SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD,	**)**	
Appellant,	**)**	
v.	**)**	**CASE NO. 9 1- 8 2 0**
JULIA L.JOHNSON, etc., et al.,	**)**	**Public Service Commission Case No. 9 7 0 0 2 2 - E U**
Appellees.	**)**	
_ _ _ _ _ _ _ _ _ _ _ _	**)**	

AMENDED INITIAL BRIEF OF APPELLANT, CITY OF HOMESTEAD

L. Lee Williams, Jr.,
Fla. Bar No. 0176926
WILLIAMS & GAUTIER, P.A.
2010 Delta Boulevard
Post Office Box 4128
Tallahassee, Florida 32315-4128
(850) 386 - 3300
Facsimile (850) 386-3663
COUNSEL FOR CITY OF HOMESTEAD

March 5, 1999

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PRELIMINARY STATEMENT

In this Initial Brief, the Appellant, City of Homestead, will sometimes be referred to as either "Homestead" or the

"City."

The Appellee, the Florida Public Service Commission, will be referred to as the "PSC."

The Florida Power & Light Company, the entity who initiated this cause by filing a Petition with the PSC, will be referred to as "FPL."

Citations to the attached Appendix will be made by referencing the "Tab" number and the page specifically referenced. The pages in the Appendix have been given the same numbers as they were assigned in the Record-on-Appeal.

The Record-on-Appeal will be referred to as "ROA" and then the pages specifically referenced.

The "Agreement" between Homestead and FPL dated August 7, 1967, is in the Appendix at Tab 3. It will be referred to in this Initial Brief as the "Agreement." It is in the Record-on-Appeal in numerous places. For example, it is attached to FPL's Initial Petition as Exhibit "B", (ROA, pages 17-20), and is attached to the Affidavit of Vernon W. Turner. (ROA, pages 166-169).

A conformed copy of the PSC Order which is the subject of this Appeal is in the ROA at pages 229-240, and is in the Appendix at Tab 5. It will be referenced in this Initial Brief as the "PSC

Order."

The Petition of FPL which initiated this proceeding and FPL's Amended Petition will be referenced in this Initial Brief as "FPL's Petitions."

STATEMENT OF THE CASE

This is an appeal from a PSC order which interpreted the

term "City-owned facilities" in a 1967 territorial agreement between the City of Homestead and FPL.

This cause commenced on January 6, 1997, when FPL filed its Petition with the PSC. (ROA, pages 1-42). Although FPL's Petition was entitled "Petition For Enforcement of Order," a subsequent Order by the PSC recognized the Petition for what it really was, i.e., a territorial dispute between FPL and the City of Homestead over who should provide electrical services to the "Park of Commerce," an industrial park being developed by the City and to whom the City had been the provider of electrical services since the development began. (ROA, page 83).

Since the City of Homestead was an interested party and since FPL did not join the City of Homestead as a party, Homestead filed a Motion For Leave to Intervene on January 29, 1997. (ROA, pages 43-44). This Motion for Leave to Intervene was accompanied by the City of Homestead's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter (ROA, pages 45-47); Motion to Dismiss for Failure to Join Indispensable Parties (ROA, pages 48-50); Motion to Dismiss for Failure to State a Cause of Action (ROA, pages 51-54); and a Motion to Strike. (ROA, pages 55-56). The PSC granted the City of Homestead's Motion For Leave to Intervene on March 5, 1997. (ROA, page 81).

On April 28, 1997, the PSC entered its "Order on City of

Homestead's Motions" referenced above and, although denying the Motions, recognized the proceeding for what it really was, i.e., a territorial dispute between the City of Homestead and FPL. (ROA, page 83).

After being made a party, the City of Homestead on May 8, 1997, filed its Response to FPL's Petition. (ROA, pages 102-105). FPL, that same day, filed an Amended Petition, which was virtually identical to FPL's initial Petition, except it contained a claim for attorney fees under § 120.69(7), Florida Statutes. (ROA, pages 88-101).

