

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-03-0739-PAA-EU
ISSUED: June 23, 2003

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER MODIFYING TERRITORIAL AGREEMENT BETWEEN
CITY OF BARTOW AND TAMPA ELECTRIC COMPANY

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein is preliminary in
nature and will become final unless a person whose interests are
substantially affected files a petition for a formal proceeding,
pursuant to Rule 25-22.029, Florida Administrative Code.

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

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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.

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, our 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 Order addresses both the factual and legal matters in Bartow's October 24, 2001, petition. We have jurisdiction to address the petition pursuant to Section 366.04, Florida Statutes.

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. We note that this is the first instance in which the Commission has addressed a unilateral petition for modification which is specifically authorized by the existing territorial agreement.

We have 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). We also have 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, we 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 our 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, we shall 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. 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 modification to the territorial agreement shall follow natural boundaries, allowing better engineering practices and improving the reliability of electric service.

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, we 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 our policy of encouraging territorial agreements.

For these reasons, we find that only 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. We also find that 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 shall follow the primary entrance road into OFP and then cross a conservation area. The modification will ensure reliable electric service for future customers, which is in the public interest. By August 4, 2003, the parties shall 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the City of Bartow and Tampa Electric Company shall modify their territorial agreement as set forth in the body of this Order. It is further

ORDERED that, by August 4, 2003, the City of Bartow and Tampa Electric Company shall file a metes and bounds description of the new boundary through Old Florida Plantation, as well as a map delineating the modification to the service areas of the City of Bartow and Tampa Electric Company. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall remain open to allow for the review of the pending territorial modification.

ORDER NO. PSC-03-0739-PAA-EU
DOCKET NO. 011333-EU
PAGE 6

By ORDER of the Florida Public Service Commission this 23rd
Day of June, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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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 that is available under Section 120.57, 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 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.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding,

ORDER NO. PSC-03-0739-PAA-EU
DOCKET NO. 011333-EU
PAGE 7

in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on July 14, 2003.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.