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Duke Energy Florida, Inc.

August 14, 2014

VIA ELECTRONIC FILING

Ms. Carlotta Stauffer, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vero Beach electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Fla.; Docket No. 140142-EM*

Dear Ms. Stauffer:

Please find enclosed for electronic filing on behalf of Duke Energy Florida, Inc. ("DEF"), DEF'S Motion for Leave to File an Amicus Brief along with DEF's proposed amicus brief as attachment A.

Thank you for your assistance in this matter. Please feel free to call me at (850) 521-1428 should you have any questions concerning this filing.

Respectfully,

s/Matthew R. Bernier

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MRB/mw
Enclosures

cc: Certificate of Service

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement or other relief regarding the expiration of the Vero Beach electric service franchise agreement, by the Board of County Commissioners, Indian River County, Fla.

Docket No. 140142-EM
Filed: August 14, 2014

**DUKE ENERGY FLORIDA’S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF AND TO PRESENT ORAL ARGUMENT**

Duke Energy Florida, Inc. (“DEF” or the “Company”), respectfully requests the Florida Public Service Commission’s (the “PSC” or “Commission”) leave to file an amicus curiae brief in support of the City of Vero Beach (the “City”) and to provide the Commission with the Company’s positions on the extraordinary and unprecedented relief sought by Board of County Commissioners for Indian River County, Florida (the “County”). Further, should the Commission permit Oral Argument before rendering its decision in this docket, DEF requests the Commission’s leave to present its positions at Oral Argument as well.

DEF is an investor-owned electric public utility regulated by this Commission pursuant to Chapter 366, Florida Statutes. As such, the Company has a significant interest in the manner in which Chapter 366, Florida Statutes, is construed in connection with other laws and Orders of the Commission that may affect public utilities in this state. Given the above interest, DEF desires to be heard regarding the legal interpretations underlying the County’s Petition for Declaratory Statement. DEF believes that its input may assist the Commission in disposing of the Petition.

DEF is aware that there is no provision in the Administrative Procedures Act, the Florida Rules of Civil Procedure, the model rules of administrative procedure, or the Commission’s rules that explicitly permits the filing of amicus briefs in Commission dockets. However, on rare

occasions, the Commission has allowed the filing of amicus briefs to assist the Commission in cases of general public interest or to aid in the presentation of difficult issues. *See* Order No. PSC-00-1265-PCO-WS, Docket Nos. 990696-WS & 992040-WD (July 11, 2000) (granting amicus status to certain counties and citing previous Commission orders permitting amicus participation).

DEF believes that the County's petition and the extraordinary relief it requests in this docket presents one of the rare occasions where amicus participation can assist the Commission. As DEF presents in more detail in its proposed brief, attached as Attachment A, approval of the County's assertion that it has the authority to expel its electric service provider due to the expiration of a franchise agreement, notwithstanding the existing Commission-approved territorial agreement between the City and Florida Power & Light, could significantly impact the provision of electric service throughout the State, as well as eviscerate the Commission's jurisdiction over territorial agreements in general.

Pursuant to Rule 28-106.204(3), F.A.C., counsel for DEF has conferred with counsel for the City and the County and is authorized to represent that the City supports this motion, while the County takes no position on whether the PSC should permit DEF to file an amicus brief in this matter.

WHEREFORE, for the reasons stated above, DEF respectfully requests the Commission grant its request to file the attached amicus curiae brief in favor of the City's positions and to participate in any oral argument the Commission may permit in this docket.

Respectfully submitted,

s/ Matthew R. Bernier
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following persons via electronic mail this 14th day of August, 2014.

s/ Matthew R. Bernier
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement or other relief regarding the expiration of the Vero Beach electric service franchise agreement, by the Board of County Commissioners, Indian River County, Fla.

Docket No. 140142-EM
Filed: August 14, 2014

**DUKE ENERGY FLORIDA’S AMICUS CURIAE BRIEF
IN SUPPORT OF THE CITY OF VERO BEACH**

Duke Energy Florida, Inc. (“DEF” or the “Company”), files this amicus curiae brief in support of the positions taken by the City of Vero Beach (the “City”). The Commission should dismiss or deny the Petition for Declaratory Statement and Such Other Relief as May be Required (the “Petition”) filed by the Board of County Commissioners for Indian River County, Florida (the “County”) to the extent that it seeks declarations that run counter to the Public Service Commission’s (“Commission”) exclusive authority to approve and regulate territorial agreements between and among electric utilities. Given the unusual and unprecedented nature of the relief sought by the County in its Petition, and the potential for a Commission order on this issue to have impact on every territorial agreement this Commission has approved (including all territorial agreements to which DEF is a party), DEF files this amicus curiae brief.

