IN THE SUPREME COURT OF FLORIDA

GULF POWER COMPANY,

Appellant,

vs. Case No. 66,307

PUBLIC SERVICE COMMISSION,

Appellee.

LEISURE PROPERTIES, LTD.,

Appellant,

vs. Case No. 66,339

PUBLIC SERVICE COMMISSION,

Appellee.

APPELLANT, GULF POWER COMPANY'S, REPLY BRIEF

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PRELIMINARY STATEMENT AND DESIGNATION

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

References to Gulf Power Company's Initial Brief will be designated as Gulf's Initial Brief, p. _____; Gulf Coast Electric Cooperative, Inc.'s Initial Brief will be designated as Coop's Brief, p. ____ and the Commission's Brief as Comm. Br., p. ____. References to the transcript of the hearing held on June 8, 1984 will be designated as Tr. _____; the Commission's Orders as Order No. _____; and references to the record will be designated "R _____."

ARGUMENT

THE EVIDENCE RELIED UPON BY THE COOP AND COMMISSION IS NEITHER COMPETENT NOR SUBSTANTIAL AND APPLICATION OF THE EVIDENCE CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

If, as the appellees allege, the Commission's actions herein are supported by competent substantial evidence, then the result is to relegate many of the citizens and ratepayers of Florida to high rates, unreliable service and no regulation. The Commission's decision is not supported by competent substantial evidence and certainly application of the evidence to the law constitutes a departure from the essential requirements of the law. Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973). The legislature of this State, in enacting Chapters 366 and 425, Florida Statutes, never intended to preclude the citizens of this State from receiving economical, reliable electricity when such was available by application from an investor-owned utility.

Both the Commission and Gulf Coast ignore the mandate of Section 366.03, Florida Statutes, which provides as follows:

> Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission.

The terms required by the Commission are those rules and regulations of the Commission relating to contributions in aid of construction. These rules prevent investor-owned utilities from constructing facilities where the revenues are insufficient to support the investment required, without charging the

customer for such service. This prevents the other ratepayers from subsidizing the service. Thus, if the revenues are sufficient to support the investment, or aid in construction is paid, the investor-owned utility is required by law to provide the requested service.

The developer of Leisure Lakes requested service from Gulf Power. The revenues from the project were estimated to be sufficient to support the investment. Pursuant to its statutory obligation, Gulf provided the requested service.

The mandate of Section 366.02 is not applicable to rural electric cooperatives. Nor are the rates and reliability of the cooperatives subject to the Commission's regulation. If the Commission's actions herein are upheld by the Court, the developer and residents located within Leisure Lakes will be subject to the unregulated whims of the Cooperative as to both rates and reliability. This is exactly what the developer and his project manager feared, and is what the adjacent property owners have been subjected to by the Cooperative. The reliability of the Cooperative has been poor and the rates are 30% higher. Tr. 51, 75-84, 99-100, 113, 203, 234, 278 & 287.

Proper application of Sections 366.02, 366.04(2)(e) and (3) dictates that Gulf serve Leisure Lakes and more importantly that the ratepayers of Leisure Lakes be allowed to take service from Gulf. Contrary to assertions made in appellees' briefs, Gulf is not racing to serve anyone. The Commission would use the hammer of this Court's admonition in Gulf Coast Electric Cooperative, Inc. v. Florida Pub. Serv. Com'n., 462 So.2d 1092

(Fla. 1985) (hereinafter Cedarwood case) to prevent Gulf from meeting its statutory obligation. Comm. Br., p. 13-14. The expenditures made by Gulf to serve Leisure Lakes are neither duplicative of the Coop's inadequate facilities, nor are they harmful to the general body of ratepayers. To the contrary, Leisure Lakes will provide a source of revenue which would enable Gulf to spread the cost of its generation and transmission system among a larger number of customers thereby reducing the cost to the individual ratepayer.

