

IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC
COOPERATIVE, INC.)
Petitioner/Appellant)

vs.)

Case No.: 85,464

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

REPLY BRIEF
OF
GULF COAST ELECTRIC COOPERATIVE, INC.
AND ANSWER BRIEF ON
GULF POWER COMPANY'S CROSS APPEAL

John H. Haswell, Esquire
Florida Bar No.: 162536
Chandler, Lang & Haswell, P.A.
Post Office Box 23879
Gainesville, Florida 32606
(904) 376-5226

J. Patrick Floyd, Esquire
408 Long Avenue
Port St. Joe, Florida 32456
(904) 227-7413

Attorneys for Gulf Coast
Electric Cooperative, Inc.

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SUMMARY OF ARGUMENT

"Staff believes Gulf Power's behavior toward Gulf Coast in this case is indefensible". (R-303-304).

So does Gulf Coast, and that is one of the two main reasons the Commission's order should be reversed.

The first reason, equally important as the second, is that the Commission's order, by its very terms, contradicts itself and without any substantial support in the record awards the disputed cite to GPC. Indeed, a reading of the Commission Staff's own recommendation, which essentially formed the basis for the Commission's order, up to and including Issue 12, would lead one to believe that the Commission was about to award service to Gulf Coast. (R-274-301). What led the Commission to erroneously allow GPC to serve the disputed site? Plainly and simply, it was a misapplication of the very findings that support Gulf Coast's position. The Commission essentially resolved all issues either in favor of Gulf Coast's position, or in such a manner that it did not effect either Gulf Coast or GPC, except the ultimate issue of who should serve the site. It is important to recognize that the Commission did not conclude that the site should go to GPC because Gulf Coast's costs were significantly higher than Gulf Power's (cost to serve has been the basis of the Commission's prior orders resolving disputes between these two utilities). Rather, the Commission found that the \$14,500.00 upgrade cost to Gulf Coast was "relatively small" (R-316), and the Staff's own recommendation determined that the \$14,500.00 upgrade cost should not be used in

resolving the dispute, characterizing the amount as "negligible" (R-292). That finding, coupled with the determination by the Commission that Gulf Coast should be reimbursed its relocation costs of nearly \$37,000.00 make it clear that the cost to serve the site by either utility is either substantially the same, or that GPC's costs would have been higher had it been selected as a service provider. If the costs are substantially the same, then the customer decides who should serve, all other issues being equal, and in this case the customer chose Gulf Coast. If GPC's costs are higher, than Gulf Coast should prevail on that issue alone.

But that is not the only place the Commission went awry. After finding that the \$14,500.00 upgrade cost to Gulf Coast was small, it nonetheless concluded that the upgraded facilities themselves "uneconomically" duplicated a portion of GPC's facilities which themselves duplicated Gulf Coast's facilities over twenty (20) years earlier. Gulf Coast's facilities were not only necessary to serve the requirements of the Department of Corrections, but were also economic. The Commission's conclusion flies in the face of the following facts:

1. Gulf Coast had facilities on the site since 1950.
2. GPC constructed a massive duplication of Gulf Coast's facilities in 1971 to serve Sunny Hills, crossing Gulf Coast's lines at least twenty (20) times.
3. Gulf Coast had 3 phase service adjacent to the site on State Road 77.

4. No matter who served the site, Gulf Coast would have to relocate its lines which were in the way of the Department of Correction facilities in order to continue service to its own customers.

5. The facility would not even exist if it were not for the efforts of Gulf Coast in its public support of the project.

6. GPC knew Gulf Coast was planning on serving the site and raised no objection until after Gulf Coast spent the money to help Washington County secure the site and relocate its lines.

7. The customer chose Gulf Coast as a service provider.

8. GPC's cross appeal clearly states its position that it would not have paid the relocation costs, in which event there would be no correctional facility in Washington County for it or anyone to serve.

The message the Commission leaves is that once a utility gets away with a duplication like GPC's 1971 construction, it can then use those very facilities to claim additional territory and service, even though another utility had onsite service facilities twenty (20) years earlier. Furthermore, the Commission's order clearly sends a message that a utility need not raise an objection to a claimed duplication until after the other utility has done all the ground work to first convince a new industry to locate on the site which it will later dispute and second, after the other utility has spent additional funds to upgrade service to a site that it has historically served.

Unlike prior suits between the parties, this was not a race to

serve - the opposite is true. GPC claims Gulf Coast has unclean hands when in fact no such suggestions, hints, or findings by the Commission supports that claim. Again, the opposite is true. GPC sat back and waited for Gulf Coast to complete its work prior to any objection. The reason is obvious. GPC wanted to serve the site at no cost and at no effort to itself from facilities it built to duplicate Gulf Coast's facilities. The unclean hands are GPC's.

Gulf Coast did not waive any right to relocation costs as GPC claims, but publically made it clear that it would not charge the Department of Correction for the relocation costs if it were chosen as the provider. GPC's argument that the Red Sapp Road is a state or publically owned road is also contrary to the evidence. In the first place, the only evidence is that it was a private road, and even it were claimed by the county as a county maintained road, the facilities of Gulf Coast were not on the right-of-way, and its facilities were not interfering with the use and maintenance of a public road in any event.

Equity, fairness, and the factual findings by the Commission itself dictates service by Gulf Coast. Gulf Coast's argument is not merely an equitable one, but the equities, in addition to the Commission's erroneous conclusions unsupported by competent substantial evidence clearly point to the realization that the Commission gave the disputed site to the wrong utility.

