IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC. Petitioner/Appellant	)	
v.	)	Case. No. 85, 464
SUSAN F. CLARK, as Chairman FLORIDA PUBLIC SERVICE COMMISSION, and GULF POWER COMPANY Respondents/Appellees	)	

ANSWER BRIEF AND CROSS-APPEAL OF GULF POWER COMPANY

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SYMBOLS AND DESIGNATIONS

References are made: to the record "[Record at page number]"; to hearing exhibits "[Hearing Exhibit number]"; to hearing transcripts "[Transcript at page number]." The Florida Public Service Commission is referred to in this brief as the Commission. Gulf Power Company is referred to in this brief Gulf or Gulf Power. The Gulf Coast Electric Cooperative is referred to in this brief as the Coop. Washington County is referred to in this brief as the County.

References to the decision and Final Judgment of the Fourteenth Judicial Circuit Court in and for Washington County in Case No. 71-563 styled Gulf Coast Electric Cooperative, Inc. vs. Gulf Power Power Company have been shortened to "the Sunny Hills decision." A copy of that decision and final judgment is attached to this brief as Appendix "A".

STATEMENT OF THE CASE AND FACTS

Gulf Power does not take issue with the Coop's statements regarding the nature of the case, the course of the proceedings or the disposition in the lower tribunal. With regard to the Coop's statement of facts, Gulf Power does not agree that the Coop's recitation is relevant, accurate, or complete.

For example, the Coop omits the fact that Gulf Power has been serving customers in Washington County since 1926. [Transcript page 68, 596, 604] In fact, Gulf Power supplied the Coop all of its electric power needs until 1981. [Transcript page 68, 596, 604].

The record reveals that since 1971, Gulf Power has had three phase distribution lines in place along Highway 279 and Highway 77, immediately adjacent to two sides of and on the same side of the Highways of the property which is the site of the correctional facility. [Transcript at pages 66, 167; Map No. 4 in the Appendix to Gulf Power's Post Hearing Brief] That the existing Gulf Power lines adjacent to the prison site were adequate to serve the correctional facility's electric needs is also in the record. [Transcript page 66, 69, 73, 78, 95-96] Further, the right of Gulf Power to have these lines in place was judicially recognized in 1971. [Sunny Hills decision, Appendix "A" hereto]

In order to serve the correctional facility, the Coop had to construct a three-phase line along Highway 279 from the intersection with Highway 77. These newly constructed three phase distribution facilities are parallel to and on the opposite side of

the highway from the existing three phase facilities of Gulf Power. [Transcript page 70-72, 78, 166-168, 336, 39] At a minimum the cost for the Coop to serve the correctional facility is nearly $15,000 more than the cost for Gulf Power to serve the same customer as a result of the Coop's construction of duplicative facilities.[1] This newly constructed three phase line was found by the Commission to be an uneconomic duplication of Gulf Power's existing facilities. [Order at page 6]

The entity who selected the Coop for electric serve to the correctional facility was not the ultimate customer, the Department of Corrections, but was in fact the Washington County Board of County Commissioners. [Transcript at pages 35-37] That by a letter sent to the Department of Corrections, the real customer herein, Gulf Power made its desire to serve the correctional facility is an undisputable part of the record below despite the Coops allegation to the contrary. [Hearing Exhibit 2; Transcript at pages 57-61; and Coop's Brief at page 4]

The Commission took official notice of Section 337.403, Florida Statutes, which governs removal of a utility's lines along on a county right-of-way. That the easement was located on private property is strongly suggested by the record in this matter. [Transcript at pages 267, 338, 387-388] Regardless of what type of right-of-way the Red Sapp Road line was located upon, the Coop voluntarily removed and relocated that line

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[1]There is sufficient evidence in the record to suggest that the so-called relocation of the Red Sapp Road single phase line was neither necessary nor the least cost alternative to maintaining the same level of service to existing Coop customers off of the correctional facility site. This would indicate that additional cost incurred by the Coop in order to be able to serve the prison greatly exceeded $15,000.

[Transcript at page 360-363, 412-413, 436; Hearing Exhibit 16] That the Coop voluntarily relocated the line without charge to either the Department of Corrections or Washington County is undisputable. [Transcript at page 360-363, 412-413, 436; Hearing Exhibit 16]

SUMMARY OF ARGUMENT

The Commission's decision that Gulf Power is the proper utility to provide electric service to the new state correctional facility in Washington County is both consistent with and required by the legislature's mandate that the "further uneconomic duplication" of electric facilities be avoided. The Coop's appeal is nothing more than a quarrel with the Commission over its interpretation of the statutory mandate that the Commission assure ". . . the avoidance of further uneconomic duplication of generation, transmission and distribution facilities." The interpretation of a statute by the agency charged with its enforcement is entitled to great weight on appeal.

The Coop argues that a $15,000 differential in costs is substantially equivalent to zero. This is not consistent with the great weight of Commission and judicial precedent. All of the cases cited by the Coop resulted in the award of service to the utility with the lower relative cost to serve. In this case, the Commission clearly considered each of the factors listed but gave the non-cost factors less weight than desired by the Coop. The uneconomic duplication of facilities was properly accorded the greatest weight in the Commission decision below.

Customer preference in this case does not justify a departure from the state policy against further uneconomic duplication of facilities. The issue of customer preference was improperly clouded by the fact that the decision to award service to the Coop was made by Washington County, not the ultimate customer. Washington County received grants and no interest loans from or through the efforts of the Coop. Current federal policy prohibits the tying of such grants or loans to a requirement that the Coop provide

electric service. Allowing customer to choose a supplier that would have to uneconomically duplicate the facilities of another would result in the violation of the state policy against further uneconomic duplication of facilities.

