IN THE SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD, Appellant, v. JULIA L. JOHNSON, etc. et al., Appellees.	)	CASE NO. 91,820

APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE THE FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

DIANA W. CALDWELL
Associate General Counsel
Florida Bar No. 865842

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(850) 413-6175

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellees, Julia L. Johnson, etc., Commissioners of the Florida Public Service Commission, are referred to in this brief as the "Commission". Appellee, Florida Power and Light Company, is referred to as "FPL" or "Company". Appellant, City of Homestead, is referred to as "City" or "Homestead".

The Order on appeal, FPSC 97-1132-FOF-EU, shall be referred to as "PAA Order" and is cited as "PAA Or. ___." (See Appendix "A".) Commission Order PSC-97-1111-PCO-EU denying City's Motion for Judgment on the Pleadings shall be referred to as "JP Or. ____." (See Appendix "B".) Commission Order PSC-97-1552-PCO-EU disposing of the Motion for Final Summary Judgment shall be referred to as FSJ Or. ___." (See Appendix "C".)

Citations to the record are referred to as "R._____." Citations to the City's initial brief are referred to as "Br. ___." A proposed agency action shall be referred to as "PAA".

The Commission has followed the City's order for discussion of the issues it raises in its brief. Before addressing City's issues, however, the Commission renews its Motion to Dismiss for Failing to Exhaust Administrative Remedies and addresses that, and other procedural arguments first. The City's first issue is then addressed under II, its second issue under III, and its third issue under IV.

STATEMENT OF THE CASE AND THE FACTS

A. Commission Proceedings.

On December 1, 1967, the Commission approved the Territorial Agreement between Florida Power & Light Company (FPL or Company) and the City of Homestead (City), Order No. 4285, Docket No. 9056-EU. On January 6, 1997, Florida Power & Light Company filed a Petition For Enforcement of Order 4285. The Petition requests Commission interpretation and enforcement of the terms of the Territorial Agreement. (See Appendix "D") FPL asserted that the City violated the Agreement by serving two for-profit businesses in FPL service territory.

Extensive pleadings were filed in the docket. Subsequent to the Petition For Enforcement filed by FPL, the City filed a Motion For Leave To Intervene (R. 43) which was granted in Order No. PSC-97-0251-PCO-EU. (R. 81) In addition, the City filed three motions to dismiss: one for lack of subject matter jurisdiction (R. 45); one for failure to join indispensable parties (R. 48); and one for failure to state a cause of action (R. 51). The City also filed two motions to strike FPL's request for attorney's fees (R. 55, 74) and a request for oral argument (R. 57). All of the City's motions were denied by the Prehearing Officer in Order PSC-97-0487-PCO-EU (R. 83) except the motion to strike FPL's request for attorney's fees. (R. 81)

In response to the favorable ruling on attorney's fees, FPL filed an Amended Petition for Enforcement of Order which was substantially the same as the original Petition but included more specific allegations with respect to its request for attorney's fees. (R. 88) Subsequently, the City filed a response to the Amended Petition (R. 106) and a Motion For Judgment on the Pleadings. (R. 122). FPL filed a Memorandum in Response to the City's Motion for Judgment on the Pleadings. (R. 122) The Prehearing Officer denied the City's Motion for Judgment on the Pleadings in Order No. PSC-97-1111-PCO-EU issued September 23, 1997. (R. 226)

On September 11, 1997, Commission Staff filed a Memorandum to be considered at the September 23, 1997, Commission Agenda Conference. The staff memorandum recommended a proposed agency action be issued finding Homestead in violation of the agreement, requiring transfer of service, and the development of a plan for that transfer. The Commission made its determination in a Proposed Agency Action (PAA) Order.[1]

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[1] A PAA is an order wherein the Commission proposes a resolution to the matters at issue subject to a request for hearing by one whose substantial interests may be affected by the decision. The Commission uses the PAA process to expedite its decision without the necessity of a hearing if no party requests one. If no one protests the PAA by requesting a hearing, the PAA matures into a final agency action within 21 days. A protest of a PAA order triggers the need for a *de novo* proceeding. If the petition contests only legal or policy issues and raises no factual disputes, an informal proceeding under subsection 120.57(2), Florida Statutes, is held.

