

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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INITIAL BRIEF
OF
GULF COAST ELECTRIC COOPERATIVE, INC.

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STATEMENT OF THE CASE AND FACTS

(a) Nature of Case: This is another territorial dispute between Gulf Coast Electric Cooperative, Inc. ("Gulf Coast") and Gulf Power Corporation ("GPC") over service by Gulf Coast to a correctional facility located in South Washington County.

(b) Course of Proceedings and Jurisdiction: The dispute was heard by the Florida Public Service Commission ("Commission") pursuant to its jurisdictional grant in Section 366.04(2)(e), Florida Statutes. This Court has jurisdiction pursuant to Section 3(b)(2) of Article V, of the Florida Constitution and Section 366.10, Florida Statutes (1993). The Commission rendered its order (R-311) on March 1, 1995, resolving the dispute and directing the parties to negotiate in good faith to develop a territorial agreement and establish boundaries. GPC took exception to the Order (R-327). Gulf Coast appealed the Order (R-333), the Commission entered a clarifying and amendatory Order on July 27, 1995 (R-358); and GPC filed a Notice of Cross Appeal on September 14, 1995 (R-364).

(c) Disposition in Lower Tribunal: The Commission awarded service to the site of the correctional facility to GPC, directed the parties to report to the Commission on all parallel lines, crossings, and areas of potential dispute in South Washington and Bay Counties, ordered the parties to negotiate a territorial boundary in South Washington and Bay Counties, and ordered GPC to reimburse Gulf Coast \$36,996.74 for its costs in relocating its existing facilities on Red Sapp Road.

(d) Statement of Facts: By 1950, Gulf Coast was serving electric customers ("Members") in South Washington County, at, and near the intersection of County Road 279 and State Road 77 which is now adjacent to the site of the new Washington County

Correctional Institute, and part of the disputed area. See (E-15) No one else was there. (T-291/7-13; T-299/10; T-300/9) GPC claims to have commenced service to Washington County in 1926 (T-68/15), although its witness, Weintritt could say why GPC was not serving all customers in Washington County. (T-91/16). In 1971, Gulf Coast had distribution facilities on and adjacent to the area of the correctional facility site, when Deltona Corporation began its development of Sunny Hills. (T-300/19-24) For whatever reason, Deltona requested service from GPC, even though GPC had no distribution service in the area, but Gulf Coast did have service along Highway 77 adjacent to the Sunny Hills site and going on up to Wausau (E-9). Over Gulf Coast's objection and prior to the time that the Commission had jurisdiction over territorial disputes involving cooperatives and investor owned utilities, GPC built a new three-phase line from Vernon, down 279 and up 77, crossing the Cooperative's lines at least eighteen (18) times (E-9). The Circuit Court in the ensuing litigation denied Gulf Coast's petition for injunctive relief and allowed the customer, Deltona, to choose the utility provider. (T-301/1-17). Soon after GPC built the new line which intruded in and across the Cooperative's facilities and service area for over ten miles (E-8 and 9), GPC installed a substation at Sunny Hills at a rated capacity of 24,640 kV, (T-301/19-22) even though the Cooperative's Crystal Lake Substation was only 5.5 miles south of the intersection of 279 and 77. GPC succeeded in duplicating the existing Cooperative facilities at a cost that now is at least \$3,314,000.00 within a five (5) mile radius and \$3,146,000.00 for just Sunny Hills, (T-106/6-7, T-110/17) as compared with the Cooperative's total investment in the area of \$1,233,475.00. (Exhibit 40, Items 16a & 16c)

Later, in the same general area, in 1984, GPC built new facilities in an attempt to

serve Leisure Lakes, an area shown on Exhibit 14 (HN-4). This time the Commission had jurisdiction to stop the intrusion by GPC into an area already served by Gulf Coast, and the Commission prohibited GPC from serving Leisure Lakes, or along the route by which those facilities would be connected to GPC's transmission system, which was the connection to GPC's three-phase line at the intersection of State Road 77 and County Road 279 (T-357, 400). As admitted by Mr. Weintritt for GPC, its line on 77 down south of the intersection of 279 and 77 still exists, but is not energized (T-159). GPC appealed the Commission's order that granted Gulf Coast the right to serve Leisure Lakes, and that order was affirmed by this Court in Gulf Power Company v. Public Service Commission, 480 So. 2d 97 (Fla. 1985).