Any duplication of facilities occurring prior to 1974, whether or not uneconomic, is not relevant to the determination whether the Coop's actions in this case constitute the "further uneconomic duplication" of facilities. Gulf Power's right to be adjacent to the prison site beginning in 1971 was judicially determined. State policy against further uneconomic duplication of facilities was not adopted until 1974. In past disputes between these two utilities, the Commission has affirmed Gulf Power's right to be in the general area of this dispute.

Equities cannot favor a party whose actions resulted in a violation of the statutory policy against further uneconomic duplication of electric facilities within the state. The Coop's so-called equitable argument is nothing more than a request that the court reweigh the evidence. Principles of equitable estoppel simply do not apply in this case. The Coop was not justified in relying upon any action or non-action of Gulf Power when the Coop undertook to duplicate the existing facilities of Gulf Power. Gulf Power expressed its willingness and availability to serve the prison site to the ultimate customer in a timely manner. Gulf Power's complaint against the Coop in this case was properly and timely filed with the Commission after the issue of the Coop's uneconomic duplication of facilities of Gulf Power in place since 1971 became ripe for decision.

The Coop's efforts in this case violated state and federal legislative policy against the "purchase" of business for the Coop through the use of economic development grants

and loans. Federal policy prohibits conditioning of such grants/loans on Coop service of the resulting electric load. The state's policy against the uneconomic duplication of facilities cannot support the Coop's actions. Finally, the Coop's actions violate equitable principle requiring that a party seeking an equitable remedy have clean hands. Coop's knowledge of Gulf Power's facilities and right to exist in that area precludes its argument for relief on equitable principles.

In its cross appeal, Gulf Power takes issue with the Commission requirement that Gulf Power pay the Coop $36,996.74 as reimbursement for the relocation of the Red Sapp Road electric distribution line. There simply is no legal basis for this requirement. The proper responsibility for these costs lies with either the utility who own the facilities being relocated, the governmental entity requiring the relocation, or the landowner whose desired use of the property was inconsistent with the continued presence of the utility's lines on the property. There simply is no basis for requiring a third party such as Gulf Power to have to bear any of the relocation cost. Further, the requirement that Gulf Power reimburse the Coop for this cost would tend to reward the Coop for engaging in a race to serve the prison, in clear violation of the statutory mandate against the uneconomic duplication of existing facilities belonging to Gulf Power. Finally, the Coop voluntarily waived any right to reimbursement for these costs when it voluntarily extinguished its easement rights as an enticement to the Department of Corrections to locate its new prison on the property.

ARGUMENT

I. The Florida Public Service Commission's decision that Gulf Power Company is the proper utility to provide electric service to the new state correctional facility in Washington County is consistent with the legislative mandate to avoid the "further uneconomic duplication" of electric facilities.

A. The Coop's appeal is nothing more than a quarrel with the Florida Public Service Commission over its interpretation of the statutory mandate that the Commission assure ". . . the avoidance of further uneconomic duplication of generation, transmission and distribution facilities."

The Florida Public Service Commission in Order PSC-95-0271-FOF-EU found that the Coop has uneconomically duplicated the distribution facilities of Gulf Power to serve the new state correctional facility in Washington County. [Order at page 6] Based on that finding, the Commission determined that Gulf Power is the proper utility to provide the correctional facility electric service. [Order at page 6] The Coop argues that this determination was not proper.

The Coop argues that the Commission committed error in resolving this matter through a "flawed view" of the term "uneconomic duplication." [Coop's Brief at page 9] The law is clear that the interpretation of a statute or a rule by an agency that is charged with the responsibility of enforcing such statute or rule is to be afforded great weight on judicial review. Department of Environmental Regulation v. Goldring, 477 So. 2d 532 (Fla. 1985); Public Employees Relations Commission v. Dade County Police Benevolent Assoc., 467 So. 2d 987 (Fla. 1985); St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So. 2d 1066 (Fla.1st DCA 1989). Here, the Commission is the sole agency with authority to implement Section 366.04(5), Florida Statutes. That

statute, which was first enacted in 1974, mandates the Commission to prevent the further uneconomic duplication of facilities by electric utilities. As the agency charged with interpreting the term "uneconomic duplication of facilities" found in Section 366.04(5), Florida Statutes, the Commission's interpretation of the term in this matter is entitled to great deference. Also in 1974, the Commission was charged with responsibility for resolving territorial disputes between electric utilities. Section 366.04(2), Florida Statutes. The Commission promulgated Rule 25-6.0441(2), Florida Administrative Code, as the mechanism for enforcement of the Commission's duties pursuant to Sections 366.04(2) and (5), Florida Statutes. That rule sets forth a nonexclusive list of factors that the Commission considers when resolving territorial disputes. The relative weight to give each factor considered is left under the rule within the sound discretion of the Commission on a case by case basis.

The Coop claims that the Commission should have ignored the cost differential in this case because it is either de minimus or substantially equal to the other factors in Rule 25-0441(2). This position is not supported by the case law cited by the Coop. In each of the cases cited by the Coop, the Commission resolved the dispute in favor of the utility having the lower cost to serve. Moreover, two of the cited cases, Suwannee Valley Electric Cooperative, Inc. v. Florida Power and light Company, 92 FPSC 7:170 (1992) and In re: Territorial Dispute between Suwannee Valley Electric Cooperative Inc., and Florida Power Corporation, 87 FPSC 11:213 (1987), had cost differentials between the two competing utilities that are smaller than that found in the present matter. In each case the prevailing party had the lower cost to serve.

