

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve) DOCKET NO. 930885-EU
territorial dispute with Gulf) ORDER NO. PSC-96-1358-FOF-EU
Coast Electric Cooperative, Inc.) ISSUED: November 18, 1996
by Gulf Power Company.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JULIA L. JOHNSON

ORDER DENYING GULF POWER COMPANY'S
MOTION TO DISMISS

BY THE COMMISSION:

In April of 1993, Gulf Coast Electric Cooperative, Inc. (Gulf Coast) became aware that the Department of Corrections (DOC) was planning on locating a prison in West Florida and was considering sites in several counties, including Washington County. Gulf Coast assisted Washington County Commission in obtaining a \$45,000 grant and a \$300,000 loan to acquire the proposed prison site property in Washington County. DOC chose the Washington County site for the new prison, and allowed the Washington County Commission to choose the electric service provider. The County Commission chose Gulf Coast, and DOC approved the choice.

In anticipation of providing permanent service to the prison site, Gulf Coast relocated and upgraded to three phase its existing Red Sapp Road line. As a result, on September 8, 1993, Gulf Power Company (Gulf Power) filed a petition to resolve a territorial dispute with Gulf Coast.

On March 1, 1995, we issued Order No. PSC-95-0271-FOF-EU awarding service to Gulf Power and directing Gulf Power to reimburse Gulf Coast for the cost incurred to relocate its Red Sapp Road line from the prison site. Gulf Coast appealed the award of service to Gulf Power and Gulf Power cross-appealed our directive that Gulf Power reimburse Gulf Coast. On May 23, 1996, the Florida Supreme Court issued its decision. Gulf Coast Electric Cooperative, Inc. v. Susan F. Clark, 674 So.2d 120 (Fla. 1996) The Court reversed that portion of our order awarding service to Gulf Power.

DOCUMENT NUMBER-DATE

12212 NOV 18 96

FPSC-RECORDS/REPORTING

In addition, the Court remanded the case for entry of an order awarding service to Gulf Coast. Because of the resolution of Gulf Coast's appeal, the Court stated Gulf Power's cross-appeal was rendered moot.

In Order No. PSC-95-0271-FOF-EU, we also decided that the territorial dispute between the two utilities extended beyond the prison site to all areas of south Washington and Bay Counties where the utilities' facilities were commingled and in close proximity. We directed the parties to submit a report identifying all parallel lines and crossings of their facilities, and all areas of potential dispute in south Washington and Bay counties. In addition, we directed the parties to negotiate in good faith to develop a territorial agreement to resolve the duplication of facilities and establish a territorial boundary. If the parties were unable to resolve their differences, we stated that we would conduct additional evidentiary proceedings to establish that boundary. In a Clarifying and Amendatory Order, we reiterated that if the parties were unable to agree to a boundary, then we would draw boundary lines. Order No. PSC-95-0913-FOF-EU, issued July 27, 1995.

On February 19, 1996, the parties filed their reports pursuant to Order No. PSC-95-0271-FOF-EU. They reported that they were unable to agree on a boundary. Thereafter, Order No. PSC-96-0466-PCO-EU was issued to establish the procedural schedule for a hearing pursuant to the directive of Order No. PSC-95-0271-FOF-EU. An evidentiary hearing is scheduled for February 11-12, 1997.

On July 22, 1996, Gulf Power filed a Motion to Dismiss and Request for Oral Argument. Gulf Coast filed its response to the motion on August 7, 1996. On August 23, 1996, Gulf Power filed a reply to Gulf Coast's response. We granted Gulf Power's request for oral argument at our agenda conference.

The crux of Gulf Power's argument is that the Supreme Court's ruling in Gulf Coast Electric Cooperative, Inc. v. Susan F. Clark has limited the Commission's authority over territorial matters. We disagree. Therefore, for the reasons set forth below, we deny Gulf Power's motion to dismiss.

In considering a motion to dismiss, we must view the facts set forth in the petition in the light most favorable to petitioning party in order to determine if the claim is cognizable under the law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993) The motion filed by Gulf Power, however, is not a typical motion to dismiss. Gulf Power does not allege that the complaint filed by the opposing party is legally deficient. In fact, this docket was

initiated upon the filing of a petition by Gulf Power. In the hearing to determine whether Gulf Power or Gulf Coast should serve the Washington County prison, we also determined that the disputed area extended beyond the prison site. Because the parties have been unable to agree on a territorial boundary, as directed by Commission Order PSC-95-0271-FOF-EU, an evidentiary hearing has been scheduled so that we can establish such a boundary.

