

State of Florida



Public Service Commission

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

11:45
FPSC - Records/Reporting

FROM: DIVISION OF LEGAL SERVICES (PAUGH) *JPR RUE*
DIVISION OF ELECTRIC AND GAS (BASS, BREMAN, TEW) *JS JDJ*

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

AGENDA: 05/19/98 - REGULAR AGENDA - POST HEARING DECISION -
PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: COMMISSION PANEL (JOHNSON, CLARK, DEASON)

FILE NAME AND LOCATION: S:\PSC\LEG\WP\930885-2.RCM

CASE BACKGROUND

On January 28, 1998, the Commission issued Order Resolving Territorial Dispute Between Gulf Coast Electric Cooperative, Inc. and Gulf Power Company, Order No. 98-0174-FOF-EU, Docket No. 930885-EU (Order). The sixth and seventh ordering paragraphs require the parties, Gulf Coast Electric Cooperative, Inc. (Gulf Coast) and Gulf Power Company (Gulf Power), to establish procedures and guidelines addressing subtransmission, distribution, and requests for new electric service and submit the procedures and guidelines to the Commission for review on or before July 31, 1998.

On February 2, 1998, Gulf Coast filed a Notice of Appeal of PSC Order No. 98-0174-FOF-EU with the Florida Supreme Court, Case No. 92,479. The appeal is currently pending before the Court. On March 11, 1998, Gulf Coast filed a Motion For Stay Pending Judicial Review with the Commission. The subject of the Motion For Stay is the requirement that the parties develop procedures and guidelines

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by July 31, 1998. Gulf Power did not file a response to the Motion. This recommendation addresses Gulf Coast's Motion.

DISCUSSION

ISSUE 1: Should the Commission grant Gulf Coast Electric Cooperative's Motion For Stay Pending Judicial Review?

RECOMMENDATION: Yes. The Commission has discretion to grant the stay for reasons other than those enumerated in Rule 25-22.061(2), Florida Administrative Code. In this instance, a stay until six months subsequent to the date a final order on Gulf Coast's appeal is rendered by the Supreme Court in Case No. 92,479 is appropriate to further the goal of administrative efficiency and will not be contrary to the public interest or the utilities. [PAUGH]

STAFF ANALYSIS: Rule 25-22.061(2), Florida Administrative Code, provides that the Commission may exercise its discretion to grant a stay of an order pending judicial review. The rule states that the Commission may, among other things, consider three factors in determining whether to grant a stay:

(a) Whether the petitioner is likely to prevail on appeal;

(b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and

(c) Whether the delay will cause substantial harm or be contrary to the public interest.

Based on the application of rule 25-22.061(2), Florida Administrative Code, and other considerations set forth below, staff recommends that Gulf Coasts's Motion For Stay be granted.

A. Whether the petitioner is likely to prevail on appeal

In its Motion, Gulf Coast addresses the three factors the Commission may consider when determining whether to grant a stay. With respect to the likelihood of prevailing on appeal, Gulf Coast states that it has a "reasonable chance" to prevail on appeal because the "Commission's Order is contrary to the Commission's prior two (2) Orders in this case, PSC-95-0271-FOF-EU and PSC-95-0913-FOF-EU". (Motion pg. 2) Gulf Coast states that the prior two

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orders required the Commission to establish delimiting geographic boundaries between the two utilities in those areas where the facilities of the electric utilities are in close proximity and where further conflict is likely to occur. Gulf Coast's position is that the Commission's finding that the facilities are in close proximity required it also to establish a territorial boundary. That the Commission declined to establish a geographic boundary, Gulf Coast opines, renders the instant order in conflict with the prior orders and increases the likelihood of Gulf Coast's success on appeal.

Staff disagrees with Gulf Coast's analysis of the law of the case. Gulf Coast's analysis fails to address the second requirement for drawing a territorial boundary. The facilities must be commingled or in close proximity and further conflict must be likely to continue to occur. The Order found that the facilities are commingled but that future conflict is not likely to occur: "the evidence in the record is that while the facilities are commingled, *further conflict is not likely because the facilities are already in place.*" (Order pg. 10) (emphasis added) As such, a territorial boundary is not required. For this reason, staff disagrees that Gulf Coast has a 'reasonable chance' to prevail on appeal.

