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July 22, 2003

HAND DELIVERED

Ms. Blanca S. Bayo, Director
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Petition of City of Bartow, Florida, Regarding a Territorial Dispute with Tampa Electric Company, Polk County, Florida; FPSC Docket No. 011333-EI

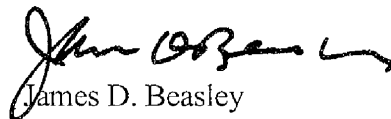
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Answer to Petition for Formal Hearing and Motion to Dismiss.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,


James D. Beasley

JDB/pp
Enclosure

cc: All Parties of Record (w/enc.)

DOCUMENT NUMBER DATE
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FPSC-COMMISSION CLERK

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
FILED: July 22, 2003

**TAMPA ELECTRIC COMPANY'S ANSWER
TO PETITION FOR FORMAL HEARING
AND MOTION TO DISMISS**

Pursuant to Rules 28-106.203 and 28-106.204, F.A.C., Tampa Electric Company ("Tampa Electric" or the "Company") hereby respectfully answers the Protest And Petition of the City Of Bartow ("City" or "Bartow") For Formal Hearing Regarding Modification Of A Territorial Agreement With Tampa Electric Company ("Petition"), filed with the Commission on July 11, 2003, and requests that the Petition be dismissed for failure to articulate material facts that warrant reversal or modification of Order No. PSC-03-0739-PAA-EU ("PAA")¹ and for failure to identify specific statutes or rules that require reversal or modification of the PAA, all as required pursuant to Rule 28-106.201, F.A.C. Specifically, the only rules or statutes alleged in the Petition to require reversal or modification of Order No. PSC-03-0739-PAA-EU relate to the Commission's authority with regard to service area disputes. Since, as a matter of law, no service territory dispute within the meaning of Rule 25-6.0439, F.A.C., exists between Tampa Electric and the City and since the PAA did not purport to address or resolve a service territory dispute, the Petition is fatally deficient on its face. Furthermore, it is equally clear that the City

¹ *Notice of Proposed Agency Action Order Modifying Territorial Agreement Between City of Bartow And Tampa Electric Company*, Order No. PSC-03-0739-PAA-EU ("PAA") issued on June 23, 2003 in Docket No. 011333-EU

has failed to allege any material facts in the Petition that would satisfy the standard for relief that the Commission has consistently applied to requests for modification of service territory agreements. In support of its Motion, the Company says:

1. On April 16, 1985, Tampa Electric and the City entered into an agreement (“Agreement”) for the purpose of creating and establishing boundary lines between their respective electric service areas in Polk County, Florida, subject to the prior approval of this Commission. The express purpose and intent of the Agreement was to “avoid uneconomic waste, potential safety hazards and other adverse effects that would result from duplication of electric facilities in the same area.” Tampa Electric and the City expressly agreed “that neither party ...{would} provide or offer to provide electric service at retail rates to future customers within the territory reserved to the other party.” (Emphasis added)

2. The Section 1.1 of the Agreement specified the term of the Agreement as follows:

After this Agreement becomes effective pursuant to Section 3.4 hereof, it shall continue in effect until termination or until modification shall be mutually agreed upon, or until termination or 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 of this Agreement.

3. Section 3.4 of the Agreement specified, in relevant part, as follows:

The parties further agree that the Agreement, if and when approved by the Commission, shall be subject to the continuing jurisdiction of the Commission and may be terminated or modified only by order of the Commission. No modification or termination of this agreement by the

parties hereto shall be effective unless and until approved by the Commission.

4. On April 30, 1985, the Company and the City jointly filed a petition with this Commission in Docket No. 850148-EU asking this Commission to approve the Agreement. On December 11, 1985, the Commission issued Order No. 15437 (the "Order") incorporating by reference and approving the Agreement. The Commission reviewed the proposed service territory boundaries and concluded that the Agreement was in the best interests of the parties and the public.

5. On October 4, 2001, Bartow initiated this proceeding by filing with the Commission its *Petition To Modify Territorial Agreement Or, In The Alternative, To Resolve Territorial Dispute in Polk County, Florida*. The relief sought by Bartow was modification of the existing service territory boundary established in the Order. The existing service territory boundary between Bartow and Tampa Electric bisects a proposed, new residential development known as the Old Florida Plantation ("OFP"). Bartow sought the right to serve the entire OFP development, including the portion currently located in Tampa Electric's service territory.

6. On June 23, 2003, the Commission issued the PAA. In approving only a minor modification of the existing service territory boundary, the Commission concluded that:

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 preservation of existing service territory 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. ...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.²

7. Pursuant to the *Notice Of Further Proceedings Or Judicial Review* attached to the PAA, the parties were advised of the opportunity to file a petition pursuant to Rule 28-106.201, F.A.C., requesting an administrative hearing with regard to the matters addressed in the PAA. However, the parties were cautioned not to construe the notice to mean that all requests for an administrative hearing would be granted or result in the relief sought.

