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ORIGINAL
FILE COPY

Susan D. Cranmer
Assistant Secretary and
Assistant Treasurer

the southern electric system

July 19, 1996

ACK _____ Ms. Blanca S. Bayo, Director
AFA _____ Division of Records and Reporting
APP 1 _____ Florida Public Service Commission
CAF _____ 2540 Shumard Oak Boulevard
CMU _____ Tallahassee FL 32399-0870

CTR _____ Dear Ms. Bayo:

EAG _____ RE: Docket No. 930885-EU
LEG 1 _____

LIN 3 _____ Enclosed are an original and fifteen copies of Gulf Power Company's Motion to
OPC _____ Dismiss and Request for Oral Argument in the above docket.

RCH _____
SEC 1 _____ Sincerely,

WAS _____
OTH _____ *Susan D. Cranmer*

Enclosure

cc: Beggs and Lane
Jeffrey A. Stone, Esquire

96 JUL 23 11 43 AM '96

DOCUMENT NUMBER-DATE

07722 JUL 23 96

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve territorial dispute)
with Gulf Coast Electrical Cooperative, Inc.)
by Gulf Power Company.)

Docket No. 930885-EU
Date filed: July 22, 1996

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**MOTION TO DISMISS
AND REQUEST FOR ORAL ARGUMENT**

GULF POWER COMPANY ("Gulf Power," "Gulf," or "the Company"), by and through its undersigned attorneys, hereby moves to dismiss the current proceeding before the Florida Public Service Commission ("Commission") in which the Commission seeks to develop and impose a territorial boundary between Gulf Power Company and the Gulf Coast Electric Cooperative (collectively "the parties"). By this motion, Gulf Power seeks to enhance administrative economy by avoiding unnecessary discovery and evidentiary hearing either through absolute termination of further proceedings in this docket, or in the alternative, by eliminating the possible involuntary imposition of a territorial boundary between the parties from range of options to be considered by the Commission as part of its jurisdiction to prevent further uneconomic duplication of facilities. In support hereof, the Company states:

1. The current proceeding is being conducted pursuant to the Commission's Order No. PSC-95-0271-FOF-EU ("the Order") in which the Commission directed the parties to conduct good faith negotiations to attempt to develop an agreement that will resolve duplication of facilities and create a territorial boundary between the two utilities.¹ The Order further indicated that the Commission, in the absence of a voluntary agreement between the parties,

¹ In a clarifying and amendatory order, PSC-95-0913-FOF-EU, the Commission acknowledged that the goal of preventing uneconomic duplication of facilities could be achieved through a solution other than the drawing of a territorial boundary.

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would conduct additional evidentiary proceedings to establish a boundary in order to avoid the uneconomic duplication of facilities. The parties conducted negotiations for several months following the issuance of the Order but were unable to reach agreement on a territorial boundary or any other mechanism for avoiding further uneconomic duplication of facilities. The Commission was notified that an impasse between the parties in their negotiations had been reached and a new procedural order relating to the proceedings addressed by this motion was issued.

2. Subsequent to the declaration of an impasse and the issuance of the new procedural order, the Florida Supreme Court issued its opinion reversing a separate aspect of the Order which constituted final Commission action. The “final action” aspect of the Order addressed on appeal to the Supreme Court concerned the Commission’s award of the right to serve a specific load to Gulf Power Company in lieu of the Gulf Coast Electric Cooperative (“GCEC”). GCEC had appealed to the Florida Supreme Court from this aspect of the Order in which the Commission had determined that GCEC’s construction of new three phase distribution facilities parallel to and on the opposite side of the highway from existing three phase distribution facilities belonging to Gulf Power in order to serve the disputed load constituted an uneconomic duplication of facilities. The expenditure by GCEC found by the Commission to be relevant to this determination of uneconomic duplication was \$14,583.

3. In Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. 674 So. 2d 120 (Florida 1996), the Supreme Court of Florida reversed the Commission's order that awarded the right to serve the disputed load to Gulf Power. With regard to the \$14,583 cost differential, the Supreme Court stated: “. . . we cannot agree that the relatively small cost incurred by Gulf

Coast in upgrading its existing line was sufficient to characterize this upgrade as ‘uneconomic’.” As a result of this holding, it is clear that the Commission’s authority over territorial matters does not extend so far as to eliminate all duplication of facilities. Rather, the Commission is authorized to exercise its jurisdiction to prevent “further uneconomic duplication of . . . facilities.” §366.04(5), Fla. Stat. (1995) The Supreme Court’s ruling demonstrates that some amount of duplication is permitted under the statutes and that not all duplication can be deemed uneconomic by the Commission. The net effect of the Supreme Court’s determination in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. is that customer choice should be considered the determining factor in more cases than was perhaps thought to be the case before the Court’s decision.

4. Although the Supreme Court did not draw a bright line as to at what constitutes uneconomic duplication, the Court's opinion shows that there is a range of cost differentials that do not constitute uneconomic duplication of facilities. The Supreme Court’s ruling means any action taken by the Commission must not be so broad as to interfere with or prohibit the range of "economic" duplication or expansion that is beyond the Commission's authority.

