreme Court upheld the sanctity of the very territorial agreement which the District seeks now to eviscerate. In so doing, the Supreme Court confirmed that it would not tolerate clever devices designed to violate the exclusive service area requirements of a territorial agreement. *Id.* (The Court refused to allow "the transparent device of constructing a line into another utility service area" as means to "avoid the effect of a territorial agreement.")

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and the Commission is responsible to see that it does so. *See* Order 92-0058-FOF-EU (Mar. 12, 1992). The Commission certainly has an equivalent if not greater responsibility to ensure compliance by a special district with the Grid Bill, given that a special district is not a municipality and is not accorded any "home rule" powers. This argument is further discussed in Section III.B below.

B. The Limitation On The Powers Of Special Districts, Which Do Not Possess Home Rule Powers, Further Confirms the Infirmity Of The District's "Primacy" Claim

The failure of the District's statutory interpretation is further pronounced by well-settled law that, unlike units of general-purpose government such as counties and municipalities, special districts are special purpose units of government and do not possess general home rule powers. *Roach v. Loxahatchee Groves Water Contr. Dist.*, 417 So. 2d 814, 817 (Fla. 4th DCA 1982). As such, the only powers special districts possess are those set forth in the laws by which they were created. *Id.; see also City of Gainesville v. St. Johns River Water Mgt. District*, 408 So. 2d 1067, 1068 (Fla. 1st DCA 1982), *rev. denied*, 418 So. 2d 1278 (Fla. 1982). Nothing in the Special Act even remotely suggests that the Legislature intended to allow the District to preempt, supersede or eviscerate orders of the Commission approving territorial agreements and establishing franchise service territories.[9] Nor is there any other basis on which the District can unilaterally unwind longstanding approval of existing service territories merely because it deems such action to be in the District's best interest. *See, e.g., Storey v. Mayo*, 217 So. 2d 304, 307-08 (Fla. 1968) ("An individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself.").

C. The District's Reliance On The Reedy Creek Proceedings Is Misplaced

The District fails in its attempt to equate its situation with that of the Reedy Creek Improvement District ("Reedy Creek"), created in 1967 pursuant to a special law in Chapter 67-764 (the "Reedy Creek special act"). As demonstrated below, the proceedings

[9]In fact, the Special Act's Limiting Provision makes the District's authority to "provide electricity" expressly subordinate and subject to the Commission's existing and exclusive authority over electric service territories.

related to Reedy Creek are not analogous to, and are readily distinguishable from, the District's unprecedented efforts in this case.

(i) Reedy Creek Was Expressly Authorized To Operate A "Public Utility" And Engage In The "Distribution" Of Electric Power

The Reedy Creek special act gave Reedy Creek the express power to "develop and operate such new and experimental public utilities" including the authority to "own, acquire, construct, reconstruct, equip, operate, maintain, extend and improve electric power plants, transmission lines and related facilities,… and to purchase electric power … for distribution[10] within the District." *See* Subsection 9(17), Ch. 67-764, Laws of Fla. (emphasis added).

In stark contrast, the Babcock Special Act says nothing about the Babcock District being authorized to operate as an electric "utility" or a "public utility.[11] Instead, as described above, it simply mentions that the District has the authority "to provide electricity and related infrastructure" but only if such authority is exercised "subject to, and not inconsistent with the regulatory jurisdiction" of the Commission. Nor does the Special Act make any mention of the District having authority to engage in the "distribution" of electric power within its boundaries, unlike the Reedy Creek special act. For the same reasons explained above, authorizing the District to "provide electricity" does not authorize it to operate as a "public utility" or to provide electric power "distribution"

[10]The term "distribution" has a commonly understood meaning in the context of utility regulation, and specifically applies to distribution of electricity on a retail basis—directly to retail customers. *See e.g., Lee County Elec. Co-op v. Jacobs*, 820 So. 2d 297, 298 (Fla. 2002) (the Supreme Court recognized the clear distinction between a "generation and transmission" utility, which supplies electricity at "wholesale" to other utilities for resale, and a "distribution" utility, which is "engaged in the retail sale of electricity to Florida customers").

[11]The term "utility" in the Special Act is used only in the context of water and wastewater utilities. Special Act at § 6(7)(b) and § 2(v).

services. The Reedy Creek special act confirms that the Legislature knows how to provide such authority when it chooses to. It has not granted that authority here.

(ii) Reedy Creek's Powers With Respect To Operating a Public Utility Were Not Constrained By The Sort of Limiting Provision Which Confines The District

A second key distinction between the Reedy Creek special act and the Babcock Special Act (which the District also omits from its Notice and Petition) is that the Reedy Creek special act did ***not*** subordinate Reedy Creek's powers to operate as a public utility in the way that the District's "Special Powers" are expressly confined by the Limiting Provision described above.[12] The District's argument that the District's Notice and Petition is simply a sequel to the Reedy Creek proceedings fundamentally ignores the polar opposite construction of these allegedly comparable provisions.