On September 19, 1997, the City filed its Motion for Final Summary Judgment. (R. 139) After the conference, Notice of Proposed Agency Action Order No. PSC-97-1132-FOF-EU was issued on September 29, 1997. (R. 229) Homestead did not protest the PAA Order. The Prehearing Officer denied the Motion for Final Summary Judgment on December 19, 1997, in Order No. PSC-97-1552-PCO-EU. (R. 286)

B. Controversy over the Agreement.

The Territorial Agreement (Agreement) entered into on August 7, 1967, delineates the respective service areas of the utilities and provides for the transfer of customers. (R. 13-21) Two paragraphs of the Agreement are the subject of the current dispute. Paragraph 6 states that if the City limits are extended through annexation into FPL's service territory, FPL would continue to serve the area, notwithstanding that the area would then be within the City. (R. 19) Paragraph 8 carves out the service exception that is the subject of this proceeding. Paragraph 8 states:

> Notwithstanding the provisions of paragraph 6 hereof, it is agreed that the City shall supply power to and, for purposes of this Agreement, shall consider that the Homestead Housing Authority Labor Camp located on the Easterly side of Tallahassee Road (S.W. 137th Avenue) 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.

(R. 19-20.)

The Agreement's delineation of the utilities' service territories anticipated the City's expansion of its corporate limits by allotting the City an area approximately twice the size of the 1967 corporate limits. The City is now attempting to expand its service territory through ground leases to private enterprises in a corporate park located within FPL's service territory. The City acquired the Park of Commerce with grant money subsequent to Hurricane Andrew. (R. 227, PAA Or. 2)

In 1993, the City leased vacant real property in the Park of Commerce to a beer distributor, Silver Eagle Distributors, Ltd. The beer distributor has since constructed a warehouse, office and distribution facility on the property. (R. 5-7) In 1996, the City leased vacant real property adjacent to the beer distributor in the Park of Commerce to a boat builder, Contender Boats. (R. 7) According to the Petition, Contender Boats was commencing construction on its facility in early 1997. (R. 7) The Park of Commerce is quite a distance from the former Housing Authority Labor Camp and is clearly within the service territory of FPL. (R. 227)

FPL's position in these proceedings was that the service exception contained in paragraph 8 for city-owned facilities does not apply to the Park of Commerce businesses because the businesses are not proprietary municipal functions. (R. 7, 122-125) The

City's position was that to qualify under the service exception, all that is required is for the City to own the underlying realty. (R. 76-79, 112-116, 139-143)

In its Notice of Proposed Agency Action Order, the Commission found that the City of Homestead was "attempting to expand its service area by asserting that private, corporate enterprises located in FPL's territory are city facilities by virtue of the fact that they are located on city property, the Park of Commerce. The City's interpretation is not supported by the language of the Agreement or the law of construction." (R. 237, PAA Or. 9) The Commission then ordered the City to transfer service of Silver Eagle, Ltd. and Contender Boats to FPL pursuant to Order No. 4285, Docket No. 9056-EU. (Id.) Since the City did not protest the PAA and request a hearing, it became final agency action on October 20, 1997.

C. This Appeal.

Subsequent to the City filing its Notice of Appeal, on November 21, 1997, this Court dismissed the case stating that the notice was not timely filed. The City filed a Motion to Reinstate Notice of Administrative Appeal on November 25, 1997. The Commission filed its Response in Opposition to [the City's] Motion to Reinstate Notice of Administrative Appeal on December 4, 1997. The City then filed a Motion to Strike [the Commission's] Response in Opposition to Motion to Reinstate Notice of Administrative

Appeal or, in the Alternative, Leave to File Response on December 17, 1997. On December 24, 1997, the Commission filed its Response to the Motion to Strike. On March 27, 1998, The Court denied the City's Motion to Strike and ordered the City to file a response to the issue of failure to exhaust administrative remedies on or before April 9, 1998. The City filed its Response on April 9, 1998. On November 16, 1998, the Court issued an Order Granting the City's Motion to Reinstate its Notice of Appeal and, further, provided a briefing schedule.

