

State of Florida



Public Service Commission

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COMMISSION CLERK

**DATE:** JUNE 6, 2002

**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK  
ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (VINING) *AEV mat*  
DIVISION OF ECONOMIC REGULATION (BREMAN, D.LEE) *JDJ*

**RE:** DOCKET NO. 011333-EU - PETITION OF CITY OF BARTOW TO  
MODIFY TERRITORIAL AGREEMENT OR, IN THE ALTERNATIVE, TO  
RESOLVE TERRITORIAL DISPUTE WITH TAMPA ELECTRIC COMPANY IN  
POLK COUNTY.

**AGENDA:** 06/18/02 - REGULAR AGENDA - INTERESTED PERSONS MAY  
PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\011333.RCM

CASE BACKGROUND

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,

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its distribution substations have the capacity to accommodate the new development.

By Order No. PSC-02-0422-PCO-EU, 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." This Order ruled only on the legal sufficiency of Bartow's claim to survive a motion to dismiss; there was no finding as to the factual support for Bartow's petition.

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. This recommendation addresses TECO's Motion to Dismiss Bartow's petition. The Commission has jurisdiction to address the motion pursuant to Section 366.04, Florida Statutes, and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant Tampa Electric Company's Motion to Dismiss?

**RECOMMENDATION:** Yes. The Commission should grant Tampa Electric Company's Motion to Dismiss. Bartow's petition is not ripe at this time for adjudication by the Commission, and the Commission should dismiss Bartow's petition without prejudice. (VINING)

#### **STAFF ANALYSIS:**

##### 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

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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.

### Analysis

A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed, may not occur at all." Texas v. U.S., 523 U.S. 296, 300 (1998) quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985). There must be a real and substantial controversy with specific relief through a conclusive decree, as distinguished from an opinion advising what the law would be based upon a hypothetical set of facts. Aetna Life Insurance Co. v. Haworth et al., 300 U.S. 227, 241 (1937). In order to determine if a case is ripe for adjudication, the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration should be assessed. Abbott Laboratories v. Gardner,

387 U.S. 136, 149 (1967). 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. 1<sup>st</sup> DCA 1993).

The final configuration of the OFP development is essential to a determination of Bartow's petition. Changes to the present configuration of OFP will materially affect costs due to placement of electric distribution facilities within the property, as well as those facilities outside OFP that are necessary to provide service. OFP's load is also subject to variance depending on the number and placement of commercial and residential areas. While Bartow has stated that the final configuration of the OFP development should be finished shortly after the August 2002 trial is completed, staff believes that it is highly unlikely that OFP will have a final configuration in short order, given the fact that this is a large and complex development that might be radically altered based upon the outcome of the litigation. In staff's opinion, the full extent of the OFP project is not sufficiently mature at this time to go forward with modifying a territorial agreement, or in the alternative, resolving a territorial dispute. As a result, staff does not believe that the Commission can make a reasonable determination of Bartow's petition based on the current facts.

Staff believes that Bartow's claim is not ripe as it does rest upon "contingent future events that may not occur as anticipated, or indeed, may not occur at all." Texas v. U.S. The Commission should not make a ruling based upon a hypothetical set of facts. In order to determine if a claim is ripe for adjudication, the Commission should determine if the issues are fit for consideration, and whether there will be a hardship to Bartow and TECO if the Commission withholds adjudication. See Abbott Laboratories. In staff's opinion, the issues raised in Bartow's petition, even taken in the light most favorable to the petitioning party, Bartow, are not fit for review at this time because the facts are too remote. Staff also believes that neither TECO nor Bartow will face undue hardship if the Commission were to withhold adjudication at this time. TECO has stated that it is prepared to abide by the current territorial agreement. The hardship to Bartow should be minimal if the Commission grants the dismissal without prejudice, giving Bartow leave to file its petition again when the facts are more developed. Therefore, staff believes that Bartow's

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petition is not ripe for adjudication at this time, and recommends that the Commission should dismiss the petition without prejudice.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. If the Commission adopts Staff's recommendation and grants TECO's Motion to Dismiss, this docket should be closed. (VINING)

**STAFF ANALYSIS:** If the Commission adopts Staff's recommendation and grants TECO's Motion to Dismiss, then Bartow's petition will be dismissed. This docket should then be closed as no further proceedings will be required.