

State of Florida



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COMMISSION CLERK

DATE: JANUARY 8, 2004

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (STERN) MKS DS
DIVISION OF ECONOMIC REGULATION (BREMAN) B R J W M W J D

RE: DOCKET NO. 031017-EU - REQUEST FOR DECLARATORY STATEMENT BY TAMPA ELECTRIC COMPANY REGARDING TERRITORIAL DISPUTE WITH CITY OF BARTOW IN POLK COUNTY.

AGENDA: 01/20/04 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: PETITION MUST BE DISPOSED OF BY MARCH 19, 2004

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\031017.RCM

CASE BACKGROUND

The procedural background of this docket is related to that of 011333-EU, Petition of City of Bartow, Florida, Regarding a Territorial Dispute with Tampa Electric Company, Polk County, Florida. Bartow's petition to modify the territorial agreement was motivated by plans for a large, residential development called Old Florida Plantation (OFP), to be located on a tract of undeveloped land. The historic (1985) territorial boundary divided the OFP property between Tampa Electric Company's ("TECO's") and Bartow's service territories. OFP lies entirely within the City's municipal boundaries and the developers wanted Bartow to serve OFP, so Bartow petitioned for a modification to the territorial agreement to include all of the OFP property within its service territory.

On June 23, 2003, the Commission issued an Order modifying the territorial agreement slightly, but leaving most of the OFP

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

DOCKET NO. 031017-EU
DATE: January 8, 2004

property in TECO's service territory. Order No. PSC-03-0739-PAA-EU in Docket No. 011333-EU. Bartow protested the Order and filed a Petition for Formal Hearing, which was set for May 19, 2004.

On October 8, 2003, TECO filed a Petition for Declaratory Statement in the same docket, 011333-EU. TECO filed the petition to address an issue that it believed would not be addressed at the hearing. The issue was whether Bartow had the right to provide end-use electric service to the non-electric utility facilities it would build in OFP (e.g. firestation, sewer-lift station). Bartow claimed it had the right to serve these facilities under the territorial agreement and TECO claimed it did not.

Staff opened this docket, No. 031017-EU, to handle the Petition for Declaratory Statement. On October 20, 2003, Bartow filed a Motion to Dismiss or Abate the Petition for Declaratory Statement. On October 29, 2003, TECO filed its Answer to Bartow's Motion to Dismiss.

As mentioned above, the hearing in Docket No. 011333-EU was set for May 19, 2004, but on November 21, 2003, the Southwest Florida Water Management District (SWFWMD) bought the OFP property. Bartow withdrew its Petition for Formal Hearing on December 2, 2003. On December 18, 2003, Bartow filed an Amended Motion to Dismiss or Abate TECO's Petition for Declaratory Statement, which was amended to account for the sale of OFP. On January 6, 2004, TECO filed its Response to Bartow's Amended Motion to Dismiss or Abate and Memorandum of Law. On January 7, 2004, Bartow filed a Motion to Dismiss and, in the Alternative, Response to TECO's Supplemental Petition for Declaratory Statement.

This recommendation addresses the Amended Motion to Dismiss or Abate TECO's Petition for Declaratory Statement filed by Bartow on December 18, 2003, and TECO's amended response filed on January 6, 2004.

The Commission has jurisdiction under Section 366.04(2), Florida Statutes. Notice of the Petition for Declaratory Statement was published in the Florida Administrative Weekly on October 24, 2003.

ISSUE 1: Should the City of Bartow's amended Motion to Dismiss or Abate be granted?

RECOMMENDATION: Yes. Because there is no current dispute, the Amended Motion to Dismiss or Abate should be granted.

STAFF ANALYSIS: In order to understand the Amended Motion to Dismiss and the Response, the declaratory relief requested by TECO must be provided. In its Petition TECO asks the Commission to declare that:

- 1) the 1985 territorial agreement is valid and binding upon TECO and Bartow;
- 2) TECO has the exclusive right and obligation under the territorial 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 TECO's service territory; and,
- 3) Any attempt by Bartow to self-provide end-use electric service to such facilities in TECO's service territory, without prior Commission approval, would constitute a violation of the territorial agreement and Order No. 15437.

Bartow's Amended Motion to Dismiss or Abate

Bartow explains that its initial Motion to Dismiss had to be amended because the OFP property was sold to the SWFWMD, which eliminated the plans for development.

