

Florida Public Service Commission
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M E M O R A N D U M

JANUARY 3, 1991

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF APPEALS (BROWN) *MCB DES*
DIVISION OF ELECTRIC AND GAS (FULFORD) *AMY Jm*
DIVISION OF RESEARCH (HOPPE) *OMA*

SUBJECT: ~~DOCKET NO. 900532-GU~~ - PROPOSAL OF RULES 25-7.047,
25-7.0471, 25-7.0472, and 25-7.0473, FLORIDA
ADMINISTRATIVE CODE, REGARDING TERRITORIAL AGREEMENTS AND
DISPUTES FOR NATURAL GAS UTILITIES.

AGENDA: JANUARY 15, 1991 - CONTROVERSIAL AGENDA - PARTIES MAY NOT
PARTICIPATE

PANEL: FULL COMMISSION

CRITICAL DATES: NONE

CASE BACKGROUND

On October 2, 1990, the Commission voted to propose new rules implementing its authority to approve and review territorial agreements and resolve territorial disputes between natural gas utilities. Rules 25-7.047, 25-7.0471, 25-7.0472, and 25-7.0473, Florida Administrative Code were published in the Florida Administrative Weekly on October 19, 1990. Although no hearing was requested, the City of Gulf Breeze did file written comments (Attachment 1), stating that the Commission should not involve itself in the territorial agreements and disputes of gas utilities. Also, the staff of the Joint Administrative Procedures Committee (JAPC), informally registered concern over certain language in the proposed rules that it believes vests the Commission with unbridled and unauthorized discretion to approve agreements and resolve disputes, (Attachment 2). We have therefore returned to agenda with the rules so that the Commission may review and consider the comments and concerns raised.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission change the proposed rules in response to the comments filed by the city of Gulf Breeze?

RECOMMENDATION: No. The Commission should not change the proposed rules.

STAFF ANALYSIS: On October 23, 1990, the city of Gulf Breeze submitted written comments regarding the gas territorial rules. The comments are general in nature. They maintain that the Commission's proposed rules are an unnecessary intrusion by the State into the affairs of public and private natural gas utilities, which "[i]n all likelihood . . . would result in more bureaucracy with little benefit." Comments by Gulf Breeze, Attachment 1, page 1. The city suggests that a territorial dispute board that would hear cases when requested by a utility might be beneficial, but the board should not have any authority to act in the dispute "except in an appellate role". The city concludes its comments on the proposed rules by stating that territorial agreements and disputes should be resolved by the parties with little or no involvement by the Commission.

Staff does not agree that territorial agreements and disputes should be resolved by the parties with little or no involvement by the Commission. The Commission is required by law to oversee and control territorial agreements and disputes, to avoid the uneconomic duplication of facilities, and to ensure the safe and reliable distribution of energy throughout the state. In fact, territorial agreements between gas utilities are only lawful when the state reviews, approves, and exercises ultimate control over them to achieve the public purposes mentioned above. Without the participation of the state, such activity would be considered a per se violation of the federal antitrust laws.

The law and Commission policy favor and encourage the development of territorial agreements between public utilities, and where utilities are able to reach an agreement, proposed Rule 25-7.0471 provides a straightforward procedure for review and approval that staff does not believe to be "bureaucratic" or unduly burdensome. The procedure prescribed by proposed Rule 25-7.0472 for resolution of territorial disputes is necessarily more elaborate, to adequately provide due process of law to all affected parties, and to adequately address and resolve all issues in dispute. The cost of dispute resolution before the Commission is

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nevertheless much less significant than the cost to the public of uneconomic duplication of facilities, unreliable service, and utility "range wars".

The proposed territorial rules for natural gas utilities codify the Commission's existing policy with regard to territorial agreements and disputes. They also implement the Commission's inherent and explicit statutory authority in this area, and they will contribute to the resolution of any questions regarding the nature and extent of that authority. Staff recommends that the rules be adopted as proposed.

ISSUE 2: Should the Commission change the proposed rules in response to the concerns expressed by the staff of the JAPC?

RECOMMENDATION: Yes. The Commission should revise the introductory language of Rule 25-7.0471 (2), Rule 25-7.0472 (2) and Rule 25-7.0472 (2)(c), to resolve JAPC staff's concern that the language allows the Commission to exercise "unbridled discretion" in its approval of territorial agreements and resolution of territorial disputes. Since it is essential that the Commission retain the discretion to respond to all issues that may arise in the context of an individual case, the Commission should add language to the rules that states that the Commission will also consider "other relevant issues that may arise from the circumstances of a particular case".