The City of Homestead then filed its Response to FPL's Amended Petition, (ROA, pages 106-109), together with a Motion to Strike FPL's alleged entitlement to attorney fees and penalties. (ROA, pages 110-111).

On May 20, 1997, after the pleadings were closed, the City of Homestead filed its Motion for Judgment on the Pleadings pursuant to Rule 1.140 (c), Florida Rules of Civil Procedure. (ROA, pages 112-121). FPL timely filed its Memorandum in Response. (ROA, pages 122-125). On September 23, 1997, PSC entered its "Order Denying Motion for Judgment on the Pleadings." (ROA, pages 226-228).

While the Motion for Judgment on the Pleadings was pending, the City of Homestead filed its Motion for Final Summary

Judgment. (ROA, pages 139-143). Attached to the Motion for Final Summary Judgment were the affidavits of Ramon F. Oyarzun (ROA, pages 144-162); Vernon W. Turner (ROA, pages 163-169); Ruth Campbell (ROA, pages 170-220); James L. Swartz (ROA, pages 221-223 and 223A); and Michael E. Watkins (ROA, pages 224-225).

On September 29, 1997, the PSC issued its "Notice of Proposed Agency Action". (ROA, pages 229-240 and App., Tab 5). This PSC Order granted the relief requested by FPL in its Petitions and rejected the City of Homestead's position.

The City of Homestead filed its Notice of Administrative Appeal on November 6, 1997, (ROA, pages 241-242).

On December 10, 1997, the PSC entered an order which specifically denied the City Of Homestead's Motion for Final Summary Judgment. (ROA, pages 286-288).

On November 10, 1998, this Court entered its Order directing that the City of Homestead's Initial Brief be filed on or before January 19, 1999. (ROA, page 313).

STATEMENT OF THE FACTS

I. Facts established when the City of Homestead filed its

Motion for Judgment on the Pleadings. (ROA, pages 112-121; App., Tab 2). These facts are based on the allegations in FPL's Petitions and the City of Homestead's Responses.

1. **On August 7, 1967, the City of Homestead and FPL entered into the Agreement, a copy of which is attached to FPL's Petition and Amended Petition as Exhibit "B". (ROA, page 106, para 7). The Agreement is in the Appendix at Tab 3.**
2. **The Agreement delineated the service areas for which the City of Homestead and FPL would provide electrical services in 1967 and into the future. (ROA, pages 17-18; App. Tab 3, pages 17-18). The two respective service areas would remain the same even if the City limits of Homestead expanded "beyond the service area of the City and into the service area of (FPL)." (ROA, page 19, para 6; App. Tab 3, page 19, para 6). However, the Agreement provided that the City of Homestead could provide electrical services to "City-owned facilities" even if the "facilities are located within the service area of (FPL)." (ROA, page 20; App. Tab 3, page 20).**
3. **Sometime after Hurricane Andrew, the City began**

the development of an industrial park named the "Park of Commerce." The real property is currently located within the city limits of Homestead, although it is within the service area of FPL as delineated in the Agreement. (ROA, page 107, para 11).

4. As part of the development of the Park of Commerce, the City entered into two lease Agreements, one of which is attached as Exhibit "C" to FPL's Petitions. (ROA, page 107, paras 12-14). Under the terms of the lease Agreements, the lessees constructed buildings and other permanent improvements on the demised properties.

5. The City of Homestead is providing electrical services to the lessees, since it is Homestead's position, that, according to the lease Agreements, the buildings and permanent improvements are owned by Homestead and are therefore "City-owned facilities."

II Facts established when the City of Homestead filed its Motion For Final Summary Judgment with five (5) accompanying affidavits.

6. When it entered into the 1967 Agreement with FPL

it was the intent and understanding of the City of Homestead that the term "City-owned facilities" meant exactly that. Further, no additional requirements existed, nor would any ever be unilaterally placed on that term (such as the facilities having to be "operated" by the City or used for a City function). (ROA, pages 163-165; App., Tab 1, pages 163-165) and (ROA, pages 170-172, para 8; App., Tab 1, pages 170-172, para 8).

