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January 15, 2015

BY ELECTRONIC DELIVERY

Ms. Carlotta Stauffer, Clerk
Room 152, Gunter Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: PSC Docket No. 140244-EM

Dear Ms. Stauffer:

On behalf of the Florida Municipal Electric Association (FMEA), Tallahassee, Florida, attached for filing in the above-styled docket is the attachment to Document No. 00268-15 titled: Florida Municipal Electric Association, Inc.'s Amicus Curiae Comments. If there are any questions regarding this filing, please contact me at (407) 933-9777.

Thank you for your assistance in this filing.

Sincerely,

/s/ Arthur J. "Grant" Lacerte Jr.

Arthur J. "Grant" Lacerte Jr.
Vice President and General Counsel
Kissimmee Utility Authority
On behalf of Florida Municipal Electric Association (FMEA)

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 22, 2014

FLORIDA MUNICIPAL ELECTRIC ASSOCIATION, INC.'S AMICUS CURIAE MEMORANDUM OF LAW

The Florida Municipal Electric Association, Inc., ("FMEA"), by its filing of August 14, 2014, requested leave to file this Amicus Curiae Memorandum of Law addressing the issues raised in the Petition for Declaratory Statement and Such Other Relief as May be Required (the "Petition") filed on behalf of the Indian River County Board of County Commissioners (the "Board"). FMEA's motion was granted in Order No. PSC-14-0419-PCO-EM, issued August 19, 2014. All parties in this proceeding have agreed on a filing deadline of August 22, 2014, for all amici curiae and intervenor substantive responses, which was approved in Order No. PSC-14-0425-PCO-EM, issued August 19, 2014. Accordingly, this Amicus Curiae Memorandum of Law is timely filed.

INTRODUCTION

The issues before the Florida Public Service Commission (the "Commission") are of great concern to FMEA and the 34 municipally-owned electric utilities that comprise its membership. The Commission will decide whether it should issue declaratory statements on questions involving the provision of electric service to certain unincorporated areas of Indian River County (the "County") currently served by the City of Vero Beach (the "City") pursuant to a territorial agreement between the City and Florida Power & Light Company ("FPL") approved

by the Commission.[1] The Board essentially asserts that the franchise agreement between the County and the City, rather than and superlative to the Commission-approved territorial agreement, is the singular source of the City's authority to operate that portion of its electric system located in unincorporated Indian River County. The Commission's responses to the Board's Petition could directly and adversely impact the Commission-approved territorial agreements by which all of FMEA's members provide electrical service to customers located outside of their corporate or municipal boundaries.

FMEA urges the Commission to either deny or issue declaratory statements in the negative to the statements requested by the County in paragraphs 57d thru 57i and 57m thru 57n[2] because the County wrongfully supposes that the franchise agreement between the City and the County is the "sole legal authority" for the City to use the County's rights-of-way to provide electric service to unincorporated portions of the County.[3] It is the Commission, not a county or municipality, which possesses exclusive and superior jurisdiction over territorial matters and has the legislatively-mandated responsibility for the planning, development, and maintenance of a coordinated electric power grid throughout Florida. For the Commission to hold otherwise would nullify the Commission's responsibility for a coordinated electric power grid in Florida,

[1] The current territorial agreement between the City and FPL, and its predecessors, were approved by the following Commission orders: In re Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach (Docket No. 72045-EU; Order No. 5520, August 29, 1972); In re Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida (Docket No. 73605-EU; Order No. 6010, January 18, 1974); In re Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas (Docket No. 800596-EU; Order No. 10382, November 3, 1981); In re Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas (Docket No. 800596-EU; Order No. 11580, February 2, 1983); and In re Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement (Docket No. 871090-EU; Order No. 18834, February 9, 1988).

[2] Although this memo does not address the County's requested statements in paragraphs 57a thru 57c and 57j thru 57l, FMEA supports the City in its position on those statements articulated in its Motion to Dismiss and Response in Opposition, filed August 14, 2014.

[3] Petition at ¶23.

leaving the Commission-approved territorial agreements to be nothing more than vestiges twisting like a weathervane to the desires of the nearly 500 local governments in the State.

