

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Lee County)	DOCKET NO. 850129-EU
Electric Cooperative, Inc. to resolve)	
a territorial dispute with Florida)	ORDER NO. 20817
Power & Light Company.)	
<hr/>		ISSUED: 2-28-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
GERALD L. GUNTER

ORDER GRANTING MOTION TO AMEND TERRITORIAL AGREEMENT
AND DISMISSAL OF PETITION BY LEE COUNTY
ELECTRIC COOPERATIVE, INC. TO RESOLVE
A TERRITORIAL DISPUTE

BY THE COMMISSION:

Background

On April 29, 1982, Florida Mining and Materials (FMM) requested Florida Power & Light Company (FPL) to provide service to FMM facilities located in Charlotte County, Florida. On May 5, 1982, FPL advised FMM that FMM's facilities were within the service area of Lee County Electric Cooperative, Inc. (LCEC). FPL advised FMM to seek service from LCEC. By letter dated May 12, 1982, FMM again requested service from FPL. This time, however, FMM requested service at a point of delivery inside FPL's geographic territory as opposed to FMM's earlier request for service within Charlotte County. In February of 1984, FMM formally indicated that it was ready to proceed with construction of an electric line and requested that FPL and FMM enter into a service agreement.

On November 14, 1984, FPL filed a petition with this Commission requesting a declaratory statement regarding FPL's obligation to serve FMM. By Order No. 13998 issued on January 11, 1985, In Re: Petition of Florida Power & Light Company for a Declaratory Statement, Docket No. 840414-EI, we stated that FPL had an obligation to serve FMM at a point of delivery within FPL's territory.

On November 19, 1984 LCEC, in Docket No. 840444-EI, filed its initial petition to resolve a territorial dispute, alleging that LCEC and FPL had an agreement in Lee County, which FPL planned to violate by serving a customer located on LCEC's side of the agreement border. On December 3, 1984, LCEC filed a motion entitled "Motion for Consolidation; Motion for Continuation; Objection to Final Hearing of Florida Power & Light Company's Petition for Declaratory Statement," which alleged that its territorial dispute and FPL's petition for a declaratory statement involved the same facts, issues, and parties and requested that the two dockets be consolidated for hearing. Finding that the question presented by FPL's petition for declaratory statement could and should be answered independently of the territorial dispute complaint, the Commission denied LCEC's motions.

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On April 15, 1985, LCEC filed another petition, Docket No. 850129-EU, which requested that the Commission resolve a territorial dispute between itself and FPL. LCEC alleged that FMM would build a transmission line into FPL's service territory. Both FPL and FMM filed motions to dismiss LCEC's petition. The Commission agreed with FMM and dismissed LCEC's petition, with leave to amend, because the Commission found that it alleged the same facts and applicable law addressed by the Commission in FPL's earlier declaratory statement. Order No. 15452, issued on December 16, 1985. LCEC later amended its petition, stating the same facts it had raised earlier, and specifically alleged that agents of FPL and FMM conspired and acted in concert to deprive LCEC of its rights under the agreement. FPL and FMM again filed motions to dismiss stating that the facts and law contained therein were identical to those in the earlier declaratory statement and that, further, even if accepted as true, they would not constitute a violation of the agreement. The Commission agreed and dismissed with prejudice, finding that the two-page territorial agreement between the two utilities neither addressed nor contemplated a customer removing itself from one service territory to another by building its own transmission line. LCEC sought review of Order No. 15452 before the Supreme Court of Florida.

In its opinion issued in Lee County Electric Cooperative v. John R. Marks, 501 So.2d 585 (Fla. 1987) the Florida Supreme Court reversed Order No. 15452. In so doing, the Court found that (1) the Commission erred in concluding that LCEC's petition, taken as true, failed to allege a violation of the agreement; (2) that the Commission's ruling established "a policy which dangerously collides with the entire purpose of agreements, as well as the PSC's duty to police the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure ... the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities. §336.04(3), Florida Statutes (1985)," and (3) that the Commission's conclusion was "unsupported by precedent and inconsistent with the Commission's own established policy of enforcing agreements for the public good." Citing Storey v. Mayo, 217 So.2d 304 (Fla. 1968), for the holding that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." The Court found that it could not "find that the transparent device of constructing a line into another utility's service area may suffice to avoid the effect of an agreement." The Court reversed and remanded to the Commission for further proceedings consistent with its opinion.

