

IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE,  
INC. )

Petitioner/Appellant )

vs. )

SUSAN F. CLARK, as Chairman,  
FLORIDA PUBLIC SERVICE COMMISSION,  
and GULF POWER COMPANY )

Respondents/Appellees )

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CASE NO. 85,464

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APPEAL FROM THE  
FLORIDA PUBLIC SERVICE COMMISSION

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ANSWER BRIEF OF APPELLEE  
FLORIDA PUBLIC SERVICE COMMISSION  
TO CROSS-APPEAL OF GULF POWER COMPANY

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## SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as "the Commission" or the "agency." Appellant/petitioner Gulf Coast Electric Cooperative, Inc. is referred to as "Gulf Coast" or "the cooperative." Appellee/Respondent Gulf Power Company is referred to as "Gulf Power" or "the investor-owned utility." The principal subject of the dispute, the Washington County Correctional Facility to be constructed by the Department of Corrections, is referred to as "the correctional facility" or "the prison site."

References to the record on appeal are designated (R. \_\_\_\_). References to the hearing transcript are designated (T. \_\_\_\_). Gulf Coast's Initial Brief is cited as (Initial Brief at \_\_\_\_). Gulf Power's Answer Brief and Cross-Appeal is cited as (Cross-Appeal at \_\_\_\_).

Order No. PSC-95-0271-FOF-EU, issued March 1, 1995, the Commission's final order that resolved the territorial dispute, shall be referred to as "the final order" with the appropriate record site noted as (R. \_\_\_\_).

**STATEMENT OF THE CASE AND THE FACTS**

The Commission accepts Gulf Power's statement of the facts as generally adequate to inform the court.

## SUMMARY OF THE ARGUMENT

It is indisputable that the Commission has exclusive jurisdiction to resolve territorial disputes in the public interest. The only limitation to this authority is that disputes are to be resolved so that further uneconomic duplication will be avoided.

The law of easements is not the deciding factor in this case. Instead, the avoidance of further uneconomic duplication and the public interest are the deciding factors.

The Commission furthered the public interest when it resolved the latest territorial dispute between Gulf Power and Gulf Coast. The Commission awarded the correctional facility to Gulf Power because Gulf Coast had uneconomically duplicated Gulf Power's lines. In addition, since Gulf Power would be serving the prison site, the Commission ordered Gulf Power to reimburse Gulf Coast for the cost of relocating the Red Sapp line, which would have had to be moved regardless of which utility served the customer. It would have been irrational to make Gulf Coast bear the relocation cost since it would not be serving the customer and would not receive any revenues to offset the cost.

The Commission properly resolved the instant dispute by tailoring its resolution to the unique facts of this case pursuant to Sections 366.01, 366.04(2)(e), and 366.04(5), Florida Statutes. The Commission's order should be affirmed.

## ARGUMENT

### I. THE COMMISSION'S RESOLUTION OF THE DISPUTE BETWEEN GULF COAST AND GULF POWER IS CONSISTENT WITH THE STATUTORY FRAMEWORK GOVERNING TERRITORIAL DISPUTES: IT CORRECTLY ASSIGNED THE RED SAPP LINE RELOCATION COST TO GULF POWER.

The Commission's resolution of the latest Gulf Power v. Gulf Coast territorial dispute was three-part. First, the Commission awarded Gulf Power the right to serve the correctional facility because Gulf Coast had uneconomically duplicated Gulf Power's lines.<sup>1</sup> (R. 312, 316, 321) Second, the Commission ordered Gulf Power to reimburse Gulf Coast for the cost of relocating the Red Sapp line. (R. 312, 317, 321) It would have been irrational and inconsistent with the Commission's authority to have required Gulf Coast to bear an expense associated with a site it would not be serving.<sup>2</sup> Id. Third, the Commission found the possibility of future disputes throughout much of south Washington and Bay Counties. (R. 317-21, 322) The Commission thus ordered the parties to file a report detailing line crossings and commingled lines and to negotiate a territorial agreement in good faith.<sup>3</sup> (R. 321, 322)

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<sup>1</sup> This part of the Commission's decision is not at issue in Gulf Power's cross-appeal. As discussed in the Commission's answer to Gulf Coast's initial brief, the award to Gulf Power is based on competent and substantial evidence and comports with the essential requirements of law.

<sup>2</sup> This part of the Commission's decision is the subject of Gulf Power's cross-appeal.

<sup>3</sup> This part of the Commission's decision is not at issue.



It is undisputable that the Legislature has declared the regulation of public utilities to be in the public interest.<sup>4</sup> § 366.01, Fla. Stat. There is likewise no dispute that the Commission has exclusive jurisdiction to resolve territorial disputes pursuant to Section 366.04(2)(e), Florida Statutes.<sup>5</sup> Nor does Gulf Power question the Legislature's directive that territorial disputes are to be resolved so that further uneconomic duplication of facilities will be avoided.<sup>6</sup> § 366.04(5), Fla.