7. **Within the City-owned Park of Commerce are City owned streets with street lights. The City provides electrical service to these City-owned street lights.**

8. **The City also provides water and sewer services to the Park of Commerce. Providing City sewer services required the installation of two (2) sewer lift stations within the Park of Commerce. The City provides City electrical services to the City-owned sewer lift stations. (ROA, pages 221-223 and 223A; App., Tab 1, pages 221-223).**

9. **The City of Homestead did not purchase the land on which the Park of Commerce is located to usurp the PSC's authority or encroach on FPL's**

electrical service territory provided for in the Agreement. The land (on which the Park of Commerce is situated) was acquired by the City of Homestead "after Hurricane Andrew in an effort by the City to rebuild the area's devastated economy." (ROA, page 171, para 6; App., Tab 1, page 171, para 6).

SUMMARY OF ARGUMENT

The sole point on this appeal is the interpretation of the

term “City-owned facilities” in a 1967 territorial agreement between the City of Homestead and FPL. The City of Homestead’s position is exactly in accordance with Florida substantive law. That is, buildings and other permanent improvements constructed on real property owned by the City with the understanding the buildings and improvements are to remain on the real property forever, become part of the realty and are owned by the City, i. e., are “City-owned facilities.”

The attempted expansion of the term by the PSC, contrary to its clear meaning and even contrary to the intent of the City of Homestead and FPL, and as requested by FPL, is error.

The City of Homestead’s Motion for Judgment on the Pleadings and the City of Homestead’s Motion for Final Summary Judgment should have been granted.

ARGUMENT

I. THE CITY OF HOMESTEAD'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD HAVE BEEN GRANTED.

FPL's Petitions, together with the City of Homestead's Responses, raise, as the sole and only substantive issue, the meaning to be given to the term "City-owned facilities" contained in Paragraph 8 of the Agreement.

In ruling on a Motion for Judgment on the Pleadings, only the pleadings are to be considered. Spolski General Contractor, Inc. v. Jett-Aire Corp. Aviation Management of Central Florida, Inc., 637 So. 2d 968 (Fla. 5th DCA 1994). For the Motion to have been granted, the pleadings must reveal there are no facts to be resolved by the trier of fact, and all well-pled facts must be accepted as true. Bradham v. Hayes Enterprises, Inc., 306 So. 2d 568 (Fla. 1st DCA 1975), and Wilcox v. Lang Equities, Inc., 588 So. 2d 318 (Fla. 3d DCA 1991). This, however, does not extend to conclusions of law in the pleadings. Yunkers v. Yunkers, 515 So. 2d 419 (Fla. 3d DCA 1987).

The Agreement is nothing more than a written document which determines, between the City of Homestead and FPL, who will be the provider of electrical services in the geographical area covered by the Agreement. FPL specifically and unequivocally agreed that the City could be the exclusive

provider of electrical services to "City-owned facilities," regardless of their location. FPL admits in paragraph 11 of the Amended Petition that the City owns the real property in question. (ROA, page 96). It is black letter law that the City therefore owns all buildings, improvements and fixtures situate on the City's real property since "(a)ll buildings and other fixtures actually or constructively annexed to the freehold become a part of it . . . ." Burbridge v. Therrell, 148 So. 204 (Fla. 1933). See also, Greenwald v. Graham, 130 So. 608 (Fla. 1930). This is also made clear in Florida Statutes, one of which is quoted in the footnote below.[1] Thus, any court or commission must conclude that the City and FPL had agreed that the City is to be the provider of electrical services to all

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[1] **196.012 Definitions. - For the purpose of this chapter, the following terms are defined as follows, except where the context clearly indicates otherwise:**

. . .

(6). . . For purposes of determination of "ownership," buildings and other real property improvements which will revert to the airport authority or other governmental unit upon expiration of the term of the lease shall be deemed "owned" by the governmental unit and not the lessee.

buildings and fixtures in the Park of Commerce.[2] Thus, the only logical interpretation of the Agreement is that the City is to be the sole provider of electrical services to the Park of Commerce.