Subsequent to that decision, on November 29, 1988, LCEC and FPL filed a joint petition requesting approval of an amendment to their territorial agreement and dismissal of LCEC's April 15, 1985 petition. The proposed amendment would allow FPL to continue servicing FMM's facilities in Charlotte County and is being sought solely because of the unique circumstances presented in this docket. The parties agree that the continued service by FPL and FMM is not precedent for establishing other amendments to the agreement and, further, that neither supplier will attempt to serve any applicant whose end-use facilities are located within the service territory of

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the other, including, but not limited to, a situation where the applicant proposes to build or builds its own electric line from a point inside the territory of either supplier to a point inside the territory of the other, except as provided by the agreement.

After a thorough review of the parties request, we find the proposed amendment to the territorial agreement between FPL and LCEC, attached to this order, to be reasonable. Having approved this agreement, we also find that the joint motion for dismissal of LCEC's complaint is now moot.

It is, therefore,

ORDERED that the joint motion for approval of the attached amendment to the territorial agreement of Florida Power & Light and the Lee County Electric Cooperative, Inc. is hereby granted. It is further

ORDERED THAT the territorial agreement of April 28, 1965, approved in Order No. 3799, will remain in full force and effect, except as hereby amended. It is further

ORDERED that the joint motion of Lee County Electric Cooperative, Inc. and Florida Power & Light Company for dismissal of Lee County's April 15, 1985 petition is hereby granted.

By ORDER of the Florida Public Service Commission,
this 28th day of February, 1989.


STEVE RIBBLE, Director
Division of Records and Reporting

(S E A L)

JW

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the

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Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In Re: Petition of Lee County)	
Electric Cooperative, Inc. against)	
Florida Power & Light Company)	Docket No.: 850129-EU
to resolve a territorial dispute)	

AMENDMENT TO TERRITORIAL AGREEMENT

Lee County Electric Cooperative (LCEC) and Florida Power & Light Company (FPL) hereby AMEND, subject to the approval of the Florida Public Service Commission, the Territorial Agreement between LCEC and FPL entered into on October 14, 1964, and approved by the Florida Public Service Commission on April 28, 1965, Order No. 3799, as set forth below:

1. The Territorial Agreement between FPL and LCEC approved by the Florida Public Service Commission on April 28, 1965, Order No. 3799, remains in full force and effect except as amended herein.

2. FM&M shall continue to receive service from FPL for its rock crushing plant at the point of delivery at Section 34, Township 42 South, Range 26 East.

3. LCEC and FPL (suppliers) agree that neither supplier will attempt to serve or serve any applicant whose end use facilities are located within the service territory of the other, including, but not limited to, a situation where the applicant proposes to build or builds its own electric line from a point inside the territory of either supplier to a point inside the territory of the other, except as provided herein.

The suppliers recognize that, in exceptional instances, good engineering practices (or economic constraints on either of the suppliers) may from

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time-to-time indicate that small service areas and/or future retail electric applicants should not be served by the supplier in whose territory they are located. In such instances, upon written request by the supplier in whose territory they are located to the other supplier, the other supplier may agree in writing to provide service to such small service areas and/or future retail electric service applicants, and the suppliers shall notify the Florida Public Service Commission of any such agreements and provide a copy of the agreement to the Commission.

In the event that a prospective applicant requests or applies for service from either supplier to be provided to end use facilities located in the territory reserved to the other supplier, then the supplier receiving such a request or application shall refer the prospective applicant or applicant to the other supplier, with citation to the Commission approved territorial agreement, and shall notify the other supplier of the request or application.

If the prospective applicant delivers a written application for service after being referred to the other supplier, or continues to demand service under an application made prior to a referral to the other supplier, the supplier shall file a Petition for Declaratory Statement requesting the Commission to apply the Territorial Agreement to the facts presented. The petitioning supplier shall notify the other supplier and the applicant of its intent to file a Petition for Declaratory Statement prior to filing the Petition and shall request the joinder of the other supplier as a necessary party with the filing of the petition. The petitioning supplier shall not provide electric service or attempt to provide electric service to the applicant unless the Commission, after hearing, authorizes the service in an order binding both suppliers.

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ATTACHMENT

Amendment to Territorial Agreement
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4. On full execution of this Amendment, LCEC and FPL shall seek approval of this Amendment by filing a Joint Motion for Approval with the Commission.

5. This amendment shall become effective upon approval by the Florida Public Service Commission.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals on this 28th day of November, 1988.

Witnesses:

Don Straley
Barbara Pyle

LEE COUNTY ELECTRIC
COOPERATIVE, INC.

By: Thomas G. Reese
Its President

Witnesses:

Barbara Sanchez
Maria Schumacher

FLORIDA POWER & LIGHT COMPANY

By: J. J. Pritch
Its Group Vice President