

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

July 6, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MCB JMF*  
DIVISION OF ELECTRIC AND GAS (DUDLEY, BASS) *Ed KD.* *JDJ*

RE: DOCKET NO. 930885-EU - PETITION TO RESOLVE TERRITORIAL  
DISPUTE WITH GULF COAST ELECTRIC COOPERATIVE, INC. BY  
GULF POWER COMPANY

AGENDA: 07/18/95 - REGULAR AGENDA  
PETITION FOR CLARIFICATION OF FINAL ORDER RESOLVING  
TERRITORIAL DISPUTE - PARTIES MAY NOT PARTICIPATE  
PANEL - CL, DS, JN

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\930885R3.RCM

CASE BACKGROUND

On September 9, 1993, Gulf Power Company (Gulf Power) filed a petition to resolve a territorial dispute with Gulf Coast Electric Cooperative (Gulf Coast). The dispute arose over who was entitled to provide electric service to a new prison that the Department of Corrections was building in Washington County. The Commission held a two-day administrative hearing on the dispute on October 19 and 20, 1994, and issued Order No. PSC-95-0271-FOF-EU resolving the dispute on March 1, 1995.

In that Order, the Commission held that Gulf Power would serve the Washington County Correctional Facility, because Gulf Coast had duplicated Gulf Power's existing facilities to serve the prison. The Commission ordered Gulf Power to reimburse Gulf Coast for the cost Gulf Coast had incurred to relocate its Red Sapp Road line from the prison site. The Commission also ordered the parties to return to the Commission within 180 days of the date the Order was issued with a report identifying all parallel lines and crossings of their facilities, and all areas of potential dispute, in south Washington and Bay counties. During that time the Commission directed the parties to negotiate in good faith to develop a

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territorial agreement to resolve duplication of facilities and establish a territorial boundary in south Washington and Bay Counties. The Commission stated that if the parties were unable to negotiate an agreement, it would conduct an additional evidentiary proceeding to resolve the continuing dispute in Washington and Bay counties itself.

On March 16, 1995, Gulf Power filed Exceptions to Order No. PSC-95-0271-FOF-EU and Request for Clarification. Gulf Power did not file a motion for reconsideration of the Order. Gulf Power did not ask for relief on its exceptions. Gulf Power only asked the Commission to clarify that it did not intend its Order to limit the parties' negotiations to the establishment of a territorial boundary in Washington and Bay Counties. Gulf Coast filed a Response to Gulf Power's Exceptions and Request for Clarification on March 31, 1995.

DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission consider Gulf Power's exceptions to Order No. PSC-95-0271-FOF-EU?

**RECOMMENDATION:** No, the Commission should not consider Gulf Power's exceptions. Gulf Power did not move for reconsideration of the Order, and neither the Florida Administrative Procedures Act nor the Commission's procedural rules provide for the filing of exceptions to a final order issued by an agency after a full evidentiary hearing. The Commission should, however, amend Order No. PSC-95-0272-FOF-EU to correct the scrivener's error on page 9 of the order that attributed certain testimony at the hearing to the wrong witness.

**STAFF ANALYSIS:** Exception 1 of Gulf's Power's filing takes issue with the Commission's finding on page 1 of the Order that:

After the grant and loan were consummated and the prison site procured, and after Gulf Coast was chosen to provide service and incurred the cost to move its Red Sapp Road line off the site, Gulf Power informed the Department of Corrections that it wanted to serve the prison. Gulf Power had not given Gulf Coast, the Washington County Commission, or the Department of Corrections official in charge of the project, any prior indication that it wished to serve the prison.

Exception 2 points out a scrivener's error on page 9 of the Order that attributes statements made by Mr. Norris, Gulf Coast's witness to Mr. Hodges, Gulf Power's witness.

