IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC.,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION and GULF POWER COMPANY,

Appellees.

SUPREME COURT NO.: 64,983
FPSC Docket No.: 830154-EU

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ANSWER BRIEF OF APPELLEE GULF POWER COMPANY

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TABLE OF CONTENTS

CITATIONS OF AUTHORITIES

FLORIDA STATUTES CITED:

UNITED STATES CODE CITED:

PRELIMINARY STATEMENT AND DESIGNATION

In this brief, the appellant, Gulf Coast Electric Cooperative, Inc. will be referred to as "the Cooperative." The appellee Florida Public Service Commission will be referred to as "the Commission," and the appellee Gulf Power Company will be referred to as "Gulf Power."

References to the record on appeal will be designated (R. ____); to the transcript of the hearing held on September 19, 1983, as (Tr. _____); to the prehearing conference held on September 6, 1983, as (Ph. _____); to the appellant's brief as (App. Br. _____); and to the appendix to this brief as (App. _____).

STATEMENT OF CASE

Gulf Power accepts the Cooperative's statement of the case.

STATEMENT OF FACTS

Cedarwood Estates Subdivision is a planned, but yet unplatted, subdivision of approximately 143 lots. It is located approximately 11 miles north of Panama City and along and west of U.S. Highway 231, with its entrance on Highway 231. (Tr. 50, 190; GPC Ex. 1, Sch. 5, GPC Ex. 5) Gulf Power has provided electric service to customers in Youngstown and on either side of Highway 231 between Panama City and Youngstown since the early 1940's. The line between Panama City and Youngstown has been continually upgraded. (Tr. 32) Even as early as the 1940's, Gulf Power felt that this area was one of growth and that the construction of a line to Youngstown was economically justified. (Tr. 43-44) All parties have agreed that the area of Cedarwood Estates Subdivision and the surrounding area is one of high growth potential. (Tr. 33, 162, 210) Gulf Power currently has many miles of distribution line in the area between Bayou George and Youngstown and serves over 1,000 customers from these lines. (Tr. 44, 365; GPC Ex. 2, Sch. 7)

Currently, the lots in Cedarwood Estates upon which trailers have been placed and to which electric power is being provided are those of Mr. Carnley, Mr. and Mrs. Lewis, and Mr. and Mrs. Harvey. Of those, Mr. Carnley is being provided service by the Cooperative, and the Harveys and Lewises are being provided service by Gulf Power. Prior to service being provided to Mr. Carnley by the Cooperative, the nearest Cooperative line was some 3,360 feet,

"as the crow flies" from Mr. Carnley's lot, while the nearest Gulf Power distribution line was only 1,520 feet. (Tr. 226) Prior to service being provided to Mr. Carnley, the Cooperative's nearest distribution line was in excess of 3,000 feet "as the crow flies" from the nearest point of Cedarwood Estates, while Gulf Power had three-phase distribution lines immediately adjacent to the subdivision. (GPC Ex. 1, Sch. 5; Ex. 5)

In early September of 1982, Frank Kujawski, the chief engineer of the Cooperative either approached, or was approached, by James Commander, one of the developers of Cedarwood Subdivision regarding the Cooperative providing electric service to the subdivision. (Tr. 132) Also discussed was the possibility of the Cooperative providing the developers an easement for drainage along the Alabama Electric Cooperative transmission line easement located to the east of the subject property. (Tr. 137) This easement was subsequently provided to the developers by Alabama Electric Cooperative at no charge to the developers. (Tr. 138) At the time of the initial discussions between Mr. Kujawski and Mr. Commander, Mr. Kujawski was aware that the Cooperative's closest distribution line was approximately 4,000 feet from the subdivision and that Gulf Power had a three-phase distribution line immediately adjacent to the subdivision and fronting on Highway 231. While Mr. Kujawski felt that he had mentioned this fact to Mr. Commander, Mr. Commander could not recall the conversation, and, in fact, indicated that he thought until informed otherwise by Gulf Power that the lines running along Highway 231 were those of the Cooperative. (Tr. 135-138; 209-211)

