



# FECA

Florida Electric Cooperatives Association, Inc.

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January 13, 2015

Kathryn G.W. Cowdery  
c/o Carlotta S. Stauffer  
Office of Commission Clerk  
Room 152, Gunter Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

RE: Docket No. 140244-EM , Petition of the City of Vero Beach, Florida, for a Declaratory Statement Regarding Effect of the Commission's Orders Approving Territorial Agreements In Indian River County

Dear Ms. Cowdery and Ms. Stauffer:

Attached for filing on behalf of the Florida Electric Cooperatives Association, Inc. in the above-referenced docket, are its Comments and Request to Address the Commission.

If you have any questions, please call me at (850)877-6166, Ext. 1.

Sincerely,

Bill Willingham

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of the City of Vero Beach, )  
Florida, for a Declaratory Statement ) Docket No. 140244-EM  
Regarding Effect of the Commission’s )  
Orders Approving Territorial Agreements ) Filed: January 13, 2015  
In Indian River County )  
\_\_\_\_\_ )

**FLORIDA ELECTRIC COOPERATIVES  
ASSOCIATION, INC’S COMMENTS AND  
REQUEST TO ADDRESS THE COMMISSION**

The Florida Electric Cooperatives Association, Inc. (“FECA”), submits the following comments regarding the Petition of the City of Vero Beach, Florida (“the City”), for a Declaratory Statement Regarding Effect of the Commission’s Orders Approving Territorial Agreements In Indian River County (“the Petition”):

1. FECA is a Florida corporation and a trade association that represents almost all of Florida’s electric cooperatives. All 17 of FECA’s members are electric cooperatives, and all 17 members are regulated by the Florida Public Service Commission (the “Commission”) pursuant to Chapter 366, Florida Statutes. FECA’s fifteen members that are distribution cooperatives provide retail service to approximately 800,000 retail accounts that are located throughout 53 Florida counties. FECA’s members also own and operate generation and transmission facilities throughout Florida. One of the purposes of FECA is to represent the interests of its members in proceedings before the Commission that could impact its members and their consumer/members. Given its long-standing representation of the majority of Florida’s electric cooperatives in Commission proceedings, FECA believes its comments will assist the Commission as it deliberates the issues in this proceeding.

2. The City seeks a declaration on the City's right and obligation to provide retail electric service in the City's designated electric service territories approved by the Florida Public Service Commission ("the Commission") when the franchise agreement between the City and Indian River County (the "County") has either expired or does not exist.

3. FECA's member-cooperatives serve in numerous areas where no franchise agreement exists between the electric cooperative and the local government. However, in some cases FECA's member-cooperatives have negotiated and executed a franchise agreement with a local government, and some of these agreements will expire in the near future.

4. FECA and its members have a significant and abiding interest in the preservation and enforcement of the regulatory provisions regarding service territories and coordinated, economically efficient electric system planning set forth in Chapter 366.04, Florida Statutes.

These interests include:

- a. the approval of territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities;
- b. the avoidance of territorial disputes;
- c. the avoidance of further uneconomic duplication of generation, transmission and distribution facilities; and
- d. the planning, development and maintenance of a coordinated electric power grid throughout Florida.

5. FECA believes an electric utility must be able – as a matter of law – to rely on Commission-approved territorial agreements and the territorial provisions in section 366.04, Florida Statutes, to define the service area that it must plan to serve now and in the future. Section 366.04(1), Florida Statutes, clearly and unequivocally states that the Commission's jurisdiction and powers are exclusive and superior to any powers that Indian River County (or any other local government) might have. Any assertion by the County that the lack of a franchise agreement provides grounds for the County (or any other local government) to prevent

the City (or any Florida utility) from serving its customers situated inside the local government's corporate limits is outrageous and would negatively impact electric rates and grid reliability in Florida.

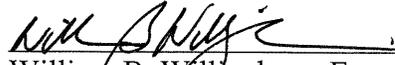
6. FECA has filed an Amicus Curiae Memorandum of Law in Docket No. 140142-EM, Petition for Declaratory Statement by the Board of County Commissioners, Indian River County, Florida. FECA believes its comments and concerns raised in Docket No. 140142-EM are equally relevant in this docket and has attached its Amicus document to this submittal for consideration by the Commission.

7. In light of the above concerns, FECA requests the opportunity to address the Commission at such time as the Petition may be brought before the Commission for review.