In Suwannee Valley Electric Cooperative, Inc. v. Florida Power and Light Company, 92 FPSC 7:170 (1992), the Commission found that Suwannee had the right to serve the particular customer based on a finding that, among other factors, Suwannee's cost to serve was approximately $5,000 less than that of Florida Power Corporation. The Coop's attempt at distinguishing Suwannee Valley Electric Cooperative, Inc. v. Florida Power and Light Company in its brief is misleading. The Coop attributes a holding to that case that is not found in the published order. The Coop claims that the Commission held that "despite [the] small difference in cost, Suwannee Valley was entitled to serve the motel because it was the historic service provider to the area since 1950." [Coop Brief at pages 11and 12]. This is a blatant mischaracterization of the Commission's order. The Commission's order states:

> In making this determination we find that the facts indicate that SVEC distribution lines on Badcock Road have been there since 1950; that FPL will have to cross SVEC's facilities to provide permanent service to the motel; and that FPL's cost to provide service is $7,877 compared to $3,154.28 for SVEC. We therefore conclude that permitting FPL to continue to serve the customer in question would allow the uneconomical duplication of SVEC's facilities.

Suwannee Valley Electric Cooperative, Inc. v. Florida Power and Light Company, at page 3. Nowhere does the Suwannee Valley order explicitly state or even allude to the holding attributed to it by the Coop. The order did not mention how small of a difference in cost to serve was found, nor did it place primary emphasis on SVEC being the historic service provider. Id. Simply, those two factors were relied upon by the Commission in arriving at its decision to award service to the lower cost provider. In that matter, just as in the current dispute, some additional and unnecessary sums of money were spent by one

of the utilities and the Commission exercised its sound discretion and found such an expenditure to be an uneconomic duplication of facilities.

Again, in the case In re: Territorial Dispute between Suwannee Valley Electric Cooperative Inc., and Florida Power Corporation, 87 FPSC 11:213 (1987), the Commission awarded service to a correctional facility to Florida Power Corporation (FPC) finding an uneconomic duplication of facilities where FPC's cost to serve was approximately $8,000 less than that of Suwannee. From the foregoing, it is clear that prior Commission precedent does not support, the Coop's suggestion that a cost to serve differential of $15,000 is substantially equivalent to zero, and therefore is insufficient upon which to base a finding of uneconomic duplication of facilities. In fact, each of the cases cited by the Coop in its brief supports the Commission's determination in this case that the lower cost provider should prevail. Gulf Power had the lower cost to serve and in keeping with prior Commission precedent, the determination that Gulf Power should be allowed to serve the new correctional facility should be upheld on appeal.

The Coop has failed to show that a "relatively small" amount of uneconomic duplication avoids the purview of Section 366.04(2). It cannot, since the statute is silent with regard to how much additional cost is permitted before it becomes "uneconomic." By its silence, the statute leaves to the discretion of the Commission the determination of what constitutes an uneconomic duplication of facilities. See Section 366.04(5), Florida Statutes. Whether the cost differential in the case at bar makes the Coops's duplication of

facilities "uneconomic" is a decision wholly within the sound discretion of the Commission. Such decision should not be disturbed by this Court on appeal. See Citizens v. Florida Public Service Commission, 425 So. 2d 534 (Fla. 1983).

In exercising its discretion in this matter, the Commission found that the factors that it considered in resolving this dispute were not substantially equal. [Order at pages 5-6] The law is clear that the factors of Rule 25-6.0441(2) are not exclusive, but are in fact just some of the factors which may be considered by the Commission. In this case, the Commission appropriately placed great emphasis on its responsibilities flowing from section 366.04(5) regarding uneconomic duplication of distribution facilities. The fact that the Commission utilized uneconomic duplication of facilities as the primary basis in resolving this dispute cannot constitute an abuse of discretion. [Order at page 6] The weight attributed to a factor considered by the Commission under its own rule, including the weight attributed to the uneconomic duplication of facilities by a utility, is wholly within the sound discretion of the Commission and should not be second guessed by this court. Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984); See Citizen v. Florida Public Service Commission, 425 So. 2d 534 (Fla. 1983).

Next, the Coop argues that customer preference should determine who serves the correctional facility in this matter despite the fact that the Coop had to uneconomically duplicate the facilities of Gulf Power in order to provide the required service. The Coop appears to read Rule 25-6.0441(2)(d) as stating that the Commission must use customer preference as the determining factor if it finds all of the factors enumerated in that rule are substantially equal. This is not a correct reading of the rule. The Commission is only

required to consider the customer's preference and then only if all other factors are substantially equal. Rule 25-6.0441(2)(d), Florida Administrative Code. For the reasons stated above, it is clear that the factors are not substantially equal. Therefore, the issue of customer preference need not be addressed by the Commission.