SUMMARY OF THE ARGUMENT

The City of Homestead failed to bring an appealable issue before this Court. The City did not exhaust its administrative remedies before seeking this appeal because it did not request a hearing after the PAA Order was issued. The issues raised, denial of Motion for Judgment on the Pleadings and Motion for Final Summary Judgment, relate to non-appealable orders. Moreover, the City fails to argue why the Proposed Agency Action should be reversed.

The Motion for Final Summary Judgment was found to be untimely under Rule of Civil Procedure 1.510. It was found to be moot because the Commission addressed the issue in its Proposed Agency Action. Standing alone, either of these findings is sufficient to dismiss this appeal.

If the Court chooses to resolve the issue on the merits, the Commission's Order should be affirmed. The Commission's interpretation of the term "city-owned facility" used in the territorial agreement sought to be enforced was a reasonable interpretation based upon standard rules of contract construction.

The Commission did not err when it denied the City's Motion for Judgment on the Pleadings. The Prehearing Officer's determination that the interpretation of a territorial agreement is a mixed question of fact and law subject to different and reasonable inferences was reasonable. She found summary judgment

should not be granted unless the facts are so crystallized that nothing remains but questions of law. Finally, she found that the issue should be submitted to the Commission for consideration of the relevant evidence. This finding by the Prehearing Officer is consistent with the law and should not be overturned.

The Prehearing Officer correctly denied the Motion for Final Summary Judgment. The Prehearing Officer's finding that summary judgment was not appropriate considering the extensive pleadings that clearly demonstrated conflicting, reasonable inferences could be drawn from the facts giving rise to the dispute was consistent with the law.

Finally, the City asks the Court to decide an issue that has not properly been before the Commission for a decision. The question of attorney's fees has not been decided by the Commission and, therefore, should not be addressed by this Court. In the event, however, the Court addresses the issue of the Commission's jurisdiction to determine attorney's fees under Section 120.69(7), Florida Statutes, the Court will find the Commission was correct in retaining jurisdiction to decide the matter should it arise.

ARGUMENT

Standard of Review

The Commission's orders come to the court with a presumption of correctness. It is not the court's function on review of a decision of the Public Service Commission to re-evaluate the evidence or substitute its judgment on the questions of fact. Citizens of Florida v. Florida Public Service Comm'n, 435 So. 2d 784 (Fla. 1983). The courts have a narrow scope of review of orders of the Florida Public Service Commission. Pan Am World Airways, Inc. v. Florida Public Service Comm'n, 427 So. 2d 716 (Fla. 1983). If the Commission acts within its authority and its decision is supported by competent, substantial evidence, the court must approve the decision. City Gas Co. of Florida v. Florida Public Service Comm'n, 501 So. 2d 580, 583 (Fla. 1987). Deference should be given to the agency's interpretation of its rules and orders and the statutes it is authorized to enforce. Florida Waterworks Ass'n v. Florida Public Service Comm'n, 473 So. 2d 237, 240 (Fla. 1st DCA 1985).

I. HOMESTEAD'S APPEAL IS PROCEDURALLY IMPROPER AND SHOULD BE DISMISSED.

This appeal should be dismissed on procedural failings alone. First, the City failed to exhaust its available administrative remedies by not requesting a hearing on the Commission's PAA Order that disposed of the merits of the dispute with FPL. Second, the City is apparently attempting to "appeal" a non-appealable order,

the Commission's Order Disposing of Motion for Final Summary Judgment and to reargue the merits of the Motion, which was denied on procedural grounds of untimeliness.

A. The City of Homestead failed to exhaust its administrative remedies.

In its Response in Opposition to Motion to Reinstate Notice of Administrative Appeal, the Commission raised the issue that the City failed to exhaust its administrative remedies prior to filing its appeal. On November 10, 1998, this Court granted Appellant's Motion to Reinstate Notice of Administrative Appeal without deciding the issue of the City's failure to exhaust its administrative remedies. The Commission renews this claim.

