

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 )

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

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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. \_\_\_\_). Appellant's Initial Brief is cited as (Brief 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 believes that this Court has not been objectively informed of the facts by Gulf Coast's statement. It is replete with argument and irrelevant information. For instance, on page four of its initial brief, Gulf Coast argues that Gulf Power "deliberately refrained from raising any objection until the grant and loan were in place . . . ." On page five, Gulf Coast argued that Gulf Power "claimed" improvements made its service more reliable. On page two, Gulf Coast discusses in great detail the distribution system Gulf Power constructed in 1971 in Washington County. This distribution system, however, was constructed over 25 years ago and is not the subject of the dispute before this Court. The Court should recognize Gulf Coast's argumentative and irrelevant statements for what they are and strike them or disregard them in their entirety.

## SUMMARY OF THE ARGUMENT

This is the third time this Court has been asked to review a Commission decision that resolves a territorial dispute between Gulf Power and Gulf Coast. As in the prior cases, in this case the Commission acted within its statutory authority in Sections 366.04(5) and 366.04(2)(e), Florida Statutes, to resolve the territorial dispute so that further uneconomic duplication of facilities would be avoided.

The Commission's order is based upon competent and substantial evidence and comports with the essential requirements of law. There was ample record evidence for the Commission to find that it would cost more for Gulf Coast to serve the prison site and that Gulf Coast uneconomically duplicated Gulf Power's lines in order to serve the correctional facility. Moreover, it was within the Commission's discretion to find that Gulf Coast raced to serve the prison site. It was the Commission's duty to refuse to condone such behavior. Because all relevant factors were not equal, it was proper for the Commission to decline to consider customer preference.

This Court should not consider the issue of equitable estoppel raised by Gulf Coast since it is not properly before it. Gulf Coast waived any right to raise the issue on appeal by failing to raise the issue in the proceeding before the Commission. If the Court finds the issue properly before it, it should conclude that Gulf Coast has failed to show that Gulf Power's actions satisfied the essential elements of equitable estoppel.

The Commission followed its past policy by refusing to condone Gulf Coast's economic duplication of Gulf Power's lines. For this Court to find otherwise would be contrary to long-standing public policy. The Commission's order should be affirmed.



## ARGUMENT

### I. THE COMMISSION'S ORDER AWARDING GULF POWER THE RIGHT TO SERVE THE CORRECTIONAL FACILITY WAS BASED ON COMPETENT, SUBSTANTIAL EVIDENCE AND COMPORTED WITH THE ESSENTIAL REQUIREMENTS OF LAW.

For the third time, this Court is being asked to review a Commission decision that resolves a territorial dispute between Gulf Power and Gulf Coast. See Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985); Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092 (Fla. 1985). The utilities have not executed a territorial agreement despite their stipulations that a territorial agreement would be in the public interest in the Commission proceedings that preceded the decisions in Gulf Power and Gulf Coast. In re Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., 84 F.P.S.C. 9:121, 123 (1984); In re Petition of Gulf Power Company involving a territorial dispute with Gulf Coast Electric Cooperative, 84 F.P.S.C. 1:146, 147 (1984).

When the Commission resolves a territorial dispute, its overriding public policy concerns are the integrity of the state's electric grid and the avoidance of uneconomic duplication of facilities.<sup>1</sup> In keeping with these concerns, and based on the

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<sup>1</sup> The Legislature has charged 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 in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

factors listed in Rule 25-6.0441(2),<sup>2</sup> Florida Administrative Code,

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Section 366.04(5), Florida Statutes (emphasis added). In addition, in 1971, the Legislature gave the Commission explicit authority:

[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.

Section 366.04(2)(e), Florida Statutes.