8. Rule 28-106.201, F.A.C., requires, in relevant part, that petitions requesting an administrative hearing contain the following information:

2(d) A statement of all disputed issues of material fact.

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action.

9. For the reasons set forth below, Tampa Electric respectfully submits that Bartow has failed to articulate in its Petition any relevant factual or legal basis for reversal or modification of the Order. Rule 28-106.201(4), F.A.C., provides that:

A petition shall be dismissed if it is not in substantial compliance with subsection (2) of this rule or it has been

² Order No. PSC-03-0739-PAA-EU at Page 4.

untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

10. In an effort to meet the threshold requirements of Rule 28-106.201, F.A.C., Bartow has asserted, at Paragraph 23 of the Petition that:

The issues of fact include: determination of which utility currently has existing facilities sufficient to serve the Old Florida Plantation; which utility can provide the most reliable and economic electric service; and service by which utility will most benefit the customers.

These alleged issues of fact generally address the topics set forth in Rule 25-6.0441, F.A.C., which might be relevant to an evaluation by the Commission of a service territory dispute. However, as discussed below, these alleged issues of fact are not material or germane to the question of whether or not the Commission should modify a previously reviewed and approved service territory agreement. Bartow further asserts, at Paragraph 24 of the Petition that:

Bartow feels that the application of Section 366.104, Florida Statutes, and of Rule 25-6.441, Florida Administrative Code, "Territorial Disputes for Electric Utilities," require that the decision of the Commission be reversed or modified.

11. To the extent that Bartow intended in Paragraph 24 of the Petition to refer to Section 366.04(2)(d), F.S., and Rule 25-6.0441, F.A.C., the legal authority and material facts cited by Bartow as purportedly requiring modification or reversal of the PAA are material and sufficient only if the PAA, in fact, addressed and purported to resolve a service territory dispute between Bartow and Tampa Electric. However, since the only matter legitimately before the Commission in this proceeding and the only matter addressed by the Commission in the PAA is Bartow's request for modification of

the existing service territory agreement, the factual and legal bases cited by the City as requiring modification or reversal of the PAA are inapposite.

12. Rule 25-6.0439(2), F.A.C., defines a “territorial dispute” as a disagreement as to which utility has the right and the obligation to serve a particular geographical area. In the present case, no such dispute exists. Pursuant to the Order, Tampa Electric was given the exclusive right and obligation to serve the area that the City now wishes to serve³. The City has alleged no facts in the Petition that could lead the Commission to a different conclusion. Bartow has not suggested that there is any doubt or ambiguity as to where the existing service territory boundary is located nor has Bartow suggested that there is any ambiguity as to which portion of the OFP development is located within Tampa Electric’s existing service territory. Instead, Bartow has asked the Commission to modify the Order by moving the existing service territory boundary to include the entire OFP development within Bartow’s service territory. Since no territorial dispute exists and the factual and legal underpinnings of the Petition rest on the existence of such a dispute, the Petition is fatally deficient and should be dismissed.

13. To the extent that the Petition amounts to a protest of the modification of the service territory agreement proposed in the PAA, Bartow has failed to cite any legal authority or material facts that would require modification or reversal of the PAA. In a service territory dispute where, as a matter of first impression, the Commission is attempting to determine who is better suited to serve a given load, the factual matters raised by the City in the Petition might have some relevance. However, in the context of a request to modify a service territory agreement that the Commission has already

³ See FPSC Order No. 23955, Issued on January 3, 1991 in Docket No. 900744-EU

considered and adopted, a quite different legal standard and set of factual considerations apply. In Order No. 23995, issued in Docket No. 900744-EU on January 3, 1991, this Commission addressed a petition filed by the City of Homestead, Florida seeking termination of the existing service territory agreement between Homestead and Florida Power & Light. In dismissing Homestead's petition, the Commission stated:

When a territorial agreement is approved by the Commission, it becomes embodied in the approving order which may only be modified or terminated in accordance with the Commission's express statutory purpose. ... Therefore, in order to withdraw or modify Order No. 4285, Homestead must make a showing that "such modification or withdrawal of approval is necessary in the public interest because of changed conditions or circumstances not present in the proceedings which led to the order being modified." ...Homestead has failed to allege facts sufficient to support a modification of Commission Order No. 4285 consistent with Peoples Gas and Fuller. Consequently, we grant FPL's motion and dismiss Homestead's petition without prejudice. (Emphasis added)

14. Tampa Electric respectfully submits that the City has alleged no facts in its Petition that amount to relevant changed circumstances requiring modification of the PAA or the Order. When boiled down to its essential elements, the City alleges the following "changed circumstances":

- a. On August 7, 2000, the City annexed the entire area comprising the Old Florida Plantation ("OFP") property;
- b. There are current plans for residential development of the OFP property that are expected to result in new electric customers, along with the associated additional revenue; and
- c. The developer of the OFP property has asked the City to provide electric service to the entire development.