1. The City was on notice that it had the opportunity to request a hearing.

The PAA Order provided Notice of Further Proceedings or Judicial Review that stated:

> . . . Any person whose substantial interests are affected by the action proposed by this Order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code . . . .)

(R. 239, PAA Or. 11) This provision put the parties on notice that further administrative remedies were available. A party that fails to avail himself of further administrative remedies below is foreclosed from appeal. General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, 346 So. 2d 1049, 1053 (Fla. 3rd DCA 1977). (The court held that permissive language, such as "may"

appeal, notifying a party of the availability of administrative review procedures, is not an option to be utilized or ignored by a party. A party must exhaust its administrative remedies where the method of appeal to an administrative department is available.)

2. The City's appeal would defeat the purpose of the Administrative Procedures Act.

By failing to exhaust its administrative remedies by not petitioning for a hearing, Homestead has defeated the purpose of Florida's Administrative Procedures Act. The First District Court of Appeals has stated:

> [A]ll review processes afforded by the executive branch must ordinarily be exhausted before the judicial branch will consider intervention. [This] . . . principle limits the availability of district court review of action by the executive branch under Chapter 120. In the APA context, the exhaustion requirement assures that the branch constitutionally responsible for implementing the statutory scheme has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue; and that requirement produces an authentic decision by the executive which then may be reviewed . . ..

Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 400 So. 2d 66, 69 (Fla. 1st DCA 1981) (citations omitted).[2] The reasons for exhausting administrative remedies are many:

> to avoid premature or unnecessary judicial labor, to assure agency action by the authentic agency head, to encourage improvement in agency decision making processes, to afford remedies simpler and less expensive

[2] Even though the Commission is a legislative entity, the principle is the same.

> than court litigation, and to encourage a responsible autonomy in the executive branch of state government.

Id. at 73 (citation omitted).

As required by Chapter 120, Florida Statutes, and Rule 25-22.029, Florida Administrative Code, the Commission issued its PAA order and gave Homestead an opportunity to challenge it and request a hearing. The agency was entitled to rely upon the conclusiveness of its proposed actions. Dickerson, Inc. v. Rose, 398 So. 2d 922, 924 (Fla. 1st DCA 1981). (The utility had in effect accepted the PAA orders as ending the controversy.) Graham Contracting, Inc. v. Dept. of General Services, 363 So. 2d 810, 814-815 (Fla. 1st DCA 1978)(citing Capeletti Bros., Inc. v. State, Dept. of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978)). Rice v. Department of Health and Rehabilitative Services, 386 So. 2d 844, 847 (Fla. 1st DCA 1980) (appeals from free-form agency action should be dismissed when appellant neglects a clear point of entry to 120.57 proceedings). Moreover, because no hearing was held, the utility preserved no issues for appeal. See Yachting Arcade, Inc. v. Riverwalk Condominium Ass'n, Inc., 500 So. 2d 202, 204 (Fla. 1st DCA 1986) (where appellant did not object to issues at the Section 120.57(1) hearing, those issues were found to be unreviewable by the appellate court).

By failing to exhaust its administrative remedies, Homestead gave up its rights to judicial review. A party to an administrative proceeding cannot maintain an appeal without first

exhausting available administrative remedies. Phillips v. Santa Fe Community College, 342 So. 2d 108, 110 (Fla. 1st DCA 1997); General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, 346 So. 2d 1049 (Fla. 3rd DCA 1997). Because administrative remedies were not exhausted, this court does not have subject matter jurisdiction. Orange County, Florida v. Game and Fresh Water Fish Commission, 397 So. 2d 411, 413 (Fla. 5th DCA 1981); Brooks v. School Board of Brevard County, 382 So. 2d 422 (Fla. 5th DCA 1980).

Since Homestead did not petition the Commission for a hearing concerning the proposed agency action at issue, the City did not exhaust all administrative remedies in this case. If the utility had petitioned for a hearing, the Commission would have conducted a hearing, at which time the City could have presented additional facts and arguments for consideration by the Commission. Because no such request was made, the order should not be appealed and this case should be dismissed.