<sup>2</sup> In order to implement the Commission's jurisdiction over territorial disputes, the agency adopted Rule 25-6.0441, Florida Administrative Code, which provides in pertinent part:

- (2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:
  - (a) the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
  - (b) the nature of the disputed area including population and the type of utilities seeking to serve it, and the degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
  - (c) the cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and
  - (d) customer preference if all other factors are substantially equal.

and the direction in Section 366.04(5), Florida Statutes, the Commission awarded the right to serve the correctional facility to Gulf Power. (R. 313)

**A. The Commission properly found that Gulf Coast uneconomically duplicated Gulf Power's lines to serve the correctional facility.**

The final order stated: "We simply cannot ignore the fact that Gulf Coast's upgrade of the relocated Red Sapp Road single-phase line to three-phase duplicated Gulf Power's existing facilities." (R. 316) Gulf Coast takes issue with this statement because the Commission did not explicitly state the duplication was uneconomic. (Brief at 9) Putting aside whether Gulf Coast makes a meaningless distinction on this point, the record evidence was clearly sufficient for the Commission to find that Gulf Coast uneconomically duplicated Gulf Power's lines.

The evidence showed that both utilities' systems were under utilized in the area. (T. 297, 302) In addition, both utilities had lines adjoining the prison site. (T. 46) Since 1971, Gulf Power has had three-phase lines bordering the prison site on two sides. (T. 66, 69) For at least the last 40 years, Gulf Coast has also had lines bordering the site on two sides as well as on the site itself. (T. 397) However, Gulf Coast's existing line on the site was single-phase and had to be moved regardless of who served the facility. (T. 80, 398-99)

Because the Department of Corrections required three-phase lines to serve the prison at a particular point, Gulf Coast had to upgrade and cross Gulf Power's lines when the cooperative

constructed its lines to serve the correctional facility. (T. 167-68, 261, 336, 398-400, 437-38) Gulf Coast thus duplicated Gulf Power's lines to serve the prison because the cooperative constructed three-phase lines where Gulf Power already had three-phase lines. (T. 72, 167, 180, 644) Moreover, it was obvious that Gulf Power could have served the facility from existing three-phase lines without incurring similar upgrade costs. (T. 69, 72, 167, 343)

Although Gulf Coast would have this Court believe that its duplication of Gulf Power's line was economic, it does not point to any compelling evidence upon which such a finding could be made. For instance, the cooperative did not show that it could serve the prison site more cost-effectively than Gulf Power or that upgrading its lines and crossing Gulf Power's lines was the most economical way for the correctional facility to be provided service.

Gulf Coast fails to acknowledge that duplication is uneconomic and undesirable for more reasons than the unnecessary cost of duplicating lines. Duplication prevents the system of each utility involved from being fully used and creates lost revenues for the non-serving utility. In addition, duplication produces aesthetic and safety problems. As this Court has noted:

[D]uplication of lines, poles, transformers and other equipment not only marr[s] the appearance of the community but it also increase[s] the hazards of servicing the area. Such overlapping distribution systems substantially increase the cost of service per customer because they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient. Obviously, neither system receives maximum benefit from its capital invested in the area. The ultimate effect on this is that the

rates charged in the affected area are necessarily higher, or, alternatively, the customers in some other part of the system must help bear the added cost.

\* \* \*

[T]he ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers.

Storey v. Mayo, 217 So. 2d 304, 306, 307 (Fla. 1968) (citation omitted).

As Gulf Coast implied in its post-hearing brief, the Commission has the expertise and discretion to determine when uneconomic duplication has occurred. (R. 208) Moreover, it is the Commission's duty to police the state's electric grid for uneconomic duplication. Lee County Electric Cooperative v. Marks, 501 So. 2d 585, 587 (Fla. 1987). In this case, the Commission properly found that Gulf Coast uneconomically duplicated Gulf Power's lines.

**B. The Commission correctly found that the cost to serve was not a "substantially equal" factor.**

Gulf Coast has twisted the concepts of cost and uneconomic duplication by arguing that the Commission has departed from prior decisions by finding a \$14,582.54 cost differential sufficient to support a finding of uneconomic duplication. (Brief at 9-10) The cooperative places undue significance on the Commission's statement that "the additional cost to Gulf Coast to serve the facility is relatively small." (R. 316, Brief at 10) It attempts to argue that the "relatively small" cost differential is a "substantially equal" factor within the meaning of Rule 25-6.0441(2). Therefore,

according to Gulf Coast, it should be awarded the prison site. The cooperative cites a number of cases where the cost differential was larger than the one at issue as support for its distorted theory.