(iii) The Reedy Creek Proceedings Did Not Involve An Attempt To Override A Pre-Existing Territorial Agreement

The District chooses to ignore another fundamental factual distinction between it and Reedy Creek, namely that there was no pre-existing territorial agreement governing the Reedy Creek territory over which the Reedy Creek Special District asserted "primacy." Furthermore, the District failed to mention that there was an orderly transition in the Reedy Creek proceeding whereby the existing utility – Reedy Creek Utilities Company, Inc. – notified the Commission that it intended to voluntarily transfer "its electric utility assets and operations" to the Reedy Creek District. In addition, the Reedy Creek District did not shy away from its responsibilities of advising the Commission of its rates as part of the transition. In fact, it formally advised the Commission that "it will adopt and ratify and

[12]Indeed, the introductory paragraph to Section 9 in the Reedy Creek special act simply states that, "In addition to and not in limitation of the powers and authorities of the District under Chapter 298, Florida

make own the rate structure of Reedy Creek Utilities Company, Inc." *See* Order No. 18224 (Sept. 30, 1987). The proceedings relating to Reedy Creek illustrate how to properly respect existing services and service territories, which the District prefers to ignore here.

D. The District's Proposed Reading of the Special Act Would Yield Unconstitutional Results

The District's distorted interpretation of the Special Act (if adopted by the Commission) would render the Act itself unconstitutional, since it would trigger a taking of LCEC's property rights without compensation[13] and an unconstitutional impairment of LCEC's contract rights.[14] The Florida Supreme Court has made it clear that statutes are to be accorded "a presumption of constitutionality" and are to be construed "to effect a constitutional outcome whenever possible." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010). The unconstitutional interpretation of the Special Act advanced by the District should be rejected for that reason as well.

IV. The "Petition" For Rule Waiver Fails To Satisfy Any Requisite Standard Under Section 120.542

As the final component of its efforts to circumvent the Commission's exclusive jurisdiction and LCEC's rights, the District asks for a waiver of the rule with regard to the timing of its filing rates as a new utility, specifically Rule 25-9.044(2), Florida Administrative Code. Rule 25-9.044(1) and (2), Florida Administrative Code, provide in pertinent part that,

> (1) In case of change of ownership or control of a utility which places the operation under a different or new utility, or when its name is changed, the company which will thereafter operate the utility business must adopt and use the rates, classifications and regulations of the former

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Statutes, and amendments thereto, the District shall have the following powers…". § 9, Ch. 67-764, Laws of Fla.

[13] *See* Art. X, s. 6, Fla. Const. (1968); Amendments V and IX, U.S. Const.

[14] *See* Art. I, s. 10, Fla. Const.; Art. I, s. 10, U.S. Const.

> operating company (unless authorized to change by the Commission), and shall, within ten (10) days, issue and file a notice adopting, ratifying, and making its own all rates, rules, classifications and regulations of the former operating utility on file with the Commission and effective at the time of such change of ownership or control.
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> (2) New utility. Within thirty (30) days after the filing of such adoption notice by a public utility which then had no tariff on file with the Commission, said utility shall issue and file in its own name the tariff of the predecessor utility then in effect and adopted by it, or make application to the Commission for such other tariff as it may propose to put into effect in lieu thereof.

The District is unabashed in explaining why it needs the waiver—that is to say, it has no ability to serve and therefore has no rates. In other words, in the same breath that the District desperately argues that it should be considered as an electric utility, it also signals that it wants nothing to do with the service obligations that go along with being a utility. Such self-contradictory reasoning cannot justify a waiver of Rule 25-9.044(2). Moreover, the District principally ignores the applicable standards for entitlement to such waiver, presumably because it recognizes they do not apply to a non-utility.

Section 120.542(2), Florida Statutes, provides the standards for application of rule waivers, and states that:

> Variances and waivers shall be granted when the <u>person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.</u> For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(Emphasis added.) Thus, to be entitled to the requested rule waiver, the District must demonstrate that (i) it is a "utility" subject to the rule, (ii) it can achieve the purpose of the

statute underlying the rule by other means, and (iii) compliance with the rule could cause the District to suffer substantial hardship or violate principles of fairness. The Commission has repeatedly applied these standards, which the District has largely ignored, to analyze and deny requested rule waivers. *See, e.g.*, Order No. PSC-09-0484-PAA-EI (July 6, 2009); Order No. PSC-02-1623-PAA-EI (Nov. 25, 2002); Order No. 99-0232-FOF-EI (Feb. 9, 1999); Order No. PSC-99-1091-PAA-EI (May 28, 1999); Order No. 98-0011-FOF-TL (Jan. 5, 1998). As described below, the District has failed to satisfy any of these requisite standards for a rule waiver.

A. <u>The District Is Not A Utility Subject To The Rule</u>

Fundamentally, the cited rule facially applies only to a "utility." Rule 25-0.044(2), Fla. Admin. Code. Put simply, and as explained above, the District is nowhere authorized to operate as a "utility," and therefore is not a "person subject to the rule" entitled to seek waiver under Section 120.542(2), Florida Statutes. The requested waiver should be denied on this basis alone.