These two utilities have had numerous disputes in Washington County, and some have been brought to the Commission and some have not (T-313). In the past several years, rural economic development has been promoted, not only by the State but also by Federal policy, and indeed, GPC has participated itself in grants, loans, and other assistance in encouraging and promoting economic development in its service area (T-146; T-616, Exhibit 36).

By April of 1993, Gulf Coast became aware that the Department of Corrections was planning on locating a prison in West Florida and was considering sites in several counties, including Washington County (T-303-304; Exhibit 16). Gulf Coast has previously assisted in the location of prison sites for economic development in Gulf County and Gulf Coast's members approved a \$45,000.00 grant to Gulf County so it could acquire land for the Department of Corrections. (Norris, T-296/3-25)

All of the proceedings in Washington County were public (T-305/23), and both GPC

and Gulf Coast were aware that Washington County desired to secure a location for the prison for the benefit of the citizens of Washington County. Because of the timing and necessity to move fast on the acquisition, Gulf Coast made a public proposal to the Washington County Commission for a \$45,000.00 grant and assistance in securing a loan of \$300,000.00 to acquire the property in April, 1993. (Norris, T-304, Exhibit 16) GPC did not make any similar proposal, although GPC's employee, John Daugherty, thought GPC should do so, (T-613, 614, 619).

Even though the Gulf Coast offer was public record, and even though GPC's employee, Daugherty, claimed to be on top of the situation (T-605/5), at no time did GPC advise or warn the Department of Corrections, the Washington County Commission, or Gulf Coast that it would dispute service by Gulf Coast, until July 30, 1993, when Gulf Power representatives met with the Department of Corrections in Tallahassee (Hodges, T-634). GPC deliberately refrained from raising any objection until the grant and loan were in place, the site had been selected and secured (Hodges, T-633/9-14; T-640/19-21), and then only after Gulf Coast relocated its existing Red Sapp Road line to Highway 279 did GPC file its objection. GPC stated that it would not enter into a "bidding contest" (T-599/16) for the prison site. There is no evidence in the record that Gulf Coast, the Washington County Commission, or the Department of Corrections asked for or suggested that there would be a bidding war. GPC, at least sixty (60) days after learning that the Department of Corrections had selected Gulf Coast, sent a delegation to Tallahassee to see Mr. Kronenberger of the Department of Corrections, on July 30, 1993. (T-634, T-55). GPC witness, Hodges testified that GPC wished to let the Department of Corrections know that GPC was willing to serve the site and wanted to "earn the business". Mr. Kronenberger

stated that what GPC was telling him was the GPC had a jurisdictional right to serve the site (T-55/12).

After Gulf Coast was selected to provide the service to the site by the Washington County Commission and the Department of Corrections, Gulf Coast relocated its Red Sapp Road single phase line to County Road 279, and upgraded the facilities to three phase at a total cost of \$51,579.00 (E-40, item 12, T-440). The relocation cost was \$36,996.74 and the upgrade to three phase was \$14,582.00 (T-400, 438). The Department of Corrections requested three phase service from County Road 279. Gulf Coast had facilities on the site of the correctional facility itself, and had those facilities in place since 1950 (T-212/21, Exhibit 9). The Red Sapp Road line connected service from the Cooperative's three-phase line on State Road 77 to its 100 plus customers on County Road 279. GPC had no service, and no prior historic service, on the site of the correctional facility, although GPC claimed that its service to a traffic signal may have been on the site (T-129/11-17). In order to continue to provide service to its customers on 279 in a reliable manner, and to get out of the way of the prison, Gulf Coast had to relocate its Red Sapp line. (T-399, 410) The relocation cost to Gulf Coast would have been incurred no matter who provided service (R-317). The Red Sapp Road is a graded sand road, and Gulf Coast's facilities were located off of the graded right-of-way (T-267, T-387/24-25, T-388/6).

GPC spent \$55,503.00 in upgrades to its facilities (E-10) to provide dual feed capability and claimed its service was more reliable (T-71). GPC outage history was 2.52 hours per customer, compared to 1.66 hours for Gulf Coast (T-111/17, E-41, E-40).