On September 28, 1982, Mr. Carnley allegedly requested service from the Cooperative. (Tr. 193) As Mr. Carnley was the only electric power customer in Cedarwood Subdivision who did not testify at the hearing, the record is void of any indication as to whether Mr. Carnley was informed by the Cooperative that electric service was available from Gulf Power. During his testimony, Mr. Lewis indicated that had Mr. Carnley been made aware of the availability of such service, he certainly would have taken it from Gulf Power. (Tr. 23) The Cooperative commenced construction of the distribution system to serve Mr. Carnley on October 27, 1982. (Tr. 193)

In order to simply reach the borders of Cedarwood Estates Subdivision, the Cooperative was required to construct approximately 3,800 feet of distribution line. From the northeast border of the subdivision, instead of taking the most direct route to Mr. Carnley, the Cooperative constructed, in a circuitous manner, an additional 4,205 feet of distribution line at a total cost of $15,090.14. (Tr. 219, 226, 253-254; Ex. 107) If constructed in the most direct route, the distribution line would have only been 1,800 feet at a total cost of $11,122.14. Gulf Power could have served Mr. Carnley with a distribution line of only 2,080 feet, at a cost of $2,402.00. (GPC Ex. 2)

In his deposition, Mr. Kujawski testified that the circuitous route was taken because of the existence of a titi swamp immediately north of Mr. Carnley's lot. However, under cross-examination by counsel for the Commission's staff, Mr. Kujawski admitted that the purpose of building out the first phase

of the subdivision was to prevent Gulf Power from serving any part of the first phase. (Tr. 254-256) In fact, the titi swamp could have been crossed without any additional costs or effort. (Tr. 299-301) Construction of the service to Mr. Carnley was completed on November 8, 1982. (Tr. 193) In addition to the service to Mr. Carnley, the Cooperative constructed a distribution line out the entrance road almost to Highway 231 and adjacent to Gulf Power's existing distribution line. This line was constructed to pre-empt Gulf Power from constructing a line into the subdivision. The Cooperative also provided the developers five street lights at no charge. (Tr. 217-218)

On January 7 and January 10, 1983, Gulf Power received requests for service from Mr. Lewis and Mr. Gainer, respectively. (Tr. 38) On January 14, 1983, Michael Dunn, the Eastern Division Manager of Gulf Power Company telephoned Mr. Norris, the manager of the Cooperative, requesting that they meet at Cedarwood Subdivision to discuss the disputed area. Mr. Norris informed Mr. Dunn that he could not meet that day, and a meeting was scheduled for January 17, 1983. (Tr. 38, 49) On January 16, 1883, the Cooperative obtained an easement from the developers to construct distribution lines along the streets of Cedarwood Subdivision. This easement was prepared by Frank Kujawski and purported to grant to the Cooperative an exclusive easement to serve the subdivision. (Tr. 193) On January 17, 1983, Mr. Dunn and Mr. Norris met at Cedarwood Estates. At that time, Mr. Dunn informed Mr. Norris of Gulf Power's position that the area of Cedarwood Estates was rightfully the territory of Gulf Power. At that time, and in a subsequent letter dated

February 2, 1983, Mr. Dunn offered, on behalf of Gulf Power, to purchase the facilities of the Cooperative within Cedarwood Estates. (Tr. 39, 40; GPC Ex. 1, Sch. 4) Mr. Norris advised Mr. Dunn that he would have to take the matter back to the Board of Directors. The offer was apparently considered by the Board of Directors and according to Mr. Norris was rejected. (Tr. 39)

As stated above, on January 7, 1983, Gulf Power received a request for service from Mr. Lewis, who had purchased Lots 8 and 9. (Tr. 39, 194) As Gulf was obligated to provide service to Mr. Lewis, and the Cooperative had blocked the entrance road to Cedarwood Estates, Gulf Power obtained a right-of-way from Mr. Davis, whose service pole was located within 500 feet of Mr. Lewis' property. Gulf Power had been providing service to Mr. Davis, whose property abuts Cedarwood Subdivision, for some time. On February 3, 1983, Gulf Power's survey crews began laying out and cutting the necessary right-of-way to provide service to Mr. Lewis. (Tr. 40)

