

State of Florida



Public Service Commission
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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION CLERK

DATE: MAY 22, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (Vining) *AEV*
DIVISION OF ECONOMIC REGULATION (BREMEN, D.LEE) *WOM* *JDJ*

RE: DOCKET NO. 011333-EU - PETITION OF CITY OF BARTOW TO
MODIFY TERRITORIAL AGREEMENT OR, IN THE ALTERNATIVE, TO
RESOLVE TERRITORIAL DISPUTE WITH TAMPA ELECTRIC COMPANY IN
POLK COUNTY.

AGENDA: 6/3/03 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\011333.RCM

CASE BACKGROUND

On October 4, 2001, the City of Bartow, Florida (Bartow or City), filed a petition to modify the territorial agreement or, in the alternative, to resolve a territorial dispute between Bartow and Tampa Electric Company (TECO or Company). Bartow and TECO entered into a territorial boundary agreement, on or about April 16, 1985, which contains a clause prohibiting either party from modifying or cancelling the agreement for a period of fifteen years from the date first written. See Order No. 15437, issued December 11, 1985, in Docket No. 850148-EU. Now that the fifteen-year term has expired, Bartow is requesting a modification to the territorial boundary line in order to serve the Old Florida Plantation (OFP) development, which spans the current boundary line. Bartow argues: it can serve OFP more economically than TECO; the developer of OFP has requested that Bartow serve the property; and, its distribution substations have the capacity to accommodate the new development.

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By Order No. PSC-02-0422-PCO-EU, issued March 3, 2002, the Commission denied a motion to dismiss filed by TECO, and found that Bartow's petition stated a legally sufficient cause of action. The Order ruled only on the legal sufficiency of Bartow's claim. There was no finding as to the factual support for Bartow's petition.

On April 16, 2002, staff and the parties held an informal meeting to discuss issues and possibility of settlement. The same day TECO filed an answer to Bartow's petition. In its answer, TECO denies any inference that TECO's facilities are any less appropriately located than those of Bartow to provide electric service to OFP, as well as the existence of a territorial dispute. TECO also disputes that Bartow can serve the territory more economically than TECO, and that there is a benefit to future customers in OFP having all their utilities supplied by Bartow. Finally, TECO states that Bartow has provided no justification for a modification to the territorial agreement, and indeed no basis for any other action by the Commission.

On April 25, 2002, Bartow filed a Motion for Continuance. Bartow requested the continuance because of ongoing litigation between OFP and a natural gas pipeline company, which was set to go to trial in August 2002. The litigation was important to this proceeding because the layout of the OFP development could have changed as a result of the civil case. The Commission granted the continuance by Order PSC-02-0939-PCO-EU, issued July 17, 2002, predicated upon Bartow filing either a status report of the configuration of the Old Florida Plantation once the August 2002 trial was completed, or a revised petition; however, Bartow was not precluded from filing both a status report and a revised petition.

On December 2, 2002, Bartow filed a status report stating that the final configuration of the OFP development had been established and that this proceeding could now resume. Bartow did not revise its October 24, 2001, petition.

This recommendation addresses both the factual and legal matters in Bartow's October 24, 2001 petition. The Commission has jurisdiction to address the petition pursuant to Section 366.04, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the City's Petition to modify the territorial agreement adjusting the current boundary lines to include all of the OFP development in the City's retail service area?

RECOMMENDATION: No. Only a minor boundary modification is necessary in this instance to ensure reliable electric service to protect the public interest. The new boundary should follow the primary entrance road into OFP, and then cross a conservation area. Within 60 days of the Commission vote in this matter, the parties should file a metes and bounds description of the new boundary through the OFP development, as well as a map delineating the modification to the service areas of TECO and Bartow. (Vining, Breman, Lee)

STAFF ANALYSIS: Section 1.1 of the territorial agreement between Bartow and TECO states:

After this AGREEMENT becomes effective . . . it shall continue in effect until termination or until modification shall be mutually agreed upon, or until termination or until 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.

More than fifteen years have passed since TECO and Bartow entered into the territorial agreement, allowing either party to petition for modification of the agreement, as Bartow has done in this case. Staff notes that this is the first instance in which the staff has addressed a unilateral petition for modification which is specifically authorized by the existing territorial agreement.