Gulf Coast, in addition to the upgrade to the Red Sapp line, spent an additional \$106,093.11 in on-site improvements to comply with DOC requirements (E-10, E-14).

SUMMARY OF ARGUMENT

This is as much a case of equitable issues as it is factual ones, and is not as complex as the number of exhibits and the amount of testimony might suggest. The primary issues involve the Commission's misapplication of the term "uneconomic duplication", its proper finding that the additional cost of \$14,582.54 to Gulf Coast was "relatively small", its disregard of customer preference, and its failure to consider the very equitable factors it found to be present.

We all recall the story of the little red hen, a story about fairness, equity, and justice. The hen planted grain, raised it, and used the grain to bake bread. Others stood by and while they watched the hen at work, they did nothing. When the bread was ready to eat, the others were suddenly ready to "help". In the case at bar, GPC is not satisfied with helping, it wants the whole loaf.

Gulf Coast worked with the Washington County Commission and the DOC to help locate a correctional facility in Washington County and expended funds to do so. It not only gave a grant to the County of \$45,000.00 for the initial purchase, it also helped the County obtain a \$300,000.00 loan to finance the total purchase price. The site selected by the Washington County Commission and the DOC was located at the intersection of CR 279 and SR 77 in Washington County (E-15, 17). Gulf Coast had lines on the property since 1951. Because the correctional facility would be located in the way of Gulf Coast's lines, it relocated those lines to CR 279, and upgraded its facilities to three phase to provide the service the DOC requested, at a location specified by the DOC. Gulf Coast could have just as easily provided service from its own existing three phase service on SR 77 (T-398, 400,

401). The Commission found that GPC uneconomically duplicated Gulf Coast's facilities when it built in its existing three phase line on CR 279 in 1971.

Because the Commission found that the additional cost to serve by Gulf Coast was relatively small, that GPC uneconomically duplicated Gulf Coast's facilities in 1971, that both utilities could provide adequate and reliable service, that the customer preferred service by Gulf Coast, and that GPC did nothing while Gulf Coast spent the funds and undertook the effort to get the prison located in Washington County, its decision to award the service to GPC is contrary to the evidence in the record, and the record lacks competent or substantial evidence to support the Commission's decision. Neither does the Commission's Order establish by competent and substantial evidence that the facilities constructed by Gulf Coast constituted an uneconomic duplication of GPC's facilities. On the contrary, Gulf Coast's facilities were necessary to provide the requested service, and the facilities built by GPC, which crossed Gulf Coast's facilities at least eighteen (18) times, should not be allowed to form the basis of any claim by GPC that Gulf Coast's reasonable and necessary extension of its own facilities is an uneconomic duplication of GPC's initial intrusion into Gulf Coast's historic service area.

ARGUMENT I

- I. THE COMMISSION ERRED IN AWARDING SERVICE TO THE CORRECTIONAL FACILITY TO GPC WHEN:
- (a) VIRTUALLY ALL OF ITS FINDINGS FAVORED SERVICE BY GULF COAST, AND
 - (b) THE COMMISSION FAILED TO ESTABLISH THAT SERVICE BY GULF COAST WAS UNECONOMIC DUPLICATION OF GPC'S FACILITIES.

A final order of an administrative agency will not be disturbed on appeal if there is competent substantial evidence in the record as a whole to support the agency's decision.

Citizens of Florida v. Mayo, 333 So. 2d 1 (Fla. 1976) The Commission has established rules to guide it in resolving territorial disputes that require it to consider:

"(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 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 sub-transmission facilities to the disputed area presently and in the future; and

(d) Customer preference if all other factors are substantially equal" (Rule 25-6.0441(2), Florida Administration Code)

The Rule was promulgated pursuant to Section 366.04(2)(e), and incorporates the statutory language. In this case the commission found that both utilities were capable of providing adequate and reliable service (R-314), satisfying the requirement of subsection (a) of the Rule. The nature of the disputed area was not an issue in the case, because

both parties, and the Commission agreed that it was a rural area (R-313). Hence, subsection (b) of the Rule was not an issue to be resolved in favor of either utility. This left subsection (c) and (d) of the Rule as the deciding factors, in addition to whatever else the Commission deemed appropriate to consider. Subsection (c) of the Rule relates to costs to provide service and subsection (d) relates to customer preference.

