

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute with Gulf Power Company in Washington County by West Florida Electric Cooperative Association, Inc.

DOCKET NO. 010441-EU  
ORDER NO. PSC-01-2499-FOF-EU  
ISSUED: December 21, 2001

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON  
MICHAEL A. PALECKI  
LILA A. JABER

APPEARANCES:

JOHN HASWELL, ESQUIRE, Chandler, Lang & Haswell Law Firm, P. O. Box 23879, Gainesville, Florida, 32602-3879, and FRANK E. BONDURANT, ESQUIRE, Post Office Box 854, Marianna, Florida 32447  
On behalf of West Florida Electric Cooperative Association (WEST FLORIDA).

RUSSELL A. BADDERS, ESQUIRE, Beggs & Lane Law Firm, 700 Blount Building, 3 West Garden Street, P. O. Box 12950, Pensacola, Florida 32576-2950  
On behalf of Gulf Power Company (GULF).

MARLENE K. STERN, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Commission Staff (STAFF).

ORDER RESOLVING TERRITORIAL DISPUTE

BY THE COMMISSION:

On April 10, 2001, pursuant to Sections 366.04(2)(e), 366.04(5), and 366.055(3), Florida Statutes, and Rule 26-6.0441, Florida Administrative Code, West Florida Electric Cooperative Association, Inc. (West Florida or WFEC) filed a Petition to

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Resolve Territorial Dispute between West Florida and Gulf Power Company (Gulf). Gulf filed its Answer to the Petition on May 8, 2001. Subsequently, Staff attempted to mediate a resolution between the parties, but no agreement could be reached. A hearing was held on September 19, 2001. Our decision in this docket was made at the Agenda Conference held on December 4, 2001.

I. BACKGROUND

West Florida serves Calhoun, Holmes, Jackson and Washington Counties. The current dispute involves an area in Washington County. Florida Gas Transmission (FGT) proposes to build a new compressor station in Washington County, referred to as the Phase V Compressor Station No. 13A, or simply Station 13A. It will be located next to FGT's existing compressors at Station 13.

FGT has installed or will soon install two new motors to power the new compressors at Station 13A. The new motors convert electricity into horsepower. Enron Compression Services Company (ECS) has an agreement with FGT whereby ECS is responsible for providing horsepower to run the compressors. ECS asked Gulf to provide electricity for the motors.

On February 26, 2001, Gulf and ECS filed a Joint Petition for Declaratory Statement concerning Gulf's eligibility to serve ECS. That Petition was assigned Docket No. 010265-EI. On April 30, 2001, Gulf and ECS waived the 90 day deadline for action on the Petition. A decision on the Petition for Declaratory Statement will not be made until a decision on the Petition to Resolve Territorial Dispute is made.

II. AREA OF DISPUTE AND SERVICE AREA

West Florida states that the area in dispute is, and that the service area should be, an area within a four-mile radius of Hinson's Crossroads in Washington County, Florida. Gulf states that the only active dispute is over service to ECS at Station 13A which is located adjacent to FGT's existing Station 13 site in Washington County, FL.

West Florida describes the area within a four-mile radius of Hinson's Crossroads as remote and rural. West Florida states:

There are approximately 390 services in the immediate area. There are no stores, shops, industries or businesses of any kind with the exception FGT, a bait and tackle shop and a junk yard, within 7 miles of the crossroads. The area is comprised mostly of single-family residences, fishing camps and farming operations.

The density of residential customers is less than six per mile.

West Florida has served the Hinson Crossroads area since 1946, and has served FGT at Station 13 since 1962. Gulf's nearest customer is over four miles away in a direct line and 6 miles away by road. Exhibit 2, part of Witness Rimes' testimony, shows that the nearest single-phase service of Gulf Power is four miles away from FGT's property and the nearest three-phase service of Gulf Power is nine miles away.

FGT is located on a 35 acre parcel known as Station 13. West Florida explains that Station 13A "is located on the same 35-acre parcel and physically joins Station 13." According to Exhibit GC-5, Station 13 and 13A "share all common facilities, including offices, parking lots, driveways and employees."

Gulf's position is that we "should designate only the confines of the equipment comprising ECS's electric load at Station 13A as the area in dispute." Witness Spangenberg describes Gulf's proposed disputed area as follows:

Station 13A ... is a vacant piece of land. It has no population and no other utility customers, presently or projected. It can best be characterized as a prospective industrial site particularly suited to natural gas pipeline interaction and/or ancillary services because of its location in close proximity to two existing pipelines and FGT's Station 13.