Even if the issue of customer preference is deemed to be a proper consideration by this Court, in the present case, the real customer did not make the decision as to who would serve it. That decision was delegated by the customer, the Department of Corrections, to Washington County. [Transcript at page 35-37]. To permit Washington County to express "customer preference" under the present circumstances would set a bad precedent in the battle against the further uneconomic duplication of facilities. Washington County clearly was influenced by the fact that it had received loans and grants from the Coop and the fact that it would not have to pay the higher electric bills likely to result over time as a result of service from the Coop. Clearly, the expression of customer preference by Washington County is clouded by the low interest REA loan, the value of the efforts to secure that loan and the outright gift of $45,000 that it received from the Coop. The fact that such grants and loans were subject to improper use as an enticement to get entities to award electric service rights to cooperatives is evident. Such abuse likely resulted in an amendment of the federal statute under which the loans and grants are made. That statute now prohibits a cooperative from conditioning a loan or grant on that cooperative being able to serve the loan/grant recipient. Rural Electrification Loan Restructuring Act of 1993, Public Law 103-129, Nov. 1, 1993. The record in this matter reveals no reason for Washington County to choose service from the

Coop other than the grants and loan. The Department of Corrections, real customer in this case, did not express a preference here. This Court should find that no valid customer preference has been shown in this matter.

Further, allowing a customer to choose an electric supplier in this case would result in the violation of the state policy against the further uneconomic duplication of facilities. State policy dictates that customer preference for service from a particular utility should not be followed where to do so would lead to the further uneconomic duplication of facilities. Lee County Electric Cooperative v. Marks, 501 So.2d 585, 587 (Fla. 1987). The Coop's argument seeks to establish a policy "which dangerously collides with . . . the PSC's duty to police 'the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.' " Id. A customer will normally make a decision based on its own self-serving interests, not the best interests of the Florida energy grid or the general public. The Florida Supreme Court has spoken to the issue of customer preference when that preference is based on the customer's own advantage and convenience finding that there is no right to service from a particular utility merely because the customer deems it advantageous to itself. Storey v. Mayo, 217 So. 2d 304, 307-8 (Fla. 1968), cert. denied, 395 U.S. 909 (1969). The Commission, in the case In re: Territorial Dispute between Suwannee Valley Electric Cooperative Inc., and Florida Power Corporation 87 FPSC 11:213, 220, reiterated the Court's aforementioned holding, finding that a customer's preference based on its own convenience should be given little weight. Here the Commission is presented with the

County asking for a customer to receive service from a utility that would have to uneconomically duplicate the facilities of another utility to provide the requested service. [Transcript at page 398] Nothing in the record reveals that the Coop was chosen by Washington County for any other reason than its own convenience and self-interest. Nothing in the record indicates that service from the Coop has any benefit not found in service from Gulf Power. In this matter, the preference of the County, who is not the real customer receiving electric service, was bought by the Coop via a no interest REA loan, the value of efforts to obtain an REA loan and an outright $45,000 grant from the Coop. This case is a prime example why allowing a cooperative to buy a customer's preference for service would inevitably lead to further uneconomic duplication of facilities throughout the state of Florida. Washington County made its decision without regard for the further uneconomic duplication of facilities by the Coop and that their decision would require the Coop to uneconomically duplicate the facilities of Gulf Power. This same scenario can and will occur again in the future if the Coop is awarded the correctional facility based in this case on so-called customer preference. The Commission, by its decision that Gulf Power is the proper utility to provide electric service, refused to set such a disastrous precedent in this matter. The Commission's holding with regard to the award of the correctional facility and the rejection of the County's preference as the basis for the decision comports with the best interests of the electric customers as a whole throughout the state.

Finally, the Coop argues that the additional cost to upgrade its facilities was necessary to serve the requirements of the customer. [Coop's Brief at page 12] This

argument must be dismissed summarily. The facilities constructed by the Coop to serve the correctional facility were not necessary for that customer to receive electrical service. These facilities were only necessary for the Coop to serve the customer. The requested service does not provide a justification for the Coop's uneconomic duplication of existing Gulf Power facilities. This argument is no more than the Coop's attempt to justify its duplication of Gulf Power's distribution facilities when it knows that to have done so was entirely unnecessary and uneconomic. If this argument is afforded any weight by this Court, the resulting precedent would allow any utility to justify the uneconomic duplication of facilities of another utility simply by saying that it was necessary to serve the customer even if another utility had the necessary facilities already in place to serve the customer. Obviously, the facilities necessarily had to be constructed by the Coop for it to serve the facility. Though it may be necessary for one utility to build additional facilities for it to serve a particular location, if another utility already has adequate facilities in place to serve that location, it is not necessary for the first utility to build duplicative facilities for the customer to obtain electric service. Preventing the uneconomic duplication of facilities is precisely what Section 366.04(5), Florida Statutes, charges the Commission to do. The best policy would require that the customer be served from existing facilities adequate to serve the load. That is precisely what the Commission's order under review decided. Here, Gulf Power had adequate facilities in place to serve the customer and the Commission properly decided that Gulf Power had the right to serve the customer. [Transcript at page 66, 69, 73, 78, 95-96]

B. Duplication of facilities prior to 1974, whether or not uneconomic, is not relevant to the determination whether the Coop's actions in this case constitute the "further uneconomic duplication" of facilities.