There is nothing mysterious, complicated or ambiguous about either the word "owned" or the word "facility." Therefore these words in the Agreement must be given their natural and most commonly accepted meaning. Royal Inv. & Dev. Corp. v. Monty's Air Conditioning Serv., Inc., 511 So. 2d 419 (Fla. 4th DCA 1987). Further, neither a court nor the Commission may give the clear and unambiguous language of a contract any meaning other than that expressed. Hamilton Constr. Co. v. Board of Public Instruction of Dade County, 65 So. 2d 729 (Fla. 1953). Therefore, since the meanings of the words "owned" and "facilities" are so well known, neither a

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[2] **To suggest, as FPL has, that notwithstanding the City's right to serve the buildings and fixtures, FPL has the right to provide service to the typewriters and other equipment, places an absurd construction on the Agreement contrary to well established law. For example see Harris v. Carolina Life Ins. Co., 233 So. 2d 833 (Fla. 1970). It also violates the Commission's well established policy against duplication of services.**

court nor the PSC should modify them by interpretation.[3] Pafford v. Standard Life Ins. Co. of Indiana, 52 So. 2d 910 (Fla. 1951). Courts simply are not at liberty to "rewrite, alter, or add to the terms of a written agreement between the parties...." Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976).

Furthermore, agencies, such as the PSC are not at liberty to disregard established judicial rules of contract construction. Island Manor Apts. v. Div. of Fla. Land Sales, 515 So. 2d 1327 (Fla. 2d DCA 1987).

In addition, the Florida Statutes overwhelmingly support the City's position. Florida Statutes define "facilities" as that term is commonly understood, i.e., to include buildings and improvements. Tab 4 of the Appendix summarizes numerous Florida Statutory definitions of "facilities." Throughout, buildings and fixtures are included in the statutory definitions of "facility" or "facilities." These statutory definitions are consistent with the ordinary understanding of a

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[3] **While the Agreement may be a PSC Order, it is also a contract between FPL and the City. There are Federal and State Constitutional limitations on the impairment of contractual rights and obligations in Article I, Section 10, of both the United States Constitution and the Florida Constitution. The substantive law also prohibits such state action. For example see Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985), and Manning v. Travelers Ins. Co., 250 So. 2d 872 (Fla. 1971).**

facility as "something (like a hospital) that is built, installed, or established to serve a particular function." Websters New Collegiate Dictionary, 410 (3d ed. 1975). Florida cases have used the term "facilities" to include: spring training headquarters for the Pittsburg Pirates to include baseball fields, batting cages, a running track, clubhouse housing and dining facilities, Brandes v. City of Deerfield Beach, 186 So. 2d 6 (Fla. 1966); group homes such as foster care facilities and adult congregate living facilities, Life Concepts, Inc. v. Harden, 562 So. 2d 726 (Fla. 5th DCA 1990); juvenile treatment or juvenile detention facilities, Interest of J. N., 279 So. 2d 50 (Fla. 4th DCA 1973); and city owned parks, stadia, race tracks, and jai alai frontons, City of Miami v. Rosenthal, 208 So. 2d 495 (Fla. 3d DCA 1968).

This is consistent with the ordinary understanding of "facility." When one asks the question: Does FSU have good athletic facilities? Does TCC have good facilities? Does the school have good facilities? These questions all have in mind buildings, structures, stadiums, fixtures, equipment, etc.

As demonstrated, the phrase "City-owned facility" is not ambiguous[4] and, therefore, it must be given its natural meaning

[4] It would be ambiguous only if one were to consider that FPL and the City contemplated two utilities, i.e., that both FPL and

or its most commonly understood meaning. Hamilton Constr. Co. v. Board of Public Instruction of Dade County, 65 So. 2d 729 (Fla. 1953); and Royal Inv. & Dev. Corp. v. Monty's Air Conditioning Service, Inc., 511 So. 2d 419 (Fla. 4th DCA 1987).