Gulf Power requests that we issue an order dismissing the proceedings or alternatively acknowledging that any resolution of this matter must allow for the economic expansion of facilities as set forth in Supreme Court's ruling. Gulf Power argues that the net effect of that ruling 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." Gulf Power argues that 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 development that falls within the range of "economic" duplication allowed by the Court's decision.

Although Gulf Power acknowledges that the Supreme Court did not establish a bright-line test for determining whether duplication of facilities is economic, Gulf Power argues there is a "range" of economic duplication or expansion allowed by the Supreme Court's ruling. It appears that Gulf Power believes the ruling establishes a \$15,000 standard. Gulf Power contends that when the differential is \$15,000 or less, the customer should be permitted to choose its electric service provider. Presumably, this standard approximates the \$14,583 differential between Gulf Power's and Gulf Coast's cost to serve the prison. According to Gulf Power, 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.

To argue that the Court's ruling in such a unique case somehow rises to the a judicial declaration that in all cases where the additional cost is \$15,000 or less, a duplication is not uneconomic, goes beyond the bounds of reason and common sense. The statutes empowering the Commission, do not establish a numerical jurisdictional limitation. Neither did the Supreme Court. The Court stated that the \$14,583 cost differential was "relatively small," however, the Court did not establish this amount as a standard to evaluate all territorial dispute cases. In concluding that the Commission erred in failing to consider customer preference, the Court stated, "[w]e reach this decision after finding, under the unique factual circumstances of this case[s], that there is no competent, substantial evidence in the record to

support the Commission's findings that Gulf Coast (1) uneconomically duplicated Gulf Power's facilities and (2) engaged in a "race to serve" the prison." Id. at 122 (emphasis added)

There is no logical reason to believe that the Court's decision represents a "significant development" in the law. The Court made no statement at all regarding future cases. It is clear that the Court's decision was based on the facts involved. The Court stated that "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." This is especially true given the fact that Gulf Coast had to construct a line regardless of who served the prison." Id. at 123 (emphasis added) Thus, the Court stated, "customer preference should have been considered a significant factor in this case." Id. at 123 (emphasis added)

Gulf Power further argues that a territorial boundary should not be drawn at the present time because such a boundary could not adequately account for the possible factual circumstances with regard to unbuilt facilities. Gulf Power contends that cost differentials change over time, therefore a boundary drawn presently cannot account for the variations in the cost differential that will be computed in the future using costs and the location of facilities existing at that future time. Gulf Power argues that a blanket determination by the Commission regarding the economic status of unbuilt facilities cannot reasonably be made at this time because whether those facilities constitute an "uneconomic" duplication depends upon the circumstances present at the time the facilities are to be constructed. According to Gulf Power, a determination that all future parallel facilities and line crossings in a particular area are an uneconomic duplication and subject to resolution at this time cannot be supported in the law as a result of the Supreme Court's recent ruling.

While it is true that cost differentials may change over time, we find that this argument is irrelevant. In resolving disputes, the Commission considers both current and future circumstances. Pursuant to Rule 25-6.0441, Florida Administrative Code, the Commission may consider the present and reasonably foreseeable future requirements of the area in question for utility service and the costs of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future. The Supreme Court's ruling does not alter our authority to consider current and future circumstances.

Finally, as we stated in Order No. PSC-95-0271-FOF-EU issued in this docket, the Commission has broad authority, both expressed and implied, over territorial matters. Section 366.04 (2)(e), Florida Statutes, gives the Commission the authority to:

To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. (emphasis added)

In addition, Section 366.04 (5), Florida Statutes, gives the Commission jurisdiction over the planning, development and maintenance of a coordinated electric grid to assure the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

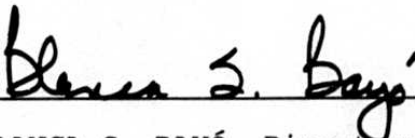
Gulf Power's arguments that the Supreme Court's ruling has limited our authority are imaginative, but unfounded. The Court's determination that service to the prison should be awarded to Gulf Coast, as noted by the Court, was based on the unique facts and circumstances surrounding the provision of service to the prison. Thus, we find that Gulf Power's Motion to Dismiss should be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company's Motion to Dismiss is denied as discussed in the body of this Order. It is further

ORDERED that this docket shall remain open pending resolution of the hearing scheduled for February 11-12, 1997.

By ORDER of the Florida Public Service Commission, this 18th day of November, 1996.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.