

067

IN THE SUPREME COURT OF FLORIDA

FILED

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CLERK, SUPREME COURT

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Chief Deputy Clerk

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

v.)

Case. No. 85, 464

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

**REPLY BRIEF ON CROSS-APPEAL
OF
GULF POWER COMPANY**

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SYMBOLS AND DESIGNATIONS

References are made: to the record “[R at page number]”; to hearing exhibits “[Hearing Exhibit number]”; to Public Service Commission's Answer Brief on Cross-Appeal “[PSC Answer on Cross-Appeal at page number]”; to the Gulf Coast Electric Cooperative's Answer Brief “[Coop Answer at page number]”; to hearing transcripts “[Tr at page number].” The Florida Public Service Commission is referred to in this brief as the Commission. Gulf Power Company is referred to in this brief as Gulf or Gulf Power. The Gulf Coast Electric Cooperative is referred to in this brief as the Coop. Washington County is referred to in this brief as the County.

Summary of Argument

The Commission has exceeded its authority in requiring Gulf Power to reimburse the Coop for the removal and relocation of the Red Sapp Road line. This requirement is arbitrary and capricious.

None of the reasons offered by the Commission for its award have legal or factual merit. First, not requiring the Coop's ratepayers to bear the relocation costs serves only to insulate the Coop's management from having to answer to the Coop's owners for the economic impacts of management's decisions with regard to the Coop's economic development efforts in Washington County. The Coop consciously decided to duplicate the facilities of Gulf Power and to relocate the Red Sapp road line without any guarantee of a revenue stream to offset the costs. The absence of a revenue stream flows from the decision of the Coop to violate the state policy against the further uneconomic duplication of facilities. As such, management should not be protected from the adverse effects of their decision. Further, allowing the award to stand would necessarily encourage further uneconomic duplication of facilities.

Gulf was under no duty to contact the Coop or to object to its economic development efforts. No legal recourse existed for Gulf against the Coop until the duplication of facilities took place. The Coop is attempting to hold Gulf to a greater duty than it held itself to in this matter. The Coop unreasonably asserts that Gulf had a duty to act, but that the Coop had no such duty under the same circumstances.

Gulf does not claim that the law of easements or Section 337.403, Florida Statutes, controls the Commission's decision in this matter. However, Gulf does claim

that these sources of law are persuasive. The Commission and the Coop fail to provide a single case or rule that could reasonably serve as the basis for its award. Gulf should not have to pay for the relocation costs just because it is the party, as between the customer and Gulf Power, that the Commission can force to pay the costs. Gulf should not have to pay for the gifts given by the Coop in the name of economic development. Any such requirement is without basis in law, fact or reason.

Finally, the Coop voluntarily waived the right to recover the costs of relocating its Red Sapp road facilities from the only two parties that could be responsible for such costs. The Coop's gift of these costs to Washington County and the Department of Corrections is simply part of its economic development package. Forcing Gulf to pay for the Coop's economic development costs is unreasonable.

Argument

I. The Commission's award of the removal and relocation cost associated with the Red Sapp road line to the Coop is arbitrary and capricious.

Both the Commission and the Coop, in their respective answers on cross appeal, argue at length that the Commission has the authority to fashion flexible and appropriate remedies in resolving territorial disputes. [PSC Answer on Cross-Appeal at 5-8, Coop Answer at 24-26] By its cross appeal, Gulf Power does not question whether the Commission has such basic authority. Rather, the issue on cross appeal is whether the Commission has exceeded the scope of its authority in fashioning the particular solution imposed in this case.

The Commission may not act arbitrarily and capriciously in fashioning such a remedy. Citizens v. Public Service Commission, 435 So. 2d 784, 787 (Fla. 1983). In this case, the Commission has acted beyond the proper bounds of its discretion by fashioning a remedy that serves to insulate the Coop's management from the consequences of their decision to uneconomically duplicate existing facilities belonging to Gulf Power in order for the Coop to have the facilities necessary to provide the electric service required by the Department of Corrections at the new correctional facility located at the intersection of Highways 279 and 77 in south Washington County.

