

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of City of Bartow, Florida,
Regarding a Territorial Dispute with Tampa
Electric Company, Polk County, Florida.

DOCKET No. 011333-EU
Filed: 011333-EU

RESPONSE OF BARTOW TO TECO'S MOTION TO DISMISS

The City of Bartow, Florida ("Bartow"), by and through its undersigned attorneys, responds to Tampa Electric Company's ("TECO") Motion to Dismiss as follows:

1. The purpose of a motion to dismiss is to test the legal sufficiency of the petition that was filed by Bartow and not to make a determination of the merits of the case. In considering a motion to dismiss, the Florida Public Service Commission ("PSC") must accept the truth of the factual statements made in Bartow's petition to modify the territorial agreement.

2. In order to prevail on its motion to dismiss, TECO has to show that, if the PSC accepts as true the factual statements and circumstances presented in Bartow's petition, the PSC would not have the legal authority to modify the territorial agreement.

3. The territorial boundary agreement between Bartow and TECO was attached as Exhibit A to the petition and is likewise attached hereto as Exhibit A. That territorial agreement specifically states in section 1.1 as follows:

[For] fifteen (15) years from the date above first written, but not before, either of the parties hereto shall have the right to initiate unilateral action before any governmental entity or court with appropriate jurisdiction, seeking to obtain modification or cancellation of this agreement.

That 15-year term has expired, and consistent with that agreement, Bartow is seeking to terminate or modify the agreement.

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4. The territorial agreement was approved by final order of the PSC on December 31, 1985. The language giving either party the unilateral right to initiate modification or cancellation of the agreement is a right granted by PSC order.

5. That right to unilaterally seek to have the PSC modify the territorial agreement is not conditioned upon either TECO's or Bartow's establishing any change in circumstances or any other precondition. The right to seek unilateral action to modify or cancel the territorial agreement is not limited.

6. Since the right to initiate unilateral action to modify the territorial agreement is authorized by territorial agreement and by PSC order and is without condition, the legal authority cited by TECO in its motion, being the case of *Florida Public Service Commission v. Fuller*, 551 So. 2d 1210 (Fla. 1989), is of no precedential value.

7. The Fuller case involved an order of the PSC approving a territorial agreement that did not contain any unilateral right by either of the parties to seek modification and it did not contain any express provisions setting forth the period of time that agreement would remain in effect.

8. The Florida Supreme Court in *Fuller* specifically affirmed the PSC's authority to modify territorial agreements at its discretion. Specifically the court held that:

“the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.”

9. The petition of Bartow fully falls within the category pleading initiated by a party to the agreement as contemplated by the court in *Fuller*.

10. Even if Bartow were required to establish a change in circumstances in order to justify maintaining its petition to modify the territorial agreement, it has in fact done so.

11. In paragraph 9 of Bartow's petition, it has alleged that, at the time the 1985 agreement was reached, there were no electrical customers in the disputed area.

12. Paragraph 11 states that Old Florida Plantation property, which is the subject matter of its petition, was annexed into the city of Bartow.

13. Paragraph 12 states that, in response to submissions of the Old Florida Plantation, Bartow issued a development order to the Old Florida Plantation.

14. Paragraph 13 states that Bartow provides some electrical service to locations in the Old Florida Plantation development within Bartow's current territorial boundary.

15. Paragraph 14 states that the developer of the Old Florida Plantation has requested that Bartow provide all of its utility services.

16. Paragraph 15 states that Bartow will provide utility services for the development, including garbage pick up, sewer services, potable water, and police and fire protection.

17. Paragraph 16 states that Bartow will own and operate certain of its own facilities located in the disputed Old Florida Plantation area, including a fire station, auxiliary police station, sewer lift station, and street lights, all of which it will serve with electrical power.

18. Paragraph 17 states that Bartow can serve the territory more economically than can TECO. It further states that its distribution substations that would provide power to the site currently have the capacity to accommodate the new development.

19. Paragraph 19 states that there is a benefit to future customers in the development's being able to have all of the utilities supplied by Bartow, as opposed to having to deal with two separate entities to receive utility services.

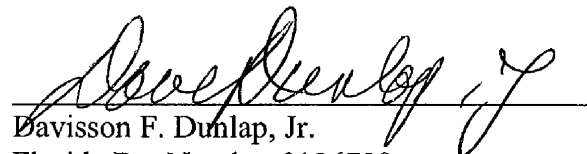
20. All the above factual statements constitute changes in circumstances that directly apply to the Old Florida Plantation property that is the subject matter of Bartow's petition to modify the territorial agreement.