HISTORICAL BACKGROUND

In the infancy of Florida's electric industry, utilities were regulated on a piecemeal basis by local governments. Private utilities would negotiate franchises from municipalities to provide service within all or part of the municipalities' respective jurisdictions, and the utilities' rates and quality of service were regulated by the municipalities in which the services were provided.[4] In 1951, to create uniform rate and service regulation of investor-owned public utilities throughout the State, the Florida Legislature vested regulatory jurisdiction over these utilities in the Florida Railroad and Public Utilities Commission, the predecessor to the Commission.[5]

Although not specifically addressed in the 1951 legislation, the Commission's power to review and approve territorial agreements involving investor-owned utilities was implicit in the authority granted to the Commission and was a vital component of the extensive regulatory scheme developed for public utilities.[6] In 1965, the Florida Supreme Court in City Gas Co. v. Peoples Gas System provided legal surety for that implicit authority by finding that without Commission approval, territorial agreements between utilities would be invalid under federal antitrust principles.[7] Since then, the Court has "repeatedly held that territorial agreements are

[4] Staff of Florida Senate Commerce Committee, A Review of Chapter 366, Florida Statutes, Public Utilities, Prepared Pursuant to the Regulatory Reform Act, Section 11.61, Florida Statutes (Jan. 1980).

[5] Ch. 26545, 1951 Fla. Laws 123.

[6] The Commission itself had recognized its authority over electric service territories as early as 1958, when it approved an administrative agreement between Florida Power Corporation and the Orlando Utilities Commission that divided territory to prevent duplication of electric facilities. See In re Application of Florida Power Corporation for approval of an administrative agreement between said company and the Orlando Utilities Commission (Docket No. 5256-EU; Order No. 2595, Mar. 28, 1958).

[7] City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429, 436 (Fla. 1965).

sanctioned and actively encouraged by the State, both as a means to avoid the harms incident to competitive practices and as a means of resolving disputes between utilities."[8]

In 1974, with the enactment of what is known as the "Grid Bill," the Legislature codified the Commission's authority to approve and review territorial agreements involving investor-owned utilities, and also expressly granted the Commission jurisdiction over rural electric cooperatives and municipal electric utilities for approving territorial agreements and resolving territorial disputes.[9] The Grid Bill thus made the Commission ultimately responsible for "the planning, development and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."[10]

Since its passage in 1974, the Grid Bill has been the heart of the Commission's regulatory authority over electric service territories in Florida. Every Florida Supreme Court opinion regarding electric territorial matters has acknowledged the Commission's authority and responsibility under the Grid Bill to prevent uneconomic duplication of electric facilities by the orderly establishment of service territories.[11]

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[8] Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. L. Rev. 407, 413 (1991).

[9] Ch. 74-196, 1974 Fla. Laws 538 (codified at Fla. Stat. §§ 366.04(2), .05(7)-(8) (2014)).

[10] Fla. Stat. § 366.04(3) (2014).

[11] See Florida Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253 (Fla. 1990); Public Serv. Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989); Lee County Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987); City Gas Co. v. Florida Pub. Serv. Comm'n, 501 So. 2d 580 (Fla. 1987); Gulf Power Co. v. Florida Pub. Serv. Comm'n, 480 So. 2d 97 (Fla. 1985); Utilities Comm'n v. Florida Pub. Serv. Comm'n, 469 So. 2d 731 (Fla. 1985); Gulf Coast Elec. Coop. v. Florida Pub. Serv. Comm'n, 462 So. 2d 1092 (Fla. 1985); Escambia River Elec. Coop. v. Florida Pub. Serv. Comm'n, 421 So. 2d 1384 (Fla. 1982); Gulf Power Co. v. Hawkins, 375 So. 2d 854 (Fla. 1979); Gainesville-Alachua County Regional Elec., Water & Sewer Utils. Bd. v. Clay Elec. Coop., 340 So. 2d 1159 (Fla. 1976).

To date, approximately 325 electric territorial agreements covering Florida's 410 municipalities and 67 counties[12] have been approved by the Commission.[13] If each of these nearly 500 jurisdictions could choose their own retail electric provider, or unilaterally evict an existing electric utility provider at the end of a franchise agreement term, there would be no coordinated electric power grid in Florida. There would be, instead, chaos, with each of these nearly 500 jurisdictions exercising Commission-like authority over their own pieces of the State, to the detriment and contravention of the licit and binding choice made by the Legislature in enacting the Grid Bill and vesting exclusive jurisdiction in the Commission to handle these matters for the benefit of the entire State.

