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IN THE SUPREME COURT OF FLORIDA

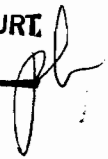
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CLERK, SUPREME COURT

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GULF COAST ELECTRIC)
COOPERATIVE, INC.,)
)
Appellant,)
)
vs.)
)
GULF POWER COMPANY,)
)
Appellee.)
_____)

SUPREME COURT NO.

APPELLANT,
GULF COAST ELECTRIC COOPERATIVE, INC.'s
INITIAL BRIEF

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PREFACE

The Appellant is Gulf Coast Electric Cooperative, Inc., and in this Brief will be referred to as Gulf Coast. The Appellee is Gulf Power Company, and in this Brief will be referred to as Gulf Power.

Florida Public Service Commission will be referred to as PSC.

Alabama Electric Cooperative, Inc., will be referred to as AEC.

The following symbols will be used:

R	Record
Vol. I TR	Volume I of the Transcript of the proceedings before the PSC
Vol. II TR	Volume II of the Transcript of the proceedings before the PSC
APP.	Appellant's Appendix

ISSUE ON APPEAL

DID THE PUBLIC SERVICE COMMISSION COMMIT REVERSIBLE ERROR IN DECLARING THAT GULF POWER COMPANY WAS ENTITLED TO PROVIDE ELECTRIC SERVICE TO CEDARWOOD, AND PROHIBITING GULF COAST ELECTRIC COOPERATIVE, INC., FROM SERVING, EITHER TEMPORARILY OR PERMANENTLY, THE DISPUTED AREA.

STATEMENT OF THE CASE

This is an appeal from a final order entered by the Florida Public Service Commission (PSC) on January 10, 1984, in Docket No. 830154-EU.

On March 21, 1983, Gulf Power Company (Gulf Power) filed its Petition before the PSC seeking a resolution of a territorial dispute with Gulf Coast Electric Cooperative, Inc., (Gulf Coast), (R 1-7). In its Petition, Gulf Power sought from the PSC, an order declaring that the Cedarwood Estate subdivision be territory that should be served by Gulf Power, and not Gulf Coast; and enjoining Gulf Coast from serving said subdivision, and directing Gulf Coast to remove its lines and facilities that had already been constructed. Gulf Power, in its Petition, alleged, as a basis for the relief sought, that Gulf Coast had violated Gulf Power's territorial rights in the area, and had violated certain contract rights.

On June 16, 1983, Gulf Coast filed its Response to the Petition of Gulf Power, (R 9-20), essentially denying Gulf Power's allegations, and denying that Gulf Power had territorial rights in Cedarwood to the exclusion of Gulf Coast; and alleged that it had been requested by the developer to provide service to

the Cedarwood Estate development, and that, pursuant to that request and its right to serve that area, it had constructed its facilities into the area prior to the time that Gulf Power commenced its construction into Cedarwood.

On September 19, 1983, this cause was heard before the PSC by two commissioners, and evidence and testimony were received on the issues raised.

On January 10, 1984, the PSC issued its order, (R 113-118), declaring that Gulf Power was entitled to serve Cedarwood and that Gulf Coast was prohibited from serving the same, either temporarily or permanently.

On January 23, 1984, Gulf Coast moved for reconsideration of the final order, (R 119), which was denied on February 17, 1984. It is from the January 10, 1984, order of the PSC resolving the Cedarwood territorial dispute in favor of Gulf Power that this administrative appeal is taken.

STATEMENT OF THE FACTS

Gulf Coast is a rural electric cooperative, organized and existing under Chapter 425, Florida Statutes; and, among other areas, provides service in rural and unincorporated areas of Bay County, Florida. Gulf Coast purchases its electricity from Alabama Electric Cooperative, Inc., (AEC), an REA generation and transmission cooperative, of which Gulf Coast is a member. Gulf Power is an investor-owned utility, subject to regulation pursuant to Chapter 366, Florida Statutes. Gulf Coast is also subject to the jurisdiction of the PSC pursuant to Florida Statutes §366.04 for the purpose of resolving territorial disputes.