21. While TECO might in the future present evidence that it maintains disputes some of the factual positions adopted by Bartow in its petition, those factual allegations must be accepted as true and accurate for the purposes of considering TECO's motion to dismiss.

22. Taken in their entirety, the factual allegations of Bartow as to the change in circumstances relating to the area in dispute would support a PSC decision to grant the petition of Bartow to modify the territorial agreement.

23. Bartow has alleged a sufficient factual and legal basis for having its petition considered on the merits by the PSC.

WHEREFORE, the City of Bartow respectfully requests that the motion to dismiss filed by Tampa Electric Company be denied.



Davisson F. Dunlap, Jr.
Florida Bar Number 0136730
DUNLAP & TOOLE, P.A.
2057 Delta Way
Tallahassee, FL 32303-4227
850-385-5000
850-385-7636 Facsimile

Attorneys for Petitioner, City of Bartow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response of Bartow to TECO's Motion to Dismiss has been furnished by United States mail on this 31st day of October, 2001, to:

Mr. Harry W. Long, Jr.
Assistant General Counsel
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601

Mr. Lee L. Willis
Mr. James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Attorneys for Tampa Electric Company


Attorney

TERRITORIAL BOUNDARY AGREEMENT
BETWEEN
TAMPA ELECTRIC COMPANY
AND
THE CITY OF BARTOW, FL.

Section 0.1 THIS AGREEMENT, made and entered into this 16th day of APRIL, 1985, by and between TAMPA ELECTRIC COMPANY, a corporation organized and existing under the laws of the State of Florida, herein referred to as "TECO" and the CITY of BARTOW - Electric Department, a city incorporated and existing under the laws of the State of Florida, herein referred to as "BARTOW";

WITNESSETH:

Section 0.2 WHEREAS, TECO is presently providing retail electric service in a portion of Polk County near and adjacent to the BARTOW city limits.

Section 0.3 WHEREAS, BARTOW is presently providing retail electric service in a portion of Polk County near and adjacent to the BARTOW city limits.

Section 0.4 WHEREAS, the areas in which each party is supplying retail electric service are in close proximity and abut in Polk County, TECO and BARTOW desire to cooperate in the public interest in supplying service in a manner so as to avoid uneconomic waste, potential safety hazards and other adverse effects that would result from duplication of electric facilities in the same area.

Section 0.5 WHEREAS, the execution of this AGREEMENT by the parties hereto is not conditioned upon the acceptance of or agreement to any other contractual arrangements pending or contemplated by or between the parties.

Section 0.6 NOW, THEREFORE, in consideration of the foregoing premises and of the mutual benefits to be obtained from the covenants herein set forth, the parties hereto do hereby agree as follows:

ARTICLE I

TERM OF AGREEMENT

Section 1.1 **TERM:** After this AGREEMENT becomes effective pursuant to Section 3.4 hereof, it shall continue in effect until termination or until modification shall be mutually agreed upon, or until termination or modification shall be mandated by governmental entities or courts with appropriate jurisdiction. Fifteen (15) years from the date above first written, but not before, either of the parties hereto shall have the right to initiate unilateral action before any governmental entity or court with appropriate jurisdiction, seeking to obtain modification or cancellation of this AGREEMENT.

ARTICLE II

ESSENCE OF AGREEMENT

Section 2.1 The boundary line delineating the retail electric service areas of the parties is marked on the map attached hereto and labeled Exhibit A, and said boundary line is further described in (a) and (b) as follows:

WINTER HAVEN

(a) Commence at the southeast corner of the northeast 1/4 of Section 30, Township 29, Range 26 east, run thence north along the east boundary of said Section 30 to the northeast corner of said Section 30, run thence west along the north boundary of said Section 30 to the southeast corner of the southwest 1/4 of Section 19, Township 29 south, Range 26 east, run thence north to the southeast corner of the southwest 1/4 of Section 18, Township 29 south, Range 26 east, run thence west along the south boundary of said Section 18 to the southwest corner of said Section 18, run thence north along the

west boundary of said Section 18 to the intersection of the said west boundary and the south right-of-way of State Road 559, run thence westerly in a straight line along the projected right-of-way of State Road 559 to the easterly right-of-way of line of State Road 555, run thence southwesterly along said right-of-way line to a point 900 feet west of the east boundary of Section 22, Township 29 south, Range 25, run thence south parallel to and 900 feet west of the east boundary of said Section 22 to the south boundary of said Section 22, run thence west along the south boundaries of Sections 22 and 21, Township 29 south, Range 25 east, to the southwest corner of said Section 21, run thence north along the west boundary of said Section 21 into Lake Hancock to a point of intersection with the westerly projected north boundary of Section 22, Township 29 south, Range 25 east, run thence west along the projected north boundary of said Section 21 to a point in Lake Hancock located 1,900 feet east of the southeast corner of Section 13, Township 29 south, Range 24 east, for a point of termination. All lying in Polk County, Florida.