The Coop argues that it should be awarded the right to serve the prison because the facilities to be used by Gulf Power to serve the correctional facility were themselves a prior duplication of the Coop's facilities. [Coop's Brief at pages 9, 14-15] The argument presented by the Coop is without merit and was so found by the Commission. The Commission made a statement in its order regarding Gulf Power's alleged prior duplication of facilities in Washington County. The Commission stated "[w]e cannot adopt a policy that sanctions further uneconomic duplication of facilities under any circumstances, and especially in this case." [Order at page 6](Emphasis added)

The Coop's argument must fail because it is misleading and raises an issue that is not relevant to the resolution of this dispute. First and foremost, the right of Gulf Power to construct and to maintain its facilities to serve the Sunny Hills subdivision, including the facilities to be used by Gulf Power to serve the correctional facility herein, was established in a Florida court of law more than twenty years ago in a contract dispute between these two utilities.[2] In that opinion, the Circuit Court of the Fourteenth Judicial Circuit in and for Washington County found that Gulf Power had the right to be in that geographical area. See Sunny Hills Decision. The Commission was not involved in the

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[2]Gulf Coast Electric Cooperative, Inc. v. Gulf Power Company, Final Judgement of April 5, 1971, Case No. 71-563; per curiam affirmed , 259 So.2d 794 (Fla. 1st DCA 1972)(hereafter "Sunny Hills Decision"). Gulf Power asks this Court to take judicial notice of this opinion which is attached hereto as appendix "A". That this Court may take judicial notice of a circuit court opinion is well-settled in the law. Section 90.202(6), Florida Statutes (1993).

resolution of that dispute. In fact, the jurisdiction of the Commission to resolve territorial disputes between electric utilities was added to the statute in 1974. The legislative policy in 1974 created jurisdiction for the Commission to assure that further uneconomic duplication of facilities is avoided. See Section 366.04, Florida Statutes; Ch. 74-196, Laws of Fla. In limiting the authority of the Commission to prevent further uneconomic duplication of facilities, the Legislature implicitly recognized the constitutional due process issues that would inevitably arise in an attempt to address any prior duplication of facilities by utilities.

Gulf Power's right to exist and serve customers in the general area where the new correctional facility was built also has been acknowledged by the Commission. In re: Petition of West Florida Electric Cooperative Assoc., Inc. to resolve a territorial dispute with Gulf Power Company in Washington County Florida, 85 FPSC 11:12 (1985); In re: Petition of Gulf Coast Electric Cooperative to Resolve a Territorial Dispute with Gulf Power Company in Washington County, 86 FPSC 5:132 (1986). Thus, any prior duplication by Gulf Power or any other utility is not relevant to the present determination that the Coop's facilities constructed in this case are an uneconomic duplication of Gulf Power's facilities.

II. Equities cannot favor a party whose actions resulted in a violation of the statutory policy against further uneconomic duplication of electric facilities within the state.

A. The Coop's argument that it should be awarded the right to serve the correctional facility based on fundamental equitable grounds is no more than a thinly veiled attempt to have the Court reweigh the evidence in this case and to substitute its judgment for that of the Florida Public Service Commission.

The Commission's decision not to use equitable grounds to award the correctional facility to the Coop was wholly within its sound discretion and should not be disturbed through this appeal. The Coop offers two reasons why it believes that the equities favor awarding it the right to serve the correctional facility. First, that Gulf Power failed to object to the Coop's actions until after the correctional facility was secured for Washington County and second, that Gulf Power had previously duplicated the facilities of the Coop in Washington County to serve the Sunny Hills subdivision. [Coop's Brief at page 13] Neither argument has merit.

As the Coop points out in its brief, the Commission considered both of the Coop's arguments and even discussed them in its order resolving this matter. Although record evidence shows that Gulf Power had made its desire to serve the prison known to the Department of Corrections in advance of the County's decision to award service to the Coop[3], the Commission stated that "[a]fter the grant and loan were consummated and the prison site procured, and after the Coop was chosen to provide service and incurred the cost to move its Red Sapp Road line off the site, Gulf Power informed the Department of

[3] Hearing Exhibit 2 and Transcript at pages 56-61.

Corrections that it wanted to serve the prison." [Order at page 1] The Order also reveals that the Commission considered the alleged prior duplication of facilities by Gulf Power citing as an example Gulf Power's construction of its three-phase line along County Road 279 and State Road 77 to serve Sunny Hills. [Order at page 6] Thus, the Commission's order clearly reveals that it considered these issues prior to deciding the case in Gulf Power's favor. Thus, the Coop's quarrel in this matter is with the weight applied to these arguments by the Commission. This Court must not substitute its discretion in this regard for that of the Commission. Citizen v. Florida Public Service Commission, 425 So. 2d 534 (Fla. 1983). It is improper for this Court to reweigh and reevaluate the evidence presented to the Commission. Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984).

B. Equitable estoppel principles do not apply to the facts of this matter.

Most important is the fact that the Coop has not shown that it was justified in relying upon the silence of Gulf Power as acquiescence to the duplication of Gulf Power's existing facilities. In each of the cases cited by the Coop, the party estopped had a duty to speak or take action. In fact, the law is clear that a duty to speak or to act is a requirement of a claim of equitable estoppel where no positive action was taken to induce reliance by the other party. United Services Corp. v. Vi-An Construction Corp., 77 So. 2d 800, 803 (Fla. 1955); Richards v. Dodge, 150 So. 2d 477 (Fla. 2nd DCA 1963). In the case at bar, there is no basis for a finding of a duty on the part of Gulf Power. First, Gulf Power took no action that could have been relied upon by the Coop. Likewise, there is no

special relationship between Gulf Power and the Coop from which a duty could arise. Moreover, no statutory or contractual duty as between Gulf Power and any other party to this dispute exists. Since no duty exists, Gulf Power did not have to contact either the customer or the Coop and failure to do so cannot be the basis for a finding of equitable estoppel. Nevertheless, Gulf Power's desire to serve the new prison was made known to the Department of Corrections several months before the Coop began to duplicate Gulf Power's existing facilities.

