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7
January 7, 2004

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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COMMISSION
CLERK

Re: Territorial Dispute Between City of Bartow
and Tampa Electric Company ("TECO")
Case No. ~~011333-EU~~ 031017-ET

Dear Ms. Bayo:

Enclosed with this letter are the original and sixteen copies of Bartow's Motion to Dismiss and, in the Alternative, Response to TECO's Supplemental Petition for Declaratory Statement.

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.

RECEIVED & FILED

Sincerely yours,


FPSC-BUREAU OF RECORDS


Davisson F. Dunlap, Jr.

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Enclosures
cc Mr. Richard A. Williams

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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: January 7, 2004

**BARTOW'S MOTION TO DISMISS
AND, IN THE ALTERNATIVE,
RESPONSE TO TECO'S SUPPLEMENTAL
PETITION FOR DECLARATORY STATEMENT**

Motion to Dismiss

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

1. There does not currently exist a case or controversy involving a dispute between TECO and Bartow. There is no current claim by Bartow that it be permitted to provide service to any potential customers outside of its service territory. Likewise, there is no current order or action of this commission that specifically relates to the service by Bartow to its city-owned facilities located outside of its service territory.

2. The fact that such a claim was previously asserted but has since been abandoned does not create a factual circumstance that would support a current case or controversy. The potential that, at some point in the future, Bartow might assert such a claim does not form sufficient factual basis to support TECO's petition.

3. Model Rule of Procedure 28-106.202, Florida Administrative Code, governs the filing and serving of amended petitions. It states that:

"The petitioner may amend the petition prior to the designation of the presiding officer by filing and serving an amended petition in the manner prescribed for filing and serving an original petition. The petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer."

4. The Model Rules of Procedure do not provide for the filing of a "supplement" to a petition for declaratory statement.

5. The rules clearly call for the filing and serving of "an amended petition in the manner prescribed for filing an original petition." TECO's attempt to amend its petition through the use of a supplement is not authorized under the rules.

6. If TECO desires to file an amended petition, it must amend its entire petition as it would if it was filing an original petition.

7. Rule 28-106.202 likewise authorizes the filing and serving of an amended petition prior to the designation of the presiding officer. Model Rule of Procedure 28-106.102, Florida Administrative Code, states that: "'Presiding officer' means an agency head, or member thereof, who conducts a hearing or proceeding on behalf of the agency" In this particular case, the presiding officer would be the member or members of the commission who have been appointed to preside over this particular case.

8. Since the presiding officer has been designated in this case, TECO cannot unilaterally amend its petition without seeking an order from the presiding officer authorizing the amendment. TECO has not sought permission from a presiding officer.

9. Model Rule of Procedure 28-106.301, Florida Administrative Code, describes what must be included in a petition and reveals a standard applied by the agency in evaluating a petition. Subparagraph (2)(c) states that the petition needs to contain a statement of when of and how the petitioner received notice of the agency decision. In its supplemental petition, other

than the initial approval of the contract between TECO and Bartow agreeing on division of the territory, there is no agency decision which TECO is seeking to have reviewed.

10. Rule 28-106.301 also speaks to specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action. As mentioned above, the agreement between TECO and Bartow is silent as to any potential service by Bartow of its own facilities located outside of its territory. The order of the commission approving it is also silent on that issue. Therefore, there can be no reversal or modification being sought of an existing action by the commission.

11. Rule 28-106.301(2)(d), in part states that the petition needs to allege facts the petitioner contends warrant a reversal or modification of the agency's proposed action. There is no proposed agency action which TECO seeks to have reviewed. The order of this commission approving the contract between TECO and Bartow does not address the issue of whether Bartow, under appropriate circumstances, would have the right to serve its city-owned facilities within its city limits. The approved agreement between Bartow and TECO does not address this issue. There can be no reversal or modification of any existing or proposed agency action.

Response to Supplemental Petition for Declaratory Statement

The City of Bartow ("Bartow"), by and through its undersigned attorneys, responds to the Supplemental Petition for Declaratory Statement filed herein by Tampa Electric Company ("TECO"), as follows:

1. There does not currently exist a case or controversy involving a dispute between TECO and Bartow. There is no current claim by Bartow involving any potential customers or existing customers that it be permitted to serve that are outside of its service territory. Likewise, there is no current order or action of this commission that specifically relates to the service by Bartow of service to its own facilities located outside of its service territory.

