

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-02-0939-PCO-EU
ISSUED: July 12, 2002

ORDER GRANTING THE CITY OF BARTOW'S MOTION FOR CONTINUANCE,
DENYING TAMPA ELECTRIC COMPANY'S MOTION TO DISMISS, AND
SUSPENDING THE PROCEDURAL SCHEDULE

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 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 is divided by 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.

By Order No. PSC-02-0442-PCO-EU, issued April 2, 2002, the Commission established the controlling dates for this proceeding.

On April 25, 2002, Bartow filed a Motion for Continuance. TECO filed a Motion to Dismiss and Answer in Opposition to Bartow's Motion for Continuance on May 3, 2002. Bartow then filed a Response to TECO's Motion to Dismiss and Answer in Opposition to Bartow's Motion for Continuance on May 9, 2002.

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Pleadings

Bartow's Motion for Continuance requests that the Commission continue this proceeding and adjust the schedule accordingly. Bartow states that the location of the primary spine road in the OFP development, as well as the location of commercial and residential areas within the development, is essential to the determination of the issues in this case. Currently, there is a jury trial scheduled for August 5, 2002, between OFP and the gas pipeline company that has located its pipeline within the OFP development. Because of the location of the gas line, OFP is in the process of relocating the primary spine road in the development, as well as the commercial and residential areas within the property. Bartow asserts that the redesign of the development should be completed either right before or shortly after the trial scheduled for August. Accordingly, Bartow requests that the Commission not schedule a final hearing in this matter until after August, because the information needed by the Commission to evaluate the merits of this case will not be available until that time.

In response to Bartow's Motion for Continuance, TECO filed a Motion to Dismiss. TECO's Motion to Dismiss requests Bartow's petition be dismissed due to Bartow's failure to state any grounds upon which the Commission may act at this time. TECO asserts that Bartow alleges that the final configuration of the OFP property is essential to the determination of the issues in this case. In addition, TECO states that Bartow asserts that the developer of the OFP property will not have a final configuration plan for the development until some time after August 2002.

TECO argues that the precise location of the existing service territory boundary is not in dispute, and was established by Order No. 15437, issued December 11, 1985, in Docket No. 850148-EU. The issue raised by Bartow, according to TECO, is whether the service territory boundary should be relocated to permit Bartow to serve the entire OFP development, and Bartow has asserted it is able to serve the entire development. TECO maintains that this assertion was not conditioned or premised on any particular configuration of the OFP development. Therefore, TECO argues that Bartow should be prepared to demonstrate that it can serve the entire development, regardless of the final configuration of OFP.

TECO claims that it is ready to serve the portion of the OFP property located within its existing service territory. Additionally, TECO asserts that it is able to serve the entire OFP development, if the Commission determines that TECO is the more appropriate utility to serve the area. TECO points out that its ability and willingness to serve all or part of the OFP property is not contingent upon the final configuration of the OFP development. If Bartow is not prepared to demonstrate that it can serve the entire OFP development, as alleged in its petition, then TECO argues that Bartow's petition should be dismissed. There is no guarantee that the revision of the OFP development plan will be complete by August 2002, or that it will not undergo subsequent revisions even if the current revision is completed by August. Holding this proceeding in abeyance for an indeterminate period of time would be a waste of the Commission's resources, according to TECO. As a result, TECO argues that Bartow's petition should be dismissed for failing to state any grounds upon which the Commission can take further action at this time.

Bartow responds that its Motion for Continuance was based on concerns that the existing boundary line dividing the OFP property does not conform with established engineering and planning principles, resulting in inefficiencies and unnecessary expense to both Bartow and TECO. Bartow argues that the final configuration of the OFP development could have a significant impact on the merits of modifying the territorial agreement or resolving the territorial dispute. Bartow maintains that the requested continuance is for a finite period of time and does not extend these proceedings beyond a reasonable time frame for resolving this dispute.

Holding the case in abeyance would not be a waste of the Commission's resources, asserts Bartow, because no additional interim work on the part of the Commission would be required. Bartow states that it wants a prompt resolution of this case, but if a brief delay would result in more complete data, then Bartow argues that is the more prudent course of action. Finally, Bartow avers that the filing of a motion for continuance is not grounds for a motion to dismiss under the Florida Rules of Civil Procedure. Therefore, Bartow requests that the Commission deny TECO's Motion to Dismiss.

Findings

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). In addition, the petition must contain a short, plain statement of the ultimate facts indicating that the petitioning party is entitled to relief. Shahid v. Campbell, 552 So. 2d 321, 322 (Fla. 1st DCA 1989).

By Order No. PSC-02-0422-PCO-EU, issued March 28, 2002, the Commission denied an earlier Motion to Dismiss filed by TECO, and found that Bartow's petition "clearly states a cause of action which is legally sufficient and cognizable under the law." TECO's current Motion to Dismiss argues that Bartow's petition does not state any grounds upon which the Commission can take any further action at this time. I am not persuaded by TECO's argument. Bartow's petition, taken in the most favorable light, does state a claim that is cognizable under the law; and, one upon which the Commission can take further action at this time. Bartow's petition clearly states ultimate facts that indicate it is entitled to relief. 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; therefore, Bartow's petition contains a sufficient factual basis to survive a Motion to Dismiss. See Order No. 15437. Accordingly, TECO's Motion to Dismiss is denied.

Pursuant to Rule 28-106.210, Florida Administrative Code, a continuance of a hearing may be granted for good cause shown. Bartow states that the final configuration of the Old Florida Plantation development may significantly change as a result of the August, 2002, trial. I agree that the location of the primary spine road in the OFP development, as well as the location of commercial and residential areas within the development, is essential to the determination of the issues in this case. Accordingly, I find that Bartow has shown good cause for granting a continuance of the hearing in this proceeding. Therefore, Bartow's Motion for Continuance is granted.

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The grant of the continuance of the hearing in this proceeding is predicated upon Bartow filing either a status report of the configuration of the Old Florida Plantation once the August 2002 trial is completed, or a revised petition; however, Bartow is not precluded from filing both a status report and a revised petition. This filing shall be made by September 16, 2002. The hearing shall be continued to a date to be determined based upon the status report or revised petition filed by Bartow. Accordingly, the controlling dates specified in Order No. PSC-02-0442-PCO-EU, issued April 2, 2002, are hereby suspended.

Based on the foregoing, it is therefore

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the City of Bartow's Motion for Continuance is granted. It is further

ORDERED that Tampa Electric Company's Second Motion to Dismiss is denied. It is further

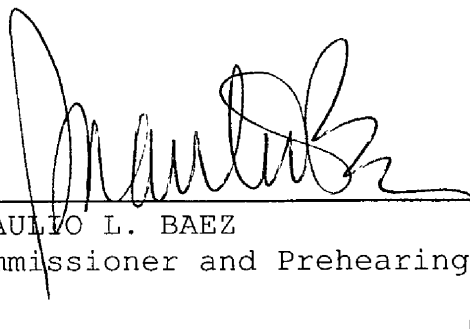
ORDERED that the controlling dates set forth in Order No. PSC-02-0442-PCO-EU are suspended. It is further

ORDERED that Order No. PSC-02-0442-PCO-EU is reaffirmed in all other respects. It is further

ORDERED that the City of Bartow shall file a status report on the configuration of the Old Florida Plantation, or a revised petition, by September 16, 2002.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 12th day of July, 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.

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

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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.