PLANT CITY

(b) Commence at the southeast corner of the southwest 1/4 of Section 3, Township 31 south, Range 24 east, run thence north to the northeast corner of the northwest 1/4 of Section 15, Township 30 south, Range 24 east, run thence east along the north boundaries of Sections 15 and 14, Township 20 south, Range 24 east, to the northeast corner of the northwest 1/4 of said Section 14, run thence

north to the center of Section 2, Township 30 south, Range 24 east, run thence west to the center of Section 3, Township 30 south, Range 24 east, run thence north to the northeast corner of the northwest 1/4 of said Section 3, run thence east along the north boundary of said Section 3 to the southeast corner of the southwest 1/4 of Section 34, Township 29, south Range 24 east, run thence north to the northeast corner of the northwest 1/4 of said Section 34 for a point of termination. All lying in Polk County, Florida.

Section 2.2 The area generally north of said boundary line (a) and generally west of said boundary line (b) is reserved to TECO (as relates to BARTOW), and the area generally south of said boundary line (a) and generally east of said boundary line (b) is reserved to BARTOW (as relates to TECO), with respect to service to retail customers.

Section 2.3 The parties agree that neither party, except as provided in Section 2.4, will provide or offer to provide electric service at retail to future customers within the territory reserved to the other party.

Section 2.4 The parties recognize that, in specific instances, good engineering practices (or economic constraints on either of the parties) may from time to time indicate that small service areas and/or future retail electric customers should not be served by the party in whose territory they are located. In such instances, upon written request by the party in whose territory they are located to the other party, the other party may agree in writing to provide service to such small service areas and/or future retail electric customers, and it is understood that no additional regulatory approval will be required for such agreement(s). By the execution of this AGREEMENT, the parties acknowledge that TECO may continue to provide retail electric service to existing and future phosphate customers and/or customers served at transmission voltage (69 KV and above) in the area of Polk County reserved for BARTOW.

Section 2.5 This AGREEMENT shall apply only to the provision of retail electric service by the parties hereto and shall have absolutely no application or effect with respect to either party's sale of "bulk power supply for resale," which is defined to mean all arrangements for supply of electric power in bulk to any person for resale, including but not limited to, the taking of utility responsibility for supply of firm power in bulk to fill the full requirements of any person engaged or to be engaged in the distribution of electric power at retail, and/or interconnection with any persons for the sale or exchange of emergency power, economy energy, deficiency power, and such other forms of bulk power sales or exchanges for resale made for the purpose or with the effect of achieving an overall reduction in the cost of providing electric power supply.

Section 2.6 Nothing in this AGREEMENT is intended to affect the power plants, transmission lines, or substations of one party which are now located, or may in the future be located in the service area of the other party, and any problems between the respective parties involving these types of facilities shall be settled at the General Office level of the parties.

ARTICLE III

MISCELLANEOUS PROVISIONS

Section 3.1 The failure of either party to enforce any provision of this AGREEMENT in any instance shall not be construed as a waiver or relinquishment on its part of any such provision but the same shall nevertheless be and remain in full force and effect.

Section 3.2 Neither party shall assign, transfer or sublet any privilege granted to it hereunder without the prior consent in writing of the other party, but otherwise, this AGREEMENT shall insure to the benefit of and be binding upon the successors and assigns of the parties hereto.

Section 3.3 This AGREEMENT shall be governed by the laws of the State of Florida.

Section 3.4 The parties recognize and agree that both companies are subject to the jurisdiction of the Florida Public Service Commission (hereinafter called the "Commission") and further agree that this AGREEMENT shall have no force and effect unless and until it is submitted to and approved by the Commission in accordance with applicable procedures. The parties further agree that the AGREEMENT, if and when approved by the Commission, shall be subject to the continuing jurisdiction of the Commission and may be terminated or modified only by Order of the Commission. No modification or termination of this AGREEMENT by the parties hereto shall be effective unless and until approved by the Commission. Each party agrees to promptly notify the other in writing of any petition, application or request for modification of the AGREEMENT made to the Commission and to serve upon the other party copies of all pleadings or other papers filed in connection therewith.