B. <u>The Requested Waiver Does Not Achieve Any Statutory Purpose, But Instead Undermines It</u>

Second, even assuming for the sake of argument that the District were subject to the rule, it would need to show that "the purpose of the underlying statute[15] will be or has been achieved by other means by the" District. § 120.542(2), Fla. Stat. The District does not acknowledge, much less allege any facts, to meet this standard. The subject rule is plainly intended to provide for orderly transition between utility providers and ensure that the Commission can meet its regulatory obligation in ensuring availability of electric service.

[15]The subject rule cites the following as its underlying statutory authority: "350.127(2), 364.335, 367.121 FS."

Here, the District cannot provide service, and asks for a waiver of the normal rate filing requirements because it cannot provide service—unlike LCEC, which can provide service and has been providing service. Allowing the District to avoid the steps needed for it to be able to serve would completely contravene an orderly transition between utilities and undermine the Commission's responsibilities under the Grid Bill to ensure that electric power is available when and where needed in our state. *Fla. Power & Light Co. v. Nichols*, 516 So. 2d at 261. Where entities have failed to demonstrate that the purpose of the underlying statute was otherwise achieved, the Commission routinely denies the waiver request. *See e.g.*, Order No. PSC-09-0484-PAA-EI (July 6, 2009); Order No. PSC-02-1623-PAA-EI (Nov. 25, 2002); Order No. 99-0232-FOF-EI (Feb. 9, 1999); Order No. PSC-99-1091-PAA-EI (May 28, 1999); Order No. 98-0011-FOF-TL (Jan. 5, 1998).

C. The Requested Waiver Is Not Supported By A Valid "Hardship" Or By Any Principle of Fairness

The District also fails to identify any valid "hardship" it would suffer or any principle of fairness that would be violated if it were not excused from the rule. It is certainly not a "hardship" that, in the seven years since passage of the Special Act, the District still has no ability to serve as a utility. The inability to serve, due to the District's own course of inaction, is a fundamental reason the District should *not* be granted a rule waiver, or be granted any other recognition or relief which it claims. It is noteworthy that the Reedy Creek District did not shy away from its responsibilities of advising the Commission of its rates. In fact, it formally advised the Commission that "it will adopt and ratify and make own the rate structure of Reedy Creek Utilities Company, Inc." *See* Order No. 18224 (Sept. 30, 1987). The District's purported difficulty in meeting the requirements of the rule is the District's own doing—it has trouble complying with the rule

because it is not and was never intended to be an electric utility. Again, that is not a "substantial hardship" that would serve to excuse compliance with the rule. Nor would any principle of fairness be violated by requiring the District, if it seeks to be a utility, to act like one. Indeed, the only potential violation of fairness here is rooted in the District's effort to nominate itself as a "utility" without being subject to the same fundamental service and regulatory requirements that *actual* utilities, like LCEC, must satisfy.

V. Conclusion

The Notice and Petition is an extraordinary attempt to seize LCEC's existing rights based on distorted interpretations of the Special Act and Commission precedent. The misleading interpretation of the Special Act would also render it unconstitutional and invite an unprecedented unraveling of territorial agreements to the detriment of stable and reliable electric service statewide. The District fails to articulate, must less allege, any element that would qualify it for the unprecedented relief which it requests. Therefore, the Notice and Petition should be dismissed for failure to state a claim on which relief can be granted. In addition, the flawed legal basis of the Notice and Petition make clear that these defects cannot be remedied by amendment—in particular, the terms of the Special Act cannot be construed in a way that provides the District with a viable claim for relief. Accordingly, dismissal of the Notice and Petition should be made with prejudice.

Respectfully submitted this 15th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was provided by e-mail this 15th day of April, 2014 to: Brian P. Armstrong (barmstrong@ngnlaw.com), William C. Garner (bgarner@ngnlaw.com) and John R. Jenkins (jjenkins@ngnlaw.com), Nabors, Giblin & Nickerson, PA, 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308; Martha Brown (mbrown@psc.state.fl.us), Office of General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399; William B. Willingham (fecabill@embarqmail.com) and Michelle L. Hershel (mhershel@feca.com), Florida Electric Cooperatives Association, Inc., 2916 Apalachee Parkway, Tallahassee, FL 32301; John T. Butler (john.butler@fpl.com) and Scott A. Goorland (scott.gorland@fpl.com), Florida Power & Light Company, 700 Universe Boulevard, Juno Beach, Florida 33408-0420; James D. Beasley (jbeasley@ausley.com) and J. Jeffry Wahlen (jwahlen@ausley.com), Ausley & McMullin, P.O. Box 391, Tallahassee, FL 32302; and, Paula K. Brown (regdept@tecoenergy.com), Tampa Electric Company, P.O. Box 111, Tampa, Florida 33601.

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