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DESIGNATIONS

Appellant, Gulf Power Company, will be referred to as Gulf Power.

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

Reference to the Record on Appeal will appear as (R.____).

Reference to the transcript of the hearing held June 8, 1984 will be designated (Tr.____).

Reference to Commission orders will be designated as Order No.____).

References to the brief of Appellant will be designated as GP Br. ____.

STATEMENT OF CASE

The Commission accepts Appellant's Statement of Case.

STATEMENT OF FACTS

At issue in the present case is which utility should serve Leisure Lakes, a development of 2,300 acres which the owner plans to subdivide into 740 lots (Tr. 18-19). The utilities involved are Gulf Power Company (Gulf Power), an investor-owned utility, and Gulf Coast Electric Cooperative, Inc. (the Cooperative), a rural electric cooperative established pursuant to 7 U.S.C. §901 and Chapter 425, Florida Statutes. This Court has jurisdiction of this case pursuant to Article V, §3(b)(2), Florida Constitution, and §350.128, Florida Statutes.

Leisure Lakes is located in southern Washington County near the intersection of Highways 77 and 279 (Ex. 1b). This area is unincorporated and sparsely populated (Tr. 46). The closest town is Vernon, Florida, located about eight miles to the north. Prior to the construction giving rise to this appeal, the cooperative had two separate distribution lines, identified as the north and south laterals, within 100 and 250 feet of Leisure Lakes (Tr. 15). (See Ex. 1b.). These facilities had been in place for more than thirty years (Tr. 14). Gulf Power had no distribution facilities closer than two miles from Leisure Lakes at the time the request for service was made (R. 5).

On August 23, 1983, an employee of Mr. Brown, the developer, requested service from Gulf Power (Exhibit 4, Schedule 3 of 4). Changes in the development's personnel resulted in representatives of the development subsequently contacting the cooperative for service (Tr. 236). The cooperative met with the developer in

early October (Tr. 236). Mr. Thompson, the new employee of Mr. Brown, asked the cooperative to prepare a proposal in early October (Tr. 236-37; 251). The developer then selected Gulf Power to provide service. The cooperative filed its petition for resolution of the dispute with the Commission on October 18, 1983. After the complaint was filed, Gulf Power built a substation and 2.2 miles of distribution line to serve Leisure Lakes. GP Br. at 6. In Order No. 13668, issued September 10, 1984, the Commission found the cooperative should serve Leisure Lakes. R. 125.

I.

THE COMMISSION'S DECISION IS SUPPORTED BY
COMPETENT AND SUBSTANTIAL EVIDENCE AND COMPLIES
WITH THE ESSENTIAL REQUIREMENTS OF LAW.

In review of Commission decisions, this Court will not reevaluate the evidence presented to the Commission, but will examine the record only to determine whether the order complained of meets the essential requirements of law and whether the agency had available competent substantial evidence to support its findings. Polk County v. Florida Public Service Commission, 460 So.2d 370 (Fla. 1984).

In the present case, the parties stipulated that both utilities had the capacity to serve the development, neither party had served the disputed area in the past, and the cost to serve the development (\$600,000) would be the same for both utilities within the subdivision (Order No. 13380, R. at 48-49). Thus, the gist of the dispute in this case centered on the utilities' respective costs to reach the disputed development, their ability to provide reliable service, the facilities of each utility and the nature of the area to be served. As to the first factor the Commission's use of costs to decide territorial disputes was recently upheld by this Court in Gulf Coast Cooperative, Inc. v. Florida Public Service Commission, et. al, slip opinion issued January 24, 1985. The three latter factors are enumerated in section 366.04(2)(e), Florida Statutes.

As further discussed below, Gulf Power asks this Court to reweigh the evidence presented. The majority of Commission

factual findings in the present case result from accepting the expert testimony of the cooperative, and rejecting that of Gulf Power. Commission discretion regarding expert testimony was discussed in United Telephone v. Mayo, 345 So.2d 638 (Fla. 1977) as follows:

It is the Commission's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinion it deems appropriate.

Id. at 654.

The Commission found Gulf Power's cost to serve the disputed territory was \$200,480. Order No. 13668; (R. 127). This cost consisted of two components: \$34,000 representing the cost of extending 2.2 miles of distribution line to the entrance of Leisure Lakes; and, \$166,480 for construction of the Greenhead substation (Tr. 95; 262). Gulf Power argued before the Commission, and again to this Court, that only a portion of the substation cost should be attributed to Leisure Lakes (G.P.Br. at 32-34). Appellant has spent a great deal of time attempting to show that the substation was not constructed exclusively to serve the disputed territory. Mr. Gordon described the substation construction as follows:

Q. Was it necessary for Gulf Power to build the Greenhead substation in order to remedy whatever problems it had with its Vernon substation or Sunnyhills substation?