The Florida Public Service Commission is a statewide administrative body, whose powers and duties are prescribed by the Legislature.

Cedarwood Estate, the disputed territory, is 143 acres of land located in an unincorporated area of Bay County, Florida, approximately fifteen miles North of Panama City, and situated between Campflowers Road on the North, and U.S. Highway 231 on the South, in the vicinity of the intersection of those two roads, (Vol. II, TR 190-191), and is depicted on the diagram shown at APP 1.

Cedarwood is rural, has no municipal services, such as fire protection, water systems, sewer systems, police protection (except that furnished by the Bay County Sheriff's Department), storm water drainage, paved streets, post office, etc., and the building tracts are generally one acre, or more, in an unrecorded subdivision or development, (Vol. II, TR 190-191).

Cedarwood is the Southeasterly part of a larger tract of property known as the "Ramsey Tract", which was partially bordered on the South by U.S. Highway 231, and bounded on the North entirely by Campflowers Road, (Vol. II, TR 189). Prior to the Cedarwood property being sold from the Ramsey Tract to its present owner, the developer, Gulf Coast furnished retail electric service to the Ramsey Tract at the dwelling house located thereon, (Vol. II, TR 284), and was so serving at the time the portion that was developed into Cedarwood was sold off. Gulf Power, on the other hand, had never furnished electric service to any part of the Ramsey Tract, (Vol. II, TR 196-197).

Both parties have had residential distribution lines in the general area for a long number of years. Gulf Coast's lines have been located along Campflowers Road since approximately 1947, (Vol. II, TR 278). Gulf

Power has had its lines along Highway 231 since about 1940, (Vol. I, TR 32).

The Cedarwood Estate development does not touch or join the right of way of U.S. Highway 231; however, access to the development is over a road through a parcel of property that is excluded from the Cedarwood plat, (Vol. I, TR 100-101; APP 2). After the Cedarwood property was sold off from the Ramsey Tract, it does not touch or join Campflowers Road. The Eastern boundary of the Cedarwood development touches and abuts the right of way of an AEC transmission line, from whom Gulf Coast purchases electricity, (Vol. II, TR 284-285; APP 1). The Northern boundary of Cedarwood, nearest Gulf Coast's distribution lines on Campflowers Road, is approximately 2800 feet by the most direct route, and the Southern boundary of the Cedarwood, nearest Gulf Power's line along U.S. Highway 231, is approximately 600 feet by the most direct route. Prior to September 1982, neither party had furnished electricity within the boundaries of the disputed development.

On September 27, 1982, James Commander, one of the developers of Cedarwood Estate, requested Gulf Coast to furnish electrical service to the Cedarwood development, and provided Gulf Coast with working drawings and

plans so that it could install its facilities, and gave Gulf Coast the necessary rights of way on which to locate its facilities within the development, (Vol. I, TR 132-133). James Commander had been a member of Gulf Coast off-and-on over the past several years, (Vol. I, TR 132). Gulf Coast was then serving another development of Mr. Commander's approximately 2 miles North of Cedarwood, and approximately 1000 feet off of U.S. Highway 231, (Vol. I, TR 136, 143).

When Mr. Commander developed that area, 5 or 6 years ago, Gulf Power did not want to serve it at that time, so it was served by Gulf Coast; and then, Gulf Coast served another development of Mr. Commander's South of Cedarwood, (Vol. I, TR 136, 143).

On September 28, 1982, Gulf Coast received a request for service from Mr. A. J. Carnley, who had purchased Lot 4, Block D, located in the northern half of Cedarwood, (Vol. II, TR 193). At that time, there were no contractual or statutory provisions that prohibited or denied Gulf Coast the right to serve Cedarwood, and the only guidelines available to Gulf Coast in determining whether it could serve the area were the factors set forth in F.S. 366.04(2)(e). There were no rules or regulations promulgated by the PSC establishing

