

State of Florida



## Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** April 7, 2005

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Brown)  
Division of Economic Regulation (Breman, McNulty)

**RE:** Docket No. 050117-EI – Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within the City of Winter Park, pursuant to Section 366.03 and 366.04, F.S.

**AGENDA:** 04/19/05 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\050117.RCM.DOC

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### Case Background

On February 10, 2005, Progress Energy Florida, Inc. (“Progress”) filed a petition asking the Commission to relieve it of the obligation to provide electric service to retail customers in the City of Winter Park (“Winter Park” or “City”). The petition results from Winter Park’s decision to purchase Progress’s electric facilities and establish a municipal utility to provide service within the City. The purchase price of Progress’s distribution facilities and the area to be served by the City were established by arbitration award, issued July 18, 2003. Since that time, Progress and Winter Park have been negotiating the details of the transfer, and Winter Park intends to begin operation of its new utility by June 1 of this year. In anticipation of the transfer, and because at this time the parties have not negotiated a territorial agreement to address the new service areas of the utilities, Progress is asking the Commission to clarify its regulatory responsibilities to the customers and the service area that will soon be served by the municipal utility. At this writing Winter Park has not asked to participate in the case.

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This is staff's recommendation to acknowledge Winter Park's purchase of the electric distribution system and grant Progress's petition to relieve it of the obligation to provide electric service in that area. The Commission has jurisdiction pursuant to sections 366.03 and 366.04, Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should the Commission relieve Progress of its obligation to provide retail electric service within the area to be served by the Winter Park's municipal utility?

**Recommendation:** Yes. The Commission should relieve Progress of its obligation to provide electric service in the area that will be served by the new municipal utility, effective June 1, 2005, or at such later date that Winter Park begins operation of the new utility. Progress should inform the Commission if the transfer will not take place on June 1<sup>st</sup>, and inform the Commission when the transfer does take place. Progress should continue to pursue a territorial agreement with Winter Park to govern their future relationship.

**Staff Analysis:** As Progress explains in its petition, the events leading to this case began several years ago when Progress and Winter Park were not able to reach agreement over the terms of a new franchise agreement to replace the one set to expire in June of 2001. The old agreement had contained a provision permitting the City to purchase Progress' distribution system within the franchise area upon the expiration of the agreement. The parties could not agree to include such a provision in the new agreement, and Winter Park then began the process to purchase Progress' facilities under the old franchise agreement. In Florida Power Corporation v. City of Casselberry, 793 So. 2d 1174 (Fla. 5<sup>th</sup> DCA 2001), the 5<sup>th</sup> District Court of Appeals affirmed the lower court's determination that under the old franchise agreement Winter Park had the right to purchase Progress' electric facilities and establish its own utility to serve in the City. Thereafter, an arbitration panel established the price and other terms for the transfer of Progress' distribution system to the City, including approval of the geographic area that Progress and Winter Park agreed will be the "City Territorial Area." Progress attached to its petition a map of Winter Park that delineates the City's service area established by the 2003 arbitration award.<sup>1</sup>

Since 2003, Winter Park has been building its municipal utility system, and Progress and the City have negotiated the details of the transfer. The citizens of Winter Park have approved a bond issuance of \$49,800,000 for the purchase of Progress' system, the City has negotiated a bulk power contract with Progress, the City has hired an electric utility director and begun construction of a new substation to protect reliability when Progress terminates its service.<sup>2</sup> For its part, Progress is modifying one of its substations so that Winter Park will be able to receive 69 kV service and is planning other system modifications to accommodate the transition. Progress has provided the City with maps and maintenance data for its distribution system, non-confidential customer billing information, and other relevant operational information. The City has stated its intention to take over operation of the system on June 1, 2005. Progress asserts that it will be ready to reliably release control over the system and cease providing service to the Winter Park customers at that time. Progress also indicates that it will continue to provide service beyond June 1 if the City is not able to provide service by that date.

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<sup>1</sup> On March 29, 2005, Progress filed additional detailed maps of the Winter Park service area.

<sup>2</sup> For a chronology of events regarding the transition, see Winter Park's *Watt's the Status Timeline* from its website, [www.cityofwinterpark.org](http://www.cityofwinterpark.org), a copy of which is attached to this recommendation as Attachment A.

Progress' petition implicates two provisions of Chapter 366, sections 366.03 and 366.04, Florida Statutes. Section 366.03 imposes the duty on each private electric utility within the state to provide "reasonably sufficient, adequate, and efficient service upon terms as required by the commission." Section 366.04 provides that the Commission shall have the power over all electric utilities in the state, including municipal utilities, to require reliability within a coordinated power grid and to approve territorial agreements and resolve territorial disputes. By its power to approve agreements and resolve disputes, the Commission can prevent future uneconomic duplication of facilities and establish the territory within which a public utility has the obligation to serve. Further, since the horizontal division of territory between suppliers of the same product or service is considered a *per se* violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, the Commission's active supervision of utility territorial boundaries provides state action immunity for the utilities from antitrust liability. See, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. et. al., 445 U.S. 97 (1980) (to receive immunity from antitrust liability, defendant must show that the actions complained of were taken pursuant to a clearly articulated state policy and actively supervised by the state); Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609 (11<sup>th</sup> Cir. 1995) (two Florida electric utilities were entitled to state action immunity from antitrust liability for their horizontal division of territory because the State had a clearly articulated policy to establish utility territories by agreement, and the Florida Public Service Commission actively supervised the agreement in question).

The Winter Park purchase of its electric distribution system has thus created uncertainty for Progress regarding its regulatory obligations in the Winter Park area. Progress points out in its petition that it has provided service to customers in Winter Park since 1927. Without some acknowledgment or agreement from the Commission that it can cease providing service to that territory, and in the absence of a territorial agreement with Winter Park that would establish a territorial boundary between the utilities and govern their relationship in the future, Progress believes that it – and perhaps Winter Park as well – could run afoul of the Commission or the antitrust court for failing to provide service.

Staff agrees that Progress needs some affirmative action by the Commission to clear up the uncertainty in this circumstance. Staff would prefer that the parties had jointly requested approval of a territorial agreement, since that is the method, along with the resolution of disputes, established by statute to approve electric utility service territory. Nevertheless, faced with the *fait accompli* of the arbitration award, and with the understanding that Progress and Winter Park did agree to the City Territorial Area approved in the award, staff recommends that the Commission acknowledge the arbitration award and the territorial boundary it establishes between Progress and the new Winter Park utility; relieve Progress from its obligation to serve in that area on June 1, 2005, or at such later date that Winter Park is ready to begin utility operations; and, since the Commission will undoubtedly be the forum to resolve any territorial disputes that may develop in the implementation of the arbitrated award, encourage Progress and the City to return as soon as possible with a territorial agreement. Staff also recommends that Progress should notify the Commission when the transfer is complete.

**Issue 2:** Should this docket be closed?

**Recommendation:** If no person whose substantial interests are affected has timely filed a protest to the Commission's Proposed Agency Action Order, a Consummating Order should be issued making the PAA Order final. The docket should remain open, however, until Progress files a notice with the Commission that the intended transfer has taken place. When the notice is filed the docket should be closed administratively.

**Staff Analysis:** If no person whose substantial interests are affected has timely filed a protest to the Commission's Proposed Agency Action Order, a Consummating Order should be issued making the PAA Order final. The docket should remain open, however, until Progress files a notice with the Commission that the intended transfer has taken place. When the notice is filed the docket should be closed administratively.