BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 930885-EU

PREPARED DIRECT TESTIMONY AND EXHIBIT OF

G. EDISON HOLLAND JR.

OCTOBER 15, 1996

GULF POWER

GULF POWER COMPANY

Before the Florida Public Service Commission
Direct Testimony of
G. Edison Holland, Jr.
Docket No. 930885-EU
Date of Filing: October 15, 1996

Q. What is your name and affiliation with Gulf Power Company?

A. My name is Ed Holland, and I am Gulf Power Company's Vice President -- Generation and Transmission and Corporate Counsel. In this role, I serve on the Leadership Council of Gulf Power Company ("Gulf Power", "the Company") which consists of the Company's president and vice presidents. I have responsibility for policy issues regarding service rights and other corporate issues related to our obligation to serve the public with retail electric service.

Q. Do you have any exhibits to which you will refer in your testimony?

A. Yes, I have five exhibits. My first exhibit (GEH-1) is a comparison of residential electric service prices between Gulf Power and Gulf Coast Electric Cooperative, Inc. (GCEC). My second exhibit (GEH-2) is a Florida State University Law Review article referenced herein. My third exhibit (GEH-3), is entitled "Territorial Policy

Statement". My fourth exhibit (GEH-4) is entitled "Policy Statement". My fifth exhibit (GEH-5) is the order of the Florida Supreme Court reversing the Commission's award of service rights for the Washington County prison to Gulf Power.

Q. What is the purpose of your testimony in this proceeding?

A. The purpose of my testimony is to present Gulf Power's position regarding the resolution of territorial disputes and the drawing of territorial boundaries.

Our basic position is very simply that the procedure used by this Commission for resolving service disputes has served the ratepayers of this state extremely well for nearly twenty-five years and should continue to be used by the Commission. Given the history of disputes between the parties and the current status of the electric utility industry, the mandating of fixed territorial service areas or "lines on the ground" would constitute a regressive rather than a progressive policy on the part of the Commission. Nevertheless, given the predisposition some have expressed for "lines on the ground," my testimony and the testimony of Gulf Power's other witnesses will also introduce several innovative methods for resolving territorial disputes between GCEC. These methods involve various forms of agreements that

could be entered into by the parties in this docket. In the absence of an agreement between the parties, one of these methods could be adopted by the Florida Public Service Commission ("Commission") as a policy statement governing the resolution of future territorial questions that may arise upon a direct request for service by a new customer in the relevant areas of southern Washington and northern Bay Counties. Each of these innovative methods will result in the avoidance of further uneconomic duplication of electric facilities and in fewer contested territorial disputes involving the two utilities while still allowing for customer choice where appropriate.

Q. What general observations would you make about the issues identified in Commission Order No. PSC-96-1191-PCO-EU?

A. The explicit issues of this proceeding, as specifically and narrowly defined by the Commission's order, clearly indicate a predisposition for the establishment of territorial boundaries between Gulf Power and GCEC consisting of detailed geographical delineations (i.e. "lines on the ground"). Such boundaries would define geographic areas in which one utility or the other would have exclusive service rights.

Gulf Power adamantly opposes such geographical delineations in Northwest Florida for several reasons.

First and foremost, we believe such a decision today, when there are vast areas of undeveloped property in this region of the state, would be contrary to the best interests of the general body of electric customers in the region both now and in the future. Lines on the ground would preclude Gulf Power from serving some new, future electric service customers for which the Company would ordinarily be the economic choice to extend facilities and provide electric service. This preclusion would hinder Gulf Power from fulfilling its basic business objective of providing reasonably priced electric service to customers in Northwest Florida through the economies inherent in the free enterprise system and the profit motive.

Q. What impact would such a policy have on the new electric service customers in the areas at issue?

A. Assigning exclusive service rights for any geographic areas to GCEC would allow (in fact, force) a rural electric cooperative to serve some electric service customers that an investor owned utility, Gulf Power, would otherwise be willing and able to serve at a lower cost. This is clearly contrary to the public policy considerations which brought about the creation and existence of such cooperatives. Gulf Power's witness

Russell Klepper will provide additional testimony as to why and how such a policy and practice is contrary to established public policy in the United States and to the general welfare of the citizens of Florida.

Another concern that Gulf Power has with the preclusive practice of "lines on the ground" is the impact it would have on specific customers. Customers in areas that would be exclusively assigned to GCEC and who would otherwise have desired service from Gulf Power would be disadvantaged and disenfranchised by a Commission decision to impose "lines on the ground." Such customers would be relegated to essentially unregulated rates for electric service charged by GCEC. The rates of GCEC, both currently and historically, have been higher than such rates made available by Gulf Power subject to the regulatory oversight of the Commission. My Exhibit GEH-1 sets forth the current and historical prices for various levels of power consumption for both Gulf Power and GCEC. Each of these as yet unidentified future customers who would be deprived of the savings available from taking electric service from Gulf Power rather than GCEC has a vested interest in the outcome of this proceeding. The collective higher prices involuntarily paid by all of these future customers as a result of imposing a "lines on the ground" solution

represents money needlessly drained from the economy of Northwest Florida. While this exhibit presents comparative residential rates, the commercial and industrial rates of GCEC are also significantly higher than those of Gulf Power. The potential impacts that the drawing of lines on the ground would have on economic development are obvious.

Q. Do you have other objections to the delineation of service territory by the drawing of lines on the ground?

A. Yes. In this area of Northwest Florida, there are large tracts of undeveloped property. A process that permanently assigns exclusive territorial rights to such property based on the location of existing electric service facilities totally ignores the differing types of facilities that might be required to serve the different types of electric loads that might be associated with as yet unknown future development. Rather than preventing the further uneconomic duplication of electric service facilities, "lines on the ground" imposed under these circumstances could have the effect of mandating uneconomic duplication. This would, of course, be contrary to the Commission's stated goal and statutory jurisdiction upon which this proceeding is presumably based.

Q. Can you give some examples why drawing "lines on the ground" could lead to rather than prevent the further uneconomic duplication of facilities?

A. Yes. Suppose a line was drawn equal distance between two existing distribution lines that were two miles apart. If the first customer obtained service 1/10th of one mile inside of the drawn line in Gulf Power's territory and was served by Gulf Power, that service would be consistent with the least cost of service policy of the Commission. However, if the next customer to be served after Gulf Power extended service to the first customer was 1/10th of one mile inside GCEC's assigned territory, then GCEC could not extend service 8/10ths of one mile at less cost than Gulf Power could extend service 2/10ths of one mile. Nevertheless, the mere act of drawing lines on the ground would preclude the utility with the least cost of extending service to this second customer from serving the request. Thus, drawing lines on the ground would result in uneconomic duplication.

Please consider another example based on the same facts. Assume that the first new customer required three phase service instead of single phase service, and that Gulf Power would have to rebuild five miles of line to serve the customer with three phase service, while GCEC would only have to build 1.1 miles of three phase

service. Obviously the least cost to serve policy would be violated if Gulf Power served the customer, since its line extension costs would be greater than GCEC's. This is true notwithstanding the fact that the customer is 1/10th of one mile within Gulf Power's side of the territorial boundary established by "drawing lines on the ground."

Q. Could the concerns you just described through these two examples be addressed by periodically re-drawing the boundaries?

A. Perhaps, however, this would entail additional controversy and additional proceedings before the Commission. In fact, I believe it would require more time than has been historically expended to resolve the few territorial disputes that have arisen between these two utilities.

Q. Why do you believe the current method for resolving territorial disputes is the preferred method?

A. Let me say that we encourage a thorough analysis of the various methods available to the Commission for the resolution of territorial disputes and the prevention of further uneconomic duplication. This is certainly not the first time the issue of mandated lines on the ground

has been raised. It has been debated for years by the legislature, the Commission, and the affected electricity providers. The ultimate outcome of each of these debates has been that the current regulatory scheme for the resolution of such disputes works well and should be continued. It is noteworthy that in a recent Florida State University Law Review article (GEH-2), members of the Commission Staff reached the same conclusion, stating:

> "While the system Florida presently uses to allocate utility territory is dynamic and thus somewhat stressful, the system is not broken. The flexibility inherent in a dynamic system, rather than the stability inherent in a static system, may well be needed to effectively resolve the territorial issues of the future, just as it has been needed in the past. The present system provides continuity, without imposing any single, rigid model statewide. Paradoxically, the most innovative system among the alternatives currently being debated may be the one already in place."

As evidenced by the several suggested alternatives or modifications to the current procedure which we make in our testimony, we recognize that other methods do exist for the resolution of disputes between electricity

providers. Of them all, the one least in the interest of the public and the customers is the drawing of lines on the ground based in large part on the location of single phase distribution lines. Again, such an approach creates and encourages uneconomic duplication, rather than preventing it.

We have seriously considered all of the proposals made in the past. For a number of reasons, we have concluded that the current method best serves the public interest and the electricity consumers of Northwest Florida. First, the current system has served well and is not broken. The reason most given for changing and for mandating lines on the ground is that disputes are expensive and time consuming. The fact is that over the years, disputes have occurred so seldomly that the relative time and expense involved is far outweighed by the benefits gained through a case-by-case resolution of disputes arising from requests for electric service.

Secondly, what has occurred, and was perhaps foreseen by the legislature and the Commission, is a systematic and economic expansion of facilities into unserved areas of Northwest Florida by the electricity providers in the area. Over the years, with the specificity of the legislative and regulatory criteria for resolving disputes, and the sparse but direct case

law on the subject, potential parties to a dispute have evaluated the likely outcome and have resolved the matter far short of ever having to come to the Commission. The fact that the dispute over the Washington County prison was the first between Gulf Power and GCEC to come before the Commission in over eight years provides ample support for this statement. The bottom line is that in 999 out of 1000 cases, it is relatively easy for the utilities to figure out which provider should serve a particular customer based on the criteria outlined by statute and rule. Cases where the ultimate outcome is not so certain are rare and are readily dealt with by the Commission.

Thirdly, and perhaps most importantly, of all the times for the Commission to be considering such a drastic change in its approach to service disputes, this is perhaps the least appropriate time. Consideration in the past by both the legislature and the Commission of mandated lines on the ground has been done in a relatively stable regulatory climate. As everyone is aware, these are times of tremendous uncertainty in the industry. One thing is certain, however, and that is that the momentum is toward giving electricity consumers a choice of suppliers where it is in their and society's best interests to do so. The drawing of lines on the ground as suggested in this proceeding would eliminate a

truly economic choice for many consumers in Northwest Florida and is moving backward rather than forward.

Q. You mentioned Gulf Power's willingness to consider alternatives to the current regulatory procedure for resolving disputes. Have there ever been any past agreements between Gulf Power and GCEC that helped determine which utility would serve a new customer or that otherwise helped to prevent uneconomic duplication of electric facilities?

A. Yes. For many years Gulf Power was the exclusive wholesale electric supplier to GCEC. Gulf Power's wholesale service contract with GCEC contained language that determined retail service rights. The provisions of this agreement are further described by Gulf Power's witness Bill Weintritt. These provisions implicitly, if not explicitly, served as a territorial agreement between the parties. During the period this contract governed the relationship between the parties, very few service rights disputes arose between the two utilities. None came before this Commission.

Q. What is Gulf Power's position regarding the need for a territorial agreement at this time?

A. There certainly does not appear to be any justification

for an agreement involving exclusive territorial assignments with the accompanying inefficiencies, diseconomies, and public policy contradictions. In the last ten years, there has been only one contested territorial dispute between Gulf Power and GCEC that was brought before the Commission for resolution. Since 1972 (when the Commission was given jurisdiction over territorial disputes between electric utilities), only six contested territorial disputes between these two utilities have been brought by one party or the other to the Commission for resolution. Given this extremely low frequency, it is difficult to comprehend how the history of disputes between these two utilities demonstrates a compelling need for an agreement at this time.

This particular proceeding does not involve a dispute over which utility should serve a particular customer that has made a request for electric service. As a result, we question whether there is an active dispute between the two utilities. Nevertheless, Gulf Power has always been willing to consider an agreement with GCEC that would enable the two utilities to avoid disputes and prevent the further uneconomic duplication of electric facilities. Gulf Power does not believe that such an agreement should involve boundary lines defining exclusive service territories for the two utilities. In

our view, the inability of the two utilities to reach an agreement that would allow them to avoid future uneconomic duplication of each other's facilities has been caused by GCEC's unwillingness to consider solutions that do not involve "lines on the ground." In the absence of an agreement voluntarily reached by the parties, Gulf Power would support a policy statement of the Commission through an order in this proceeding that would give the two utilities specific guidance as to the type of future utility construction that would constitute uneconomic duplication of existing electric facilities in violation of the Florida Statutes. Such a policy statement need not and should not involve the establishment of "lines on the ground". By following one of our proposals, the Commission can reasonably assist the two utilities in preventing further uneconomic duplication of each other's electric facilities and consequently avoiding unnecessary territorial disputes.

Q. What type of agreement to avoid further uneconomic duplication would Gulf Power propose?

A. Gulf Power's first choice for such an agreement would be one similar to, if not identical to, the one that served each party and the general public well for many years as part of the prior wholesale service contract between the

two utilities. As Bill Weintritt discusses in his testimony, there were provisions in that contract that helped the parties to avoid uneconomic duplication, gave some recognition to differing service needs of customers associated with the size of their electric service requirements, and provided customers an initial voice and choice in determining which utility would have permanent service rights to a particular premise and load.