ARGUMENT I

I. THE COMMISSION'S ORDER OF SERVICE TO THE CORRECTIONAL FACILITY BY GPC WAS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

GPC has attempted to minimize Gulf Coast's appeal by characterizing it as a thinly veiled effort to have this Court reweigh the evidence (GPC's brief pp. 7, 18-19). This is not a case of reweighing or reevaluation of evidence. It involves an appeal of a final order that totally ignores the Commission's own factual and equitable findings that overwhelmingly favored Gulf Coast, and instead concluded GPC should be awarded service to the correctional facility based on an alleged uneconomic duplication of facilities unsupported by substantial and competent evidence, and contrary to fundamental equitable principles.

A. Gulf Coast's construction of 3 phase facilities was in fact economic and necessary.

GPC suggests that the Commission's interpretation of the phrase uneconomic duplication of facilities should be left to the discretion of the Commission and not disturbed by this Court on appeal. (GPC's brief p. 11) What constitutes an uneconomic duplication of facilities has never been defined by the Commission or any Florida court. Contrary to GPC's and the Commission's contentions, the alleged uneconomic duplication of facilities by Gulf Coast was in fact "economic".

The Commission claims that Gulf Coast failed to point to any compelling evidence upon which a finding could be made to support the economic duplication argument (Commission's brief p. 7),

although there is ample evidence to support that conclusion. At the outset it is important to recognize that Gulf Coast's Red Sapp Road line had been located on the actual site of the correctional facility for more than forty (40) years and that Gulf Coast had significant facilities on three sides of the correctional facility site. (R-316) Both Gulf Coast and GPC have facilities on the perimeter of the site of the correctional facility that cross each other or are on opposite sides of County Road 279 and State Road 77. (R-316) The relocation of the Red Sapp Road line was a necessity to continue service to Gulf Coast's customers at the western end of the Red Sapp Road line.

The line was also necessary to continue existing service to the site of the correctional facility where the Red Sapp Road line had been located. On this point GPC has argued that the Court's acceptance of Gulf Coast's economic duplication argument is tantamount to the destruction of utility regulation. (GPC's brief pp. 14-15) GPC has consistently refused to acknowledge Gulf Coast's Red Sapp Road line had been located on the actual site of the correctional facility since 1950 and that its relocation was vital to the continued service to the site. The customer on the very site where Gulf Coast had established its facilities long before GPC ever came along, specifically requested service from Gulf Coast, and the service it needed was 3 phase service. In its own service area, historically served and long established, Gulf Coast, of necessity, upgraded its service capability to 3 phase. The duplication, if it can ever be called that, was necessary and

economic both to the interests of the Department of Corrections and to the members of Gulf Coast.

B. The Commission actually found that Gulf Coast's cost to serve was less than Gulf Power's.

GPC and the Commission have made several arguments regarding cost to serve. Although Gulf Coast will defer to its initial brief to avoid redundancy on these issues, one issue deserves additional comment. Recognizing that Gulf Coast incurred the costs of relocating its Red Sapp Road line because of GPC's failure to timely file its territorial dispute with the Commission (discussed at length below) it becomes clear that Gulf Coast was in fact the lower cost provider. The Commission's Order stated that it could not ignore the fact that Gulf Coast's upgrade of the relocated Red Sapp Road Line from single-phase to three-phase duplicated GPC's existing facilities. (R-316) However, the Department of Corrections made it clear that it would not finance the \$36,996.74 for the removal and relocation of the line, hence, it may not have selected Washington County as the site for the new correctional facility. (T-38) The Commission recognized this point when it found that but for Gulf Coast's actions, there would be no facility for anyone to serve.

In light of that statement, had GPC been timely two events would have occurred. First, Gulf Coast would not have moved the Red Sapp Road line. Second, if GPC would have been forced to pay for the removal and relocation of the line at a cost of \$36,996.74 that would represent part of its cost to serve. In contrast, the Commission found that Gulf Coast's cost to serve was a mere

\$14,582.54 for the upgrade of the Red Sapp Road Line from single-phase to three-phase. (T-314-315) A timely objection by GPC would have allowed Gulf Coast to show that its cost to upgrade its facilities would be over \$20,000.00 less than GPC's cost to relocate Gulf Coast's facilities.

Since the Commission relied on the \$14,582.54 as the foundation for its conclusion that Gulf Coast uneconomically duplicated GPC's facilities, it becomes clear that the Commission ignored its own finding that the cost to relocate Gulf Coast's facilities was almost \$37,000.00, a cost Gulf Power would have incurred if it was initially selected as the service provider. While Gulf Coast spent an additional \$14,500.00 to upgrade its pre-existing facilities, Gulf Power would spend over \$36,000.00 to provide the same service capability. GPC should not benefit from its knowing failure to object to Gulf Coast's service.

- C. The Commission improperly ignored customer preference in its resolution of the territorial dispute.

In terms of customer preference of electric service providers, Gulf Coast recognizes that who the customer chooses is not a dispositive factor in a territorial dispute, but that it should be considered when all other factors are substantially equal. See Florida Administrative Code Rule 25-6.0441(2)(d). Again, this issue is tied into cost to serve because if the appropriate figure is used, then customer preference is the final nail in GPC's coffin.

