

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within the City of Winter Park, pursuant to Section 366.03 and 366.04, F.S.

DOCKET NO. 050117-EI
ORDER NO. PSC-05-0453-PAA-EI
ISSUED: April 28, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

NOTICE OF PROPOSED AGENCY ACTION

ORDER RELIEVING PROGRESS ENERGY FLORIDA, INC.
OF THE OBLIGATION TO PROVIDE RETAIL ELECTRIC SERVICE
TO CERTAIN CUSTOMERS WITHIN THE CITY OF WINTER PARK

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

INTRODUCTION

On February 10, 2005, Progress Energy Florida, Inc. ("Progress") filed a petition asking the Commission to relieve it of the obligation to provide electric service to retail customers in the City of Winter Park ("Winter Park" or "City"). The petition results from Winter Park's decision to purchase Progress's electric facilities and establish a municipal utility to provide service within the City. The purchase price of Progress' distribution facilities and the area to be served by the City were established by arbitration award, issued July 18, 2003. Since that time, Progress and Winter Park have been negotiating the details of the transfer, and Winter Park intends to begin operation of its new utility by June 1 of this year. In anticipation of the transfer, and because at this time the parties have not negotiated a territorial agreement to address the new service areas of the utilities, Progress is asking the Commission to clarify its regulatory responsibilities to the customers and the service area that will soon be served by the municipal utility.

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FPSC-COMMISSION CLERK

As explained below, we acknowledge Winter Park's purchase of the electric distribution system serving the City, and we grant Progress's petition to relieve it of the obligation to provide electric service in the area that will be served by Winter Park's new municipal utility. We have jurisdiction pursuant to sections 366.03 and 366.04, Florida Statutes.

DECISION

As Progress explains in its petition, the events leading to this case began several years ago when Progress and Winter Park were not able to reach agreement over the terms of a new franchise agreement to replace the one set to expire in June of 2001. The old agreement had contained a provision permitting the City to purchase Progress' distribution system within the franchise area upon the expiration of the agreement. The parties could not agree to include such a provision in a new agreement, and Winter Park then began the process to purchase Progress' facilities under the old franchise agreement. In Florida Power Corporation v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001), the 5th District Court of Appeals affirmed the lower court's determination that under the old franchise agreement Winter Park had the right to purchase Progress' electric facilities and establish its own utility to serve in the City. Thereafter, an arbitration panel established the price and other terms for the transfer of Progress' distribution system to the City, including approval of the geographic area that Progress and Winter Park agreed will be the "City Territorial Area." Progress filed detailed maps that delineate Winter Park's service area which was established by the 2003 arbitration award.

Since 2003, Winter Park has been building its municipal utility system, and Progress and the City have negotiated the details of the transfer. The citizens of Winter Park have approved a bond issuance of \$49,800,000 for the purchase of Progress' system. The City has negotiated a bulk power contract with Progress, hired an electric utility director and begun construction of a new substation to protect reliability when Progress terminates its service. For its part, Progress is modifying one of its substations so that Winter Park will be able to receive 69 kV service and is planning other system modifications to accommodate the transition. Progress has provided the City with maps and maintenance data for its distribution system, non-confidential customer billing information, and other relevant operational information. The City has stated its intention to take over operation of the system on June 1, 2005. Progress asserts that it will be ready to reliably release control over the system and cease providing service to the Winter Park customers at that time. Progress also indicates that it will continue to provide service beyond June 1 if the City is not able to provide service by that date.

Progress' petition implicates two provisions of Chapter 366, sections 366.03 and 366.04, Florida Statutes. Section 366.03 imposes the duty on each private electric utility within the state to provide "reasonably sufficient, adequate, and efficient service upon terms as required by the commission." Section 366.04 provides that we have the power over all electric utilities in the state, including municipal utilities, to require reliability within a coordinated power grid and to approve territorial agreements and resolve territorial disputes. By our power to approve agreements and resolve disputes, we can prevent future uneconomic duplication of facilities and establish the territory within which a public utility has the obligation to serve. Further, since the horizontal division of territory between suppliers of the same product or service is considered a *per se* violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, our active supervision

of utility territorial boundaries provides state action immunity for the utilities from antitrust liability. See, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. et. al., 445 U.S. 97 (1980) (to receive immunity from antitrust liability, defendant must show that the actions complained of were taken pursuant to a clearly articulated state policy and actively supervised by the state), and Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609 (11th Cir. 1995) (two Florida electric utilities were entitled to state action immunity from antitrust liability for their horizontal division of territory because the State had a clearly articulated policy to establish utility territories by agreement, and the Florida Public Service Commission actively supervised the agreement in question).

The Winter Park purchase of its electric distribution system has thus created uncertainty for Progress regarding its regulatory obligations in the Winter Park area. Progress points out in its petition that it has provided service to customers in Winter Park since 1927. Without some acknowledgment or agreement from us that it can cease providing service to that territory, and in the absence of a territorial agreement with Winter Park that would establish a territorial boundary between the utilities and govern their relationship in the future, Progress believes that it – and perhaps Winter Park as well – could run afoul of the Commission or the antitrust court for failing to provide service.

We find that Progress does need some affirmative action by the Commission to clear up the uncertainty in this circumstance. We would have preferred that the parties had jointly requested approval of a territorial agreement, since that is the method, along with the resolution of disputes, established by statute to approve electric utility service territory. Nevertheless, faced with the *fait accompli* of the arbitration award, and with the understanding that Progress and Winter Park did agree to the City Territorial Area approved in the award, we will acknowledge the arbitration award and the territorial boundary it establishes between Progress and the new Winter Park utility. We relieve Progress from its obligation to serve in that territory, effective June 1, 2005, or at such later date that Winter Park is ready to begin utility operations. Progress shall inform us if the transfer will not take place on June 1st, and also inform us when the transfer does take place, whenever that may occur. Furthermore, since we will be the forum to resolve any territorial disputes that may develop between Progress and Winter Park, we encourage them to return as soon as possible with a territorial agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida, Inc.'s petition for relief from the statutory obligation to provide retail electrical service to certain customers within the City of Winter Park is granted, effective June 1, 2005, or at such later time that the City of Winter Park's municipal utility begins service to those customers. It is further

ORDERED that Progress shall inform the Commission if the transfer of its electric distribution system to the new municipal utility does not occur on June 1. Progress shall also inform the Commission when the transfer does take place. It is further

ORDERED that this Order shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201,

Florida Administrative Code is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall remain open until Progress files a notice with the Commission that the intended transfer has taken place. When the notice is filed the docket may be closed administratively.

By ORDER of the Florida Public Service Commission this 28th day of April, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: 
Kay Flynn, Chief
Bureau of Records

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal

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proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 19, 2005.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.