In Exception 3 Gulf objects to language in the Order that it believes:

appears to imply that an agreement resolving existing duplication of facilities and creating a territorial boundary must be submitted by the parties to avoid having the Commission conduct additional evidentiary proceedings in order for the Commission itself to establish a territorial boundary between the parties.

Neither the Florida Administrative Procedures Act nor the Commission's procedural rules provide for the filing of exceptions to a final order issued by an agency after a full evidentiary

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hearing. Exceptions are appropriate when the Commission is considering a recommended order by a hearing officer, not when the Commission itself has issued its final order in a case. In Legal Environmental Assistance Foundation, Inc. v. Florida Public Service Commission, Case No. 93-2956RX, LEAF's challenge to the Commission's procedural rules, the DOAH Hearing Officer upheld the Commission's rules and said:

[I]n instances where two or more Commissioners conduct proceedings and are responsible for entering the final order, a majority of those Commissioners assigned have either heard the case or read the record before rendering the final order. Therefore, there is no requirement for serving a proposed order upon the parties and the parties are not afforded an opportunity to file exceptions to a proposed order.

Final Order, p. 27, issued August 27, 1993.  
Per Curiam affirmed 1st DCA, August 4, 1994.

Furthermore, Gulf Power did not move for reconsideration of any material mistake of law or fact in Order No. PSC-95-0272-FOF-EU, a remedy clearly available to it under Rule 25-22.060, Florida Administrative Code. In fact, Gulf Power did not request any relief from the Commission on its exceptions at all. Therefore, there is no action for the Commission to take, and staff recommends that the Commission should not consider the exceptions. The Commission should, however, amend page 9 of the order to replace "Hodges" with "Norris", in order to attribute the testimony referred to on page 9 to the correct witness.

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**ISSUE 2:** Should the Commission clarify Order No. PSC-95-0272-FOF-EU regarding the establishment of a territorial boundary between the utilities?

**RECOMMENDATION:** Yes. The Commission should clarify the scope and extent of the agreement the parties should negotiate, and the boundary the Commission will delineate if the parties fail to reach agreement. The Commission has directed the parties to negotiate in good faith to reach a territorial agreement that delineates their service areas in south Washington and Bay Counties where facilities are commingled or in close proximity, and further territorial conflict and uneconomic duplication of facilities is likely to occur. The utilities are not necessarily required to delineate their service territory in areas where facilities are not commingled or in close proximity and further conflict is not likely to occur in the reasonably foreseeable future. In those areas, and in other areas of the Panhandle where there is no present conflict, the utilities should be encouraged to consider a wide range of possible solutions to accommodate future growth and avoid future conflict.

**STAFF ANALYSIS:** Gulf Power's Request for Clarification asks the Commission to affirm that solutions other than the establishment of boundary lines may provide the basis for an agreement between the parties. Gulf Power also asks the Commission to state that the range of possible solutions to the territorial dispute available to the Commission if the parties do not reach agreement should not be limited to the establishment of a territorial boundary. Gulf states:

[T]he Order appears to presuppose that the scope or form of agreement that the parties might reach during the period of good faith negotiations called for in the Order must include a territorial boundary in order to be acceptable to the Commission. Gulf Power is concerned that this perception of the Commission's intent would serve to chill or otherwise impede the efforts of willing parties to fashion creative solutions that will enable the utilities to successfully resolve their differences in a manner that is in the best interests of all present and potential electric service customers and the utilities themselves.

In its response, Gulf Coast asserts that the Commission's Order intended to establish a territorial boundary between the parties. Interestingly enough, Staff agrees to some extent with

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both parties' interpretation of Order No. PSC-95-0272-FOF-EU and therefore believes it is necessary to clarify the nature and scope of the boundary the Commission intends to establish for the utilities.

