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June 14, 2002

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COMMISSION
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Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
& Administrative Services
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850


Re: Territorial Dispute Between City of Bartow
and Tampa Electric Company ("TECO")
Case No. 011333-EU

Dear Ms. Bayo:

Enclosed with this letter are the original and sixteen copies of a Memorandum of Bartow in Response to PSC's Recommendation on TECO's Motion to Dismiss. Please file the original pleading in the Commission's file for this matter. Please then stamp one copy with the date and time filed and return it to me in the enclosed stamped, addressed envelope.

Thank you for your assistance.

Sincerely yours,


Davisson F. Dunlap, Jr.

Enclosures

- AUS _____ cc Mr. Richard A. Williams
- CAF _____
- CMP _____
- COM 5
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC 1
- OTH _____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of City of Bartow, Florida,
Regarding a Territorial Dispute with Tampa
Electric Company, Polk County, Florida.

DOCKET No. 011333-EU
Filed: _____

**MEMORANDUM OF BARTOW IN RESPONSE TO PSC'S
RECOMMENDATION ON TECO'S MOTION TO DISMISS**

The City of Bartow, by and through its undersigned attorneys, responds to the recommendation of the Florida Public Service Commission staff regarding the Motion to Dismiss of Tampa Electric Company as follows:

In October 2001 the City of Bartow ("Bartow") filed its petition to modify the territorial agreement or to resolve the territorial dispute between Bartow and Tampa Electric Company ("TECO"). In its petition, Bartow pointed out that the territorial agreement that had been approved in 1985 by the Florida Public Service Commission ("PSC") specifically provided that either side could seek modification after the passage of 15 years.

The petition noted significant changes in the circumstances that have occurred in the intervening 15 years. These included establishment of the Old Florida Plantation development, which is divided by the current territorial line between TECO and Bartow and the annexation of Old Florida Plantation into the city of Bartow. Bartow is currently providing some retail electrical power to the Old Florida Plantation development. Old Florida Plantation had requested that Bartow provide its electrical power. Bartow was going to provide other utility services in the Old Florida Plantation development. It also noted that Bartow could most economically provide the power to Old Florida Plantation.

In response to the petition, a motion to dismiss was filed by TECO. That motion to dismiss was denied by the PSC on March 28, 2002.

PSC staff suggested that the case might be one that could be settled and with the concurrence of Bartow and TECO arranged for a settlement conference involving the parties at the PSC's offices in Tallahassee on April 16, 2002 (?).

During that settlement conference members of the PSC staff suggested a potential settlement based on the development plan for Old Florida Plantation. The question of whether the development plan depicting the location of businesses, house, and roadways was still in effect.

After this meeting, the developer of the Old Florida Plantation was contacted to find out whether the maps depicting the configuration of the Old Florida Plantation development had been changed or modified. The developer of the Old Florida Plantation indicated that there had been a gas pipeline installed in the development and that there was a trial scheduled for August 2002 to determine Old Florida Plantation's claim for compensation arising out of the installation of the gas pipeline. The existence of the gas pipeline was causing Old Florida Plantation to reconfigure the locations of some of the roads, housing and commercial property. The developer indicated that those redesigned plans would be part of its presentation at trial on the issue of its damages in August. The revised plans for the Old Florida Plantation development are expected to be available by the time this matter is rescheduled.

Based on the concerns expressed by PSC staff and with the information that the changes that were being made in the Old Florida Plantation plan would be completed. Bartow filed its motion seeking to reschedule final hearing after August 2002.

In response to the motion for continuance, TECO filed a second motion to dismiss, stating in paragraph two that "Bartow alleges that the final configuration of the Old Florida Plantation property is essential to a determination of the issues in this case." That is not an accurate statement. What Bartow said in its motion in paragraph two is that the PSC staff had

indicated that it was essential to its consideration. While it might be a factor to be considered, Bartow does not consider it "essential to determination of the issues in this case."

The configuration of Old Florida Plantation was not a fact that was alleged in Bartow's petition. The ultimate configuration, housing and roadways within the Old Florida Plantation are not essential to the determination of the issues in Bartow's case. The essential factors are stated in Bartow's petition. The ultimate configuration of the Old Florida Plantation development does not change the fact that Bartow feels that it is entitled to serve the customers in the area in dispute.