A similar but somewhat more detailed approach to resolving potential disputes is contained in my attached Exhibit GEH-3. The document is written as a policy statement to be adopted by the Commission, but could be easily adapted and put in agreement form. This proposal provides specific distance and load criteria for determining which utility is best capable of providing requested electric service. It also provides, under specifically defined circumstances, a requirement that a party receiving a request for service notify the other party of the request. If the notified party desires, a meeting will be held prior to the provision of service for the purpose of determining the appropriate party to provide the requested service. Failing agreement at the meeting, the matter is to be submitted to mediation before the Commission Staff. Should mediation fail, causing the matter to be submitted to the Commission for

ultimate resolution, the losing party would be required to pay the prevailing party's costs of litigation including reasonable attorney's fees.

We believe either of these proposals (reinstatement of the relevant provisions from the wholesale service contract or adoption of the policy set forth in GEH-3) would drastically reduce, if not eliminate, the Commission's involvement in the resolution of disputes. Moreover, and we think, more importantly, it would allow the economically prudent expansion of both systems to the benefit of the ratepayers of Northwest Florida.

Q. Do you have any other proposals or alternatives for the Commission to consider.

A. Yes. As an alternative to the type of agreement or policy statement I just described, the utilities could be directed to follow a policy such as the one set forth in Exhibit GEH-4 attached to my testimony. We provide this alternative because we firmly believe that if Gulf Power and GCEC followed the policy and procedures outlined in GEH-4, the Commission would have few, if any, territorial disputes to settle in the future. More importantly, further uneconomic duplication would be prevented if each utility followed this policy and procedure. Furthermore, like the proposal in GEH-3, this proposed solution is

more consistent with existing Commission policy than would be an imposed "lines on the ground" solution. The proposal set forth in GEH-4 would allow for a least cost solution to territorial issues on a case-by-case basis.

Q. How does the proposed policy in GEH-4 differ from existing Commission policy?

A. It does not really differ from existing policy. It supplements and clarifies the Commission's existing policies by providing procedural incentives for a different and less costly process to dispute resolution than litigation before the Commission. It also takes into account the recent Supreme Court decision reversing the Commission's award of service rights for the Washington County prison to Gulf Power.

The proposal set forth in GEH-4 first sets out the mechanism for consultation between the utilities in the event of a request for service that may result in a potential dispute regarding uneconomic duplication of facilities. In the event the utilities cannot agree that the customer's choice of supplier does not result in uneconomic duplication of electric facilities, the proposal mandates that the utilities submit the question to mediation.

Q. Would the mediation process in GEH-4 eliminate all Commission decision or involvement in settling territorial disputes?

A. No. The Commission would still have to approve any agreements and, in the event mediation fails to result in an agreement between the utilities, the Commission would still have to hold a hearing to resolve the dispute. Like the proposal in GEH-3, the proposal in GEH-4 provides an incentive to resolve the matter either short of or through the mandated mediation by requiring, in the event of a contested hearing, the losing utility to pay the litigation costs of the prevailing party, including reasonable attorneys' fees. This type of incentive is consistent with similar provisions in the context of civil litigation in traditional judicial proceedings.

Q. You stated earlier that the proposals in GEH-3 and GEH-4 are more consistent with existing Commission policy than an imposed "lines on the ground" solution would be. Why is this the case?

A. The policy and practice of the Commission generally has been to award service based on a determination of which utility would have the lowest incremental cost of service. Imposing "lines on the ground" is not consistent with the determination of which utility should

honor a particular request for electric service based on the least cost of service.

Q. Is the proposal set forth in GEH-4 consistent with allowing customer choice when everything else is essentially equal?

A. Yes. The policy provides that customer choice will prevail when the net incremental cost to the selected utility is no more than $15,000 greater than the net incremental cost to the other utility. Otherwise, the customer is required to choose the utility with the lowest net cost of extending or providing the required electric service.

Q. What is the rationale for allowing a differential of up to $15,000?

A. The Supreme Court's decision reversing the Commission's decision regarding which utility should serve the Washington County Correctional Institute recognized that customer choice should be allowed, if the cost to serve for the two utilities is substantially equal. In that case the Commission found that there was a $14,583 difference in cost between the two utilities with Gulf Power having the higher cost. The Supreme Court ruled as a matter of law that this differential was not sufficient

to warrant deviation from the customer's choice of GCEC to be the electric supplier. For ease of reference, I am attaching the Supreme Court's opinion as Exhibit GEH-5.

On the maps identified by the Commission Staff where the parties' lines are in close proximity, there are few, if any, areas where either party could not serve any new load for $15,000 or less. In other words, setting the threshold at some level consistent with the Supreme Court's decision would eliminate the vast majority of instances where "uneconomic" duplication might occur, and therefore prevent most disputes. And again, unlike "lines on the ground", it would allow the economic provider of choice to serve the customer.

If one can conclude anything from the Supreme Court's opinion it is that customer choice does matter and there is a threshold level of cost which is too small to constitute "uneconomic duplication" as defined in the statutes. In the vast majority of cases, any duplication of distribution facilities which will occur in the future will be *de minimus*. It is upon this basis that Gulf is suggesting that the threshold level be set at $15,000.

Q. If neither of the two proposals you have just discussed are acceptable to the Commission, and if the Commission insists on assigning exclusive geographic service areas

to each of the parties in this docket, do you have a proposal that would meet this criterion?

A. Again, Gulf Power does not feel this type of "solution" would be appropriate. However, should an approach that assigns detailed, specific territories be required, it is clearly inappropriate to assign territories and all the future customers that would locate within such areas without regard to the character of service that would be required or the size of load to be served. Our witness Ted Spangenberg provides testimony concerning a proposal that avoids the problems of indiscriminate territorial assignments related only to the presence of any type of facility, regardless of its capabilities. The proposal he describes assigns territories on the basis of the relative economics of facilities expansion related to the nature of the load to be served.

Q. Has the Commission staff identified specific maps that should be addressed in this proceeding due to the close proximity or co-mingling of both utilities' facilities?

A. Yes. Gulf Power's witness Bill Weintritt will further discuss the details of those maps. Again, let me reiterate Gulf Power's position that specific and detailed geographical delineations that assign exclusive territories are not needed and are extremely unwise due

to the economic inefficiencies and the poor public policy that result. When new customers can be provided an initial choice of electric service provider without introducing uneconomic duplication, particularly when that initial choice can yield these customers the economic benefits of lower and regulated electricity prices, it should be allowed.

Q. Does this conclude your testimony?

A. Yes, it does.

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ESCAMBIA)

Docket No. 930885-EU

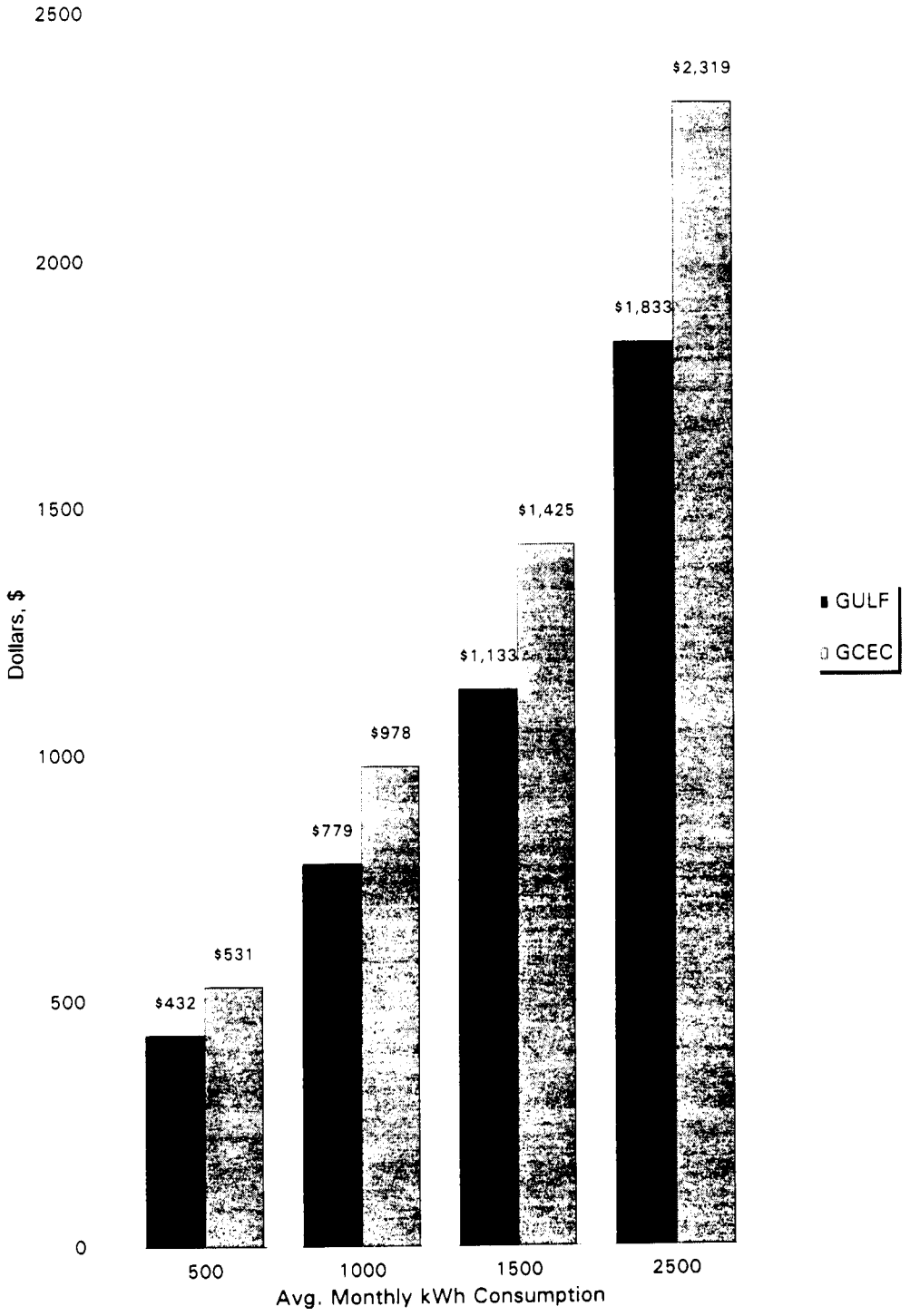
Before me the undersigned authority, personally appeared G. Edison Holland, Jr. who being first duly sworn, deposes, and says that he is the Vice President -- Power Generation/Transmission and Corporate Counsel for Gulf Power Company, a Maine corporation, that the foregoing is true and correct to the best of his knowledge, information, and belief. He is personally known to me.

G. Edison Holland, Jr.
Vice President -- Power Generation/
Transmission and Corporate Counsel

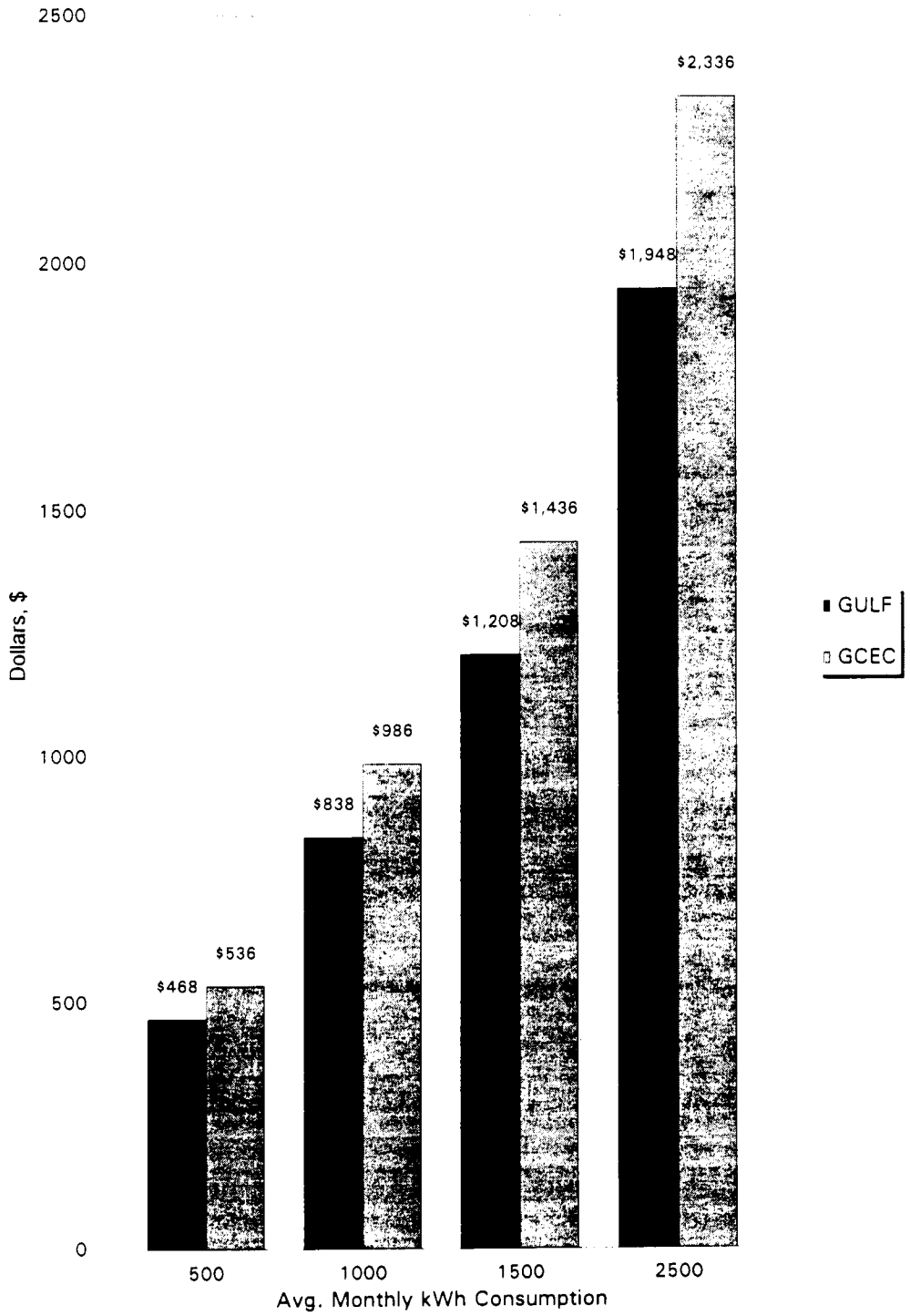
Sworn to and subscribed before me this 19th day of March, 1996.