Gulf Coast will again defer to its initial brief to avoid redundancy, although GPC's depiction of actual customer preference

and allegedly improper conduct on Gulf Coast's behalf merit brief attention. GPC has stated that the Department of Corrections and not Washington County is the true customer in the instant case. (GPC's brief p. 12-14) GPC has also repeatedly stated that the Department of Corrections did not express a preference for either Gulf Coast or GPC, (GPC's brief p. 12-14) a position directly in conflict with testimony of Ronald Kronenberger, the Department of Corrections' Assistant Secretary for the Office of Management and Budget. (T-34/18) When Mr. Kronenberger was asked "[b]ased on what you have reviewed so far, and, if you had a choice of providers to serve the prison in Washington County, what company would you choose?", he responded, "[w]e would support the decision that we made to go with Gulf Coast." (T-38/8-12) Without question Gulf Coast was the preferred service provider of the Department of Corrections and Washington County and this fact was recognized by the Commission. (R-315)

GPC has also characterized Gulf Coast's rural economic development program as improperly, and now illegally, enticing Washington County to prefer service by Gulf Coast. (GPC's brief p. 12) Yet the Commission found that the Department of Corrections' decision was based on Gulf Coast's ability to serve, the location of its lines, and its patronage capital credit incentives. (R-315) In addition, Mr. Kronenberger testified that Gulf Coast's longer history in the area was another "extenuating circumstance" that favored Gulf Coast. (T-38) Gulf Coast will not deny that its rural development program did not have any effect on customer

preference, although GPC's characterizations that Gulf Coast bought the business of Washington County is a transparent attempt to slander Gulf Coast before this Court (GPC's brief pp. 12, 21), and is rendered meaningless when one considers GPC's own economic development activities and assistance to new business. Apparently GPC believes that its own economic development activities are okay, but not Gulf Coast's, no doubt because Gulf Coast was successful.

D. GPC's duplication of Gulf Coast's facilities in 1971 prior to Commission jurisdiction is material to the determination of this territorial dispute.

The Commission's Final Order recognized that during 1971 GPC constructed a massive duplication of Gulf Coast's three-phase facilities along County Road 279 and State Road 77 that crossed Gulf Coast's lines at least 20 times. (R-316) These are the two roads on the perimeter of the site of the correctional facility. Further, the Commission recognized that GPC crossed Gulf Coast's lines during the pendency of those proceedings to serve a realty company on State Road 77. (R-316) Despite the findings of GPC's prior duplication, the Commission and GPC now attempt to ignore the obvious import of such duplication.

If the Commission's Final Order is upheld by this Court, a message will be sent to all utility companies in Florida. That message suggests that if a utility gets away with the construction of duplicative facilities it can later use those facilities to claim that any upgrade or extension of the other utility's system now duplicates its own facilities. This makes about as much sense as a situation where a landowner builds a boundary fence 100 feet

onto his neighbors land, and when the neighbor claims over the fence to object to its construction, the landowner tries to have him arrested for trespassing.

The Commission and GPC, to a lesser extent, refer to the disadvantages of an uneconomic duplication of facilities (Commission's brief pp. 7-8; GPC's brief pp. 16-17), and the Commission cited a passage from this Court that discusses some specific problems that result from such duplication. (Commission's brief pp. 7-8) The effects of unnecessary and uneconomic duplication of facilities occur whether the duplication was accomplished before or after the Commission had jurisdiction to stop duplication. GPC suggests that the Commission must prohibit "further" uneconomic duplication. (GPC's brief p. 17), while conveniently, it regards past uneconomic duplication as acceptable. It makes no sense for the Commission to take the position of ignoring past duplications when resolving a territorial dispute whose historical basis was caused by a massive duplication by one of the utilities.

In the instant case all of GPC's facilities in the area of the correctional facility are a product of its massive duplication that occurred during 1971 to serve a new development called Sunny Hills. All of the cases cited by GPC to illustrate its presence are the direct result of that duplication. (GPC's brief p. 17) And now GPC is attempting to build on its 1971 duplication, that would not be permitted under the present regulatory scheme, and expand its presence in Gulf Coast's historic service area that was at one time

Gulf Coast's exclusive service area. The fundamental flaw in both GPC's and the Commission's arguments is the mistaken premise that because the Commission had no jurisdiction to stop GPC's 1971 duplication, it should now give those facilities higher weight than those of Gulf Coast.

ARGUMENT II

II. GULF COAST SHOULD BE AWARDED SERVICE OF THE CORRECTIONAL FACILITY BASED ON FUNDAMENTAL ESTOPPEL GROUNDS.

Contrary to the Commission's allegation that Gulf Coast failed to properly raise equitable estoppel in the proceedings below (Commission's brief pp. 15-16), the record is replete with requests for the Commission to exercise its discretionary authority and estop GPC's objection to Gulf Coast's service of the correctional facility. (R-169, 182, 189, 209) Even if the record below did not show that estoppel was raised, Rule 25-22.038 (5)(b)(2), Florida Administrative Code, provides that with good cause shown the Commission will consider any issue that was not raised prior to the issuance of a prehearing order. Although the Commission did not embrace the estoppel argument, the contents of its Final Order implicitly demonstrate that Gulf Coast did not waive the estoppel argument. (R-317)

The Commission cited Phoenix Insurance Co. v. McQueen, 286 So.2d 570 (Fla. 1st DCA 1974) for the proposition that estoppel is an affirmative defense that is waived if it is not pleaded. (Commission's brief p. 16) This proposition is merely a restatement of Rule 25-22.038, cited above, which specifically governs such procedural matters before the Commission.