According to Mr. Kujawski, he observed the Gulf Power crews working, and when it became obvious that Gulf Power intended to provide service to Mr. Lewis, Mr. Kujawski notified Mr. Commander and requested that he request service to Lot 6 of Cedarwood Estates. Lot 6 is located one lot to the east of Mr. Lewis' property. On February 4, 1983, the Cooperative commenced and completed construction of distribution lines from its existing facilities in phase I throughout phase II of Cedarwood Estates Subdivision. (Tr. 222-223, 254-256) Working with an above average number of men and trucks, the Cooperative completed construction, again using a circuitous route to reach Lot 6. In addition, the

Cooperative built past Lot 6 and north, serving no one. (Tr. 40-41; GPC Ex. 1, Sch. 5) The Cooperative provided the service drop, service pole, and all facilities necessary for service to Lot 6 at no charge to Mr. Commander. (Tr. 225). As testified to by Mr. Commander and Mr. Kujawski, no electricity was ever used at this location. (Tr. 226) Shortly after installation, the meter was removed. (Tr. 140, 226) This line was built primarily to block Gulf Power from serving Mr. Lewis, not to provide service to Mr. Commander at Lot 6. (Tr. 256) According to Mr. Lewis, Mr. Kujawski repeatedly made inquiries regarding Mr. Lewis' intent to take service from the Cooperative. (Tr. 27, 28)

On August 14, 1983, Gulf Power received a written request for service from Mr. and Mrs. Harvey, the purchasers of Lots 3 and 4, Block G. (Tr. 134; GPC Ex. 7) Upon receiving the request, Gulf Power contacted several of the developers regarding obtaining an easement for service along the streets of the development. None of the developers objected to Gulf Power serving the Harveys, and Gulf Power obtained a license to provide such service from the developers. (Tr. 62-63) Gulf Power constructed its lines and provided service to the Harveys on August 18, 1983. (Tr. 13)

Testimony at the hearing and evidence in the record establishes that if the Cooperative had not circuitously and expansively installed its lines, Gulf Power's cost to serve the entire subdivision would have been $39,976.00, while the Cooperative's estimated cost to serve the entire subdivision according to its own witness, was $66,374.82. (Tr. 219, 234-35, 265; GPC Exs. 1, 8; GPC Ex. 106)

ARGUMENT

THE COMMISSION'S DECISION TO AWARD THE DISPUTED AREA TO GULF POWER IS NOT ERRONEOUS BECAUSE THE COMMISSION'S ACTION COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW AND IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Florida Supreme Court's scope of review of the appealed order of the Commission is narrow. The Court only has to determine whether the Commission's action comports with the essential requirements of law and is supported by competent substantial evidence. Citizens v. Public Service Commission, 435 So.2d 785, 787 (Fla. 1983) (Florida Power and Light Company); Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716, 717 (Fla. 1983); Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353, 1354 (Fla. 1980); Gulf Coast Motor Line, Inc. v. Hawkins, 376 So.2d 391, 392 (Fla. 1979); Kimball v. Hawkins, 364 So.2d 463, 466 (Fla. 1978); State v. Hawkins, 364 So.2d 723, 727 (Fla. 1978) (Holiday Lake Water System, Inc.); Florida Telephone Corp. v. Mayo, 350 So.2d 775 (Fla. 1977). In its brief, the Coopertive is asking the Court to reweigh the evidence; however, the Court is duty bound not to reweigh the evidence. 435 So.2d at 787; Florida Retail Federation, Inc. v. Mayo (Fla. 1976). Indeed, the Commission's order is before the Court with a presumption of correctness, and the burden of the Cooperative, as appellant, is to show that the findings of the Commission do not comply with the essential requirements of law and are not supported by competent substantial evidence. Surf Coast Tours, Inc., 385 So.2d at 1354; Gulf Coast Motor Line, Inc., 376 So.2d at 393; Fargo Van & Storage, Inc. v. Bevis, 314 So.2d 129, 132 (Fla. 1974).

The Cooperative has woefully failed to meet its burden. As fully discussed below, the Commission's order (App. A; R. 773) is lawful and is supported by competent substantial evidence.