In fact, the Commission decisions relied upon by Gulf Coast at pages 10 through 11 of its brief show that the size of the cost differential is not the only significant factor considered by the Commission when it determines whether there has been uneconomic duplication. In In re Territorial Dispute Between Withlacoochee River Electric Cooperative, Inc. and Florida Power Corporation, 88 F.P.S.C. 6:477, 478 (1988), Florida Power Corporation's (FPC's) situation was similar to Gulf Coast's in the instant case, because FPC had lines that crossed the disputed area, a residential development. However, like Gulf Coast's lines on the prison site, FPC's existing lines could not be used to serve the disputed area. Id. In order to serve the subdivision, FPC would have had to construct a line which would have crossed Withlacoochee River Electric Cooperative, Inc.'s (Withlacoochee's) lines. Id. Moreover, it would have cost FPC more to serve the disputed area than Withlacoochee. Id. at 6:480. The Commission stated that in order to resolve the dispute, it must "consider whether provision of service by one utility would result in duplication of the facilities of the other." Id. Because it concluded that FPC would have to uneconomically duplicate Withlacoochee's facilities to serve the disputed area, the Commission awarded the right to serve to Withlacoochee. Id. at 6:480, 481. In addition, the Commission

found Withlacoochee was entitled to serve despite the fact the customer preferred service from FPC. Id. at 6:480.

In In re Petition of Clay Electric Cooperative, Inc. to resolve territorial dispute with Florida Power and Light Company, 88 F.P.S.C. 2:85, 86-87 (1985), the Commission found that although Florida Power and Light Company's (FPL's) facilities were closest to the disputed area, they were inadequate to serve the mine site, while Clay Electric Cooperative, Inc.'s (Clay's) facilities were adequate to provide service. The Commission also found that it would cost FPL more to serve the disputed area. Id. at 2:87. The Commission concluded that it "would be unnecessary and economically wasteful" for FPL to extend its facilities and "[t]o condone such duplication would be contrary to the intended purpose of Section 366.04(3), Florida Statutes, which gives this Commission authority to prevent uneconomic duplication . . . ." Id.

The Commission decision in In re Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a territorial dispute with Florida Power Corporation, an area located in Lafayette County, 83 F.P.S.C. 8:90 (1983), also resolved a dispute over the right to serve a Department of Corrections prison site. In Suwannee v. FPC, Suwannee Valley Electric Cooperative, Inc. (Suwannee) had customers and distribution lines surrounding the disputed area, including an energized line at the site. Id. at 8:91. Unlike Gulf Power, FPC had no customers or distribution lines in the immediate area. Id. Therefore, it would have cost FPC more to serve the disputed area. Id. at 8:91-92. According to

the Commission, the weight of the evidence greatly favored an award to Suwannee. Id. at 8:93. The Commission concluded Suwannee should serve the prison site because "service by FPC would result in a duplication of facilities." Id. The Commission made this decision even though the Department of Corrections favored service by FPC. Id. at 8:92.

In the fourth order cited by Gulf Coast, In re Petition to resolve territorial dispute between Talquin Electric Cooperative, Inc. and Town of Havana, 92 F.P.S.C. 12:511, 517 (1992), the City of Havana's race to serve the disputed area was one of the main reasons the Commission awarded the area in question to Talquin. The Commission also found that it would cost Talquin less to serve the disputed area. Id. at 12:516.

Gulf Coast is correct that one of the reasons the Commission awarded the subdivision in dispute to Gulf Coast in Gulf Power Co. v. Public Service Commission, 480 So. 2d 97, 98 (Fla. 1985) was because the agency had found "Gulf Power's relatively extravagant expenditures in providing service reckless and irresponsible . . . ." What Gulf Coast neglects to tell this Court is that Gulf Power built 2.2 miles of power lines when Gulf Coast had lines within 100 feet of the subdivision in dispute. Id. In Gulf Power, because of the proximity of the lines and the large cost differential, this Court agreed with the Commission that Gulf Power had uneconomically duplicated Gulf Coast's lines. Id.