The continued existence of single phase electric lines on the prison property along Red Sapp road was known to be inconsistent with the development plan for the property and was viewed as an impediment to obtaining the Department of Correction's decision to locate a prison on the site. [Tr. 363, 436] The Coop made an economic development

contribution to the Department of Corrections and Washington County in the form of a voluntary waiver of any reimbursement for the costs associated with removing and relocating electric lines crossing the property to be developed into a new prison. [Tr. at 360-363; Hearing Exhibit 16] The Coop attempted to use this voluntary economic development contribution as a means of justifying its violation of the public policy against the further uneconomic duplication of electric facilities. The Coop wanted to encourage the County and the Department of Corrections to ignore this policy and to award the Coop the right to serve the new prison. The Commission's requirement that Gulf Power reimburse the Coop for the costs associated with the removal and relocation of the electric lines along Red Sapp road cannot be supported as a proper remedy to the territorial dispute created by the Coop's improper actions in this case.

A. The reasons articulated by the Commission in support of the award of relocation costs to the Coop are without reasonable legal or factual basis.

The Commission asserts three reasons for the decision to require Gulf Power to reimburse the Coop for its Red Sapp road line removal and relocation costs. [PSC Answer on Cross-Appeal at 8-9] First, the Commission argues that the award was based on its finding that the Coop's members would suffer if they were required to pay the costs since they would not see the benefit of offsetting revenues. [PSC Answer on Cross-Appeal at 8] The Commission then argues that Gulf Power failed to take action or to speak up when the Coop relocated the Red Sapp road line and that this is a basis for forcing Gulf Power to pay the relocation costs. [PSC Answer on Cross-Appeal at 8] Finally, the Commission claims as a basis for its award that Gulf Power uneconomically

duplicated the facilities of the Coop during the pendency of this action. [PSC Answer on Cross-Appeal at 9] As will be demonstrated in the discussion that follows, none of the preceding reasons provide a reasonable basis for the award of removal and relocation costs to the Coop.

The Commission first argues that the award was based on its finding that the Coop's members would suffer if they were required to pay for the expenses for which they would not see the benefit of offsetting revenues. [PSC Answer on Cross-Appeal at 8, 11] This merely serves to insulate the Coop's management from the consequences of their decision to violate state policy against the further uneconomic duplication of existing electric facilities. Although the Commission expressed its desire to insulate the Coop's ratepayers from the effects of those decisions, the consequences of that insulation are to reward management for seeking to violate the state policy that the Commission is obligated to enforce. The Coop's ratepayers are the equivalent to the Coop's owners and thus have the power to hire and fire management personnel based on the quality of their leadership.

The Coop's management made several decisions for which it should be required to answer to the Coop's owners. The Coop's management chose to uneconomically duplicate the facilities of Gulf Power in order for the Coop to be able to supply the prison with the required electric service. The Coop's management also chose to waive reimbursement from either Washington County or the Department of Corrections for the cost of removing and relocating the Red Sapp road line. [Tr. at 360-363; Hearing Exhibit 16] In each case, management made its decision without a guarantee that the Coop would

receive an additional revenue stream to offset these costs. The Commission's decision effectively prevents the Coop's management from being held accountable for their actions in this matter by failing to require the Coop to bear the costs of relocating the Red Sapp road line. By insulating the Coop's ratepayers from the adverse consequences of decisions made by the Coop's management, the Commission effectively removes any incentive for the Coop's management to both act within the limits of the law and to operate the cooperative in the most efficient and economical manner.

Allowing the award to stand would also result in a policy favoring the further uneconomic duplication of facilities. The precedent this award establishes would encourage a utility to use its economic development activities as a basis for securing a potential customer's choice of electric supplier without regard to whether the selection of one utility would result in the uneconomic duplication of existing electric facilities of another. The portion of the Commission's order challenged on cross appeal would encourage a utility to gamble in this regard because, in the event that its actions are found to be an uneconomic duplication, the utility found to be in violation of state policy could still recover some of the costs associated with its improper actions. This would necessarily encourage the further uneconomic duplication of facilities, a policy very much against the public policy and legislative mandate of the Florida legislature.