Bartow claims the Petition should be dismissed because there are currently no plans to develop OFP. Accordingly, Bartow explains it has no plans to serve its own non-electric facilities in OFP, because such facilities will not be built now that no development is planned.

Under these circumstances Bartow contends that the relief requested by TECO cannot be granted. First, lack of development moots the need for the Commission to declare that TECO has 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

DOCKET NO. 031017-EU
DATE: January 8, 2004

within TECO's service territory." The need for such a declaration no longer exists because Bartow does not plan to build such facilities.

Similarly, there is no need for the Commission to declare that "[a]ny attempt by Bartow to self-provide end-use electric service to such facilities in TECO's service territory, without prior Commission approval, would constitute a violation of the territorial agreement and Order No. 15437" because Bartow has no plans to do so.

Finally, Bartow contends that TECO's request that the Commission find the territorial agreement valid and binding upon Bartow is not proper because under Section 120.565, Florida Statutes, declaratory statements accept as valid the existing orders of the Commission, and therefore cannot be used to validate or invalidate a Commission order. Retail Grocers Association of Florida Self Insurers Fund v. Department of Labor & Employment Security, 474 So. 2d 379, 383 (Fla. 1st DCA 1985).

Bartow also claims that it is improper to resolve contract disputes through declaratory statements, yet that is exactly what TECO is trying to do. Bartow's position is that contract disputes should be adjudicated.

Bartow explains that two purposes of declaratory statements are to avoid costly litigation by selecting the proper course of action in advance, Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corporation of Palm Beach, et al., 747 So. 2d 374 (Fla. 1999), and to provide guidance to others in similar circumstances. Id. at 525; Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998). Bartow contends that neither of these purposes is served by TECO's Petition because if Bartow or TECO ever again seek to have their rights under the territorial agreement adjudicated, it will be in the nature of a contract dispute that may or may not include issues related to Bartow's provision of electric service to city-owned facilities.

TECO's Answer

TECO explains that Bartow and TECO clearly disagree on the interpretation of the territorial agreement. Bartow contends it has the right to serve city-owned facilities in TECO's service

DOCKET NO. 031017-EU
DATE: January 8, 2004

territory and TECO claims Bartow does not have that right. TECO further contends that this disagreement will lead to uneconomic duplication of electric distribution facilities in TECO's service territory.

TECO makes two arguments in support of its contention on uneconomic duplication. First, based on information filed in Docket No. 011333-EU, TECO claims that Bartow has constructed excess transformer capacity of over 84 MVA in the vicinity of the OFP property. Second, TECO believes that part of the OFP property will be developed, based on a recent article in the Bartow Ledger. TECO explains that in the article, officials of the Southwest Florida Water Management District (SWFWMD) said they intended to sell back 1200 acres to OFP, and that the sale price for the property was based on the value of the anticipated development, not the value of the land. Given these facts and Bartow's belief that it has the right to serve city-owned facilities in TECO's service territory, TECO believes that uneconomic duplication is likely to occur. TECO therefore maintains that the declaratory relief it requested must be granted in order to avoid uneconomic duplication of facilities.

TECO claims that it is not trying resolve a contract dispute with a declaratory statement. TECO explains the territorial agreement "becomes embodied" in the Order approving it. Order No. 23995 issued in Docket No. 900744-EU on January 3, 1991. The agreement is part of the Order and TECO is asking the Commission to interpret its Order.

TECO claims that its request that the Commission find the territorial agreement to be valid and binding on TECO and Bartow is legitimate. TECO explains that Florida Power & Light asked for a similar declaration regarding its territorial agreement with the City of Homestead, and over Homestead's objection, the Commission found it appropriate. Order No. 20400 issued in Docket No. 880986-EU on December 2, 1988.

Analysis

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement. In pertinent part, it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to

the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

When determining the availability of a declaratory statement in administrative proceedings, courts may be guided by the law on declaratory judgments in civil proceedings. Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979). In both administrative and civil proceedings, an entity seeking a declaratory statement must show that there is an "actual, present and practical need for the declaration", and that the declaration addresses a "present controversy." Sutton v. Department of Environmental Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995); see also Santa Rosa County, Fla. V. Administration Commission, Division of Administrative Hearings et al., 661 So. 2d 1190 (Fla. 1995); Couch at 33. Judicial restraint is also a principle that must be considered when deciding whether to issue a declaratory statement. Couch at 33.