other factors that it would consider in resolving territorial disputes. On October 27, 1982, after Gulf Coast had received Mr. Commander's request to serve the entire Cedarwood development, and after Mr. Carnley's request to serve his lot, Gulf Coast commenced construction of the facilities necessary to provide electrical service not only to Mr. Carnley, but also, to the first phase of the Cedarwood development (poles and distribution lines necessary for primary facilities). This construction was completed on November 8, 1982, and on the same date, service was provided to Mr. Carnley, (Vol. II, TR 193). By the most direct route, the Northern boundary of Cedarwood was approximately 2800 feet from Gulf Coast's lines along Campflowers Road, and was approximately 3450 feet from the Carnley lot. Because there was a potential of developing the remainder of the Ramsey Tract between the Northern boundary of Cedarwood and Campflowers Road, and because of the possibility of having to relocate any lines constructed, Gulf Coast elected to bring its lines into Cedarwood down the AEC right-of-way line, which is also the Eastern boundary of Cedarwood, (Vol. II, TR 192-193, 208).

While extending its distribution lines to provide electrical service to Mr. Carnley, Gulf Coast had

the foresight to extend its poles and lines along the streets of the remaining portion of the development which had been completed because it had been requested by Mr. Commander to serve the whole subdivision. This avoided the necessity of recalling a construction crew into the development area when a new customer requested service, (Vol. II, TR 198). Upon Gulf Coast's completing the construction of the first phase of Cedarwood for which it had plans, its lines were within a few hundred feet of U. S. Highway 231 and Gulf Power's lines along that highway, (APP 2).

On January 5, 1983, Gulf Power became aware that Gulf Coast had constructed its distribution lines in Cedarwood, (Vol. I, TR 60). Gulf Power then went to Mr. Commander and requested easements to serve Cedarwood, and Mr. Commander refused, (Vol. I, TR 62). However, Mr. Commander furnished Gulf Power with the name of Mr. Lewis, who had bought a lot in the subdivision, (Vol. I, TR 38, 61). As a means of getting into the subdivision, Gulf Power, between January 7 and January 10, 1983, actively solicited Mr. Lewis' business, (Vol. I, TR 38,61). At the time Gulf Power sought to serve Mr. Lewis, it knew that Gulf Coast had made a commitment to serve Cedarwood, (Vol. I, TR 67-68).

On February 3, 1983, Gulf Power's survey crew began laying a route for its line to Mr. Lewis; and on

the same day, Gulf Coast observed Gulf Power's survey crew. On February 4, 1983, Gulf Coast commenced and completed the extension of its facilities throughout the portion of the development which was laid out, including bringing its line by Mr. Lewis' lot, (Vol. II, TR 222-224). On January 14, 1983, Gulf Power demanded that Gulf Coast remove its facilities from Cedarwood, which demand was refused, (Vol. I, TR 38-39). Gulf Power completed its construction on February 9, 1983, installed Mr. Lewis' meter on March 3, 1983, (Vol. I, TR 41), and filed its Petition before the PSC on March 17, 1983.

The record reflects the cost each party incurred in completing the above-described construction for their initial service. The cost to Gulf Power to build 1000 feet of line from Highway 231 to serve Mr. Lewis was \$13,000.00 to \$14,000.00, (Vol. I, TR 76-77). The cost to Gulf Coast to build its facilities from Campflowers Road down the AEC right of way into the subdivision, not only to serve Mr. Carnley but to serve the remainder of Phase I, was \$14,457.82, (Vol. II, TR 197-198). Gulf Coast's entire cost to locate its facilities in the subdivision, including what was built in the first phase and that built after Gulf Power

started into the subdivision, totaled \$20,647.00, (Vol. II, TR 243).

The Staff Counsel for PSC requested each party to furnish its cost estimate of serving the entire subdivision. The request for cost estimate was unique. Both parties complied, but, each furnished an estimate based on different factors and elements of cost. As a result, a true and fair comparison of the estimated costs is impossible. Gulf Power stated that its cost to serve the subdivision would be \$39,976.00, based on the way that it would have built had it not been blocked by Gulf Coast from entering the subdivision where it would have otherwise entered, (Vol. I, TR 5). However, Gulf Power's figure of \$39,976.00 not only did not include the \$13,000.00 to \$14,000.00 that it had spent to serve Mr. Lewis, and it did not include overhead, (Vol. I, TR 115-116; APP 6). Gulf Coast's estimated total cost included the cost of the facilities already constructed and overhead, (Vol. II, TR 243, 219-221; APP 4-5).

