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FILED
SID J. WHITE
APR 22 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GULF POWER COMPANY,

Appellant,

vs.

PUBLIC SERVICE COMMISSION,

Appellee.

CASE NO. 66,307

LEISURE PROPERTIES, LTD.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION,

Appellee.

CASE NO. 66,339

ANSWER BRIEF OF APPELLEE GULF COAST ELECTRIC COOPERATIVE, INC.

LAW OFFICES OF
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PRELIMINARY STATEMENT AND DESIGNATION

In this Brief, Appellant, GULF POWER COMPANY, will be referred to as "Gulf Power." The Appellee, 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."

Reference to the transcript of the hearing held on June 8, 1984 will be designated (TR.____); references to the record on appeal will appear (R._____); on Commission's orders will be designated as "Order No. _____."

STATEMENT OF THE CASE

The Cooperative accepts Appellant's statement of the case.

STATEMENT OF THE FACTS

Gulf Power is an investor owned public utility and The Cooperative is an REA cooperative organized pursuant to Chapter 425, Florida Statutes.

This case involves a territorial dispute between Gulf Power and The Cooperative. The disputed development is known as "Leisure Lakes" and consists of approximately 2300 acres, which the owner plans to establish as a rural development of about 740 -750 residential lots ranging in size from 1/2 acre to 5 acres with the average size being 3.2 acres. (TR. 18-19). The disputed development is located in rural south Washington County approximately 2.5 miles west of Highway 77 in the vicinity of the intersection of Highway 77 and Highway 279 (Exhibit "1b"). The area is unincorporated, is sparsely populated, has a population of less than 2500 (TR. 26), has no urban characteristics, the state roads are the only paved roads in the area (TR. 12-13) and electricity and telephone service are the only utilities available. (TR. 13). Although neither party had its facilities within the boundaries of the disputed area, historically (for more than 30 years) The Cooperative has been the only supplier of retail electricity in that general area of south Washington County. (TR. 13, 14).

In October of 1983, prior to Gulf Power commencing its disputed construction, The Cooperative had a 3 phase distribution line along Highway 77 within approximately 2.5 miles east of the

disputed area (TR. 14) and from the 3 phase primary on Highway 77, it had 2 single phase laterals that ran in a westerly direction to the immediate vicinity of the disputed area. (TR. 15). (See Exhibits 1b and 1d for the location of The Cooperative's north and south laterals.) One of the laterals terminated within 100 feet of the disputed area and the other one terminated within approximately 250 feet of the disputed area. (TR. 15). The undisputed testimony established that The Cooperative's 2 single phase laterals would have been adequate to serve the initial needs of the development.

In August of 1983, the owner requested Gulf Power to serve the disputed area. (TR. 232). However, the owner continued to investigate the other sources of electricity and contacted The Cooperative in September of 1983 (TR. 204-205, 232) and requested a proposal from The Cooperative to serve the disputed area in October of 1983. (TR. 236-237). The owner was looking for someone who would install underground service without cost to him. (TR. 205, 213).

On or about October 17, 1983, without consulting The Cooperative who had lines much closer to Leisure Lakes, Gulf Power commenced construction of a substation approximately .5 miles west of Highway 77 and 2.5 miles eastern boundary of the disputed area; at the same time Gulf Power commenced construction of approximately 2.5 miles of distribution line along a winding county road in a westerly direction from the substation site to

the eastern boundary of the disputed area.

On or about October 19, 1983 The Cooperative filed a Petition against Gulf Power with the Commission requesting that the Commission declare the disputed area to be the territory of The Cooperative and enjoin Gulf Power from serving the area. Gulf Power continued its construction, even though The Cooperative's existing lines were much closer to the development and even though The Cooperative had filed a Petition before the Commission. The facility and service installed by Gulf Power duplicated those already available to the disputed area by The Cooperative.

The Cooperative could have provided 3 phase service to the disputed development by rephasing its south lateral with an expenditure of $10,000.00 or by rephasing its north lateral at a cost of $17,000.00. Both lines rephased would have provided a loop feed to the disputed area for a total cost of approximately $27,000.00. Either lateral rephased would have supplied the same 3 phase service to the development that Gulf Power could supply by its 3 phase line. The cost figures of The Cooperative includes the cost of rephasing the lines and extending them to the boundary of the disputed area (TR. 20-21).

