

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

JULY 2, 1997

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)
FROM: DIVISION OF LEGAL SERVICES (JOHNSON) *WJ* *RUE* *RT*
DIVISION OF ELECTRIC & GAS (BASS) *Records/Reporting*
RE: DOCKET NO. 970512-EU - PETITION TO RESOLVE TERRITORIAL
DISPUTE WITH CLAY ELECTRIC COOPERATIVE, INC. IN BAKER
COUNTY BY FLORIDA POWER & LIGHT COMPANY.
AGENDA: 07/15/97 - REGULAR AGENDA - DECISION PRIOR TO HEARING -
INTERESTED PERSONS MAY PARTICIPATE
CRITICAL DATES: NONE
SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\970512EU.RCM

CASE BACKGROUND

On April 29, 1997, Florida Power & Light Company (FPL) filed a petition to resolve a territorial dispute between FPL and Clay Electric Cooperative, Inc. (Clay) in Baker County. FPL alleges that both FPL and Clay currently provide retail electric service to customers within an area of Baker County where River City Plastics Inc. (River City) is in the process of constructing a manufacturing facility. FPL states that the River City plant will be located immediately adjacent to an existing FPL industrial customer and FPL's distribution facilities which can serve River City are closer than comparable facilities owned by Clay.

On May 23, 1997, Clay filed its Answer, Affirmative Defenses and Motion to Dismiss, and on June 5, 1997, FPL filed its Memorandum in Opposition to Motion to Dismiss. This recommendation addresses Clay's Motion to Dismiss.

DOCUMENT NUMBER-DATE

06675 JUL-25

FPS-RECORDS/REPORTING

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Clay Electric Cooperative Inc.'s Motion to Dismiss?

RECOMMENDATION: No.

STAFF ANALYSIS: Clay's Motion to Dismiss is premised on two grounds: (1) That FPL has not alleged that it "is serving or has ever served the property" where River City is constructing its plant; and (2) FPL has not alleged that it can provide the "quality and character of service" which River City Plastics requires.

In its Memorandum in Opposition to Motion to Dismiss, FPL states that the two grounds which are the basis for Clay's motion are not essential elements of a petition to resolve a territorial dispute. FPL points out that Clay has not offered a citation to any authority to support its argument. According to FPL, the Commission's rules concerning territorial disputes do not contain any reference to "actual service to a particular customer or particular character of service" which a customer may require. FPL cites Fountainbleu Hotel Corp. v. Peters, 246 So.2d 563 (Fla. 1971) for its argument that where a complaint contains sufficient allegations to acquaint the respondent of the petitioner's claim, it would be error to dismiss the petition on the grounds that more specific allegations are required. Finally, FPL states that Clay filed a petition for declaratory statement (Docket No. 970502-EU) concerning the identical set of facts as those alleged by FPL in this docket; therefore it is clear that both parties recognize there is a dispute as to which utility should serve River City.

In considering a motion to dismiss, it is appropriate to view the facts set forth in the petition in the light most favorable to the petitioning party in order to determine if the claim is cognizable under the law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). As discussed below, Staff believes that FPL's petition meets the requirements of the Commission's rules and is legally sufficient.

FPL's petition clearly indicates that FPL and Clay disagree as to which utility is entitled to serve River City and this disagreement meets the definition of a territorial dispute set forth in Rule 25-6.0439(1)(b), Florida Administrative Code. Rule 25-6.044(1), Florida Administrative Code, states that a utility may initiate a territorial dispute by requesting, as FPL has, the Commission to resolve the dispute. In addition, FPL's petition contains sufficient allegations to apprise Clay of the basis upon which FPL asserts it has a right to right to serve River City.

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Staff believes that whether FPL or Clay has served the area and can provide the character of service required by the customer are factual issues to be determined based upon the record developed at the hearing. Thus, staff recommends that Clay's motion to dismiss be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No.

STAFF ANALYSIS: This docket should remain open pending the evidentiary hearing scheduled for October 27, 1997.