3. The City of Homestead waived its right to appeal.

The City's appeal should be dismissed because it waived any right to appeal when it failed to request a Section 120.57(1) hearing. The rights of substantially affected persons are waived unless they timely request a 120.57 hearing. Florida Optometric Ass'n v. Dept. of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 935 (Fla. 1st DCA 1980).

B. The Motion for Final Summary Judgment was untimely and moot and the City cannot argue the merits of the motion in this appeal.

The City fails to address Commission Order PSC-97-1552-PCO-EU that disposed of the Motion for Final Summary Judgment. First, the Commission found the motion was untimely filed under Florida Rule of Civil Procedure 1.510. (R. 287, FSJ Or. 2) Under the Florida Rule of Civil Procedure 1.510, the motion "shall be served at least 20 days before the time fixed for the hearing." The City's motion was filed eight days after the staff recommendation was issued and just four days before the matter was considered at Agenda Conference. (R. 287, FSJ Or. 2) The Prehearing Officer was correct in finding that the Motion was untimely filed.

Second, the Commission found the motion was untimely as to the PAA Order which was not issued until September 27, 1997, six days after the Motion was filed. Finally, the City did not renew its Motion for Final Summary Judgment or request a hearing after the PAA Order was issued. The City's failure should not be rewarded by considering its appeal. The appeal should be dismissed.

The Prehearing Officer's finding that the issue was moot was also correct since the PAA Order was issued September 29, 1997, was not protested, and became final on October 20, 1997. Again, the Motion for Final Summary Judgment was filed eight days after staff filed its recommendation to the Commission for consideration at its September 23, 1997, Agenda Conference. At the conference,

the Commission found in favor of FPL and issued its PAA which was appealed. The Order denying the Motion for Final Summary Judgment was issued December 10, 1997.

Substantially and procedurally, the City is attempting to appeal the denial of its Motion for Summary Judgment without addressing the grounds on which it was denied. That order is not appealable standing alone. Gore v. Hansen, 59 So. 2d 538 (Fla. 1952). Any right to argue its merits was forgone when no request for hearing was filed in response to the dispositive PAA Order.

II. THE COMMISSION CORRECTLY DENIED HOMESTEAD'S MOTION FOR JUDGMENT ON THE PLEADINGS.

A. The Commission correctly decided the meaning of the term "city-owned facility."

Commission orders come to this court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. Florida Interexchange Carriers Ass'n. v. Beard, 624 So. 2d 248, 250 (Fla. 1993); United Tel. Co. v. Florida Public Service Comm'n, 496 So. 2d 116, 118 (Fla. 1986) (quoting General Tel. Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959) footnote omitted). The set of facts set forth in the PAA order were not protested and, therefore, should be assumed true. The Commission reviewed the legal arguments put forth by each party and applied the proper rules of construction to

interpret the meaning of the term “city-owned facility” as used in the Agreement. (R. 236, PAA Or. 8)

The City states in its initial brief that it is black letter law that the City owns all the buildings, improvements and fixtures situate on the City’s real property. (Br. 10-12) This position, however, does not answer the question before the Commission or this Court. The question before the Commission was what is the meaning of the term “city-owned facilities” within the context of the territorial agreement between the City of Homestead and FPL. From the City’s point of view, however, the question appears to be whether ownership of real property by a municipality is within the meaning of the term “city-owned facility” for the purposed of the territorial agreement. The Commission rejected the City’s argument and correctly answered that question by finding that “the meaning of the phrase ‘city-owned facility’ implies a requirement of city proprietary function at the facility in order to qualify for the service exemption.” (R. 236, PAA Or. 8)

After the Petition was filed, each party presented argument by petition, motions, responses or Memorandums of Law. The PAA Order contained a set of facts upon which the Commission relied. The Commission considered each party’s argument in its Order, analyzed the pleadings, and applied the appropriate rules of construction before finding for FPL. (R. 231, PAA Or. 3)

B. The Commission correctly applied the rules of contract construction.

In its analysis, the Commission first looked at the harm to be prevented in entering into an agreement. (See Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944). The purpose of the Agreement was to end the unsatisfactory effects of expensive, competitive activity between the parties. City of Homestead v. Beard, 600 So. 2d 450, 454 (Fla. 1992). The Commission concluded that the City's interpretation was contrary to that purpose:

> If the service area exception were read to allow the City to encroach upon FPL's service territory any time it purchases real property for any purpose, it would only promote expensive, competitive activity, a race to serve, and uneconomic duplication. The result is clearly contrary to the purpose of the agreement and our mandate, pursuant to Section 364.04, Florida Statutes, to minimize uneconomic duplication.

