

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 IN SUPPORT OF
CITY OF BARTOW'S AMENDED MOTION TO COMPEL
TAMPA ELECTRIC TO RESPOND TO
DISCOVERY REQUESTS, AND MOTION FOR SANCTIONS**

Petitioner, City of Bartow, Florida ("Bartow"), by and through its undersigned attorneys, states the following in support of its amended motion to compel Respondent, Tampa Electric Company ("TECO"), to respond to discovery requests and to impose sanctions:

TECO failed to fully respond to Bartow's first set of interrogatories served on or about November 8, 2001, by giving incomplete answers and filing objections to interrogatories 1, 2, and 3.

TECO has also failed to respond as required by the Florida Rules of Civil Procedure to Bartow's second set of interrogatories served on April 12, 2002, and Bartow's first request to produce served on April 12, 2002.

In TECO's response to Bartow's first set of interrogatories, TECO gave only partial answers to interrogatories 1, 2 and 3 and filed objections to those interrogatories. TECO objected to interrogatory 1 on the grounds that it was ambiguous, unnecessarily broad, and called for responses that would be burdensome. TECO objected to interrogatory 2 on the ground that it was ambiguous because the issues in the proceeding had not yet been identified. TECO objected to interrogatory 3 on the grounds that it was burdensome, unnecessarily broad, and called for responses that would be burdensome to produce.

DOCUMENT NUMBER-DATE

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Interrogatories 1, 2 and 3 asked for information concerning the identification and location of persons with knowledge concerning the issues in the proceeding as provided in Florida Rules of Civil Procedure 1.280(b)(1) and 1.340(b). The interrogatories ask for the identification of any persons who had heard or know about any statements or remarks made by any party to the petition concerning any issue in this proceeding, and the name, address and phone number of every person who has knowledge of or possession, custody or control of any documents relating to any issues involved in this proceeding.

The scope of the required responses to these interrogatories is set forth in Florida Rules of Civil Procedure 1.340(b) and 1.280(b). These rules provide that information that is relevant to the subject matter of the pending action and which relate to the identification and location of persons having knowledge of discoverable matters are within the scope of discovery covered by the rules.

The interrogatories clearly fall within the scope of discovery that is covered by the Florida Rules of Civil Procedure. It should be noted that TECO decided to give only partial answers to these interrogatories without any explanation about the persons covered by the rule but whose identity was withheld.

It is claimed by TECO that the information sought would be burdensome; however, no objection was made under section (c) of Florida Rule of Civil Procedure 1.280, which requires a motion by the party for a protective order to protect against an objection based upon undue burden. TECO made no such motion.

TECO's failure to respond to Bartow's second set of interrogatories and its first request to produce has no legal basis. According to the response of TECO to Bartow's motion to compel, served by TECO on February 7, 2003, TECO claims that an advisory communication from the Commission staff on an unspecified date that the current procedural schedule would be

temporarily suspended gave TECO a valid legal reason to disregard the time schedule provided in the Florida Rules of Civil Procedure for responses to the serving of interrogatories and of a request to produce. There is no valid basis for such an assumption by TECO.

At the time Bartow filed its first request to produce and second set of interrogatories on April 12, 2002, an order establishing procedure issued by the Commission was in effect, since it was issued on April 2, 2002.

The only provision of this order that dealt with discovery provides objections or clarification of discovery requests must be made within ten days of service, rather than 30 days as provided in the Florida Rules of Civil Procedure. There is no provision in the order that provides that, if it is temporarily suspended, it overrides the provisions of the Florida Rules of Civil Procedure that such objections and responses must be made within 30 days of the service of the discovery requests. There is no rule or procedure of the Commission that provides that an advisory of a temporary suspension of the current procedural schedule by the staff would modify or supersede the provisions of the Florida Rules of Civil Procedure.

The provisions of the Florida Administrative Code relating to the Commission provide in section 28-106-206, for discovery by the parties and provides that the parties may obtain discovery through the means and in the manner provided by Florida Rules of Civil Procedure 1.280 through 1.400. Further, the Administrative Code, in section 25-22.033, governs the effect of communications between Commission employees and parties on the application of the Florida Rules of Civil Procedure. Section 25-22.033(1) provides that the rules shall govern communication between Commission employees and parties to docketed proceedings before the Commission. That section provides that "nothing in this rule is intended to modify or supersede the procedural requirements for formal discovery under the Commission rules and the applicable

provisions of the Florida Rules of Civil Procedure or affect communications regarding discovery requests or procedure or other matters not concerned with the merits of the case."

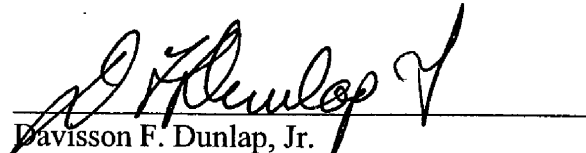
This section clearly governs any communication by the Commission staff with regard to a temporary suspension establishing procedure. It provides that communications by the staff cannot modify or supersede the procedural requirements for formal discovery under the applicable provisions of the Florida Rules of Civil Procedure.

In the present case, it is clear that the Florida Rules of Civil Procedure required a response to Bartow's second set of interrogatories and first request for production in 30 days. Under rule 25-22.033, any communication from staff members temporarily suspending the procedure schedule in effect of April 2, 2002 did not supersede or modify the procedural requirements requiring a 30-day response after service to discovery requests under Florida Rules of Civil Procedure 1.340 and 1.351. There was no legal basis for TECO's failure to respond based on an advisory communication from the Commission staff temporarily suspending the procedure schedule. In this case, the answers to Bartow's second set of interrogatories and the response to Bartow's request to produce were due on May 17, 2002. TECO has to this date not responded to Bartow's request to produce and has produced no documents.

It should also be noted that Bartow has complied with the interrogatories propounded by TECO and has produced documents pursuant to TECO's document production requests.

TECO has failed to respond to Bartow's discovery requests as required by the Florida Rules of Civil Procedure and has taken legal positions that are unsupported by the rules or the law as grounds for its failure to timely answer such requests. The request for sanctions by Bartow should be granted and TECO should be directed to make proper answers to the first set

of interrogatories served by Bartow and to the second set of interrogatories and request to produce served by Bartow.


Davisson F. Dunlap, Jr.
Florida Bar Number 0136730
DUNLAP & TOOLE, P.A.
2057 Delta Way
Tallahassee, FL 32303-4227
850-385-5000
850-385-7636 Facsimile

Attorneys for Petitioner, City of Bartow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Support of City of Bartow's Amended Motion to Compel Tampa Electric to Respond to Discovery Request and Motion for Sanctions has been furnished by United States mail on this 1st day of oct, 2003, to:

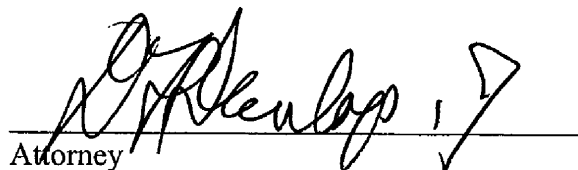
Mr. Harry W. Long, Jr.
Assistant General Counsel
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601

Ms. Adrienne Vining
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0863

Mr. Lee L. Willis
Mr. James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Attorney for Florida Public Service
Commission

Attorneys for Tampa Electric Company


Attorney