At the time Gulf Power filed its Petition, Gulf Coast had spent \$20,647.00, and had installed its primary facilities throughout the subdivision.

Each of the parties follow similar construction practices and use similar materials, (Vol. I, TR 117; Vol. II, TR 287-288).

ISSUE

DID THE PUBLIC SERVICE COMMISSION COMMIT REVERSIBLE ERROR IN DECLARING THAT GULF POWER COMPANY WAS ENTITLED TO PROVIDE ELECTRIC SERVICE TO CEDARWOOD, AND PROHIBITING GULF COAST ELECTRIC COOPERATIVE, INC., FROM SERVING, EITHER TEMPORARILY OR PERMANENTLY, THE DISPUTED AREA.

ARGUMENT

Gulf Power Company (Gulf Power) filed its Complaint alleging that it had certain territorial rights to Cedarwood, the disputed area, and that Gulf Coast Electric Cooperative, Inc., (Gulf Coast) had violated the contractual provisions of a tariff between Gulf Power and Alabama Electric Cooperative, Inc., (AEC), from whom Gulf Coast purchased power. The Commission ruled against Gulf Coast on the reasons alleged by Gulf Power in its Complaint, but ruled in favor of Gulf Power for reasons not raised in its Complaint.

The evidence established, and the Commission so found, that Cedarwood was a rural area, and that Gulf Coast was not prohibited from serving Cedarwood by reason of Chapter 425, Florida Statutes.

In this case, we have a rural area that is in the immediate vicinity of both parties, and either party had the right to serve the disputed area. Gulf Coast received a request from Mr. Commander, the developer of the Cedarwood subdivision, for service; and, at that time, Gulf Coast was serving other developments of Mr. Commander's in the immediate vicinity. After having been requested by Mr. Commander to serve the Cedarwood development, Gulf Coast received a request from Mr. Carnley to provide retail electrical service to his lot. At this point, Gulf Coast had received a request from the developer to serve a subdivision that it was lawfully entitled to serve, and had received a request for service from a retail consumer, whom it had the lawful right to serve.

Upon receiving the requests from Mr. Commander and Mr. Carnley, Gulf Coast built its facilities into that portion of the Cedarwood development for which plans had been completed, (APP 2). In building into the Cedarwood subdivision, Gulf Coast built its distribution line down the AEC to the eastern boundary of Cedarwood right-of-way rather than coming across Mr. Ramsey's property, which had the potential of being developed and

when developed would have required a relocation of the line. Gulf Coast on entering the subdivision, while its construction crews were there, extended its poles and lines throughout that portion of the subdivision where the roads were laid out because Mr. Commander had requested that the entire subdivision be served and because it was good construction practice and more economical than to return when it received another consumer request. The PSC infers, but does not find that Gulf Coast, in extending its facilities throughout Phase I of Cedarwood, acted wrongfully. This inference is gleaned from the following statement by the PSC at page 2 of its Order:

"...However, we will not condone the utility's competitive conduct in racing to serve new customers." (R 114)

There is not one shred of evidence to support the conclusion that Gulf Coast raced to get in the subdivision. There is not one shred of evidence to indicate that the manner in which Gulf Coast built into the subdivision and the extension of its lines after it entered the subdivision, was not good, sound and economical construction practices in the utility industry. Gulf Coast completed the construction in the first phase and furnished electricity to Mr. Carnley on November 8, 1982.

On January 5, 1983, almost two months after Gulf Coast had finished the construction of its facilities in the first phase of Cedarwood, Gulf Power realized that Gulf Coast had its facilities in Cedarwood and was serving a consumer. With full knowledge that Gulf Coast had made a substantial financial commitment to serve a subdivision that it had the lawful right to serve, Gulf Power tried to get into the subdivision. It first went to Mr. Commander and asked for right of way easements, which request was refused; it then found out that Mr. Lewis had purchased a lot in Cedarwood and that it could reach Mr. Lewis' lot by building across property adjacent to the subdivision into the backside of Mr. Lewis' lot. It solicited service to Mr. Lewis in order to get its facilities in the subdivision knowing that Gulf Coast had already made a commitment to serve.