(R. 236, PAA Or. 8)

The Commission next considered the general and specific terms that aid in the interpretation. (See Thayer v. State, 335 So. 2d 815 (Fla. 1976); Ideal Farms Drainage Dist. v. Certain Lands. The Commission looked at the type of city-owned facility specifically named in paragraph 8 of the Agreement that was to be served by the City notwithstanding its location in FPL's territory. (R. 236, PAA Or. 8) The conclusion that the meaning of Paragraph 8 that the labor camp site, if utilized by the City for a proprietary function, may be served by the City is rational and consistent with the rule of law.

The Commission considered the meaning of particular terms that may be ascertained by reference to words associated with them. (R. 237, PAA Or. 9) Applying the rule to the paragraphs and terms in the Agreement reaches the same results as the previous rule. The general phrase "city-owned facility" is restricted to the narrower meaning of "city-owned facility with a municipal, proprietary function" by the analogous phrase "Homestead Housing Authority Labor Camp." This conclusion is supported by case law. Orange County Audubon Society v. Hold, 276 So. 2d 542 (Fla. 4th DCA 1973), (which held that to determine whether a corporation was included in the meaning of the term "citizen" 'depends upon the intent to be gathered from the context and the general purpose of the whole legislation in which it occurs'." Id. at 543.)

Finally, the Commission harmonized the different provisions of the Agreement in order to give effect to all portions thereof. (R. 237, PAA Or. 9) Application of the rule supports the interpretation that the location and use of the service exception was limited. This rationale is consistent with that used for statutory construction. Specifically, that laws are passed with knowledge of prior laws and will favor a construction that gives a field of operation to both rather than construe one as being meaningless. Claude R. Kirk, et. al v. U.S. Sugar Corp., et. al, 24 Fla. L. Weekly D343 (4th DCA 1999); Oldham v. Rooks, 361 So. 2d

140 (Fla. 1978); Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944).

Upon review of the arguments of the two parties and applying the rules of construction, the Commission was correct in concluding that acceptance of the City's interpretation of the meaning of "city-owned facility" renders paragraph 6 of the Agreement meaningless. (R. 237, PAA Or. 9) Paragraph 8 is, by its terms, a specific exception to paragraph 6. Paragraph 6 states that if the City limits are extended beyond the service area of the City and into the service area of the Company, the City agrees that the Company will continue to service such area although it would then be within the City. (R. 19) Acceptance of the City's position that any city-owned land in any locations used for any purpose should be considered a "city-owned facility" negates the operation of paragraph 6 as well as the purpose of the Territorial Agreement. (R. 237, PAA Or. 9) This conclusion is a reasonable interpretation of the Agreement. Where the Commission has reached a reasonable conclusion based upon the facts presented, the court must uphold the Commission's action. City Gas Co. v. Florida Public Service Comm'n, 501 So. 2d 580. The Commission's findings and conclusions are in accord with the "essential requirements of law" and are based on "competent substantial evidence" and should be upheld. Fort Pierce Utilities Authority v. Beard, 626 So. 2d 1356, 1357 (Fla. 1993); quoting General Telephone Co. v. Carter, 115 So. 2d

554 (Fla. 1959); Polk County v. Florida Public Service Comm'n, 460 So. 2d 370 (Fla. 1984).