The County’s Petition is premised on the legal error that the City provides electric service to the County and certain of its residents pursuant to the 1987 Franchise Agreement¹ which is set to expire on or about March 4, 2017. In fact, the City serves the County and certain of its residents pursuant to the Commission-approved Territorial Agreement entered by the City and Florida Power & Light (“FPL”), and therefore the County does not have the authority to expel

¹ See Indian River County Resolution 87-12 (Mar. 5, 1987), *Indian River County, Florida, granting to the City of Vero Beach, Florida, its Successors and Assigns, and Electric Franchise in Certain Unincorporated Areas of Indian River County, Florida; Imposing Provisions and Conditions Relating Thereto; and Providing an Effective Date*, attached as Ex. A to the County’s Petition and herein referred to as the “Franchise Agreement”.

the City and choose its own electric service provider. Because thirteen (13) of the County's fourteen (14) questions are based on this same faulty premise, DEF supports the City's motion to dismiss the County's Petition as it pertains to those questions.²

I. The Petition

The facts stated in the County's Petition, which the Commission must accept for purposes of these proceedings, are straightforward. On March 5, 1987, the City and the County executed the Franchise Agreement, which pursuant to its terms and written notice provided by the County, is set to expire on March 4, 2017. Prior to execution of the Franchise Agreement³ the City provided service to the County and its residents not served by FPL. According to the Petition, prior to the existence of the Franchise Agreement, the City's "electric service within the unincorporated areas of the County was ancillary to [the City's] service within its city limits and subject to *general law* and common law principles regarding its occupation of the streets, easements, and other public property within the unincorporated areas of the County." *See* Petition, at ¶ 20.⁴

The "general law" that permitted the City to provide electric service in the County was, and is, the Commission's Orders approving Territorial Agreements under authority provided by the legislature in Chapter 366, Florida Statutes. As early as 1972 and continuing to the present, the City has provided electric service to the County and its residents pursuant to five (5) successive iterations of Territorial Agreements between the City and FPL. *See* Petition, at ¶ 11(a)-(e).

² DEF takes no position regarding the County's request for a declaratory statement regarding the Commission's jurisdiction with respect to section 366.04(7), Florida Statutes. *See* Petition, at ¶ 11(j).

³ The Petition states that, as far as the County is aware, the Franchise Agreement is the first such agreement between the County and the City. *See* Petition, at ¶ 20.

⁴ All emphasis in quotations is added unless otherwise noted.

As stated above, in 1987 the City and County executed the Franchise Agreement to govern the City's use of the County's "public places" for the purpose of providing electric service; as discussed below, the County now conflates the Franchise Agreement's grant of authority to occupy the public places of the County for the purpose of providing electric service with the grant of authority to provide electric service in the County. The former is within the County's authority, the latter authority resides solely with the Commission under Chapter 366, Florida Statutes.

II. The Public Service Commission has exclusive jurisdiction to approve and regulate territorial agreements notwithstanding any provision of any franchise agreement

The County's fundamental misunderstanding of the role the Franchise Agreement plays relative to the Commission-approved Territorial Agreements is clearly demonstrated in one paragraph of its Petition:

Chapter 366, Florida Statutes, differentiates between "public utilities," investor owned electric utilities such as FPL, and "electric utilities," a classification that includes municipal electric utilities such as COVB. While the Commission's jurisdiction with respect to electric utilities is more limited than with public utilities, *Section 366.04(2) grants to the PSC specific jurisdiction to approve territorial agreements for both public utilities and electric utilities* and upon petition or its own motion to resolve territorial disputes. On the basis of this statutory authority, COVB and FPL have entered into a series of territorial agreements and boundaries that have been approved by the PSC as is set forth in more detail below. *While these territorial agreements and boundaries determine the service areas of each utility, COVB's fundamental legal authority to provide electric service outside its city limits and within the unincorporated areas of the County is expressly granted by, and dependent upon, the Board's Franchise to COVB.*

Petition, at ¶ 14.