8. Consent of parties. FECA has contacted counsel for the City, Robert Scheffel Wright and John T. LaVia, III, and is authorized to represent that the City does not object to FECA filing and the Commission accepting, its Comments and Request to Address the Commission.

WHEREFORE, FECA respectfully requests that the Commission accept and consider these comments as well as FECA's positions in the attached Amicus Curiae Memorandum of Law filed in Docket No. 140142-EM in its disposition of the Petition filed in this proceeding. In addition, FECA requests the opportunity to be heard when the Petition is brought before the Commission.

Respectfully submitted this 13<sup>th</sup> day of January, 2015.

  
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Attorneys for the Florida Electric Cooperatives Association, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Comments and Request to Address the Commission, filed on behalf of the Florida Electric Cooperatives Association, Inc., has been furnished by electronic mail on this 13<sup>th</sup> day of January, 2015 to the following:

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\_\_\_\_\_  
WILLIAM B. WILLINGHAM

**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, )  
Florida )  
\_\_\_\_\_ )

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

**FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC'S  
AMICUS CURIAE MEMORANDUM OF LAW**

The Florida Electric Cooperatives Association, Inc. ("FECA") has requested leave to file this Amicus Curiae legal memorandum addressing the issues raised in Indian River County's ("County") "Petition for a Declaratory Statement and Such Other Relief As May be Required" ("Petition"). The issues before the Florida Public Service Commission ("Commission") are of great concern to FECA, the 17 electric cooperatives that are members of FECA, and to the consumer-members that are served by those electric cooperatives. The Petition poses numerous questions and issues for the Commission to address, but for FECA's purposes there is one issue that is extremely significant - whether a utility can rely on Commission-approved territorial agreements and the territorial provisions in section 366.04, Florida Statutes, to define the service area that it must plan to serve now and in the future, or whether a local government can unilaterally take away a utility's customers and service area whenever a franchise agreement expires or if there is no franchise agreement. FECA believes the law is extremely clear that the Commission is the exclusive authority to determine which electric utility will serve in the area at issue in this proceeding. Moreover, since there is a Commission-approved territorial agreement in place between the City of Vero Beach ("COVB") and Florida Power & Light Company ("FPL"), COVB must serve the area until such time that the Commission approves modifications

to the agreement.<sup>1</sup> Contrary to the County's assertions, the granting or expiration of a franchise agreement has no bearing on a Commission-approved territorial agreement or which electric utility will serve in the area, and the County's threat to evict COVB from the franchise area is without any legal authority or foundation. The County also lacks authority to deny COVB's use of its rights-of-way, and the County does not have the option of providing electric service within the Franchise area. Therefore, FECA believes the Commission should deny the Petition.

### **The Grid Bill**

In 1974 the Grid Bill<sup>2</sup> was enacted, which gave the Commission jurisdiction over municipally-owned utilities and electric cooperatives for the first time, and which clarified and codified the Commission's jurisdiction to define and control the service areas of all electric utilities in Florida. The Grid Bill includes comprehensive language for the Commission to regulate electric utility service boundaries and to determine which utility shall serve an area or an individual customer when service boundaries have not been clearly defined. Pursuant to section 366.04(1), Florida Statutes, the Commission's jurisdiction under the Grid Bill is "exclusive and superior," and the grant of exclusivity is clear and unequivocal:

The jurisdiction conferred upon the commission shall 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.

The Legislature clearly intended that the Commission, not the County, shall be the exclusive authority to decide which utility or utilities shall provide electric service throughout a county.

The Grid Bill encourages territorial agreements between all utilities in order to prevent the uneconomic duplication of utility facilities throughout Florida. FECA and its members have

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<sup>1</sup> Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989).

<sup>2</sup> Fla. Stat. §§ 366.04(2) - 366.04(5).

a significant and abiding interest in the preservation and enforcement of the Grid Bill. Those interests include: (i) the approval of territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities; (ii) the avoidance of territorial disputes; (iii) the avoidance of further uneconomic duplication of generation, transmission and distribution facilities; (iv) the planning, development and maintenance of a coordinated electric power grid throughout Florida; and (v) minimizing the cost of electricity in Florida. These interests are critical to an electric utility's ability to plan for future growth based upon long term growth projections. Planning for generation, transmission, and substations requires multi-decade forecasts, and it is not uncommon for distribution facility planning to involve multi-decade forecasts. To assist with planning, many utilities have entered into Commission-approved territorial agreements with neighboring utilities, which define the area that each utility must plan to serve.