ISSUES PRESENTED

FMEA believes that the County's Petition, at its core, presents the following questions for the Commission to address:

Issue No. 1: Are the Commission's orders and jurisdiction with respect to electric utility service areas and territorial matters exclusive and superior to franchise agreements authorized by municipalities and counties?

Issue No. 2: Does a county or municipality, by virtue of an authorized franchise agreement, have the right or power to determine what utility provides electric service in an existing Commission-approved service area?

Issue No. 3: Does an electric utility have the right to continue to serve customers within its Commission-approved service territory after the expiration of a franchise agreement which purports to exclusively grant franchise rights to provide retail electric utility service within portions of that existing Commission-approved service territory?

[12] "There are 282 cities, 109 towns, and 19 villages in the U.S. state of Florida, a total of 410 incorporated municipalities. They are distributed across 67 counties, in addition to 66 county governments." http://en.wikipedia.org/wiki/List_of_municipalities_in_Florida (Aug. 19, 2014). (After consolidation of the City of Jacksonville and Duval County in 1968, the City of Jacksonville City Council serves as the governing body for the consolidated city and county.)

[13] This number is based on a search of Commission records conducted on August 19, 2014.

SHORT ANSWERS

FMEA further believes that the questions presented require the following answers:

Issue No. 1: Yes. The Commission's jurisdiction under Chapter 366, Florida Statutes, over electric utility service areas and territorial matters is exclusive and superior to any and all franchise agreements authorized by municipalities and counties.

Issue No. 2: No. A County or municipality, under the Florida Supreme Court decision in Storey v. Mayo, does not have the right or power by virtue of an authorized franchise agreement or mechanism to determine what utility provides electric service in an existing Commission-approved service area.

Issue No. 3: Yes. An electric utility has the right, under the Florida Supreme Court decision in Homestead v. Beard, to serve customers within its Commission-approved service territory after the expiration of a franchise agreement which purports to exclusively grant franchise rights to provide retail electric utility service within portions of that existing Commission-approved service territory.

DISCUSSION

1. Are the Commission's orders and jurisdiction with respect to electric utility service areas and territorial matters exclusive and superior to franchise agreements authorized by municipalities and counties?

FMEA urges that the clear answer to this question is yes. Section 366.04, Florida Statutes (2014), sets forth the Legislature's grant of jurisdiction to the Commission. Specifically, Section 366.04(1) articulates the Legislature's clear mandate that the Commission's jurisdiction is exclusive and superior to that of all other state agencies, political subdivisions, and other entities, stating as follows:

> 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 the case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail. [14]

[14] Fla. Stat. § 366.04(1) (2014) (emphasis added).

Section 366.04(2)(d) & (e) sets forth the Commission's jurisdiction over territorial agreements and territorial disputes. Section 366.04(5) codifies the Commission's jurisdiction over the State's generation, transmission, and distribution grid, providing the Commission with

> [j]urisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.[15]

The statutory language is clear beyond reasonable inquiry. The Commission's jurisdiction and authority over electric utility service territories supersedes the County's authority to alter utility territory rights in any manner by termination of its franchise agreement with the City. This result is not only based on the statutorily-mandated responsibility of the Commission to coordinate the electric power grid and avoid uneconomic duplication of facilities, it is necessary to avoid the federal antitrust issues involved in the designation of a single utility to serve a specific area, which without Commission oversight and control would be a *per se* violation under the Sherman Act.[16]

2. Does a county or municipality, by virtue of an authorized franchise agreement, have the right or power to determine what utility provides electric service in an existing Commission-approved service area?

The Supreme Court of Florida has clearly said no. In Storey v. Mayo, the Florida Supreme Court reviewed an order of the Commission which approved a territorial agreement between the City of Homestead and FPL.[17] In 1967, Homestead and FPL had entered into a territorial agreement to avoid the duplication and overlapping of infrastructure caused by

[15] Fla. Stat. § 366.04(5) (2014).

