

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve) DOCKET NO. 920214-EU
territorial dispute between) ORDER NO. PSC-92-1474-FOF-EU
Talquin Electric Cooperative,) ISSUED: 12/21/92
Inc. and Town of Havana.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
BETTY EASLEY
LUIS J. LAUREDO

ORDER RESOLVING TERRITORIAL DISPUTE

BY THE COMMISSION:

By petition filed March 5, 1992, Talquin Electric Cooperative, Inc. (Talquin) petitioned the Commission for resolution of a territorial dispute with the Town of Havana (Havana). The dispute involves service to a proposed middle school to be constructed in Gadsden County. The dispute arose when Havana built a three phase service line along County Road 12-A, outside the incorporated area of Havana, to serve the middle school site.

Talquin is a rural electric cooperative organized and operating under Chapter 425, Florida Statutes, and under Chapter 31 of Title 7, United States Code. Havana is a municipal corporation which operates an electric utility under Chapter 366, Florida Statutes. Both entities are "electric utilities" as defined by Section 366.02(2), Florida Statutes, and as such are subject to the provisions of Chapter 366. Pursuant to Section 366.04(2)(e), Florida Statutes, we have the jurisdiction:

[t]o resolve, upon petition of a utility or on [our] own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under [our] jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

A prehearing conference was held on August 31, 1992, and a formal evidentiary hearing was held on September 4, 1992.

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FILE RECORDS/REPORTING

Having reviewed the record, we award the area in dispute to Talquin. While some facts in the record supported an award to Havana, we believe that the greater weight of the evidence supports our decision. Talquin can provide service to the disputed area at a cost substantially less than Havana's cost, and that fact was significant to our decision. Also, Havana raced to serve the disputed area. We have refused to condone such competitive behavior in the past and will not do so now. See Gulf Coast Elec. Co-op., Inc. v. Fla. Public Serv. Com'n, 462 So.2d 1092, 1095 (Fla. 1985).

The Disputed Area

The area in dispute is the site of the proposed Havana Middle School, situated in Section 35, Township 3 North, Range 2 West, in Gadsden County. This site is east of and outside of the town limits of Havana, on the south side of County Road 12-A. This area once served as farm land, although it is presently used for silvicultural purposes. The parties differ as to the degree of urbanization of the school site. Talquin contends that the disputed area is rural in nature, and Havana maintains that the disputed and surrounding areas are urban in nature.

Pursuant to Section 425.03(1), Florida Statutes, a rural area is defined as "any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." The latest U.S. Census found the town's population to be around 1,800. Because Havana believes its population to be 2,500, it has contested this number. No conclusive evidence, however, was presented at the hearing to prove the invalidity of the census number.

Chapter 425, the "Rural Electric Cooperative Law," does not define urban area. This concept, however, is defined elsewhere by the Florida legislature. For instance, pursuant to the "Florida Transportation Code" an urban area is

[a] geographical region comprising as a minimum the United States Bureau of Census boundary of an urban place with a population of 5,000 or more persons Section

¹ In fact, the Florida Supreme Court has repeatedly approved our "efforts to end the economic waste and inefficiency resulting from utilities 'racing to serve'...." Lee County Elec. Co-op. v. Marks, 501 So.2d 585 (Fla. 1987).

334.03(28), Florida Statutes.

According to the "Uniform Special District Accountability Act of 1989" an

'urban area' means a contiguous developed and inhabited urban area within a district with a minimum average resident population density of at least 1.5 persons per acre ... or a minimum density of one single-family home per 2.5 acres with access to improved roads or a minimum density of one single-family home per 5 acres within a recorded plat subdivision. Section 189.4051(2)(b), Florida Statutes.

The evidence presented at hearing does not show that Havana would meet either of these definitions. The legislature has also defined an area that is "urban in character" in the "Municipal Annexation or Contraction Act." Such an area is

used intensively for residential, urban recreational or conservation parklands, commercial, industrial, institutional, or governmental purposes or an area undergoing development for any of these purposes. Section 171.031(8), Florida Statutes.

It is clear that Havana is not an area urban in character pursuant to this law. The three statutes listed above may not directly relate to the territories of electric utilities; however, they do give some insight into what the Florida Legislature considers to be an urban area. We find the disputed area to be rural in nature.

