

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of City of
Bartow to modify territorial
agreement or, in the
alternative, to resolve
territorial dispute with Tampa
Electric Company in Polk County.

DOCKET NO. 011333-EU
ORDER NO. PSC-02-0422-PCO-EU
ISSUED: March 28, 2002

ORDER DENYING TAMPA ELECTRIC COMPANY'S
MOTIONS TO DISMISS AND TO STAY DISCOVERY

On October 4, 2001, the City of Bartow, Florida (Bartow), filed a petition to modify the territorial agreement or, in the alternative, to resolve a territorial dispute between Bartow and Tampa Electric Company (TECO). Bartow states that TECO and Bartow 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. Now that the fifteen year term has expired, Bartow requests a modification to the territorial boundary line in order to serve the Old Florida Plantation (OFP) property, which is divided by the boundary line. Bartow argues that 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.

On October 22, 2001, TECO filed a Motion to Dismiss and a Request for Oral Argument. On October 31, 2001, Bartow filed a Response to TECO's Motion to Dismiss and a Request for Oral Argument. TECO filed a Motion to Stay Discovery on November 26, 2001. Bartow filed a response to TECO's Motion to Stay Discovery on December 4, 2001.

I. Motion to Dismiss

TECO's Motion to Dismiss requests that Bartow's petition be dismissed for failure to state a cause of action for which relief can be granted. Specifically, TECO argues that the facts alleged in the petition do not identify a service territory dispute within the meaning of Rule 25-6.0439, Florida Administrative Code. Also, TECO contends that Bartow failed to allege any relevant facts

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PSC-02-0422-PCO-EU CLERK

demonstrating changed conditions or circumstances that would require modification of the Commission's order adopting the existing service territory boundaries and finding them to be in the public interest.

TECO asserts that Rule 25-6.0439, Florida Administrative Code, defines a territorial dispute as a disagreement as to which utility has the right and obligation to serve a particular geographic area. TECO contends that no such dispute exists in this proceeding. Further, TECO argues that it has the exclusive right and obligation to serve the area on its side of the boundary line. TECO avers that Bartow has alleged no facts in the petition that could lead to a different conclusion; therefore, the petition should be dismissed for lack of merit.

TECO states that Order No. 23995, issued January 3, 1991, in Docket No. 900744-EU, In re: Petition to acknowledge termination or, in the alternative, to resolve territorial dispute between the City of Homestead and Florida Power & Light Company, provides the standard for modification of a territorial agreement. The Order provides that "modification or withdrawal of approval [of the agreement] is necessary in the public interest because of changed conditions or changed circumstances." TECO argues that Bartow has alleged no facts in its petition indicating changed circumstances requiring modification of the agreement. According to TECO, Bartow alleges the following changed circumstances: 1) Bartow annexed the OFP property; 2) there are plans for residential development of the OFP property that is expected to result in new electric customers and associated revenue; and, 3) the developer of OFP has asked Bartow to provide electric service to the entire development.

As to the first point, TECO contends that Bartow's annexation of the OFP property does not make it necessary in the public interest to modify the territorial agreement. In fact, the relief requested by Bartow would create unnecessary duplication of facilities as TECO already has the distribution infrastructure in place to serve the OFP property. With regard to the other points, TECO argues that the probability that the OFP property would be developed someday was clearly anticipated by Bartow and TECO, since the agreement states "that neither party . . . [would] provide or offer to provide electric service at retail rates to future customers within the territory reserved to the other party." As

such, the fact that the anticipated development of OFP is about to occur cannot be viewed as a changed circumstance requiring modification of the territoriality agreement.