Gulf invites a comparison of the facts in this case to those in Cedarwood. See Comm. Br., p. 12. Such a comparison only serves to emphasize the numerous differences between the purpose and intent of rural electric cooperatives as opposed to investor-owned utilities. In the Cedarwood case, Gulf's lines were located immediately adjacent to the subdivision and were fully capable of providing the required service. Herein, although the Cooperative had single phase lines in the immediate vicinity of the subdivision they were inadequate even to serve the initial requirements of Leisure Lakes. Contrary to the assertion in the Coop's Brief at page 4, these Coop's lines could not have provided the initial request for service which included a three phase water pump. Tr. 93.

The inadequacy of the Coop's lines supports Gulf's position that the mere existence of inadequate facilities should give the Coop no presumptive right to serve an area. The Commission below found that the Coop had historically served the area on the basis of these inadequate single phase lines. Order

No. 13668, issued September 10, 1984. R. 128. It ignored the existence of Gulf's transmission lines which until recently provided all the power at wholesale or retail to the entire area. Tr. 91-93. It was only when the Cooperative began buying its power from an Alabama wholesale cooperative that anything other than Gulf's generation was serving the area. Gulf has expended millions of dollars in generation, transmission and distribution facilities in order to meet its statutory obligation and provide economical and reliable electric power to the ratepayers of Northwest Florida. Taken to its logical conclusion, the Commission's decision below will result in the denial of this desired service to many of the customers in the area and increased costs to those remaining on Gulf's system.

If Gulf were racing to serve anyone, it would have constructed all of the facilities necessary to serve all of the requirements of the entire subdivision. This is what the Coop did in the Cedarwood case. To the contrary, Gulf has provided only the initial requirements of the subdivision and will construct the remainder as needs dictate.

Finally, with respect to comparative costs, Gulf did not object in the Cedarwood case to such an analysis. The Cooperative did. Gulf does object to the "tunnel-vision" of the Commission in looking primarily at comparative costs while virtually ignoring the criteria set forth in Section 366.04(2)(e), Florida Statutes. These criteria are enumerated in the statute for a purpose, i.e., a recognition of the distinction in the intent and purpose of investor-owned

utilities as opposed to cooperatives. Proper application of these criteria dictate that Gulf be allowed to continue its service to Leisure Lakes. The Commission's application constitutes a departure from the essential requirements of the law.

Gulf stipulated that both it and the Cooperative have the capacity to serve the subdivision. This was from a generation standpoint. Gulf did not stipulate that both entities were equally capable of providing the requested service. The record reflects that Gulf is much more capable than the Coop of providing the requested service within its own capabilities and meeting the present and future requirements of the area for other utility services. § 366.04(2)(e), Fla. Stat. In other words, Gulf can provide the more economical and reliable service to Leisure Lakes and the surrounding area.

The Commission's position on the issue of reliability is puzzling. Its statutory mandate is to provide fair and equitable rates and reliable service to the citizens of this state. §§ 366.01, et. seq., Fla. Stat. Yet, it accepts at face value the Cooperative's assertion that five outage hours per customer per year is the industry standard and ignores the evidence that Gulf is at a minimum three times as reliable as the Cooperative. Comm. Br., p. 8-9. Tr. 99-100, 113. The Commission likewise ignores the testimony and virtual pleas from Coop customers adjacent to Leisure Lakes regarding reliability, quality of service and cost of service. Tr. 75-84. As indicated by Mr. Thompson and Mr. Sapp, they have no where to

complain due to the absence of regulation. Tr. 83-84. The Commission may have evidence of the Coop's reliability, but it is from the Coop and is neither competent, nor substantial.

The Commission and Gulf Coast's support for the estimate of $27,000 for the Coop to serve the subdivision rests solely on a portion of the developer, Mr. Brown's testimony which is taken completely out of context. Comm. Br., pp. 7-8. The complete portion of Mr. Brown's testimony provides as follows:

> Q Would there by anything wrong with coming in from here and down to a lot line down to here, and then to the entrance road? . . . .
>
> A No, sir, as long as the underground starts at my entrance and goes throughout the whole project underground, whether it ran right down this part of the county road or my property line there or here, it wouldn't matter.
>
> Q (By Mr. Foster) What I am asking you is, it really wouldn't cause you any problems if it ran along this easement right inside your property line to this entrance gate here, would it?
>
> A No, sir, I could probably live with that. I hadn't thought about it but I don't see that as any big problem. There is a county road right there so it wouldn't make much difference whether it runs down this part of the county road or this part here..