B. Whether the petitioner has demonstrated that it is likely to suffer irreparable harm if the stay is not granted

Gulf Coast admits that it "is not likely to suffer significant irrevocable harm if the stay is not granted...." (Motion pg. 3) However, the petitioner states that it should not be required "to spend resources in attempting to work out procedures and policies with Gulf Power that as past practice has shown will result in fruitless...efforts" (Motion pg. 3) Such a requirement will harm Gulf Coast's members because of the costs associated with the wasted effort, petitioner states. Staff agrees that Gulf Coast is not likely to suffer irreparable harm if it is required to develop procedures and guidelines with Gulf Power for future utility expansion pursuant to the terms and conditions of the Order.

C. Whether the delay will cause substantial harm or be contrary to the public interest

Gulf Coast argues that neither Gulf Power nor the public interest will be harmed if the stay is granted:

Because the Commission has in essence ruled that there can be no uneconomic duplication in the identified areas

because the two utilities are already there, the current practices of the parties will not result in harm to the parties or to the public. While those practices may be subject to refinement if the Order were not stayed, staying the Order will not change the status quo and will allow both utilities to avoid what may be unnecessary expenses, pending the outcome of the appeal.

(Motion pgs. 3 - 4)

Staff agrees that neither Gulf Power nor the public interest will be harmed if the stay is granted. The areas of commingling in south Washington and Bay Counties have been identified and the Order does not require transfer of service in those areas. As such, existing ratepayers and members should not be harmed by a stay and it is unlikely that either utility will suffer detriment if the stay is granted.

D. Other considerations

Pursuant to Rule 25-22.061(2), Florida Administrative Code, the Commission has discretion to consider matters other than those enumerated within the rule. In this instance, considerations of administrative efficiency also affect the decision on whether a stay should be granted. The intent of the requirement for establishing procedures to address future growth is to encourage a cooperative, creative effort between the utilities that would provide them with flexibility and would result in the most economic method of providing service. (Order pg. 10) The parties have diametrically opposed positions on whether a territorial boundary between the utilities is necessary. Gulf Coast's position is that a territorial boundary should be established. Gulf Power's position is that a territorial boundary is not necessary.

During the pendency of the appeal, it is unlikely that mandated negotiation between parties will be productive. Thus, for reasons of administrative efficiency, staff recommends that it would be in the best interests of the parties and the Commission, which must review the results of the negotiations, to grant the stay during the pendency of the appeal. In Re: Petition by Metropolitan Fiber Systems of Florida, Inc. for arbitration of certain terms and conditions of a proposed agreement with Central Telephone Company of Florida and United Telephone Company of Florida concerning interconnection and resale under the Telecommunications Act of 1996, Docket No. 960838-TP, Order No. PSC-97-0274-FOF-TP, issued March 11, 1997; In Re: Application for amendment of Certificates Nos. 359-W and 290-S to add territory in

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Broward County by South Broward Utility, Inc., Docket No. 941121-WS, Order No. PSC-96-1403-FOF-WS, issued November 20, 1996. In addition, staff recommends that the deadline for Gulf Coast and Gulf Power to establish procedures and guidelines addressing subtransmission, distribution, and requests for new electric service as set forth in the Order be revised to a date no later than six months following the date the final order of the Supreme Court of Florida in Case No. 92,479 is rendered.

In summary, while staff disagrees that Gulf Coast has a reasonable chance of prevailing on appeal, and staff agrees that Gulf Coast is not likely to suffer irreparable harm if the stay is not granted and that the delay will not cause substantial harm or be contrary to the public interest, a stay in this case is justified by considerations of administrative efficiency. The parties' opposing positions on the preferred outcome of this territorial dispute are likely to render negotiations on procedures and guidelines less than productive until the appeal is decided by the Supreme Court. Therefore, because the stay will not be contrary to the public interest or the utilities, staff recommends that the stay be granted as set forth herein.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open. [PAUGH]

STAFF ANALYSIS: The docket should remain open pending the Supreme Court's disposition of the appeal and thereafter for the purpose of reviewing the procedures and guidelines developed by the two utilities as set forth in Order No. PSC-98-0174-FOF-EU, issued January 28, 1998, in the event that the Order is upheld.