Gulf Coast, seeing Gulf Power's surveying crew at work, in one day completed the extension of its facilities throughout the subdivision, and brought its line by Mr. Lewis' lot before Gulf Power had even completed its surveying. Yet, Gulf Power continued to build its facilities to Mr. Lewis' lot.

On January 5, 1983, when Gulf Power learned

that Gulf Coast was serving Cedarwood, it chose not to file a Petition with the PSC to resolve a territorial dispute, and seek injunctive relief against Gulf Coast's serving the area. Rather, it proceeded to spend \$13,000.00 to \$14,000.00 to serve Mr. Lewis, with full knowledge that Gulf Coast had extended its facilities throughout the remainder of the subdivision, and had located lines adjacent to Mr. Lewis' lot. Only after Gulf Power had expended \$13,000.00 to \$14,000.00 and got inside the subdivision did it file its Petition with the PSC.

At the time Gulf Coast received the requests from Mr. Commander and Mr. Carnley in September of 1982, Gulf Power was not serving the Cedarwood subdivision, had no facilities in the Cedarwood subdivision, and had made no expenditures in connection with the Cedarwood subdivision. Since Gulf Coast was lawfully entitled to serve the subdivision, it was totally justified in constructing its lines and facilities in Cedarwood. The only other options available to Gulf Coast were, (1) to ask Gulf Power if it would give its permission to serve Cedarwood, or (2) file a petition before the PSC seeking an order declaring that it had the right to serve

Cedarwood, when it had pending a request for service. Neither of those alternatives were practical nor acceptable, and Gulf Coast had no lawful obligation to pursue either alternative under the existing circumstances.

The PSC, found that the area was rural; that Gulf Coast was not prohibited from serving it; that both utilities were able to generate or purchase enough power to meet the potential demand of the disputed area; that both utilities have reliable service records in the disputed area; and, that the service reliability of both utilities in the disputed area was similar.

Jurisdiction to resolve territorial disputes is granted to the PSC by Florida Statutes 366.04(2)(e) and provides:

"e. To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, but not be limited to consideration of, the ability of the utility to extend service within their own capabilities and the nature of the area involved, included population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area or other utility services."

As a basis of resolving the territorial dispute in favor of Gulf Power, the PSC relied upon an

ill-defined nonrule policy of "estimated cost". At page 3 of its Order, (R 115), the Commission stated:

"Based upon the distances to serve the aforementioned customers, it was much more costly for Gulf Coast to provide service in the disputed area. The estimated cost for Gulf Coast to serve the entire subdivision was \$66,374.00 as compared to \$39,976.00 for Gulf Power. We consider this factor compelling in favor of awarding Gulf Power the disputed area." [Underlining supplied]

"Estimated cost" to serve, and the factors which are to be considered in determining estimated cost, are not mentioned in F.S. 366.04(2)(e), and are not promulgated as agency rules. Further, "estimated cost" and the factors of which it is comprised, are not readily ascertainable in agency decisions. The PSC, when requesting estimated cost figures from the parties, gave little or no guidance as to the type of information it desired. Nonetheless, the Commission found that the estimated cost difference between the two companies was the compelling and decisive factor in favor of Gulf Power. The PSC's failure to establish the factors of cost to be considered and to adequately support this nonrule policy in its findings constitutes reversible error. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA, 1977).

It is clear from the record that the PSC's failure to promulgate a rule concerning "estimated cost" or to adequately explain this agency policy, led to considerable confusion. The PSC had asked each of the parties to furnish it an estimate of the cost of serving the entire subdivision, but that request was so vague that the respective responses are of little value. Both parties furnished such a cost estimate, but the cost estimates were different, not only in the amount of the costs, but the elements that made up the cost. Gulf Power furnished an estimate for service that did not include its initial cost to serve Mr. Lewis or its overhead. Gulf Coast, on the other hand, furnished an estimate that included its initial cost and its overhead.