The County's assertion that it can abrogate the Commission's exclusive jurisdiction to implement, supervise, and enforce electric service territories and territorial agreements in Florida has serious implications for electric utility regulations statewide. Forecasting is challenging enough when a utility knows the area that it will serve, but it would become a guessing game if a local government were allowed to evict a utility from an area it serves and had planned to serve for decades. Such a result would undermine the clear language of the Grid Bill regarding a coordinated grid and the prevention of further uneconomic duplication of facilities, and would lead to an unacceptable outcome by allowing local governments, not the Legislature or the Commission, to be the ultimate decision-maker as to where a utility can serve. The Legislature clearly did not give local governments powers that are superior to the Commission's in this area. Under the County's scenario, utilities' stranded cost could quickly mount, and rates would

increase unnecessarily due to uneconomic duplication of facilities, which is exactly what the Grid Bill is supposed to prevent.

### **The Facts**

Prior to 1987 the COVB had served the disputed area for decades without entering into a franchise agreement with the County. FECA believes the COVB's facilities in the County were, and are, located in state, city, and federally-owed rights-of-way, in private easements, and some facilities are in the County's rights-of-way. In 1972, the Commission approved the original territorial agreement between COVB and FPL, and the Commission has approved several modifications to the agreement. The territorial agreement grants COVB exclusive authority to serve the disputed area. The agreement also provides that FPL cannot serve the disputed area. The franchise agreement entered into between the COVB and the County in 1987 is irrelevant to the territorial agreement. Moreover, the termination of the franchise agreement does not have any effect on the COVB's right to continue using state, city, and federally-owed rights-of-way or private easements. FECA believes the termination of the agreement does not affect COVB's rights to continue using the County's rights-of-way, but even if it does, Section 361.01 authorizes electric utilities to use eminent domain to obtain easements they require, both on public and private lands, and COVB can obtain the easements it needs to continue providing service in the disputed area.

### **The County's Authority to Enter into Franchise Agreements Does Not Include the Power to Prevent an Electric Utility from Providing Service in its Commission-Approved Service Area or to Designate Which Utility can Serve**

The County clearly has the right to adopt reasonable rules and regulations for utilities that utilize its rights-of-way and has other rights that generally are associated with the powers to franchise. However, the County's franchise authority does not include the ability to dictate

which electric utility can serve in a given area. The Grid Bill emphatically reserves that jurisdiction to the Commission and renders the powers and jurisdiction of all other governmental entities, including counties subordinate to the Commission's "exclusive and superior" jurisdiction, as section 366.04(1), Florida Statutes, states that the Commission's jurisdiction is "exclusive and superior to that of . . . counties."

The County's assertion that it can unilaterally assign the disputed area to a utility other than COVB raises antitrust issues, as noncompetitive agreements must be approved by the Commission.<sup>3</sup> Anticompetitive conduct is only entitled to state action immunity from antitrust liability if: (1) the conduct is performed pursuant to a clearly articulated policy of the state to displace competition with regulation; and (2) the conduct is closely supervised by the state.<sup>4</sup> The State's articulated policy is that the Commission shall regulate and supervise service territories of electric utilities. FECA believes that if the County attempted to unilaterally award an exclusive, noncompetitive service territory to a utility that did not already have approval from the Commission to exclusively serve the area, the County's actions could violate anti-trust laws.

Ironically, even if the County were able to award the area to another utility, FECA believes the only electric utility that is immediately adjacent to the disputed area is FPL. Of course FPL is expressly prohibited from serving the disputed area by the territorial agreement/contract that it executed with COVB, and that agreement cannot be modified or terminated without approval from the Commission.<sup>5</sup> Again, the County's presumption that it can unilaterally award the disputed area to a utility other than COVB is baseless. Likewise,

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<sup>3</sup> See State v. Willis, 310 So. 2d 1 (Fla. 1975).

<sup>4</sup> California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed.2d 233 (1980).

<sup>5</sup> Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989).

termination of the franchise agreement will have no effect on COVB's rights and obligations to serve the disputed area.

