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September 25, 1995

**ORIGINAL
FILE COPY**

Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

RE: Gulf Coast Electric Cooperative, Inc., Respondent/Appellant
v. Florida Public Service Commission and Gulf Power Company,
Petitioner/Appellee; FPSC Docket Number: 93-0885-EU

Dear Ms. Bayo:

I am enclosing herewith the original and seven (7) copies of a Motion for Stay Pending Judicial Review on behalf of Gulf Coast Electric Cooperative, Inc. for filing.

Please call me if you have any questions.

Very truly yours,

John H. Haswell
John H. Haswell

JCK _____
AFA *Heltzer* _____
JHH/lez _____
APP _____
CAF _____ Enclosures
CMD _____
cc: J. Patrick Floyd, Esquire
CTR _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 25th day of September, 1995, by regular U.S. mail to G. Edison Holland, Jr., Esquire, Jeffrey A. Stone, Esquire, and Russell Badders, Esquire, 3 West Garden Street, Suite 700, Post Office Box 12950, Pensacola, Florida 32576-2950 and to David Smith, Esquire, and Mary Ann Helton, Esquire, Florida Public Service Commission, Division of Appeals, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

John H. Haswell Jr.
John H. Haswell

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve) DOCKET NO. 930885-EU
territorial dispute With)
Gulf Coast Electric) Filed: _____
Cooperative, Inc.)
by Gulf Power Company)
_____)

MOTION FOR STAY PENDING JUDICIAL REVIEW

Gulf Coast Electric Cooperative, Inc. (Gulf Coast), Respondent/Appellant, by and through its undersigned attorneys pursuant to Rule 25-22.061, Florida Administrative Code, files herewith its Motion for Stay Pending Judicial Review of the Florida Public Service Commission (Commission) Order rendered March 1, 1995, Order Number PSC-95-0271-FOF-EU as clarified and reaffirmed by Order No. PSC-95-0913-FOF-EU rendered on July 27, 1995 (the "Order"). The nature of the Order is a final order resolving a territorial dispute between Gulf Coast and Gulf Power Company (Gulf Power). In that Order the Commission held that Gulf Power should serve the Washington County Correctional Facility and reimburse Gulf Coast for \$36,996.74, the cost to relocate the Red Sapp line as a single-phase line. (Order, p. 2)

Stays pending judicial review of a Commission final order are governed by Rule 25-22.061(2) of the Florida Administrative Code which states that the Commission "shall have the authority to grant, modify, or deny such relief." Fla. Admin. Code Ann. r. 25-22.061(2) (1993).

Rule 25-22.061(2) also states that stays may be conditioned upon the posting of a bond. Id. Gulf Coast requests that the

Commission not require Gulf Coast to post a bond pursuant to Rule 25-22.061(2) because neither Gulf Coast nor Gulf Power will be adversely affected by a status quo order pending judicial review. Indeed, Gulf Power has itself cross-appealed Order No. 950913.

The Rule allows the Commission to consider three factors, among other things, which are: (1) whether the petitioner is likely to prevail on appeal; (2) whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and (3) whether the delay will cause substantial harm or be contrary to the public interest. The Commission is not limited to just those three factors.

Gulf Coast's motion to stay should be granted because the three factors of Rule 25-22.061(2) are satisfied and for other reasonable considerations. Under the first discretionary factor, Gulf Coast has a reasonable chance to prevail on appeal based on Gulf Coast's view that the Commission's Order failed to consider the necessity for Gulf Coast's construction of a replacement line on County Road 279, the reasonableness of and economic justification for upgrading the line to 3 phase, the insubstantial cost differential, customer choice, and the equities of the case. The Order cites Florida Administrative Code Rule 25-6.0441(2) and Florida Statute 366.04(5) which provide that,

- (2) In resolving territorial disputes, the Commission may consider, but not limited to the 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.

(Order, pp. 2-3 citing Fla. Admin. Code Ann. r. 25-6.0441(2) (1993) (underlines added)).

