

**Eric Fryson**

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**From:** Patrick Flanigan [patrick@bartonsmithpl.com]  
**Sent:** Monday, April 02, 2012 11:37 AM  
**To:** Filings@psc.state.fl.us  
**Cc:** 'Bart'; 'Greg Oropeza'; dedenkwf@bellsouth.net  
**Subject:** Docket Number 120054-EM  
**Attachments:** 4-2-2012 Complainants' Opposition to UB's Response and Motion to Dismiss.pdf; 4-2-2012 Complainants' Request for Oral Argument on Opposition to UB's Response and Motion to Dismiss.pdf

Dear Sirs,

Pursuant to the Florida Administrative Code and the PSC's rules regarding electronic filing, the firm of Barton Smith, P.L. hereby submits an Opposition to Respondent, Utility Board of the City of Key West, Florida D.B.A Keys Energy Services' Response to Complaint and Motion to Dismiss and Request for Oral Argument on behalf of the Complainants, Robert D. Reynolds and Julianne C. Reynolds.

The person filing this response is:

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Docket Number 120054-EM

This Opposition and Request for Oral Argument are being filed on behalf of the Complainants, Robert D. Reynolds and Julianne C. Reynolds.

Total Number of Pages of Opposition: 7  
Total Number of Pages of Request for Oral Argument: 2

Total Number of Pages: 9

There are no attachments or exhibits to the Opposition or Request for Oral Argument.

Thank you.

Sincerely,

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BEFORE THE STATE OF FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS

Complainants,

v.

UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d.b.a KEYS ENERGY SERVICES,

Docket No. 120054

Respondents.

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**COMPLAINANTS, ROBERT D. REYNOLDS AND JULIANNE C. REYNOLDS’  
OPPOSITION TO RESPONDENT, UTILITY BOARD OF THE CITY OF KEY WEST,  
FLORIDA D.B.A KEYS ENERGY SERVICES’ RESPONSE TO COMPLAINT AND  
MOTION TO DISMISS**

Complainants, ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS (collectively, “Reynolds”), by and through undersigned counsel and pursuant to the Florida Rules of Administrative Code, file their opposition to the Respondent, UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d.b.a KEYS ENERGY SERVICES’ (“KES”) Response to Complaint and Motion to Dismiss, and in support state as follows:

**PROCEDURAL HISTORY**

1. On March 5, 2012, Mr. and Mrs. Reynolds filed a Complaint with the Florida Public Service Commission (“PSC”), because KES has refused to provide power to Reynolds and other similarly situated property owners located on No Name Key even after the property owners had remitted payment for construction and installation of transmission power lines to their properties. *See* Reynolds’ Complaint ¶¶ 1, 15 – 16, 21 – 34, previously filed in this action and incorporated herein by reference. Reynolds’ Complaint alleges that the PSC approved a territorial agreement for KES wherein KES is the exclusive provider of commercial electric

service to the lower Florida Keys, including No Name Key, where the Reynolds home is located. *Id.* at 12 – 13. Finally, Reynolds’ Complaint alleges that KES has refused to provide commercial power to Reynolds and other No Name Key Property Owners because Monroe County has enacted a land development regulation prohibiting the extension of utility lines by public utilities to Coastal Barrier Resource Zones, which certain No Name Key Property Owners are located within.<sup>1</sup> *Id.* at ¶¶ 35 – 46.

2. The prayer for relief in Reynolds’ Complaint requests the PSC: (a) exercise jurisdiction over this action and the parties and hold an evidentiary hearing on the issues raised; (b) issue an Order and/or Mandate requiring KES to extend commercial electrical transmission lines to each property owner of No Name Key, Florida; (c) Impose upon KES any fine, forfeiture, penalty, or other remedy provided by statute; (d) Issue a finding that Monroe County cannot unreasonably withhold building permits from KES’ customers based solely on their property location on the island of No Name Key; (e) Award reasonable attorney’s fees and costs for the prosecution of this action; and (f) Award such other and supplemental relief as may be just and necessary under the circumstances.