The Commission found that the estimated cost for Gulf Coast to serve the subdivision was \$66,374.82, as compared to Gulf Power's cost of \$39,976.00. The Commission failed to properly consider and analyze the evidendce. Gulf Coast's estimate of cost included the \$20,647.00 that it had expended at that point in providing primary service throughout Cedarwood, and service to Mr. Carnley. Gulf Coast's estimate of \$59,145.00 for

serving the subdivision, (Vol. II, TR 243), was a fully loaded cost, including overhead, (Vol. II, TR 219-221; APP 4-5). Gulf Power's estimated cost to serve the subdivision of \$39,976.00, not only did not include the \$13,000.00 or \$14,000.00 that it spent to serve Mr. Lewis, but also, did not include overhead, (Vol. I, TR 115-116; APP 6), which it estimated to be at twenty-five per cent (25%), (Vol. I, TR 76-77).

When you take the \$39,976.00 cost estimate of Gulf Power and add to it an overhead factor of \$10,000.00 (25%), and the \$14,000.00 that was spent to serve Mr. Lewis, it brings Gulf Power's total to approximately \$64,000.00, which is in excess of Gulf Coast's estimate. The PSC's finding that Gulf Coast's cost to serve was \$66,374.82 is based on a statement by Mr. Kujawski in response to a question propounded by Gulf Power's attorney on cross-examination, (Vol. II, TR 64-65). It is apparent that Mr. Kujawski was confused by Mr. Holland's adding and subtracting some of the cost estimates for alternative routing to Mr. Carnley's lot, which were requested by the PSC staff, and which were irrelevant and immaterial, but resulted in Mr. Kujawski saying that he would go along with the calculations

arrived at by Mr. Holland of \$66,374.82. Mr. Kujawski had repeatedly testified that the entire cost estimate of Gulf Coast to serve the subdivision was \$59,145.00, (Vol. II, TR 243-244, 264; APP 4, 5). This is further established by the unrefuted testimony of Archie Gordon, Gulf Coast's consulting engineer, and Frank Kujawski, its engineer, that Gulf Coast and Gulf Power use similar construction practices, similar materials, and once each utility was within the subdivision, there would be no appreciable cost difference to either party in serving the subdivision, and, if anything, Gulf Coast would be cheaper because it had a lower overhead than Gulf Power.

Based on the undisputed testimony, there is no factual basis to support the PSC's finding that there was a large cost difference between the parties in serving the subdivision. If there was a duplication of facilities, it is certainly not an uneconomic duplication of facilities. The problem with this case is that the PSC applied the same standards and analysis after the fact that it might have applied before the fact.

In order for the difference to be a relevant consideration, it would appear that the cost savings must be beneficial to the public, or at least that portion of the public that consumes electricity in the

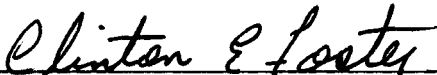
disputed area. In this case, the consumers in the subdivision are not benefited if the cost is essentially the same. In this case, the PSC has ordered that Gulf Coast remove its facilities from the disputed area, this adversely impacts on every consumer on Gulf Coast's system, because Gulf Coast has lost the right to serve a rural development and increase its consumer density per mile of distribution line which would result in savings to its consumers and because it must absorb into its rate base, the cost of constructing a facility which it is prohibited from using, into an area which it had every right to believe that it was entitled to serve.

CONCLUSION

The PSC's decision is not supported by competent, substantial evidence and should therefore be reversed. F.S. 120.68(10). Further, the PSC's decision should be reversed because it is based on a nonrule policy that has not been clearly stated or supported by the record. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA, 1977). This Court is urged to reverse the PSC's Order herein appealed and remand it with instructions to enter an order in favor of Gulf Coast and against Gulf Power Company.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE


I HEREBY CERTIFY THAT a copy of Appellant's Initial Brief, and the Appendix thereto, has been furnished to:

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