The Commission Order that GPC should serve the site is not supported by competent substantial evidence, and is indeed contradicted by its own finding that the cost differential to Gulf Coast was "relatively small" (R-316), and that the GPC facilities it used to compare costs were themselves an uneconomic duplication of Gulf Coast's facilities (R-316).

The key to the Commission's error lies in its flawed view of "uneconomic duplication" in this case. The statutory language in the Rule clearly indicate that first there must be a duplication, which by itself is not a violation of any rule. The duplication must also be uneconomic.

The Commission's holding that GPC should serve the site is bottomed on its finding that "we simply cannot ignore the fact that Gulf Coast's upgrade of the relocated Red Sapp Road single phase line to three phase duplicated GPC's existing facilities" (R-316). Note that the Commission does not say that Gulf Coast "uneconomically" duplicated GPC's facilities in the foregoing quote. The Order goes on to state:

"We always consider whether one utility has uneconomically duplicated the facilities of the other in a "race to serve" an area in dispute, and we do not condone such action" (R-316).

In this case there is absolutely no evidence that Gulf Coast "raced to serve" the site. There simply was no race. The quoted language refers to uneconomic duplication, but fails to

state what was uneconomic about it. If we search for the Commission's rationale to support the use of the term "uneconomic" we must look to the section of the Order on costs to serve (R-314). We find that the Commission determined that the cost to Gulf Coast was \$14,582.54 more than GPC, yet in the section of the Order on uneconomic duplication, the Commission finds that the \$14,582.54 is "relatively small". If we infer that the Commission meant that the \$14,582.54 is the basis for finding that the duplication was "uneconomic", then the Commission has departed from its own prior orders where similar costs differentials were disregarded as being substantially equal. In light of prior Commission orders, the cost of this upgrade constitutes a de minimis difference that should have been disregarded, or alternatively, regarded as "substantially equal".

Support for Gulf Coast's position begins with Gulf Power Company v. Public Service Commission, 480 So. 2d 97 (Fla. 1985) and in several other Commission orders that awarded service rights to the utility with dramatically lower cost differentials. The 1985 Gulf Power case represents an earlier chapter in the continuing controversy between Gulf Coast and Gulf Power that involved service to the Leisure Lakes subdivision in Washington County. Id. at 97. In affirming the Commission's order that granted Gulf Coast the right to serve the subdivision, this Court held that in contrast to Gulf Coast's costs of about \$27,000, Gulf Power's costs of about \$200,480 constituted a "considerable" cost differential. Id. at 98.

In territorial disputes before the Commission, dramatic differences in off-site cost to serve are the rule. In a territorial dispute over service to a residential development, the Commission ruled in favor of the utility whose off-site cost to serve was about \$695,552 less than its competitor. Withlacoochee River Electric Cooperative, Inc. v. Florida Power

Corporation, 88 FPSC 6:477, 480 (1988). In a territorial dispute over service to a sand mine, the Commission ruled in favor of the utility whose off-site cost to serve was about \$360,000.00 to \$410,000.00 less than its competitor. Clay Electric Cooperative, Inc. v. Florida Power and Light Company, 88 FPSC 2:85, 87 (1988). A number of other prior territorial disputes demonstrate these dramatic differences in off-site cost to serve. Suwannee Valley Electric Cooperative, Inc. v. Florida Power Corporation, 83 FPSC 8:90, 91-92 (1983) (holding that the cost to serve differential was about \$186,000); Talquin Electric Cooperative, Inc. v. Town of Havana, 92 FPSC 12:511, 516 (1992) (holding that cost to serve differential was about \$29,324).

On the other hand, in Suwannee Valley Electric Cooperative, Inc. v. Florida Power and Light Company, 92 FPSC 7:170 (1992), that addressed a territorial dispute over service to a motel, the Commission ruled in favor of Suwannee Valley although its cost of service was a mere \$4723.00 less than FP&L's. The Commission did not reach this conclusion based on cost of service alone. Id. at 7:172. It found that despite this small difference in cost, Suwannee Valley was entitled to serve the motel because it was the historic service provider to the area since 1950, well before FP&L established its presence. Id.