In each of these decisions the Commission considered factors other than cost, such as proximity of lines; adequacy of existing



lines; type of lines; the historic service provider; and whether there had been a race to serve. The prevailing rationale behind these decisions is that the Commission will award the disputed area to the utility that does not uneconomically duplicate the lines of the competing utility. Thus, in resolving territorial disputes, the cost differential is only one of the factors the Commission uses to determine whether a utility has uneconomically duplicated the lines of another.

**C. The Commission correctly determined historic provision of service was not determinative since both utilities had provided service to the area for over 20 years.**

Gulf Coast relies on In re Petition of Suwannee Valley Electric Cooperative, Inc. to resolve a territorial dispute with Florida Power and Light Company (Live Oak Innkeepers, Inc. - Best Western Motel), 92 F.P.S.C. 7:170 (1992), for the proposition that given the small cost differential, Gulf Coast should be awarded the disputed site because it was the historic service provider to the area. (Brief at 11-12) In Suwannee v. FPL, FPL attempted to serve a motel that was in Suwannee's historic service area. Id. In order for FPL to have served the customer, it would have had to cross over Suwannee's lines and expend more money than Suwannee would have spent to serve the disputed area. Id. at 7:171-72. The Commission awarded Suwannee the right to serve the motel because to do otherwise would have allowed FPL to uneconomically duplicate Suwannee's facilities. Id. at 7:172.

The historic service factor in Suwannee v. FPL, however, is inapposite to the case at bar even though Gulf Coast provided

service in the disputed area before Gulf Power. (R. 185-86, 223-225) Gulf Coast places undue emphasis on the fact that Gulf Power duplicated Gulf Coast's facilities when Gulf Power constructed its lines in the vicinity of the prison site over 20 years ago. (Brief at 11-12) The Commission correctly noted in its final order:

[t]he contention that Gulf Power's facilities duplicated Gulf Coast's facilities when they were installed in the 1970's does not justify Gulf Coast's duplication now. We cannot adopt a policy that sanctions further uneconomic duplication of facilities under any circumstances . . .

(R. 316)

The facts in this case show when the instant dispute became ripe, both utilities had been serving in the area for over 20 years. (R. 312-13) Unlike the Suwannee v. FPL decision, supra, the facts in the case at bar show that both utilities have historically provided service in the disputed area. Therefore, historic service is a substantially equal factor within the meaning of Rule 25-6.0441(2).

**D. The Commission properly refused to condone Gulf Coast's race to serve.**

In Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092, 1095 (Fla. 1985), as in the case at bar, Gulf Coast disputed the Commission's observation that it would not condone a race to serve. (R. 316; Brief at 9) This Court found that the first Gulf Coast record

clearly demonstrate[d] a competitive race. Gulf Coast did indeed act in a manner to preempt Gulf Power from serving the area. . . . [I]t knew Gulf Power lines were half as far as its own yet it proceeded to install line using a circuitous route to reach one customer which, "coincidentally," wired a substantial area of the rest of the development. Once Gulf Coast became aware of Gulf

Power's intentions to serve a customer, it hurriedly extended its own lines to the same customer, on the apparent pretense of serving an adjacent vacant lot. . . . [I]t is within the discretion of the Commission to refuse to condone [this behavior].

462 So. 2d at 1095.

The facts in the instant dispute also clearly demonstrate a competitive race. The manager of Gulf Coast testified that he knew both utilities "had the potential to serve" the correctional facility when he made Gulf Coast's proposal to Washington County. (T. 342-43) Gulf Coast's manager also testified that they "had to move quickly." (T. 384) According to the manager,

No one else stepped up to the plate to say . . . they would help. We did. We just said . . . "here's the money, buy your land and we'll talk about the rest of it later."

(T. 385) Gulf Coast knowingly crossed Gulf Power's lines in its attempt to serve the prison site. (T. 400) Moreover, Gulf Coast never attempted to contact Gulf Power to determine whether the investor-owned utility had an interest in serving the utility. (T. 647-8)

As in Gulf Coast, it was within the Commission's discretion to refuse to condone Gulf Coast's competitive race to serve the correctional facility. This Court has "repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities 'racing to serve . . .'" and should continue to do so here. Lee County Electric Cooperative v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (citations omitted).