In its brief, the City provides criteria for ruling on a Motion for Judgment on the Pleadings. (Br. 10) It then launches into its argument supporting its position that was rejected by the Commission. In Order No. PSC-97-1111-PCO-EU, the Prehearing Officer found that summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. If the evidence will permit different, reasonable inferences, it should be submitted to the trier of fact. McCraney v. Barberi, 667 So. 2d 355 (1st DCA 1996). From the cases presented by the parties, it is clear that different reasonable inferences could be drawn. (R. 227, JP Or. 2)

The Prehearing Officer also correctly found that the interpretation of the Territorial Agreement for the purpose of settling the service area dispute between the parties is a mixed question of fact and law subject to different, reasonable inferences and, therefore, should be submitted to the Commission for consideration of the relevant evidence. (R. 227, JP Or. 2) The Prehearing Officer correctly applied the standard and denied the City's motion. (See Homeowner's Corporation of River Trails v. Saba, 626 So. 2d 274 (2nd DCA 1993.) (The Court held that mixed questions of law and fact, though not necessarily a question for a

jury, should not be resolved prematurely but should be resolved after consideration of the relevant evidence.)

Moreover, if the Prehearing Officer had granted the motion, the case would have been disposed of without the full Commission's consideration. In instances where final disposition of a case is to be decided, the full Commission must make the decision. It would have been inappropriate for the Prehearing Officer to grant either of Homestead's motions if doing so would dispose of the case. Moreover, the City did not ask for rehearing of the Prehearing Officer's ruling before the full Commission. The Prehearing Officer's denial of the motion should be upheld. (R. 227, JP. Or. 2)

III. THE COMMISSION CORRECTLY DENIED HOMESTEAD'S MOTION FOR FINAL SUMMARY JUDGMENT.

On the merits of the Motion for Final Summary Judgment, summary judgment cannot be granted unless it is conclusively shown that there is no genuine issue of any material fact that the moving party is entitled to judgment as a matter of law. Rule 1.510(c), Florida Rules of Civil Procedure. (R. 286, FSJ Or. 1) Moreover, if the evidence raises any issues of material fact, or if the evidence is conflicting or will permit different reasonable inferences, summary judgment cannot be granted. McDonald v. Florida Department of Transportation, 655 So. 2d 1164 (Fla. 4th DCA 1995). Every possible inference in favor of the party against whom

summary judgment is sought must be drawn. Moore v. Morris, 475 So. 2d 666 (Fla. 1985). (R. 286, FSJ Or. 1)

The Prehearing Officer's finding that in this case, the extensive pleadings of the parties clearly demonstrate that conflicting, reasonable inferences may be drawn from the facts giving rise to the territorial dispute and, as such, summary judgment is not appropriate was consistent with the standards for summary judgment. (R. 286, FSJ Or. 1)

In it's Brief, the City raises two arguments of interpretation of the meaning of the term "city-owned facility". In the first argument, the City attempts its own analysis of reading terms together. Specifically, the City's clarification regarding the Homestead Housing Authority Labor Camp fails to prove the City's point that because it is a separate corporate entity, this usage is consistent with labeling Silver Eagle and Contender Boats city-owned facilities. To the contrary, however, it disproves the City's point and supports the Commission's position. The property carved out for the City to serve has a municipal purpose and did not require the City to own the realty upon which it was situated. This situation is consistent with the Commission's interpretation of the Agreement.

The City's second argument that Paragraph 6 has no relationship to Paragraph 8 is equally flawed. The City states: "Had the parties desired to link paragraph 6 and paragraph 8, they

could have done so." (Br. 16) To the contrary, the two paragraphs are linked by the opening of paragraph 8 which states: "Notwithstanding the provisions of paragraph 6 hereof, ..." (R. 19) Whatever criteria is established in paragraph 6, paragraph 8 is making exception to that criteria. The paragraphs must be read together and the meaning of paragraph 8 must be taken from paragraph 6.

The City's Motion for Final Summary was correctly denied as being inappropriate, untimely and moot. The Commission's Order No. PSC-97-1552-PCO-EU should be upheld.

IV. THE ISSUE OF ATTORNEY'S FEES IS NOT RIPE AND SHOULD NOT BE BEFORE THIS COURT.

The City prematurely raises the issue of attorney's fees when the Commission has not made such an award. The Commission Order states ". . . such an award is premature. . . . FPL may file for attorney's fees and costs along with supporting affidavits and other evidence required by the enabling statute". (R. 238, PAA Or. 10). This statement does not rise to the level of an appealable final agency action and should be dismissed.

