

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

JULY 6, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CULPEPPER)^{te mp}
DIVISION OF ELECTRIC AND GAS (BASS, DUDLEY, TEW)^{Rob KS. KJ} JBJ

RE: DOCKET NO. 950307-EU - PETITION TO RESOLVE A TERRITORIAL
DISPUTE WITH FLORIDA POWER AND LIGHT COMPANY IN ST. JOHNS
COUNTY, BY JACKSONVILLE ELECTRIC AUTHORITY

AGENDA: 07/18/95 - REGULAR AGENDA
MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950307.RCM

CASE BACKGROUND

On March 20, 1995, Jacksonville Electric Authority (JEA) petitioned the Florida Public Service Commission (Commission) to resolve a territorial dispute between JEA and Florida Power and Light Company (FPL). Pursuant to Section 366.04, Florida Statutes, jurisdiction lies with the Commission to resolve this dispute.

On May 12, 1995, FPL filed its Second Amended Answer to Jacksonville Electric Authority's Petition and Counter-Petition. On June 1, 1995, JEA filed a Motion to Dismiss Florida Power & Light's Counter-Petition. On June 8, 1995, FPL responded with a Memorandum in Opposition to Jacksonville Electric Authority's Motion to Dismiss. Although the parties have undertaken settlement negotiations on this matter and filed a Joint Motion for Extension of Time to File Testimony and Prehearing Statements on June 6, 1995, the motion for extension of time need not delay the Commission's consideration of the motion to dismiss.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Jacksonville Electric Authority's Motion to Dismiss Florida Power & Light Company's Counter-Petition?

RECOMMENDATION: No, the Commission should deny JEA's Motion to Dismiss. FPL's Counter-Petition adequately states a cause of action upon which the Commission can grant relief. It should be considered in this docket.

STAFF ANALYSIS: FPL and JEA are currently bound by a territorial agreement entered into on April 13, 1979, and approved by the Commission on May 9, 1980, in Order No. 9363, issued in Docket No. 790886-EU. In its counter-petition, FPL seeks modification or cancellation of the agreement. JEA, however, asserts that FPL's counter-petition should be dismissed. In considering this motion to dismiss, the facts set forth in the counter-petition should be viewed in the light most favorable to FPL in order to determine if FPL's claim is cognizable under the provisions of Section 366.04(2), Florida Statutes and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code.

In its counter-petition, FPL seeks modification of the 1979 territorial agreement pursuant to Section 1.1 of the agreement. Section 1.1 provides, in part:

. . . [A]fter fifteen (15) years, from the date first written, but not before, either of the parties hereto shall have the right to initiate unilateral action before any entity with appropriate jurisdiction, seeking modification or cancellation of this AGREEMENT.

FPL asserts that modification of the agreement is in the best interests of existing and future customers. In the alternative, FPL asks the Commission to cancel the current agreement and allow the parties to negotiate a new agreement.

JEA alleges that the counter-petition fails to set forth ultimate facts necessary to support the relief requested, as required by Rule 1.110(b), Florida Rules of Civil Procedure. Rule 1.110(b) requires that a counter-claim contain:

. . . (1) a short and plain statement of the grounds upon which the court's jurisdiction

depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled.

JEA argues that Section 1.1 of the agreement does not eliminate the legal requirement that FPL state a cause of action, such as the existence of a "territorial dispute," as defined in Rule 25-6.0439(1)(b), or "changed circumstances," as described in Peoples Gas Systems, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

Effect of Order 9363

When the Commission approved the 1979 territorial agreement between JEA and FPL, that agreement became an order of the Commission. Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) (an agreement has no existence apart from the Commission order approving it). See also City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) ("... the practical effect of such approval is to make the approved contract an order of the Commission . . ."). Order 9363 approved the 1979 agreement in its entirety and, therefore, Section 1.1 of the agreement is part of a Commission directive. Section 1.1 provides that either party may petition to modify or cancel the agreement after 15 years "from the date first written." FPL's counter-petition to modify or cancel the 1979 agreement was filed more than 15 years from the date the agreement was first written. FPL's counter-petition asks the Commission to take action that it specifically considered in Order 9363. Certainly the Commission can grant such relief and no other factual allegations are necessary to support the request. FPL's counter-petition clearly states a sufficient cause of action on this point. Furthermore, it is appropriate for FPL to raise this matter in its counter-petition because it pertains to issues that will be addressed in this docket. As such, FPL's counter-petition should not be dismissed.

