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

REPLY BRIEF OF APPELLANT
GULF COAST ELECTRIC COOPERATIVE, INC.

CLINTON E. FOSTER
1610 Beck Avenue
Panama City, FL 32405
904/784-3474
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	Page(s)
Table of Contents	i.
Table of Citations	ii.
Argument	1 - 12
Conclusion	13
Certificate of Service	14

TABLE OF CITATIONS

	Page(s)
Cases	
City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983)	9 - 10
McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st D.C.A. 1977)	12
Straughn v. O'Riordan, 338 So.2d 832 (Fla. 1976)	12
Statutes	
Florida Statutes §366.04(2)(e)	4

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

The Appellees' position that the PSC's finding that "the estimated cost of Gulf Coast to serve the entire subdivision was $66,374 as compared to $39,976 for Gulf Power is a compelling factor in favor of awarding Gulf Power the disputed area", is based upon competent and substantial evidence is not supported by the record. Assuming the validity of the argument of Appellees that the record shows that Mr. Kujawski's statement on cross-examination that Gulf Coast's total cost to serve would be $66,374.82 is correct and was not the result of confusion, the finding of the PSC is still not supported by competent and substantial evidence.

The record clearly establishes that the cost estimate of Gulf Power is based on the way that it would have built its facilities if Gulf Coast's facilities had not already been in the subdivision. Gulf Power did not

include in its estimate the cost already expended in the subdivision, and it did not include its overhead. On the other hand, the estimate of Gulf Coast is based on what it had already spent, what it needed to spend to complete the subdivision, and its cost estimate included overhead.

It is obvious that the $39,976.00 cost estimate of Gulf Power, plus an overhead factor, (which Mr. Dunn testified, was 25%), would amount to $10,000.00, plus the $14,000.00 Gulf Power had already spent to serve Mr. Lewis, would bring Gulf Power's total cost to serve to approximately $64,000.00, which is within approximately $2,400.00 of the Cooperative's cost. This is an insignificant cost difference which, at best, is the result of estimates made by ill-defined rules or guidelines.

Cost, or estimated cost, to serve should only be a dispositive issue if it has some relevancy and reasonable relationship to the question of which party should be permitted to serve Cedarwood. In this case, the cost to serve inside the subdivision is really irrelevant and immaterial. If cost is an issue, the question should be the cost of constructing facilities to the first consumer. The evidence is undisputed that

once in the subdivision, the construction practices and materials used by both parties are essentially the same, and the cost to build inside the subdivision would be substantially the same.

In the final analysis, the cost to serve inside the subdivision is going to depend on how the subdivision develops, and how electrical service is requested. If the subdivision develops in a manner so that service is furnished to the first lot and then consecutively to adjoining lots throughout the subdivision, one set of costs are involved; but, if the subdivision develops in a manner so that requests for service are scattered throughout the subdivision, a wholly different set of costs are involved.

The PSC, at page 8 of its Answer Brief, said the issue was cost/benefit because of the interest of the rate payers. That begs the question, "Who are the rate payers?". Are the rate payers the contemplated users in the subdivision, or are they the existing rate payers of the parties? Gulf Coast and Gulf Power have a completely different type of rate payer. Gulf Coast's rate payers are member/owners of its system, and Gulf Power's rate payers are customers of a third party. Gulf Coast's consumers per mile of distribution line is

a fraction of the number of consumers per mile of distribution line of Gulf Power Company. If the interest of their rate payers is the issue, then the question becomes, "Which rate payers are going to be benefited or damaged by the expenditure for construction?". The future users of electricity in Cedarwood are entitled to reliable electric service at reasonable rates, and not the the best service at the lowest rates. The PSC's Order herein appealed establishes that Gulf Coast's rates are reasonable, and that its service is reliable. The cost/benefit issue would be most relevant to the existing rate payers of each of the parties, and whether or not the expenditure in question is prudent and would cost or benefit those rate payers. The expenditure of the same number of dollars by the parties to serve Cedarwood will have a substantially different impact on their respective rate payers. An expenditure of $66,000.00 to serve a subdivision that would increase Gulf Coast's consumer density per mile of distribution line, thereby lowering its cost to serve, would have a substantial beneficial impact and would not be an imprudent investment.

