

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to Resolve a) DOCKET NO. 950307-EU
Territorial Dispute with Florida) ORDER NO. PSC-95-0897-FOF-EU
Power and Light Company in St.) ISSUED: July 25, 1995
Johns County by Jacksonville)
Electric Authority)
_____)

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION TO DISMISS

Introduction

On March 20, 1995, Jacksonville Electric Authority (JEA) petitioned the Florida Public Service Commission (Commission) to resolve a territorial dispute between JEA and Florida Power and Light Company (FPL). Pursuant to Section 366.04, Florida Statutes, we have jurisdiction to resolve this dispute.

On May 12, 1995, FPL filed its Second Amended Answer to Jacksonville Electric Authority's Petition and Counter-Petition. On June 1, 1995, JEA filed a Motion to Dismiss Florida Power and Light's Counter-Petition. On June 8, 1995, FPL responded with a Memorandum in Opposition to Jacksonville Electric Authority's Motion to Dismiss.

FPL and JEA are currently bound by a territorial agreement entered into on April 13, 1979, and approved by the Commission on May 9, 1980, in Order No. 9363, issued in Docket No. 790886-EU. In its counter-petition, FPL seeks modification or cancellation of the agreement. JEA, however, asserts that FPL's counter-petition should be dismissed. In considering this motion to dismiss, the facts set forth in the counter-petition are viewed in the light most favorable to FPL in order to determine if FPL's claim is cognizable under the provisions of Section 366.04(2), Florida Statutes and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code.

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FPSC-RECORDS/REPORTING

Effect of Order 9363

In its counter-petition, FPL seeks modification of the 1979 territorial agreement pursuant to Section 1.1 of the agreement. Section 1.1 provides, in part:

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

FPL asserts that modification of the agreement is in the best interests of existing and future customers. In the alternative, FPL asks that the current agreement be cancelled and the parties allowed to negotiate a new agreement.

JEA alleges that the counter-petition fails to set forth ultimate facts necessary to support the relief requested, as required by Rule 1.110(b), Florida Rules of Civil Procedure. Rule 1.110(b) requires that a counter-claim contain:

. . . (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled.

JEA argues that Section 1.1 of the agreement does not eliminate the legal requirement that FPL state a cause of action, such as the existence of a "territorial dispute," as defined in Rule 25-6.0439(1)(b), or "changed circumstances," as described in Peoples Gas Systems, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

When the Commission approved the 1979 territorial agreement between JEA and FPL, that agreement became an order of the Commission. Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) (an agreement has no existence apart from the Commission order approving it). See also City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) (" . . . the practical effect of such approval is to make the approved contract an order of the Commission . . ."). Order 9363 approved the 1979 agreement in its entirety and, therefore, Section 1.1 of the agreement is part of a Commission directive. Section 1.1

provides that either party may petition to modify or cancel the agreement after 15 years "from the date first written." FPL's counter-petition to modify or cancel the 1979 agreement was filed more than 15 years from the date the agreement was first written. FPL's counter-petition asks us to take action that the Commission specifically considered in Order 9363. We do not believe that any other factual allegations are necessary to support that request. FPL's counter-petition clearly states a sufficient cause of action on this point. Furthermore, it is appropriate for FPL to raise this matter in its counter-petition because it pertains to issues that will be addressed in this docket. For these reasons, we will not dismiss FPL's counter-petition. JEA's motion is denied.

Additional Issues

In light of the above analysis, we do not need to reach the other arguments JEA raised in its motion, but the following analysis of those arguments also supports our decision to deny the motion to dismiss.

A. Cause of Action to Modify or Cancel Agreement

JEA argues that FPL's counter-petition must be dismissed because it fails to set forth ultimate facts necessary to state a cause of action. JEA asserts that Section 1.1 of the existing agreement can not stand alone as a basis for FPL's counter-petition, but that FPL must also sufficiently allege ultimate facts demonstrating that it is necessary to modify the agreement due to "changed conditions," as outlined in Peoples Gas Systems, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966).

We think Mason is distinguishable. In Mason the court determined that the Commission cannot modify an order that has become final solely upon the basis that the Commission did not have the authority to enter the original order in the first place. The Mason court did not address the validity of a provision such as Section 1.1 as the basis for modifying an agreement. Mason does not, therefore, apply in instances where the modification or termination of the agreement was specifically provided for in the agreement and approved by the Commission.

It follows, therefore, that FPL's counter-petition does not have to contain specific factual allegations of changed circumstances or public need. The counter-petition need only contain a short, plain statement of the ultimate facts indicating that FPL is entitled to relief. Shahid V. Campbell, 552 So. 2d 321 (Fla. 1st DCA 1989). See also Fontainbleau Hotel Corp. v. Walter,

246 So. 2d 563 (Fla. 1971). FPL has fulfilled that requirement by alleging that, pursuant to Section 1.1, the passage of 15 years entitles it to unilaterally petition the Commission to modify or cancel the agreement. FPL has also alleged that the customers' best interests will be served if we modify the agreement. FPL's counter-petition states a cause of action, states grounds for our jurisdiction, states the ultimate facts showing FPL is entitled to relief, and makes a demand for relief. This is all that is necessary under the Florida Administrative Code and Rule 1.110(b), Florida Rules of Civil Procedure.

B. Existence of Territorial Dispute

In addition, JEA argues that the only other alternative means for FPL to exercise its right to have the boundary redrawn would be to allege that a territorial dispute exists. JEA argues that FPL did not make this allegation. We disagree. FPL is not required to make that specific allegation in the body of the counter-petition when the case itself is titled "Petition of Jacksonville Electric Authority to Resolve a Territorial Dispute with Florida Power and Light Company in St. Johns County." Clearly, a territorial dispute exists. JEA has alleged it in its petition. We will not dismiss FPL's counter-petition for failing to restate the obvious.

CONCLUSION

It would be inappropriate to dismiss FPL's counter-petition when the facts alleged in the counter-petition, viewed in the light most favorable to FPL, set forth a claim that is cognizable by the Commission under the provisions of Section 366.04 (2), Florida Statutes and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code. JEA's Motion to Dismiss is, therefore, denied.

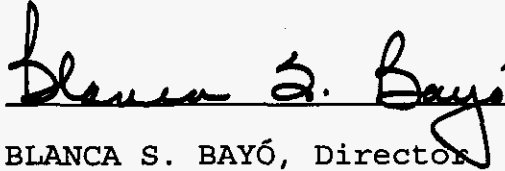
Based on the foregoing, it is therefore

ORDERED that Jacksonville Electric Authority's Motion to Dismiss Florida Power and Light's Counter-Petition is denied. It is further

ORDERED that this docket shall remain open pending resolution of the substantive issues in the case.

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By ORDER of the Florida Public Service Commission, this 25th
day of July, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.