In this case, Gulf Coast is asking the Court to reweigh the evidence to reach a result different from the Commission's. As

this Court said in Gulf Power Co. v. Public Service Commission, 480 So. 2d 97, 98 (Fla. 1985), that is not its function. The role of the Court is to review the Commission's findings to ensure they are supported by competent, substantial evidence and comport with the essential requirements of law. Id. A review of the Commission's findings in this case will clearly show that they are supported by competent, substantial evidence and comport with the essential requirements of law.

**II. GULF COAST CANNOT RELY ON EQUITABLE ESTOPPEL AS A BASIS FOR ITS CLAIM THAT IT SHOULD HAVE BEEN AWARDED THE RIGHT TO SERVE THE CORRECTIONAL FACILITY.**

**A. Gulf Coast failed to properly raise an estoppel issue before the Commission.**

The second issue raised in Gulf Coast's appeal is whether Gulf Power should be equitably estopped from serving the prison. (Brief at 13) This issue is not properly before this Court because an appellant cannot raise an issue for the first time on appeal. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

Pursuant to Rule 25-22.038(5)(b)2., Florida Administrative Code, "[a]ny issue not raised by a party prior to the issuance of a prehearing order shall be waived by that party, except for good cause shown." Gulf Coast never made any attempt to raise an equitable estoppel issue in this case, although it had ample opportunity to raise issues. (R. 36, 99) Moreover, although Gulf Coast made gratuitous statements in its post-hearing brief to the Commission such as "[t]his case is as much a matter of factual issues as equitable ones," "[t]his case includes legal and equitable issues that should weigh in favor of Gulf Coast," and

"[b]oth factually and equitably, the distinctions in this case favor Gulf Coast," the appellant made no attempt to brief the Commission on the issue. (R. 169, 189, 209) In addition, estoppel is an affirmative defense that must be specially pleaded; it is waived if it is not pleaded. Phoenix Insurance Company v. McQueen, 286 So. 2d 570, 572 (Fla. 1st DCA 1974). In no prehearing pleading before the Commission did Gulf Coast plead the affirmative defense of equitable estoppel. Gulf Coast waived its right to raise an estoppel issue when it failed to properly do so in the proceeding below.

**B. Gulf Coast has not proven that equitable estoppel applies to the facts of this case.**

Even if this Court decides Gulf Coast's equitable estoppel issue is properly before it, the record of the case does not support Gulf Coast's claim. The cooperative had the burden of proving that estoppel should apply to this territorial dispute, and it was required to prove every fact essential to an estoppel "clearly and satisfactorily." Barber v. Hatch, 380 So. 2d 536, 537 (Fla. 5th DCA 1980); 22 Fla.Jur. 2d Estoppel and Waiver § 9 (1980). Yet, in its brief, Gulf Coast does not even mention that equitable estoppel has three essential elements, much less point the Court to any facts in the record that support the elements. Gulf Coast had the burden to specifically prove:

(1) a misrepresentation of a material fact by the party estopped to the party claiming estoppel as to some material fact, (2) a reliance upon this representation by the party claiming estoppel, and (3) a change in the position of the party claiming the estoppel to its detriment based on the misrepresentation.

Rissman v. Kilbourne, 643 So. 2d 1136, 1139 (Fla. 1st DCA 1994). No showing has been made that Gulf Power misrepresented to Gulf Coast a material fact; that Gulf Coast relied upon any alleged misrepresentation; or that Gulf Coast changed its position due to any alleged misrepresentation.

All Gulf Coast has done is to argue that Gulf Power should have told the cooperative it objected to Gulf Coast serving the prison. (Brief at 15-16) Gulf Coast mistakenly attempts to place a duty to speak on Gulf Power without showing from where that duty derives. Id. It fails to point out that neither this Court or the Commission has placed a duty on a utility in a similar situation.<sup>3</sup> Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092, 1095 (Fla. 1985) ("Although Gulf Coast was not obligated to consult with Gulf Power before providing service, it knew Gulf Power lines were half as far as its own[,] yet it proceeded to install line using a circuitous route to reach one customer . . ."); In re Territorial Dispute between Suwannee Valley Electric Cooperative Inc., and Florida Power Corporation, 87 F.P.S.C. 11:213, 218 (1987) ("Absent a relevant territorial agreement, FPC does not have the duty to advise any potential customer that electric service can be supplied by another utility. This is particularly true here where there was a distribution line

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<sup>3</sup> While the Commission was unhappy with Gulf Power's failure to come forward, it did not assert that the investor-owned utility had a duty to inform Gulf Coast of its intention to serve the prison site. (R. 317)

owned by SVEC in plain view of anyone on the proposed prison site.")