STAFF ANALYSIS: Proposed Rule 25-7.047, Territorial Agreements for Natural Gas Utilities, and proposed Rule 25-7.042, Territorial Disputes for Natural Gas Utilities, list certain factors that the Commission routinely considers in territorial matters. The introductory language of subsection (2) of those rules states ". . . the Commission may consider, but not be limited to consideration of. . ." the factors the rules then list. Subsection (2)(c) of the Territorial Dispute Rule, 25-7.042, also uses similar language when it lists factors the Commission will consider in its determination of the costs to a utility to provide service to a disputed area.

The staff of the JAPC has informed the Commission staff by letter that it is concerned with the use of this language in the territorial rules, because the language vests "unbridled discretion" in the Commission and is thus an invalid exercise of delegated legislative authority, contrary to section 120.52 (8)(d),

Florida Statutes.

Section 120.52 (8), Florida Statutes, states in relevant part;

Invalid exercise of delegated legislative authority means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply: . . . (d) the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. . .

JAPC staff states that the rules do not apprise the reader of which criteria, if any, the Commission will consider when it approves agreements and resolves disputes. Even though the rules list criteria to be considered, the use of the permissive word "may", makes the list meaningless, because the Commission has total discretion to disregard any and all the criteria if it chooses.

JAPC cites several authorities to support its position; and having reviewed those authorities, particularly the case of City of Miami v. Save Brickell Avenue, 426 So.2d 1100 (Fla. 3rd DCA 1983), Commission staff agrees that the questioned language should be changed.

In the City of Miami case, the court found that the city's zoning ordinance was an invalid exercise of delegated legislative authority, even though the ordinance listed criteria for the zoning board to consider. The court stated;

While it is true that criteria are listed in the ordinance for the City Commission consideration, further examination reveals that such criteria are solely permissive and not mandatory. The key phraseology is "may include but are not limited to. . . ." In statutory construction, the word "may" when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word "shall" (citation omitted) Moreover, the wording of the ordinance clearly permits the Commission to totally disregard the listed criteria and

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instead to base a decision upon criteria that are not listed or no criteria at all. Certainly, an ordinance which permits a legislative agency to totally disregard listed criteria and to base a decision upon unlisted or no criteria does not meet the standards. .
. .(citations omitted)

On the basis of this legal analysis, staff suggests that the Commission should replace the word "may" with the word "shall" in the introductory language of the territorial agreement and dispute rules, 25-7.0471(2), and 25-7.0472(2). Staff also suggests deleting the phrase "but not be limited to consideration of" in those rules. The language in Rule 25-7.0472(2)(c) which reads "but is not limited to" should also be deleted. These changes will better define the criteria the Commission will take into account when it approves territorial agreements and resolves territorial disputes, and conform the proposed rules to statutory and judicial requirements.

Staff recognizes that the Commission cannot properly exercise its implicit and explicit statutory duty to approve territorial agreements and resolve territorial disputes if it does not have the discretion it needs to respond to unique circumstances and issues that may arise in individual cases. Therefore, staff suggests that the Commission should add a subsection to 25-7.0471(2) and 25-7.0472(2) which states that the Commission will consider "other relevant factors that may arise from the circumstances of a particular case". Similar language should also be used in 25-7.0472(2)(c) to indicate that the Commission will consider "other costs that may be relevant to the circumstances of a particular case".

Staff believes that the changes to the proposed gas territorial rules will balance the requirement of certainty and reasonable standards in rulemaking with the Commission's need for flexibility in responding to unique issues that arise in territorial agreements and disputes. Staff recommends that the rules should be adopted with the suggested changes.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. The docket should be closed when these rules are adopted.

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STAFF ANALYSIS: This docket may be closed when the rules are filed with the Secretary of State.

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Attachments

1 25-7.047 Territorial Agreements and Disputes for Natural
2 Gas Utilities - Definitions.

3 For the purpose of Rules 25-7.0471, 25-7.0472 and 25-7.0473
4 the following terms shall have the following meaning:

5 (1) "territorial agreement" means the entire agreement
6 between two or more natural gas utilities which identifies the
7 geographical areas to be served by each natural gas utility party
8 to the agreement, the terms and conditions pertaining to
9 implementation of the agreement, and any other terms and
10 conditions pertinent to the agreement;

11 (2) "territorial dispute" means a disagreement as to which
12 utility has the right and the obligation to serve a particular
13 geographical area.

14 (3) "Natural Gas Utility" will be defined as the term is
15 defined in section 366.04(3)(c), Florida Statutes, 1989.

16 Specific Authority: 366.04(3)(a)(b)(c)(4), Florida Statutes.

17 Law Implemented: 366.04, Florida Statutes.

18 History: New
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~~struck through~~ type are deletions from existing law.

1 25-7.0471 Territorial Agreements for Natural Gas Utilities.

