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January 29, 1997

Ms. Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RE: Docket No. 970022-EU
In re: Petition of Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU

Dear Ms. Bayó:

Please find enclosed an original and 15 copies of a Memorandum of Law in Support of Motions Filed by the City of Homestead for filing in the above-referenced docket. Please acknowledge your receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to the undersigned.

Thank you for your assistance in this matter.

Sincerely,

Frederick M. Bryant

FMB/km
Enclosures

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BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU.

Docket No. 970022-EU

MEMORANDUM OF LAW
IN SUPPORT OF MOTIONS FILED BY THE CITY OF HOMESTEAD

In 1967, the City of Homestead ("City") and Florida Power and Light Company ("FPL") entered into a Territory Agreement which was approved by the Commission in Order No. 4285 issued on December 1, 1967 ("Order"). The City was not subject to the Commission's jurisdiction at the time of the entry of the Order. In 1993, the City entered into a lease agreement ("Lease") with Silver Eagle Distributors ("Silver Eagle") for real property owned by the City and located in the City's Park of Commerce and within the city limits. The Park of Commerce was vacant land acquired by the City after Hurricane Andrew in an effort to help restore the area's devastated economy and to provide a location for the reconstruction of the lessee's business. In 1994, the City entered into a similar lease agreement with Contender Boats ("Contender"). The City is furnishing electric service to buildings located on the land leased to Silver Eagle and Contender based on the belief that the buildings are "City-owned" facilities, and thus fall within the meaning of an exemption contained in the Territory Agreement.

Paragraph 8 of the Agreement provides that the City will furnish electric service to "City-owned" facilities notwithstanding that said facilities are located within the service area of FPL. The buildings and the Park of Commerce are in the service area of FPL. Paragraph 8 states in total:

> Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the city shall supply power to and, for the purposes of this Agreement, shall consider that the Homestead Housing Authority Labor Camp

> located on the Easterly Side of Tallahassee Road (S.W. 137th Ave.) is within the service area of the City, including any additions to or extensions of said facilities of the Homestead Housing Authority. **The City's right to furnish service to City-owned facilities, or those owned by agencies deriving their power through and from the City (including but not limited to the Homestead Housing Authority) may be served by the said City, notwithstanding that the said facilities are located within the service area of the company.** (emphasis supplied)

On January 6, 1997, FPL filed a Petition for Enforcement of Order No. 4285 ("Petition"), alleging that the City is in violation of the Order. FPL is asking the Commission find the City in violation of Order No. 4285 based on allegations that the structures being served by the City are not "City-owned" facilities, and that if such facilities were found to be "City-owned," then the City would be engaged in an ultra vires act violative of the Florida Constitution. The City is not named as a Party to the Petition but it has moved to intervene for purposes of filing the various motions referred to herein.

CITY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

FPL has failed to state any statutory authority or Commission rule which grants FPL the right to file a Petition requesting the Commission to enforce an order against another party. Section 120.96 of the Florida Statutes provides that a substantially interested party may file a petition for enforcement of agency action in Circuit Court, not at the affected agency. FPL has failed to file its Petition in the appropriate forum (ie: circuit court) and thus the Commission lacks jurisdiction over FPL's Petition.

In addition, FPL in its Petition asks the Commission to make a judicial determination of ownership of the facilities (buildings) built upon real property owned by the City and leased to Silver Eagle and Contender. In paragraph 11, FPL expressly asserts that ownership of the facilities is the

issue. In paragraph 7, FPL cites to provisions of the Leases in support of its allegation that the City does not own the facilities. Thus, FPL has put the terms and conditions of the Lease Agreements between the City and Silver Eagle and Contender at issue. However, FPL has failed to cite any statutory authority which would provide the Commission with jurisdiction to determine ownership of real property or the rights of parties to a lease agreement.