Notary Public, State of Florida at Large

Annual Bill Comparison
1990



Annual Bill Comparison
1995



DRAWING THE LINES: STATEWIDE TERRITORIAL BOUNDARIES FOR PUBLIC UTILITIES IN FLORIDA

RICHARD C. BELLAK* AND MARTHA CARTER BROWN**

I. INTRODUCTION

OVER the past four decades, the State of Florida has grown dramatically from a predominantly rural and relatively unpopulated state to an urban and densely populated one.[1] To meet the increasing demand for utility service accompanying this growth, Florida's public utilities have also grown remarkably. Today, five investor-owned electric utilities—along with thirty-five municipal electric utilities and eighteen rural electric cooperatives—serve 6,736,858 residential, commercial, and industrial customers.[2] Sixty natural gas utilities, including municipal gas systems and gas districts, as well as 13 local exchange telephone companies, 123 interexchange telephone companies, and 244 water and sewer utilities operate in Florida.[3]

Growth has driven regulatory authorities to require, and utilities to implement, increased quality and efficiency in the provision of utility service. But growth has also led to conflict and competition between utilities as they have expanded their service areas to meet growing needs and raced to serve new customers in surrounding areas. In the

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Before she was appointed to the Florida Public Service Commission, Susan Forbes Clark researched and drafted the legislative history narratives included in this Article. The authors gratefully acknowledge her important contribution.

This Article reflects the analyses of the authors and does not necessarily reflect the opinions of the Commission or individual Commissioners.

1. In 1950, Florida was home to 2,771,305 people and had only three major urban areas, all located along its coasts. By 1990, Florida's population had grown to 12,671,000 (estimated) and was increasing at a rate of 1,000 new residents a day. BUREAU OF ECON. AND BUS. RESEARCH, UNIV. OF FLA., 1990 FLORIDA STATISTICAL ABSTRACT 3-4 (1990).

2. *See generally* FLA. PUB. SERV. COMM'N, MASTER COMMISSION DIRECTORY (1991) [hereinafter MASTER COMMISSION DIRECTORY]. (This source is an electronic data base maintained by and accessible at Fla. Pub. Serv. Comm'n, Div. of Records & Reporting, Tallahassee, Florida.); FLA. ELEC. POWER COORDINATING GROUP, INC., 1991 TEN-YEAR PLAN—STATE OF FLORIDA 8 (1991).

3. MASTER COMMISSION DIRECTORY, *supra* note 2.

field of electric service, for example, growth has created a contest for service territory between utilities serving expanding urban areas and cooperatives serving rural areas. Growth has also pitted rural electric cooperatives and investor-owned utilities against municipally-owned utilities that seek to extend their territory and to increase municipal revenues as municipal boundaries expand.

The effort of governmental authorities to respond appropriately to the extensive demographic changes in the State is a persistent theme in the history of utility regulation in Florida, particularly in the regulation of electric utility service territories. The Florida Public Service Commission has considered numerous cases and issues on that subject since 1951, when the Commission was given regulatory authority over investor-owned electric utilities (public utilities).[4] The Florida Supreme Court has reviewed thirteen electric utility territorial cases since 1950,[5] and the Florida Legislature has considered legislation on the subject five times since 1974.

The Legislature considered a bill concerning electric service territories most recently during its 1991 session.[6] The bill proposed a method to divide service territories between electric utilities by establishing territorial boundaries on a statewide basis. While the legislation was not adopted, the controversy the bill engendered demonstrates the importance of the issue in public utility regulation. It is likely to reappear on a future legislative agenda.

This Article presents an overview of Florida's regulation of utility service territories and a review of the history of territorial legislation since 1974.[7] The Article then analyzes the legal and regulatory issues

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4. Since 1985, the Commission has considered 62 cases involving the service territories of electric utilities, not including declaratory statement petitions on territorial issues. FLA. PUB. SERV. COMM'N, CASE MANAGEMENT REPORT, DOCKET INDEX LISTING, June 25, 1991. (This source is an electronic data base maintained by and accessible at Fla. Pub. Serv. Comm'n, Div. of Records & Reporting, Tallahassee, Fla.)

5. Florida Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253 (Fla. 1990); Public Serv. Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989); Lee County Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987); City Gas Co. v. Florida Pub. Serv. Comm'n, 501 So. 2d 580 (Fla. 1987); Gulf Power Co. v. Florida Pub. Serv. Comm'n, 480 So. 2d 97 (Fla. 1985); Utilities Comm'n v. Florida Pub. Serv. Comm'n, 469 So. 2d 731 (Fla. 1985); Gulf Coast Elec. Coop. v. Florida Pub. Serv. Comm'n, 462 So. 2d 1092 (Fla. 1985); Escambia River Elec. Coop. v. Florida Pub. Serv. Comm'n, 421 So. 2d 1384 (Fla. 1982); Gulf Power Co. v. Hawkins, 375 So. 2d 854 (Fla. 1979); Gainesville-Alachua County Regional Elec., Water & Sewer Utils. Bd. v. Clay Elec. Coop., 340 So. 2d 1159 (Fla. 1976); Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429 (Fla. 1965); Tampa Elec. Co. v. Withlacoochee River Elec. Coop., 122 So. 2d 471 (Fla. 1960).

6. Fla. HB 1863 (1991); Fla. SB 1808 (1991).

7. This Article includes allocation of service territories for gas utilities, because the nature and source of the regulation is the same. Both electric utilities and gas utilities are regulated under the provisions of chapter 366, Florida Statutes.

surrounding House Bill 1863, the 1991 territorial bill, and includes a brief discussion of federal antitrust challenges to utility territorial agreements in Florida. The Article concludes with a brief discussion of the relative merits of the present regulatory system and proposed systems that would create permanent territorial boundary lines for electric utilities.

II. HISTORICAL DEVELOPMENT OF UTILITY RETAIL SERVICE TERRITORIES

In this section, the Article traces the evolution of service territory regulation from before the Public Service Commission's creation in 1951, through the establishment of the Commission's authority to approve territorial agreements and resolve territorial disputes, and through territorial legislation since the enactment of the "Grid Bill" in 1974.

A. The Commission and the Courts

Before 1951, electric utilities and gas utilities were regulated on a piecemeal basis by local governments, usually municipalities. Private utilities would obtain franchises from municipalities to provide service within all or part of the municipalities' respective jurisdictions. The utilities' rates and quality of service were regulated by the municipalities in whose jurisdictions the services were provided. It was, therefore, not unusual for a single utility to have different rates in different localities for the same service.[8]

In 1951, to create uniform rate and service regulation of investor-owned public utilities throughout the State, the Florida Legislature vested regulatory jurisdiction in the Florida Railroad and Public Utilities Commission, the predecessor to the present Florida Public Service Commission (hereinafter Commission or PSC).[9] The authority given to the Commission over those utilities was exclusive and plenary. Indeed, the Florida Supreme Court described the Commission's authority as "omnipotent within the confines of the statute and the limits of organic law."[10]

1. Territorial Agreements

The Commission's power to review and approve territorial agreements involving investor-owned utilities was implicit in the Legisla-

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8. STAFF OF FLA. S. COMM. ON COM., A REVIEW OF CHAPTER 366, FLORIDA STATUTES, PUBLIC UTILITIES, PREPARED PURSUANT TO THE REGULATORY REFORM ACT, SECTION 11.61, FLORIDA STATUTES (Jan. 1980).

9. Ch. 26545, 1951 Fla. Laws 123.

10. Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968).

ture's pervasive grant of authority to the Commission and was part and parcel of the extensive regulatory scheme developed for public utilities.[11] The Commission itself had recognized its authority over electric service territories as early as 1958, when it approved an administrative agreement between Florida Power Corporation and the Orlando Utilities Commission that divided territory to prevent duplication of electric facilities.[12]

That same year the Commission approved a territorial agreement between City Gas Company and Peoples Gas System. In its order approving the agreement, the Commission articulated the rationale behind encouraging such agreements dividing service territories between public utilities:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste.[13]

Two years after the Commission approved the territorial agreement between City Gas and Peoples, Peoples filed a complaint charging that City Gas had violated the agreement.[14] City Gas answered, *inter alia*, that the agreement was void and unenforceable under state and

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11. *Id.*; City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429, 436 (Fla. 1965).

12. *In re* Application of Fla. Power Corp. for Approval of an Admin. Agreement Between Said Co. and the Orlando Util. Comm'n, Docket No. 5256-EU, Order No. 2595 (Fla. Pub. Serv. Comm'n, Mar. 28, 1958).

13. *In re* Territorial Agreement Between Peoples Gas Sys., Inc. and City Gas Co. of Fla., Docket No. 6231-GU, Order No. 3051, at 1 (Fla. Pub. Serv. Comm'n, Nov. 9, 1960).

14. 182 So. 2d 429 (Fla. 1965).

federal antitrust laws.[15] In *City Gas*, the Florida Supreme Court concluded that, in view of the regulatory authority of the Commission over the parties to the agreement pursuant to chapter 366, Florida Statutes, the Commission could prevent the agreement from resulting in the "monopolistic control over price, production, or quality of service" that was the true object of antitrust enforcement.[16] Therefore, the territorial agreement did not violate Florida's antitrust law. The court determined that the Commission had adequate implied authority to approve the agreement, which would have been invalid without such approval. The court's opinion recognized that regulation of natural-monopoly public utilities is consistent with the public interest.[17]

The *City Gas* opinion provided precedent for the legality of Commission-approved territorial agreements. First, the court recognized that regulated monopoly public utilities are complementary to, and consistent with, the free market competition envisioned by the antitrust laws, rather than opposed to it, because both are in the public interest in their respective spheres.[18]

Second, the court recognized the Commission's implied authority to approve territorial agreements: "The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute. Neither category is possessed of greater dignity or effect."[19]

Thus, with the approval of the Florida Supreme Court, by 1965 the Commission had effectively implemented the State's policy to replace competition between utilities with regulation in the public interest. Moreover, it had also established the premise that without Commission approval, territorial agreements between utilities were invalid.

> In the exercise of [its] jurisdiction the Commission is specifically authorized to require repairs, improvements, additions and

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15. *Id.*
16. *Id.* at 434.
17. *Id.*
18. To this end, the court cited California v. Federal Power Comm'n, 296 F.2d 348, 353-54 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 482 (1962).

> The antitrust laws and the regulatory laws are not in conflict; they are complementary. Both have as their objective the public interest. They deal with different subject matters. . . . [One] . . . is not required to—and indeed should not—begin with a general premise that competition is always and under all circumstances in the public interest. [One's] premise should be that the antitrust laws in certain areas of our economy and the regulatory laws in other areas are supplementary enactments and each must be given full effect in its area, recognizing always its concomitant body of law in the other area.

City Gas Co., 182 So. 2d at 433-34.

19. *Id.* at 436-37 (citation omitted).

> extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extensions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission.[20]

The Legislature and the Commission continue to espouse this rationale in approving territorial agreements.[21] Commission-approved territorial agreements have become the preferred method for allocating electric and gas utility service territories in Florida.[22]

2. *Regulatory Schemes*

While the method for establishing service areas for electric and gas utilities differs from the method prescribed for water and sewer utilities and for telephone companies, the purpose and the result are the same. Territorial agreements displace competition among utility service providers with the goal of eliminating uneconomic duplication of utility facilities. The regulatory scheme for water and sewer utilities and for telephone companies requires the utility or company to request issuance of a certificate covering the entire territory that it may serve. The Commission reviews the application and may or may not grant the certificate for the area requested.[23]

In the electric and gas industries, utilities submit agreements with other utilities that propose boundaries between their respective service territories.[24] The Commission reviews each agreement and may or may not approve the allocation of territory.[25] Where disputes arise between electric or gas utilities, the service territories are allocated through

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20. *Id.* at 436.

21. Public Serv. Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989).

22. *See, e.g., In re* Territorial Agreement between Peoples Gas Sys. & City Gas Co., Docket No. 6231-GU, Order No. 3051, at 1 (Fla. Pub. Serv. Comm'n, Nov. 9, 1960); *In re* Application of Fla. Power Corp. for Approval of Territorial Agreement with City of Ocala, Docket No. 7061-EU, Order No. 3799, at 3-4 (Fla. Pub. Serv. Comm'n, Apr. 28, 1965); Utilities Comm'n v. Florida Pub. Serv. Comm'n, 469 So. 2d 731, 732 (Fla. 1985).

23. *See* FLA. STAT. §§ 364.335(4), 367.045(5)(a) (1989).