Additional Issues

In light of the above analysis, it is not necessary for the Commission to reach the other arguments JEA raised in its motion, but the following analysis of those arguments also supports denial of the motion to dismiss.

A. Cause of Action to Modify or Cancel Agreement

JEA argues that FPL's counter-petition must be dismissed

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because it fails to set forth ultimate facts necessary to state a cause of action. JEA asserts that Section 1.1 of the existing agreement can not stand alone as a basis for FPL's counter-petition, but that FPL must also sufficiently allege ultimate facts demonstrating that it is necessary to modify the agreement due to "changed conditions," as outlined in Peoples Gas Systems, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966). JEA argues that FPL has failed to allege those facts.

Staff disagrees. The Mason case is distinguishable. In Mason the court determined that the Commission cannot modify an order that has become final solely upon the basis that the Commission did not have the authority to enter the original order in the first place. The Mason court did not address the validity of a provision such as Section 1.1 as the basis for modifying an agreement. Mason does not, therefore, apply in instances where the modification or termination of the agreement was specifically provided for in the agreement and approved by the Commission.

FPL's counter-petition does not have to contain specific factual allegations of changed circumstances or public need. The counter-petition need only contain a short, plain statement of the ultimate facts indicating that FPL is entitled to relief. Shahid V. Campbell, 552 So. 2d 321 (Fla. 1st DCA 1989). See also Fontainbleau Hotel Corp. v. Walter, 246 So. 2d 563 (Fla. 1971). FPL has fulfilled that requirement by alleging that, pursuant to Section 1.1, the passage of 15 years entitles it to unilaterally petition the Commission to modify or cancel the agreement. FPL has also alleged that the customers' best interests will be served if the Commission modifies the agreement. FPL's counter-petition states a cause of action, states grounds for the Commission's jurisdiction, states the ultimate facts showing FPL is entitled to relief, and makes a demand for relief. This is all that is necessary under the Commission's rules and Rule 1.110(b), Florida Rules of Civil Procedure.

B. Existence of Territorial Dispute

In addition, JEA argues that the only other alternative means for FPL to exercise its right to have the boundary redrawn would be to allege that a territorial dispute exists. JEA argues that FPL did not make this allegation. We disagree. FPL is not required to make that specific allegation in the body of the counter-petition when the case itself is titled "Petition of Jacksonville Electric Authority to Resolve a Territorial Dispute with Florida Power and Light Company in St. Johns County." Clearly, a territorial dispute exists. JEA has alleged it in its petition. FPL's counter-petition should not be dismissed for failing to restate the obvious.

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CONCLUSION

It would be inappropriate to dismiss FPL's counter-petition when the facts alleged in the counter-petition, viewed in the light most favorable to FPL, set forth a claim that is cognizable by the Commission under the provisions of Section 366.04 (2), Florida Statutes and Rules 25-6.0440 and 25-6.0441, Florida Administrative Code. Staff recommends that JEA's Motion to Dismiss should be denied.

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ISSUE 2: Should this docket be closed?

STAFF RECOMMENDATION: No. This docket should remain open until all matters contained herein have been resolved.

STAFF ANALYSIS: Whether JEA's Motion to Dismiss is granted or denied, issues will remain in this docket that must be resolved by the Commission. This docket should, therefore, remain open until all the issues have been resolved.