Section 3.5 This AGREEMENT shall be effective on the date it is approved by the Florida Public Service Commission in accordance with Section 3.4 hereof.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed by their duly authorized officers, and copies delivered to each party, as of the day and year first above stated.

ATTEST:

TAMPA ELECTRIC COMPANY

BY: [Signature]
Secretary

BY: [Signature], 4-16-85
Vice President Date

ATTEST:

CITY OF BARTOW, FL

BY: [Signature]
City Clerk

BY: [Signature] APR 4 1985
Vice Mayor Date

Approved as to correctness
and form:

Approved as to substance:

By: [Signature]
City Attorney

By: [Signature]
City Manager

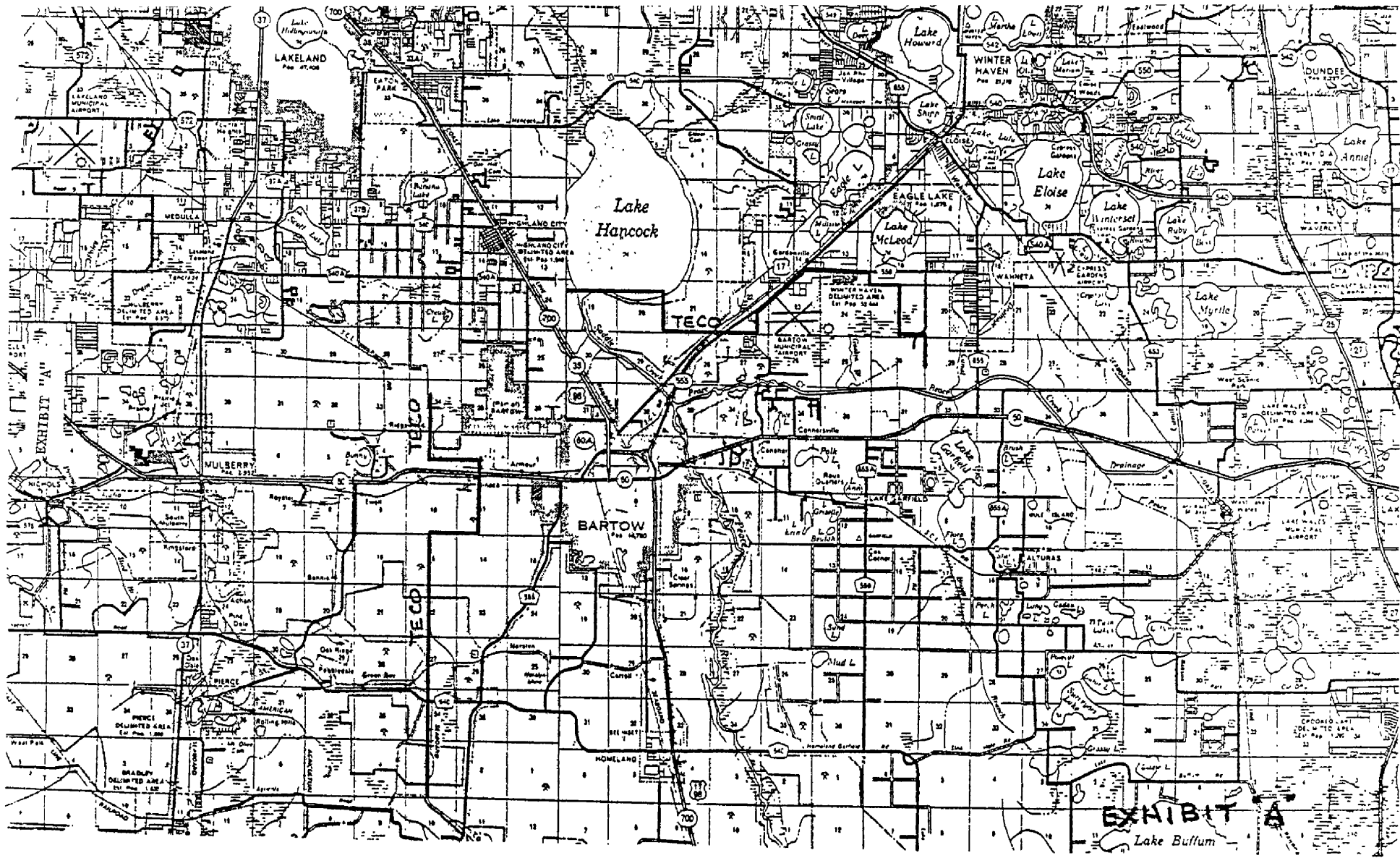


EXHIBIT A
Lake Buffum