2. The fact that such a claim was previously asserted but has since been abandoned does not create a factual circumstance that would support a current case or controversy.

3. Paragraph 1 of TECO's supplemental petition is admitted, except that there currently exists no claim by Bartow to self-provide end-use electrical services to its city-owned facilities located outside of its service territory.

4. Paragraph 2 of TECO's supplemental petition is admitted.

5. Paragraph 3 of TECO's supplemental petition is admitted.

6. Paragraph 4 of TECO's supplemental petition is admitted.

7. Paragraph 5 of TECO's supplemental petition is admitted to the extent that paragraph 16 of Bartow's then pending petition was accurately stated. However, there is no current pending claim by Bartow.

8. Paragraph 6 of TECO's supplemental petition is a characterization of the facts by TECO.

9. Paragraph 7 of TECO's supplemental petition is correctly quotes from paragraph 22 of Bartow's response; however, at the current time there exists no such factual circumstances under which Bartow seeks to serve city-owned facilities located within its city boundaries but outside its service territory.

10. Bartow denies that it is currently challenging the authority of the commission alleged in paragraph 8. Bartow has no current, pending claims.

11. Paragraph 9 of TECO's supplemental petition, rather than citing specific factual allegations, is a legal argument. To the extent that it constitutes a statement of facts, Bartow denies it.

12. Paragraph 10 of TECO's supplemental petition is a argument, not a statement of facts. Bartow has no current plan to serve any specific city-owned facilities located outside of its territorial boundaries. To the extent that paragraph 10 is an attempt to state facts, it is denied.

13. Paragraph 11 of TECO's supplemental petition is an argument and not a statement of fact. There currently exists no factual basis for the argument contained in paragraph 27, in that Bartow does assert a current claim to serve any particular facilities located outside of its service territory. TECO's characterization of the relief being sought in its administrative petition as only affecting TECO's rights is incorrect. The relief it is seeking would establish a precedent that would, in fact, affect the rights of Bartow and all other municipally-owned electric systems under similar circumstances.

14. Paragraph 12 of TECO's supplemental petition is admitted.

15. Paragraph 13 of TECO's supplemental petition is admitted.

16. Paragraph 14 of TECO's supplemental petition is constitutes an argument and not issues of facts. However, the fact remains that Bartow has no current plans to serve any specific given facility located outside of its territorial limits. If appropriate facts were to present themselves in the future, Bartow may or may not be in a position to seek to serve its own city electrical facilities located within its city limits but outside of its territorial boundary. Currently there exists no such factual circumstance.

17. As to paragraph 15 of TECO's supplemental petition, TECO cites to some local edition of a newspaper article, but fails to attach a copy of a newspaper article as an exhibit. Even citing the article, there is no indication that there is any time limitation for selling back to developers any of the Old Florida Plantation property. It is an event that may or may not take place at some point in the future.


18. As to paragraph 16 of TECO's supplemental petition, Bartow denies that there is any anticipated residential development of the Old Florida Plantation property. Bartow is unaware of any current, pending sale or any negotiations that are currently underway with respect to prospective purchasers. Bartow further asserts that its statement that it has no current plans to construct and provide electric service to city-owned facilities in TECO's territory and it is not disingenuous or misleading. It is merely a statement of the current facts that exist.

19. Paragraph 17 of TECO's supplemental petition contains argument by TECO, not statement of fact. No current facts exist that threaten the service of TECO to any current or known planned electrical customers that would avoid uneconomic duplication and distribution of facilities within TECO's service territory. To the extent that this paragraph attempts to assert facts, they are denied by Bartow.

20. Paragraph 18 of TECO's supplemental petition is not a statement of facts but is an argument, and is therefore denied.

21. Paragraph 19 of TECO's supplemental petition is denied, in that there is no ongoing disagreement regarding any interpretation of any commission order.

WHEREFORE, the City of Bartow respectfully requests that this court enter its order dismissing the Supplemental Petition for Declaratory Statement and, in the alternative, deny the relief sought by that petition.



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Attorneys for Petitioner, City of Bartow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Bartow's Motion to Dismiss and, in the Alternative, Response to TECO's Supplemental Petition for Declaratory Statement has been furnished by United States mail on this 6th day of January, 2004, to:

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

Ms. Marlene Stern
Division of Legal Services
Florida Public Service Commission
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Attorney for Florida Public Service
Commission

Attorneys for Tampa Electric Company



Attorney