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October 29, 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: Request for Declaratory Statement from Tampa Electric Company Regarding  
Territorial Dispute with City of Bartow in Polk County;  
FPSC Docket No. 031017-EI

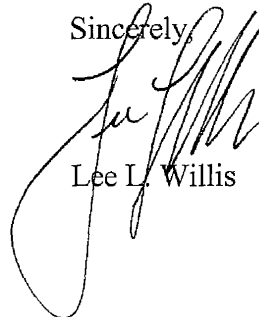
Dear Ms. Bayo:

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

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,



Lee L. Willis

LLW/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: Request for Declaratory Statement )  
from Tampa Electric Company Regarding )  
Territorial Dispute with City of Bartow )  
in Polk County. )  
\_\_\_\_\_ )

DOCKET NO. 031017-EI  
FILED: October 29, 2003

**ANSWER OF TAMPA ELECTRIC TO BARTOW MOTION TO DISMISS  
TAMPA ELECTRIC PETITION FOR DECLARATORY STATEMENT**

Tampa Electric Company (“Tampa Electric” or the “Company”) hereby responds to the City of Bartow’s (“City” or “Bartow”) October 20, 2003 Motion To Dismiss or Abate the Petition For Declaratory Statement filed by Tampa Electric on October 8, 2003 (the “Petition”). As discussed in more detail below, Bartow’s legal argument for dismissing the Petition is based on several erroneous assertions of fact and a serious misunderstanding and misapplication of legal precedents. In support whereof, Tampa Electric says:

1. In its Petition, Tampa Electric requested that the Commission issue a declaratory Statement establishing, pursuant to Order No. 15437<sup>1</sup> (the “Order”) that: 1) The Service Territory Agreement embodied in the Order is valid and binding upon Tampa Electric and Bartow; 2) Tampa Electric has the exclusive right and obligation under the Service Territory Agreement to provide end use electric service to fire stations, police stations, sewer lift stations, street lights or other non-electric utility facilities owned and/or operated by Bartow and located within Tampa Electric’s service territory; and 3) Any attempt by Bartow to self-provide end use electric service to such facilities in Tampa Electric’s service territory,

without prior Commission approval, would constitute a violation of the Service Territory Agreement and Order No. 15437.

2. On October 4, 2001, Bartow initiated the currently pending proceedings under Docket No. 011333-EU by filing with the Commission its *Petition To Modify Territorial Agreement Or, In The Alternative, To Resolve Territorial Dispute in Polk County, Florida*. The only 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.
3. At Paragraph 4 of its Motion to Dismiss, Bartow suggests that the subject matter of Tampa Electric’s Petition is already at issue in Docket No. 011333-EU and is, therefore, improper subject matter for a Petition for Declaratory Statement. However, this assertion is obviously incorrect.
4. As noted above, the subject matter of Tampa Electric’s Petition is Bartow’s assertion of authority to serve City-owned facilities in Tampa Electric’s service territory. The Bartow Petition does not ask the Commission to modify the existing service territory agreement to permit Bartow to serve City-owned facilities located in Tampa Electric’s service territory. Bartow simply assumes that it has the authority to serve such facilities. This assertion of authority, without a request

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<sup>1</sup> Issued in Docket No. 850148-EU on December 11, 1985.

that the service territory be amended to give Bartow such authority, does not serve to put the question of Bartow's authority to serve such facilities at issue in Docket No. 011333-EU. It is precisely because this issue is not raised by Bartow's Petition that Tampa Electric's Petition is necessary and appropriate. Bartow's assertion to the contrary is simply not supported by the facts.

5. Bartow's characterization of Tampa Electric's Petition as an attempt to resolve a contract dispute represents a profound misunderstanding of Tampa Electric's Petition and established Commission precedent. The declaratory relief requested by Tampa Electric is an interpretation of the Order, as it affects Tampa Electric, not the underlying service territory agreement. 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. ...*

6. Once a service territory becomes embodied in a Commission Order, interpretation of the resulting order is not a matter of contract law. Instead, such interpretation is governed by the laws and regulations pertaining to the implementation, interpretation and modification of Commission Orders<sup>2</sup>. Therefore, the

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<sup>2</sup> See Homestead v. Beard, 600 So2 450 (May 7, 1992)

declaratory relief sought by Tampa Electric is not a matter of contract interpretation.

7. Bartow asserts in Paragraph 6 of its Motion to Dismiss that “TECO’s request that the Commission find that the Service Territory Agreement is valid and binding upon Tampa Electric and Bartow is a remedy not authorized under the declaratory statement statutes”. This assertion is demonstrably incorrect.
8. In Docket No. 98096-EU, Florida Power & Light (“FP&L”) filed a request for Declaratory Statement asking the Commission to declare that FP&L’s Service Territory Agreement with the City of Homestead was a valid, binding agreement. Homestead filed a motion to dismiss FP&L’s Petition on the ground that the relief requested was not appropriate subject matter for a declaratory statement. In granting FP&L’s request for declaratory relief, the Commission stated in order No. 20400, issued on December 2, 1988, as follows:

*Because of our finding that the issues of whether or not there is a valid, binding agreement between FP&L and the City of Homestead is a proper question for a declaratory statement, the motion to dismiss filed by the City of Homestead must be denied.*

9. The provisions of Rules 25-22.020 and 25-22.021, F.A.C., require that a declaratory statement relate to the applicability of a specified statutory provision or rule or order of the Commission and that it applies to the Petitioner in his set of particular circumstances. Tampa Electric’s Petition for Declaratory Statement is entirely consistent with these requirements and constitutes a proper request for declaratory relief.

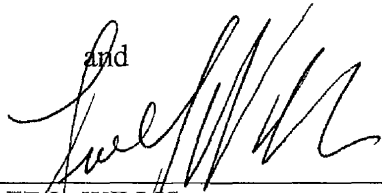
**WHEREFORE**, Tampa Electric respectfully requests that the Commission issue an order denying Bartow's Motion to Dismiss.

DATED this 29<sup>th</sup> day of October 2003.

Respectfully Submitted,

HARRY W. LONG, JR.  
Assistant General Counsel  
Tampa Electric Company  
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Tampa, Florida 33601  
(813) 228-1702

and



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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

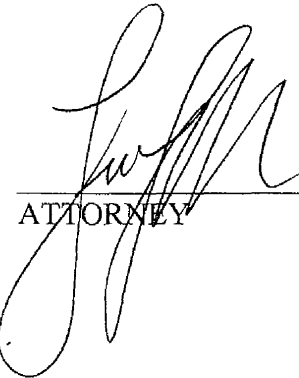
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer to Bartow's Motion to Dismiss, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 29<sup>th</sup> day of October 2003 to the following:

Ms. Adrienne Vining\*  
Staff Counsel  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Mr. Joseph J. DeLegge  
City of Bartow  
P. O. Box 1069  
Bartow, FL 33830-1069

Mr. Davisson F. Dunlap, Jr.  
Dunlap & Toole, P.A.  
2057 Delta Way  
Tallahassee, FL 32303



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ATTORNEY