Although GPC asserted that it could not have filed its complaint against Gulf Coast any sooner because its dispute was not ripe until Gulf Coast allegedly duplicated its facilities, (GPC's brief pp. 20-21), it failed to include any authority that supports the black and white distinction it has drawn with regard to

ripeness in territorial disputes. Quite simply, there is no authority for the proposition that the actual construction of allegedly duplicating facilities is a prerequisite to the filing of a complaint for a territorial dispute. If that proposition were true, then the whole point of authorizing the Commission to prevent uneconomic duplication would be rendered meaningless.

The Commission itself exposed the fiction of GPC's position by chastising GPC for failure to object to Gulf Coast's service until after the site of the correctional facility was selected and after Gulf Coast relocated the Red Sapp Road line. (R-317) The Commission's brief expressly stated that it "was unhappy with Gulf Power's failure to come forward". (Commission's brief p. 17)

The merits of Gulf Coast's estoppel arguments in the record become clear upon a close examination of the benefits that accrued to GPC from its dilatory tactics. First, Gulf Coast removed the Red Sapp Road line from the site of the correctional facility. Secondly, the Department of Corrections would not have paid the \$36,966.74 to relocate the line (T-38). Thirdly, GPC would have been ultimately responsible for these costs if it wished to serve the correctional facility or else the Department of Corrections would have built the prison elsewhere. Fourthly, GPC's decision to delay its objection was an attempt to save GPC \$36,966.74 at Gulf Coast's expense. The delay allowed GPC to argue that Gulf Coast uneconomically duplicated its facilities through allegedly redundant three-phase lines. Finally, the Commission rewarded GPC's misdeeds by awarding service to GPC.

GPC's claim of a timely objection is an attempt to thwart the application of Cowgill v. Hopkins, 52 So.2d 343 (Fla. 1951). In Cowgill, this Court addressed an action for ejectment between two neighbors that stemmed from a disputed common boundary. Id. at 343. This Court stated that if one is silent and watches another construct valuable improvements to property with disputed ownership, and the former fails to give a satisfactory explanation for their silence, then the former is estopped to complain. Id. at 344. Since GPC was silent while Gulf Coast took public and positive steps to secure and serve the correctional facility and GPC has failed to provide a satisfactory explanation for its silence, this Court should reject GPC's claims of timeliness and recognize its dilatory tactics for what they are, self-serving, calculated business decisions.

The Commission also claims that Gulf Coast has not proved that equitable estoppel is applicable to the facts of this case. (Commission's brief pp. 16-19) Although the Commission has contended that Gulf Coast did not specifically enumerate the three elements of equitable estoppel (Commission's brief p. 16), a closer reading indicates that each element was enumerated and included the requisite factual support. For purposes of clarification, the three elements of equitable estoppel as cited by the Commission are as follows:

- (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 on the misrepresentation.

Rissman v. Kilbourne, 643 So.2d 1136, 1139 (Fla. 1st DCA 1994).

Under the first element of equitable estoppel it is well established that the misrepresentation of a material fact may be satisfied by silence when there is a duty to speak. Southeast Grove Management, Inc. v. McKiness, 578 So.2d 883 (Fla. 1st DCA 1991); Harbor House Partners Ltd. v. Mitchel, 512 So.2d 242 (Fla. 3d DCA 1987); Head v. Lane, 495 So.2d 821 (Fla. 4th DCA 1986); Garner v. Pearson, 545 F.Supp. 549 (D.C. Fla. 1982); Richards v. Dodge, 150 So.2d 477 (Fla. 2d DCA 1963).

In the instant case, GPC's silence is evidenced by its failure to come forward while Gulf Coast was publically expending the effort and financial resources to secure the correctional facility and relocate the Red Sapp Road line. (R-311-312, 317; See Cowgill, 52 So.2d at 344) Further, GPC's duty to speak is evidenced by its admitted knowledge of Gulf Coast's activities and GPC's rejection of an internal recommendation to take action to secure the correctional facility through a proposal for a grant and loan under its own economic development program. (T-613, 614, 619)

In an effort to distinguish the case law cited by Gulf Coast, both the Commission and GPC have argued that a contractual or statutory relationship must have existed between Gulf Coast and GPC before a duty to speak could have arose. (GPC's brief pp. 19-20; Commission's brief p. 17) These arguments misinterpret the cited case law. This Court's decision in Cowgill is again instructive because it involved the silence of one adjoining landowner while the neighboring landowner improved property that was the subject of

an ongoing border dispute. Cowgill, 52 So.2d at 343. Despite the obvious absence of a contractual or statutory relationship between the neighbors in Cowgill that the Commission and GPC contends is required, this Court held that estoppel of the silent landowner was appropriate. Id. at 344.