The second basis offered by the Commission for its decision to award the relocation costs to the Coop is that "Gulf Power took no affirmative steps until the cooperative had expended money, energy, resources, and time to get the correctional facility to Washington County." [PSC Answer on Cross-Appeal at 8] The Commission

claims that Gulf Power "sat back" and let the Coop solicit the prison and then "reaped the benefits". [PSC Answer on Cross-Appeal at 8-9] For this argument to have any validity, Gulf Power would have to be under a duty to take some type of affirmative action at the time the Coop was soliciting the correctional facility. The issue of whether Gulf Power was under a duty to take affirmative action with regards to the Coop and the correctional facility has been briefed by both the Commission and Gulf Power in their answer briefs related to the Coop's appeal in this case. In those briefs, each party provided ample legal support showing that Gulf Power was not subject to any duty to contact the Coop and to object to its economic development efforts. There was no way for Gulf to know the route by which the Coop was going to serve the new prison or if the chosen route would uneconomically duplicate the facilities of Gulf Power. It defies logic that Gulf Power could have a duty to speak or act before it became known that the Coop would uneconomically duplicate Gulf Power's existing facilities in order to allow the Coop to serve the prison. Gulf Power simply did not have any cognizable legal recourse against the Coop until the duplication of Gulf Power's facilities took place.

The Coop's argument in answer to Gulf Power's cross appeal would hold Gulf Power to a greater duty than the Coop held itself to in this matter. At page 31 of the Coop's answer brief, the Coop asserts that this was not a case of ". . . 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." This is a clear admission by the Coop of its awareness that Gulf Power's lines already in place were sufficient to serve the prison and that the Coop's duplication of those lines could result in a dispute before the

Commission. Even without this admission, the Coop's knowledge regarding the existence of Gulf Power's lines adjacent to highways 279 and 77 is beyond question. The Coop has consistently complained about the existence of these facilities since they were constructed in 1971 to facilitate Gulf Power's service to the Sunny Hills development. Gulf Power's right to exist in that location has been affirmed by judicial and Commission decisions rejecting Coop challenges to Gulf Power providing electric service via these facilities. See e.g. Gulf Coast Electric Cooperative, Inc. v. Gulf Power Company, (Fla. 14th Cir Ct. 1971)(Sunny Hills decision); In re: Petition of Gulf Coast Electric Cooperative to Resolve a Territorial Dispute with Gulf Power Company in Washington County, 86 F.P.S.C. 5:132 (1986)(Paradise Lakes decision). Notwithstanding this knowledge, the Coop accepted Washington County's decision to allow the Coop to serve the new prison to be developed on the site by the Department of Corrections and proceeded to violate state policy by duplicating the existing facilities of Gulf Power. The Coop engaged in its uneconomic duplication of Gulf Power's existing facilities without making any attempt at contact with Gulf Power in an effort to avoid a dispute regarding the right to provide the electric service required by the correctional facility.

The Coop apparently contends that the alleged silence by Gulf Power has greater significance than their own. This argument is fallacious for several reasons. First, Gulf Power was not "silent" with regards to its desire to serve the correctional facility. This fact was communicated to the ultimate customer before the selection of an electric utility had been made. [Tr. 56-61; Hearing Exhibit 2] Second, even if Gulf Power had been silent, this silence would not justify a violation of the public policy against the further

uneconomic duplication of existing electric facilities.

The Coop's reliance on the fact that its offers of economic development assistance to the county were matters of public record is of no consequence in regard to the Coop's failure to speak to Gulf Power before the Coop duplicated Gulf Power's facilities in this case. Gulf Power's lines adjacent to and along two sides of the prison site are in the public open for all to see. These lines have been in place for over twenty years.

Furthermore, Gulf Power's right to be present in that location was established in litigation between these two parties in a dispute over Gulf Power providing electric service to the Sunny Hills development.¹ Subsequently, in the 1985 dispute between Gulf Power and the Coop over Gulf Power's service to the Paradise Lakes development, Gulf Power's lines along Highway 279 (which are the very lines that are adjacent to the prison site) were accepted by the Commission when it approved Gulf Power's right to serve Paradise Lakes via lines extended from the Highway 279 line.² The Coop knew (or should have known) that its duplication of Gulf Power's more than twenty year old three-phase facilities along Highway 279 would likely result in a territorial dispute before the Commission. Notwithstanding this knowledge, and the fact that the law prohibits the

¹As noted in Gulf Power's answer brief, the Sunny Hills dispute was litigated and resolved in favor of Gulf Power in 1971, three years before the enactment of the legislation that established the state's policy against the further uneconomic duplication of electric facilities. See Chapter 74-196, Laws of Florida.