West Florida argues that in deciding territorial disputes, we are required to consider territory not customers. First, West Florida explains that the language of Chapter 366 refers to territories, not customers. In addition, West Florida relies on

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Order No. PSC-98-0174-FOF-EU, claiming that in that Order we accepted the following as a conclusion of law:

Chapter 366 speaks to "Territory", not to customers as the Florida Supreme Court has ruled, a customer has no organic, economic or political right to choose an electric supplier merely because he deems it to be to his advantage, (Story v. Mayo, 217 So.2d 304 (Fla 1968), Lee County v. Marks, 501 So.2d 585 (Fla 1987).

West Florida further argues that we have considered historic service area to be a factor in deciding territorial disputes. West Florida relies on Order No. 12324, which addressed a territorial dispute between Suwanee Valley Electric Cooperative, Inc., and Florida Power Corporation (FPC) over service to a prison. See Order No. 12324, issued August 4, 1983, in Docket No. 83-0271-EU. FPC argued that it was the historic service provider to the area because it had a transmission line near the prison. We awarded service to the electric cooperative because it historically and currently served customers in the area while FPC did not.

West Florida also relies on Order No. 18886, which addressed a 1988 dispute between Gulf and West Florida over service to a new high school in Holmes County. See Order No. 18886, issued February 18, 1988, in Docket No. 87-0235-EI. Gulf was already serving an elementary school located adjacent to the property on which the high school would be built, without objection from West Florida. The school board determined that West Florida and Gulf could serve the high school for the same cost and requested service by West Florida. The order states that the service should be awarded to Gulf to Gulf because Gulf had been providing service to the "school complex property" since 1981.

West Florida cites a number of additional cases in support of its contention that it should provide service to ECS because West Florida is the historic service provider in the area. See Order No. 13668, issued September 10, 1984 in Docket No.83-0484-EU, and upheld in Gulf Power Company v. Public Service Com'n, 480 So.2d 97 (Fla 1985); Order No. 16106, issued May 13, 1986 in Docket No. 85-0087-EU; Order No. PSC-98-0178-FOF-EU, issued January 28, 1998, in Docket No. 97-0512-EU.

Gulf argues that the disputed area should not extend beyond the footprint of the compressor engines at Station 13A, because there is no controversy over service to any other customer. Gulf explains that in the past we have declined to rule on hypothetical disputes. Gulf relies on Order No. 20892 in which we dismissed a petition filed by CHELCO, an electric cooperative with territory that is adjacent to West Florida's. Gulf quotes the following passage:

The Commission's authority to resolve such disputes stems from Section 366.04(2)(e), Florida Statutes (1987) which the Commission itself has expressly limited to "actual and real" controversies; no statutory basis for interceding in a potential dispute exists." See, Order No. 15348 issued on November 12, 1985, in Docket No. 850132-EU. Thus, CHELCO's complaint is, at best, premature. If and when Gulf actually attempts to serve a customer within CHELCO's service area, the cooperative will have a cause of action.

Gulf states that it does not intend to serve any present customer of West Florida's, and that it will not serve any future prospective customer in the vicinity of Station 13A if it requires uneconomic duplication of West Florida's facilities.

Gulf also argues that deciding on service to an area of the size proposed by West Florida would conflict with our established policy of avoiding uneconomic duplication in undeveloped areas. Gulf relies on Gulf Coast Electric Cooperative v. Johnson, 727 So.2d 259 (Fla. 1999) [hereinafter Gulf Coast I], in which the court determined that prematurely awarding service rights in an undeveloped area prevents us from determining which utility will provide the most economic service when the area begins developing.

Although Gulf says that the only dispute is over who serves ECS Station 13A, West Florida disagrees and states that the disputed area is the area within a four-mile radius of Station 13A. Thus, it is clear that the entire area within the four-mile radius is in dispute. However, just because an area is in dispute does not obligate us to establish territorial boundaries throughout the entire disputed area at this time. See Gulf Coast I at 265.

There are currently no Commission approved territorial boundaries in the disputed area. It is our policy not to prematurely establish territorial boundaries. See Order No. PSC-98-0174-FOF-EU, issued January 28, 1998 in Docket No. 930885-EU. This policy has been upheld by the Florida Supreme Court. See Gulf Coast I at 265. For these reasons we find that territorial boundaries shall the footprint of the two 15,000 horsepower motors at Station 13A.

