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January 6, 2004

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

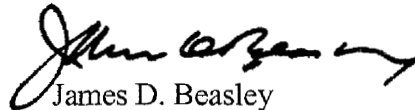
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Response of Tampa Electric Company to the City of Bartow's Amended Motion to Dismiss or Abate and Memorandum of Law.

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

00161 JAN-6 3

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement of) DOCKET NO. 031017-EI
Tampa Electric Company Regarding Territorial) FILED: January 6, 2004
Dispute with City of Bartow in Polk County.)
_____)

**RESPONSE OF TAMPA ELECTRIC COMPANY TO THE CITY OF BARTOW'S
AMENDED MOTION TO DISMISS OR ABATE AND
MEMORANDUM OF LAW**

Tampa Electric Company ("Tampa Electric") hereby responds to the Amended Motion To Dismiss Or Abate And Memorandum Of Law filed by the City of Bartow ("Bartow") on December 17, 2003. As explained in more detail in Tampa Electric's December 23, 2003 Supplement To Petition for Declaratory Statement and below, Tampa Electric's Petition in this docket is not "based" on Bartow's Petition in Docket No. 011333-EI to modify the Service Territory Agreement approved by the Commission and embodied in Order No. 15437 (the "Order"), issued in Docket No. 850148-EU on December 11, 1985. Therefore, Bartow's recent motion to dismiss its Petition for modification of the Order in no way diminishes the need for a clear interpretation of the Order by the Commission, as requested by Tampa Electric in this Docket. The parties clearly disagree as to the proper interpretation of the Order and the Commission's failure to resolve this disagreement now may well result in the uneconomic duplication of electric distribution facilities in Tampa Electric's service territory. In support of this response, Tampa Electric says:

1. On December 2, 2003, Bartow filed a one sentence Notice of Voluntary Dismissal Without Prejudice of its Petition in Docket No. 011333-EU. At the

time, Bartow offered no explanation for its decision to withdraw its request for relief.

2. Subsequently, on December 18, 2003, Bartow filed an Amended Motion To Dismiss or Abate and Memorandum of Law. In this pleading, Bartow explained that the Southwest Florida Water Management District (“SWFMD”) had purchased the Old Florida Plantation (“OFP”) Property. Bartow further suggested that in light of the SWFMD purchase, there were no current plans for the development of the OFP property, rendering Bartow’s petition moot for the present.
3. Bartow further alleged in its Amended Motion, that the Purchase by SWFMD and the resulting withdrawal of Bartow’s petition rendered Tampa Electric’s Petition for Declaratory Statement in this docket moot since Bartow allegedly now has no current plans to construct and provide electric service to City-owned facilities in Tampa Electric’s service territory. However, as explained below, Bartow’s pleading is misleading in that Bartow has not repudiated its assertion of entitlement to serve City-owned facilities in Tampa Electric’s service territory and residential/commercial development of a significant portion of the OFP property is likely to occur, despite the SWFMD purchase, thereby the economic incentive for Bartow to act preemptively to construct and serve City-owned facilities in Tampa Electric’s service territory.
4. As explained in Tampa Electric’s Petition and in its December 23rd Supplement to that Petition, Tampa Electric’s request for relief in this docket is not, by definition, a function of Bartow’s Petition in Docket No. 11333-EU. The

question of whether Bartow is authorized to provide end use electric service to city-owned, non-electric utility facilities located in Tampa Electric's service territory was not at issue in Docket No. 011333-EU. Bartow merely asserted the right to provide such service in that docket but did not ask the Commission to modify the Service Territory Agreement to permit such extra-territorial electric service. In effect, Bartow asserted the right to serve City-owned facilities in Tampa Electric's service territory even if its request to move the service territory boundary to include the entire OFP development was denied by the Commission. This assertion of authority under the Order was neither retracted nor repudiated by Bartow in the withdrawal of its Petition in Docket No. 011333-EU. To the contrary, any doubt as to Bartow's continuing assertion of authority to serve City-owned facilities in Tampa Electric's service territory without prior Commission approval can be conclusively put to rest by reference to Bartow's December 1, 2003 response in this Docket to Tampa Electric's Petition for Declaratory Statement.

5. At Paragraph 29 of its response, Bartow asserts:

“What TECO failed to mention is that the [service territory] agreement between TECO and Bartow, which was approved by the Commission, does not address the issue of whether Bartow can serve its city-owned facilities located within its city boundary. One of the reasons that it does not address that issue is that Bartow's position is that it has the inherent right to serve its own city-owned facilities. Furthermore, at the time of the agreement, the OFP property was not within the City limits of Bartow.”