Moreover, the Commission has misunderstood Gulf Coast's argument with regard to GPC's duty to speak. The Commission cited Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So.2d 1092 (Fla. 1985) and In re Territorial Dispute between Suwannee Valley Electric Cooperative, Inc. and Florida Power Corp., 87 FPSC 11:213 (1987) for the proposition that a utility does not have any duty to advise another utility or potential customer of a disputed claim of service. (Commission's brief p. 17) The Commission missed the point entirely. It was not Gulf Coast that Gulf Power owed a duty to, it was, and is, the general body of electric consumers in this state represented by the Florida Public Service Commission. It is to the Commission that Gulf Power did object to, but not until it felt its own selfish interests were served. For the Commission to take the position that a utility should be able to sit idly by and watch what it claims is an uneconomic duplication of its facilities being constructed, in plain view and after public meetings, and do nothing stretches the bounds of creditability beyond recognition. Now if GPC had no knowledge of what was going on, had not discussed making a similar offer to the Department of Corrections and Washington County, had not driven to Tallahassee to make a pitch to

the Department of Corrections, including a thinly valid demand that it was entitled to be the service provider, and had not sat on its hands knowing that Gulf Coast was spending its members money to provide service to the prison, then maybe the Commission would be right. The first element of equitable estoppel is therefore satisfied.

The second element of estoppel is satisfied because Gulf Coast, early on, made it publically clear that it was willing to grant \$45,000.00 to the County, assist in getting a loan for the County, and therefore be able to serve the site, if it were selected as the service provider (Exhibit 16). It is patently clear that Gulf Coast would not have incurred the expenses it did if it knew that GPC would later object. The avoidance of Gulf Coast's change of position to its detriment was in GPC's hands - all it had to do was file an objection. Had GPC timely filed its complaint with the Commission, Gulf Coast would not have relocated the line, and ultimately GPC would have been responsible for these costs.

Under the third element of equitable estoppel, Gulf Coast has demonstrated a detrimental change in position that was caused by GPC's silence. Id. at 1139. This element has been broadly interpreted and was held to be satisfied when a state employee continued her employment based on a memorandum from the Division of Retirement that she needed another 0.42 years of creditable state retirement service in order for her retirement benefits to vest. Kuge v. Department of Administration, Division of Retirement, 449 So.2d 389 (Fla. 3d DCA 1984) Litigation ensued after the employee

completed the additional 0.42 years and the Division of Retirement rescinded the statements in its memorandum. Id. at 390. The Third District held that without question the employee's decision to continue state employment for another 0.42 years before leaving constituted a detrimental change in position that was caused by the misrepresentation by the Division of Retirement. Id. at 391.

Like the state employee in Kuge whose decision to continue her employment constituted a detrimental change in position, Gulf Coast's decision to continue its efforts to secure and serve the correctional facility in the absence of a timely objection by GPC, clearly establishes the detriment. The only relevant distinction between Kuge and the instant case is that the Division of Retirement was indifferent to the employee's actions, while GPC had a financial motive to sit back and let Gulf Coast spend the money to bring the correctional facility to Washington County.

In summary, all three element of equitable estoppel are satisfied in the instant case. Specifically, GPC misrepresented its interest in the correctional facility through its intentional and calculated silence that was implicitly relied on by Gulf Coast and was detrimental to Gulf Coast because it continued its efforts to secure and serve the facility but was not awarded service to the correctional facility. Analogous to Harbor House Partners Ltd. v. Mitchel, 512 So.2d 242 (Fla. 3d DCA 1987) that Gulf Coast cited in its initial brief, GPC's conduct constitutes a classic example of unclean hands that warrants estoppel of Gulf Coast's service to the correctional facility.

GPC has argued that Gulf Coast cannot seek an equitable remedy because it does not come into this matter with clean hands. (GPC's brief pp. 22-24) However, the events that preceded this action make clear that Gulf Coast's hands are clean and that it deserves an equitable remedy. Gulf Coast began its involvement in April 1993 when it made a public proposal to the Washington County Commission for a \$45,000 grant and assistance in securing a loan of \$300,000 for the future site of the new correctional facility. (Norris, T-304, Exhibit 16). Although GPC has participated in grants, loans, and other assistance in encouraging and promoting economic growth in its service area (Weintritt, T-146; Hodges, T-616, Exhibit 36), GPC rejected an internal recommendation that it should become involved. (Hodges, T-613-614, 619/20). Later, Gulf Coast was selected service provider by the Department of Corrections and Washington County. (R-315) Its involvement continued with the removal and relocation of the Red Sapp Road line that was located on the site of the correctional facility. (R-317) Only thereafter did GPC contest Gulf Coast's service. (R-317)

Despite GPC's contentions that Gulf Coast raced to serve the correctional facility (GPC's brief p. 24), there is no evidence in the record to support that a race had ever occurred. In fact, the very definition of the word "race" mandates competition between two or more entities. However, in the instant case, the Commission recognized that Gulf Coast was the only utility that expressed an interest in the correctional facility and made the effort to develop that interest. (R-311-312, 317) Given GPC's silence

during the occurrence of these events, and regardless of GPC's similar facilities on County Road 279, Gulf Coast was justified in relocating the Red Sapp Road Line to 279 as a three-phase line. Had GPC been interested, it would have utilized its own economic development program, filed a complaint with the Commission, or taken any action prior to Gulf Coast securing and serving the facility. For these reasons, Gulf Coast comes into this matter with clean hands and deserves to serve the site.

The Commission has argued that equitable estoppel cannot apply to the facts of this case in any event because estoppel of GPC would be contrary to public policy since Gulf Coast allegedly uneconomically duplicated GPC's facilities. (Commission's brief pp. 18-19) However, the record does not establish that Gulf Coast's duplication of facilities was uneconomic, and Gulf Coast maintains that the duplication was in fact "economic". In addition, the Commission's Final Order itself offends public policy because it rewarded the underhanded competitive practices used by GPC which fueled protracted and costly litigation before this Court.¹ Consequently, Gulf Coast respectfully requests that this Court reverse the Commission's Final Order and award Gulf Coast service to the correctional facility.