²The dispute over Paradise Lakes was resolved by the Commission pursuant to its authority first enacted in 1974. In re: Petition of Gulf Coast Electric Cooperative to Resolve a Territorial Dispute with Gulf Power Company in Washington County, 86 F.P.S.C. 5:132 (1986)(Paradise Lakes decision); See Chapter 74-196, Laws of Florida.

further uneconomic duplication of electric facilities, the Coop consciously decided to proceed to build duplicative electric facilities in order to serve the prison. The Coop took these actions without making any attempt to discuss the question with Gulf Power in an effort to avoid a violation of law and a territorial dispute. While Gulf Power does not agree that it was under any duty to the Coop in this case, if it was, equity would not be served by permitting the Coop to cry foul because of Gulf Power's silence when the Coop itself remained silent.

Finally, the Commission offers as a basis for its award that ". . . it was troubled that Gulf Power had uneconomically duplicated Gulf Coast's lines elsewhere during the pendency of this dispute." [PSC Answer on Cross-Appeal at 9] There is a striking absence of any factual support in the record related to this "other duplication". In fact, the Coop and the Commission cite only to the order in this matter and do not point this court to a single place in the record that could support the Commission's finding. The record contains very little testimony and no exhibits addressing this other so-called duplication. From the record it is clear that there is no evidence related to the factors enumerated in section 366, Florida Statutes from which the Commission could determine whether Gulf Power's actions were an uneconomic duplication of the Coop's facilities. In contrast, in the dispute over the Washington County prison testimony and extended discovery took place. Evidence was offered such that the Commission could resolve the dispute pursuant to the factors and direction contained in section 366, Florida Statutes. It seems that this entire proceeding was meaningless if the Commission can decide without benefit of a developed record that a utility has uneconomically duplicated the facilities of

another utility. This so-called uneconomic duplication by Gulf has not been properly brought before the Commission, nor has a record been developed upon which the Commission can find an uneconomic duplication. The Commission's reliance on the presence of this other alleged uneconomic duplication of facilities is clearly unreasonable. Any finding or award based on this unsupported allegation would necessarily be arbitrary and capricious.

B. The law of easements and section 337.403, Florida Statutes, are persuasive authority to guide the Commission in resolving who must pay for the relocation costs associated with the Red Sapp road line.

The Commission and the Coop argue that the law of easements and the statutory provision for relocation of utility easements, section 337.403, Florida Statutes, is not relevant to the present matter. Gulf Power does not assert, as the Coop improperly attributes to Gulf Power, that the record shows that Red Sapp road is a public or a private road, only that in either case Gulf Power cannot be liable for extinguishing and relocating the easement. Furthermore, Gulf Power does not assert to this Court that the Commission is bound by either the general law on easements or section 337.403, Florida Statutes. Gulf Power does, however, contend that the body of general easement and property law and section 337.403, Florida Statutes, serve as persuasive authority regarding the proper result regarding the allocation of responsibility for costs of removing and relocating the Coop's Red Sapp road line. None of the Commission's own rules or established precedent speak to this specific issue. As a result, it is entirely proper to look to the general law on easements or section 337.403 for guidance as to a proper resolution of this matter.

The Commission is bound to follow sound reasoning in fashioning a remedy within its broad statutory discretion. Sound reasoning places the cost of removing and relocating the Red Sapp road line on either the Coop or the customer/property owner. The Commission's requirement that Gulf Power pay the costs of removing and relocating the Coop's Red Sapp road line is the same as requiring a third party to pay for the extinguishment and reestablishment of a utility easement where neither the easement nor the property upon which it is located is owned by the third party. Putting aside the fact that this sets a policy which encourages the further uneconomic duplication of facilities, this result is one for which support is not found in the law or equity. Neither the Coop nor the Commission cites a single case in which a court has forced a third party to pay for the relocation of a utility or other easement where that third party has no property interest in the matter. Although the Commission's discretion is necessarily broad, this breadth of discretion does not permit the Commission to compel a result that is not consistent with the law or sound reasoning. The sources of law that the Commission could draw from do not place the burden of extinguishing an easement on a party not having a property interest in the easement.