Under circumstances very similar to those in this docket, the Florida Supreme Court ruled that a declaratory statement should not be issued because there was not a present need. Santa Rosa County at 1192-3. In Santa Rosa County the County adopted a comprehensive plan after the Department of Community Affairs (DCA) found it to be out of compliance. The DCA petitioned for an administrative hearing seeking a determination that the plan was out of compliance. The case was settled.

During the pendency of the administrative case the county had filed a complaint for declaratory relief in circuit court pertaining to the constitutionality of the laws governing comprehensive plans. DCA filed a motion to have the complaint denied, claiming the case was moot now that the administrative case had been settled. The County objected, claiming it needed declaratory relief because it anticipated future disputes over complying with the comprehensive planning laws. The circuit court ruled in favor of DCA, the 1st District Court of Appeals reversed,

DOCKET NO. 031017-EU
DATE: January 8, 2004

and the Florida Supreme Court reversed the 1st District Court of Appeals. Id.

The Court found that the actual dispute between the parties was resolved by the settlement so declaratory relief was not available to the County. Id. The Court stated that:

Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.'

Id. (citing LaBella v. Food Fair, Inc., 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)).

In this docket, the actual dispute between the parties was resolved when the OFP property was sold and the Petition for Formal Hearing was withdrawn. Although TECO has ongoing concerns about Bartow's interpretation of the territorial agreement, and disagrees with Bartow's interpretation, that disagreement does not create an "actual, present and practical need for the declaration." Sutton at 1048. There is no such need because there are no city-owned facilities for Bartow to serve in TECO's territory and Bartow has no plans to build any. TECO's concern that Bartow will build electric distribution facilities if development does occur in the future may or may not be well grounded but it is not up to the Commission to decide because TECO's assertion is based on a "state of facts which has not arisen." Santa Rosa County at 1192-3. For this reason the Motion to Dismiss should be granted.

Much of TECO's argument against the Motion to Dismiss is factually based. TECO addresses the likelihood of future development, and Bartow's actions if there is future development. These are questions of fact that cannot be resolved through a declaratory statement. The only types of hearings allowed for declaratory statements are those not involving disputed issues of material fact. Rule 28-105.003, Florida Administrative Code. Because a declaratory statement proceeding cannot be used to test the veracity of TECO's assertions against Bartow, they are extraneous.

Finally, TECO's petition for a declaratory statement is not legitimized by the more liberal interpretation of Chapter 120.565, Florida Statutes, resulting from the 1996 amendment to the statute. At that time the term "only" was deleted from Section 120.565(1), as shown below:

Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances ~~only~~.

The Florida Supreme Court addressed the effects of this amendment in Florida Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corporation of Palm Beach, D/B/A Kennel Club and Palm Beach Jai Alai, et al. 747 So. 2d 374 (Fla. 1999)[hereinafter "Investment Corp."]. Prior to this decision petitions for declaratory statements could be dismissed if the issue raised was applicable to more than one person. The view was that rulemaking was the required procedure under such circumstances.

In Investment Corp. the Court modified its position and found that issuance of a declaratory statement can be appropriate and beneficial if it applies to more than one person's particular situation. Id. at 380-1 (quoting Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998)). The Court recognized a distinction between a rule and a declaratory statement that would apply to more than one person. In this context the Court stated that the purposes of a declaratory statement were to allow parties to avoid litigation by selecting the proper course of action in advance, and to provide guidance to others who may interact with an agency in the same way. Id. at 381 (quoting Chiles at 154-5). The Court, while allowing a declaratory statement to serve as a policy statement in some respects, did not eliminate the need for a live controversy, nor did it allow a declaratory statement to serve as an adjudication. Thus, reaching the merits of TECO's petition for declaratory statement might avoid litigation, but its petition still does not satisfy a threshold requirement for issuance of a declaratory statement because there is no live controversy. Furthermore, because of the factual assertions TECO makes about any future development and Bartow's actions if it does occur, reaching the merits would bring an adjudicatory element into a proceeding where it has no place.

DOCKET NO. 031017-EU
DATE: January 8, 2004

For the reasons provided above, staff recommends that Bartow's Amended Motion to Dismiss or Abate TECO's Petition for Declaratory Statement be granted.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

STAFF ANALYSIS: If the Commission votes to dispose of the petition, a final order can be issued and the docket closed.

MKS