

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

SEPTEMBER 26, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JOHNSON) *VJS RVE*
DIVISION OF ELECTRIC AND GAS (BASS) *Feb RLT*

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

AGENDA: OCTOBER 8, 1996 - REGULAR AGENDA - DECISION PRIOR TO
HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

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

CASE BACKGROUND

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, the Commission 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 the

DOCUMENT NUMBER-DATE

10374 SEP 26 96

000536

FPSC-RECORDS/REPORTING

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

Commission's 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 the Commission's order awarding service to Gulf Power. 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 PSC-95-0271-FOF-EU, the Commission 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. The Commission 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. The Commission 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, the Commission stated that it would conduct additional evidentiary proceedings to establish that boundary itself. In a Clarifying and Amendatory Order, the Commission reiterated that if the parties were unable to agree to a boundary, then the Commission 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 Commission 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.

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

ISSUE 1: Should the Commission grant Gulf Power's request for oral argument on its Motion to Dismiss?

RECOMMENDATION: Yes. Oral argument should be permitted on Gulf Power's Motion to Dismiss. Oral argument, however, should be limited to five minutes for each side.

STAFF ANALYSIS: Rule 25-22.058(1), Florida Administrative Code, requires a request for oral argument to accompany the pleading and to "...state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." Gulf states that the parties should be afforded the opportunity to present oral argument because the Supreme Court's decision in Gulf Coast Electric Cooperative, Inc. v. Susan F. Clark, is a "significant development in the law" that has occurred subsequent to the issuance of Commission Order No. PSC-0271-FOF-EU. Staff believes that Gulf Power has complied with Rule 25-22.058(1), Florida Administrative Code, and that oral argument will be beneficial to the Commission in arriving at its decision on the Motion to Dismiss. Therefore, staff recommends that the parties be allowed to present oral argument.

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

ISSUE 2: Should the Commission grant Gulf Power's Motion to Dismiss?

RECOMMENDATION: No.

STAFF ANALYSIS: The standard used in considering a motion to dismiss is to 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. In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side."

The motion filed by Gulf Power is not a typical motion to dismiss which alleges 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 to resolve a territorial dispute concerning whether Gulf Power or Gulf Coast should serve the Washington County prison. In the hearing to address that question, despite protests by Gulf Power, the Commission also determined that the disputed area extended beyond the prison site and directed the parties to negotiate to develop a territorial agreement to resolve the duplication of facilities and establish a territorial boundary. 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 the Commission can establish a boundary itself.

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. Staff disagrees. Therefore, for the reasons set forth below, staff recommends that Gulf Power's motion to dismiss be denied.

Gulf Power requests that the Commission 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

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

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.

In its reply to Gulf Coast's response, Gulf Power states 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 states that, because duplication of facilities has already occurred, instances when the difference between two utilities' cost to serve is not de minimis would be rare. In those rare instances, the Commission's jurisdiction would be invoked and the system which has worked extremely well for over twenty years would resolve the matter. In support of this statement, Gulf Power cited a law review article written by Richard C. Bellak and Martha Carter Brown entitled Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, which was attached to its reply as Appendix A.

Gulf Coast responds that the Commission has broad authority, both express and implied, over territorial matters. In addition, Gulf Coast argues that Gulf Power misreads the Supreme Court's ruling. Gulf Coast argues that the decision does not suggest that the Commission's jurisdiction should be limited to cases where the cost differentials are greater than \$14,583.

Gulf Coast asserts that 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. Staff agrees.

Staff agrees with Gulf Coast that the Commission has broad authority over territorial matters. As was discussed in Order No. PSC-95-0271-FOF-EU issued in this docket, 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

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

of further uneconomic duplication of generation, transmission, and distribution facilities.

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.

As was noted by Gulf Coast, 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. Gulf Power acknowledges that the Court did not establish a bright-line test for determining whether duplication of facilities is economic. 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 argues that in areas where duplication has already occurred, any cost differential would likely be "de minimis" as defined by the Supreme Court. Because Staff has requested specific maps of those areas where the parties distribution lines are in

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

close proximity, Gulf Power believes it is Staff's assumption that these lines constitute uneconomic duplication. Gulf Power states that there has been no determination that uneconomic duplication exists, and Gulf Power would submit that in most cases the contrary is fact the case. That is precisely the reason the proceedings in this docket should not be dismissed. During the evidentiary hearing, Gulf Power, as well as Gulf Coast, will have the opportunity to present testimony and other evidence to support its contentions.

Gulf Power also 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.

Staff does not dispute that cost differentials may change over time. Staff, however, believes this argument is irrelevant. As discussed above, Staff believes that the Court's recent ruling has not limited the Commission's authority to resolve territorial disputes. 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.

In summary, the Supreme Court's ruling does not change the law with respect to territorial disputes. 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. Gulf Power's argument that the Court's ruling significantly alters the Commission's authority in future territorial cases is imaginative, but unfounded. Thus, Staff recommends that Gulf Power's Motion to Dismiss be denied.

DOCKET NO. 930885-EU
DATE: SEPTEMBER 26, 1996

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No, the docket should remain open.

STAFF ANALYSIS: The Docket should remain open pending final resolution of the remaining issues in the case. An evidentiary hearing is scheduled for February 11-12, 1997 to resolve the continuing dispute between the utilities.