3. On March 28, 2012, KES filed its Response to Complaint and Motion to Dismiss (“Motion to Dismiss”) in the above-styled action based upon the purported existence of a new Line Extension Agreement, arguing that KES’ Board’s vote to approve the new Line Extension Agreement rendered Mr. and Mrs. Reynolds’ Complaint moot. *See* KES Motion to Dismiss, previously filed in this action and incorporated herein by reference.

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<sup>1</sup> Reynolds’ property is not located within a Coastal Barrier Resource Zone, but the extension of utility lines to their property would require KES to place utility lines through a Coastal Barrier Resource Zone.



**MEMORANDUM OF LAW IN OPPOSITION TO  
THE UTILITY BOARD'S RESPONSE TO COMPLAINT AND MOTION TO DISMISS**

KES' Response and Motion to Dismiss should be denied as it improperly argues the existence of facts beyond the four corners of the Complaint. Furthermore, assuming *arguendo*, that KES' board has voted to provide power to Reynolds, until commercial power is available, Reynolds' Complaint is not moot. Finally, pursuant to Rule 28-106.204(2), Florida Administrative Code, a motions to dismiss a petition must be filed no later than 20 days after service of the petition unless otherwise provided by law, and in this instance the law does not provide otherwise.

**I. KES' arguments in favor of dismissing the Reynolds' complaint goes outside of the four corners of the complaint, and must be denied.**

"It is well established that a motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action." *See In re Lake Utility Services, Inc.*, 1999 WL 246832 (1999), *citing Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in determining the merits of a motion to dismiss is whether, assuming all the allegations in the complaint are true, the petition states a cause of action upon which relief may be granted. *Id.* When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.* Consequently, the trial court, or in this case, the PSC, is bound by the four corners of the complaint and its exhibits and attachments, and all ambiguities and inferences drawn from the recitals in the complaint, together with the exhibits attached, must be construed in the light most favorable to the plaintiff. *See Lonestar Alternative Solution, Inc. v. Leview-Boymelgreen Soleil Developers, LLC*, 10 So.3d 1169 (Fla. 3d DCA 2009).

A motion to dismiss tests whether the plaintiff has stated a cause of action, not whether the plaintiff will prevail at trial. *Id.* It is well settled that the PSC is bound by this standard of law.

Here, KES' brief four paragraph Motion to Dismiss solely goes to events well outside of the four corners of the Complaint, attaching numerous documents and agreements that took place after the complaint was filed, and argues that the purported vote approving the Line Extension Agreement moots Mr. and Mrs. Reynolds' case. KES asks the PSC to accept and interpret the terms of the purported Line Extension Agreement attached to its Motion to Dismiss instead of reviewing the sufficiency of the allegations of the complaint. Motions to dismiss are not forums to litigate the facts of the case.

In the case at bar, the facts alleged by Reynolds are that they, along with the other No Name Key Property Owners, requested electric service from KES. KES agreed to provide such service and billed the future customers for the installation of the power lines. KES was paid for the power lines, and refused to provide service. Reynolds requests the PSC order KES to provide service and issue any such orders and/or writs required to force KES to provide commercial power to KES. Therefore, Reynolds has stated a valid cause of action and KES' Motion to Dismiss should be denied. KES' argument based on mootness is facially deficient because it attempts to bring facts not alleged in the complaint. Thus, the PSC should deny KES' Motion to Dismiss and allow this action to proceed.

**II. KES' arguments in support of dismissing Mr. and Mrs. Reynolds' complaint do not render Mr. and Mrs. Reynolds' complaint moot.**

The PSC has the power over electric utilities to require power conservation and reliability within a coordinated grid, for operational as well as emergency purposes. Fla. Stat. §366.04(2)(c). The execution of a contract with a third party does not render Mr. and Mrs.