In resolving territorial disputes, Florida Statutes §366.04(2)(e) provides that the PSC is not

limited to the consideration of the ability of the utility to extend 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 foreseeable future requirements of the area or other utility service. However, in considering factors other than those stated in the Statute, the Commission should be limited to such other factors as it has defined by clearly established policy or adopted rule, and then, only if they are substantially relevant.

A cost difference standing along without a determination as to the effect or impact of that cost difference on the parties and their rate payers is not sufficient to support the PSC's decision in this case.

The Appellees try to justify the PSC's decision in favor of Gulf Power Company by arguing that Gulf Power's lines were closer to the subdivision boundary than were Gulf Coast's; that Gulf Coast engaged in an uneconomic "race to serve"; and, that a decision in favor of Gulf Coast would result in the first utility to reach the consumer being automatically entitled to serve, despite other more cost-effective alternatives. What the Appellees fail to come to grips with, are the

following facts:

1. Both parties have had facilities in the general area of Cedarwood since the 1940's and, even though Gulf Power was several hundred feet closer to Cedarwood and Mr. Carnley than was Gulf Coast, Cedarwood and Mr. Carnley are in a general area where each party's facilities duplicate the other party's facilities in the sense that either party could serve the consumers in the general area, and each party serves consumers that were initially closer to the other party's facilities.

2. That Gulf Coast was lawfully in that area and, by the Commission's own findings and determination, had the right to serve.

3. That Gulf Coast had served the parent tract of land of which the Cedarwood land was previously a part.

4. The record as a whole amply demonstrates that Gulf Power would not be complaining that it should have served Mr. Carnley and would have done so if Mr. Carnley's lot had not been in a subdivision. The dispute arose because Mr. Carnley, who requested service of Gulf Coast, is located in a subdivision that has the potential of generating a substantial number of consumers in a small area.

5. If Gulf Coast's construction to Mr. Carnley would not have been an uneconomic duplication of facilities, if Mr. Carnley had not been located in the subdivision, the fact that he is located in the subdivision cannot change the status of Gulf Coast's construction to that of an uneconomic duplication of facilities.

6. The developer requested Gulf Coast's service; and, despite the Appellees attempts to explain away that preference, the unrefuted facts show that the developer had requested Gulf Power to serve other of his developments in the general area, and Gulf Power had referred him to Gulf Coast; and that Gulf Coast was, in fact, serving several of that developer's subdivision that sort of surrounded this subdivision.

7. The first service to the subdivision was by Gulf Coast at the request of Mr. Carnley.

8. Gulf Coast's testimony is undisputed that even though its construction in Cedarwood in the first phase resulted in a pre-emption of Gulf Power, that it followed good engineering practices and cost-effective methods.

9. There is not one shred of evidence to indicate that Gulf Coast's expenditure was an imprudent

expenditure of its members' funds, and that its member/owners would not have substantially benefited its expenditure of that size to serve a subdivision with the consumer density of Cedarwood.

10. That Gulf Coast had completed construction in the first phase of Cedarwood and was, in fact, furnishing electric service inside the subdivision for about 45 days before Gulf Power was aware that Gulf Coast was in the subdivision.

11. That Gulf Power solicited a request for service in a subdivision that was being served by Gulf Coast and that it knew Gulf Coast had made a substantial commitment to serve in order to create a dispute for the purpose of bringing this action.

In response to Gulf Power's argument that it should have a preference because it is an investor-owned utility, and that cooperatives were never intended to compete with investor-owned utilities, that issue is effectively dealt with by the Commission in its order. Gulf Power raised the REA purpose in the proceedings before the PSC, and the PSC ruled against it, and Gulf Power did not cross-appeal that issue. The PSC in its order, said:

> "Not only is Chapter 425, Florida Statutes not a prohibition to the cooperative serving the

> disputed area, but it appears on its face to justify a decision in favor of the cooperative. This fact becomes clear when reading Section 425.02, Florida Statutes in pari materia with Section 425.03, Florida Statutes. Because the disputed area has been determined to be rural, for purposes of this proceeding, Chapter 425 does not prohibit the cooperative from serving the area."

Further reply to Gulf Power's argument concerning whether or not Gulf Coast could lawfully serve the disputed area would serve no useful purpose.