Like Suwannee Valley, Gulf Coast has been the historic service provider to the area in dispute since 1951 and had its Red Sapp line on the actual site of the correctional facility. (Norris, T-299/10-15) Gulf Power did not establish its presence in the area for another 21 years in 1971 until it constructed a three-phase line along 279 that crossed Gulf Coast's facilities at least 20 times. (Norris, T-300/17-24) The Commission itself recognized that this construction represented a major duplication of Gulf Coast's facilities. (R-316) Despite

the fact that Gulf Coast's costs to serve are relatively small, that Gulf Coast had historically served the site, and that Gulf Power's presence in the area is based on a major duplication of Gulf Coast's facilities, it nonetheless awarded the site to GPC.

The Commission's resolution of similar territorial disputes have generally addressed situations where the duplication of facilities was at least double the additional off-site cost to serve in the instant case. Despite the fact that Suwannee Valley (1992 case) involved substantially lesser amounts, the central aspect of that holding involved the fact that FP&L intruded into Suwannee Valley's historic service area.

Far from being uneconomic, the additional cost to Gulf Coast to upgrade its facilities was necessary to serve the requirements of the Department of Corrections. The DOC required three phase service (T-398). In addition, Gulf Coast could have provided the three phase service required by the DOC from its own lines on State Road 77, which pre-existed this dispute, but since the DOC requested that its service be off of County Road 279, that is where Gulf Coast constructed the facilities. (T-398). This fact, coupled with the de minimis cost differential and GPC's major duplication of Gulf Coast facilities clearly support and indeed require a decision in favor of Gulf Coast, and demonstrates a lack of competent or substantial evidence to support the Commission's award to GPC.

ARGUMENT II

- II. THE COMMISSION'S FINDING THAT GPC DUPLICATED GULF COAST FACILITIES, AND THAT GPC DID NOTHING WHILE GULF COAST SPENT FUNDS TO RELOCATE ITS RED SAPP ROAD LINE, AND THAT THE CORRECTIONAL FACILITY ITSELF WOULD NOT BE THERE BUT FOR GULF COAST'S EFFORTS, REQUIRE A RULING FOR GULF COAST ON FUNDAMENTAL EQUITABLE GROUNDS.

Gulf Power Company should be equitably estopped to claim any right to or interest in serving the Washington County Correctional Facility because of its failure to object to Gulf Coast's relocation and upgrading of its facilities to serve the correctional facility, when GPC's own witness acknowledged that his company was aware of Gulf Coast's efforts, but deliberately said nothing and filed no complaint with the Commission until after Gulf Coast went to the expense of relocating and upgrading its historic service to the site (T-625, 628).

Not only should GPC's deliberate silence barr its subsequent objection, but also its own duplication of Gulf Coast's facilities should not be rewarded. The Commission's holding for GPC on the issue of who should serve the correctional facility is plainly and simply the wrong decision. Indeed, Gulf Coast takes little issue with the Commission's findings on the facts which overwhelmingly support Gulf Coast's estoppel argument. The Commission, however, completely ignored its own findings of a compelling basis for equitable estoppel. The Commission succinctly established the elements of estoppel when it found:

"Gulf Coast made the effort and spent the money necessary to bring the new correctional facility to Washington. But for Gulf Coast's efforts, the facility would not be there for anyone to serve. Gulf Power was aware of Gulf Coast's efforts, but said nothing. Gulf Coast was selected as the electric service provider for the prison and incurred a cost of \$36,996.74 to relocate the Red Sapp Line off the prison property. Gulf Power

did nothing. There is no evidence in the record that shows that Gulf Coast would have had to incur that cost if another provider was selected to serve the prison. Only after the prison site was selected, only after Gulf Coast relocated the line, did Gulf Power indicate that it disputed Gulf Coast's provision of service to the prison." (R-317)

Gulf Coast's actions were public and but for Gulf Coast's actions, there would be no correctional facility in Washington County (R-317). The Commission also found that GPC duplicated Gulf Coast's facilities on CR-279 in 1971, facilities that crossed the Cooperative's lines at least twenty (20) times so that GPC could capture service to a proposed Sunny Hills residential development (T-300, 301).