24. FLA. ADMIN. CODE ANN. r. 25-6.0439-.0442 (1991) (pertaining to electric utility territorial agreements and disputes); FLA. ADMIN. CODE ANN. r. 25-7.047-.0473 (1991) (pertaining to natural gas utility territorial agreements and disputes).

25. FLA. ADMIN. CODE ANN. r. 25-6.0439-.0442 (1991); FLA. ADMIN. CODE ANN. r. 25-7.047-.0473 (1991).

Commission resolution of the dispute.[26] In this manner, exclusive service territories are established incrementally, following patterns of growth and development. As a particular area of the State begins to develop, electric and gas utilities that desire to serve the area are expected to anticipate potential problems of duplication of facilities; they are expected to present the Commission with a proposed agreement dividing the new territory and resolving the problems.[27] The exclusive service area of a particular utility, be it an investor-owned, municipal, or rural cooperative utility system, thus develops over time, in response to the growth patterns of the area. It is defined by territorial agreements or dispute resolutions between the utility and adjacent utilities over a number of years.

Agreements are encouraged because they provide for the orderly and economical expansion of facilities in a manner responsive to the growth patterns of a rapidly developing state.[28] Expensive and time-consuming litigation is thus avoided. In several cases, the Commission has recognized this principle and suspended territorial dispute proceedings to allow utilities the opportunity to reach agreement.[29]

Since 1965, the Florida Supreme Court has affirmed the Commission's implied authority to approve territorial agreements, acknowledged the necessity of Commission approval for those agreements to be valid, and supported the Commission's implementation of the State's policy to replace competition with regulation in the public interest. The court has repeatedly held that territorial agreements are sanctioned and actively encouraged by the State, both as a means to avoid the harms incident to competitive practices and as a means of resolving disputes between utilities.[30]

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26. *Id.*

27. *In re* Application of Florida Power Corp. for Approval of Territorial Agreement with City of Ocala, Docket No. 7061-EU, Order No. 3799, at 3 (Fla. Pub. Serv. Comm'n, Apr. 28, 1965).

28. *See, e.g., In re* Joint Petition of Florida Power Corp. and Withlacoochee River Elec. Coop. for Approval of Territorial Agreement, 88 Fla. Pub. Serv. Comm'n Rep. 6:215 (Order No. 19480, June 10, 1988).

29. *See, e.g., In re* Petition by Sumter Elec. Coop. to Resolve Territorial Dispute with the City of Ocala, 87 Fla. Pub. Serv. Comm'n Rep. 10:331 (Order No. 18324, Oct. 21, 1987); and *In re* Territorial Dispute Between Peace River Elec. Coop. & City of Wauchula, 84 Fla. Pub. Serv. Comm'n Rep. 10:14 (Order No. 13726, Oct. 10, 1984).

30. *See* Utilities Comm'n v. Florida Pub. Serv. Comm'n, 469 So. 2d 731 (Fla. 1985); Gainesville-Alachua County Regional Elec., Water & Sewer Utils. Bd. v. Clay Elec. Coop., 340 So. 2d 1159 (Fla. 1976). In *Utilities Commission*, the Florida Supreme Court said: "The legal system favors the settlement of disputes by mutual agreement between the contending parties. This general rule applies with equal force in utility service agreements." 469 So. 2d at 732. *See also* Lee County Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987). The cooperative had alleged that one of its retail industrial customers had constructed a transmission line into the service

B. *Legislative Milestones*

The first specific statutory reference to territorial agreements between electric utilities was added to chapter 366 by the 1974 Legislature, as part of an act commonly known as the Grid Bill.[31] The amendments were part of a package that granted the Commission jurisdiction over municipal utilities and rural electric cooperatives for certain specific purposes.[32]

While the Commission's authority to review and approve territorial agreements involving investor-owned electric utilities was implicit in the plenary authority it enjoyed over those utilities, the Commission lacked such all-encompassing authority over rural electric cooperatives and municipal electric utilities.[33] In fact, before 1974, the Commission did not have jurisdiction over municipal utilities or rural electric cooperatives for any purpose. Thus, explicit legislation was necessary to establish that jurisdiction.[34]

1. *The Grid Bill*

The Grid Bill was introduced by the Senate Committee on Governmental Operations; discussion at the committee meeting indicated that the bill resulted from a study of the energy problems of the State.[35] The study concluded that a coordinated energy grid, to include investor-owned utilities, municipally-owned utilities, and rural electric cooperatives, would use energy more efficiently and would help control the dramatic rise in the cost of electricity.[36] Thus, the Grid Bill gave the Commission expanded authority over all electric utilities regarding "the planning, development and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes

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territory of another electric utility in violation of their territorial agreement. The court noted that it had "repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities 'racing to serve' . . . and we cannot find that the transparent device of constructing a line into another utility's service area may suffice to avoid the effect of a territorial agreement." *Id.* at 587.

31. Ch. 74-196, 1974 Fla. Laws 538 (codified at FLA. STAT. §§ 366.04(2), .05(7)-(8) (1989)).

32. *Id.*

33. *See* FLA. STAT. § 366.11 (1974).

34. The purpose of rural electric cooperatives is "supplying electric energy and promoting and extending the use thereof in rural areas." FLA. STAT. § 425.02 (1989). In fulfilling this purpose, rural electric cooperatives extend electric power service to sparsely populated areas that may lack sufficient revenue potential to attract investor-owned utilities to serve them.

35. Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (May 20-21, 1974) (on file with comm.).

36. *Id.*

in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."[37]

Under the Grid Bill, the Commission's jurisdiction to ensure the adequacy of the grid and to prevent uneconomic duplication of facilities included the following authority: to require reports from all electric utilities;[38] to require installation or repair of necessary facilities, including generating plants and transmission facilities when necessary to remedy inadequacies in the grid;[39] and to review and approve territorial agreements and resolve disputes involving all types of utilities, not just investor-owned utilities.[40] The primary objective of the 1974 legislation was to give the Commission expanded authority over the planning, development, and coordination of electric facilities throughout the state.[41] Extending Commission authority over municipal and rural cooperatives was a necessary prerequisite to achieving that objective.

The debate before the Senate Committee on Governmental Operations, and the parliamentary maneuvering on the floor of the House and Senate, indicate that significant controversy surrounded the proposed legislation. Gulf Power Company was opposed to the notion of a coordinated grid in Florida, because Gulf Power was already part of the Southern Company's energy grid.[42] The municipal electric utilities resisted any extension of Commission authority over their operations, and attempts were made to exclude municipal utilities operating exclusively within municipal limits.[43]

The bill did pass both houses, however, and it provided a powerful policy direction for the regulation of electric utilities in the State. The Grid Bill's primary purpose was to provide for the establishment and maintenance of a coordinated energy grid for the State; established utility service territories are an essential part of a coordinated energy grid. Thus, since its passage in 1974, the Grid Bill has become the focus of the Commission's regulatory authority over retail service territories of electric utilities in the State. Every Florida Supreme Court opinion that has considered electric and gas territorial matters since

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37. FLA. STAT. § 366.04(3) (1974).
38. *Id.* § 366.05(7).
39. *Id.* § 366.05(8).
40. *Id.* § 366.04(2).
41. *See* FLA. STAT. §§ 366.04(2)(c), .05(7)-(8) (1989).
42. Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (May 21, 1974) (on file with comm.).
43. Attempts were also made to exclude specific municipal utilities from the bill. *See* FLA. S. JOUR. 747 (Reg. Sess. 1974).

1974 has acknowledged the Commission's authority and responsibility under the Grid Bill to prevent uneconomic duplication of electric facilities by the orderly establishment of service territories.[44]

2. *Legislation in the 1980s*

In the following decade, no further legislation on territorial matters was considered by either the House or the Senate. Then in 1984, a bill was introduced at the request of the Florida PSC that proposed regulatory action to prescribe territorial boundaries for all electric utilities on a statewide basis.[45]

The Commission had initiated an investigation of electric service areas in 1981 because of its concern that Florida's burgeoning population growth had increased the conflict between utilities seeking to serve the same areas. The Commission recognized that the convergence of territories increased the potential for uneconomic duplication of facilities and the need to establish territorial agreements and to resolve territorial disputes.[46]

The Commission's proposed legislation sought to encourage utilities to reach agreements setting territorial boundaries as the most efficient and economical means for establishing territories. The resolution of territorial disputes often involved substantial expenditures of both time and money. Also, absent a territorial agreement or Commission order allocating territory, utilities would rush to serve an area in order to establish a claim to the territory, resulting in rival utilities building duplicative facilities to serve the same customers.[47]

The 1984 bill would have given the Commission explicit authority to modify territorial agreements that had been submitted for approval.[48]

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44. Florida Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253 (Fla. 1990); Public Serv. Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989); Lee County Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987); City Gas Co. v. Florida Pub. Serv. Comm'n, 501 So. 2d 580 (Fla. 1987); Gulf Power Co. v. Florida Pub. Serv. Comm'n, 480 So. 2d 97 (Fla. 1985); Utilities Comm'n v. Florida Pub. Serv. Comm'n, 469 So. 2d 731 (Fla. 1985); Gulf Coast Elec. Coop. v. Florida Pub. Serv. Comm'n, 462 So. 2d 1092 (Fla. 1985); Escambia River Elec. Coop. v. Florida Pub. Serv. Comm'n, 421 So. 2d 1384 (Fla. 1982); Gulf Power Co. v. Hawkins, 375 So. 2d 854 (Fla. 1979); Gainesville-Alachua County Regional Elec., Water & Sewer Utils. Bd. v. Clay Elec. Coop., 340 So. 2d 1159 (Fla. 1976).

45. Letter from Fla. Pub. Serv. Comm'n Chair Gerald L. Gunter to H. Lee Moffit, H.R. Speaker (Feb. 21, 1984) (on file at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

46. Fla. Pub. Serv. Comm'n, tape recordings of Internal Affairs conference (Sept. 20, 1983) (on file with Fla. Pub. Serv. Comm'n Dir. of Records and Reporting).

47. Fla. Pub. Serv. Comm'n, tape recordings of Internal Affairs conference (Sept. 20, 1983) (on file with Fla. Pub. Serv. Comm'n Dir. of Records and Reporting).

48. *See* Fla. SB 464 (1984).

The authority to modify agreements with the concurrence of the participating utilities was described as a means of simplifying legal proceedings involving approval of territorial agreements.[49] Rather than denying approval of an agreement because a particular aspect of the agreement was unsatisfactory, the Commission could modify the agreement with the concurrence of the utilities.[50] Under the bill's provisions, the Commission would have retained authority to disapprove the agreement outright if it did not approve of the agreement as a whole, or if the utilities did not concur.[51] The bill would also have authorized the Commission to "prescribe territorial boundaries for any utility, which, by January 1, 1986, [had] not filed with the Commission territorial agreements reflecting its service territory."[52]

The bill was referred to the Senate Committee on Economic, Community and Consumer Affairs and to the Committee on Commerce. No action was taken, and the measure died in committee.[53]

The following year, the Public Service Commission again recommended legislation regarding territorial boundaries. The bill was filed in both the Senate and the House, and it was identical to the 1984 bill in all significant respects.[54] The House bill was referred to the Committee on Regulated Industries and Licensing, which proposed a committee substitute that substantially revised the Commission's version of the bill. This bill, Committee Substitute for House Bill 650 (1985), reiterated previous court declarations that "inefficient and uneconomic duplication of electric service facilities" was contrary to the public interest.[55] It also proposed more detailed provisions for setting utility boundaries. The bill would still have required utilities to file agreements by January 1, 1987, but the bill would also have required the Commission to adopt rules establishing the criteria it would use in prescribing territorial boundaries should the utilities fail to file agreements. The Commission's rules were to be submitted to the Legislature for review and approval. The bill went on to provide that if the rules were not approved by the Legislature, they would not become effective, and the statutory criteria, court decisions, and Commission orders then in effect would govern Commission prescription of terri-

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. FLA. LEGIS., HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF SENATE BILLS at 160-61, SB 464.
54. The date for utilities to file territorial agreements was extended one year to January 1, 1987.
55. Fla. H.R. Comm. on Reg'd Indus. & Licensing, CS for HB 650 (1985).

torial boundaries. The Commission would have been given explicit authority to require the transfer of facilities and property from one electric supplier to another in connection with the allocation of service territories, and the legislation proposed a method for determining compensation for the sale or transfer of facilities.[56]

Finally, the bill provided that any gain or loss from a sale or transfer "ordered or approved by the Commission, or resulting from a sale or transfer of electric facilities or property which has been or is otherwise compelled by force of law, shall inure to the stockholders of such electric public utility."[57] This provision drew opposition from the Commission and ultimately resulted in the demise of the proposed legislation. The Commission was concerned that utility property, the investment in which had been recovered in rates and which had appreciated in value, would be sold at a profit with no opportunity for that profit to benefit the ratepayers. Throughout the 1985 session, legislators, utility representatives, and the Commission unsuccessfully attempted to draft a compromise acceptable to all.[58] The House and Senate bills died in the Senate Committee on Commerce.[59]

At several internal affairs meetings in the fall of 1985, the Commission again considered recommending legislation to establish territorial boundaries.[60] Representatives for investor-owned utilities, rural electric cooperatives, and municipal electric utilities participated in these discussions.[61] A reassessment of its existing authority under the Grid Bill led the Commission to conclude that it had not yet used that authority to its fullest extent.[62] The Commission concluded that the Legislature had already provided it with the necessary tools to take interdictory measures to prevent uneconomic duplication of facilities.[63] The Commission directed its staff to develop rules under its existing statutory authority to accomplish the same purposes it had previously advocated through proposed legislation: to encourage

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56. *Id.*

57. *Id.*

58. Fla. Pub. Serv. Comm'n, tape recordings of Internal Affairs conference (Apr. 30 and May 7, 1985) (discussion of proposed legislation on territorial boundaries) (on file with Fla. Pub. Serv. Comm'n Dir. of Records & Reporting).

59. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF HOUSE BILLS at 94, HB 650.

60. Fla. Pub. Serv. Comm'n, minutes of Internal Affairs conference (Oct. 1, 1985, Oct. 7, 1985, and Nov. 12, 1985) (on file with Fla. Pub. Serv. Comm'n Dir. of Records & Reporting).

61. Fla. Pub. Serv. Comm'n, tape recording of Internal Affairs conference (discussion of proposed territorial legislation) (Nov. 12, 1985) (on file with Fla. Pub. Serv. Comm'n Dir. of Records & Reporting).

62. *Id.*

63. *Id.*

agreements and to otherwise establish boundaries in areas where there was a significant likelihood of duplication of facilities and of territorial disputes.[64]

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64. The Commission opened a rulemaking docket in April of 1987, *In re* Adoption of Rules 25-6.0439 through 6.0442, Territorial Agreements & Disputes, Docket No. 870372-EU. After several false starts, considerable controversy, and delay, territorial rules for electric utilities were adopted in March of 1990. These rules, codified at Florida Administrative Code rules 25-6.0439-.0442, provide:

25-6.0439 Territorial Agreements and Disputes for Electric Utilities - Definitions.
(1) For the purpose of Rules 25-6.0440, 25-6.0441, and 25-6.0442, the following terms shall have the following meaning:
(a) "Territorial 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, the terms and conditions pertaining to implementation of the agreement, and any other terms and conditions pertinent to the agreement;
(b) "Territorial dispute" means a disagreement as to which utility has the right and the obligation to serve a particular geographical area.
25-6.0440 Territorial Agreements for Electric Utilities.
(1) All territorial agreements between electric utilities shall be submitted to the Commission for approval. Each territorial agreement shall clearly identify the geographical area to be served by each utility. The submission shall include: (a) a map and a written description of the area, (b) the terms and conditions pertaining to implementation of the agreement, and any other terms and conditions pertaining to the agreement, (c) the number and class of customers to be transferred, (d) assurance that the affected customers have been contacted and the difference in rates explained, and (e) information with respect to the degree of acceptance by affected customers, i.e., the number in favor of and those opposed to the transfer. Upon approval of the agreement, any modification, changes, or corrections to this agreement must be approved by this Commission.
(2) Standards for Approval. In approving territorial agreements, the Commission may consider, but not be limited to consideration of:
(a) the reasonableness of the purchase price of any facilities being transferred;
(b) the reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electrical service to the existing or future ratepayers of any utility party to the agreement; and
(c) the reasonable likelihood that the agreement will eliminate existing or potential uneconomic duplication of facilities.
(3) The Commission may require additional relevant information from the parties of the agreement, if so warranted.
25-6.0411 Territorial Disputes for Electric Utilities.
(1) A territorial dispute proceeding may be initiated by a petition from an electric utility requesting the Commission to resolve the dispute. Additionally the Commission may, on its own motion, identify the existence of a dispute and order the affected parties to participate in a proceeding to resolve it. Each utility which is a party to a territorial dispute shall provide a map and a written description of the disputed area along with the conditions that caused the dispute. Each utility party shall also provide a description of the existing and planned load to be served in the area of dispute and a description of the type, additional cost, and reliability of electrical facilities and other utility services to be provided within the disputed area.
(2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:
(a) the capability of each utility to provide reliable electric service within the disputed

The issue of territorial boundaries surfaced again in the 1989 Regular Session. In that session, the Legislature conducted a review of the Commission's electric and gas utility regulatory statute,[65] pursuant to the Regulatory Sunset Act.[66] The House Committee on Science, Industry and Technology prepared House Bill 1805, which contained the House's proposed revisions to chapter 366. The bill contained language for establishing approved retail electric service territories. The bill would have established the utilities' initial boundaries as either: (1) those established by a territorial agreement or Commission order in effect before July 1, 1990, or (2) those established by drawing a line "substantially equidistant between an electric utility's distribution line and the nearest existing distribution lines of any other electric utility."[67] The initial boundary lines could be protested within 120 days after the Commission issued a map delineating the boundary lines.[68] Additionally, after the initial establishment of lines, joint petitions by electric utilities to adjust the lines were also permitted, and the Commission could reassign a customer from one utility to another if the service from the original utility was inadequate.[69] Changes in municipal boundaries would not affect the right of a utility to serve custom-

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area with its existing facilities and the extent to which additional facilities are needed;
(b) the nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
(c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and
(d) customer preference if all other factors are substantially equal.
(3) The Commission may require additional relevant information from the parties of the dispute if so warranted.
25-6.0442 Customer Participation.
(1) Any customer located within the geographic area in question shall have an opportunity to present oral or written communications in commission proceedings to approve territorial agreements or resolve territorial disputes. If the commission proposes to consider such material, then all parties shall be given a reasonable opportunity to cross-examine or challenge or rebut it.
(2) Any substantially affected customer shall have the right to intervene in such proceedings.
(3) In any Commission proceeding to approve a territorial agreement or resolve a territorial dispute, the Commission shall give notice of the proceeding in the manner provided by Rule 25-22.0405, F.A.C.

Territorial rules for natural gas utilities were adopted on February 25, 1991. FLA. ADMIN. CODE ANN. r. 25-17.047-.0473 (1991).

65. FLA. STAT. §§ 366.01-.85 (1989 & Supp. 1990).
66. FLA. STAT. § 11.61 (1989).
67. Fla. HB 1805 (1989).
68. *Id.*
69. *Id.*

ers in its assigned territory.[70] In its deliberations, the House Committee on Science, Industry and Technology voted down an attempt to remove the language drawing territorial boundaries.[71]

The Senate Committee on Economic, Professional and Utility Regulation proposed a separate bill, Senate Bill 1224. The Committee staff's report addressed the question whether service territories for electric and gas utilities should be established.[72] Among the issues covered by the staff report was the argument that statewide territorial boundaries would more adequately protect utilities from the threat of federal antitrust litigation over territorial agreements.[73] Although only two federal antitrust cases have arisen involving utility territorial agreements approved by the Florida Public Service Commission, both have occurred since 1986, and both raised questions concerning the antitrust status of territorial agreements between Florida utilities.[74]

The staff's report also discussed the potential cost to ratepayers when two utilities compete for previously unallocated territory.[75] The report recommended that the statute be amended to allow the Commission to modify agreements and to specifically enunciate the Commission's authority to declare a dispute. Language to this effect was included in Senate Bill 1224.[76] The early versions of the Committee's bill contained language to make it clear that the Commission should continue to develop territorial boundaries for utilities through agreements and dispute resolution, rather than through certification of territories.[77] An amendment to incorporate language similar to that in House Bill 1805, proposing to establish territorial boundaries by line drawing, was offered on the floor of the Senate. It was defeated by the full Senate by a vote of twenty-two to eighteen.[78]

The revised version of Chapter 366 ultimately enacted in 1989 did not provide for statewide establishment of territorial boundaries for electric and gas utilities.[79] Instead, the Commission's authority to resolve disputes on its own motion was specifically recognized, and the

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70. Fla. HB 1805 (1989).

71. Fla. H.R. Comm. on Science, Indus. & Tech'y, Committee Secretary's Record of Vote on Amendment No. 13 to PCB 89-01 (May 2, 1989) (on file with comm.).

72. STAFF OF FLA. S. COMM. ON ECONOMIC, PROFESSIONAL AND UTILITY REGULATION, A REVIEW OF CHAPTER 366, FLORIDA STATUTES, RELATING TO PUBLIC UTILITIES 34-38 (Apr. 1989) (on file with comm.) [hereinafter CHAPTER 366 REVIEW].

73. *Id.*

74. These two cases are discussed in detail in Part III, *infra*.

75. CHAPTER 366 REVIEW, *supra* note 72, at 34-38.

76. Fla. SB 1224 (1989).

77. Fla. CS for SB 1224 (1989).

78. FLA. S. JOUR. 629 (Reg. Sess. May 31, 1989).

79. Ch. 89-292, 1989 Fla. Laws 1796-1812.

Commission's authority to approve agreements and resolve disputes for natural gas utilities was specifically set forth in a new subsection.[80]

C. *The 1991 Session: House Bill 1863*

A draft bill addressing territorial boundaries for electric utilities first surfaced in the regulatory community several weeks before the 1991 Legislature convened, and this bill was introduced in the House on the first day of the Regular Session.[81] The bill was referred to the Committee on Regulated Services and Technology and to the Committee on Appropriations. The Regulated Services and Technology Committee referred the bill to its subcommittee on Public Utilities, which heard a long and complex debate on the bill on March 13, 1991.[82]

The proposed legislation provided for the division of all electric utility territories in the State into "certified approved retail service areas" by January 1, 1993.[83] The lines delineating the service territory of a particular utility would be established by Commission-approved territorial agreements and by Commission orders resolving territorial disputes. Where boundaries could not be set by agreement or by dispute resolution, the proposed bill directed the Commission to set the boundaries by "a line or lines approximately equidistant between an electric utility's existing distribution line and the nearest existing distribution lines of any other electric utility in every direction on the effective date of this act."[84]

The bill also provided that any party aggrieved by the equidistant method could, within six months of passage of the Act, petition the Commission to set the boundaries in accordance with other criteria set out in the bill.[85] Specifically, those criteria were: the nature and proximity of existing distribution lines to the area in question and the types of load to be served in the area; the degree to which the distribution lines and facilities would provide reasonably sufficient, adequate, and efficient retail electric service; the elimination and prevention of uneconomic duplication of facilities; and the facilitation of a coordinated electric grid.[86]

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80. *Id.* at 1799 (codified at FLA. STAT. §§ 366.04(2)(e), .04(3)(1989)).

81. Fla. HB 1863 (1991). A similar bill, Senate Bill 1808, was introduced in the Senate, but the House measure was pursued as the vehicle for passage of territorial legislation.

82. Fla. H.R. Comm. on Reg'd Serv. & Tech'y, Subcomm. on Public Utilities, tape recordings of proceedings (Mar. 13, 1989) (on file with comm.).

83. Fla. HB 1863 (1991).

84. *Id.*

85. *Id.*

86. *Id.*

The proposed bill directed the Commission to encourage utilities to enter into territorial agreements before the 1993 deadline.[87] The proposal reiterated that service areas thus established would be exclusive, but that facilities of one utility could be extended through the territory of another if necessary to connect the utility's facilities or to serve any of the utility's customers. The bill would have given the Commission authority to modify territorial boundaries, either on its own motion, on petition of affected electric utilities, or on petition by the Public Counsel, if the modification promoted the purposes and objectives of chapter 366. In deciding to modify a territorial boundary, the Commission was to be guided by the same criteria listed above.

Perhaps most significant for the fate of the proposed legislation were two provisions that specifically concerned municipalities and local governments. The bill provided that annexation of a utility's service area into the corporate limits of a municipality would not affect the authority of that utility to provide service in its certified area.[88] The bill also eliminated the right of local governments to condemn the facilities of an electric utility in order to acquire the right to provide electric service within their governmental boundaries.[89]

Florida Power & Light Company (FPL) was the only investor-owned utility that publicly supported the legislation.[90] In testimony presented to the Public Utilities subcommittee of the House Committee on Regulated Services and Technology, FPL supported the bill because it believed that growth in the electric utilities' service territories, spurred by the State's rapid population growth, had led to overlapping service territories and a demonstrable increase in the number of disputes brought to the Commission.[91] Florida Power & Light argued that the time had come to certify service areas for electric utilities statewide.[92] Statewide territorial boundaries would facilitate efficient planning for the construction and deployment of electric utility facilities.[93] Utilities would be certain of the territory they were obligated to

87. The bill would have permitted disputes to be filed after the 1993 deadline. The bill would have directed the Commission to resolve such disputes in accordance with the equidistant criterion or, upon petition, based on the criteria described above. *Id.*

88. Fla. HB 1863 (1991).

89. *Id.*

90. Fla. H.R. Comm. on Reg'd Indus. & Tech'y, Subcomm. on Public Utilities, tape recording of proceedings (Mar. 13, 1991) (on file with comm.). Gulf Power Company opposed the legislation, and Florida's two other major investor-owned electric utilities, Florida Power Corporation and Tampa Electric Company, did not take any public position on the bill.