[16] See Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (holding that two Florida electric utilities were entitled to state action immunity for antitrust liability under section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), regarding territorial agreements based on the clearly articulated state policy to regulate retail electric service areas and the Commission's extensive control over territorial agreements).

[17] Storey v. Mayo, 217 So. 2d 304, 306 (Fla. 1968), cert. denied, 395 U.S. 909.

competition for customers in the suburban areas surrounding the city. FPL applied to the Commission for approval of the territorial agreement, and a group of customers being transferred from FPL to Homestead objected. The Commission approved the territorial agreement, and the customers sought review pursuant to Section 350.641 and Section 366.10, Florida Statutes, contending that the proposed agreement was contrary to the public interest and in restraint of trade; and that it denied them equal protection and due process of law. Specifically, the customers claimed that "the rates and service of [FPL] are superior to [Homestead], and that the agreement eliminates competition."[18]

In upholding the Commission's order approving the territorial agreement, the Court stated as follows:

> An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council.[19]

The Board's Petition is essentially an attempt to wrest from the Commission its exclusive and superior jurisdiction over retail service territories in order to obtain, for now, lower electric rates for the unincorporated areas of the County, in complete disregard of the remainder of the State and the smooth functioning of a coordinated and reliable electric power grid.[20] However, the logic used by the Court in Storey applies equally in this case, and the same result must be reached. A county or a municipality must not be allowed to pick and choose its electric supplier

[18] Id. at 307.

[19] Id. at 307-08.

[20] Petition at ¶8 (asserting that the Board has the power and authority to "designate a successor electric service provider" in areas presently served by the City).

based on the changing whims of its governing body, which are constantly subject to fluctuating economic and political influences. In other words, the County has no organic, economic, or political right to service by another utility merely because the current Board myopically deems it advantageous for its constituents at this time.

3. Does an electric utility have the right to continue to serve customers within its Commission-approved service territory after the expiration of a franchise agreement which purports to exclusively grant franchise rights to provide retail electric utility service within portions of that existing Commission-approved service territory?

FMEA urges that the clear answer to this question is yes. In City of Homestead v. Beard, the Florida Supreme Court reviewed a 1991 Commission order dismissing Homestead's petition to terminate its territorial agreement with FPL.[21] Homestead argued that the territorial agreement should be governed by the ordinary law of contracts, and therefore was terminable at will, because Homestead was not subject to the Commission's jurisdiction at the time the territorial agreement was originally executed. In upholding the Commission's order granting dismissal, the Court quoted its 1989 opinion in Public Service Commission v. Fuller, 551 So. 2d 1210, as follows:

> Any modification or termination of that order must first be made by the PSC. The subject matter of the order is within the particular expertise of the PSC, which has the responsibility of avoiding the uneconomic duplication of facilities and the duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida. The PSC must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.[22]

The Court also discussed the adverse impact on parties who make investments in reliance on territorial agreements that would result if one party could terminate a territorial agreement at will, stating as follows:

[21] City of Homestead v. Beard, 600 So. 2d 450, 451 (Fla. 1992).

[22] Id. at 452.

> A party would be hesitant to make substantial investments in franchised areas if the other party could terminate the franchise at will. In the instant agreement, FPL refrained from competing with the City for twenty years, transferred a large number of its customers to the city, and made investments in territories in which it believed it had an exclusive franchise. The detriment to FPL as a result of these acts cannot be undone and it is unlikely that FPL intended to place itself in a position in which the City could unilaterally deprive it of its franchised areas under the agreement and, thus, impair its investment in those areas.[23]

As discussed above, the City's authority to serve its customers in unincorporated Indian River County derives from the Commission's orders approving its territorial agreement with FPL, not from the franchise agreement between the City and the County. To find otherwise would completely undermine the Commission's legislatively-charged responsibility under Chapter 366 to coordinate the state's electric grid and avoid uneconomic duplication of facilities. The County acknowledges that the City's provision of electric service to parts of unincorporated Indian River County as part of the City's Commission-approved territory predates its 1987 franchise agreement with the City.[24] The City entered into the franchise agreement willingly with the County, and the record of the docket does not disclose any allegation or suggestion that the City, even after termination of the franchise agreement, has any intent other than to continue operating under the terms of the agreement, i.e., the City will continue to collect and remit to the County the six percent franchise fee required under the franchise agreement.[25]

The Board cites four cases to support its erroneous assumption that the City's right to occupy the County's rights-of-way is solely dependent upon the franchise agreement. [26]

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[23] Id. at 454.

