

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute with Clay Electric Cooperative, Inc. in Baker County by Florida Power & Light Company.

DOCKET NO. 970512-EU  
ORDER NO. PSC-97-0922-PCO-EU  
ISSUED: August 4, 1997

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK  
DIANE K. KIESLING  
JOE GARCIA

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

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 Order addresses Clay's Motion to Dismiss.

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

DOCUMENT NUMBER-DATE

07862 AUG-45

FPSC-RECORDS/REPORTING

ORDER NO. PSC-97-0922-PCO-EU  
DOCKET NO. 970512-EU  
PAGE 2

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, we find 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. 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, we find that Clay's motion to dismiss should be denied.

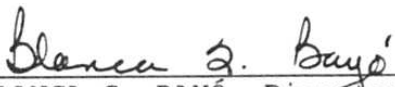
ORDER NO. PSC-97-0922-PCO-EU  
DOCKET NO. 970512-EU  
PAGE 3

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Clay Electric Cooperative Inc.'s Motion to Dismiss is denied. It is further

ORDERED that this docket shall remain open pending the evidentiary hearing scheduled for October 27, 1997.

By ORDER of the Florida Public Service Commission, this 4th day of August, 1997.

  
\_\_\_\_\_  
BLANCA S. BAYO, Director  
Division of Records and Reporting

( S E A L )

RVE

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida

ORDER NO. PSC-97-0922-PCO-EU  
DOCKET NO. 970512-EU  
PAGE 4

Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.