The Coop argues that Gulf Power failed to disclose its desire to serve the correctional facility before the Coop duplicated Gulf Power's existing facilities and that this somehow supports a finding of equitable estoppel. [Coop's Brief at page 13] To the contrary, evidence in the record shows that Gulf Power contacted the Department of Corrections in a letter dated April 9, 1993, to Marvin Moran, the project manager, over a month before Washington County made a decision as to who would serve the prison. [Transcript at pages 56-61; Hearing Exhibit 2] Thus, Gulf Power did make its desire to serve the correctional facility known to the proper party in a timely manner.

Not only was Gulf Power's notice to the customer timely, but so was its filing of the complaint in this matter on September 8, 1993. Gulf Power was not in the position of being able to file a complaint before the Commission until it became apparent the Coop was going to serve the prison through an uneconomic duplication of Gulf Power's facilities. The issue was not ripe until that time. The filing of a complaint sooner would have been premature. Only after the Coop constructed facilities parallel to and on the opposite side of the highway from Gulf Power's existing three phase lines did this issue

become ripe for Commission review. Gulf Power in no way acted improperly or with undue delay either in contacting the customer to inform it of the Company's desire to serve the prison or by the Company's filing of a complaint in this case.

Finally, there are strong policy reasons against rendering an award to the Coop based on the so-called equities. State and Federal legislative policy take a strong stand against the "purchase" of business by cooperatives through application of economic development grants. The Coop effectively bought the County's decision to allow the Coop serve the correctional facility through its grant of $45,000, a gift of administrative costs to secure an REA loan and an REA loan to Washington County. An award in equity should not be made where the result is against public policy at both the state and federal level.

State policy dictates that a utility should not be permitted to "buy" the right to serve a customer when it leads to the further uneconomic duplication of facilities. The Florida Supreme Court articulated the state policy against allowing customer preference for service from a particular utility lead to the further uneconomic duplication of facilities. Lee County Electric Cooperative v. Marks, 501 So.2d 585, 587 (Fla. 1987). This policy must not be subverted by allowing the County to choose service from the Coop when to do so requires an uneconomic duplication of facilities.

Federal policy with regards to the role of the Rural Electrification Administration (REA), and in turn the Coop, is to bring electricity to rural areas that do not have adequate electric service available to them from the lines of a private power company. See Withlacoochee River Electric Cooperative, Inc. v. Tampa Electric Company, 158

So.2d 136, 138 (Fla. 1963)(Hobson concurring). A cooperative's use of low or no interest loans and other enticements to compete for new customers has been viewed as unfair and not within the REA's role. Id. Indeed, this Court has found that when the electrical requirements of a customer can reasonably be met by a privately owned utility, the cooperatives can be enjoined from competing for that customer. See Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1385 (Fla. 1982), citing Withlacoochee River Electric Cooperative, Inc. v. Tampa Electric Company, 158 So.2d 136, 138 (Fla. 1963). Thus, both state and federal policy is against the actions taken by the Coop to secure the correctional facility in Washington County. The Coop has exceeded the public policy role of the REA and has unfairly competed for a customer that can and should be served by Gulf Power, the private utility having existing and adequate facilities adjacent to that customer.

C. The Coop does not come into this matter with clean hands and therefore cannot seek an equitable remedy.

The Coop's brief goes to great length in an attempt to show that it is entitled to serve the correctional facility based on equitable grounds. A longstanding maxim in the area of equity is that "[h]e who comes into equity must come with clean hands." United Services Corp. v. Vi-An Construction Corp., 77 So. 2d 800, 803 (Fla. 1955). In other words, one seeking equity must not himself be guilty of conduct in violation of fundamental equity. The actions undertaken by the Coop in this matter reveal that it has "unclean hands."

The actions undertaken by the Coop in this matter are precisely the actions that have been found to be outside of the Coop's role and in violation of state and federal policy. It is undisputable that Gulf Coast was aware that Gulf Power had three phase distribution lines adjacent to the correctional facility. The Coop is in the business of being a supplier of electric service and must be able to visually determine what type of line that Gulf Power had adjacent to the correctional facility site. Nothing in the record in any way shows that the presence of Gulf Power's lines was anything but obvious. Simply put, the Coop knew that the customer could be served from Gulf Power Company's existing facilities and chose to construct duplicative facilities to serve the prison.

Likewise, the Coop has been aware of Gulf Power's right to serve customers in Washington County in general and in the area in which the correctional facility is located. As far back as 1971, Gulf Power's presence in Washington County and, in fact, its right to have the very facilities from which the correctional facility will be served were established in the Sunny Hills dispute. [Sunny Hills decision, Appendix "A" hereto] Again, the Coop was made aware of Gulf Power's right to serve customers in Washington County in the dispute between it and Gulf Power over the Paradise Lakes development. In re: Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Company in Washington County, 86 FPSC 5:132 (1986) (right to serve awarded to Gulf Power). Finally, this Court upheld a Commission decision awarding Gulf Power the right to serve a residential development north of Panama City. Gulf Coast Electric Cooperative v. Florida Public Service Commission, 462 So. 2d 1092

(Fla. 1985). Interestingly, the Court in that case found that the Coop's competitive conduct was a race to serve the customer and upheld the Commission's refusal to condone a competitive race to serve. Just as in the foregoing case, the Coop again has competitively constructed duplicative facilities in a race to serve the correctional facility. That race to serve is evidenced by the Coop's race to construct lines to the site of the prison without first making any attempt at resolving a potential dispute with Gulf Power. The Coop had to know that Gulf Power's lines were adjacent to the customer and yet duplicated these existing facilities without making an attempt to resolve any potential dispute before constructing new duplicative facilities. The new Coop lines were an effort to get to the site first and be able to argue that since it was already there, the Coop should be allowed to serve the customer. The Coop cannot show a single attempt on its part to resolve any potential dispute with Gulf Power. No contact from the Coop to Gulf Power was ever made regarding service to the prison until after the Coop had taken the course of uneconomic duplication of Gulf Power's facilities and a complaint before the Commission had been filed. This had to be a conscious decision to do exactly what Section 366.04(5), Florida Statues, prohibits. Clearly, the hands of the Coop are not clean and it cannot come to this court seeking equity.