The Commission also cited F.S. § 366.04(5) which provides that,

- (5) The Commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(Order, p. 3 citing Fla. Stat. ch. 366.04(5) (1993) (underline added)). In addition, the Commission itself recognized that the regulatory framework allows the Commission to enjoy "considerable authority and discretion to resolve territorial disputes and to fulfill our responsibilities over ... Florida's energy grid." (Order, p. 3)

The Commission reluctantly held in favor of Gulf Power reasoning that Gulf Coast inappropriately duplicated Gulf Power's facilities, (Order, p. 6), however no evidence was presented that supported the conclusion that Gulf Coast's relocation and upgrade of the Red Sapp Line constituted an "uneconomic" and unnecessary

duplication of Gulf Power's facilities. Regardless of whether Gulf Coast or Gulf Power became the electric service provider to the new correctional facility, it was necessary for Gulf Coast to relocate the Red Sapp Line to continue to provide reliable service to its members on County Road 279. Upgrading the line to 3 phase was a logical and cost effective extension of Gulf Coast's currently offered service.

The Commission failed to consider customer preferences because all other factors were "substantially" equal. (Order, p. 5) The Commission is not limited to the four considerations described in the statute, and has the jurisdiction to give appropriate weight to the compelling equitable circumstances raised in this case.

The Commission itself noted that the alleged duplication was "relatively small", and no competent evidence was cited to support the conclusion that this duplication was "uneconomic" or unnecessary. (Order, p. 6) The Order states that the Commission will "...always consider whether one utility has uneconomically duplicated the facilities of the other in a "race to serve" an area in dispute, and we do not condone such action". Order 95-0271, p.6. There is no evidence in the record that Gulf Coast raced to serve the area. Indeed, the only inference that a "race to serve" occurred is the Order's reference to Gulf Power's construction of facilities on County 279 and 77 in 1971, duplicating Gulf Coast's facilities.

The Commission acknowledged the fact that Gulf Power inappropriately duplicated Gulf Coast's facilities back in 1971

(Order, p. 6) and found that Gulf Coast's active and decisive involvement was responsible for the selection of Washington County as the site for the new correctional facility. (Order, p. 7) To this effect, the Commission stated, "[b]ut for Gulf Coast's efforts, the facility would not be there for anyone to serve." (Order, p. 7, underline added) The Commission found that Gulf Power's challenge to Gulf Coast's service of the correctional facility occurred after the prison site was selected and after Gulf Coast relocated its facilities at considerable expense. Gulf Coast acted openly and publicly in its efforts to secure the new correctional facility in Washington County, while in the words of the Commission, "Gulf Power did nothing." (Order, p. 7) Because there is no competent evidence in the record that the actions of Gulf Coast were unnecessary or uneconomic, Gulf Coast believes it has a reasonable chance to prevail on appeal.

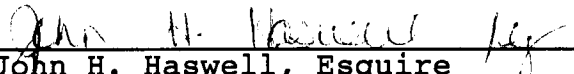
Under the second discretionary consideration Gulf Coast is likely to suffer irreparable harm if the stay is not granted because of its substantial investment in the new correctional facility. That investment exceeds \$100,000.00, which if lost, will be detrimental to the cooperative's members.

Under the third discretionary consideration for a Motion to Stay, the delay that would result from a stay will not cause substantial harm to Gulf Power or be contrary to the public interest. In fact, Gulf Power would enjoy a benefit from the delay because it would forestall the Commission's order to reimburse Gulf Coast in the amount of \$36,996.74 for the relocation of its

facilities nor will Gulf Power have to expend the additional costs to acquire the cooperative owned facilities on the site itself and to integrate the prison load into its system.

Perhaps the most compelling factor for the Commission to consider is the ongoing negotiations between the utilities that are intended to result in a territorial agreement. By preserving the status quo, the Commission will either allow the two utilities to focus on an amicable resolution of their continuing disputes, or allow the Commission to do so, without the additional costs to both utilities that will be incurred if the load transfer, payment, and facilities transfers are allowed to proceed in the meantime. The public interest will be unaffected by the delay because the new correctional facility is presently being served by Gulf Coast, and regardless of the outcome of this litigation, the service to the correctional facility will be unaffected.

Respectfully submitted,


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