A. No, it is obvious that Gulf Power used this as an excuse to build a substation that was unnecessary in order to provide

retail electric service to a tract of property that was partially surrounded by the distribution facilities of Gulf Coast Electric. (Tr. 362).

Mr. Gordon is a registered professional engineer with 34 years of experience in the electric utility industry (Tr. 10). The expert testimony cited above clearly supports the Commission's decision to include the entire cost of the substation in calculating Gulf Power's cost to serve. United Telephone, supra. Even Gulf Power concedes that construction of the Greenhead substation was unplanned and unbudgeted "until the opportunity to serve the Leisure Lakes load came along" (G.P.Br. at 35; Tr. 189-90). Mr. Gordon also characterized the substation as inadequate to accomplish the other purposes Gulf Power claimed the substation would provide (Tr. 66).

The Commission found that the cooperative could reach Leisure Lakes at a cost of \$27,000 (Tr. 20-21; 60). This cost was based upon rephasing existing adjacent lines and extending them to the boundary of Leisure Lakes (Tr. 13). The large cost differential (\$27,000 vs. \$200,490) is explained by the fact that, prior to any construction, the cooperative had two separate lines within 100 and 250 feet of Leisure Lakes, while Gulf Power's closest facilities were over two miles away (Tr. 15; 20-21). See Exhibit 1b for a map of the utilities' facilities prior to any construction.

The developer preferred that service enter the subdivision from the main entrance road (Tr. 206). To serve by this route,

the cost of the cooperative would be approximately \$61,000 (Tr. 41). When asked if he had a problem with the alternate route proposed by the cooperative, the developer, Mr. Brown, replied:

No sir, I could probably live with that.
I hadn't thought about it but I don't see
that as any big problem. (Tr. 219).

Mr. Brown's primary concern with electric service was getting service without having to pay an up front contribution-in-aid-of-construction (Tr. 205; 208; 213; 219; 225). Given Mr. Brown's ambivalence concerning the actual route, the Commission acted reasonably in using the \$27,000 figure for comparative purposes. Any reasonable analysis yields a significantly lower cost for the cooperative to provide service to Leisure Lakes.

The Commission found that both utilities could provide reliable service to Leisure Lakes. This finding was based upon Mr. Gordon's testimony which indicated that the service provided by both utilities was reliable by industry standards (Tr. 29; 55). At page 38 of its brief, Gulf Power states that the industry standard of less than five outage hours per customer per year "is not an industry standard" and "was not supported as such...." This is a misstatement of fact. Mr. Gordon explicitly identified the five outage hours as an industry standard (Tr 29; 55). Gulf Power did not cross-examine the witness on this issue, and offered no benchmark of its own during its presentation. Gulf Power's outage rate is lower than that of the cooperative, but the record

demonstrates that this variance does not dictate a finding that the cooperative's service is in any way deficient (Tr 29; 55).

Gulf Power also suggests that its greater experience in installation of underground facilities, compared to that of the cooperative, should be taken into account as to the reliability decision (G.P. Br. at 18-19). This argument is specious. The cooperative has been installing underground systems since 1958, and has 18 such systems in three counties (Tr. 29). Gulf Power made no showing that the cooperative was incapable of installing quality underground facilities (See Tr. 30).

The Commission found the disputed territory to be rural in nature (R 130; see Tr. 46). Gulf Power does not take issue with this specific finding, but argues that the Commission's failure to consider the area's potential for growth constitutes a departure from the essential requirements of law (G.P.Br. at 21). Despite Gulf Power's assertion that "undisputed testimony" indicated that the area is one of high growth, in transition from rural to urban, evidence in the record shows that southern Washington County is not the high growth area Gulf Power portrays. (See G.P.Br. at 21-24). Sunny Hills is a development located near Leisure Lakes. (See Ex. 4, Schedule 4 of 4). Of 25,000 lots in that development, only 351 are occupied (Tr. 192-3). These lots have been on the market for over 10 years (Tr. 186). The projected sell out of Leisure Lakes is simply an unsubstantiated estimate. As Chairman Gunter pointed out, developers are invariably optimistic concerning their developments. (Tr. 141-2). The rosy projection

assumes that in three years, growth at Leisure Lakes alone will exceed the growth of the entire county for the period 1980-83 (Tr. 143-44). This was simply not believable. In sum, the Commission acted well within its discretion in believing that the growth estimates were overstated.

The Commission found that Gulf Power's action in the present case constituted an uneconomic duplication of facilities pursuant to section 366.04(3), Florida Statutes, Order No. 13668; (R. 130). Examination of Exhibits 1b and 4, Schedule 4 of 4, graphically demonstrate this duplication - Gulf Power extended facilities over two miles to reach an area within several hundred feet of the cooperative's facilities. Gulf Power spent over \$200,000 to provide service to an area that could have been served by the cooperative at a cost of \$27,000. See above at p. 7. It is difficult to imagine a more blatant, clear cut example of uneconomic duplication based on cost and distance differentials.