ISSUES ON CROSS APPEAL BY GULF POWER

I. The cost associated with the relocation of the Red Sapp Road line is the responsibility either of the utility who owns the line or of the owner of the property on which the utility's easement was located.

In the order under review, the Florida Public Service Commission determined that Gulf Power should pay the Coop $36,996.74 as reimbursement for the relocation of the Red Sapp Road line as a single-phase line. There simply is no legal basis for this requirement for this award. In its justification for this award, the Commission found that "[t]here is no evidence in the record that shows that the Coop would have had to incur the cost if another provider was selected to serve the prison." Id at page 7. Further, the Commission found that Gulf Power would be serving the prison at the Coop's expense if it were not required to reimburse the Coop for the relocation of Red Sapp Road. Id. Finally, the Commission noted that the line would have had to been relocated no matter who provided service to the prison site. Id. This decision departs from the essential requirements of the law and must be reversed.

Foremost, Gulf Power did not have the burden of proving that it was not responsible for the relocation costs of the Red Sapp Road line. The Coop has the burden of showing that it is entitled to a recovery for any costs associated with the prison project since it is in the best position to know the facts necessary for the Commission to determine this factual issue. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The evidence presented in the hearing below before

the Commission centered around whether the Red Sapp Road line was located on a county right-of-way or was on an easement, prescriptive or otherwise, associated with private property.

Testimony was sought in an attempt to show that the Red Sapp Road line was on a county right-of-way. [Transcript at page 337-338, 387] The Commission took official notice of Section 337.403, Florida Statutes, which places responsibility for the cost of relocation of a line along a public road on either the utility who owns the line, in this case the Coop, or the governmental entity requiring the relocation, in this case either Washington County or the Department of Corrections. If this statute is applicable to this matter, then the entity responsible for the Red Sapp Road line relocation would be the Coop or the County, but not a third party, such as Gulf Power. No eminent domain proceedings were instituted by the County or any other governmental entity. Neither the County nor any other governmental entity asked for or demanded the removal of the line from a public right-of-way. In any event, the line had to be moved to build the prison and the owner of the prison site requested that the line be removed. A dispute over reimbursement would properly have been between the County and the Coop, not the Coop and Gulf Power. The fact that Gulf Power is to provide a service to the structure that is built by the property's owner after the property owner had extinguished any right-of-ways or easements affecting the site of the proposed structure has no relevance in the determination as to who is responsible for the relocation costs.

The Commission could have found that the Red Sapp Road line was on an easement located on private property. [Transcript at pages 267, 387-388]. This finding

is supported by testimony offered by the Coop at the hearing. [Transcript at page 388] Such a finding would also determine who was to be responsible for the costs of the Red Sapp Road line relocation. In this scenario, the only two entities who could be responsible for the relocation costs would be the owner of the private property on which the easement runs or the owner of the line and holder of the accompanying easement. A witness for the Coop testified that the party requesting them to move facilities from a private easement normally bears the cost of removal and relocation. [Transcript at page 388] Again, a third party such as Gulf Power, even though another electric utility in this case, would not be liable for the relocation or extinguishment of an easement running on private property. Easements often interfere with a property owners desired use of his property and have to be extinguished, relocated or the easement purchased from its holder. Obviously, a land owner would be acting imprudently by building over the site of an easement until the easement issue is resolved. It will always be "but for" the extinguishment or relocation of an easement that a structure is built. It defies logic that a third party, such as Gulf Power Company, who is not the property owner or the easement holder would have to pay for or be responsible in any way for the costs associated with extinguishing or relocating an easement.

The present circumstances are analogous to the situation when any private land owner or developer has to extinguish or relocate utility easements in order to build a new structure or development. Often water, gas cable and electric lines must be relocated to build streets, parking lots and new structures. The resolution of who is to pay for relocation or extinguishment of each of these easements is between the property

owner/developer and the utility who owns the easement. The fact that the utility who owns the easement may not be the utility that ultimately serves the developed property is not relevant. In the present case, it is mere coincidence that Gulf Power Company is in the same business as the Coop. This fact should have no bearing on who pays for the relocation of the Red Sapp Road line.

Gulf Power does not assert that there is sufficient proof in the record to determine if the Red Sapp Road line was either on a public right-of-way or a private easement. Regardless however that issue is resolved, Gulf Power cannot be the party responsible for the relocation costs for the reasons detailed above. The Coop had the burden and has failed to carry it with regard to who has responsibility for the relocation costs as between the County and the property owner, the Department of Corrections. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977) The law should follow the logic here and place the burden of such costs on the property owner or the Coop. The Commission's order that Gulf Power pay the cost of relocating the Red Sapp Road line is without legal basis and should therefore be overturned by this Court.