On June 6, 2002, the PSC staff filed its memorandum. In that memorandum, the PSC staff indicated that "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 incur at all."

Bartow does not agree with the staff's assessment. While final configuration of the Old Florida Plantation may be a factor to be considered by the PSC in determining the outcome of this dispute, the issue is ripe for consideration.

A motion to dismiss tests the sufficiency of the matters that are set forth in a complaint or petition. Courts and administrative bodies cannot dismiss cases based on whether certain facts are available or not available. That is what trials are for.

Not one of the cases cited by the PSC staff in its memorandum of law involves a situation in which a case that is being actively pursued and is dismissed because some fact that would go to prove one of the issues in the case is uncertain.

Texas v. United States, 118 S. Ct. 1257 (1998), was a declaratory judgment case. The complaint was dismissed because the essential subject of the case, being the issue of whether the state of Texas would appoint a master management team for the sanction for the failure of a local

school district to meet state mandated educational achievement levels was contingent in nature. It was uncertain whether Texas would in fact impose those sanctions in the future.

Bartow's petition does not involve an action seeking a declaratory judgment. It seeks to adjudicate its legal rights based on certain specific factual statements in its petition that are not contingent in nature.

The *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 So. Ct. 1507 (1967), case involved an action by drug companies against the Secretary of Health, Education, and Welfare. In that case, the Supreme Court determined that, in fact, the legal issues presented were fit for judicial resolution, because the regulation in question required an immediate and significant change in the plaintiff's conduct of its affairs. *See Abbot Laboratories* at 1518. As in *Abbott Laboratories*, the matter currently pending before the PSC in Bartow's petition presents issues that are ripe for administrative resolution, because the issue of who is to provide electrical service to the Old Florida Plantation needs immediate resolution.

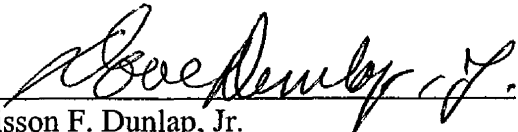
The *Aetna Life Ins. Co. of Hartford Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461 (1937), case cited by the PSC staff favors Bartow's position in this matter. The court noted the distinction between failure of a matter to involve a controversy and one where facts are in dispute. The court noted that the parties were in a dispute in adversary proceedings to determine legal rights and obligations between them. It further noted that just because a dispute turns on questions of fact does not withdraw it from judicial consideration.

The same reasoning applies to Bartow in this case. Bartow has stated a cause of action, which the PSC has already recognized as valid in denying TECO's earlier motion to dismiss. The merits of Bartow's and TECO's positions will turn on a consideration of all the facts. One of those facts considered by the PSC staff to be important is the ultimate configuration of the Old Florida Plantation development. However, the status of one fact being unsettled does not mean

that there is not a legitimate case or controversy pending and certainly does not form the basis for dismissing the action.

It has long been the settled law in the Florida that dismissal of administrative pleadings is an extreme sanction and appropriate only in the most exceptional cases. *Mathis v. Florida Department of Corrections*, 726 So. 2d 389 (Fla. 1st DCA 1999). The primary purpose of a motion to dismiss is to determine whether the petition or complaint properly states a cause of action upon which relief can be granted. *Fax v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175 (Fla. 5th DCA 2001). The purpose of a motion to dismiss is not to test or to determine whether there is sufficient proof or facts available to determine the outcome the case.

Bartow's request for a continuance for a limited period of time is perfectly reasonable under the circumstances. A revised schedule based on that request can easily be established. If the configuration of the Old Florida Plantation is still not settled at the time this matter comes up for ultimate determination, the matter will be determined by the evidence that is available. Bartow is prepared to move forward.



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Attorneys for Petitioner, City of Bartow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum of Bartow in Response to PSC's Recommendation on TECO's Motion to Dismiss has been furnished by United States mail on this 16th day of June, 2002, to:

Mr. Harry W. Long, Jr.
Assistant General Counsel
Tampa Electric Company
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Attorney