GPC further argues that Gulf Coast violated state and federal policies through its alleged "purchase" of the right to serve the

¹ In fact, the Commission itself recognized that during the pendency of the proceedings below, GPC duplicated Gulf Coast's facilities to provide service to a realty company on State Road 77. (R-316; See Norris, T-313/2-4)

customer, whether it be the Department of Corrections or Washington County. (GPC's brief pp. 21-22) For support of the alleged violation of state policy, GPC cites Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987). However, the assertion that Gulf Coast "purchased" or "bought" the customer is pure folly given GPC's own economic development practices.

In terms of GPC's contentions that Gulf Coast violated federal policy, GPC cites Withlacoochee River Electric Cooperative, Inc. v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963) for the proposition that Gulf Coast's assistance to the Department of Corrections and Washington County constituted unfair competition. (GPC's brief pp. 21-22) GPC failed to clearly identify that this Court in Withlacoochee River specifically stated that utility enticements are not forbidden by law, and that GPC's was identified by this Court as mere dicta that was unnecessary to the holding. Id. at 137. Again, it is interesting to consider how GPC perceives its own economic development program in light of Withlacoochee River.

Lastly, GPC oversimplifies this Court's holding in Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1385 (Fla. 1982) for the proposition that a privately owned utility should always be selected over a cooperative utility where a customer's electrical requirements can be reasonably met by either. (GPC's brief p. 22) However, Escambia River quickly becomes adverse to GPC's position when one considers that GPC failed to mention that it also recognized that

both factual and equitable distinctions that may favor one utility over another. Id. at 1385. In the instant case, both factually and equitably, the distinctions favor Gulf Coast. GPC conveniently omits instances where its hands were slapped for racing to serve² and omits mention that GPC facilities adjacent to the intersection of 77 and 279 (where the prison is located) were built in yet another GPC attempt to outbuild and duplicate Gulf Coast's facilities to serve Leisure Lakes³. Although the Commission's order prohibited GPC from using its duplicative facilities to pick up any retail customers, GPC has failed to remove the facilities⁴. The hands that are unclean in this case are GPC's.

²In re: Petition of Gulf Coast Electric Cooperative, Inc. to Resolve Territorial Dispute with Gulf Power Company, Docket No. 850087-EU, Order No. 16106, issued May 13, 1986 (Calvary Catholic Cemetery); In re: Petition of Gulf Coast Electric Cooperative, Inc. against Gulf Power Company, Docket No. 830484-EU, Order No. 13668, issued September 10, 1984 (Leisure Lakes), affirmed, 480 So. 2d 97 (Fla. 1985).

³480 So. 2d 97 (Fla. 1985).

⁴Order No. 13688, T-159.

ISSUES ON CROSS APPEAL BY GULF POWER

I. THE COMMISSION HAS CLEAR AUTHORITY TO ORDER GPC TO REIMBURSE GULF COAST FOR THE REMOVAL AND RELOCATION OF THE RED SAPP ROAD LINE.

A. The ordered reimbursement is within the Commission's delegated authority to resolve territorial disputes.

Should this Court affirm the Commission's award of service of the correctional facility to GPC, it should also affirm the Commission's requirement that GPC reimburse Gulf Coast \$36,966.74 for the relocation of the Red Sapp Road Line from the correctional facility site. As an administrative agency, the Commission operates under statutory authority delegated to it by the Florida Legislature. The Commission's delegated authority, in conjunction with its equitable discretion, provides the necessary support for the ordered reimbursement.

Chapter 366, Florida Statutes, includes two statutes that are relevant to the discussion of this issue. First, Section 366.04(2)(e) describes the Commission's delegated statutory authority and states,

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.

§ 366.04(2)(e), Fla. Stat. (1993).

Second, Section 366.01 describes the legislative intent with regard to the interpretation of the chapter and states,

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

§ 366.01, Fla. Stat. (1993).

Like Section 366.01, Rule 25-6.001, Florida Administrative Code, describes the Commission's authority to fully resolve matters within its jurisdiction and states,

In the exercise of such jurisdiction, the Commission shall have the power ... to exercise all judicial powers, issue all writs, and do all things necessary and convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements.

Fla. Admin. Code R. 25-6.001 (1995).

On numerous occasions the courts have addressed the situation where the authority of an administrative agency is challenged where a particular action lacks precise and exact statutory support. In the context of the Commission, this Court has addressed this issue repeatedly and has consistently held that the Commission's authority includes powers expressly and impliedly conferred by statute. Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978); Department of Transportation v. Mayo, 354 So.2d 359 (Fla. 1977); Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977); City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973).

Further, echoing the legislative mandate to liberally construe the provisions of Chapter 366, this Court has stated that because the regulatory powers of the Commission are exclusive, they are necessarily broad and comprehensive. Storey v. Mayo, 217 So.2d

304, 307 (Fla. 1968), cert. denied, 89 S.Ct. 1751, 395 U.S. 909, 23 L.Ed.2d 222. This Court conveyed a similar sentiment in Fogarty Brothers Transfer, Inc. v. Boyd, 109 So.2d 883 (Fla. 1959). Although Fogarty involved the Public Utilities Commission, the predecessor of the Public Service Commission, this Court reasoned that because it is impossible for the legislature to specifically enumerate "all" powers intended to be conferred, the Commission "may exercise reasonable administrative discretion and judgment to accomplish the intent of the law". Id. at 886.