Ability to Serve

Both utilities have historically served the area in dispute. Neither utility, however, was providing service to the area in 1991, when Havana constructed its line along CR 12-A to the proposed middle school site. Both utilities are capable of providing adequate and reliable electric service to the site in a timely manner. Havana has adequate electric facilities in place immediately adjacent to the disputed area, and it would only have to construct on-site facilities to serve the school site. Talquin has adequate electric facilities in place 711 feet from the school site. It would have to convert and extend lines to the disputed area in addition to constructing on-site facilities.

Cost to Serve

In the short term, there would be no real cost to Talquin or its ratepayers if it does not serve the disputed area. Talquin is not currently serving this area and has not expended any money to construct facilities to the school site. There is the potential for future effects on Talquin, however, if Talquin does not serve the disputed area or areas to the east and north of the disputed area. Talquin would lose future revenues from its inability to serve these areas. These potential future costs were not quantified.

The costs to Havana and its ratepayers, however, are more quantifiable. Havana expended \$12,459 to construct Phases C-1 and C-2. These phases extend service from the town limits to and past the disputed area. Because Havana was not awarded the disputed area, these lines should be dismantled, which would cost \$1,197.38. The salvage value of the dismantled line would be \$2,150.10. Havana contends that if it does not serve the school site, it would incur an economic loss of \$11,506.28 ($\$12,459 + \$1,197.38 - \$2,150.10$). In addition, Havana argues that after the new middle school is built, the town would lose the revenues it currently receives from the existing middle school. Havana presently receives a total annual revenue of \$17,000 from the school, which represents approximately 1.2 percent of Havana's total annual electric system revenues. This \$17,000 figure represents total revenue and not revenue net of Havana's wholesale power cost; therefore, the potential future net revenue loss appears to be something less than \$17,000.

Talquin projected it would cost \$14,075 to provide overhead service and \$15,314 to provide underground service to the disputed area. These cost estimates were undisputed, and we have no reason to doubt their reasonableness. Havana projected its cost would be \$3,463.93 to provide overhead service and \$3,885.17 to provide underground service to the school site. This estimate includes only the cost of extending service from the transition point at the town limits to the site. Because Havana actually incurred more costs than this to provide service to the school site, we believe that Havana's estimate is incorrect.

Havana constructed its line along CR 12-A to the disputed area as part of a four phase project, which included rehabilitating, upgrading and extending lines within the town limits. Phase A, which cost \$27,476, involved rehabilitating and reconstructing an existing two-phase distribution line within the town limits that provided service from First Street east towards CR 153. Phase B, which cost \$2,500, involved adding a phase to the existing two-

phase distribution line from the intersection of CR 12-A and CR 153 south to the town recreational field and a proposed lift station site. Phase C-1, which cost \$4,655, involved constructing a new three-phase distribution line from the intersection of CR 12-A and CR 153 east, at the town's border, to a point at the northwest corner of the proposed school site outside of the incorporated area of the town. Phase C-2, which cost \$7,804, extended the new Phase C-1 line to a point further east along CR 12-A and then north across CR 12-A.

Havana argues that we should not consider the costs associated with the A and B phases when determining Havana's cost to serve the proposed school site. We agree that the costs associated with Phase B should not be included in the total cost as this construction was not necessary to serve the school. We believe, however, that the costs associated with Phase A should be considered in determining Havana's cost to serve the school site because Havana's decision to proceed with the construction project in late 1991 was a race to serve.

Race to Serve

When Havana decided to construct its new facilities, the Gadsden County School Board had not yet determined which utility was going to provide electric service to the new school. This decision was not made until February 11, 1992, when the school board voted to award electric and gas service to Havana and water and sewer service to Talquin. In addition, at the time of our hearing in September of 1992, the School Board had not yet purchased the property on which it planned to build the school, and did not expect to close on its option to purchase until October of 1992. In fact, the School Board did not have all the necessary approvals and funding to go forward with the project until July of 1992. Havana constructed facilities to serve the proposed school site, however, seven months prior to the School Board's approval to construct the new school. Finally, eight months before Havana constructed its new facilities, Talquin informed Havana that Talquin considered the proposed middle school site to be in the cooperative's service territory. In spite of this, Havana proceeded with its construction project.