II. The Coop waived any right to be reimbursed for the relocation costs associated with the Red Sapp Road line when it voluntarily extinguished its easement on the prison site and relocated its Red Sapp Road line without charge to the property owner or the Department of Corrections.

The Coop relinquished its right to an easement on the prison site by a letter dated April 13, 1993. [Transcript at page 360-363; Hearing Exhibit 16] The same letter expressly waived any right to reimbursement for the removal and the relocation of the

Red Sapp Road line. Id. A fair reading of the letter implies that either the Department of Corrections or Washington County would have been responsible for those costs if the Coop had not voluntarily given up the easement and relocated the line. [Transcript 363] Little doubt exists that the Red Sapp Road line was relocated with the intention of "freeing up acreage that the Department of Corrections will require for construction purposes." [Hearing Exhibit 16 at page 2] The record is clear that the line would have to have been removed to build the prison. [Transcript at page 363, 436] Thus, the analogy of a developer developing a tract of land with an easement running through it applies. In such a case, the developer would be responsible for the relocation costs, not some other utility providing a service to the site. The owner of the easement-burdened property is the party responsible for the costs if it decides it must have the easement relocated to build its building. Any other result is without basis in law or logic.

The Coop waived all rights to recover the relocation costs from the parties responsible for such costs. The record makes it clear that the Coop made a voluntary decision to relocate the Red Sapp Road line without charge to either of the parties possibly responsible for the relocation costs: the County or the Department of Corrections. [Transcript at page 363, 412-413, 436] This was in effect a gift of the relocation costs and the value of the easement to either the County or the Department of Corrections. The Commission stated that not requiring Gulf Power to pay for the relocation costs would permit Gulf Power to serve the prison site at the Coop's expense. [Order at page 7] The order fails to take into account that the Coop voluntarily made this gift to either Washington County or the Department of Corrections as part of its overall

effort to obtain the right to serve the prison site. To request reimbursement by Gulf Power would reward the Coop for its efforts to uneconomically duplicate the facilities of Gulf Power. The letter from the Coop makes it clear that it would pay the costs of relocating the Red Sapp Road line and would not seek reimbursement from the parties responsible for such costs. [Transcript at page 363] The Coop should not be allowed to search for other pockets to dip into to recover these costs where the Coop made a voluntary decision to forego the relocation costs. Simply because the Coop failed to follow the law regarding uneconomic duplication. To make Gulf Power pay the relocation costs would be without basis in law, reason or fairness.

CONCLUSION

The Coop's actions in this case were properly recognized by the Commission as a violation of the state policy against the further uneconomic duplication of existing electric utility facilities in the state. The Commission determination that Gulf Power is the proper utility to provide electric service to the new state correctional facility in Washington County should be affirmed.

The Commission's decision to require Gulf Power to reimburse the Coop $36,966.74 is not supported by any legal basis. That portion of Commission Order No. PSC-95-0271-FOF-EU should be reversed and remanded with instructions to strike that requirement from the order.

Respectfully submitted this 10th day of November, 1995

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 10th day of November, 1995 by U.S. Mail to the following:

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IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC. Petitioner/Appellant	)	
v.	)	Case. No. 85, 464
SUSAN F. CLARK, as Chairman FLORIDA PUBLIC SERVICE COMMISSION, and GULF POWER COMPANY Respondents/Appellees	)	

ANSWER BRIEF AND CROSS-APPEAL
OF
GULF POWER COMPANY

APPENDIX "A"

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR WASHINGTON
COUNTY

GULF COAST ELECTRIC COOPERATIVE, INC., a cooperative non-profit membership corporation, organized and existing under the laws of the State of Florida,

Plaintiff,

vs.

GULF POWER COMPANY, a foreign corporation,

Defendant.

FINAL JUDGMENT

THIS CAUSE coming on for trial before the Court and the Court having fully considered the following:

(a) All of the pleadings herein including the complaint, amendments of the complaint, motion for more definite statement, motion to strike, motion to dismiss, answer, counterclaim and answer to counterclaim;

(b) The evidence received at the hearing for application for temporary injunction on March 19, 1971, which by stipulation of counsel, approved by the Court, is taken by the Court as if having been presented in full at the trial and as becoming a part of the record of the trial herein;

(c) Supplemental and additional evidence offered at the trial on April 2, 1971;

(d) Full and complete argument of counsel; and the Court having fully considered the matter, finds and holds that there is no preemption of territory in the geographical area in question; that either party has the right to compete for the Deltona electrical load; and that either of the parties to this cause, in order to serve said load will have to expand its facilities; and, that Gulf Power Company's actions in this area as reflected by the evidence, does not violate Paragraph 16 of the power supply contract

attached as Exhibit "A" to plaintiff's complaint; now, therefore,

IT IS CONSIDERED AND ORDERED AS FOLLOWS:

1. That the temporary restraining order entered in this cause on March 12, 1971, be, and the same is hereby, dissolved and extinguished.

2. That the temporary restraining order entered in this cause on March 19, 1971, be, and the same is hereby, dissolved and extinguished.

3. That the complaint of Gulf Coast Electric Cooperative, Inc., be, and the same is hereby, dismissed with prejudice and that said plaintiff take nothing by this action and that the defendant, Gulf Power Company, go hence without day.

4. That the counterclaim of Gulf Power Company be, and the same is hereby, dismissed with prejudice and that said defendant take nothing by its counterclaim and that the plaintiff, Gulf Coast Electric Cooperative, Inc., go hence without day.

DONE AND ORDERED this 5th day of April, 1971.

Joseph W. Bailey
CIRCUIT JUDGE