[24] Petition at ¶20.

[25] See Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004) (holding that the terms of an expired franchise agreement became an implied contract at law required Florida Power to continue collecting and remitting to the City of Winter Park the six percent franchise fee required under the expired franchise agreement).

[26] Petition at ¶23 (citing Lee County Electric Coop., Inc. v. City of Cape Coral, 2014 WL 2218972 (Fla. 2nd DCA 2012)); Petition at ¶23 (citing Florida Power Corp. v. City of Castleberry, 793 So. 2d 1174 (Fla. 5th DCA 2001)); Petition at ¶41 (citing Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. den., Gulf Power Co. v. Santa Rosa County, 645 So. 2d. 452 (Fla. 1994)); and Petition at ¶44 (citing City of Indian Harbour

However, none of these cases dealt with a county or municipality attempting to evict a utility from a Commission-approved service territory.[27] There is no valid legal authority supporting the Board's assertion that a utility can be prohibited from serving its customers simply because a franchise agreement expired upon the passage of time.

Just like FPL in Homestead, the City has made substantial investments in order to serve the customers within its Commission-approved service area, including its customers in unincorporated Indian River County. Allowing a county or municipality to essentially evict a utility from its rights-of-way upon expiration of a franchise agreement, and thereby thwart the Commission's exclusive and superior jurisdiction over electric service territories, would undermine the ability of utilities to adequately plan for the future, and would destabilize the electric industry throughout the state, creating a chaotic state of nature where the Legislature has demanded coordination, and the courts have agreed.[28]

CONCLUSION

The County asserts in its Petition that its ability to grant or withhold a franchise is superior to the Commission's jurisdiction over territorial matters. The County's petition would have the Commission dispatch both Chapter 366, Florida Statutes, which vests in the Commission "exclusive and superior" jurisdiction over territorial matters, as well as controlling opinions of the Florida Supreme Court, which have consistently stated since 1968 that "[a]n

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Beach v. City of Melbourne, 265 So. 2d 422, 424-25 (Fla. 4th DCA 1972)).

[27] In Lee County, the 2nd DCA held that a utility's property was not taken without compensation when the utility had to pay the cost of moving its electric lines as a result of the city's road expansion, specifically stating that "[n]o one contends that the City attempted to revoke the franchise." 2014 WL 2218972, at *4. The court in Castleberry simply upheld an arbitration provision contained in an expired franchise agreement. 793 So. 2d at 1181. In Santa Rosa County, the 1st DCA upheld a county's power to require a utility to pay franchise fees for the use of the county's rights-of-way. 635 So. 2d at 100. Indian Harbour was decided in 1972, before the Grid Bill gave the Commission jurisdiction over territorial agreements between municipal utilities. 265 So. 2d at 423.

[28] See Grove Isle, Ltd. v. Department of Envtl. Reg., 454 So. 2d 571, 573 (Fla. 1st DCA 1984) (administrative bodies, unless specifically created in the constitution, must derive their power from the Legislature).

individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself."[29] Should the Commission grant the requested declaratory statements, it would effectively surrender its jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida by delegating to counties and municipalities the Commission's legislatively-mandated authority to determine which utility may serve a specific area. No utility could plan or make prudent investments in infrastructure if any county or municipality had the power to evict the utility upon expiration of a franchise agreement. Such a result would be both illogical and contrary to established law.

The Commission should uphold its exclusive and superior jurisdiction over territorial matters and fulfill its legislatively-mandated responsibility for the planning, development, and maintenance of a coordinated electric power grid throughout Florida by either denying or issuing declaratory statements in the negative to the statements requested by the County.

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[29] Storey v. Mayo, 217 So. 2d at 307-08.

Respectfully submitted this 22nd day of August, 2014.

s/Arthur J. "Grant" Lacerte, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Memorandum of Law has been furnished by electronic mail and U.S. Mail this 22nd day of August, 2014 to the following:

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