91. *Id.*

92. *Id.*

93. *Id.*

serve and they would be free of the burden of planning to construct facilities to serve unallocated territory.[94]

The rural electric cooperatives supported the bill for the same reasons. Their advocates also argued that permanent territorial boundaries would eliminate the need to litigate territorial disputes before the Commission—a costly and arduous activity. Costs incurred in territorial dispute litigation, the cooperatives argued, are most often borne by the utilities' ratepayers, without receipt of any significant benefit in return.[95]

Gulf Power Company and the Florida Municipal Electric Association opposed the proposed legislation.[96] Gulf Power pointed out that drawing lines equidistant from current facilities did not necessarily result in the provision of electricity at the least possible cost, because generation facilities and other facilities needed to provide electric service were not considered in the determination of which utility should serve an area.[97] Depending on the type of growth and where that growth occurred, the utility chosen to serve the area might not be the least-cost provider in the future. Gulf Power explained that some distribution lines might not be able to serve the capacity demands of the new customers.[98] Moreover, these parties argued, the future growth of an area could occur closest to one utility's territory, but be allocated to another utility's territory.[99]

Current Commission policies and procedures, Gulf Power argued, properly assure the allocation of territory to the utility that can provide it at the least cost.[100] Gulf stated that its present rates for electricity were substantially lower than the rural electric cooperatives that served nearby areas.[101] By allocating territory to those cooperatives now, the Legislature was insuring higher rates for those customers in the future.[102]

Gulf Power questioned whether the proposed legislation would eliminate territorial disputes, because even after the boundaries were

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* Gulf also pointed out that cooperatives have virtually no regulatory body overseeing their operations to ensure that the costs they incur in providing service are reasonable.

drawn, the opportunity remained to contest those boundaries. Gulf argued that the number of territorial disputes had actually declined in recent years.[103] Gulf Power considered the legislation an exercise in futility, because the boundaries could always be changed according to least-cost criteria. If the boundaries could always be changed, there would be no improved certainty in utility planning.[104]

Individual municipalities and the Florida Municipal Electric Association (FMEA) espoused reasoning similar to Gulf Power in their opposition to the bill. The FMEA argued that the present system worked well and that no additional legislation was needed.[105] Since 1974, only a small number of disputes before the Commission had involved municipal electric utilities. Most of their territorial boundaries had been established by agreements. The FMEA predicted that the equidistant criteria would be challenged as not being fair, just, and reasonable.[106] Also, lines would need to be modified with the passage of time, because growth patterns would make the boundaries unresponsive to the goal of providing electricity at the least possible cost.[107]

The municipal utilities also pointed out that the Commission presently has the authority both to identify and to resolve disputes over which utilities are obligated to serve a particular area.[108] The Commission can establish boundaries in areas where the potential for uneconomic duplication of facilities is significant—it does not have to wait for the utilities to petition for dispute resolution.[109]

The municipalities' primary criticism of the bill was that it would reduce:

> the authority of municipalities to raise revenues . . . from: (1) the establishment, operation, and expansion of municipal electric utility systems; and (2) fees charged to other utilities for the privilege of providing electric service within municipal corporate limits.[110]

The municipal governments argued that territorial boundaries set pursuant to the bill would preclude municipal utilities from adding to

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Memorandum of Law from Messer, Vickers, Caparello, Madsen & Lewis to Fla. Mun. Elec. Ass'n (Apr. 1, 1991) (on file at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

their service territories through annexation and condemnation and would take away their authority to grant franchises to other utilities.[111] Some existing territorial agreements between municipal electric utilities and other utilities provide that service territories can be modified to include newly-annexed territory in the municipality's territory. Additionally, where agreements do not provide for such modifications, municipalities can nonetheless acquire private utility property and provide service within their municipal boundaries through the exercise of their eminent domain powers.[112] The authority to condemn such property is based on the principle that the provision of electric service within a municipality is a governmental function that the local government may perform itself or may grant a franchise to a private company to perform.[113]

The bill proposed to prohibit municipalities from exercising their powers of eminent domain to acquire private electric power facilities.[114] The exclusive right to serve an area would have been established through the procedures set out in the bill and would have been unaffected by later municipal annexations.[115]

The municipalities predicted that the bill would have a significant detrimental revenue impact on them. The powers of municipalities to provide electric service and the impact of the bill on those powers were discussed at length in a memorandum prepared for the FMEA.[116] In it, the FMEA argued that the territorial legislation required a two-thirds vote of both the House and the Senate pursuant to the new 1990 amendment to the Florida Constitution, article VII, section 18,[117] because the legislation would reduce the authority of municipalities to raise revenues.[118]

In contrast, a memorandum prepared for Florida Power and Light concluded that the bill was not subject to the two-thirds majority requirement.[119] Both of these memoranda, and a follow-up memoran-

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111. Memorandum of Law from Messer, Vickers, Caparello, Madsen & Lewis to Fla. Mun. Elec. Ass'n (Mar. 20, 1991) (on file at Fla. Dep't. of State, Div. of Archives, Tallahassee, Fla.) [hereinafter March 20 Memorandum].

112. *Id.* at 7; *see also* FLA. STAT. § 73.0715 (1989), which provides the procedure for valuing electric utility property taken by eminent domain.

113. March 20 Memorandum, *supra* note 111, at 7; *see* Saunders v. City of Jacksonville, 25 So. 2d 648 (Fla. 1946) (cited in March 20 Memorandum).

114. Fla. HB 1863 (1991).

115. *Id.*

116. March 20 Memorandum, *supra* note 111.

117. Fla. CS for CS for CS for CS for HJRs 139-40, (1989) (approved by voters Nov. 6, 1990).

118. March 20 Memorandum, *supra* note 111.

119. Memorandum of Law from Steel Hector & Davis to Tracy Danese, Fla. Power & Light Co. (Mar. 14, 1991) (on file at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

dum prepared for FMEA, were widely circulated among legislators and lobbyists during the legislative session. The revenue issue is only one indication of the level of controversy surrounding the bill.

When the constitutional issue was raised on the floor of the House, the bill was immediately referred to the Committee on Finance and Taxation and there amended to negate any adverse impact on local revenues. First, the amendments recognized the authority of municipalities to continue serving the areas they currently served. Second, the amendments specifically authorized municipalities to charge franchise fees of up to six percent of revenues received from the sale of electricity within the municipal limits, or the amount of the fee currently charged, whichever was greater.[120]

A review of the discussion at the Finance and Taxation Committee meeting and the subsequent floor debate on the bill indicates that this issue was not resolved to the satisfaction of many House members. Legislators questioned whether the amendments did, in fact, negate the adverse revenue impact on local governments, and they were unconvinced that the constitutional issues with respect to article VII, section 18, could be resolved without a court challenge.[121] The debate intertwined several fundamental issues of government,[122] which will undoubtedly continue to plague any future proposed territorial boundary legislation.

Committee Substitute for Committee Substitute for House Bill 1863 passed the House by a vote of 57 to 54.[123] However, the bill died in the Senate Commerce Committee. The Senate Commerce Committee did consider the Senate companion to HB 1863, Senate Bill 1808. The Commerce Committee heard an abbreviated version of the debate on the bill that took place in the House. The Committee passed a Committee Substitute for SB 1808 that was substantially similar to Committee Substitute for Committee Substitute for 1863.[124] That bill, however, died in the Senate Committee on Community Affairs,[125] and with it died the proponents' hope for legislation during the 1991 session setting territorial boundaries for electric utilities.

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120. Fla. CS for CS for HB 1863 (1991).

121. Fla. H.R. Comm. on Fin. & Tax'n, tape recording of proceedings (Mar. 22, 1991) (on file with comm.); Fla. H.R., tape recording of debate on House floor (Mar. 26 & 28, 1991) (on file with Clerk).

122. Fla. H.R. Comm. on Fin. & Tax'n, tape recording of proceedings (Mar. 22, 1991) (on file with comm.); Fla. H.R., tape recording of debate on House floor (Mar. 26 & 28, 1991) (on file with Clerk).

123. FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF HOUSE BILLS at 315, HB 1863.

124. *Id.* HISTORY OF SENATE BILLS at 156, SB 1808.

125. *Id.*

III. Recent Federal Antitrust Challenges to Florida Utility Territorial Agreements

In contrast to the legislative debates described above, the federal antitrust status of Florida utility territorial agreements recently has come closer to resolution. This section discusses two federal cases involving the antitrust status of territorial agreements: *Consolidated Gas Co. v. City Gas Co.*[126] and *Union Carbide v. Florida Power & Light Co.*[127]

A. Consolidated Gas Co. v. City Gas Co.

In the 1965 antitrust case between City Gas and Peoples Gas, City Gas's counterclaim against Peoples Gas alleged that the territorial agreement between the two was void and unenforceable under state and federal antitrust laws.[128] Because federal courts have exclusive jurisdiction over federal antitrust claims, the Florida Supreme Court addressed only the issue whether the territorial agreement violated state antitrust law; the court found that it did not.[129]

In 1987, some twenty-two years later, a nonparticipant in the agreement, Consolidated Gas Company of Florida, again raised the unresolved issue of the federal antitrust status of the territorial agreement between City Gas and Peoples Gas.[130]

Consolidated Gas was a small distributor of liquified petroleum gas (LP) that had decided to sell natural gas because the high price of LP relative to natural gas made LP an uncompetitive energy source.[131] Consolidated Gas alleged that, in the course of its attempt to enter the market and compete as a distributor of natural gas, it had been the victim of numerous anticompetitive offenses perpetrated by City Gas, the large, established distributor of natural gas in the area surrounding Consolidated's small enclave of LP distribution activities.[132] The gravamen of Consolidated's federal antitrust claim was that City Gas's anticompetitive practices violated the Sherman Act's prohibition against monopolization.[133]

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126. 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *aff'd en banc*, 912 F.2d 1262 (11th Cir. 1990), *vacated*, 111 S. Ct. 1300 (1991).

127. No. 88-1622-CIV-T-13C (M.D. Fla. filed Oct. 14, 1988).

128. City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429, 431 (Fla. 1965).

129. *Id.* at 431-32.

130. 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *aff'd en banc*, 912 F.2d 1262 (11th Cir. 1990), *vacated*, 111 S. Ct. 1300 (1991).

131. Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 299 (11th Cir. 1989).

132. 880 F.2d at 304; 665 F. Supp. at 1501-02.

133. 15 U.S.C. § 2 (1988).

The Eleventh Circuit summarized six acts that the district court had determined to be an abuse of City Gas's monopoly power.[134] Five of these allegations shared a common allegation of action taken by City Gas against Consolidated. That much cannot be said for the first of the acts found by the district court to be an abuse by City Gas: "agreeing in 1960 with Peoples Gas not to compete . . . in their respective territories in the sale of natural gas."[135]

Thus, the 1960 City Gas-Peoples Gas territorial agreement became a tag-along to City Gas's other activities complained of by Consolidated Gas, even though the agreement did not even concern Consolidated Gas. Arguably, this issue was both irrelevant to Consolidated's substantive antitrust complaints and incorrectly decided by the district court.

As discussed below, the state action doctrine enunciated in *Parker v. Brown*[136] should have provided the means to affirm the federal antitrust immunity of the Commission-approved territorial agreement between Peoples Gas and City Gas, yet the district court—and the initial opinion of the Eleventh Circuit—rejected that conclusion. On rehearing by the Eleventh Circuit, however, the ten *en banc* judges were evenly split on the issue of the antitrust status of this territorial agreement—even though City Gas's antitrust liability on the other five monopolization issues was affirmed by a vote of seven to three.[137] Because the case was ultimately settled and the opinion vacated by the United States Supreme Court and remanded for dismissal, the Florida Supreme Court's approval of the territorial agreement in *City Gas Co. v. Peoples Gas System* remains undisturbed.[138] However, the analyses of the district court and the Eleventh Circuit are still reported, if no longer precedential; they therefore deserve comment.

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134. *Consolidated Gas*, 880 F.2d at 304. Although acts two through six did not involve territorial agreements, they are listed here to give an overview of the antitrust issues in this litigation. The district court found that City Gas abused its power:

> 2. By refusing to sell or transport natural gas to Consolidated at a reasonable price.
> 3. By attempting to purchase Consolidated and eliminate it as a potential competitor.
> 4. By acquiring two other small competitors.
> 5. By intervening in and opposing Consolidated's FERC [Federal Energy Regulatory Commission] allocation proceedings seeking permission to sell natural gas.
> 6. By not charging Consolidated's customers the usual "contribution in aid of construction" to extend service to them in an effort to lure Consolidated's customers away.

135. *Id.*

136. 317 U.S. 341 (1943).

137. 912 F.2d 1262, 1262-1338 (opinions of Johnson & Kravitch, JJ., dissenting; Tjoflat, C.J., dissenting; Anderson, J., dissenting in part; Edmondson, J., dissenting in part).

138. *See* United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

In *Parker v. Brown*, the United States Supreme Court held that federal antitrust laws were not intended to reach state-regulated anticompetitive activities.[139] That holding came to be known as the state action doctrine. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Court established a two-pronged test for private party anticompetitive conduct to warrant state action immunity from antitrust liability: (1) the conduct had to be performed pursuant to a clearly articulated policy of the state to displace competition with regulation, and (2) the conduct had to be closely supervised by the state.[140]

As to the first prong of the *Midcal* test, *Southern Motor Carriers Rate Conference, Inc. v. United States* in turn established that:

> [a] private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.[141]

Applying the foregoing authority, the territorial agreement between City Gas and Peoples Gas met the first prong of the *Midcal* test for state action immunity. Section 366.04(1), Florida Statutes, gave the Commission jurisdiction to "regulate and supervise each public utility with respect to its rates and service." The Commission, in its order approving the territorial agreement, explicitly relied on this clearly articulated policy of the Legislature to displace competition with regulation:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate unnecessary and uneconomical duplication of plant and facilities which always accompany expansions into areas already served by competing utilities are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest.[142]

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139. 317 U.S. at 350-52. In discussing the question of the Sherman Act's applicability to California's agricultural marketing program, which regulated the handling, disposition, and prices of raisins, the Court stated: "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." *Id.* at 351.

140. 445 U.S. 97, 105 (1980).

141. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978)).