Reynolds' Complaint moot because KES has failed to provide reliable power to Reynolds. Until such time as reliable commercial power is available to Reynolds and Reynolds is allowed to connect, Reynolds' Complaint is not moot.

KES argues that by entering into the purported Line Extension Agreement, it is providing the very relief sought in Reynolds' Complaint, to wit, requiring KES to extend commercial electrical transmission lines to the property owners of No Name Key, Florida. *See* KES Motion to Dismiss, ¶4. The Line Extension Agreement is not the relief sought by Reynolds. The Line Extension Agreement is not the act of providing commercial electrical service to No Name Key. The Line Extension Agreement attached to KES' Response and Motion to Dismiss is an open-ended, unconscionable, and unilaterally drafted contract forced upon the residents of No Name Key through coercive measures which provides no enforcement mechanisms for the residents of No Name Key to ensure KES provides commercial electrical service to No Name Key. Conceivably, KES could take several years, if not decades, to provide commercial electricity to No Name Key under the Line Extension Agreement, as the Line Extension Agreement provides no time frames, schedules and assurances for completion. Until the residents of No Name Key, Florida who have paid for commercial power are connected, the issue of KES providing commercial electrical service to No Name Key is a justiciable issue, ripe for the PSC to render an Order upon.

Additionally, Mr. and Mrs. Reynolds' Complaint seeks relief over and above the mere extension of commercial electrical service to No Name Key. Specifically, Mr. and Mrs. Reynolds also seek the imposition of applicable fines upon KES, and a finding that Monroe County cannot unreasonably withhold building permits from KES' customers based solely on their property location on the island of No Name Key, and an award of attorneys' fees and costs.



The request for the extension of commercial electrical service is only one part of Mr. and Mrs. Reynolds' Complaint, and, even though KES is now claiming that it will extend such service, this case is far from moot. Clearly, the existence of a contract between KES and the residents of No Name Key does not render the issue of whether Monroe County can prevent the connection of individual homes to commercial power, moot. Despite the execution of the Line Extension Agreement all six (6) of Reynolds' prayers for relief are justiciable and ripe for a decision.

After attempting to submit payment for their pro-rata share of the line extension, Mr. and Mrs. Reynolds' payment was returned, and as an explanation for why said funds were refused, KES stated that Mr. and Mrs. Reynolds could not provide payment for their pro-rata share of Line Extension Agreement because the line extension was not complete. By KES' own admission, the line extension is not complete and therefore the issue of providing commercial electrical service to No Name Key is neither settled nor moot.

**III. KES' Motion to Dismiss is untimely and must be denied by law.**

Reynolds' Complaint was filed and served on March 5, 2012 by electronic mail. KES filed its Motion to Dismiss on March 28, 2012. Pursuant to the Florida Administrative Code and the PSC's rules regarding electronic mail service, the Complaint was deemed served on March 5, 2012. *See* Rule 28-106.103, Florida Administrative Code. Therefore, KES' motion to dismiss was required to be filed on or before March 26, 2012. *See* Rule 28-106.204(2), Florida Administrative Code. KES may argue that it served its motion within the requisite twenty days, but this argument is in error because KES did not file the motion within the required time frame, which is the standard according to the Florida Administrative Code. Consequently, KES' motion is untimely and must be denied. *See In re Lake Utility Services, Inc., 1999 WL 246832 (1999).*



WHEREFORE, Complainants ROBERT D. REYNOLDS and JULIANNE C. REYNOLDS respectfully request the Commission enter an Order denying the Respondent's, UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA d/b/a KEYS ENERGY SERVICES Response to Complaint and Motion to Dismiss, and granting such other, further relief the Commission may deem appropriate.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail and Electronic Mail to Nathan E. Eden, Esq., Nathan E. Eden, P.A. 302 Southard Street, Suite 205, Key West, Florida 33040 this 2<sup>nd</sup> day of April, 2012.

Respectfully submitted,

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