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October 20, 2003

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 Bartow's Motion to Dismiss or Abate and Memorandum of Law.

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.

AUS _____
CAF _____
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OTH _____

Enclosures
cc Mr. Richard A. Williams

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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-EU
Filed: October 20, 2003

**BARTOW'S MOTION TO DISMISS OR
ABATE AND MEMORANDUM OF LAW**

Motion

The City of Bartow ("Bartow"), by and through its undersigned attorneys, moves this court to dismiss or abate any ruling on the Petition for Declaratory Statement filed herein by Tampa Electric Company ("TECO"), and in support of this motion, states the following:

1. Bartow initiated the currently pending proceedings under docket number 011333-EU, by filing with the Florida Public Service Commission ("Commission") its petition to modify territorial agreement, or in the alternative, to resolve the territorial dispute in Polk County, Florida.

2. The underlying petition seeks modifications of the Bartow agreement with TECO, which was approved by order of the Commission.

3. TECO's petition for declaratory statement was not filed in a separate proceeding but was filed in the current docket.

4. Bartow has taken the position that it can provide electrical service to fire stations, police stations, service lift stations, street lights, and/or other city-owned facilities located in its city limits. In deciding the merits of Bartow's current case, the Commission will have to consider whether the provision of electric service to its own, city-owned facilities amounts to

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simple self-service, rather than provision of electrical service at retail. These are the same issues as are framed in TECO's petition. The statute and rules relating to declaratory statements do not authorize the use of declaratory statements and address issues are currently pending before a judicial or administrative court.

5. The TECO petition seeks to resolve a contract dispute between TECO and Bartow and to have the Commission interpret the contract provisions of the parties' agreement. Declaratory statements cannot be used to resolve contract disputes between the parties.

6. TECO's request that the Commission find that the "Service Territorial Agreement is valid and binding upon Tampa Electric and Bartow" is a remedy not authorized under the declaratory statement statutes. Declaratory statements accept as valid the existing orders of the Commission. A declaratory statement is not proper which seeks to either validate or invalidate an existing Commission order.

WHEREFORE, Bartow requests that the Commission enter its order dismissing TECO's petition for declaratory statement.

Memorandum of Law

As noted in the case of *Novick v. Department of Health, Board of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002), a declaratory statement is not an appropriate remedy to determine a contract dispute and interpret the provisions of the contract where there is related, pending litigation or a litigation involving the same issues. In the pending case, docket no. 011333-EU, the issues framed by TECO's petition are already pending before the Commission.

The Florida Supreme Court case of *Florida Department of Business and Professional Regulation, Division of Pari-Mutual Wagering, v. Investment Corporation of Palm Beach, et al.*, 747 So. 2d 374 (Fla. 1999), contains a summary of the purpose and proper use of declaratory statements. The purpose is to provide the party a statement of the agency's position in order to

avoid costly administrative litigation by selecting the proper course of action in advance. They also serve as useful guidance to others who are likely to interact with the agency in similar circumstances. (See *Investment Corporation* at p. 525.) Neither of these purposes can be achieved by the TECO petition. The issues are already pending in this docket proceeding and will be resolved within that action. This principal was also announced in the case of *Chiles v. Department of State, Division of Elections*, 711 So. 2d 151 (Fla. 1st DCA 1998), which was approved by the Florida Supreme Court.

Since the administrative litigation is already pending between the parties, the statement will not avoid costly administrative litigation or help select a proper cause of action in advance by TECO. The issues in the pending action arise out of the agreement between TECO and Bartow, and a declaratory statement will not offer useful guidance to others.

Section 120.565, Florida Statute, and Rules 28-105.001-003, contemplate that a petition for declaratory statement be made in a separate proceeding and not in a pending matter that involves the same parties and issues covered by the petition for declaratory statement. TECO has filed its declaratory action in the pending docket.

Section 125.65, Florida Statutes, does not sanction the use of a declaratory statement that relates to issues included in a currently pending administrative action.

Actions for declaratory statements are not appropriate where there is a pending litigation involving the same issue or where they involve contract disputes. In *Novick v. Department of Health, Board of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002), the Fifth District Court of Appeal affirmed a decision of the Board of Health, which declined to entertain a petition for declaratory statement that involved a pending contract dispute between the parties. TECO's petition involves a contract dispute between TECO and Bartow, as well as a pending action.