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<sup>4</sup> Section 366.01, Florida Statutes, provides:

[t]he regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

<sup>5</sup> Section 366.04(2)(e), Florida Statutes, provides the Commission with jurisdiction

[t]o resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among [all electric utilities] under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand 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 reasonably foreseeable future requirements of the area for other utility services.

<sup>6</sup> Section 366.04(5), Florida Statutes, provides the Commission with:

jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes

Stat.; Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159, 1162 (Fla. 1977); Utilities Commission of City of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 732 (Fla. 1985). What Gulf Power appears to indirectly question is whether the Commission's powers are sufficient to order Gulf Power to reimburse Gulf Coast for the cost of relocating the Red Sapp line.<sup>7</sup> (Cross-Appeal at 25).

Gulf Power asserts that the Commission had no legal basis for its decision. (Cross-Appeal at 25) It is mistaken. The Commission's legal basis is grounded in Chapter 366, Florida Statutes. That authority is not superseded by the law of easements, as argued by Gulf Power at pages 25 through 28 of its cross-appeal.

**A. The Commission has the discretion to tailor its remedies to unique situations.**

As this Court stated in Microtel, Inc. v. Florida Public Service Commission, 464 So. 2d 1189, 1191 (Fla. 1985):

In implementing [a] policy decision, the legislature is obliged by the nondelegation doctrine to establish adequate standards and guidelines. Subordinate functions may be transferred by the legislature to permit

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in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

<sup>7</sup> The Red Sapp line was Gulf Coast's single phase line on the site of the correctional facility that would have to be relocated regardless of which utility served the prison. (T. 399)

administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions. Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation. 'Obviously, the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable.'

(Citations omitted)

As pertains to this case, the Legislature has provided the Commission with exclusive authority to resolve territorial disputes, with the additional directives that disputes are to be resolved in the public interest and that further uneconomic duplication of facilities is to be avoided. The Legislature recognized that it could not foresee the facts of every territorial dispute that would arise. The Legislature provided the Commission with the discretion and flexibility needed to resolve territorial disputes on a case-by-case basis.

The Commission has tailored its resolution of territorial disputes to the peculiar circumstances of each case. For example, in a dispute between Gainesville-Alachua County Regional Electric, Water and Sewers Utilities Board and Clay Electric Cooperative, Inc., the Commission resolved the matter by ordering the competing utilities to develop a territorial agreement for the area in dispute, in addition to ordering the municipal utility to refrain from duplicating facilities. Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159, 1161 (Fla. 1977). In

Gainesville-Alachua v. Clay, the Commission did not award the right to serve the disputed area to either utility, and the Court found this to be within the Commission's discretion since it approved the Commission's approach. Id. at 340 So. 2d 1162. The Court recognized that the Commission's resolution "must . . . consider the larger issues of territorial conflict, duplication of facilities and conservation of energy resources," regardless of whether these issues are contemplated by the complaint and answer. Id. at 340 So. 2d 1160.

In In re Petition to resolve territorial dispute between Okefenoke Rural Electric Membership Corporation and Jacksonville Electric Authority, 92 F.P.S.C. 10:651 (1992), the Commission was asked to resolve a dispute over the right to serve the Holiday Inn at the Jacksonville airport. On its own motion, the Commission found that the possibility of additional disputes were present throughout much of northern Duval County because of rampant uneconomic duplication and accordingly found much of northern Duval County to be in dispute. Id. at 10:655. Therefore, the Commission ordered JEA to prepare a detailed proposal to eliminate the uneconomic duplication in northern Duval County. Id. at 10:658. The Commission also announced it would not allow JEA's "cream skimming" approach to providing electric service. Id. Finally, the Commission awarded the right to serve the Holiday Inn to Okefenoke, in part, because of the detrimental economic impact the

loss of this customer would have on the cooperative and its members. Id. at 10:657-58.

As the above decisions show, the Commission's practice is to use its authority to reach a result that promotes the public interest in all respects. To construe the Commission's authority in a narrow sense would defeat the intent of the Legislature to protect the public. Insurance Company of North America v. Morgan, 406 So. 2d 1227, 1229 (Fla. 5th DCA 1981).

**B. The Commission properly tailored its resolution of the case at bar to the facts of the dispute.**

In this case, it would have been irrational for the Commission to order Gulf Coast to pay the cost of relocating the Red Sapp line since it was not the utility that was awarded the right to serve the correctional facility. To have ordered Gulf Coast to pay would have made the cooperative's members suffer, which would have been against the public interest. The Commission did not want to harm Gulf Coast's ratepayers by making them responsible for an expense for which they would have no offsetting revenues. (R. 317) Even though the Commission does not have rate setting authority over cooperative utilities, the public interest obliges the Commission to consider costs imposed by it on the members of a cooperative.

