

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve)	DOCKET NO. 900284-EU
territorial dispute in Clay County)	ORDER NO. 24003
between Clay Electric Cooperative,)	ISSUED: 1/18/91
Inc. and Florida Power & Light)	
Company.)	
_____)	

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
FRANK S. MESSERSMITH

ORDER APPORTIONING TERRITORY IN CLAY COUNTY, FLORIDA

BY THE COMMISSION:

This docket was initiated on April 12, 1990 by Clay Electric Cooperative, Inc. (Clay) upon filing a Petition to Resolve Territorial Dispute In Clay County Between Clay Electric Cooperative, Inc. and Florida Power and Light Company. Clay, a rural electric cooperative organized and existing under Chapter 425 of the Florida Statutes, furnishes electric service to customers in Alachua, Bradford, Baker, Clay, Columbia, Duval, Lake, Levy, Marion, Putnam, Union, and Volusia County. Clay petitioned the Florida Public Service Commission (the Commission) for permission to provide electric service for a proposed titanium dioxide mine site in Clay County that is owned and operated by E.I. du Pont de Nemours & Company (du Pont). The mine site is referred to as the Maxville mine site.

Florida Power and Light Company (FPL) serves 35 Florida counties, including parts of Clay County. FPL presently provides electric service for two other du Pont mines just south of the Maxville site; the Highland and Trailridge mine sites. The Highland mine site is separated from the Maxville site by highway 301 and a few outparcels. Consequently, FPL also intended to furnish the Maxville mine site with electric services.

The Maxville mine site is located in an area known as the "Four Corners." The Four Corners encompasses the intersection of Baker, Duval, Clay, and Bradford counties. More specifically, the property encompasses approximately 10 square miles of undeveloped land and is located in the northwestern part of Clay County. It is just south of a small unincorporated community known as Maxville and to the north of a small unincorporated community known as Highland. The two nearest towns are Baldwin, 10 miles to the north and Starke, about 14 miles to the South. The area west and southwest of the site is swampy and the property southeast of the

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area is the Camp Blanding Military reservation.

Du Pont expects to extract titanium dioxide ores and zircon from the site. The principal mining machinery is composed of dredges, pumps, wet mills and dry mills. All are operated by electricity and run 24 hours a day. Du Pont's load is expected to be approximately 10 MWs, 24 hours a day for approximately 18 years beginning in 1992.

In order to operate their machinery, du Pont has requested high voltage electric service at an interruptible rate to be delivered to a central point on the site. Service is to be delivered through an extension of FPL's Starke-Baldwin transmission line which intersects the mine site. Furthermore, a substation is to be built on the site along with distribution facilities. Both the substation and the distribution facilities are to be leased to du Pont. We agree with Clay's and FPL's assertions that du Pont is entitled to the facilities and the type of service they have requested. We note, however, that Clay does not offer an interruptible rate for transmission level service.

Both parties also have sufficient facilities and capacity to extend adequate and reliable service in and about the Maxville mine site. Clay has a single phase distribution line paralleling the Starke-Baldwin transmission line as well as a dual circuit distribution line running from its Maxville substation south down U.S. 301 to state road 218. Clay also has access by contract to the Starke-Baldwin transmission line through its power supplier, Seminole Electric Cooperative, Inc.. FPL has the Starke-Baldwin transmission line that traverses the mine site from north to south and it also has distribution lines located at the southern end of the property.

Clay has in the past and is currently serving one residential customer found on the actual mine site with distribution level service. Nevertheless, provision of service by either party will not result in the duplication of existing facilities. Since Clay's customer located on the property in dispute receives distribution level service and du Pont has requested transmission level service, the provision of transmission level service by either utility will not result in the uneconomic duplication of existing facilities. It should also be noted that neither party will have to cross the lines of the other to provide service.

In providing the requested service, the cost should be approximately the same, no matter which utility provides the service, due to the fact that they will both have to construct essentially the same facilities in order to meet du Pont's

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requirements. Nevertheless, FPL and Clay disagree as to the cost of these facilities. Clay contended that the cost of the facilities is in the range of \$400,000 to \$500,000. These costs, however, were not based on du Pont's specifications. In fact, the estimate provided by Clay was "a rough approximation" of the cost of the facilities needed by du Pont.

FPL contended that the cost to provide the requested service to du Pont would be approximately \$190,000 for transmission related facilities and \$545,000 for distribution substation facilities. These cost estimates were based on "continuous, substantial, and significant" engineering interchange between du Pont and FPL and the evidence of these costs were not impeached by any of the parties. In any event, both FPL and Clay failed to offer sufficient evidence that would demonstrate their ability to provide the substation and the tap at a lower price than that of the other utility.

Clay has also asserted that the Maxville mine site is within their "historical service area." Clay serves over 30,000 customers in Clay County, however, only a single residential customer is currently being provided distribution service on the mine site. On the other hand, FPL has approximately 3,000 customers within a 10-mile radius of the disputed area, 1000 customers being in Clay County. Most of Clay's 30,000 customers are in the northeastern or south-western portions of Clay County while most of FPL's customers are located in the west central and northwestern part of Clay County.