142. *In re* Territorial Agreement Between Peoples Gas Sys. and City Gas Co., Docket No. 6231-GU, Order No. 3051, at 1 (Fla. Pub. Serv. Comm'n Nov. 9, 1960).

As discussed earlier, the Florida Supreme Court addressed the question of whether the Commission's approval of the City Gas-Peoples Gas territorial agreement was authorized by the Legislature's grant of regulatory authority. The Court answered in the affirmative, based on an extensive and detailed statutory construction of chapter 366: "[W]e also conclude that the commission has adequate implied authority under Ch. 366 to validate such agreements as the one before us."[143]

That should have been found by the lower federal courts to satisfy the first prong of the *Midcal* test. As stated in *Cotton States Mutual Insurance Co. v. Anderson*, "'state courts have the right to construe their own statutes,' and *federal courts are bound* by that state interpretation."[144]

As to the second prong of the *Midcal* test, the Eleventh Circuit noted: "Active supervision requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[145] In its order reviewing and approving the City Gas-Peoples Gas territorial agreement, the Public Service Commission stated that the agreement "can have no validity without the approval of this Commission."[146]

Obviously, the active supervision test of *Midcal* was met. The Commission reviewed the territorial agreement and disapproved as invalid *ab initio* any such agreements not receiving Commission approval.[147] As recently stated by the United States Court of Appeals for the First Circuit in *New England Motor Rate Bureau, Inc. v. Federal Trade Commission*:

> Where as here the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established [as to the active supervision prong of *Midcal*]. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would

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143. City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429, 436 (Fla. 1965).

144. 749 F.2d 663, 667 (11th Cir. 1984) (quoting Bank of Heflin v. Miles, 621 F.2d 108, 113 (5th Cir. 1980) (emphasis added)).

145. Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 303 (11th Cir. 1989).

146. *In re* Territorial Agreement Between Peoples Gas Sys. and City Gas Co., Docket No. 6231-GU, Order No. 3051, at 1 (Fla. Pub. Serv. Comm'n Nov. 9, 1960).

147. *Id.*

> become a means for federal oversight of state officials and their programs.[148]

The now-vacated Eleventh Circuit opinion obviously conflicts with the First Circuit analysis. Florida's regulatory program providing for Commission-approved utility territorial agreements has been closely supervised—as well as clearly articulated—for thirty years.[149] For *Midcal* purposes, the relevant questions were whether, as a matter of law, the state policy to replace competition with regulation was clearly articulated, and whether activity engaged in pursuant to that policy was closely supervised. As a matter of law, the relevant Florida Supreme Court holdings and Public Service Commission orders answered those questions in the affirmative. Had the case not settled, the United States Supreme Court would have had the opportunity to correct the errors of the lower federal courts on these issues. Indeed, Judges Johnson and Kravitch had already dissented on that very point:

> The [Eleventh Circuit] concludes that the Florida Supreme Court should not have the last word on the proper interpretation of chapter 366 and endorses the district court's critique of the Florida Supreme Court's analysis of the Florida statute. . . . Because *the Florida Supreme Court is the final authority on the meaning of chapter 366*, we should not endorse such a critique.[150]

The Supreme Court's order vacating the Eleventh Circuit's opinion has nullified *Consolidated Gas* as precedent. Thus, the state action antitrust immunity of the Peoples Gas-City Gas territorial agreement remains undisturbed.

B. Union Carbide v. Florida Power & Light Co.

Only one antitrust case involving a Florida utility territorial agreement has been filed since *Consolidated Gas*: *Union Carbide v. Florida Power & Light Co.*[151] Union Carbide claimed that it was damaged because FPL's charges for electricity to Union Carbide's plant at Mims, Florida, were higher than the rates that Florida Power Corporation (FPC) would charge were FPC not precluded by a Commission-ap-

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148. 908 F.2d 1064, 1071 (1st Cir. 1990).

149. *In re* Territorial Agreement Between Peoples Gas Sys. and City Gas Co., Docket No. 6231-GU, Order No. 3051 (Fla. Pub. Serv. Comm'n Nov. 9, 1960); City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429 (Fla. 1965).

150. *Consolidated Gas*, 912 F.2d 1262, 1265 (11th Cir. 1990) (Johnson and Kravitch, JJ., dissenting) (emphasis added).

151. No. 88-1622-CIV-T-13C (M.D. Fla. filed Oct. 14, 1988).

proved territorial agreement with FPL from supplying electricity to the Mims plant. Because *Union Carbide* is ongoing, no extensive comment on it is in order, except to note that the Supreme Court's order vacating the *Consolidated Gas* decision[152] has nullified that opinion as authority for the proposition that the territorial agreement between FPL and FPC lacks antitrust immunity under the state action doctrine.[153]

Interested observers should well note that the *Consolidated Gas* scenario is capable of repetition each time a nonregulated distributor of LP or propane decides to enter the regulated natural gas market. Potential participants in similar "range wars," "racing to serve" activities, and other accoutrements to territorial disputes should carefully note the Commission's policy that such disputes be anticipated and resolved through "some reasonable territorial agreement."[154] Racing to serve is not condoned.[155] The Florida Supreme Court has condemned range wars between utilities and has "repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities racing to serve."[156]

Antitrust cases are fact-intensive.[157] Therefore, it is difficult to predict what effect—if any—legislation like the utility territorial boundary bills discussed above might have on future antitrust litigation. The impetus behind that legislation, as well as the history of such legislation as set out in this Article, appears to reflect concerns other than avoiding antitrust litigation. That territorial legislation should be driven by concerns other than potential antitrust ramifications makes sense, particularly because only two Commission-approved territorial agreements have been the subject of antitrust challenges in Florida during the last three decades.

IV. CONCLUSION

To this point in its development, Florida's preferred method of allocating electric and gas utility territories has responded effectively to

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152. 111 S. Ct. 1300 (1991).

153. *Id.*

154. *In re* Application of Fla. Power Corp. for Approval of Territorial Agreement with City of Ocala, Docket No. 7061-EU, Order No. 3799, at 3 (Fla. Pub. Serv. Comm'n Apr. 28, 1965).

155. *In re* Petition of Gulf Power Co. Involving a Territorial Dispute with Gulf Coast Elec. Coop., 84 Fla. Pub. Serv. Comm'n Rep. 146 (Order No. 12858, Jan. 10, 1984).

156. *See* Lee County Elec. Coop. v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (citing Gulf Power Co. v. Public Serv. Comm'n, 480 So. 2d 97 (Fla. 1985); Gulf Coast Elec. Coop. v. Florida Pub. Serv. Comm'n, 462 So. 2d 1092 (Fla. 1985)).

157. In Consolidated Gas Co. v. City Gas Co., for example, the district court's findings of fact require thirteen pages. 665 F. Supp. 1493, 1502-15 (S.D. Fla. 1987). In contrast, the applicable substantive law, section 2 of the Sherman Act, is a mere one-sentence prohibition against monopolization, attempts to monopolize, or combinations or conspiracies to monopolize.

the pressures of rapid and unpredictable growth by combining sensitivity to market forces with appropriate regulatory oversight. The current methods of assigning electric utility service areas have recognized the benefits of market-based efficiencies in energy production in responding to the actual growth and development patterns of Florida's unique evolution. Those efficiencies might have been lost through a more heavy-handed command and control approach.

The Public Service Commission's involvement in each agreement and each dispute has ensured that the utilities' response to Florida's expanding energy requirements reflects the fundamental public interest in safe, efficient, nondiscriminatory utility service at the least possible cost. The Florida Supreme Court has long validated this approach, and although a federal antitrust challenge to its underlying assumptions recently loomed, that challenge has substantially receded.

While growth has driven the State's regulatory response to the development of electric utilities' service territories in the past, the near-passage of the 1991 territorial boundary legislation indicates that the effects of growth will drive the State's response in the future. There appears to be a concern that the State's present method of allocating utility territory by agreements and dispute resolutions no longer promotes the public interest. The needs of a mature, highly developed state may, it is argued, require other means of allocating or assigning service territories. The question, of course, is what these other means and mechanisms would be, and the failure of the 1991 legislation shows that there is as yet no clear consensus on the answer to that question.

The utilities' positions supporting or opposing the 1991 bill were likely determined by their perception of whether they would gain, preserve, or lose territory—and thus revenues—when the Public Service Commission set territorial boundaries statewide. Rural electric cooperatives, experiencing the encroachment of urbanization on their territory, sought to draw the lines to protect against further intrusion. Utilities operating primarily in highly developed areas of the State also perceived a benefit from a permanent delineation of municipal service territories. Municipalities, on the other hand, did not perceive that they would benefit from territorial boundary legislation that would prevent expansion of their utility systems and partly preempt their right of eminent domain in the process. Utilities still operating in predominantly rural and undeveloped areas of the State opposed the bill as an unnecessary encumbrance on their ability to expand. All of the utilities represented their respective proposed solutions as being most in the public interest.

The ongoing legislative debate may well be about the degree to which perceptions accord with reality. Although Florida's current system of allocating utility service territories may be perceived initially as less than optimally certain, in practice it has worked well and has survived many challenges. Conversely, although the imposition of statewide line drawing may be perceived initially as conferring absolute certainty, provision for a reconsideration process for any lines that are drawn might well vitiate that certainty. In fact, the reconsideration provisions of the 1991 proposed legislation clearly recognized the continuing need for flexibility in the process of allocating utility service territories.

While the system Florida presently uses to allocate utility territory is dynamic and thus somewhat stressful, the system is not broken. The flexibility inherent in a dynamic system, rather than the stability inherent in a static system, may well be needed to effectively resolve the territorial issues of the future, just as it has been needed in the past. The present system provides continuity, without imposing any single, rigid model statewide. Paradoxically, the most innovative system among the alternatives currently being debated may be the one already in place.

DOCKET 930885-EU, Exhibit GEH-3

TERRITORIAL POLICY STATEMENT

THIS POLICY STATEMENT is adopted by the Florida Public Service Commission, hereinafter referred to as the "Commission," this _____ day of _____, 19___ in order to govern the relationship between Gulf Power Company, a Maine corporation qualified to do business in Florida, hereinafter referred to as "Gulf Power"; and Gulf Coast Electric Cooperative, Inc., a Florida corporation, hereinafter referred to as "Gulf Coast". Gulf Power and Gulf Coast shall collectively be referred to herein as "the Parties".

WITNESSETH:

WHEREAS, Gulf Power is an electric utility subject to regulation as a public utility by the Florida Public Service Commission pursuant to the provisions of Chapter 366 of the Florida Statutes; and

WHEREAS, Gulf Coast is a rural electric cooperative organized under Chapter 425 of the Florida Statutes and is an electric utility pursuant to Chapter 366 of the Florida Statutes; and

WHEREAS, the Parties each own and operate electric facilities in Northwest Florida; and

WHEREAS, the Commission desires to avoid further unnecessary and uneconomic duplication of electric facilities by the parties; and

WHEREAS, the Commission desires to avoid future disputes regarding the territorial right to serve particular premises or contiguous groups of premises; and

WHEREAS, the Commission has authority pursuant to Chapter 366 of the Florida Statutes to resolve territorial disputes between electric utilities as part of the Commission's jurisdiction to assure the avoidance of further uneconomic duplication of generation, transmission and distribution facilities;

NOW THEREFORE, the Commission orders and directs the parties to comply with the following provisions:

(1) Neither of the Parties shall uneconomically duplicate the other's electric facilities.

(2) The Parties shall construct or extend distribution lines only when immediately necessary to serve a new premises or a contiguous group of premises pursuant to a bona fide and documented request for such service from a customer or developer, and shall not construct or extend distribution lines to serve future, speculative growth in the absence of a bona fide and documented request for such construction or extension by a customer or developer. Nothing in

this paragraph shall prevent a party from constructing facilities necessary in order to transmit electrical energy between unconnected points on a party's lines when such is necessary for reliability purposes. When such "point to point" facilities are constructed, no existing customers served by the existing facilities of the other party nor any prospective customers immediately adjacent to the existing facilities of the other party may be served by the "point to point" facilities.

(3) Except where otherwise provided in this policy statement, neither of the Parties shall construct or maintain electric distribution lines for the provision of retail electric service to any premises then currently being provided retail electric service by the other party.

(4) Except as specified in paragraph five (5) of this policy statement, a new premises or contiguous group of premises located within one thousand feet (1,000') of an existing electric distribution line belonging to only one of the Parties, which electric distribution line and associated electrical facilities are adequate and capable of providing the retail electric service required by the new premises or contiguous group of premises, shall be served by the party that has such existing electric distribution line and associated electrical facilities. Under such circumstances, said party shall be the electric supplier for such particular new premises or contiguous group of premises and shall have an obligation to provide retail electric service thereto. Except as specified in paragraph five (5) of this policy statement, the other party shall not render retail electric service to such premises.

(5) Notwithstanding paragraphs three (3) and four (4), where a new premises or contiguous group of premises require a combined electric load equal to or greater than 300 KVA, under normal operations and within a five (5) year growth period from the date of initial service, a written request to either Party by the owner or developer of certain new premises or contiguous group of premises shall determine which Party shall be the retail electric supplier responsible for providing electric service to such new premises or contiguous group of premises. The Party requested by the owner or developer to provide retail electric service to the new premises or contiguous group of premises may construct, operate and maintain facilities for the provision of such electric service when the premises or contiguous group of premises are not, at the time the request is made, being served by the other party, or if being served by the other party, are not being served by electrical facilities and capabilities in place and belonging to the other party that are adequate for the service and capacity being requested by the owner or developer.