POINT I

THE COMMISSION'S ORDER COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

The thrust of the Cooperative's argument is that the Commission's comparison of the two utilities' estimated costs is not a policy or procedure promulgated within the Commission's rules and therefore constitutes a nonrule policy which is violative of the Florida Administrative Procedures Act (Florida APA), Chapter 120, Florida Statutes. In support of its position, the Cooperative cites the decision in McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA), without identifying the specific portion of that decision which purportedly supports its contention. App. Br. 17, 22. The Cooperative's reliance on McDonald is misplaced; the decision in McDonald actually rebuffs the Cooperative's assertions.

The Court in McDonald expressly acknowledged that the Florida APA recognizes - -

> the inevitability and desirability of refining incipient agency policy through adjudication of individual cases. There are quantitative limits to the detail of policy that can effectively be promulgated as rules, or assimilated; and even the agency that knows its policy may wisely sharpen its purposes through adjudication before casting rules.

346 So.2d at 581.

The Florida Supreme Court has specifically held that the Commission may develop policies by adjudication and has not required

formal rulemaking as the initial step in the expression of policy. City of Tallahassee v. Florida Public Service Commission, 443 So.2d 505, 508 (Fla. 1983). The Court stated in Tallahassee:

> [I]f the PSC seeks to exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adversary proceedings, then we hold that there should be erected no impediment to the PSC's election of such course. We feel that the ad hoc pronuncements either through orders of the PSC or through decisions made after adversary proceedings should be viewed as de facto rules, or as expressed in McDonald v. Department of Banking and Financing, 346 So.2d 569 (Fla. 1st DCA 1977), "incipient policy."

Id. at 507. Through the adversary proceedings, a forum is provided in which agency policy and discretion are challenged, exposed, and examined. McDonald 346 So.2d at 583. In this manner, agency policy is fully developed in the record through testimony and cross examination, and litigants are not subject to any unfair surprise from any unexpected or precipitous agency pronouncement of policy. Id.

Thus, the Commission's use of the costs of service as a factor in deciding who should serve the disputed territory was proper. The Cooperative cannot now complain of any surprise that the cost of service the subdivision would be an issue since that question was expressly placed into issue at the prehearing conference and was specified as factual issue number five (5) in the prehearing order, number 12473, issued on September 12, 1983. (Ph. 22-24; R. 31) Moreover, testimony and evidence was taken from witnesses of both utilities on the subject of costs. The

witnesses specifically addressed the cost issue and were subject to cross examination on the matter. (Tr. 76-78, 112-117, 215-220, 238-245, and 264-265) The Cooperative, as the record in this case clearly establishes, had every opportunity to present evidence of its costs to serve the subdivision, to cross examine Gulf Power's witnesses on the issue of costs, and to even recall out of order, in this administrative proceeding, its own witnesses if there was any actual confusion as it now alleges in its brief.

The Cooperative was sufficiently informed of the cost issue and was given more than adequate opportunity to challenge the cost comparison and facts associated with that issue. Indeed, as the transcript references noted above clearly evince, the Cooperative presented its evidence and participated fully in the determination of comparative costs. The requirements of McDonald were met, and the Cooperative attack on the cost comparison is without merit. See 346 So.2d at 581-83; Tallahassee, 433 So.2d at 507-08.

The Cooperative has also incorrectly asserted that the Commission's order does not comply with the essential requirements of law because the cost comparison is not one of the factors enumerated in Section 366.04(2)(e), Florida Statutes, which the Commission must consider in territorial disputes. Section 366.04(2)(e) provides, inter alia:

> In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonable foreseeable future requirements of the area for other utility services.

(Emphasis supplied). Thus, this statutory provision expressly states that the Commission's consideration is not limited to the factors enumerated. One of the chief issues to be decided by the Commission in a territorial dispute is whether there has been an uneconomic duplication of facilities. See §§ 366.04(3), 425.04(4), Fla. Stat.; Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982). The cost of providing requested service is recognized as a factor in determining the economics of any potential duplication. See 421 So.2d at 1384.

