

IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC., )  
Appellant, )  
V. )  
FLORIDA PUBLIC SERVICE COMMISSION, )  
Appellee. )

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CASE NO. 64,983

**FILED**

S'D J. WHITE ✓

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ANSWER BRIEF OF APPELLEE

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## DESIGNATIONS

In this brief the following designations will apply:

Appellant Gulf Coast Electric Cooperative, Inc., will be referred to by name or as the "Co-op".

Appellee, the Florida Public Service Commission, will be referred to as the "Commission".

Gulf Power Company will be referred to as "Gulf Power".

References to the record on appeal will be designated (R. \_\_\_\_).

References to the transcript of the hearing held September 19, 1983, will be designated as (Tr. \_\_\_\_).

References to the prehearing conference held September 6, 1983, will be designated as (PH \_\_\_\_ ) and references to appellant's brief will be (App. Br. \_\_\_\_).

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case, but would supplement the Statement with the following to reflect recent events: On May 29, 1984, the Commission panel of Chairman Gunter and Commissioner Leisner voted to stay the effect of the order at issue in this appeal upon motion of Gulf Coast Electric Cooperative, Inc. This was done to allow the Co-op to serve customers in Cedarwoods Estates pending the outcome of this appeal.

## STATEMENT OF THE FACTS

By order issued January 10, 1984 the Commission found that Gulf Power Company, an investor-owned utility, should provide electric service to Cedarwoods Estates. Cedarwoods Estates is an unrecorded subdivision of 94 lots located approximately 11 miles north of Panama City West of U.S. Highway 231, with its entrance on U.S. Highway 231. (Tr. 50; 190). Gulf Coast Electric Cooperative appeals that decision to this Court.

Gulf Power has had power lines parallel to U.S. Highway 231 between Panama City and Youngstown since 1940. (Tr. 43). The Co-op has had lines bordering Camp Flowers Road, which is north of the subdivision, since the late 1940's. (Tr. 278). Gulf Power has had customers on both sides of U.S. Highway 231 for 44 years. (Tr. 32). See Appendix 1 for a map of the area. The map in Appendix I is Exhibit I, Schedule 2 of 5, introduced into the Record through the testimony of Michael R. Dunn.

On September 27, 1982, Frank Kujawski, the chief engineer of the Co-op, either approached or was approached by James Commander, one of the developers of Cedarwoods subdivision regarding the possibility of the Co-op's providing electric service to the subdivision. (Tr. 132). Also discussed was the Co-op's help in negotiating an easement for drainage along the Alabama Electric Cooperative transmission line located to the east of the property.<sup>1</sup> (Tr. 137). The easement was later granted by

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<sup>1</sup> Gulf Coast Cooperative is a member of Alabama Electric Cooperative. (Tr. 79).

Alabama Electric Cooperative to the developers at no cost.  
(Tr. 138).

Mr. Commander testified that no one from the Co-op told him that the power lines on Highway 231 were those of Gulf Power.  
(Tr. 135).

On September 28, 1982, Mr. Carnley, owner of a lot in the Cedarwoods subdivision, requested electric service from the Co-op. (Tr. 193). Measured in a straight line, Mr. Carnley's lot was 3,450 feet from the Co-op's lines and 1,850 feet from the lines of Gulf Power. (Tr. 226). The Co-op built 3,800 feet of line just to reach Cedarwoods Estates while Gulf Power's lines were adjacent to the subdivision off of Highway 231. See Appendix I.

On October 27, 1982, the Co-op began construction of a line to serve Mr. Carnley, parallel to the existing Alabama Electric Cooperative line and then into Cedarwoods subdivision.

(Tr. 193). The Co-op completed this construction on November 8, 1982. (Tr. 193). This portion of construction, identified as Phase I, was built in a circuitous manner using 8,000 feet of line to cover the 3,450 straight line distance. (Tr. 226; 253-54). (A map of Phase I appears as Appendix II. The map in Appendix II is Exhibit 1, Schedule 3 of 5, introduced into the Record through the testimony of Michael R. Dunn.) The Phase I construction of the Co-op came within 200 feet of the existing Gulf Power line. (Tr. 46). See Appendix II.

On January 7, 1983 Gulf Power received an oral request for service from Mr. Lewis, who had purchased two lots in Cedarwoods Estates. (Tr. 38). Although Mr. Lewis' lots were in an area of



the subdivision not yet built in by the Co-op, Gulf Power could not construct facilities without paralleling existing Co-op facilities because of the circuitous nature of the existing Co-op facilities. (Tr. 38). Mr. Dunn of Gulf Power contacted Mr. Norris of the Co-op and they met at the subdivision on January 17, 1983. Mr. Dunn objected to the Co-op's method of construction and offered to buy part of the extension, an offer which was later rejected by the Co-op. (Tr. 39). This objection was later formalized in a February 2, 1983 letter from Mr. Dunn of Gulf Power to Mr. Norris of the Co-op. (See Exhibit 1, Schedule 4 of 5, introduced into the Record through the testimony of Michael R. Dunn).