An agency derives its power from legislative enactment and thus its powers are limited to those expressly or impliedly conferred by statute. State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982) (holding that the Circuit Court had jurisdiction to hear action for declaratory relief challenging the Department of Environmental Regulation's jurisdiction over dredge and fill activities where the Department's claim of jurisdiction was totally unsupported by statute or rule). An agency may not increase its own jurisdiction and has no common law jurisdiction. Falls Chase at 793. In addition, any reasonable doubt over whether an agency has a particular power should be resolved against it. State, Dept. Of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1978) (holding that the Public Service Commission did not have authority to use rate making as a means of regulating the safety of road-building and construction aggregates because a reasonable doubt existed as to whether the legislature intended to confer that authority).

There are no statutes or agency rules which expressly grant the Commission authority to make judicial determinations regarding ownership of real property or improvements located thereon. In addition, two of the parties to the Leases (ie: Silver Eagle and Contender) are not within the regulatory power of the Commission. Thus, the Commission's power is doubtful and should be resolved against it. See Mayo; See also East Central Regional Waste Facilities Operation Board v. City of West Palm Beach, 659 So.2d 402 (Fla. 4th DCA 1995) (holding the Department of

Community Affairs exceeded its jurisdiction by interpreting an agreement involving an entity that was not within its regulatory powers).

Furthermore, FPL seeks an adjudication from the commission that the Leases between the City and Silver Eagle and Contender are unconstitutional because they constitute an ultra vires act on the part of the City violative of the Florida Constitution. Again, FPL has failed to cite to a statute or rule which gives the Commission the power to determine the constitutionality of the Leases. In addition, under Florida law, agencies lack jurisdiction to determine questions of constitutional import. Metropolitan Dade County v. Department of Commerce, 365 So.2d 432 (Fla 3d DCA 1978) (holding that the "Administrative Procedure Act cannot relegate matters of constitutional proportions to administrative agency resolution, nor can it impair judicial jurisdiction to determine constitutional disputes"). While Dade County involved a challenge to the constitutionality of agency action, cases have held that agencies lack the authority to determine other constitutional disputes as well. See Dept. Of Revenue v. Amrep Corp. 358 So.2d 1343 (Fla. 1978); City of Pensacola V. King, 47 So.2d 317 (Fla. 1950) (both holding that agencies do not have jurisdiction to decide the constitutionality of a statute.)

MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

An indispensable party is one whose interest will be substantially and directly affected by the outcome of the case. Amerada Hess Corp. v. Morgan, 426 So.2d 1122 (Fla. 1st DCA 1983) (citing to W.F.S. Co. v. Anniston Natl. Bank, 191 So 300 (Fla. 1939)). In addition, all persons materially interested in the subject matter of a suit should be made parties thereto. Carter v. Howarth, 285 So.2d 442 (Fla. 1st DCA 1973) (holding that where the validity of a trust was at issue, it was proper

to add beneficiaries of the trust and persons who purchased property from the trust as parties to the suit).

FPL in its Petition is asking the Commission to make a judicial determination regarding ownership of improvements based on the terms and conditions of the Leases between the City and Silver Eagle and Contender. However, Silver Eagle and Contender, parties to the Leases whose interests will be affected by the Commission's determination, are not before the Commission.

In addition, FPL is seeking an adjudication by the Commission that the Leases with Silver Eagle and Contender are unconstitutional. Such a determination by the Commission would substantially affect the interests of the parties to the Leases, yet Silver Eagle and Contender (the lessees) are not parties before the Commission.

Because FPL is seeking an adjudication which will substantially affect the interests of parties who are not before the Commission in this proceeding, the City's Motion to Dismiss for Failure to Join Indispensable Parties should be granted.

MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

FPL's allegation that the City is not the owner of the facilities located on the real property leased by the City to Silver Eagle and Contender is without merit and should be dismissed for failure to state a cause of action. The common law rule is that all buildings become a part of the land as soon as they are placed on the freehold. See George W. Thompson, Commentaries on the Modern Law of Real Property, Sec. 1140 (1980). Structures placed on the land become a part of the land as each stone or brick is fastened to the structure. Thompson, Sec. 1140. The Florida courts have relied on the common law rule that ownership of permanent improvements constructed on the land vest in the owner of the land. Burbridge v. Therell, 148 So. 204 (Fla. 1933) (holding that a widower

who constructed a cottage on mortgaged land was not allowed to remove the cottage upon foreclosure as it was a part of the land.) The parties to a lease can contract for a right of removal. Burbridge at 207. However, absent an agreement to the contrary, improvements made by a lessee to real property become a part of the realty, and the lessee has no right to remove the improvements nor does the lessor have an obligation to reimburse the lessee for the improvements. Crawford v. Gulf Cities Gas Corp., 387 So.2d 993 (Fla 2d DCA 1980). Under common law and Florida case law, absent an agreement to the contrary, any improvements constructed on the real property owned by the City and leased to Silver Eagle and Contender become a part of the real property as soon as they are constructed thereon.