This Court has previously held that the consideration of equities is appropriate in the resolution of a territorial dispute between utilities. Gulf Power, 480 So.2d at 99 citing Escambia River Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982); Tampa Electric Company v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960). In addition, estoppel is a doctrine well entrenched in the jurisprudence of Florida. North v. Culmer, 193 So.2d 701, 704 (Fla. 4th DCA 1967). In North the Court noted that "[f]rom the earliest cases the Florida Supreme Court has applied the doctrine of estoppel as a result of silence when common honesty and fair dealing demanded that a person estopped should have spoken." Id. citing United Service Corp. v. Vi-An Construction Corp., 77 So.2d 800 (Fla. 1955); Nichols v. Bodenwein, 146 So. 86 (1932); Hollingsworth v. Handcock, 7 Fla. 338 (1856).

The Commission itself has recognized its equitable principles in a 1986 dispute between these same utilities. Gulf Coast Electric Cooperative, Inc. v. Gulf Power Company, 86 FPSC 5:132, 136 (1986). In that dispute, Gulf Power sought to estop Gulf

Coast from complaining of alleged duplication of facilities because Gulf Power considered itself the historic service provider to the Paradise Lakes residential development. Id. The Commission found that "estoppel does not apply to the facts of this dispute" and stated that historical service or subsequent extension of facilities cannot be a basis for preventing a party from seeking relief from the Commission. Id.

Both §366.04(2)(e), Fla. Stat. and Rule 25-6.0441(2), Fla. Admin. Code, state that in the resolution of territorial disputes the Commission may consider, "but not be limited to consideration" of the listed factors. The Commission has stated that the regulatory framework provides it with "considerable authority and discretion to resolve territorial disputes". (R-313)

Gulf Coast's efforts to secure the correctional facility in Washington County were conducted openly and pursuant to Florida's Sunshine Law. (Norris, T-305/23) The Commission found that Gulf Power's 1971 duplication of Gulf Coast's facilities on CR 279 (a three-phase line that crossed Gulf Coast's facilities at least eighteen (18) times) was another example of uneconomic duplication (R-316). Gulf Coast filed suit in the Circuit Court because the Commission lacked jurisdiction over territorial disputes in 1971. In the ensuing litigation, the Circuit Court allowed the customer to choose the service provider (Norris, T-301/1-17). In this case, the Commission has essentially allowed Gulf Power to use its own uneconomic duplication of Gulf Coast's facilities in 1971 to assert its right to serve the correctional facility, and to support a claim that Gulf Coast has uneconomically duplicated GPC's facilities!

Actions that can provide the basis for estoppel need not be direct representations, "but can consist of failure to act or, more particularly, failure to speak when under some

duty to speak." Richards v. Dodge, 150 So.2d 477, 481 (Fla. 2d DCA 1963). In Harbor House Partners Ltd. v. Mitchel, 512 So.2d 242 (Fla. 3rd DCA 1987) the Court considered "failure to act" where a son sent a letter to the landlord of his incapacitated mother requesting the landlord to cancel her lease at a specified date because it was necessary to relocate her to a health care facility. The landlord did not respond to the son's request and the Third District held that this failure to act constituted consent to the son's request. Id. at 243.

Like the landlord in Mitchel, Gulf Power failed to take any action that would indicate its objection to Gulf Coast serving the correctional facility until after Gulf Coast made the effort and spent the money to bring the correctional facility to Washington County. The only logical explanation why Gulf Power failed to act is that it was a calculated business decision designed to let Gulf Coast incur the cost of securing the correctional facility.

Ignoring the fundamental equitable principles it found to be present, the Commission then granted service to Gulf Power based on a "relatively small" duplication of facilities despite the facts that Gulf Coast unilaterally secured the correctional facility, was selected by Washington County and the Department of Corrections, was equally suited to serve the facility in terms of ability to serve and on-site cost to serve, and was the historic service provider to the area. Against the extraordinary weight of the evidence, the Commission misapplied its policy on uneconomic duplication of facilities where there was no competent evidence that the duplication was uneconomic, and ample proof that Gulf Power sat on its hands while Gulf Coast did all the work.

Had Gulf Power timely challenged Gulf Coast's service of the new correctional facility in a timely manner, the protracted litigation and resulting inequities that followed may

well have been avoided. In this respect, the Commission's Order will act to reward Gulf Power for its initial duplication in 1971. The Commission's award to GPC in this case, if allowed to stand, will establish a precedent for allowing the use of a prior uneconomic duplication to form the foundation for further intrusion into another utility's service area.