In *Couch v. State Department of Health and Rehabilitative Services*, 377 So. 2d 32 (Fla. 1st DCA 1979), the First District Court of Appeal upheld the refusal of the department to issue a declaratory statement based on the fact that there was already a court proceeding which involved the same issues pending in the circuit court. The court ruled that the petition for declaratory statement was not proper. The court cited judicial principles from the declaratory judgment under Chapter 86, and the similarity of the remedies under Chapter 86. The guiding principle was that an actual, present and practical need must be shown. Since the issues framed by TECO's petition are already pending in the current action, there is no actual, present or practical need for the same issues to be decided by declaratory statement.

The rule is equally applicable to actions pending in administrative courts. In the case of *Fox v. State Board of Osteopathic Medical Examiners*, 395 So. 2d 192 (Fla. 1st DCA 1981), the court held it was appropriate to deny a petition for declaratory statement where the issues raised were currently pending in the administrative hearings. In the *Fox* case, the court held that declaratory statement proceedings brought pursuant to section 120.565 could not be based on issues simultaneously being litigated in a section 120.57 proceeding.

In the case of *Padilla v. Liberty Mutual Insurance Co. and Department of Insurance*, 832 So. 2d 916 (Fla. 1st DCA 2002), the court held that, where questions presented in a petition for declaratory statement are at issue in a pending judicial proceeding, the administrative agency to whom the petition is addressed should refrain from issuing a declaratory statement until the pending judicial proceedings are concluded. It further held that a declaratory statement is not an appropriate remedy when there is related pending administrative litigation.

In the case of *First Lawyers Professional Liability Insurance Company v. Shand, Morahan & Co., Inc.*, 394 So. 2d 238 (Fla. 1st DCA 1981), the court upheld a denial of an action

for declaratory statement when there was a federal suit already pending which involved the same issues and which could afford full and adequate and complete relief.

The request of TECO to have the Commission declare that the service territory agreement is valid and binding (point 1 of the petition) is not a valid request to be obtained in a petition for declaratory statement. In the case of *Retail Grocers Assoc. of Florida Self Insurers Fund v. Department of Labor & Employment Security*, 474 So. 2d 379, 383 (Fla. 1st DCA 1985), the court, stated that an action for declaratory statement under section 120.565 assumes the validity of the statute, rule or order. It is not a vehicle for testing the validity of the statute, rule or order. By filing the declaratory statement, TECO is conceding the validity of the Commission's prior order. TECO's declaratory statement cannot be used to have the Commission find that the service territory agreement is binding on TECO and Bartow or to determine its validity.

Conclusion

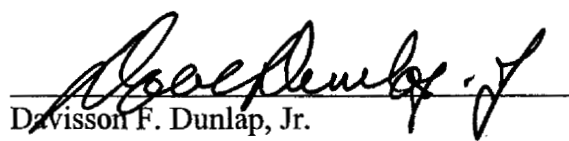
To permit the use of a petition for declaratory statement, to carve out some of the issues in a pending case, and to have the issues decided by a different set of rules and procedures would adversely affect the administration of justice and permit parties to cherry pick selected issues and have them be determined by declaratory statement rather than by the normal procedures of the administrative agency or court. There is no basis in the law, the rules or the cases to permit such a procedure. Allowing TECO's declaratory statement action to continue would subvert the purpose of the declaratory statement statute.

TECO's petition would not constitute an advanced ruling by the agency or provide useful guidance to the parties to avoid costly administrative litigation. With a currently existing docket, a declaratory statement by the Commission would not assist the parties in avoiding litigation. There is no actual, present or practical need for such a declaratory statement where the issues are already before the administrative agency.

The TECO petition is based on an order of the Commission approving a contract between Bartow and TECO involving a service territory. It is not an order in which the Commission made any ruling or policy that would have broad application affecting other persons. Interpretation of this type of order is not contemplated by a section 120.565 action.

TECO's petition should be dismissed.

Respectfully submitted


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CERTIFICATE OF SERVICE

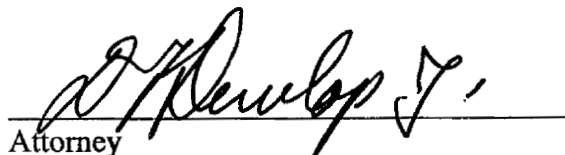
I HEREBY CERTIFY that a copy of the foregoing Bartow's Motion to Dismiss or Abate and Memorandum of Law has been furnished by United States mail on this 20th day of October, 2003, to:

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