Prior to Gulf Power commencing its construction to the disputed area, its nearest active retail customer was over 3 miles away on the north side of Lucus Lake (TR. 22, 113, Exhibit "1b).

In order for Gulf Power to serve the disputed area, it was necessary that it construct a substation next to its 115 KV transmission line (TR. 22-23) of a rudimentary configuration and design (TR 23, 24) and at a cost of $166,480.00 (TR. 262). In addition, Gulf Power was required to construct more than approximately 2.2 miles of overhead 3 phase distribution line from the substation to the entrance of the disputed area at a cost of approximately $34,000.00. (TR. 93). Prior to construction of the 3 phase line from the substation to the disputed area, the closest Gulf Power 3 phase distribution line was more than 3 miles away located on State Road 279 (TR. 113) and it would have been necessary for it to have crossed the Cooperative's lines several times in order to extend that line to the disputed development.

ISSUES ON APPEAL

Issue I

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

Issue II

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

ISSUE I

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

ARGUMENT

Gulf Power argues that the Commission's decision was arbitrary, was not supported by substantial, competent evidence in the record and was a departure from the essential requirements of the law.

A review of the record will reflect that there was substantial, competent evidence which, if believed by the Commission, would support each of its findings. Gulf Power is really asking this court to reweigh the evidence, reverse the Commission's decision and award it the disputed territory simply because it is an investor owned utility and The Cooperative is an REA Cooperative.

This court in reviewing the Commission's order must affirm the Commission if the order meets the essential requirements of law and if the Commission had before it competent, substantial evidence to support its findings. Polk County v. Florida Public Service Commission, 460 So.2d 370 (Fla. 1984). The Commission's order is before the court with a presumption of correctness and the burden is on Gulf Power to convince this

court that the Commission's order is invalid, arbitrary and not supported by the evidence. Surf Coast Tours v. Florida Public Service, 385 So.2d 1353 (Fla. 1980). Shevin v. Yarbrough, 274 So.2d 505 (Fla. 1973).

In this case there was competent, substantial evidence, which if believed by the Commission, would support its finding that the disputed development was in a rural area that had been historically served by The Cooperative; that the disputed development had not been served by either party; and that Gulf Power had engaged in an uneconomic duplication of facilities. There was also competent, substantial evidence to support the Commission's finding that both utilities could provide reliable service to Leisure Lakes and that the service provided by both utilities was reliable by industry standards. The parties stipulated that either had the capacity to the disputed development.

The Commission also found that Gulf Power built its Greenhead substation just to serve the Leisure Lake Development and then sought to justify that expenditure by allocating a portion of the cost to back-up service for other areas. There was substantial, competent evidence to support the Commission's findings. Gulf Power had not budgeted or planned the Greenhead substation until the Leisure Lakes load came along and the substation was of a rudimentary design and configuration and did not contain all of the equipment usually found in Gulf Power substations. According to the testimony of Mr. Gordon, the

substation was inadequate to accomplish the back-up service that Gulf Power claimed it would provide. Gulf Power may disagree with the Commission's findings, but there was substantial, competent evidence in the record to support such findings.

There is no dispute that the Greenhead substation cost Gulf Power $166,480.00 as found by the Commission, and there is no dispute that its 2.2 miles of distribution line cost $34,000.00 making a total cost to Gulf Power of $200,480.00. The dispute was whether the total cost of the Greenhead Substation should be charged to Leisure Lakes and the Commission found that it should, based upon competent and substantial evidence.

There is also no dispute that the Cooperative's cost would either be $27,000.00 or $61,000.00 depending on where it entered the development and since the developer decided he could live with service entering his development at a point other than the entrance road (TR. 219), the Cooperative's cost would be $27,000.00 as opposed to $61,000.00 if it were to enter at the entrance road where Gulf Power entered. The Commission's finding that it would cost Gulf Power $200,480.00 as opposed to $61,000.00 for the Cooperative is supported by competent, substantial evidence.

In this case, among other things, the Commission found that Gulf Power blatantly constructed the facilities in dispute in total disregard of the Cooperative's existing facilities and that Gulf Power had taken a position inconsistent with the posi-

tion it had taken in an earlier case, Commission Docket No. 83014-EU which was before this court in Gulf Coast Elec. v. Fla. Public Serv. Com'n., 462 So.2d 1092 (Fla. 1985). Also, Gulf Power, in its Answer Brief filed before this court in Gulf Coast Elec. supra, argued that because its facilities were closer to the disputed area than The Cooperative's, that fact alone justified the Commission's finding of an uneconomic duplication of facilities, notwithstanding the fact that the cost may be the same.