The Commission also acknowledged that Gulf Power took no affirmative steps in regards to Gulf Coast until the cooperative had expended money, energy, resources, and time to get the correctional facility to Washington County. (R. 317; T. 55, 145,

303-06, 625, 635-38) As noted by the Commission in its final order, Gulf Power sat back and let Gulf Coast pursue solicitation of the prison project. (R, 317) Then Gulf Power reaped the benefits. In addition, the Commission was troubled that Gulf Power had uneconomically duplicated Gulf Coast's lines elsewhere during the pendency of this dispute. (R. 316, 319)

Therefore, the Commission ordered Gulf Power to pay the relocation cost. This was the logical decision to make since it would be Gulf Power who would be serving the customer. The Commission must, and does, have the broad discretion to fashion a reasonable and effective resolution of the dispute by ordering Gulf Power to pay the relocation cost pursuant to Sections 366.01, 366.04(2)(e), and 366.04(5), Florida Statutes.

It is a well established principle that the Commission's construction of a statute that it is charged with enforcing and interpreting is entitled to great weight, and "[t]he Courts will not depart from such a construction unless it is clearly unauthorized or erroneous." PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988). In this case, the Commission correctly exercised its statutory authority.

**II. THE COMMISSION'S AUTHORITY OVER TERRITORIAL DISPUTES IS EXCLUSIVE: THE ISSUES RAISED BY GULF POWER CONCERNING EASEMENTS AND GULF COAST'S WAIVER ARE NOT DISPOSITIVE.**

Gulf Power argues that the law of easements should resolve the issue of who should pay the cost of relocating the Red Sapp line. (Cross-Appeal at 25-28) The fact that an easement or other

property interest may be involved does not necessarily limit the Commission's exercise of jurisdiction in territorial disputes. To a degree, easements and other property interests will always be affected in territorial dispute resolutions. Nevertheless, the Commission has exclusive jurisdiction over the regulation of public utilities and electric utilities for territorial matters. The Commission's jurisdiction is

exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

§ 366.04(1), Fla. Stat.

In this case, the record was unclear whether the Red Sapp line was on a county or private right-of-way. (T. 337-38, 387-88) Nor was the record clear concerning who the easement holder was. (T. 387-88) What was clear was that the Red Sapp line would have to be moved regardless of which utility served the prison. (T. 399) It was also clear that if Gulf Coast had known from the beginning that it would not be the service provider to the correctional facility, Gulf Coast would not have expended any money to relocate the Red Sapp line. (T. 308, 399) Because Gulf Power was awarded the right to serve, either Gulf Power or its customer should be responsible for the relocation cost.

The arguments raised by Gulf Power concerning easements and Gulf Coast's April 13, 1993 letter are irrelevant and without

merit. They fail to recognize the Commission's ability to fashion a resolution of a territorial dispute on its own motion. § 366.04(2)(e), Fla. Stat. The larger public policy issues at stake warrant the Commission's order to Gulf Power to reimburse Gulf Coast for the cost of relocating the Red Sapp line. The Commission fulfilled its obligation to protect the public interest by not burdening Gulf Coast's ratepayers with the cost of relocating the line.

The Commission's decision does not reward Gulf Coast's behavior as argued by Gulf Power. (Cross-Appeal at 30). Instead, to have required Gulf Coast to pay the relocation costs for a customer it would not be serving would have unduly rewarded Gulf Power and been inconsistent with the Commission's authority.

Gulf Power also argued that Gulf Coast failed to meet its burden of proof concerning the relocation cost. Gulf Power fails to recognize that the Commission has the authority to resolve territorial disputes on its own motion. § 364.04(2)(e), Fla. Stat. Accordingly, it is not necessarily bound to grant the relief requested by either utility. Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159, 1160 (Fla. 1977). This is because there are larger public policy issues at stake than who has the right to serve a particular customer. Lee County Electric Cooperative v. Marks, 501 So. 2d 585, 587 (Fla. 1987).



Gulf Coast did not request reimbursement for the relocation of the Red Sapp line. Since the cooperative did not request reimbursement, it did not have the burden of proof on this issue. Therefore, Gulf Power's reliance on Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977) is without merit. The Balino case involved a different situation in which a party who had the burden of proof on an issue did not meet it.

Gulf Power is improperly asking the Court to substitute its judgment for that of the Commission's. Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237, 241 (Fla. 1st DCA 1985). Gulf Power's appropriate remedy is to seek reimbursement for the relocation cost from the customer, if it does not want to bear the cost itself.

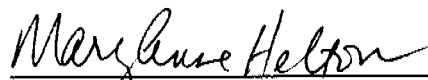
The Commission's order is consistent with its statutory authority and a proper exercise of agency discretion. Because the Commission's decision is based on competent and substantial evidence and comports with the essential requirements of law, the final order should be affirmed. Gulf Power Co. v. Public Service Commission, 480 So. 2d 97, 98 (Fla. 1985).

**CONCLUSION**

Gulf Power has not met its burden of overcoming the presumption of correctness that attaches to Commission orders. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). The Commission's order should be affirmed.

Respectfully submitted,

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Dated: December 5, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 5th day of December, 1995 to the following:

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