If the Court does address the merits of the City's argument, then it should uphold the Commission's reservation of jurisdiction. The issue as to whether the Commission has authority to award attorney's fees under Section 120.69(7), Florida Statutes, has been addressed and resolved in previous Commission orders. 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 costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.

It is clear that the Commission is the proper forum in which a party to a territorial agreement must bring an action to enforce that agreement. City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992). The enforcement proceeding before the Commission is an administrative one governed by Chapter 120, Florida Statutes, that eventually results in the issuance of a final order.

The PAA Order is consistent with past Commission Orders and case law. In Hitchcock and Driver Enterprises v. Dept. of Labor, 652 So. 2d 970 (Fla 1st DCA 1995), the Court set aside an order of a hearing officer from the Division of Administrative Hearings that dismissed an appellant's petition for attorney's fees and costs. According to the decision, DOAH hearing officers may award attorney's fees for administrative proceedings. Because the Commission acts as the hearing officer in administrative proceedings within its jurisdiction, the Commission has the same authority to award attorney's fees and costs in the same manner, and pursuant to the same authority as a hearing officer. In re: Objection by St. Johns North Utility Corp, 89 FPSC 10.342 (Jan. 27, 1989).

The City cites no authority for its statement that "no provision of Section 120.69, Florida Statutes (1997), authorizes an

agency to award attorney's fees in a proceeding brought before that agency." (Br. 18) The cases cited by the City in its brief do not support that position. In State Ex. Rel. Pettengill v. Copelan, 466 So. 2d 1133 (Fla. 1st DCA 1985), the Court stated that Section 120.69, is available only for the enforcement of, rather than a challenge to, agency action . . . ." The award of attorney's fees turns on the action sought to be enforced (enforcement of an Order) rather than the enforcer (challenge to the Order) as the City is trying to lead this Court to believe. In the instant case, FPL is seeking enforcement of Commission Order No. 4285, it is not a challenge to the order. Further, State v. Copelan supports FPL's position for an award of attorney's fees since FPL sought enforcement of Commission Order 4285 against the City. 466 So. 2d 1133. The instant case is consistent with that holding.

The Commission has the authority to award attorney's fees under Section 120.69(7), Florida Statutes. Because this case was enforcement of Order 4285, the Commission was correct in retaining jurisdiction over the matter and postponing its decision until the Order became final. The Court should dismiss any protestation or claim the City makes on this issue.

CONCLUSION

The City of Homestead failed to exhaust its administrative remedies and, therefore, its appeal should be dismissed. The Commission's Orders denying judgment on the pleadings and final summary judgment were consistent with case law and should be upheld. The Commissions Order interpreting the term "city-owned facilities" is a reasonable interpretation based upon the facts and the law and should be not be overturned. The City did not meet its burden of overcoming the presumption of correctness that attaches to Commission orders. City of Tallahassee V. Mann, 411 So. 2d 162 (Fla. 1981). For the foregoing reasons, the Commission's Orders should be affirmed.

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

DIANA W. CALDWELL
Associate General Counsel
Florida Bar No. 865842

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(850) 413-6175

Dated: February 22, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 22nd day of February 1999 to the following:

L. Lee Williams, Jr.
Williams & Gautier, P.A.
2010 Delta Boulevard
P. O. Box 4128
Tallahassee, FL 32315-4128
Counsel for City of Homestead

Mark Logan, Esquire
Smith, Ballard, and Logan
403 East Park Avenue
Tallahassee, FL 32301

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

DIANA W. CALDWELL

HOMSTEAD.DWC

APPENDIX

A. NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING ENFORCEMENT OF TERRITORIAL AGREEMENT - PSC-97-1132-FOF-EU.

B. ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS. - PSC-97-1111-PCO-EU.

C. ORDER DISPOSING OF MOTION FOR FINAL SUMMARY JUDGMENT - PSC-97-1552-PCO-EU.

D. PETITION FOR ENFORCEMENT OF ORDER.