2 (1) All territorial agreements between natural gas
3 utilities shall be submitted to the Commission for approval.
4 Each territorial agreement shall clearly identify the
5 geographical area to be served by each utility. The submission
6 shall include:

7 (a) a map and a written description of the area,

8 (b) the terms and conditions pertaining to implementation of
9 the agreement; and any other terms pertaining to the agreement,

10 (c) the number and class of customers to be transferred,

11 (d) assurance that the affected customers have been
12 contacted and the difference in rates explained, and

13 (e) information with respect to the degree of acceptance by
14 affected customers, i.e., the number in favor and those opposed
15 to the transfer. Upon approval of the agreement, any
16 modification, changes, or corrections to this agreement must be
17 approved by this Commission.

18 (2) Standards for Approval. In approving territorial
19 agreements, the Commission shall may consider, ~~but not be limited~~
20 ~~to consideration of:~~

21 (a) the reasonableness of the purchase price of any
22 facilities being transferred;

23 (b) the reasonable likelihood that the agreement, in and of
24 itself, will not cause a decrease in the reliability of natural
25 gas service to the existing or future ratepayers of any utility

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1 party to the agreement, and

2 (c) the reasonable likelihood that the agreement will
3 eliminate existing or potential uneconomic duplication of
4 facilities.

5 (d) other relevant factors that may arise from the
6 circumstances of a particular case.

7 (3) The Commission may require additional relevant
8 information from the parties of the agreement, if so warranted.

9 Specific Authority: 366.04(3)(a)(b)(c)(4), Florida Statutes.

10 Law Implemented: 366.04, Florida Statutes.

11 History: New

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1 25-7.0472 Territorial Disputes for Natural Gas Utilities.

2 (1) A territorial dispute proceeding may be initiated by a
3 petition from a natural gas utility, requesting the Commission to
4 resolve the dispute. Additionally the Commission may, on its
5 own motion, identify the existence of a dispute and order the
6 affected parties to participate in a proceeding to resolve it.
7 Each utility which is a party to a territorial dispute shall
8 provide a map and written description of the disputed area along
9 with the conditions that caused the dispute. Each utility party
10 shall also provide a description of the existing and planned load
11 to be served in the area of dispute and a description of the
12 type, additional cost, and reliability of natural gas facilities
13 and other utility services to be provided within the disputed
14 area.

15 (2) In resolving territorial disputes, the Commission shall
16 ~~may consider, but is not limited to consideration of:~~

17 (a) The capability of each utility to provide reliable
18 natural gas service within the disputed area with its existing
19 facilities and gas supply contracts and the extent to which
20 additional facilities are needed;

21 (b) The nature of the disputed area and the type of
22 utilities seeking to serve it and degree of urbanization of the
23 area and its proximity to other urban areas, and the present and
24 reasonably foreseeable future requirements of the area for other
25 utility services;

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1 (c) The cost of each utility to provide natural gas service
2 to the disputed area presently and in the future; which includes
3 but is not limited to the following:

- 4 1. Cost of obtaining rights-of-way and permits.
- 5 2. Cost of capital.
- 6 3. Amortization and depreciation.
- 7 4. Labor; rate per hour and estimated time to perform
8 each task.
- 9 5. Mains and pipe; the cost per foot and the number
10 of feet required to complete the job.
- 11 6. Cost of meters, gauges, house regulators, valves,
12 cocks, fittings, etc., needed to complete the job.
- 13 7. Cost of field compressor station structures and
14 measuring and regulating station structures.
- 15 8. Cost of gas contracts for system supply.
- 16 9. Other costs that may be relevant to the
17 circumstances of a particular case.

18 (d) other relevant factors that may arise from the
19 circumstances of a particular case.

20 (e) customer preference if all other factors are
21 substantially equal.

22 (3) The Commission may require additional relevant
23 information from the parties of the dispute if so warranted.
24 Specific Authority: 366.04(3)(a)(b)(c)(4), Florida Statutes.
25 Law Implemented: 366.04, Florida Statutes

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1 | **History: New.**

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1 25-7.0473 Customer Participation.

2 (1) Any customer located within the geographic area in
3 questions shall have an opportunity to present oral or written
4 communications in Commission proceedings to approve territorial
5 agreements or resolve territorial disputes. If the Commission
6 proposes to consider such material, then all parties shall be
7 given a reasonable opportunity to cross-examine or challenge or
8 rebut it.

9 (2) Any substantially affected customer shall have the
10 right to intervene in such proceedings.

11 (3) In any Commission proceeding to approve a territorial
12 agreement or resolve a territorial dispute, the Commission shall
13 give notice of the proceeding in the manner provided by Rule 25-
14 22.0405, Florida Administrative Code.

15 Specific Authority: 366.04(3)(a)(b)(c)(4), Florida Statutes

16 Law Implemented: 366.04, Florida Statutes

17 History: New
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