Havana contends that Phase A was necessary because that portion of the town's distribution system was in substantial disrepair and could no longer be counted on to provide reliable service. This section was badly damaged by Hurricane Kate in 1985, and only temporary repairs had been made. Because Havana waited six years to make these repairs, it appears that this section was

repaired and upgraded so that Havana could serve the proposed school site. Havana also attempted to justify the upgrading by arguing that three-phase service is necessary for the proposed lift station. The town manager, however, admitted that it was possible to provide three-phase service to a pump at the lift station from a two-phase line. He also indicated that although Havana had filed a pre-application with Farmers Home to fund the lift station project, as of yet no completion date had been established for the lift station. In addition, Havana attempted to justify the extension of three-phase service out to the school site and beyond. Mr. Trippe, the town manager, testified that a potential customer had approached him concerning electric service north of CR 12-A, north of the proposed school site. This potential customer had indicated the possibility of subdividing or developing his property, although any development was still in the speculation stage. The possibility of a customer developing property does not justify the town's decision to incur costs to extend its service lines. Havana's decision to construct lines north across CR 12-A is a clear example of Havana's desire to keep Talquin out of that area.

Because Havana raced to serve the proposed school site, in determining Havana's costs to serve the disputed area, we shall consider the town's costs associated with Phases A, C-1, and C-2. This results in a total cost of \$39,935. In addition, Havana would incur costs constructing on-site facilities, which would be \$3,463.93 for overhead service and \$3,885.17 for underground service. In evaluating the cost to serve the disputed area, we find the appropriate cost to consider for Havana to be \$43,399 for overhead service and \$43,820 for underground service. Talquin's cost to serve the disputed area would be \$14,075 for overhead service and \$15,314 for underground service, which is substantially less than Havana's cost to serve.

Potential for Future Conflicts

The parties have essentially agreed that there are other areas of potential conflict before them. Before the dispute at hand was filed, the parties had never discussed the possibility of a territorial agreement. In the past, Havana served within its town limits and Talquin served the surrounding rural area, although there has been some crossover where Havana served outside its town limits and Talquin served within the town limits.

Because the 3 phase line built by Havana to serve the middle school site is more than adequate to serve the needs of the town and the new middle school, it is highly probable that Havana will

be looking for additional customers to serve. If Havana looks to areas that Talquin regards as its service territory, this could lead to other areas of conflict.

Section 366.04(2)(e), Florida Statutes, gives us broad authority to resolve territorial disputes. In fact, the Florida Supreme Court has stated that we have a "duty to police 'the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure ... the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.'" Lee County Elec. Co-op. v. Marks, 501 So.2d 585, 587 (Fla. 1987). In this case, we would be ignoring our statutory duty if we did not consider the other areas of potential conflict between Havana and Talquin.

Because the potential for future conflict is present, the parties shall meet and discuss any areas where other disputes may occur. After the parties have identified any other areas of potential conflict, they should pursue resolution of any conflicts which may arise in these areas. Within 180 days after the issuance of the order resolving this territorial dispute, the parties shall file a report with us relating the progress of these discussions. It is hoped that such discussions will keep the parties from becoming involved in any territorial disputes in the future.

Conclusion

Based on the above, Talquin Electric shall be awarded the school site. Havana's actions to construct service lines to the disputed area constituted a race to serve. Rather than discuss service arrangements with Talquin, Havana proceeded to construct lines outside the town limits to the proposed school site. Havana raced to serve the school even though it has no intentions of annexing the disputed area and it is under a legal obligation to serve only the citizens of Havana. While the service lines to the school site were under construction, Havana contracted to continue the line construction across CR 12-A. This action effectively cut off Talquin's ability to serve any territory north of the school site.

Havana's action resulted in the town incurring costs of approximately \$43,399 to serve the school site. Talquin's estimated cost to serve the proposed school site is \$14,075, approximately \$29,000 less than Havana's cost. It appears Talquin can provide adequate service to the new school at a cost substantially less than Havana's cost to serve. To reduce the economic loss to be incurred by Havana, Talquin shall work with

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Havana to determine if Talquin can purchase the existing distribution service system in the disputed area. This purchase would also reduce Talquin's cost to construct facilities which would duplicate those already in place.

Finally, this docket shall remain open so that the parties can meet to discuss the resolution of potential future conflicts as discussed above.

It is, therefore,

ORDERED by the Florida Public Service Commission that the disputed area defined above shall be awarded to Talquin Electric Cooperative, Inc. It is further

ORDERED that Talquin Electric Cooperative, Inc. shall work with the Town of Havana concerning the purchase of the existing distribution lines in the proximity of the school site. It is further

ORDERED that Talquin Electric Cooperative, Inc. and the Town of Havana shall file a progress report as discussed in the body of this order within 180 days of the issuance of this order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 21st day of December, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAH

by: Kay Flynn
Chief, Bureau of Records

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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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.