### III. EXISTING AND PLANNED LOAD TO BE SERVED

The estimated retail load West Florida currently serves in the four mile area surrounding Hinson Crossroads is 3,000 kilowatts including the existing service to Station 13. The existing load at Station 13 has a peak demand of 159 kilowatts. A 2% annual growth rate is projected for the area. West Florida's estimates do not include retail service to the proposed electric motors at Station 13A. The peak demand of the proposed two 15,000 horsepower electric motors is estimated to be near 20,000 kilowatts. Consequently, the total projected load for the four-mile area surrounding Station 13 will be approximately 23,000 kilowatts after Station 13A is completed. The load characteristics of the proposed new load are substantially different from the existing load in the disputed area.

### IV. COST OF SERVICE

The parties stipulated as follows:

The estimated cost of \$5.5 million for electric utility facilities is approximately the same for either utility to provide service. This amount includes a 230KV switching station, approximately 6 miles of 230 KV transmission cable and poles from the new switching station to a new substation located at Station 13A, a new substation at Station 13A, land purchases, and one transformer.

### V. RELIABILITY

The position of both companies is that the planned facilities and services to Station 13A can not be reasonably expected to cause a decline in reliability to existing and future customers of

either utility in the area. West Florida rebutted claims by Gulf that West Florida's service was inadequate, risky or insufficient. Gulf's views stem from an expectation that West Florida would use a 115KV transmission tap or a 230KV tap extending from Alabama rather than a six mile 230KV transmission tap to serve Station 13A. However, West Florida is suggesting using the same or similar 230KV facilities proposed by Gulf. Further, we approved the stipulation addressing proposed facilities and the estimated costs to bringing adequate and reliable service to Station 13A. Consequently, there is no material difference in adequacy or reliability between West Florida and Gulf in providing service to Station 13A.

West Florida identifies a potential reliability benefit if West Florida were allowed to provide service to Station 13A because it would seek to integrate the new facilities with those currently used to serve existing customers in the area. There is no evidence supporting a need to improve West Florida's service reliability for existing or future customers within the four-mile vicinity of Station 13. Further, use of the proposed facilities for additional customers may require substantial voltage conditioning equipment and additional costs associated with the voltage dips that occur during Station 13A motor start-ups.

For the reasons provided above, we find that the planned facilities and services to be provided within the disputed area is not expected to cause a decline in the reliability of service to existing and future customers of either utility.

#### VI. NATURE OF THE DISPUTED AREA

The parties stipulated as follows:

The nature of the disputed area is rural as defined by Section 425.03(1), Florida Statutes. Retail service to Station 13A is the only present and reasonably foreseeable future requirement of the area in dispute. The general vicinity is expected to remain rural with slow residential and agricultural load growth. Station 13A is approximately 9 miles from Vernon, 12 miles from Bonifay, 10 miles from Caryville, and 18 miles from Chipley.

VII. CUSTOMER PREFERENCE

The parties stipulated as follows:

The customer, ECS, prefers retail service from Gulf.

VIII. UNECONOMIC DUPLICATION

The parties stipulated as follows:

The construction of the facilities identified in Issue 4 [Part VI. Of this Order] by either West Florida or Gulf, will not cause uneconomic duplication of electric facilities with regard to serving the new retail load at Station 13A.

IX. RIGHT OF ACCESS

The parties stipulated as follows:

Gulf does not have exclusive access to the existing and future electric transmission system necessary to serve the new retail load at Station 13A.

X. THIRD PARTY PROVIDERS

One issue presented in this proceeding was whether, as a matter of law or policy, an existing customer of an electric utility could enter into a contract for electricity with a third party, when the third party gets the electricity from a different electric utility. We find that this issue need not be decided. The territorial dispute can be resolved without reaching this issue.

XI. AWARD OF SERVICE

West Florida claims that it should be awarded the service area in dispute because: the service area is within West Florida's historic service area; the specific site is currently being served by West Florida; the service is an expansion of the existing customer's load; the claim that by using a third party arranger (ECS), FGT is not the customer, is just that - a claim, when in



fact this is service to an existing customer of West Florida, and West Florida can provide service adequately and reliably at no more cost than Gulf Power.