The PSC erred by not granting the City of Homestead's Motion for Judgment on the Pleadings.

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the City would provide electrical service to the same buildings, as FPL has argued.

II. THE CITY OF HOMESTEAD'S MOTION FOR FINAL SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

When the City of Homestead filed its Motion for Final Summary Judgment, it attached five affidavits. (ROA, pages 139-225; App., Tab 1). Since the affidavits were never contested by FPL and since no evidentiary hearing was held before the PSC, these affidavits contain uncontested facts which are in addition to (or provide further support for) the facts established by the City of Homestead's admissions to some of the allegations in FPL's Petitions. These additional facts are contained in the above Statement of Facts.

Based on these undisputed facts and the same reasoning and legal authorities cited in the above argument, the City's Motion for Final Summary Judgment should have been granted. As stated above, the sole and only issue before the PSC was the meaning to be given to the term "City-owned facilities" contained in paragraph 8 of the 1967 Agreement between the City of Homestead and FPL. This term must be given a reasonable construction according to the intent of the City of Homestead and FPL when they entered into the Agreement in 1967. James v. Gulf Life Insurance Co., 66 So. 2d 62 (Fla.1953). The only evidence in the Record on Appeal of the parties' intent when they entered into the Agreement in 1967 is contained in the

Affidavits filed with the City of Homestead's Motion for Final Summary Judgment. This evidence is contained in Section II. of the Statement of Facts above and totally supports the City of Homestead's position. This intent is also consistent with Florida's substantive law, i. e., that permanent buildings and fixtures on leased property are deemed to be part of the realty and owned by the landowner, i.e., the City of Homestead. Burbridge v. Therrell, 148 So. 204 (Fla. 1933). Even chattels which are personalty become part of the realty if permanently annexed to the realty. Commercial Finance Co. v. Brooksville Hotel Co. , 98 Fla. 410, 123 So. 814, 64 ALR 1219 (Fla. 1929); Devlin v. Phoeonix, Inc., 471 So. 2d 93 (Fla. 5th DCA 1985), review den. 480 So. 2d 1295 (Fla. 1985).

For example, kitchen appliances, once permanently annexed to a building, become part of the realty. Fla. Federal Savings & Loan Association v. Britts, 455 So. 2d 1345 (Fla. 5th DCA 84). The buildings on the demised premises are clearly part of the realty and are owned by the City of Homestead. Crawford v. Gulf Cities Gas Corp., 387 So. 2d 993 (Fla. 2d DCA 1980). Thus, pursuant to the Agreement and Florida substantive law, the city clearly has the right to provide electrical service to all the buildings and permanent improvements.

Also, as shown above, the City of Homestead's position is

consistent with the ordinary and common meaning of the words, as well as being consistent with their use and meaning in the Florida Statutes. See Tab 4 of the Appendix for a listing of Florida Statutes that define the words "facility" or "facilities."

Although not germane to the issue raised in FPL's Petitions, the following must be addressed. FPL asserts that the City, in its attempt to provide electric service to the entire Park of Commerce, has constructed transmission lines that would not otherwise be needed. This is specifically refuted in the affidavit of James L. Swartz, the Director of Utilities for the City. The transmission lines were constructed to allow the City to provide electric service to the city-owned street lights and the city-owned sewer service facilities, including two sewer lift stations. (App., Tab 1, pages 221-223).

There is also some apparent confusion about the Homestead Housing Authority Labor Camp, including an assumption that it is located on City-owned property. That is not the case as shown in the attached affidavit of Michael E. Watkins, the City Attorney. Further, the Homestead Housing Authority is a separate corporate entity and is not a division of the City. (App., Tab 1, pages 224-225).