Both Gulf Power and the PSC concede that the Commission's policy on cost in territorial disputes is not promulgated as a rule. Both argue that cost is incipient, emerging policy, and therefore not required to be promulgated as a rule.

However, as urged by both Appellees, there are a number of prior Commission decisions which rely upon the Commission's policy on cost as a determinative factor in territorial disputes. Gulf Power suggests a host of precedent for this position. If, indeed, the Commission has decided a considerable number of territorial disputes upon the issue of costs, the Commission's policy on cost no longer is in its developmental stage, and is therefore ripe for rule-making procedures.

As this Court stated in City of Tallahassee v.

Florida Public Service Commission, 433 So.2d 505 (Fla. 1983), at page 507:

> "To the extent the PSC solidifies its position on policy in a particular area, we believe such established policy should be codified by rule. However, as in the instant case, if 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..." (Emphasis provided).

Clearly then, the PSC has focused on a common scheme of inquiry derived through experience in these prior territorial adversary proceedings. The Commission's policy on cost is not longer incipient, but is rather a solidified position which should properly be a rule.

In City of Tallahassee, supra., this Court allowed the Commission to proceed with its rate-making proceedings without the requirement of initiating formal rule-making proceedings. However, in that case, the party whose substantial interest were affected had the benefit of a statute delineating a number of factors to be considered in arriving at a fair, just and reasonable rate, as well as ten well-defined factors set forth in the Commission's Order to Show Cause. In the instant case, the Appellant has the benefit only of a statute which is vague and which does not even mention

uneconomic duplication of facilities as a specific factor, and a pre-hearing order which placed cost in issue in a broad sense. Gulf Coast did not have the benefit of specific factors to be considered in preparing its case. In effect, Gulf Coast was left to guess at the factors the Commission would consider in arriving at a decision based upon cost, and the particular weight each factor would carry with the Commission.

The result of this ill-defined policy is evident in the record. The Commission requested Gulf Power and Gulf Coast to furnish it with an estimate of cost of serving the entire subdivision, but that request was so vague that the respective responses were of little value. Both parties furnished such a cost estimate, but the cost estimates were considerably different, not only in the total estimated cost, but also with regard to the factors involved. Gulf Power furnished an estimate for service that did not include its initial cost to serve Mr. Lewis, and did not include its overhead estimates. Gulf Coast, on the other hand, furnished an estimate that did include its initial costs, as well as overhead. The Commission's failure to delineate the factors it required in these cost estimates resulted in a marked

difference between the parties' estimates. Gulf Power's estimated cost was only $39,976.00, while Gulf Coast's was $66,374.82. To compound this mistake, the Commission failed to make allowances for the different components of the estimated cost, and considered the difference in estimated cost to be the compelling factor in awarding Gulf Power the disputed area.

It is clear that the Commission's policy on cost is intended by its own affect to create rights, or to require compliance, or to otherwise have the direct and consistent effect of law. It is an agency policy of general applicability. It should therefore be promulgated as a rule. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st D.C.A. 1977). The Commission's action in this case is precisely the type of evil that this Court spoke of in 1976 in Straughn v. O'Riordan, 338 So.2d 832, at 834:

> "The new act has as one of its principle goals the abolition of 'unwritten rules' by which agency employees can act with unrestrained discretion to adopt, change and enforce governmental policy. The term 'rule' was broadly defined in the new act to reach precisely the form of invisible policy-making which the Departments has employed in the course of enforcing this bonding requirement."

CONCLUSION

The Commission's Order should be reversed, and the disputed territory awarded to Gulf Coast or, in the alternative, the Commission's Order should be quashed and remanded with specific instructions to promulgate rules concerning costs.

LAW OFFICES OF
CLINTON E. FOSTER, P.A.

Clinton E. Foster

CLINTON E. FOSTER
1610 Beck Avenue
Panama City, Florida 32405
904/785-3474
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of Appellant's foregoing Reply Brief was furnished to the following named persons:

G. Edison Holland, Jr., Esq.
BEGGS & LANE
Post Office Box 12950
Pensacola, Florida 32576

Robert D. Vandiver, Esq.
Florida Public Service Commission
101 East Gaines Street
The Fletcher Building
Tallahassee, Florida 32301

by U.S. Mail this 18 day of June, 1984.

Clinton E. Foster
CLINTON E. FOSTER