The Commission has exclusive jurisdiction to modify territorial agreements that are expressly approved by Order of the Commission. Public Service Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989). The Commission also has the responsibility to ensure that the territorial agreement "works no detriment to the public

interest." Utilities Comm'n of City of New Smyrna Beach v. Florida Public Service Comm'n, 469 So. 2d 731, 732-733 (Fla. 1985). Thus, the Commission may modify a territorial agreement where a demonstrated public interest requires the modification. Absent such a demonstrated need, however, the principle of administrative finality supports the Commission's policy of encouraging territorial agreements. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966). On the basis of these legal principles and policies and pursuant to Section 1.1, staff believes the Commission should modify the parties' existing agreement only to the extent necessary to ensure reliable electric service to the new development.

Pursuant to Rule 25-6.0440(2)(b), Florida Administrative Code, a territorial agreement should not cause a decrease in the reliability of electrical service to future electric customers. In response to staff data requests, both utilities stated that strict adherence to the current boundary line through OFP would result in a decrease in the reliability of service to future customers, because a radial rather than a loop underground circuit would need to be installed in the proximity of the boundary. Staff believes a minor boundary modification following the primary entrance road into OFP, and then across a conservation area, would result in improved reliability to future customers because no radial circuits would need to be installed. The recommended modification to the territorial agreement follows natural boundaries, allowing better engineering practices and improving the reliability of electric service. A map of the OFP development with the current service area boundaries, as well as staff's suggested boundary modification, has been included for informational purposes as Attachment A to the recommendation.

As both parties have indicated, under the existing territorial boundary future customers would receive less reliable electric service, which would not be in the public interest. The boundary modifications suggested by the City's petition are excessive, however, and not required to ensure reliable electric service for future customers. Granting all of OFP to Bartow is not necessary to protect the public from harm, and indeed could lead to uneconomic duplication of facilities. In this proceeding, the Commission must balance the public's interest in receiving reliable electric service with the preservation of existing territorial agreements, which also provides a public benefit. Territorial agreements establishing exclusive service areas are encouraged as

a means to avoid the harms resulting from competitive practices. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992). Here, a minor modification to the boundary pursuant to Section 1.1 of the agreement would protect the public from harm, while also according the requisite finality to the order approving the current territorial agreement. This action is consistent with the Commission's policy of encouraging territorial agreements.

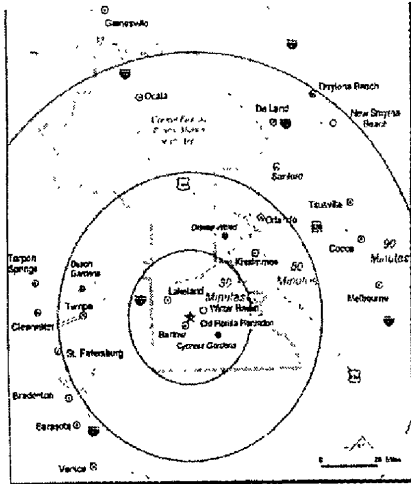
For these reasons, staff believes that a minor modification of the boundary through OFP is appropriate, because future customers will have more reliable electric service when the territorial boundary follows natural boundaries, allowing better engineering practices. The current territorial agreement between TECO and Bartow would result in a decrease in the reliability of electric service to future customers unless modified to address apparent deficiencies. As a result, the new boundary line through OFP should follow the primary entrance road into OFP and then cross a conservation area. The recommended modification will ensure reliable electric service for future customers, which is in the public interest. Within 60 days of the Commission vote in this matter, the parties should file a metes and bounds description of the new boundary through OFP, as well as a map delineating the modification to the service areas of TECO and Bartow.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon the issuance of a Consummating Order. The docket should remain open to allow for the review of the pending territorial modification. (Vining)

STAFF ANALYSIS: Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon the issuance of a Consummating Order. The docket should remain open to allow for the review of the pending territorial modification.



LAKE HANCOCK

Existing TECO Service Area

Existing Bartow Service Area

Staff's suggested modification

MASTER PLAN
OLD FLORIDA PLANTATION
PLANNED COMMUNITY

LATEST REVISION, FEBRUARY 2002

TYPICAL DWELLINGS	
(SINGLE FAMILY) [Diagram of single family lot]	75 FOOT WIDE LOTS = 2235 LIVING UNITS
(MEDIUM DENSITY) [Diagram of duplex lot]	68' X 60' DUPLEX = 1710 LIVING UNITS
(HIGH DENSITY) [Diagram of sixplex lot]	50' X 120' SIXPLEX WITH PARKING = 852 LIVING UNITS
TOTAL = 4797 LIVING UNITS	