In its own brief the Commission recognizes that the customer here should bear the cost of removing and relocating the Red Sapp road line. The Commission's brief asserts that "because Gulf Power was awarded the right to serve, either Gulf Power or its customer should be responsible for the relocation cost." [PSC Answer on Cross-Appeal at 10] Since the Commission could not force the customer to pay, it placed the burden on Gulf Power. The fact is that Gulf Power had nothing to do with the easement or the

relocation of the line and therefore has no grounds upon which to force the customer, if it so desired, to pay for the relocation costs. This further shows that Gulf Power is an uninvolved party to the agreement providing for the relocation of the Red Sapp road line.

The agreement between the Coop and the customer regarding the relocation costs is no different than any of the other "gifts" given by the Coop in the name of economic development. Gulf Power should not, and in fact must not be made to pay for the Coop's economic development endeavors over which it has no control or discretion.

II. The Coop waived the right to recover the costs of relocating the Red Sapp road line and must not be allowed to recover these economic development costs from Gulf Power who was not a party to the relocation.

The Coop voluntarily waived the right to recover the costs associated with the relocation of the Red Sapp road line from the Department of Corrections and Washington County. [Tr. at 360-363; Hearing Exhibit 16] That these two parties were the only two parties who could be held responsible for such costs has been discussed in detail in Gulf Power's initial brief on cross-appeal and will not be repeated here. Affirming the Commission's award of relocation costs to the Coop is in effect allowing the Coop to back out of its economic development endeavors because it is not being allowed to serve the new customer at which the economic development endeavors were targeted. Moreover, allowing the award challenged via this cross appeal to stand would in effect require Gulf Power to pay for the economic development endeavors of a competing utility. This is quite simply an unreasonable result.

The Coop offered an economic development package to Washington County and the Department of Corrections in order to attract a correctional facility to Washington

County. [Coop Reply at 20] That package consisted of a monetary grant, financial help in securing a federal rural development loan and the removal and relocation of utility property that was a nonconforming use of the property. [Coop Reply at 20] The Coop has argued that it did not precondition the waiver of the removal and relocation costs associated with the Red Sapp road line, or any of the other economic development gifts on the Coop being granted the right to serve the new correctional facility. [Tr. 334] Now it claims that the relocation of the Red Sapp road line at no cost to the county or the Department of Corrections was conditioned on the Coop being able to serve the prison. [Coop's answer brief on cross-appeal at 32-33] Whichever is true, the end result is that it was an economic development enticement from the Coop to Washington County and the Department of Corrections. Throughout its briefs the Coop states that Gulf Power was not involved in the economic development negotiations between the Coop and the Department of Corrections and Washington County. To compel Gulf Power to be an involuntary party to the Coop's economic development endeavors is without any reasonable basis. No public policy is served by shifting one utility's economic development expenses to one of its competitors. This is in effect allowing the Coop to spend Gulf Power's money to buy a chance to serve a customer that it knew it could not serve without uneconomically duplicating Gulf Power's facilities. Sound public policy cannot support such an unreasonable result.

Current federal law makes it illegal for the Coop to precondition rural development loans on the Coop receiving the right to serve a customer resulting from the economic development activity. Rural Electrification Loan Restructuring Act of 1993,

Public Law 103-129, Nov. 1, 1993. Thus, the federal rural development loans are intended to be purely economic development and not intended to serve as a means to secure electric loads for cooperatives. Likewise, it is not sound policy to allow the Commission to pass on the economic development costs of the Coop to Gulf Power simply because the Coop ultimately proved unsuccessful in its efforts to "buy" the right to serve the prison. The Coop should bear the costs of its own economic development endeavors regardless of whether it has a right to serve a particular customer.

CONCLUSION

The Commission's decision to require Gulf Power to reimburse the Coop for the removal and relocation of the Red Sapp road line is arbitrary and capricious. The Commission failed to articulate any valid reason for the award to the Coop. That portion of Commission Order No. PSC-95-0271-FOF-EU should be reversed and remanded to the Commission with instructions to strike that requirement from the order.

Respectfully submitted this 2nd day of January, 1996

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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 2nd day of January, 1996 by U.S. Mail to the following:

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