

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Florida ) DOCKET NO. 970022-EU  
Power & Light Company for ) ORDER NO. PSC-97-0487-PCO-EU  
enforcement of Order 4285, which ) ISSUED: April 28, 1997  
approved a territorial agreement )  
and established boundaries )  
between the Company and the City )  
of Homestead. )  
\_\_\_\_\_ )

ORDER ON CITY OF HOMESTEAD'S MOTIONS

On January 6, 1997, Florida Power & Light Company ("FPL") petitioned the Florida Public Service Commission ("FPSC") to enforce its Order No. 4285, issued on December 1, 1967, in Docket No. 9056-EU. On January 29, 1997, the City of Homestead ("City" or "Homestead") filed the following motions: (1) a Motion to Dismiss for Failure to Join Indispensable Parties, (2) Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter, (3) Motion to Dismiss for Failure to State a Cause of Action, (4) the City of Homestead's Motion to Strike, (5) Motion to Strike, and (6) a Request for Oral Argument. On February 10, 1997, FPL filed In Response to the City of Homestead's Motions. The City responded by filing a Reply of the City of Homestead to Florida Power & Light Company's Memorandum.

In considering the City's motions to dismiss, the facts set forth in FPL's petition are viewed in the light most favorable to FPL in order to determine if FPL's claim is cognizable under the provisions of Section 366.04(2), Florida Statutes, and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code.

Motion to Dismiss for Failure to Join Indispensable Parties:

The purpose of this proceeding is to resolve a territorial dispute between two utilities, both parties to this proceeding. Utility customers are not indispensable parties to this proceeding. Accordingly, the City's Motion to Dismiss for Failure to Join Indispensable Parties is denied.

Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter:

In its Motion to Dismiss for Lack of Jurisdiction over the Subject Matter, the City states that FPL failed to allege any statutory authority or Commission rule that procedurally or substantively grants FPL the right to file its petition. The City maintains that FPL should have filed its petition for enforcement

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of an agency action "in the circuit court where the subject matter of the enforcement is located."

Section 366.04, Florida Statutes, gives the Commission considerable authority and responsibility to ensure the adequacy and reliability of Florida's electric grid, and specifically to avoid uneconomic duplication of facilities. Section 366.04(5), Florida Statutes (1995); See, Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989) (The City of Homestead brought an action in circuit court to modify its territorial agreement with FPL. The Supreme Court concluded that the PSC must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose). See also Utilities Commission of City of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985).

When the Commission approved the 1967 territorial agreement between FPL and the City, that agreement became an order of the Commission. Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989) (Stating that an agreement has no existence apart from the Commission order approving it). See also City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965) ("...the practical effect of such approval is to make the approved contract an order of the commission..."); City of Homestead v. Beard, 600 So.2d 450, 454 and 455 (1992) (The Supreme Court ruled that the "the...[A]greement is not terminable at will by the parties and may only be modified or terminated by the [Commission] in a proper proceeding . . . " )

The City's Motion to Dismiss for Lack of Jurisdiction over the Subject Matter is denied.

Motion to Dismiss for Failure to State a Cause of Action:

The City's Motion to Dismiss for Failure to State a Cause of Action states that this Commission must dismiss FPL's petition because it fails to set forth ultimate facts necessary to state a cause of action.

FPL is not required to make a specific allegation in the body of its petition that a territorial dispute is at issue. What constitutes a City-owned facility has been identified as an issue in this proceeding and is a reasonable question for us to resolve. FPL's petition clearly sets forth a sufficient cause of action. Therefore, the City's motion is denied.

City of Homestead's Motion to Strike:

In its first Motion to Strike, the City requests that FPL's Paragraph 17 of FPL's Petition for Enforcement of Order be stricken. Paragraph 17 reads as follows:

17. If the Commission finds that the City's violation of Order No. 4285 was willful and intentional, FPL further prays that the commission assess the City for Petitioner's reasonable attorneys' fees and such other penalties the commission deems appropriate.

In utility regulation, any authority to award attorney fees must come from the statute creating the utility regulatory body. FPL failed to allege any statutory authority for the award of attorney fees. Therefore, the City's motion to strike is granted and FPL's request for attorneys' fees and other penalties is hereby stricken from the pleading. However, FPL has leave to amend its petition. Crane V. Barnett Bank of Palm Beach County, 22 Fla. L. Weekly D520, February 26, 1997.

The City of Homestead's second Motion to Strike, filed pursuant to Rule 1.140, Florida Rules of Civil Procedure, states that the first paragraph of FPL's Memorandum in Response to the City of Homestead's Motions is without record foundation and is, in fact, inaccurate and incomplete. The City has failed to allege sufficient basis to strike FPL's response to the City's motions. Accordingly, the City's first and second Motions to Strike are denied.

Request for Oral Argument:

The City alleges that the complexity of the issues requires oral argument in order for the Commission to understand the arguments contained in the City's Motions. FPL does not oppose the City's request for Oral Argument. I find that oral argument is not necessary to resolve the issues raised by the pending motions. Therefore, the City's request for Oral argument is denied.

Based on the foregoing, it is therefore

ORDERED by Commissioner Diane Kiesling, as Prehearing Officer, that the City of Homestead's Motion to Dismiss for Failure to Join Indispensable Parties, is denied. It is further

ORDERED that the City of Homestead's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter, is denied. It is further

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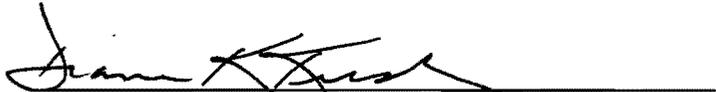
ORDERED that the City of Homestead's Motion to Dismiss for Failure to State a Cause of Action, is denied. It is further

ORDERED that the City of Homestead's first Motion to Strike is granted. It is further

ORDERED that the City of Homestead's second Motion to Strike is denied. It is further

ORDERED that the City of Homestead's request for Oral Argument is denied.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 28th day of April, 1997.

  
DIANE K. KIESLING, Commissioner and  
Prehearing Officer

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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.

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Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, 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 Director, Division of Records and Reporting, 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.

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