(6) Except as specified in paragraphs one (1), three (3) and four (4) of this policy statement, customer preference shall determine which party shall provide the initial retail electric service to a premises. Nothing herein shall be construed to allow a party to commence electric service to a customer who at the time such service is to commence is already receiving adequate central station electric service from the other party.

(7) When a party receives a request for electric service that is governed by paragraph five (5) of this policy statement and the new premises or contiguous group of premises is not located within one thousand feet (1000') of facilities belonging to the party receiving the request for service but is located within one thousand feet (1000') of the other party's facilities, the party receiving such a request for service shall give to the other party notice in writing within five (5) working days of receipt of said request for electric service. Such notice must set forth the type of electric service requested, the date service is requested to commence, as well as the location of the new premises or contiguous group of premises.

(8) The notice required by paragraph seven (7) to this policy statement begins a suspension period in which the following procedures shall control:

(a) No new construction or extension of electrical facilities to provide permanent retail electric service to the new premises or contiguous group of premises is to commence during the suspension period.

(b) The party receiving notice pursuant to paragraph seven (7) of this policy statement may request a meeting regarding the proposed electric service in which case such meeting shall be held within ten days of receipt of such notice. Any request for a meeting pursuant to this paragraph shall be submitted to the other party in writing. Failure of the party receiving notice pursuant to paragraph seven (7) to request such a meeting within five (5) working days of receiving the notice shall constitute a waiver of all rights to serve the new premises or contiguous group of premises by that party, and the suspension period shall thereupon be terminated.

(c) At the meeting provided for in paragraph (8)(b) or within ten (10) days thereafter, the Parties shall make a good faith attempt to resolve any dispute regarding which party shall provide electric service to the new premises or contiguous group of premises. Unresolved disputes shall be submitted to mediation before the Commission Staff and, if necessary, expedited hearing before the Commission. The issue to be resolved shall be limited to whether the right to serve the new premises or contiguous group of premises is governed by paragraphs one (1), three (3) or four (4) of this policy statement or is governed by customer preference as provided in paragraphs five (5) and six (6) of this policy statement. In the event mediation of the dispute has failed and as a result a contested dispute is presented to the Commission for its resolution, the losing party shall pay the prevailing party's costs of litigation including reasonable attorney's fees.

(9) This policy statement shall be effective for an initial period of fifteen years from the date this policy statement is issued by the Commission and shall continue thereafter from year to year unless terminated by the Commission with twelve (12) months prior written notice to the parties. Notwithstanding the foregoing, if "retail access" or "retail wheeling" is adopted as a matter of public policy at either the federal or state level, then the Commission may terminate this policy statement upon three (3) months prior written notice to the parties. Either party may request that the Commission terminate this policy statement upon good cause having been shown.

DONE AND ORDERED by the Florida Public Service Commission this _____day of _____, 19____.

Policy Statement

In the event one utility plans to serve a customer which could obtain service from another utility having existing distribution lines in place closer to the customer's location, the utility planning to serve will notify the utility with distribution lines closest to the customer's location prior to commencing service. Following such notification, if there is disagreement between the utilities as to which utility should serve the customer, the utilities shall notify Staff of the situation. Staff will attempt to mediate the dispute between the utilities. If mediation fails to resolve the dispute via an agreement between the affected utilities, the utility with selected by the customer shall be entitled to serve the customer until the dispute is resolved by the Commission. The Commission shall resolve the dispute by determining which utility is able to serve the customer at the lowest net cost to the utility. In determining which utility is able to serve the customer at the lowest net cost to the utility, customer contributions in aid of construction to extend service will be taken into account as reductions to the utility's gross cost to serve. Notwithstanding the foregoing, the customer's choice of utility shall be honored so long as the net cost to that utility of extending service to that customer does not exceed the other affected utility's net cost of extending service to that customer by an amount greater than $15,000. In the event mediation of the dispute has failed and as a result a contested dispute is presented to the Commission for its resolution, the losing utility shall pay the prevailing utility's costs of litigation including reasonable attorney's fees. For purposes of this policy, existing distribution lines shall be construed to mean installed conductor of sufficient type and capacity to satisfy the service requirements of the requesting customer without the necessity of any upgrades.

Supreme Court of Florida

No. 85,464

GULF COAST ELECTRIC COOPERATIVE, INC.,
Appellant/Cross-Appellee,

vs.

SUSAN F. CLARK, etc., et al.,
Appellees/Cross-Appellants.

[May 23, 1996]

OVERTON, J.

We have on appeal a decision by the Florida Public Service Commission (the Commission) resolving a territorial dispute between Gulf Coast Electric Cooperative, Inc. (Gulf Coast) and Gulf Power Company (Gulf Power). We have jurisdiction. Art. V, § 3(b)(2), Fla. Const. For the reasons expressed, we reverse the Commission's order awarding service to Gulf Power and remand for entry of an order awarding service to Gulf Coast.

The relevant, unrefuted facts in this record are as follows. In April 1993, Gulf Coast became aware that the Florida Department of Corrections (DOC) was planning to locate a prison in West Florida and was considering sites in several counties, including one in Washington County. In that same month, Gulf Coast made a public proposal to the Washington County Commission for a $45,000 grant and for assistance in securing a loan of $300,000 to acquire Washington County property for the prison. Gulf Power, which also served the Washington County area, made no similar proposal. The loan and grant were put in place and a site was selected and secured. Gulf Coast was selected to provide service to the site by Washington County, and DOC approved that choice.

To serve the prison, Gulf Coast relocated its existing Red Sapp Road single-phase line, which was located on the prison site, and upgraded the line to three-phase at a total cost of $51,579. The relocation cost was $36,997 and the upgrade to three-phase cost was $14,583. This existing line had to be relocated, regardless of whether Gulf Coast or Gulf Power served the prison. The line was relocated by Gulf Coast across the road from Gulf Power's existing three-phase line that was constructed during the early 1970s.

In September 1993, Gulf Power filed with the Commission a petition seeking to serve the prison and asserting that Gulf

Coast had constructed facilities that duplicated Gulf Power's.

In resolving the dispute, the Commission followed Florida Administrative Code Rule 24-6.0441(2) (1993), which provides:

> (2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:
>
> (a) the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
>
> (b) the nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
>
> (c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and
>
> (d) customer preference if all other factors are substantially equal.

The Commission also applied section 366.04(5), Florida Statutes (1993), which provides:

> (5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(Emphasis added.)

Under subsection (a) of rule 25-6.0441(2), the Commission found that both utilities had been serving the same area for more than twenty years and that the utilities had a "comparable ability" to serve the prison. Specifically, the Commission found:

> Both utilities have been serving customers in the vicinity of the intersection of County Road 279 and State Road 77 for over 20 years. Gulf Coast has served retail customers along Red Sapp Road since 1949-50. Gulf Coast has also maintained two-phase and three-phase service adjacent to the correctional facility site since 1950. Currently, Gulf Coast is serving 665 customers within 5 miles of the site. Gulf Power currently has 532 metered customers within five miles of the site, 330 of which are in Sunny Hills.

The Commission also found that "both utilities have adequate facilities to serve the prison, both are capable of providing reliable electric service, and therefore both have comparable ability to serve."

Subsection (b) of rule 24-6.0441(2), which concerns the nature of the disputed area (rural with small commercial development), was not at issue in this proceeding.

Under subsection (c) of the rule, the Commission found that Gulf Coast had expended $14,583 upgrading its single-phase line to a three-phase line in order to provide service. Because Gulf Power had an existing three-phase line capable of providing service to the prison, the Commission found that the $14,583 represented the cost differential between the two utilities' "cost to serve."

The Commission found subsection (d), customer preference, to be inapplicable, concluding that it could consider customer preference in resolving territorial disputes only if all other factors were substantially equal. The Commission determined, however, that all other factors in this case were not equal because Gulf Coast had duplicated Gulf Power's existing lines and had engaged in a "race to serve." In making this determination, it said:

> We have decided that Gulf Power shall provide electric service to the new correctional facility in Washington County. Our primary reason for this is that Gulf Coast duplicated Gulf Power's existing facilities in order to serve the prison. We understand that the area in dispute is primarily rural. We understand that the additional cost to Gulf Coast to serve the facility is relatively small. We believe that Gulf Coast is as able as Gulf Power to serve reliably, and we are aware that the customer prefers Gulf Coast even though its rates are higher. We simply cannot ignore the fact that Gulf Coast's upgrade of the relocated Red Sapp Road single-phase line to three-phase duplicated Gulf Power's existing facilities. We always consider whether one utility has uneconomically duplicated the facilities of the other in a "race to serve" an area in dispute, and we do not condone such action.
>
> . . . .
>
> . . . [W]e are very conscious of the role Gulf Power played in this matter. Gulf Coast made the effort and spent the money necessary to bring the new correctional facility to Washington County. But for Gulf Coast's efforts, the facility would not be there for anyone to serve. Gulf Power was aware of Gulf Coast's efforts, but said nothing.

(Emphasis added.)

Based on these facts, the Commission awarded service to Gulf Power and directed Gulf Power to reimburse Gulf Coast for the $36,997 cost of relocating the Red Sapp Road line. The Commission also ordered the two companies to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries.

Gulf Coast has appealed the Commission's award of service to Gulf Power; Gulf Power has cross-appealed the Commission's directive that Gulf Power reimburse Gulf Coast for the cost of relocation. The Commission's order regarding the development of a territorial agreement is not at issue. Because of our resolution of Gulf Coast's appeal, Gulf Power's cross-appeal is rendered moot.

In its appeal, Gulf Coast contends that the Commission erred in finding that Gulf Coast uneconomically duplicated Gulf Power's facilities, in finding that Gulf Coast engaged in a "race to serve," and in failing to consider customer preference. Additionally, because Gulf Power was the first to intrude into Gulf Coast's historic service area and because Gulf Power was the first to duplicate services, Gulf Coast asserts that it should be allowed to provide service to the prison.

In reviewing Gulf Coast's assertions, this Court must determine whether the order complained of meets the essential requirements of law and whether there is competent, substantial

evidence in the record to support the Commission's findings. Gulf Power Co. v. Public Serv. Comm'n, 480 So. 2d 97 (Fla. 1985); Citizens v. Public Service Comm'n, 464 So. 2d 1194 (Fla. 1985). Based upon the unrefuted facts and the Commission's own findings, we conclude that the Commission erred in failing to consider customer preference and abused its discretion in awarding service to Gulf Power. We reach this decision after finding, under the unique factual circumstances of this cases, 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.

First, we address the Commission's findings regarding uneconomic duplication. The record reflects that Gulf Coast has been the historic provider of power to this area since the early 1950s and that Gulf Coast's single-phase line was already in place at the site of the prison before Gulf Coast sought to provide service. Further, Gulf Coast would have been required to move its line regardless of who provided power to the prison to allow for the construction of the prison. It was only after Gulf Coast was selected by DOC to provide service to the prison that it moved its line and, in order to serve the prison, upgraded the line to three-phase at a cost of $14,583. The Commission itself characterized this sum as "relatively small." Although Gulf

Power did have a three-phase line available to serve the prison, 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 new line regardless of who served the prison.

In its argument before the Court, the Commission asserts that the actual cost is only one factor to be considered in determining uneconomic duplication. The Commission states that lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has been a "race to serve," and other concerns must be considered in evaluating whether an uneconomic duplication has occurred. We do not disagree that these factors must be considered. In this case, however, both utilities were already serving the area in question. Additionally, Gulf Coast had to move the line regardless of who provided service, and the cost for upgrading the line was relatively small. Compare, for instance, the costs incurred for the upgrade in this case with the costs incurred in Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985)(difference between Gulf Coast's $27,000 cost to provide service and Gulf Power's $200,480 cost to provide service found to be considerable). The cost differential in this case is de minimis in comparison to the cost differential in that case.

Next, we address the Commission's conclusion that Gulf Coast engaged in a "race to serve." As noted previously, Gulf Coast was the historic provider of service to this area and was already serving a substantial number of customers in this area. Additionally, Gulf Coast's line had to be moved regardless of who served the prison. Although Gulf Coast concedes that it acted quickly in its efforts, the record reflects that Gulf Coast did so to convince DOC to choose Washington County as a site for the prison rather than to preempt Gulf Power from serving the prison. Moreover, Gulf Coast never attempted to hide its actions in attempting to bring the prison to Washington County. As acknowledged by the Commission, but for the actions of Gulf Coast, there would be no prison to serve. Under these circumstances, we conclude that there is no substantial, competent evidence to support the Commission's finding that Gulf Coast engaged in a "race to serve."

Given our conclusion that Gulf Coast did not uneconomically duplicate Gulf Power's facilities or engage in a "race to serve," we find that the record supports the conclusion that the factors set forth in rule 25-6.0441 are substantially equal. As the Commission noted, both utilities have been serving the area for many years and both have a comparable ability to serve the prison; the nature of the disputed area is not in dispute; and the cost differential between the two utilities' cost to serve is

relatively small. Consequently, we find that customer preference should have been considered as a significant factor in this case. See rule 25-6.0441(d)(Commission to consider customer preference if all other factors are substantially equal). Because both DOC and Washington County have indicated their desire to have Gulf Coast provide service to the prison, we conclude that Gulf Coast should be awarded service.

Accordingly, we reverse the order of the Commission awarding service to Gulf Power and remand for entry of an order awarding service to Gulf Coast.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Notice and Cross-Notice of Appeal from the Public Service Commission

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for Appellees/Cross-Appellants