Gulf claims that it should be awarded the service area because no uneconomic duplication of facilities will occur if Gulf provides the electric service to Station 13A as requested by the customer. Gulf claims that there are no factors that warrant overruling the customer's choice of Gulf Power as electric supplier for Station 13A.

We find that based on consideration of each of the four requirements laid out in Rule 25-6.0441(2), Florida Administrative Code, Gulf provide service to FGT's new 15,000 horsepower motors. Each requirement is discussed below.

**25-6.0441(2)(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;**

Neither utility can adequately serve ECS at Station 13A with existing facilities. Both parties agree that Station 13A requires 230 kV service and that the best way to get 230 kV service to Station 13A is to build a six-mile 230 kV transmission line from the customer's site to Gulf Power's existing 230 kV grid. West Florida's CEO, Mr. William S. Rimes, stated that "In fact, we would build the same six-mile 230 kV transmission line that GPC's currently building, perhaps even build it cheaper." He did not go on in his testimony to explain how West Florida would build the line less expensively. Also, the parties reached a stipulation on Issue 4 in this proceeding stating that, "The estimated cost of \$5.5 million for electric utility facilities is approximately the same for either utility to provide the service."

Gulf Power Company has the only 230 kV transmission system in Washington County. However, through the FERC's open access requirements, West Florida through Alabama Electric Cooperative (AEC) can access Gulf's 230 kV system and thus provide service to Station 13A.

It is clear that both utilities have the capability of providing reliable service through the additional facilities that Gulf Power Company is currently constructing.

**25-6.0441(2)(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;**

The area within a four-mile radius of Hinson's Crossroads is rural in nature. Both utilities serve rural customers in Washington County and have done so for many years. But, part of the disputed area, namely Station 13A, is quite unique in that the huge motors that will be installed to provide compression power will require 230 kV service to operate reliably. Neither utility has existing facilities that can meet these requirements. Gulf Power Company is the utility that has the nearest 230 kV source to serve the unique load at Station 13A.

It is clear that the disputed area is rural in nature, except for the very discrete requirements for ECS at Station 13A. While it may be argued that Gulf Power Company has the closest facilities with a source that can meet the needs of ECS at Station 13A, we believe that this factor does not substantially favor one utility over another. This is because of West Florida's ability to access Gulf Power Company's 230 kV system through AEC as mentioned previously.

**25-6.0441(2)(c) - the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future;**

As mentioned above in the discussion of Rule 25-6.0441(2)(a), the parties reached a stipulation about the cost to provide service to ECS at Station 13A. We accept this stipulation. So, clearly, consideration of this factor is not determinative of who should serve.

**25-6.0441(2)(d) - customer preference if all other factors are substantially equal.**

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The customer, in this case ECS, prefers Gulf to be the provider of electricity to Station 13A. Consideration of this factor clearly favors Gulf Power Company. Since the other factors in the rule do not substantially favor either utility, we find that customer choice should be the deciding factor. The customer should be able to choose when the exercise of that choice causes no harm from the present position of any utility's other customers. In particular, this means that the customers of either utility may be better off if their utility served Station 13A and neither utility's other customers are worse off than if Station 13A never existed.

In this case Gulf acted responsibly and prudently to work with the customer to design and build the necessary facilities to cost-effectively and reliably serve ECS at Station 13A. Gulf will not be uneconomically duplicating any facilities owned and operated by West Florida in the area. In fact, there is no duplication at all, economic or uneconomic.

Since we do not know how this area may develop in the future, and in keeping with the our prior policy on not prematurely drawing territorial boundary lines, we shall not establish other territorial boundaries within the disputed area beyond awarding service to Gulf.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the service area shall be the footprint of the two 15,000 horsepower motors located at Station 13A. It is further

ORDERED that Gulf Power Company shall provide electric service to the service area. It is further

ORDERED that all stipulations between the parties provided in the body of this Order are approved. It is further

ORDERED that this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 21st  
day of December, 2001.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

( S E A L )

MKS

Commissioner Palecki dissented from the Commission's decision with the following opinion:

The majority decision has rejected the primary recommendation of the Commission staff and awarded Gulf Power Company the right to serve a customer in territory served by West Florida Electric Cooperative since 1946. Gulf Power's nearest customer is over four miles away in a direct line and six miles away by road from the territory to be served. I believe the majority decision disregards basic tenets of fairness and is contrary to Florida law.