Finally, the Cooperative's contention that there is no precedent for the Commission's consideration as a factor the estimated cost of providing service to the disputed area is specious. The Commission has considered the cost of or savings on service in previous territorial disputes before it, and in some instances, like the present case, the cost of service was a determinative factor. In re: An Emergency Petition of Escambia River Electric Cooperative, Inc., No. 810265-EU, Order No. 10171 (Fla. PSC July 7, 1981) (App. B), aff'd Escambia River Electric Cooperative, Inc., 421 So.2d 1384; In re: Petition of Suwannee Valley Electric Cooperative, Inc., No. 830271-EU, Order No. 12324 (Fla. PSC Aug. 4, 1983)(App. C); In re: Proposed Territorial Agreement, No. 790380-EU, Order No. 12277 (Fla. PSC July 20, 1983)(App. D); see also In re: Complaint of Florida Power and Light Company, No. 790380-EU, Order No. 10300 (Fla. PSC Sept. 18, 1981)(App. E).

In short, the Cooperative's claim that the Commission's order (App. A; R. 773) does not comport with the essential

requirements of the law has no merit, and the order should be affirmed.

POINT II

THE FINDINGS OF THE COMMISSION ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

In this Appeal, the Cooperative only takes issue with two findings of the Commission: the cost to provide service to the disputed area would be over one-third greater for the Cooperative than it would be for Gulf Power; and the Cooperative's competitive conduct in "racing to serve new customers." (App. A at 2, 4; R. 114, 115-116; App. Br 13, 17-21) The Cooperative specifically concurs with the following findings of the Commission:

. . .

> (3) Both utilities are able to generate or purchase enough power to meet the potential demand in the disputed area.

. . .

> (6) Both utilities have reliable service records in the disputed area.
>
> (7) The disputed area is rural in nature.

(App. A at 4; R. 116; App. Br. 11, 16) There is no challenge by the Cooperative in this appeal to any of these remaining findings by the Commission:

. . .

> (2) Gulf Power's facilities are closer to the disputed area than are Gulf Coast's.

. . .

> (4) Neither utility has served the disputed area in the past.

(5) Gulf Power's rates would be lower than Gulf Coast's rates based upon a hypothetical residential customer receiving 1,000 KWH of electric service.

. . .

(8) There is no current territorial agreement concerning the disputed area.

(9) Two of the three customers residing in Cedarwood Estates prefer to receive service from Gulf Power. The subdivision developer preferred to receive service from Gulf Coast, probably because of Gulf Coast's ability to furnish a drainage easement.

(10) Gulf Power has not violated Rule 25-6.64, Florida Administrative Code or its tariff in failing to have collected contributions in aid of construction.

(11) Gulf Coast's construction of approximately 4,000 feet of line just to connect its existing line to the border of the subdivision amounted to an uneconomic duplication of facilities.

(App. A at 4-5; R. 116-117)

In deciding that Gulf Power should serve the disputed area, the Commission found that two factors weighed heavily in Gulf Power's favor. First, Gulf Power's existing facilities were closer to the disputed area and the Cooperative had to construct approximately 4,000 feet of line just to connect its existing facilities to the border of the subdivision. Second, Gulf Power's cost to serve the subdivision was significantly less than the Cooperative's cost. (App. at 2-5; R. 114-117) The Cooperative, as noted previously, does not dispute the first factor but challenges the second factor. However, even if the estimated costs were about equal as the Cooperative contends, a finding of uneconomic duplication of facilities is clearly still

warranted based on the first factor alone. Indeed, even if the costs were equivalent and the existing facilities were equidistant, the Commission would be required under law to award the disputed area to Gulf Power, a privately owned utility. The Florida Supreme Court has expressly held that:

> [W]hen . . . no factual or equitable distinction exists in favor of either utility,. . . the territorial dispute is properly resolved in favor of the privately owned utility.

Escambia River Electric Cooperative, Inc., 421 So.2d at 1385.

Nevertheless, the Commission's findings as to the costs of service in the present case are based on substantial competent evidence taken directly from the record. Gulf Power introduced evidence and testimony that its costs would be $39,976.00, and also provided testimony explaining the derivation of this figure. (GPC Ex. 8; Tr. 364-377) The Cooperative also presented evidence of its costs (GCC Ex. 114, Tr. 198-199), and on cross examination, the Cooperative's own witness determined that the Cooperative's total cost to serve the disputed area would be $66,374.82. (Tr. 265)

Based on this uncontroverted and substantial competent evidence, the Cooperative is unable to and cannot overcome the presumption of correctness of the Commission's findings. The Commission's finding that the Cooperative's total cost to serve the subdivision is more than one-third Gulf Power's cost is substantiated by the record and is correct. This finding should be affirmed.