On February 3, 1983, Gulf Power began laying out an extension to serve Mr. Lewis. (Tr. 40). The Co-op's personnel observed this activity and the next day began and completed construction of Phase II of the Cedarwoods subdivision. (Tr. 223). (See Appendix III, at Exhibit 1, Schedule 5 of 5, introduced into the Record through the testimony of Michael R. Dunn.) This construction also was built in a circuitous manner. Service was ostensibly to serve one of Mr. Commander's lots next to Mr. Lewis, but no electricity was ever used at that location and the meter was removed a month later. (Tr. 226). The Co-op's witness admitted that the "main reason" for this extension was to supercede Gulf Power from putting up lines. (Tr. 256).

Gulf Power completed construction of the extension to serve Mr. Lewis on February 9, 1983 and service was hooked up on March 3, 1983. (Tr. 41). The Gulf Power's line could not be

constructed in the most cost-effective manner because of the Co-op's February 4, 1983, Phase II construction. (Tr. 112-115). Gulf Power filed its petition for resolution of the territorial dispute with the Commission on March 17, 1983. (R. at 1).

If the Co-op had not built its lines as it did, Gulf Power could have served the entire Cedarwoods subdivision at a cost of approximately \$40,000. (Tr. 115; Exhibit 8, testimony of Michael R. Dunn). The Co-op's total cost to serve the entire Cedarwoods subdivision was estimated at \$66,374.82 by the Co-op's own witness. (Tr. 265).

POINT I

THE COMMISSION'S DECISION TO AWARD THE DISPUTED  
TERRITORY TO GULF POWER COMPANY COMPLIES WITH  
THE ESSENTIAL REQUIREMENTS OF LAW.

- A. The Commission's decision is supported by competent and substantial evidence.

Judicial review of Commission orders is limited to whether the Commission's action complies with the essential requirements of law and whether the findings of fact are supported by competent and substantial evidence. Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); Kimball v. Hawkins, 364 So.2d 463 (Fla. 1978).

The Commission's findings in this case are amply supported in the record. The Commission's decision was based upon the respective utilities' ability to serve the area, the cost of each utility to serve the area, the distance of each utility's lines from the disputed area, and the nature of the disputed area. Based upon the evidence discussed below, the Commission found that Gulf Power Company to be the most cost effective provider of service.

The Commission's factual findings in the present case are taken directly from the record. Gulf Power's costs of serving the subdivision were broken down into component parts (Exhibit 8, introduced into the Record through the testimony of Michael R. Dunn). The total figure was \$39,976. Gulf Power presented testimony of Mr. Dunn to explain how the figure was calculated. (Tr. 364-77). The Co-op also presented cost evidence (Exhibit 114, testimony of Frank Kujawski). (Tr. 198-99). On cross

examination, the Co-op's witness, Mr. Frank Kujawski, estimated the total cost to serve the subdivision at \$66,374.82 for the Co-op. (Tr. 265).

The distance of the respective utilities' lines from the territory to be served is not in dispute. The Commission found the lines of Gulf Power to be 1,850 feet from the original user of service, Mr. Carnley, versus 3,450 feet for the Co-op. (Tr. 226). The Commission also found the disputed area to be rural in character with both utilities capable of providing reliable service to Cedarwoods Estates. (Tr. 191; 287).

The Commission panel of Chairman Gunter and Commissioner Leisner heard more than eight hours of testimony before reaching its decision. The Commissioners were able to judge the credibility of the witnesses and asked clarifying questions of witnesses. (See Tr. 77; 216). This Court has only to determine whether the Commission's action comports with the essential requirements of law and is supported by substantial competent evidence. Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716, 717 (Fla. 1983). There is competent substantial evidence to support the Commission's decision and it should be affirmed.

**B. The Commission's decision is procedurally correct and in compliance with Chapter 120, Florida Statutes.**

The Commission complied with the requirements of Chapter 120 and applicable case law in reaching its decision in this case. To the extent that the Commission relied on policy considerations not

enunciated within a rule, its intention to consider such matters was made clear to the parties and its decision is supported by competent and substantial evidence.

The Commission has complied with the holding of McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). McDonald stands for the proposition that agency policy not expressed by rule be fully developed in the record. Id. at 583. The McDonald holding prevents unfair surprise to litigants by limiting spontaneous agency pronouncement of policy. In the present case the element of each utility's costs to serve the subdivision was placed in issue at the prehearing conference, and was identified as an issue in the prehearing order. (PH 22-24, R. 31). Rule 25-22.38(5)(a), Fla. Admin. Code, provides that the "prehearing order shall control the conduct of the parties in the case to the extent the matter is addressed in the order." The Appellant had ample notice that cost was a consideration in the case by virtue of the Commission's procedural rules, the prehearing conference and the prehearing order. Appellant cannot now complain that the Commission consideration of such matters was a spontaneous declaration of policy. Witnesses from both utilities addressed cost issues and were subject to cross examination concerning the cost issue. (Tr. 76-78; 112-117; 215-220; 238-245; and 264-265).