ARGUMENT III

- III. THE CUSTOMER, WHETHER IT BE THE DEPARTMENT OF CORRECTIONS OR THE WASHINGTON COUNTY COMMISSION, PREFERRED SERVICE FROM GULF COAST, AND ALL OTHER FACTORS WERE SUBSTANTIALLY EQUAL. THE COMMISSION ERRED BY NOT AWARDING SERVICE TO GULF COAST BASED ON ITS OWN RULE 25-6.0441(2)(d), FLA. ADMIN. CODE.

The Commission ignored customer preference because it mistakenly reasoned that all other factors were not substantially equal (R-315, 316). The Commission's failure to consider customer preference was not supported by substantial and competent evidence and is contrary to prior Commission orders.

Rule 25-6.0441(2)(d) states that in the resolution of territorial disputes, the Commission will consider customer preference if all other factors are substantially equal. The other factors, as previously noted, relate to cost to provide service to the site, the capability of each utility to provide adequate and reliable service, and the nature of the disputed area. The Commission decided that customer preference would not be a determining factor:

"...because, as we explain below, Gulf Coast uneconomically duplicated Gulf Power's facilities to serve the prison". (R-315, 316)

One can only infer that the "uneconomic" aspect of the duplication was the \$14,582.54 additional cost to Gulf Coast to upgrade its relocated Red Sapp Road line. Yet the Order also found that additional cost to be "small" (R-316).

Ability to serve addresses whether each utility has sufficient facilities in the area to accommodate the load of the disputed area and the reliability of those facilities. In the instant case the Commission found that "[b]oth utilities have sufficient facilities and

substation capacity in the area to accommodate the load. We find that both utilities have adequate facilities to serve the prison, both are capable of providing reliable electric service, and, therefore, both have a comparable ability to serve." (R-314) The import of this statement is that the Commission considered both utilities ability to serve substantially equal.

The Commission also found that "[b]oth utilities cost to provide service on the actual prison site should be relatively the same." (R-314)

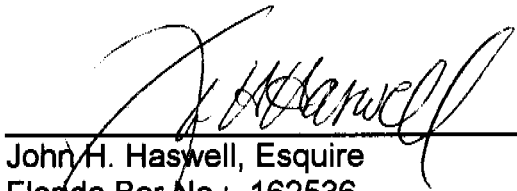
The Commission's finding that Gulf Coast's costs to serve was "relatively small" is fundamentally inconsistent with the statement that all other factors were "not substantially equal". In essence, the Commission failed to apply the common meaning of the word "substantially" from Rule 25-6.044(2)(d) to the facts of the instant case.

Suwannee Valley Electric Cooperative, Inc. v. Florida Power Corp., Docket No. 870096-EU (1987) involved a territorial dispute between two utilities over electric service to a correctional facility. In that case the Commission found that Florida Power had historically served the area in dispute, that the cost differential between the two utilities was "not great" (an \$8,373.39 difference), that Florida Power was already serving the City of Jasper, and a public school within 1400 feet of the site (a site that Suwannee Valley had not provided service), and concluded that those factors, "combined with the DOC's selection of FPC" (Order 18425, p. 9) called for an award of the service to the correctional facility to Florida Power. (Id.)

In the instant case, the combination of the equitable factors, the de minimis cost differential, and Gulf Coast's historic service on the site itself, can only lead to the conclusion that Gulf Coast should be awarded the service.

CONCLUSION

Based on the record and the foregoing arguments, the Commission's finding that Gulf Coast uneconomically duplicated GPC's facilities, its holding that customer preference should not be considered, and its holding that GPC should serve the correctional facility, should be reversed, because there not only is no competent substantial evidence in the record to support those findings and holdings, but the contrary is true, that the record heavily favors Gulf Coast's service to the site.



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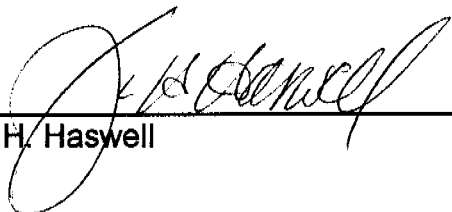
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to the following:

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this 2nd day of October, 1995.



John H. Haswell