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December 17, 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

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Re: Petition for Declaratory Statement of Tampa Electric Company
("TECO") Regarding Territorial Dispute with City of Bartow
Docket No. 031017-EI

Dear Ms. Bayo:

Enclosed with this letter are the original and sixteen copies of Bartow's Amended 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.

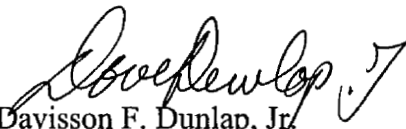
Thank you for your assistance.

Sincerely yours,

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Davisson F. Dunlap, Jr.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement of
Tampa Electric Company Regarding Territorial
Dispute with City of Bartow in Polk County.

DOCKET No. 031017-EI
Filed: _____, 2003

**BARTOW'S AMENDED 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. Since the initial Motion to Dismiss or Abate was filed, certain events have occurred which change critical facts and lend further support to Bartow's position that TECO's petition should be dismissed.

2. Southwest Florida Water Management District ("SWFMD") has purchased the Old Florida Plantation property.

3. Because of this purchase by SWFMD, many of the factual circumstances that supported Bartow's petition for modification of its territorial agreement with TECO (docket no. 011333-EU), no longer exist.

4. There are no current plans for the development of the Old Florida Plantation property.

5. In light of the purchase by SWFMD, Bartow has dismissed its petition regarding a territorial dispute with TECO (docket no. 011333-EU).

6. On October 20, 2003, in response to the petition for declaratory statement filed by TECO, Bartow filed its initial motion to dismiss. This amended motion to dismiss is filed in recognition of the change in factual circumstances that have occurred by virtue of the sale of the property to SWFMD and Bartow's dismissal of its petition for modification of its territorial agreement.

7. TECO's petition for declaratory statement referred to Bartow's underlying action that has since been dismissed and on facts relating to the potential pending development of the Old Florida Plantation and Bartow's intention to serve its facilities within the Old Florida Plantation.

8. TECO's petition refers to the Old Florida Plantation development. There is currently no such development.

9. TECO's petition cites Bartow's assertion that it would own, operate, and serve certain of its city-owned facilities located in the Old Florida Plantation development. Bartow has no such plans, now that the planned development does not exist.

10. In its wherefore clause, in paragraph 2, TECO seeks a statement from the Florida Public Service Commission that it be given the right 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." There are no such facilities planned.

11. Paragraph 3 of the wherefore clause seeks an order or opinion out of the Florida Public Service Commission that: "Any attempt by Bartow to self-provide electrical service to facilities Tampa Electric's service territory, without prior Commission approval, would constitute a violation of the Service Territory Agreement and Order No. 15437." There are no such plans by Bartow.

12. None of the factual bases mentioned above upon which TECO bases its petition for declaratory statement relating to Bartow's prospective service of electrical services to its facilities located within the Old Florida Plantation development have any current basis in fact.

13. The underlying petition in docket number 011333-EU, which sought modifications of the Bartow agreement with TECO, has been dismissed.

14. The dismissed action consisted of a contract dispute between TECO and Bartow. 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.

15. 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

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. 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.

If and when Bartow or TECO seek to have their rights under their territorial agreement adjudicated, it will be in the nature of a contract dispute. Any future contract dispute may or may not include issues relating to Bartow's providing electrical service to its city-owned utilities.

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

Petitions for declaratory statement cannot be used to adjudicate a contract dispute. The process cannot be used to validate a contract through the expedience of declaring the agreement between the parties valid or invalid.

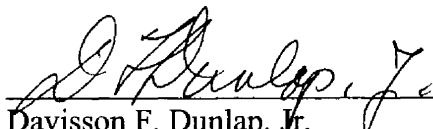
TECO's petition would not constitute an advanced ruling by the agency or provide useful guidance to the parties to avoid costly administrative litigation. There is no current factual framework to consider the issues framed by TECO's petition.

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 Amended Motion to Dismiss or Abate and Memorandum of Law has been furnished by United States mail on this 17 day of December, 2003, to:

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