

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Alabama Electric Cooperative, Inc. and Complaint Against Gulf Power Company	)	DOCKET NO: 881262-EU
	)	ORDER NO: 20892
	)	ISSUED: 3-14-89

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, CHAIRMAN  
 THOMAS M. BEARD  
 BETTY EASLEY  
 GERALD L. GUNTER  
 JOHN T. HERNDON

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

On September 19, 1988, Alabama Electric Cooperative (AEC) filed a petition and complaint against Gulf Power Company (Gulf) alleging that Gulf was building a 115 KV transmission line from Niceville to Destin, Florida via the Bluewater Bay area, which would run across the service territory of a distribution member cooperative of AEC, Choctawhatchee Electric Cooperative (CHELCO). This line is not subject to the Transmission Siting Act because it is less than 230 KV and does not cross a county line. AEC further alleged there is no dispute as to the existence or location of the transmission facilities. AEC, instead, wishes to own the line because it has a lower cost of capital and would benefit from the elimination of certain wheeling charges. AEC alleges its ownership would benefit Gulf customers because the line would not be added to Gulf's base rate.

AEC states that Gulf has refused to jointly plan for a coordinated, economical transmission system in northwest Florida. AEC specifically cited Commission Orders No. 13191 and 13926 (issued on April 4, 1984 and December 21, 1984 respectively.) As evidence, AEC alleged Gulf's refusal to divide ownership of the 115 KV transmission line. AEC premised Commission jurisdiction on the Grid Bill, specifically sections 366.04(3) and 366.04(7) and (8), Florida Statutes (1987), and asked the Commission to order the matter for hearing as to the most economical plan for construction and ownership of the line. AEC also requested that the Commission enter Notices of Proposed Agency Action ruling both that Gulf has arbitrarily and capriciously refused to jointly plan to avoid an uneconomic transmission system and that AEC's response of joint ownership of a transmission line is a valid concept in conducting joint planning.

On October 6, 1988, CHELCO petitioned for leave to intervene which was subsequently granted, and filed a complaint against Gulf in support of AEC's petition. CHELCO additionally alleged a territorial dispute with Gulf in that the transmission line being built by Gulf is "wholly located within CHELCO's historic service area," and that "CHELCO has no reason to believe that Gulf would not use the transmission line to acquire or attempt to acquire additional customers in the area already served by CHELCO."

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On October 21 1988, Gulf filed a Motion to Dismiss the petitions and complaints of both AEC and CHELCO claiming 1) that there is no basis for the forced sale of Gulf's transmission line to AEC and 2) that CHELCO's allegations do not constitute a territorial dispute between Gulf and CHELCO.

The purpose of a motion to dismiss a pleading is to test the legal sufficiency of the pleading. Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320 (Florida. 1956). Even assuming that all of the facts asserted in AEC's petition and complaint are true, AEC does not state a cause of action upon which relief can be granted.

First and simply put, AEC wishes to own a portion of the transmission line Gulf is in the process of building in AEC service area. Because Gulf allegedly refused to agree to such joint ownership, AEC requests the Commission force Gulf to sell AEC the portion of the line in AEC service area. Under the Grid Bill, upon which AEC relies, the Commission has extensive powers, including great latitude pursuant to Sections 366.05(7) and (8), Florida Statutes, in correcting or preventing "inadequacies...with respect to the energy grids developed by the electric utility industry..." AEC, however, has not alleged such inadequacy or potential inadequacy. In fact, AEC specifically states that its dispute with Gulf "relates primarily to ownership of line sections in the Bluewater Bay area and not to the existence or location of these transmission facilities." Neither has AEC requested the repair or installation of a facility pursuant to Section 366.05(8), Florida Statutes (1987). The Commission's powers under the Grid Bill do not include divesting a utility of an asset to award it to a cooperative which has a lower cost of capital and wishes to eliminate or offset wheeling charges.

The issue of joint transmission planning in northwest Florida was addressed by the Commission in Docket No. 830428-EU. Order No. 13191, which followed the hearing in that docket, stated that:

(t)he goal of this process is to work towards a coordinated economic transmission system in northwest Florida.

Order No. 13926 of the same docket required Gulf and AEC to take two steps to accomplish that goal:

1. Gulf Power Company and Alabama Electric Cooperative, Inc. shall file annual ten-year site plans and shall review the other utility's filing for any wasteful or uneconomic plan to expand the transmission system; and,
2. Gulf Power Company and Alabama Electric Cooperative, Inc. shall file reports detailing their progress toward joint planning of the transmission system in northwest Florida.

AEC has not alleged that Gulf failed to file site plans or reports as ordered, or refused to meet or discuss transmission planning with AEC. Rather, AEC concludes that Gulf has refused to jointly plan because Gulf would not accept AEC's offer of joint ownership of transmission facilities and refused to enter into a territorial accord unconnected with the 115 KV

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transmission line being built. It is evident, however, from AEC's petition that although AEC and Gulf were unable to reach an agreement they have had continuing discussions and correspondence relating to joint transmission planning. The Commission's above-cited orders do not require either party to agree to territorial accords or joint ownership of transmission lines. AEC, therefore, has failed to allege a violation of a Commission order. This portion of AEC's petition and complaint should be dismissed. Dismissal of this portion of AEC's petition and complaint does not prevent AEC from complaining of a violation of the involved joint planning orders by Gulf in the future. Any such complaint, however, should allege with specificity the acts or omissions which constitute a violation of one of the Commission's orders, and should not simply conclude from the failure to reach agreement that a violation has occurred.

AEC's request that the Commission issue a Proposed Agency Action order stating that AEC's approach to joint ownership of transmission lines is a valid concept in conducting joint planning is simply a restatement of AEC's allegation that it is entitled to own a portion of the transmission line should also be dismissed.

CHELCO's Petition and Complaint should also be dismissed. CHELCO has only offered speculation as to a future fact pattern and has not alleged facts constituting a present territorial dispute. The Commission's authority to resolve such disputes stems from section 366.04(2)(e), Florida Statutes (1987) which the Commission itself has expressly limited to "actual and real" controversies; "no statutory basis for interceding in a potential dispute exists." [sic] See, Order No. 15348 issued on November 12, 1985 in Docket No. 850132-EU. Thus, CHELCO's complaint is, at best, premature. If and when Gulf actually attempts to serve a customer within CHELCO's service area, the cooperative will have a cause of action. The remainder of CHELCO's complaint requests essentially the same relief as requested by AEC.

In consideration of the foregoing, we find that Gulf's Motion to Dismiss AEC's and CHELCO's petitions and complaints should be granted with prejudice except as to any future allegations of violation of any order relating to joint planning. Although not a ground for our decision, Gulf, at the February 6, 1989 agenda conference at which the Commission voted on this matter, represented, through its attorney, that Gulf did not intend to and would not use the transmission line in question to serve CHELCO customers. Therefore, it is

ORDERED by the Florida Public Service Commission that Gulf's Motion to Dismiss AEC's and CHELCO's petitions and complaints against Gulf Power Company is granted with prejudice.

By ORDER of the Florida Public Service Commission,  
this 14th day of MARCH, 1989.

STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

BAB

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