FPL alleges in paragraph 11 of its Petition that the City owns the land leased to Silver Eagle and Contender. In addition, FPL has attached to its Petition as Exhibit C a copy of the Lease between the City and Silver Eagle. There is no provision in the Lease which states that the lessee, Silver Eagle, is the owner of the improvements (facilities) or has the right to remove the improvements (facilities) constructed on the City's land. In fact, the Option Agreement attached to FPL's Petition as exhibit D provides that Silver Eagle has the option to purchase from the City the land and the improvements "now or hereafter existing." It would not be necessary for Silver Eagle to contract for an option to buy the facilities from the City if Silver Eagle already owned the facilities.

A complaint may be dismissed on motion if it is without merit. "This want of merit may consist in an absence of law supporting a claim of the sort made, or of facts sufficient to make a good claim, or in disclosure of some fact which will necessarily defeat the claim." Martin v. Highway Equipment Supply Co., 172 So.2d 246, 248 (Fla. 2d DCA 1965) (holding that action was properly dismissed where plaintiff's complaint alleged the existence of an oral contract and the defense of

statute of frauds was raised by motion to dismiss for failure to state a cause of action.) See also Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1973) (holding that action was properly dismissed where plaintiff conceded that injuries were sustained during the course of employment and Workmen's Compensation Act precluded a private remedy.); Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067 (11th Cir. 1984) (holding that usury action was properly dismissed where credit agreement attached to plaintiff's complaint complied with federal law).

FPL has failed to allege facts that, under common law and Florida case law, would establish that the City is not the owner of the improvements (facilities) located on the real property leased by the City to Silver Eagle and Contender. In fact, FPL discloses facts on the face of its Petition and attached exhibits that defeat its claim. (ie: FPL alleges that the City owns the land and attaches a copy of a the Lease which does not provide that the lessee owns the improvements or can remove the improvements and the option grants Silver Eagle the right to purchase the improvements.) The City's Motion to dismiss FPL's Petition for failure to state a cause of action should be granted because the common law and Florida case law do not support FPL's position and FPL alleges facts within its Petition that defeat its claim. See Martin.

MOTION TO STRIKE

FPL claims an entitlement to attorney's fees and penalties in paragraph 17 of its Petition. However, FPL fails to state the statutory or contractual basis for its claim. Florida law requires that a claim for attorney's fees be specifically pled. Stockman v. Downs, 573 So.2d 835 (Fla 1991). This requirement of specificity means that a party must indicate the statutory or contractual basis on which the claim is based. Dealers Insurance Co. V. Haideo Investments Enterprises, Inc., 638 So.2d 127 (Fla. 3d DCA 1994). Because FPL has failed to cite the statutory basis for its claim, the claim by FPL

for attorney's fees should be stricken from the Petition pursuant to Rule 1.140, Florida Rules of Civil Procedure.

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Attorneys for the City of Homestead

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 15 copies of the foregoing Memorandum of Law in Support of Motions Filed by the City of Homestead were filed with **Ms. Blanca S. Bayó, Director, Division of Records and Reporting, Florida Public Service Commission, Room 110, Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850**; and that a true and correct copy of the foregoing was furnished by Hand Delivery to **Lorna R. Wagner, Esquire**, Division of Legal Services, Florida Public Service Commission, Room 370, Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that true and correct copies of the foregoing were furnished by regular U.S. mail to **Wilton R. Miller, Esquire**, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, FL, 32301; and **David L. Smith, Esquire**, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100 on this 14th day of February, 1997.

Attorney

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