In the instant case, the intent of the law provides the Commission with the authority to fully and completely resolve the territorial dispute between Gulf Coast and GPC. The resolution of that dispute necessarily required the Commission to resolve the issue of the relocation costs associated with the Red Sapp Road Line, and costs, which if not reimbursed, will adversely affect the rate payers of Gulf Coast.

The Red Sapp Road line was constructed in 1950, at which time Gulf Coast established its presence on the future site of the correctional facility. (T-212/21, Exhibit 9) Until recently, this line connected service from Gulf Coast's three-phase line on State Road 77 to its 100 plus customers on County Road 279. Gulf Coast relocated the line south on State Road 77 and north on County Road 279 in order to clear the facility site for construction and to continue reliable service to its customers on County Road 279, without knowledge that GPC was planning on challenging Gulf Coast's service to the correctional facility. (T-399, 410)

Although the Commission erroneously awarded service of the correctional facility to GPC, it at least recognized that it would be manifestly unfair to deny Gulf Coast the removal and relocation costs associated with the line. To wit, the Commission stated,

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. While Gulf Power will be permitted to serve the prison, it will not serve at Gulf Coast's expense. Therefore, we find it necessary to relocate the Red Sapp single-phase line, which would have had to be relocated no matter who ultimately provided service to the prison site.

(R-317)

There is no debate that Section 366.04(2)(e) provides the Commission with jurisdiction over the resolution of territorial disputes between utilities. Likewise, there is no genuine debate that Section 366.01, Rule 25-6.001, and the case law cited above provides the Commission with implied jurisdiction to resolve issues integral to the resolution of a territorial dispute. In fact, the Commission's resolution of this issue is a textbook example of what constitutes an "implied" power. Gulf Power Co. v. Wilson, 597 So.2d 270 (Fla. 1992). In Wilson, this Court held that the Commission's implied powers include the authority to reduce GPC's rate of return based corrupt management practices. Id. at 273.

In the instant case, the Commission ordered GPC to reimburse Gulf Coast for the relocation of the Red Sapp Road line because it considered that vital to a fair and equitable resolution of the territorial dispute. As quoted above, the Commission recognized that Gulf Coast was under no obligation to remove and relocate its line, and that only after the line was relocated did GPC dispute Gulf Coast's service to the correctional facility. (R-317) Had GPC objected to Gulf Cost's service in a timely manner, Gulf Coast would not have moved the Red Sapp Road line in the first place. As a result, like Wilson, the Commission's implied powers include the authority to reduce the benefits to GPC based on its conduct in this case, and to protect the rate payers of Gulf Coast.

GPC portrays the Commission as a mere mechanism whose jurisdiction is restricted to a simple determination that Utility A, or Utility B, is entitled to serve the new correctional facility. In light of the statutes, rules, and case law cited above, it is clear that the Commission's jurisdiction is not so limited. Hence, consistent with Rule 25-6.001, the Commission's ordered reimbursement was necessary for the full and complete exercise of its jurisdiction to resolve the territorial dispute between Gulf Coast and GPC.

- B. GPC's allegations that Gulf Coast or the property owner are responsible for relocation costs associated with the Red Sapp Road line, and that Gulf Coast "waived" any right to reimbursement from GPC lack any foundation in law or equity.
 1. Gulf Coast or the property owner is not responsible for relocation costs associated with the Red Sapp Road Line.

In its brief, GPC contends that the cost associated with the relocation of the line is the responsibility of Gulf Coast or the owner of the correctional facility site, whether that is the Department of Corrections or Washington County. (GPC's brief pp. 25-28) Although GPC has offered several explanations why it should not be responsible for these costs, each explanation is devoid of legal substance.

First, GPC contends that Section 337.403, Florida Statutes, places responsibility for utility relocation costs on the utility or property owner. (GPC's brief p. 26) However, a plain reading of that statute reveals that it is totally irrelevant to the factual situation presented by the instant case. Section 337.403(1) states,

Any utility heretofore or hereafter placed upon, under, over, or along any public road that is found by the authority to be unreasonably interfering in any way with the convenient, safe, or continuous use, or maintenance, improvement, extension, or expansion of such public road shall, upon 30 days' written notice to the utility or its agent by the authority, be removed or relocated by such utility at its own expense except as provided in paragraphs (a) and (b).

§ 337.403, Fla. Stat. (1993) (Emphasis added).

In its brief, GPC cited Section 337.403 for the proposition that it "places responsibility for the cost of relocation of a line along a public road on either the utility who owns the line ... or the governmental entity requiring the relocation". (GPC's brief p. 26) Although there are many reasons why the application of Section 337.403 is precluded in the instant case, the first reason is that it is only applicable to public roads, while the record in the

instant case supports a finding that Red Sapp Road is a private road. (T-266/22-25, 267/1-3) Consequently, Gulf Coast was under no obligation to absorb the cost to relocate its line.