Bartow responds that the purpose of a motion to dismiss is to test the legal sufficiency of a case, not determine its merits. As such, Bartow argues that the Commission must accept the truth of the factual statements made in its petition. Bartow asserts that the right to seek modification of the territorial agreement is not limited, nor is it conditioned upon either TECO or Bartow establishing any change in circumstances or conditions. Further, Bartow contends that the right to initiate the modification of the territorial agreement is authorized by both the territorial agreement and Order No. 15437, issued December 11, 1985, in Docket No. 850148-EU, In re: Joint Petition for Approval of Territorial Agreement Between the City of Bartow and Tampa Electric Company. Accordingly, Bartow argues that Florida Public Service Com'n v. Fuller, 551 So. 2d 1210 (Fla. 1989), one of the predicates upon which Order No. 23995 is based, is of no precedential value in this proceeding. Bartow maintains that Fuller involved an Order approving a territorial agreement that did not contain any unilateral right to seek modification, nor a provision establishing the time period for which the agreement would be in effect. Bartow states that Fuller affirmed the Commission's authority to modify territorial agreements at its discretion.

Bartow argues that even if it were required to establish a change in circumstances in order to justify maintaining its petition to modify the territorial agreement, it has done so. Bartow maintains that while TECO might present evidence to dispute the factual allegations made by Bartow, the factual allegations stated by Bartow must be accepted as true and accurate for the purposes of considering TECO's Motion to Dismiss. Therefore, Bartow asserts that it has alleged a sufficient factual and legal basis for having its petition considered on the merits.

In considering a motion to dismiss, the facts alleged in the petition must be viewed in the light most favorable to the petitioning party in order to determine if the claim is cognizable under the law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). For the reasons stated below, Bartow's petition, taken in the most favorable light, does state a claim that is cognizable under the law. Therefore, TECO's Motion to Dismiss is hereby denied.

TECO is correct that Order No. 23995 requires "changed conditions or changed circumstances" in order for the Commission to modify a territorial agreement; however, that requirement does not apply when the agreement in question contains a provision for modification or cancellation. See Order No. PSC-95-0897-FOF-EU, issued July 25, 1995, in Docket No. 950307-EU, In re: Petition to Resolve a Territorial Dispute with Florida Power and Light Company in St. Johns County by Jacksonville Electric Authority. Absent this requirement, Bartow's petition must contain a short, plain statement of the ultimate facts indicating that it is entitled to relief. Shahid v. Campbell, 552 So. 2d 321, 322 (Fla. 1st DCA 1989). Bartow alleges that the passage of more than fifteen years entitles it to petition the Commission to modify the territoriality agreement. Bartow's petition clearly states ultimate facts that indicate it is entitled to relief. More than fifteen years has passed since TECO and Bartow entered into the territorial agreement, allowing either party to petition for modification of the agreement; therefore, Bartow's petition contains a sufficient factual basis to survive a motion to dismiss.

Section 1.1 of the territorial agreement between TECO and Bartow provides that either party may petition to modify or cancel the agreement after "fifteen years from the date above first written." See Order No. 15437. Bartow's petition to modify the agreement was filed more than fifteen years from the date the agreement was first written. Bartow's petition clearly states a cause of action which is legally sufficient and cognizable under the law. Accordingly, TECO's Motion to Dismiss is denied.

II. Request for Oral Argument

Both TECO and Bartow requested oral argument on TECO's Motion to Dismiss. Because the pleadings summarized above were sufficiently clear, oral argument is not necessary. Therefore, the requests for oral argument filed by TECO and Bartow are hereby denied.

III. Motion to Stay Discovery

TECO's Motion to Stay Discovery requests that discovery be stayed in order to avoid uneconomic waste of time and expense in answering discovery while TECO's Motion to Dismiss is pending before the Commission. Bartow is opposed to TECO's Motion to Stay Discovery. Since TECO's Motion to Dismiss is denied, there is no

ORDER NO. PSC-02-0422-PCO-EU
DOCKET NO. 011333-EU
PAGE 5

need to stay discovery in this case. Therefore, TECO's Motion to Stay Discovery is hereby denied.


Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Tampa Electric Company's Motion to Dismiss is denied. It is further

ORDERED that Tampa Electric Company's and the City of Bartow's Requests for Oral Argument are denied. It is further

ORDERED that Tampa Electric Company's Motion to Stay Discovery is denied.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 28th day of March, 2002.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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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 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.

ORDER NO. PSC-02-0422-PCO-EU
DOCKET NO. 011333-EU
PAGE 6

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.

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 25-22.0376, 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 the Commission Clerk and Administrative Services, 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.