5. The current proceedings are apparently being conducted for the express purpose of drawing a boundary line on the ground between the parties.² Although the Commission does

²Currently pending staff data requests are clearly designed to obtain information intended to facilitate “drawing lines on the ground.” Based on statements made in meetings during April and May between staff and the parties, it appears that staff is taking the position that the Commission has mandated the drawing of “lines on the ground.” This position is apparently based on the following statement in Order No. PSC-95-0271-FOF-EU: “If the parties are not able to resolve their differences, we will conduct additional evidentiary proceedings to establish a boundary ourselves.” Order at .

have statutory authority to review and approve agreement reached between two utilities regarding territorial boundaries³, in this case the parties have been unable to reach such an agreement on their own. In order for the Commission to impose its own version of “lines on the ground,” the Commission must first be able to determine which facilities that may be built in the future will necessarily constitute an uneconomic duplication. The Commission does not have authority to impose boundaries between two utilities in the absence of a voluntary agreement if the effect of such imposed boundaries would be to preclude the type of electric facility development that falls within the range of “economic” duplication or expansion allowed by the Supreme Court’s decision in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. A simple line drawn between existing facilities cannot account for cost differentials in the development of facilities that is permitted by Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. In fact, the cost differential between two utilities seeking to serve a specific facility changes over time and is directly impacted by the location of the facilities from which the service will be extended. The drawing of a territorial boundary at the present time cannot account for the differences in the cost differential that will be computed in the future using costs and the location of facilities present at that future time.

6. Consider the following hypothetical for illustrative purposes. Assume that in the absence of a territorial agreement between two utilities, a line has been drawn equidistant from the existing facilities of the two utilities, Utility A and Utility B. Further assume that Utility A subsequently builds facilities to serve a customer who is located at the closest point to the

³§366.04(2)(d), Fla. Stat. (1995)

boundary on Utility A's side. Next, assume that Utility B has not built any facilities since the drawing of the boundary. A new customer who would otherwise choose service from Utility A develops property next to the boundary line but on Utility B's side. Finally, assume that the net cost to Utility A of extending service to this new customer is less than \$15,000. Pursuant to the Supreme Court's holding in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al., the customer's choice of Utility A would not result in uneconomic duplication of facilities, yet the boundary line imposed on the utilities in the guise of preventing uneconomic duplication would prevent that customer from exercising that choice. Since the new customer falls within the sphere of permissible "economic duplication," the boundary drawn by the Commission would in effect be prohibiting economic expansion of facilities otherwise protected under the Supreme Court's holding in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. Moreover, addition of new facilities in the future moves the sphere of permissible economic expansion since the new facilities may be closer to the location of facilities that may be added in the future. A territorial boundary cannot account for the changing sphere of permissible economic expansion of facilities.

7. A second hypothetical reveals another instance in which the drawing of a territorial boundary would conflict with the Supreme Court's holding in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. Assume that the Commission draws a territorial boundary between two utilities, Utility A and Utility B, and that either or both utilities have transmission lines that cross through one another's defined territory. Next, assume that a commercial or an industrial customer who requires transmission level service locates at a point from which it could be served by a transmission line which is owned by Utility B, but runs

through the territory of Utility A. The territorial boundary would preclude Utility B from serving the customer even if the cost to serve the customer is within the range deemed by the Supreme Court not to be "uneconomic". The territorial boundary would be in direct conflict with the Supreme Court's holding in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al.

8. A blanket determination by the Commission regarding the economic status of as yet unbuilt facilities cannot reasonably be made at this time since whether those facilities would constitute an uneconomic duplication of facilities depends on the circumstances present at the time the facilities are to be constructed. A determination by the Commission that all future parallel facilities and crossings in a particular area are uneconomic duplication of facilities and subject to resolution at this time cannot be supported in the law as a result of the Supreme Court of Florida's opinion in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. Any determination of whether future facilities are an economic expansion or an uneconomic duplication must be conducted on a case-by-case basis contemporaneously with the events that would lead to construction of allegedly uneconomic facilities. Thus, in order for a method of preventing further uneconomic duplication of facilities to be permissible under the law, it must accommodate the type of development of facilities that the Supreme Court has ruled to be beyond the oversight jurisdiction of the Commission. A chosen methodology must allow for the sphere of permissible economic expansion protected under Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al.


9. The parties and the Commission Staff are presently engaged in discovery activities that are clearly designed to facilitate the drawing of lines on the ground. This effort is burdensome on the parties and the staff. Given that the permissible range of remedies available

to the Commission to prevent further uneconomic duplication of facilities, in the absence of a voluntary agreement between the parties, cannot include "drawing lines on the ground" and still be consistent with the Supreme Court's recent opinion, administrative efficiency is better served by a prompt determination on this motion. If outright dismissal of the current proceedings in this docket is not deemed appropriate, then at a minimum the Commission should, consistent with its own order on clarification and the Supreme Court's decision in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al., direct the consideration of those solutions which allow for the economic expansion of utility facilities in the best interest of the ratepayers of the state. In this manner, the discovery efforts and further discussions between staff and the parties can be better focused on possible solutions that would not be subject to reversal on appeal.

10. It support for its request that it be afforded an opportunity to present oral argument in support of this motion, Gulf Power points out that the Supreme Court's decision in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al. is a significant development in the law that has occurred subsequent to the issuance of Order No. PSC-95-0271-FOF-EU by the Commission. Gulf Power reasonably believes that oral argument will aide the Commission in its determination of the effects of the Supreme Court's decision on the further activities mandated by the Commission's previous order.

WHEREFORE, Gulf Power Company respectfully requests that the Florida Public Service Commission issue an order dismissing the current proceedings in this docket. In the alternative, Gulf Power Company respectfully requests that the Commission issue an order acknowledging that any resolution of this matter must allow for the economic expansion of utility facilities as set forth in Gulf Coast Electric Cooperative, Inc., v. Susan F. Clark, etc., et al.

Respectfully submitted this 19th day of July 1996.



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve)
territorial dispute with Gulf)
Coast Electric Cooperative, Inc.) Docket No. 930885-EU
by Gulf Power Company)
_____)

Certificate of Service

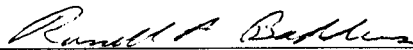
I HEREBY CERTIFY that a copy of the foregoing has been furnished this 19th day of July 1996 by U.S. Mail or hand delivery to the following:

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