6. In no uncertain terms, Bartow is directly challenging the exclusive authority of this Commission under Sections 366.04(2)(d) and 366.04(2)(e), Florida Statutes,

to establish and enforce service territory boundaries where a municipal utility is concerned. Not surprisingly, Bartow offers no legal authority for its assertion. Nonetheless, this assertion brings into dramatic relief the compelling need for Commission clarification of the Order.

7. The suggestion inherent in Bartow's Amended Motion that the sale of the OFP property to SWFMD removes the economic incentive for Bartow to construct and preemptively attempt to serve City-owned facilities in Tampa Electric's service territory is seriously misleading. According to an article in the November 1, 2003 edition of the Bartow Ledger, SWFMD officials stated that the agency intended to sell back to developers as much as 1200 acres of the OFP property for residential development. In fact, the sale price for the OFP property purchased by SFWMUD was negotiated based on the value of the anticipated residential development, not the value of the land. Copies of the relevant newspaper articles were attached as Exhibit A to Tampa Electric's December 23rd Supplement to its Petition and are incorporated here by reference.
8. In light of the anticipated residential development of the OFP property, it is clear that Bartow's motive to construct and serve city-owned facilities in Tampa Electric's service territory has not been eliminated. Instead, the timing of such activity has changed. Bartow's assertion in its Amended Motion that it has no current plans to construct and provide electric service to city-owned facilities in Tampa Electric's service territory is disingenuous and misleading.
9. Given Bartow's continued assertion of entitlement to serve such city-owned facilities in Tampa Electric's service territory without prior Commission review

and approval, the declaratory relief requested by Tampa Electric in its Petition remains essential to avoid uneconomic duplication of distribution facilities in Tampa Electric's service territory.

10. As explained in Tampa Electric's March 28, 2003 letter to Staff Attorney Vining in Docket No. 011333-EU, Bartow has already demonstrated a propensity to engage in uneconomic duplication of facilities. As discussed in Tampa Electric's March 20, 2003 response to Staff Data Request No. 1 in Docket No. 011333-EU, the total OFP load at full build out was estimated to be 30 MVA. Of that total, less than 6 MVA was estimated to reside within Bartow's current service territory at full build out. However, Bartow reported in response to Staff's February 17, 2003 Data Request No. 5 that Bartow had spent over \$2 million since 1996 for substation expansion in the area of the OFP property, resulting in excess transformer capacity of over 84 MVA. Excess capacity of this magnitude could only have been installed in anticipation of substantial load and/or service territory expansion, possibly including the OFP load with Tampa Electric's current service territory boundary. This is precisely the kind of uneconomic duplication of facilities that the Order was intended to avoid.
11. On October 29, 2003, Tampa Electric responded in this docket to Bartow's Motion to Dismiss or Abate Tampa Electric's Petition For Declaratory Statement. The legal arguments raised in Bartow's Amended Motion were directly addressed in Tampa Electric's October 29th Response. Therefore, Tampa Electric will incorporate by reference its earlier response rather than reiterating those points in this pleading.

12. In light of the above discussion, it is clear that Bartow and Tampa Electric have a current and on-going disagreement with regard to the proper interpretation of the Order. Bartow has unambiguously asserted the right to serve city-owned facilities in Tampa Electric's service territory without prior Commission approval. With the anticipated resumption of plans for residential and commercial development of a significant portion of the OFP property, Bartow will have the financial motive and opportunity to act on its asserted right unless Tampa Electric's rights and obligations under the Order are clarified.

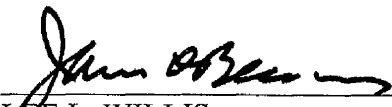
WHEREFORE, Tampa Electric respectfully requests that the Commission issue an order denying Bartow's Motion to Dismiss or Abate.

DATED this 6th day of January 2004.

Respectfully Submitted,

HARRY W. LONG, JR.
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and



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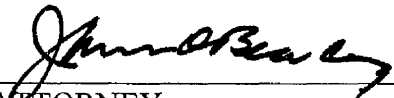
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to City of Bartow's Amended Motion to Dismiss or Abate and Memorandum of Law, has been furnished by U. S. Mail or hand delivery (*) on this 6th day of January 2004 to the following:

Ms. Marlene Stern*
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
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Bartow, FL 33830-1069

Mr. Davisson F. Dunlap, Jr.
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Tallahassee, FL 32303



ATTORNEY