As the County concedes, the Commission has exclusive authority to approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. § 366.04(2)(d), Fla. Stat.; *Pub. Serv. Comm'n v. Fuller*,

551 So. 2d 1210 (Fla. 1989); *City of Homestead v. Beard*, 600 So. 2d 450 (Fla. 1992). Once approved by the Commission, the Territorial Agreements between the City and FPL “merged with and became a part of” the Commission’s Orders approving them and “any modification or termination of th[ose] order[s] must first be made by the PSC.” *Fuller*, 551 So. 2d at 1212. Indeed, a territorial “agreement has no existence apart from the PSC order approving it[.]” *Id.*

Therefore, the existing Commission-approved Territorial Agreement between the City and FPL provides the “fundamental legal authority” for the City to provide electric service to the County and its residents; in fact, it provides the sole authority.

In contrast, the Franchise Agreement constitutes a bargained for exchange whereby the City was permitted to place (or, in this case, keep) its facilities within the County’s rights-of-way in return for compensation. In no way does it or could it provide the legal authority for the City to provide electric service to the County because it has not been approved by and merged into an Order of the Commission.⁵ As such, for purposes of establishing the City’s right to provide electric service in and to the County, the Franchise Agreement has “no existence.” *See Fuller*. To the extent that the Franchise Agreement itself purports to authorize the City to provide electric service within the County, any provisions to that effect are void as a matter of law because the Commission has exclusive jurisdiction over utility service areas. *See* § 366.04(2)(d), Fla. Stat.; *Fuller; Beard*.

Additionally, the Territorial Agreement between the City and FPL has no expiration date and will continue in effect (as amended) until the two parties either mutually agree to, or the

⁵ In light of the Commission-approved territorial agreements between the City and FPL that pre-date the Franchise Agreement, *see* Petition, at ¶ 11 (a)-(d), the County’s argument that the Franchise Agreement provides the sole authority by which the City provides electric service to and in the County could only lead to two possible logical conclusions: 1) the County believes that the Commission orders pre-dating the Franchise Agreement were of no legal effect; or 2) that the Franchise Agreement somehow preempted or supplanted the existing Commission-approved Territorial Agreement. Neither conclusion passes legal muster.

Commission orders, its termination. *See* Petition, Ex. A, p. 14 of 18, § 1.1 (“TERM: After this AGREEMENT becomes effective pursuant to Section 3.4 hereof [requiring Commission approval], it shall continue in effect until termination or until modification shall be mutually agreed upon, or until termination or modification shall be mandated by governmental entities or courts with appropriate jurisdiction.”). An electric utility has an obligation to provide service to customers within its territorial boundaries until it is relieved by the Commission of that obligation. *See generally, Order Relieving Progress Energy Florida, Inc. of the Obligation to Provide Retail Electric Service to Certain Customers Within Winter Park*, Order No. PSC-05-0453-PAA-EI, Docket No. 050117-EI (Apr. 28, 2005).

The County was clearly aware of the existing Territorial Agreement between the City and FPL at the time it entered the Franchise Agreement as evidenced by the fact that it was attached to the Franchise Agreement. *See* Petition, at ¶ 32. That is, the County entered into the Franchise Agreement under notice that the City had an open-ended obligation to serve the County and its residents. It has long been established that “[c]ontracts with public utilities are made subject to the reserved authority of the state . . . to modify the contract in the interest of the public welfare.” *H. Miller & Sons, Inc. v. Hawkins*, 373 So. 2d 913, 914 (Fla. 1979).

Therefore, County was and is on notice that the rights and obligations under the Franchise Agreement are subject to the over-arching jurisdiction of the Commission to regulate territorial agreements and that pursuant to the Commission-approved Territorial Agreement governing service to the County, the City had the right and obligation to serve the County until the Commission relieved it of that duty.

III. Conclusion

The County's premise that it has the right to modify the Commission-approved Territorial Agreement between the City and FPL by virtue of the expiring Franchise Agreement is simply without merit. The Franchise Agreement exists to provide a mechanism for the County to recoup the costs of providing and maintaining the rights-of-way, i.e., it is an agreement that allows it to collect franchise fees. As discussed above, it cannot be an agreement related to the right to provide electric service within the County because the Commission has exclusive jurisdiction over territorial agreements under Chapter 366.

At this time, there is a Commission-approved Territorial Agreement between the City and FPL that governs the provision of electric service to the County and no party has raised a territorial dispute with respect to that area. Because the County has propounded thirteen (13) questions based on the incorrect legal conclusion that it has the legal authority to extinguish the City's right and obligation to serve its customers within the County, DEF supports the arguments of the City and urges the Commission to grant its motion to dismiss or deny the County's requested statements.

Respectfully submitted,

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