As Chairman Gunter pointed out to Appellant's counsel at the hearing on this matter:

"One of the things you have to do is look at the cost/benefits because apparently too often in the heat of competition, or the heat of construction, or what have you, we forget the interest or (sic) the ratepayers and ultimately

that is what we are all after and what we are all looking for." (Tr. 215).

In Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980), this Court reversed Commission disallowance of certain deductions on the ground that record support for the non-rule policy was lacking. There the Court held that the Commission was not required to develop policy by rule, but that there be adequate support in the record for such policy. Id. at 1281. In that case the Court found there was "absolutely no record foundation" for the Commission policy Id. at 1281. In the present case, record support is extensive. (PH 22-24; R.31; Tr. 76-78; 112-117; 215-220; 238-245 and 264-265).

Appellant had every opportunity to present evidence of the Co-op's costs of service and to cross examine Gulf Power's witnesses concerning the costs of Gulf Power. The numerous record references cited above fully document and support Commission use of costs as a factor in making its decision. Section 366.04(2)(e), Florida Statutes, expressly provides that Commission consideration is not limited to the factors enumerated. Given the similarity of the two utility's service reliability and ability to serve the disputed area, the large cost difference was initially and throughout the proceeding a key point.

**C. The Commission's decision is supported by judicial precedent and policy considerations.**

The Commission's decision that Gulf Power was entitled to serve the disputed area finds clear support in judicial

precedent. Florida law relating to territorial disputes between a privately owned utility and a rural electric cooperative is enunciated in Escambia River Electric Cooperative, Inc., v. Florida Public Service Commission, 421 So.2d 1384, 1385 (Fla. 1982). (Cert. den. \_\_\_\_\_ U.S. \_\_\_\_, 103 S.C. 1888, 77 L.Ed. 2d 280). The Court held:

"We also find that when, as in the present case, no factual or equitable distinction exists in favor of either utility, Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960), controls, and the territorial dispute is properly resolved in favor of the privately owned utility."

Florida law is very clear--when all factors are equal, the territorial dispute is to be resolved in favor of the investor-owned utility. In the present case, the factual circumstances weigh heavily in Gulf Power's favor. Gulf Power's facilities were closer (1,850 ft. v. 3,450 ft. for the Co-op) to the disputed territory.<sup>2</sup> This undisputed geographical fact is buttressed by the cost of serving the disputed area. Gulf Power's costs were estimated at \$39,976. The Co-op's costs were estimated at \$66,374.82 by its Coast's own witness. Curiously, the Appellant asserts that its own witness was "confused" (App. Br. at 19) and asks this Court to re-weigh the evidence of its witness and then disregard it. If this was the case, the method for correcting the confusion is through redirect examination. No

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<sup>2</sup> Record support for these facts are discussed, supra, pp. 6-7.

redirect examination of the witness was undertaken by Appellant at the time to clear up any confusion.

Because the Escambia River decision requires resolution of territorial disputes in favor of investor-owned utilities when all other things are equal, the Commission decision that Gulf Power should serve the area must be affirmed, particularly since the factual circumstances heavily favor Gulf Power. The cost and distance variations between the two utilities and relevant Florida law mandate that Gulf Power is the proper provider of electric service to Cedarwoods Estates.

The Commission's decision to award the disputed territory to Gulf Power is also supported by other policy considerations. The Co-op built 3800 feet of line to reach a subdivision adjacent to the existing Gulf Power line. See Appendix II. This type of uneconomic "race to serve" should not be condoned by the Commission or this Court. The Commission is charged with responsibility of setting fair, just and reasonable utility rates. § 366.05(1), Fla. Stat. Ratepayers pay the costs of providing service. Imprudent expenditures must not be encouraged. Commission resolution of the dispute in the most cost-effective manner discourages imprudent expenditures and benefits ratepayers.

Adoption of appellant's policy of looking at the costs only after the utility reaches the area can result in uneconomic allocation of resources. Appellant's approach would result in the first utility to reach the customer being automatically entitled to serve that customer, despite other more cost effective



alternatives in the area. Appellant's position encourages the "race to serve" problem which can and does result in inefficient and uneconomic utilization of resources. See Appendix II. The Commission's finding that Gulf Power was entitled to serve the area promotes efficiency and cost-effectiveness and should be affirmed.

CONCLUSION

The Commission's decision to award the disputed territory to Gulf Power is supported by competent, substantial evidence in the record, complies with the essential requirements of law, and should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid this 4<sup>th</sup> day of June, 1984 to the following:

Clinton E. Foster, Esquire  
1610 Beck Avenue  
Panama City, Florida 32405

G. Edison Holland, Jr., Esquire  
Beggs and Lane  
Post Office Box 12950  
Pensacola, Florida 32576

  
\_\_\_\_\_  
Robert D. Vandiver