Staff agrees with Gulf Coast that the Order does intend to establish a territorial boundary in the areas identified in the record as areas where the utilities' facilities are commingled or in close proximity, and further territorial conflict and uneconomic duplication of facilities is likely to occur. The Order is clear on that point. At page 11 of the Order the Commission said:

We believe that both utilities, their ratepayers, and the public interest will be well served by a final, comprehensive resolution of these utilities' continuing dispute. Therefore we direct the parties to file a report within 180 days of the date of this order, advising the Commission of the location and proximity of all their facilities in south Washington and Bay counties. The report should identify all parallel lines and crossings, and all areas of potential dispute. During that time the parties shall conduct good faith negotiations to attempt to develop an agreement that will resolve duplication of facilities and create a territorial boundary. If the parties are not able to resolve their differences, we will conduct additional evidentiary proceedings to establish a boundary ourselves. We intend to resolve the continuing dispute between these utilities once and for all.

The Commission's directive to the parties to attempt to create a territorial agreement by defining geographical service areas is based on the Commission's established policy to encourage territorial agreements, and it necessarily envisions a geographical division of territory. The concept is even incorporated into the Commission's definition of "territorial agreement" in its rules on territorial agreements and disputes. Rule 25-6.0439(1)(a), Florida Administrative Code, states:

"[T]erritorial agreement" means a written agreement between two or more electric utilities which identifies the geographical areas to be served by each electric utility party to the agreement...

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Commission Rule 25-6.0440(1) requires that:

...Each territorial agreement shall clearly identify the geographical area to be served by each utility.

We believe that a territorial agreement implicitly, logically, and necessarily contemplates the establishment of a territorial boundary, and that was clearly what the Commission intended the parties to do in areas of South Washington and Bay Counties where facilities are commingled or in close proximity and further conflict is likely. A boundary is not necessarily required in areas where there is no conflict and none is reasonably foreseeable. In those areas, and in other areas of the Panhandle where there is no present conflict, we agree with Gulf Power that the utilities should be encouraged to consider a wide range of possible solutions to accommodate future growth and avoid future conflict. Staff would also point out that there are numerous ways to define territorial boundaries, as the many and varied territorial agreements the Commission has approved for utilities throughout the State clearly demonstrate. We believe that with this clarification Order No. PSC-95-0272-FOF-EU provides the utilities full opportunity to fashion an agreement that is "creative", practicable and beneficial to both sides, and to the public interest.

Staff recommends that Gulf Power and Gulf Coast should be encouraged to consider a variety of possible solutions to avoid future conflict and accommodate future growth for two reasons. First, because there have been continuing disputes between these utilities, it is reasonable to plan to avoid further conflict in all areas where it might arise. Second, the record indicates that both utilities have demonstrated considerable interest in the future economic development of the Panhandle. Staff believes that Gulf Power and Gulf Coast now have a unique opportunity to work together to plan for, and contribute to, that development. We look forward to the ideas and creative solutions they may invent.

We would like to see their ideas on accommodating new commercial or industrial customers in currently undeveloped areas. Perhaps their agreement could include a provision which provided that territorial boundaries would be readdressed when a new commercial or industrial customer locates in an area and requires a significant upgrade of existing facilities - no matter who owns the existing facilities. For example, in Georgia a new customer with a KW demand above a certain level has a one-time choice of serving utility. In Louisiana, no territorial boundary is set until utility electric lines are planned within a certain short distance of another utility's lines. Creative solutions such as

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these can encourage economic efficiency for all customers. The limit of one-time choice avoids undesirable rate shopping that could result in eventual duplication of facilities and increased costs to other ratepayers.

While we encourage the parties to explore creative solutions in their territorial agreement discussions, staff wants to emphasize that any unique arrangements the parties may develop would be subject to the Commission's careful review under applicable law and Commission policy. Staff also wishes to reiterate that in areas of south Washington and Bay Counties, where conflict and further duplication of facilities is likely, Order No. PSC-95-0272-FOF-EU requires that the parties clearly define their geographical areas of service.



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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open.

**STAFF ANALYSIS:** The docket should remain open pending completion of the events contemplated in Order No. PSC-95-0272-FOF-EU.