The cold, hard truth is that the Commission substantially believed the testimony of the Cooperative's witnesses and rejected the testimony of the Gulf Power's witnesses and Gulf Power simply wants this court to reweigh the evidence.

Gulf Power argues that the area in which the disputed development is located instead of being rural is one of high growth and in transition from rural to urban and that the Commission failed to consider the area's potential for growth or "the degree of urbanization of the area". The Commission simply rejected the testimony of Gulf Power and its witnesses concerning the southern portion of Washington County's potential for growth. Gulf Power failed to recognize that there is a difference between lot sales and growth. Gulf Power serves a portion of the Sunny Hills development near Leisure Lakes which consists of 25,000 lots with only 351 being occupied, although those lots have been on the market for over 10 years. The developer himself admitted

that the market was untried and that he did not know what it would do, that he was proceeding cautiously and was only developing 168 lots initially. (210, 225, 228). The Commission rejected the testimony of Gulf Power's expert on growth in Washington County.

Gulf Power argues that it should be awarded the territory because an REA Cooperative should not be allowed to serve any area that an investor owned utility desires to serve. Gulf Power takes refuge and comfort in this Court's pronouncement in Tampa Electric Co. v. Withlacoohee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960) and Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982) where this court said:

> "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."

Those cases are distinguishable from this case now before the Court and those cases have no application among other reasons because in those cases there was found to be no factual or equitable distinction between each utility and the court concluded in those cases the dispute should be resolved in favor

of the privately owned utility. Also, in the Escambia River case the dispute was over a large industrial load rather than a rural residential load as is involved in this case, and in that case there would have been no duplication of facilities as are involved in this case.

While on the subject of Tampa Electric v. Withlacoohee and Escambia River v. Florida Public Service Commission, it is respectfully suggested that this Court recede from that portion of those decisions quoted above.

The Cooperative makes this suggestion because that pronouncement was not necessary to the decision in the Tampa Electric case. This court in Withlacoohee River Elec. Coop. Inc. v. Tampa Electric Co., 158 So.2d 136 (Fla. 1963) recognized that its above pronouncement in the Tampa Electric case was unnecessary when it said:

> "It appears that some confusion has arisen with reference to Footnote # 6, page 473 of our opinion, published in 122 So.2d beginning at page 471. It should be perfectly clear even to a novitiate that the remarks contained in said footnote that were unnecessary to the decision which we reached, were not pronouncements of law, but merely philosophical observations, and constitute nothing more or less than obiter dicta. They should be so treated by the bench and bar."

Also, in the Escambia River Electric Cooperative case, this court's reliance on Footnote 6 of the Tampa Electric case concerning the purpose of REA is not justified for 2 reasons.

First, as this court observed in The Withlacoohee case, 158 So.2d 136 (Fla. 1963) it was not a pronouncement of law, but merely a philosophical observation and constituted nothing more or nothing less than obiter dicta; and second, that pronouncement was not necessary to this court's decision in the Escambia case.

If for some reason, since this court's statement in the Withlacoohee case in 1963, Footnote 6 of the Tampa Electric case has become law, this court should still recede from that pronouncement because in 1985, it is illogical and makes no sense. The first of Gulf Power's arguments is that REA cooperatives are subsidized by the government through low interest loans and should therefore not be in competition with investor owned utilities. Under the economic conditions and tax laws that exist today, including but not limited to exemptions of certain dividends from income tax, income tax investment credits, tax free industrial bond issues available to and used by investor owned utilities; and since most, if not all REA cooperatives now are required to go on the open market for a portion of their financial needs, the question of whether the investor owned utilities or REA Cooperatives are being subsidized by the government to the greater extent is a question of fact, and not of law and should be decided as a matter of fact based on competent evidence as to the extent of government subsidy.

It is observed that Chapter 425, Florida Statute, which is the enabling legislation for REA cooperatives does not require

an REA cooperative to borrow money from the Rural Electrification Administration and an REA Cooperative can exist without ever borrowing a nickel from REA, and if no money is borrowed from the government, then Gulf Power's argument about interest free loans fails. It is observed that FS 425.02 states that the purpose of the REA cooperatives is to supply electric energy and promote and extend the use thereof in rural areas and nowhere is there an exception that provides "except in places where an investor owned utility wants to serve because it is economically feasible."