Paragraph 6 of the Agreement has absolutely no relationship to paragraph 8 of the Agreement. Paragraph 6 simply provides that the expansion of the city limits has no effect on either party's service rights. The PSC was requested to take judicial notice of the fact that a municipality's limits have absolutely no relationship to the municipality's ownership of real property. (ROA, page 142; App., Tab 1, page 142). Thus, paragraph 6 was inserted to make clear that FPL was not to lose service territory solely as a result of the City of Homestead expanding its limits. Paragraph 8 is applicable regardless of where a City-owned facility is located. Had the parties desired to link paragraph 6 and paragraph 8, they could have done so. They did not. Thus, these two paragraphs are not even remotely related.

The PSC erred in denying the City of Homestead's Motion for Final Summary Judgment and by ruling in favor of FPL.

III. THE ATTORNEY FEE ISSUE.

Out of an abundance of caution, the City of Homestead thinks it advisable to address an issue raised by FPL. FPL contends, and apparently the PSC is in accord that if the PSC Order is affirmed, which it should not be, FPL may be entitled to attorney fees under the authority of Section 120.69(7), Florida Statutes (1997). The Notice of Proposed Agency Action, i.e., the PSC Order, which is the subject of this appeal, states the following:

> Florida Power & Light has requested attorneys fees in this proceeding. Pursuant to Section 120.69 (7), Florida Statutes, attorneys fees may only be awarded, if at all, in a final order. Because the action taken herein is preliminary in nature, attorneys fees are not available until the action becomes final.
>
> Section 120.69 (7), Florida Statutes, provides:
>
> > In any final order on a petition for enforcement the court may award to the prevailing party all or part of the attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.
>
> We have jurisdiction to award fees and costs pursuant to the statute but such an award is premature. This order will be issued as proposed agency action. After this order becomes final, FPL may file for attorneys fees and costs along with supporting affidavits and other evidence required by the enabling statute. We hereby reserve jurisdiction in this proceeding over the issue of attorneys fees.

Both FPL and the PSC are wrong. Section 120.69

(7), Florida Statutes, (1997), is only applicable in a court proceeding which seeks the enforcement of an agency order. (emphasis supplied). Section 120.69 (1) (a), Florida Statutes (1997), reads: "Any Agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located." (emphasis supplied). No provision of Section 120.69, Florida Statutes (1997), authorizes an agency to award attorney fees in a proceeding brought before that agency. See State Ex Rel. Pettengill v. Copeland, 466 So. 2d 1133 (Fla. 1st DCA 1985); Doyal v. School Board of Liberty County, 415 So. 2d 791 (Fla. 1st DCA 1982).

WHEREFORE, based on the above authority, any claim for attorney fees and penalties by either party must be denied.

CONCLUSION

The PSC Order which construes the term "City-owned facilities" in the Agreement contrary to its ordinary and commonly understood meaning, contrary to the intent of the parties, contrary to Florida's substantive law and contrary to how the terms are defined in the Florida Statutes, must be reversed and an Order should be entered in favor of the City of Homestead.

RESPECTFULLY SUBMITTED this 5th day of March, 1999.

_____

L. Lee Williams, Jr.
Fla. Bar No. 0176926
Williams & Gautier, P.A.
2010 Delta Blvd. (32303)
Post Office Box 4128
Tallahassee, FL 32315-4128
(850) 386-3300
Facsimile (850) 386-3663

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the City of Homestead's Amended Initial Brief were furnished to:

Leslie Paugh, Esquire
Division of Legal Services
Florida Public Service Commission
Room 370, Gunter Building
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850

Wilton R. Miller, Esquire
Bryant, Miller and Olive, P.A.
201 South Monroe Street, Ste.500
Tallahassee FL 32301

and David L. Smith, Esquire
Florida Power & Light Company
Post Office Box 029100
Miami FL 33102-9100

by United States Mail on this 5th day of March, 1999. I also HEREBY CERTIFY the Amended Initial Brief of Appellant, City of Homestead is in Courier New (Font 12), 10 characters per inch. The original Amended Initial Brief filed with the Court is accompanied by a diskette which contains in WordPerfect 8.0 the Amended Initial Brief of Appellant, City of Homestead. The diskette has been scanned for viruses.

_____
L. Lee Williams, Jr.