Tr. 218-219.

Thus, no matter how the Coop entered Leisure Lakes, service would have commenced at the entrance road. Had the Coop entered the subdivision at the points it desired, and then had to go underground or overhead to the entrance road, the cost would have far exceeded the Coop's estimate of $61,000 to provide above ground service to the entrance road. Moreover, at

no point does the Coop or Commission address the refusal of the adjoining land owners to grant easements to the Coop. Tr. 74, 82. Given this refusal, the Coop would either have had to condemn the right-of-way or duplicate the facilities of Gulf Power from Highway 77 to the entrance road. Either alternative would have added to the Coop's total cost.

Had Gulf been in a "race to serve" and sought only to establish its "right to serve" it obviously would have constructed the 3.4 miles of distribution line from Highway 279 instead of the substation. The cost would have been substantially the same as the Coop. Tr. 169, 275, 300. Instead, Gulf looked at all the alternatives and selected the one most beneficial to all its ratepayers. Ex. 5A, App. B to Gulf's Initial Brief. This was the construction of the Greenhead substation to provide needed back-up to Vernon and Sunny Hills, as well as service to Leisure Lakes. Tr. 261-262. Ex. 4, Sch. 1 The Court cannot ignore, as did the Commission, the tremendous cost savings as well as operational advantages which the Greenhead substation offered Gulf over the other alternatives.

The Commission and Coop have failed to make yet another distinction between this and the Cedarwood case. In Cedarwood, the Coop maintained that it had the right to compete with investor-owned utilities. If the Coop truly desires competition, it should not now be heard to object when the developer has selected Gulf over it based on rates, quality of service and reliability. To the contrary, here, the Coop is

maintaining that it alone has the right to serve those rural areas in which it has spent relatively little in the construction of single phase distribution lines, to the exclusion of Gulf who has spent millions to provide the generation and transmission for both Gulf's and the Coop's customers.

This Court has correctly and consistently held that the coops should not compete with investor-owned utilities where electricity is available by application from the investor-owned utility. Escambia River Electric Cooperative, Inc. v. Public Service Commission, et al., 421 So.2d 1384 (Fla. 1983) Tampa Electric Co. v. Withlacoochee River Coop., 122 So.2d 471 (Fla. 1960). The holding is supported by and consistent with the legislative mandate of the Rural Electrification Act, 7 U.S.C. 901, et. seq., and Chapter 425, Florida Statutes. It is likewise consistent with the distinction made by the criteria set forth in Section 366.04(2)(e). The Cooperative would have the Court recede from its holding so that the coops' single phase lines might become barbed wire fences forcing more and more Florida citizens to become coop members against their will, while paying higher rates with less reliable service. The fears of Justice Hobson, expressed in his concurring opinion in Withlacoochee River Elec. Coop. v. Tampa Elec. Co., 158 So.2d 136 (Fla. 1963), have occurred. The Court should not condone this expansionism. Neither Sections 366.04(2)(e) and (3) nor the prior holdings of the Court dictate that the residents of Leisure Lakes be forced to take service from the Coop. The Commission should be reversed.

CONCLUSION

The Commission's decision is unsupported by competent, substantial evidence and application of the evidence to the law constitutes a departure from the essential requirements of the law. The Commission should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Clinton E. Foster, Esq., 1610 Beck Avenue, Panama City, FL 32504; Gene D. Brown, Esq., Brown & Camper, 800 West Calhoun Street, Tallahassee, FL 32302; and Robert Vandiver, Esq., Fletcher Building, 101 East Gaines Street, Tallahassee, FL 32301 by U.S. Mail this 13th day of May, 1985.

G. EDISON HOLLAND, JR.