Gulf Coast relies on Harbor House Partners, Ltd. v. Mitchell, 512 So. 2d 242 (Fla. 3d DCA 1987), and Richards v. Dodge, 150 So. 2d 477 (Fla. 2d DCA 1963), for the proposition that Gulf Power had a duty to speak in this case. (Brief at 15-16). Both of these cases, however, concern whether a duty to speak was present due to a contractual relationship. The record is clear that no territorial agreement exists between Gulf Power and Gulf Coast. (R. 145) There could be no other contractual relationship that would create a duty for one utility to inform another utility of its plans to serve a particular customer.

As in Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092, 1095 (Fla. 1985), whether either utilities' behavior was wrongful is beside the point. In keeping with the Commission's policy on uneconomic duplication, the Commission refused to condone Gulf Coast's uneconomic duplication by awarding Gulf Power the disputed area. For the Commission to have resolved the dispute in Gulf Coast's favor would have required the Commission to make a complete reversal of its longstanding policy on uneconomic duplication. As Gulf Coast stated in the pleadings to this case, "the Commission's interest is not merely the interest of the two parties, but more importantly, the public interest." (R. 79) The Commission furthered the public interest by awarding the prison site to Gulf Power. Equitable estoppel cannot apply in this case. To do so would be contrary to public

policy. Chmil v. Mediterranean Manors Association, Inc., 516 So. 2d 1109, 1112, (Fla. 2d DCA 1987) ("[t]he doctrine of equitable estoppel should not be employed to reach a result which is unlawful or contrary to public policy").

Gulf Coast is claiming estoppel now because it believes the Commission's decision was unfair. Its equitable estoppel argument is simply another attempt to get the court to adopt its view of the evidence and award the cooperative the right to serve the correctional facility.

**III. THE COMMISSION CORRECTLY DETERMINED THAT CUSTOMER PREFERENCE WAS NOT A DETERMINATE FACTOR IN THIS CASE.**

The law is clear that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So. 2d 304, 307-8 (Fla. 1968). As this Court has recognized, "[l]arger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC." Lee County Electric Cooperative v. Marks, 501 So. 2d 585, 587 (Fla. 1987).

Notwithstanding the above legal principles, the Commission's rule on territorial disputes does take into account that in some circumstances, when all other factors are substantially equal, customer preference may play a role. Rule 25-6.0441(2)(d), Fla. Admin. Code. The Commission, however, did not find that all of the factors were substantially equal in this case, as shown in Points I.A., B., and D. of this brief. The Commission properly found that it would cost Gulf Coast more than Gulf Power to serve the



correctional facility. (R. 315) Even more significant was the Commission's finding that Gulf Coast had uneconomically duplicated Gulf Power's lines to serve the disputed area. (R. 316-17) Both utilities were capable of providing adequate and reliable service. (R. 314) Therefore, the Commission declined to follow the preference of Washington County and the Department of Corrections which was to award the right to serve the correctional facility to Gulf Coast.<sup>4</sup>

Although the current statutory scheme was not in place when this Court decided Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), its message still holds true today that "the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices." The Commission properly used these powers when it applied its policy concerning uneconomic duplication to resolve this dispute.

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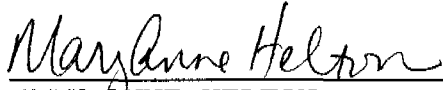
<sup>4</sup> As the Commission noted in its final order, the customer was satisfied with Gulf Coast, but recognized the Commission's authority to determine who should serve the prison. (R. 315)

CONCLUSION

Gulf Coast 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 because it is based on competent and substantial evidence and comports with the essential requirements of law. Gulf Power Co. v. Public Service Commission, 480 So. 2d 97, 98 (Fla. 1985).

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Dated: November 13, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 13th day of November, 1995 to the following:

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