FPL is providing service in the small unincorporated community of Highland on the southwest end of the disputed area. FPL also has been providing service to du Pont's Highland and Trailridge mine sites for the past 40 years. The Highland mine site is within one mile of the Maxville site and the Highland and Trailridge mine sites are currently receiving transmission level service from FPL's Starke-Baldwin transmission line and a dedicated substation. This transmission line traverses the area in dispute.

Regardless, of which party is providing service in this area, the term "historical service area" is an undefined term not included in the criteria to be analyzed in resolving a territorial dispute. Rule 25-6.0441 of the Florida Administrative Code outlines the criteria:

- (a) the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are

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needed;

(b) the nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and present and foreseeable future requirements of the area for other utility services;

(c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and

(d) customer preference if all factors are substantially equal.

The vague concept of "historical service area" may be subsumed in one of the abovementioned criterion but it is not in and of itself an independent element of this formula.

In this case, Clay asserts that because it has distribution lines and customers in the area of the Maxville mine site, the site is within its historic service area, and thus, should be allowed to provide service to du Pont. However, in re: Petition of Peace River Electric Cooperative Inc. to Settle Territorial Dispute with Florida Power and Light Company, 85 FPSC 12:202, the Commission stated:

PRECO maintains that the fact that it has lines near Tara necessitates a conclusion that any lines built by FPL in the area would result in a duplication of services. According to this theory, if one utility has lines in an area, no other utility could be awarded that territory. However, this theory ignores the issue of adequacy of the lines and the ability of the utilities to serve.

The Commission clearly asserted that mere presence of facilities does not entitle a utility the right to serve a customer. Accordingly, in this matter, the mere presence of Clay's distribution lines in the area does not automatically entitle them the right to serve du Pont. Other elements must be considered, such as the ability of Clay to serve du Pont with its facilities. In this matter, Clay is unable to provide the type of service du Pont has requested with the distribution lines it currently has in place in and about the site. We find, therefore, that the Maxville mine site is not within Clay's historical service area.

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Commission's Rule 25-6.0441, provides that:

the Commission may consider, but not be limited to consideration of:

(a) the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;

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

(c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and

(d) customer preference if all other factors are substantially equal.

As noted above, this Commission, as a matter of policy and in accordance with its rules, may consider customer preference when all other factors are equal, in addition to the statutory factors listed in Section 366.04(2)(e) of the Florida Statutes. In re: Petition of Peace River Electric Cooperative against Florida Power and Light Company for resolution of a Territorial Dispute, 85 FPSC 10:120. This is not to say that customer preference is controlling. As stated by the Florida Supreme Court in Lee County Electric Cooperative, Inc. v. Marks, 501 So. 2d 585 (Fla. 1987), "an individual has no right to service by a particular utility simply because he deems it advantageous to himself." See also; Storey v. Mayo, 217 So. 304, 307-8 (Fla. 1968), cert denied, 395 U.S. 909 (1969).

Customer preference is but one factor to consider when meeting the Commission's obligation to satisfy itself that awarding the disputed area to a particular utility will not harm those to be served or currently served by that utility. City of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 733 (Fla. 1985). In fact, it is the factor of last resort. All other factors must be considered before the Commission can turn to customer preference.

In this territorial dispute, both parties have offered

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sufficient evidence establishing that they both can provide reliable service and the specific type facilities requested by du Pont. It has further been established that du Pont is entitled to the type of service they requested and that neither party can satisfy du Pont's needs with the facilities they currently have in and around the area. Furthermore, it is undisputed that the Maxville site is not in an urban setting and that there are no foreseeable future requirements for other utility services in the area. Finally, it has been established that in order to provide the transmission service that du Pont requires, either party will have to provide essentially the same facilities, and thus, the cost of constructing the needed facilities should be identical regardless of which party provides service. FPL and Clay have failed to offer competent and substantial evidence that would demonstrate their ability to provide the requested facilities at a lower price than that of the other utility. Therefore, the Commission cannot award the Maxville mine site to either utility on the grounds that they are able to provide the needed facilities at a lower cost to the customer.

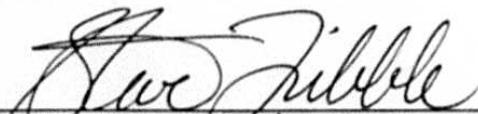
In this matter, the Commission is forced to turn to the criteria of last resort. Du Pont has established a preference for FPL as the service provider, and thus, based on the foregoing discussions, it is this Commission's conclusion that FPL should serve the disputed area.

Based on the foregoing, it is

ORDERED that Florida Power and Light Company is hereby entitled to provide electric service to the disputed area described herein as the du Pont Maxville mine site. It is further,

ORDERED that Clay Electric Cooperative, Inc. is hereby prohibited from serving the du Pont Maxville mine site.

By ORDER of the Florida Public Service Commission, this
18th day of JANUARY, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.