**The County Cannot Evict COVB from its Rights-of-Way**

In paragraph 27 of the Petition, the County claims that when a franchise agreement expires, the electric utility must remove its facilities from the rights-of-way<sup>6</sup>. The logical extension of this is that an electric utility that operates without a franchise agreement and uses the local government's rights-of-way can be evicted at will, and with no notice. If either of these allegations were true, it would produce an untenable situation for utilities and their ratepayers and would play havoc with the electric grid and utility rates. It also would allow local governments to extort unlimited fees and other concessions from electric utilities that are simply trying to provide electricity to the public at the lowest cost possible by using the existing rights-of-way. This is an extremely important issue for all of Florida's electric cooperatives, many of which operate without any franchise agreements. FECA believes the County is wrong for several reasons, including: an electric utility's ability to use eminent domain to obtain easements they require on both public and private lands; various equitable easements that may exist such as an easement of necessity or a prescriptive easement; and the lack of authority cited by the County. FECA doubts that all, or even a significant portion, of COVB's facilities are located in the County's rights-of-way, but even if they are the COVB has several options for providing service to its ratepayers once the franchise agreement expires.

The County incorrectly assumes that the only authority COVB has to utilize the rights-of-way is obtained from its franchise agreement. The County acknowledges that COVB utilized the

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<sup>6</sup> "Given the conditional nature of a utility's placement of facilities pursuant to a franchise, after the expiration of the Franchise COVB shall no longer have any right to occupy the County's property or utilize any public easements. Thus, COVB shall be required to remove the Electric Facilities unless COVB can negotiate a sale or other transfer to the successor electric service provider." (Footnote omitted.)

County's rights-of-way to provide service before there was a franchise agreement. The COVB's previous use of the rights-of-way should create an equitable easement that allows the COVB to continue using the County's rights-of-way once the franchise agreement expires. In addition, section 361.01, Florida Statutes, authorizes the COVB to use eminent domain to obtain easements they require, including easements in the County's rights-of-way.

The authority cited by the County is not relevant and is not even a final order. The issues in Lee County Electric Cooperative, Inc. v. City of Cape Coral<sup>7</sup> are whether the utility's facilities are in a private easement or a municipal right-of-way, and whether the city or the co-op must pay to relocate the facilities. There is no mention of the co-op being forced to remove its facilities altogether. In addition, review has been requested at the Florida Supreme Court and it is not a final order. The County's reliance on section 337.401(2), Florida Statutes, for the proposition that it can deny use of its rights-of-way for no cause also is misplaced.<sup>8</sup> Section 337.401 authorizes local governments to "prescribe and enforce reasonable rules or regulations" for the placement of utility facilities in rights-of-way. While section 337.403 addresses the relocation of utility facilities that interfere with the government's use of its rights-of-way, there is no authority in Chapter 337 for a local government to require a utility to simply remove its facilities from a right-of-way or for a local government to completely prohibit any utility from using its rights-of-way under any circumstance without good cause.

### **The County Cannot Become an Electric Utility**

The County asserts that it can provide electric service to the disputed area. For support, the County cites section 125.01(1)(q), Florida Statutes, which lists numerous services that counties are authorized to provide, including water and wastewater utilities, through municipal

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<sup>7</sup> Fla. L. Weekly D1082 (Fla. 2d DCA May 23, 2014).

<sup>8</sup> Paragraph 23 of the Petition.

services benefit or taxing units. However, neither Section 125.01(1)(q), nor any other subsection of Chapter 125 authorizes counties to own or operate electric utility systems. FECA notes that section 125.3401, Florida Statutes, also addresses a county's ability to purchase or sell water, sewer, and wastewater reuse utilities. Noticeably absent from both sections is any reference to electric utilities or the provision of electric service to the public. Based upon a basic tenant of statutory construction, *expressio unius est exclusio alterius*, the listing of the other utility services excludes electric utility services, and therefore Chapter 125 does not authorize the County to provide electric service to the public.

### **Conclusion**

The Grid Bill gives the Commission exclusive jurisdiction to determine which electric utility shall serve a given area or specific customers. The County cannot unilaterally select an electric utility to replace COVB and the County cannot become an electric utility. Therefore, the declaratory relief sought by the County cannot be granted and the Petition should be dismissed.

Dated this 14<sup>th</sup> day of August, 2014.

Respectfully submitted

  
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ATTORNEYS FOR THE FLORIDA ELECTRIC  
COOPERATIVES ASSOCIATION, INC.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae Memorandum of Law, filed on behalf of the Florida Electric Cooperatives Association, Inc., has been furnished by electronic mail on this 14<sup>th</sup> day of August, 2014 to the following:

Ms. Kathryn Cowdery  
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