Second, GPC failed to discuss a pivotal aspect of Section 337.403 which states that the utility or governmental entity is responsible for relocation costs only where the facilities interfere with the use or improvement of the road. In the instant case, Gulf Coast's Red Sapp Road line was not interfering with the use or improvement of any road when Gulf Coast had it relocated. Tracking the statutory language, Gulf Coast's facilities were not interfering with the convenient, safe, or continuous use, or maintenance, improvement, extension, or expansion of a state road. Rather than Gulf Coast's facilities interfering with the maintenance or improvement of a state road, the Department of Corrections planned facilities would interfere with Gulf Coast's existing facilities that were located off the right-of-way of a private road. (T-267/15-17)

The obvious legislative intent behind Section 337.403 is to insulate the government from utility relocation costs on state owned rights-of-way. The statute wisely accomplishes this goal by allocating the expense associated with utility relocation to the utilities that are allowed to use state rights-of-way. Since a plain reading of Section 337.403 requires government action to maintain or improve a public road, and because there was or is no government action to maintain or improve Red Sapp Road, Section 337.403 has absolutely no application to this case.

GPC also contends that the case is analogous to the garden variety development of property that requires a utility line to be relocated or the utility easement extinguished. (GPC's brief pp. 27-29) According to GPC, the utility or property owner is the party responsible for relocation or extinguishment costs. (GPC's brief pp. 27-29)

The instant case is distinguished from the garden variety situation because here there are two utilities that are now in competition for service to a new customer, rather than a single utility working with a developer where there is no dispute that the utility who relocated or extinguished an easement will be the service provider. GPC's analogy is inapplicable because the factual situation presented by the instant case is a fundamentally different situation.

GPC cites Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977) for the proposition that the burden was on Gulf Coast to show that it was entitled to recover its relocation costs. (GPC's brief pp. 25, 28) Presumably, GPC was attracted to the First District's statement that "[t]he general rule is, that as in court proceedings, the burden of proof ... is on the party asserting the affirmative of an issue before an administrative tribunal." Balino, 348 So.2d at 350. However, the burden on this case is on GPC, not Gulf Coast.

Even if Gulf Coast had the burden of establishing the amount of its relocation costs, the Commission found that it did. Gulf Coast demonstrated that regardless of who served the correctional

facility, it had to remove and relocate the Red Sapp Road Line in order to continue to provide reliable service to its customers on County Road 279. (T-399, 410) Mr. Norris testified that while Gulf Coast was willing to absorb the costs of relocation if it became the electric service provider to the facility, it would not absorb these costs if another utility was used. (T-362, 363)

GPC, on the other hand, tried but failed to establish by evidence or testimony that Gulf Coast had any obligation to absorb the relocation costs if another utility was used. The Commission's Order confirmed that failure by finding, "[t]here is no evidence in the record that shows the Gulf Coast would have had to incur that cost if another provider was selected to serve the prison." (R-317) As a result, Gulf Coast carried the burden that GPC alleges was necessary to recover costs associated with the relocation.

2. Gulf Coast has not "waived" any right to reimbursement from GPC.

GPC also contends that Gulf Coast "waived" its right to be reimbursed for its relocation costs. (GPC's brief pp. 28-30) GPC alleges that Gulf Coast's letter dated April 13, 1993, [Exhibit 16] constitutes a "voluntary" relinquishment of its easement on the site of the correctional facility and a waiver of any right of reimbursement from any and all parties. (GPC's brief pp. 28-29) That letter states that the relocation costs would not be at the expense of the Department of Corrections or Washington County. (T-360/24-25; 361/1-2)

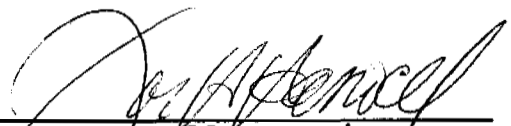
Gulf Coast neither voluntarily relinquished its easement, nor waived any right of reimbursement. The easement was clearly

relinquished only on the condition that Gulf Coast becomes the service provider. GPC remained intentionally silent and held its objection to Gulf Coast's service until after Gulf Coast secured the correctional facility and relocated the Red Sapp Road line. All the while GPC was fully aware of Gulf Coast's efforts. (T-304, Exhibit 16; 305/23; 633/9-14; 640/19-21) The scope of the letter was limited to the Department of Corrections and Washington County, and did not include GPC.

Should this Court affirm the Commission's award of service of the correctional facility to GPC, Gulf Coast respectfully requests that it also affirm the Commission's requirement that GPC reimburse Gulf Coast \$36,996.74 for the relocation of the Red Sapp Road Line.

CONCLUSION

Based on the record and the foregoing arguments, Gulf Coast respectfully requests this Court to reverse the Commission's holding that GPC should serve the correctional facility. Should this Court affirm the Commission's holding, Gulf Coast requests that it also affirm the Commission's order that GPC reimburse Gulf Coast \$36,966.74 for the costs associated with the relocation of the Red Sapp Road Line.



John H. Haswell, Esquire
Florida Bar No.: 162536
Chandler, Lang & Haswell, P.A.
Post Office Box 23879
Gainesville, Florida 32606
(904) 376-5226

J. Patrick Floyd, Esquire
408 Long Avenue
Port St. Joe, Florida 32456
(904) 227-7413

Attorneys for Gulf Coast
Electric Cooperative, Inc.

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:

Russell Badders, Esquire
Jeffrey A. Stone, Esquire
Beggs & Lane
3 West Garden Street, Suite 700
Post Office Box 12950
Pensacola, Florida 32576-2950

David E. Smith, Esquire
Mary Ann Helton, Esquire
Division of Appeals
Florida Public Service
Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-
0850

this 5 day of December, 1995.



John H. Haswell