If this court decides to stand by its pronouncement in the Tampa Electric case and restated in the Escambia River case, it will fortify the resolve of the investor owned utilities and the "range wars" will continue and they will maintain the attitude displayed by Gulf Power in this case. Gulf Power, at page 12 of its Brief, said that it in no was condoned the "competitive race to serve" found to be so offensive in a prior case, Gulf Coast Electric v. Florida Public Service Commission, 462 So.2d 1092 (Fla. 1985). It is observed that while this court had not rendered its decision in the Gulf Coast Elec. case when Gulf Power undertook its construction in the case now before the court, the Commission had entered its order which was later affirmed by this court and Gulf Power had that order to guide it which it elected to ignore, relying on this court's statement in Tampa Electric and Escambia River.

For more than 25 years Gulf Power has relied on this

court's statement in Footnote 6 of the Tampa Electric case to justify its position that it can roam the rural areas of the panhandle of Florida and select the plum loads "(the loads that it finds economically feasible to serve), arguing that the REA Cooperatives were not intended to serve loads that can be profitably served by investor owned utilities.

Should this court stand by its pronouncement in Tampa Electric and Escambia River, it is respectfully pointed out that the pronouncement in those cases apply only when there are no factual or equitable distinctions that would justify resolving the dispute in favor of the REA Cooperative. In this case, there are factual and equitable distinctions as found by the Commission that makes this court's pronouncement in Tampa Electric and Escambia River inapplicable to the facts and circumstances of this case.

Gulf Power argues that the Commission ignored the statutory criteria of the ability of the respective utilities to expand service within their own capabilities and likewise ignored the superior ability of Gulf Power to "expand services within its own capabilities". Gulf Power also argues that the Commission ignored the tremendous investment that will be required in order for either party to serve Leisure Lakes. There is no evidence in the record that The Cooperative can not or will not expand services within its own capabilities. It is observed that in the pretrial order it was stipulated that the cost to the respective

parties to serve Leisure Lakes would be the, same, approximately $600,000.00 (TR. 41, 265-266). Since the parties stipulated as to that cost, it is unlikely that the Commission ignored that figure since it is contained in its pretrial order and is also reflected in Order Number 13668.

Gulf Power argues that it has more experience than The Cooperative in installing underground electric systems. There was no evidence that The Cooperative did not have the experience and capability of installing and maintaining a reliable underground system. The question is not who can provide the very best service, the question is whether adequate and reliable service can be provided. It is observed that Gulf Power's underground installation is contracted out, however The Cooperative installs its own. It is assumed that The Cooperative like Gulf Power, would be able to find a contractor at least as capable as those used by Gulf Power. The Cooperative concurs with the statement in the Commission's Brief that Gulf Power's argument that it has the most experience in underground construction is specious.

Gulf Power argues that it is assumed that The Cooperative would be required to seek low interest rate funds from the federal government under the Rural Electrification Act in order to serve the project. This is an unwarranted assumption and there is no evidence in the record to support that assumption.

Gulf Power argues that it should be awarded the disputed area because of customer preference. The law of Florida is clear that a consumer has no organic or economic right to service by a particular utility. Storey v. Mayo, 217 So.2d 304 (Fla. 1968). The Commission specifically considered the preference of the developer and rejected it as being a decisive factor in the resolution of this dispute. Likewise, the Commission specifically considered the fact that The Cooperative's rates were approximately 20% higher than Gulf Power's rates and rejected that as being decisive in the resolution of this dispute.

The parties stipulated that both had the capacity to serve the disputed area. The Commission, based on competent, substantial evidence, found that The Cooperative had the ability to serve the disputed area with reliable service at reasonable rates.

ISSUE II

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

ARGUMENT

The Cooperative adopts the argument of the Commission as to Issue II as stated in its Answer Brief filed herein.

CONCLUSION

The Commission's award of the disputed territory to The Cooperative is supported by competent, substantial evidence, 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 above and foregoing Answer Brief of Appellee, Gulf Coast Electric Cooperative, Inc., has been furnished to G. Edison Holland, Jr., Esq., Beggs & Lane, P. O. Box 12950, Pensacola, Florida 32576, Gene D. Brown, Esq., Brown & Camper, 800 West Calhoun Street, Tallahassee, Florida 32302 and William S. Bilenky, General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301, by U. S. Mail this 19 day of April, 1985.

Clinton E. Foster

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