15. Although the City's annexation of the OFP property is a changed circumstance in the literal sense, the annexation does not make it necessary in the public interest to modify the Order. Throughout its current service territory, Tampa Electric currently serves tens of thousands of customers who reside within incorporated areas. In every instance, these customers receive various municipal/utility services from their city government and electric service from the Company. The City's assertion that it intends to provide fire, sewer, police and street light service to the future residents of the OFP property does not make it necessary for the City to also provide electric service. The City was content to cede the OFP property to Tampa Electric fifteen years ago when there was no immediate prospect of development and associated revenue generation. In the meantime, in reliance on the Order, Tampa Electric has invested in the distribution infrastructure that will permit it to discharge its public utility obligation to serve the OFP property. The Company's distribution facilities surround and, in places, extend into the OFP property. Therefore, as the Commission recognized in the PAA, the relief requested by the City would only serve to create the unnecessary duplication of facilities that this Commission expressly intended to prevent in the PAA and the Order.

16. The current plans for residential development of the OFP property do not represent changed circumstances. As noted in Section 1 above, the Agreement expressly provided that "that neither party ... {would} provide or offer to provide electric service at retail rates to future customers within the territory reserved to the other party." (Emphasis added) The probability that the OFP property would be developed someday, resulting in "future customers" was clearly anticipated by the City and Tampa Electric. Therefore, the fact that the anticipated development of the OFP property is apparently

about to materialize cannot now be viewed as a “changed circumstance” requiring that the Order be changed.

17. Finally, the OFP developer’s alleged request to the City for electric service within Tampa Electric’s service territory and the City’s offer to provide such service in apparent violation of the Order provides no legitimate basis for modification of the Order. The OFP developer’s preferences do not amount to a public necessity requiring amendment of the Order. In the case of Storey v. Mayo, 217 So.2d 304 (Fla. 1968), the Florida Supreme Court noted the following in refusing to overturn a Commission order approving a territorial agreement between the City of Homestead and FP&L:

An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.

18. In Paragraphs 5, 6, 20 and 21 of its Petition, Bartow contends that the Agreement contains a termination provision that effectively limits the term of the agreement to 15 years, thereby relieving Bartow of the obligation to satisfy the “changed circumstances” standard for relief that the Commission has consistently applied to requests for modification of service territory agreements in other proceedings. Based on the assumption that it has been allocated some special entitlement as the result of the expiration the initial 15 year period specified in Section 1.1 of the Agreement, Bartow further asserts that it now has an “equal claim” with Tampa Electric to the portion of the OFP development located within Tampa Electric’s service territory. The nature of this entitlement appears to be the right to have the Commission review its Petition as though it involved a dispute over the right to serve previously unserved territory rather than a request to modify a service territory arrangement previously reviewed and approved by

the Commission. The logic of Bartow's position is convoluted, directly contradicted by uncontested facts and, therefore, fatally flawed.

19. Despite the City's suggestions to the contrary, there are no provisions in the Agreement or the Order that limit the term of the Agreement to 15 years or any other period. To the contrary, the agreement specifies in Section 1.1 that it will:

. . . continue in effect until termination or until modification shall be mutually agreed upon, or until termination or modification shall be mandated by governmental entities or courts with appropriate jurisdiction.

20. Section 1.1 of the Agreement further specifies that:

. . . 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 of this Agreement.

Absent this provision, either party would have had the right to petition the Commission for modification or termination of the service territory agreement at any time after the Order became effective. Far from creating additional rights or entitlements, the language in question limited the right to petition the Commission that the parties otherwise would have had. Expiration of the initial 15-year period simply restored rather than expanded the right of the parties to seek modification of the Agreement. The City's suggestion that this restoration of rights somehow gives the City an "equal claim" to the portion of the OFP development located in Tampa Electric's service territory is ridiculous on its face. The expiration of the initial 15-year period served only to free the parties to file petitions for modification or termination of the Agreement; it did not excuse the parties from satisfying the standard for relief that the Commission has consistently applied to such petitions. The right to request relief does not imply the right to be granted the relief

requested nor does it imply the right to a hearing on the relief requested if the request is deficient, as a matter of law. In this case, the City's Petition is clearly deficient in that the City has failed to cite legal authority or material facts that require that the PAA be modified or reversed. Therefore, the petition should be dismissed.

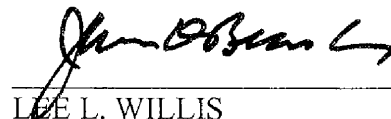
WHEREFORE, Tampa Electric respectfully requests that the Petition be dismissed on the grounds that it fails to satisfy the requirements of Rule 28-106.201, F.A.C.

DATED this 22nd day of July, 2003.

Respectfully Submitted,

HARRY W. LONG, JR.
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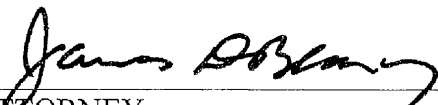
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer to Petition for Formal Hearing and Motion to Dismiss, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 22nd day of July 2003 to the following:

Ms. Adrienne Vining*
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