Rule 25-6.0441(2), Florida Administrative Code, provides that in resolving territorial disputes, the Commission may consider customer preference if all factors are substantially equal. Here, the majority considers customer preference and goes on to base its decision on customer preference, when all factors are not substantially equal. Here, the factor of history of service to the territory weighs heavily in favor of West Florida. This factor has been routinely considered, and even heavily weighed, by this Commission in determining numerous territorial disputes. See Order

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No. 13668, issued September 10, 1984, in Docket No. 830484-EU, and upheld in Gulf Power Company v. Public Service Com'n, 480 So. 2d 97 (Fla. 1985); Order No. 12324, issued August 4, 1983, in Docket No. 830271-EU; Order No. 16106, issued May 13, 1986, in Docket No. 850087-EU; Order No. 18886, issued February 18, 1988, in Docket No. 870235-EI; Order No. PSC-98-0178-FOF-EU, issued January 28, 1998, in Docket No. 970512-EU.

In contrast to the Commission's treatment in previous dockets, history of service to the territory has been arbitrarily disregarded by the majority in this case. The Commission has not initiated revisions to our rule to eliminate history of service to the territory from being considered. It does not seem appropriate for the Commission to consider this factor in some cases and disregard it in others.

The manner in which the majority manages to reject consideration of West Florida's history of service is somewhat convoluted. First, the majority cleverly defines the area under dispute as "the footprint of two motors." Then, the majority considers that the motors require 69 kV service which neither utility provides in the area. Therefore, the majority concludes, there is no history of service to the area. The majority decision is unprecedented. It does not cite to a single past decision wherein this Commission has based its decision in a territorial dispute on a similarly clever analysis. None exists.

Traditionally, Florida's electric utilities have been awarded exclusive service territories. The majority's novel opinion establishes for the first time in Florida a nonexclusive service territory, allowing different electric providers to serve the same territory, as long as they serve at different voltage levels requiring separate facilities. Under the majority opinion, yet a third or a fourth electric provider could serve this territory if a customer needed perhaps 115 or 230 kV service. The majority treats different voltage levels as if they are different types of utility service, like telecommunications, or water and wastewater service, that require separate providers. The Florida Legislature, however, has never recognized different voltage levels as separate types of utility service.

The majority's most persuasive argument is that since neither company has 69 kV facilities in the area, and since the cost for either company to provide 69 kV facilities is identical, all factors are essentially equal and customer preference should, therefore, be considered. The majority reasons that if no 69 kV line currently exists in the area, a Gulf Power 69 kV line will not duplicate the Coop's existing facilities. Unfortunately, this argument only holds water if the sole reason for establishing exclusive service territories is to avoid duplication of the power lines themselves.

This Commission has recognized that other reasons exist for the establishment of exclusive service territories. Exclusive service territories allow for provision of more efficient maintenance and emergency service without duplication of trucks, garages, tools, storage facilities, personnel and administrative support. Exclusive service territories prevent competing work crews from literally bumping into each other during emergency responses. Optimally, the same crew could work on 69 kV facilities in the morning, a substation later in the day, and the community's light poles in the afternoon. Under the majority decision, this efficiency will not exist. A Gulf Power work crew will work on 69 kV facilities. A separate West Florida work crew will work on other electric facilities in the same territory and even in the same building that houses the 69 kV pumps which the majority awarded to Gulf Power.

I believe that the majority decision is unfair and one-sided. The record in this case reflects that West Florida has provided this territory with safe, reliable service for over 50 years. During this time, it has served rural residential and small commercial customers spread over a wide area. For the first time, a huge customer has come to this part of the Cooperative's territory. Despite the fact that Gulf Power has never served a single customer in the area, the majority has awarded this large customer to Gulf Power. Meanwhile, I see no opportunity in the foreseeable future for West Florida to go into Gulf's territory and pick off large customers.

I am a firm believer in competition and customer choice, and I personally believe that customer preference should play a greater role in deciding territorial disputes. I believe, however, that

such a shift in policy should be done either through legislation, or at the very least, an amendment to our existing rule. With a statutory change or rulemaking, all players will know the rules of the game in advance. West Florida, as well as Gulf Power and other potential providers, will be able to govern themselves with full knowledge that customer preference will be paramount in determining which utility will be awarded service to customers in dispute.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.