The Cooperative has registered its dismay, if not astonishment, that the Commission found that it was engaging in competitive conduct. (Appr. Br. 13) What is surprising is that

the Cooperative is now representing it was not competing with Gulf Power since its position had been the contrary during the proceedings before the Commission. In its pre-trial statement, the Cooperative suggested the following issue of law for consideration:

> E. Issues of Law:
>
> 2. Where an area can be conveniently served by either of two competing power companies, each having adequate capacity and reliability of service, what considerations are determinative of the right to serve?

(R. 24) (Emphasis supplied). Likewise, in its post-trial brief, the Cooperative argued that there was no limitation on its "right" to compete with investor-owned utilities. (R. 92-107)

It is the position of the Cooperative that they should be allowed to compete freely and openly with investor-owned utilities, clearly ignoring the clear legislative intent to the contrary and the interest of the ratepayers. It is the position of the Cooperative that it should be allowed to construct 4,000 feet of distribution line to serve a subdivision which can be served by the adjacent distribution line of an investor-owned utility, and that it can build out the subdivision for the sole purpose of preventing the utility which has the lower rates, better reliability, and preferred service from serving such subdivision. It is the position of the Cooperative that it should be allowed to use federal subsidization, free street lights, service poles, etc., to entice developers to take service from it, despite the fact that none of these can be offered by the investor-owned utility. (R. 92-107)

It is obvious from both the statutory, as well as case law, that the cooperatives were never intended to compete with the investor-owned utilities. During the hearing, numerous quotes from the Congressional record were read evidencing the intent of the sponsors of the Rural Electrification Act (7 U.S.C. §§ 901-913). (Tr. 348-352, Ex. 118) As evidenced thereby, it was never the intent of Congress that the rural electric cooperatives be able to use the low interest loans and tax free status to compete with the investor-owned utilities. The subsidies provided under the Act were intended to be used for providing electric service to those persons whom the investor-owned utilities were unable to serve. (Ex. 118) The Act prohibits the funds from being used in communities with populations in excess of 1,500 people. Now, the Rural Electrification Administration, a branch of the Agriculture Department, is investigating the cooperatives' use of these low interest funds in metropolitan areas much larger than 1,500 in population. (Ex. 117) Again, the cooperatives are using these low interest funds to compete openly with investor-owned utilities, a use never intended by Congress.

These low interest loans were originally available to the cooperatives at the rate of 2%. 7 U.S.C. § 904. The rate is currently 5%. (Ex. 116) Not only are the cooperatives receiving these low interest funds, they are attempting to get Congress to waive some 7.9 billion in unpaid loans that the Treasury issued before 1973. Congress has already forgiven the interest on the loans, which would have totaled $307 million a year. (Ex. 116)

It is obvious that the cooperatives enjoy a "preferential economic advantage" as recognized by the Commision and the Florida Supreme Court in Escambia River Electric Cooperative, Inc., 421 So.2d 1384. The Court in Escambia River upheld the Commission's ruling and adhered to its decision in Tampa Electric Co. v. Withlacoochee River Coop., 122 So.2d 471 (Fla. 1960). The Court applied the holding of Withlacoochee, stating:

> It is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory 421 So.2d at 1385. (Emphasis added)

In Escambia River, the Court recognized that the legislature of Florida, in enacting Chapter 425, intended to preclude rather than promote competition between cooperatives and investor-owned utilities. Id. The intent of the Rural Electrification Act ("the Act") was obviously the same. Section 2 of the Act authorizes loans for "rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . ." 7 U.S.C. § 902 (Emphasis supplied). Further, Section 4 of the Act specifically authorizes the low interest loans but prohibits their use under certain circumstances:

> The administrator is authorized and empowered, from the sums hereinbefore authorized to make loans for rural electri-

> fication . . . . for the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . .

7 U.S.C. § 904. (Emphasis supplied).

Florida law, however, does not condition the "central station service" upon obtaining loans, but instead, specifically prohibits any electric cooperative from serving or offering to serve, a customer receiving adequate central station service:

> However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation. (Emphasis added)

§ 425.04(4), Fla. Stat. (Emphasis supplied).

It is the position of the Cooperative that these provisions in no way prohibit its providing service to the residents of Cedarwood Subdivision. (R. 92-107) It would admit that central station service is certainly readily available from Gulf Power. However, the Cooperative interprets these provisions to allow it to serve anyone who is not actually receiving such service on the date its service is provided. Id. In other words, despite the fact that central station service is available within a very few hundred feet from an investor-owned utility, if the cooperative can simply "get there first," it is permitted outright to serve the customer. Under this interpretation, if two houses on either side of a house in question were being served by the

investor-owned utility, but the house in question was being served by no one, the Cooperative would have a perfect right to provide service to such dwelling. The absurdity of this longstanding position of the cooperatives was recognized by Justice Hobson in his concurring opinion in Withlacoochee River Electric Cooperative, Inc. v. Tampa Electric Co., 158 So.2d 136, 137-38 (Fla. 1963). To quote Justice Hobson, he was "surprised, not to say shocked and amazed," at the position taken by the cooperatives on this issue. Id.

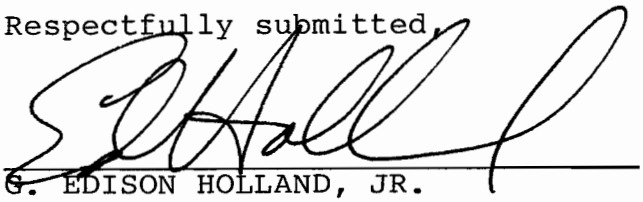
The obvious spirit and intent of Sections 2 and 4 of the Act and Section 425.04, Florida Statutes, was to preclude competition and duplication of facilities. The Cooperative's interpretation of this provision promotes competition and duplication. Likewise the spirit and intent of Sections 366.04(2) and (3), Florida Statutes, evidence a further legislative intent to prohibit such competition. Congress, the Florida Legislature, the Commission, and the Supreme Court have all recognized that allowing the cooperatives to use their "preferential economic advantage" to compete with investor-owned utilities is inequitable and violates the "fundamental underlying purposes which motivated the establishment of the Rural Electrification Program". Escambia River, 421 So.2d at 1385. If the true spirit and intent of the Program and Sections 425.04 and 366.04(2) and (3) are to be upheld, and competition and duplication avoided, the holding of Withlacoochee must be followed. In other words, if electricity is readily available by application to an investor-owned utility, the cooperatives should not compete for that load.

In this instance, the Cooperative has gone beyond attempting to compete with Gulf Power. Instead of allowing the customers of Cedarwood Subdivision to have a choice, the Cooperative blatantly built out the entire subdivision so as to preclude Gulf Power from providing service to any cutomer within the subdivision. (Tr. 217-219, 222-223, 253-256, 299-301) The Commission's finding that the Cooperative was "racing to serve" and was engaging in competitive conduct is amply supported by the record and by the Cooperative's own admission that it believes it has a "right" to compete. The Commission's finding should be upheld.

CONCLUSION

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

Respectfully submitted,



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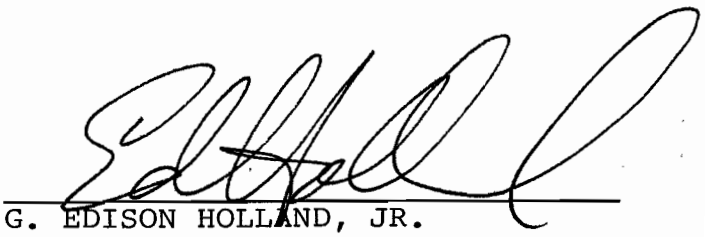
CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Answer Brief of Appellee, Gulf Power Company has been furnished to Clinton E. Foster, 1610 Beck Avenue, Panama City, Florida 32405 and Robert D. Vandiver, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, FL 32301 by U.S. Mail this 1st day of June, 1984.



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