Gulf Power also argues that 7 U.S.C. §904 and Chapter 425, Florida Statutes, dictate a finding that Gulf Power should serve Leisure Lakes (G.P.Br. at 13-16). Gulf Power seeks to have this Court change the words of 7 U.S.C. §904 and Chapter 425 from persons presently getting adequate service to persons that could get adequate service. These statutes forbid cooperatives from serving persons currently receiving central station electric power from another utility (G.P.Br. at 15). In the present case the parties stipulated that neither utility had served the disputed area in the past (Order No. 13380; R. at 48-49). There is absolutely no basis for this assault upon the English language.

Gulf Power's reliance upon Escambia River Cooperative v. Florida Public Service Commission, et al., 421 So.2d 1384 (Fla. 1982), is also misplaced. Escambia River stands for the proposition that when all factors are equal in a territorial dispute, the investor-owned utility should be awarded the territory. Id. at 1385. The logical corollary to this proposition is that when the factors overwhelmingly favor either a cooperative or an investor-owned utility, that utility should get the right to serve the territory. That is the case here. Gulf Power's expansive reading of Escambia River would result in the investor-owned utility being awarded the territory in every territorial dispute. Service by the cooperative to Leisure Lakes is completely consistent with the cooperative's purpose - the area is rural. (See discussion above at p. 9-10). Gulf Power, not the cooperative, has brought about "competition" with the reckless extension of facilities. The evil of competition to which Gulf Power cites was engendered by Gulf Power's imprudent duplication of facilities.

II.

THE COMMISSION'S DECISION IS SUPPORTED BY
JUDICIAL PRECEDENT AND POLICY CONSIDERATIONS.

The "range wars" continue, despite the efforts of the Commission and this Court. In Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, et al., Case No. 64,983, opinion issued January 24, 1985, this Court upheld Commission resolution of a territorial dispute between the same utilities involved in the present case. The similarities between the two cases are striking. Once again a utility engages in lengthy, reckless construction to reach a subdivision within several hundred feet of the rival utility's facilities (Tr. 14-15; 22). Once again we see construction continuing despite the filing of a complaint with the Commission (R. 1; G.P. Br. at 6). Once again both utilities stipulated that a territorial agreement would be in the best interests of all parties (Order No. 13380; R. 48-49). The only significant distinction is the identity of parties - here the investor-owned utility raced to serve an area within several hundred feet of the cooperative's facilities. The saw must cut both ways - irresponsible duplicative construction by either a cooperative or an investor-owned utility should not be condoned. After reviewing the similar factual pattern in Gulf Coast, the Court noted: "Whether this constitutes wrongful behavior by either party is beside the point; it is within the power of the Commission to refuse to condone it." Id. at p. 5.

Given the similarity of Gulf Coast and the present case and the fact that the Gulf Coast opinion represents the Court's most

recent pronouncement territorial disputes, the Commission finds it interesting that Gulf Power cites the case only once in passing (G.P.Br. at 12). The reason for the lack of analysis of the Gulf Coast decision is because the case dictates affirmance of the Commission decision on appeal in the present case. As discussed above, the Commission decision rested upon the similar abilities of the utilities to provide reliable service, the proximity of the respective utility's facilities, the nature of the area, and the cost of each utility to serve. This is precisely the analysis used in the Gulf Coast case. As previously discussed each factual finding was supported by competent and substantial evidence. Given the evidentiary basis and policy implications discussed above, the Commission's decision should be upheld by this Court.

Gulf Power also argues that customer preference should be given weight by this Court (G.P. Br. at 39-41). Florida law is clear on this issue. "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So.2d 304, 307-8 (Fla. 1968). Individual customers are entitled to adequate service. Id. at 308. The fact that Gulf Power is subject to the Commission's regulatory jurisdiction is not a valid reason to support a finding in favor of Gulf Power. Escambia River, at 1385. Leisure Lakes can receive reliable service from the cooperative, which is clearly the most cost effective provider of service.

Gulf Power's conduct in the present case is analagous to the lack of concern for ratepayers and the duplication of competitive

facilities condemned in Gulf Coast. Utilities must recognize that imprudent expenditures will not be tolerated by the Commission or this Court. Subsequent to this case, the Commission removed Gulf Power's expenditures in this case from the rate base, thereby shifting the cost from the ratepayers to the stockholders of Gulf Power. See Order No. 13668; R. 132.

CONCLUSION

The Commission's decision to award the disputed territory to the cooperative is supported by competent and substantial evidence of record, policy considerations, 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 ANSWER BRIEF OF APPELLEE has been furnished by U.S. Mail this 1st day of April, 1985 to the following:

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