

IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC., )

Petitioner/Appellant )

v. )

JULIA L. JOHNSON, as Chairman )  
FLORIDA PUBLIC SERVICE COMMISSION, and )  
GULF POWER COMPANY )


Respondents/Appellees )

Case. No. 92,479

**FILED**

SID J. WHITE

JUN 15, 1998

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

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**ANSWER BRIEF OF GULF POWER COMPANY**

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## SYMBOLS AND DESIGNATIONS

References are made: to the record "[R-\_\_]"; to hearing exhibits "[Ex.\_\_\_\_]"; to hearing transcripts "[Tr. \_\_\_\_]." 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 Power or GPC. Gulf Coast Electric Cooperative, Inc. is referred to in this brief as GCEC, the Coop, or the Appellant.

## STATEMENT OF THE CASE AND FACTS

Appellee Gulf Power Company rejects Appellant's Statement of the Case and Facts presented in the Initial Brief as inaccurate, incomplete and argumentative. In lieu thereof, Gulf Power submits the following:

(a) Nature of Case: This case is an appeal from an order entered in an administrative proceeding involving the Florida Public Service Commission's exercise of its statutory jurisdiction over the electric grid in Florida and territorial matters involving electric utilities. The Commission is directed by statute to prevent the further uneconomic duplication of electric generation, transmission and distribution facilities. The administrative proceedings held in this phase of the docket below were conducted as part of the Commission's attention to this statutory directive. In contrast to the earlier case before this Court arising out of the same Commission docket which addressed a specific dispute about which utility should properly serve a particular customer actually requesting electric service, this case involves the Commission's examination of whether further uneconomic duplication is likely to occur in several specific areas located in south Washington County and in Bay County. There is no dispute over a specific customer request for electric service at issue in the case presently before the Court pursuant to the appeal being pursued by Appellant.

(b) Course of Proceeding and Jurisdiction: An evidentiary hearing was held on April 29 and 30, 1997 pursuant to the Commission's decision in Order No. PSC-95-0271-FOF-EU wherein the Commission stated that if Gulf Power and GCEC "are unable to negotiate an agreement, then we will conduct an additional evidentiary proceeding to

resolve the continuing dispute between them." 95 FPSC 3:16, 17 In addition, on June 18, 1997, the Commission and the parties visited 15 sites throughout south Washington and Bay Counties in order to view the extent of the commingling of facilities of the two utilities and evaluate the prospect of further uneconomic duplication in these areas. Having considered all the evidence and the arguments of the parties, the Commission entered Order No. PSC-98-0174-FOF-EU, on January 28, 1998 [R-999]. Gulf Coast Electric Cooperative, Inc. filed a notice of appeal on February 26, 1998 [R-1026]. This Court has jurisdiction pursuant to Article V, Section 3(b)(2) of the Florida Constitution and Section 366.10 of the Florida Statutes (1997).

(c) Disposition in Lower Tribunal: After having considered the evidence presented at hearing on April 29-30 and June 18, 1997, the Commission declined to draw territorial boundaries between Gulf Power and the Coop. The Commission found

. . . that further uneconomic duplication of the electric facilities in the 27 identified areas where the facilities of Gulf Power and Gulf Coast are commingled will not occur because of the negligible cost of incremental service expansion. In addition, future uneconomic duplication between these two utilities will be precluded through the application of and compliance with criteria for resolving territorial disputes previously established by this Commission and through refinements to those guidelines set forth in Gulf Power's Composite Exhibit 5. 98 FPSC 1:647, 655

In its determination that a territorial boundary should not be established between Gulf Power and GCEC in either south Washington County or Bay County, the Commission found:

[t]here is no assurance that a territorial boundary is going to be the most economic way of providing service. We have established that the facilities are commingled and that the incremental cost to serve additional customers is negligible. Thus, in the congested areas, a 'line on the ground' will cure neither past nor future

duplication. In the undeveloped areas, a line on the ground will eliminate the flexibility the utilities need to determine which one is in the most economic position to extend service. That flexibility will result in the least cost service provision. It is inappropriate for us to draw lines in undeveloped areas in south Washington and Bay Counties where we do not know what the expansion patterns are going to be. 98 FPSC 1:647, 654

The Commission further stated:

. . . drawing lines on the ground would result in centralized planning by this Commission which is not the most economic way to determine the service areas because it does not take into account market forces which will dictate the manner in which some of the expansion of facilities is going to take place. 98 FPSC 1:647, 655

(d) Statement of Facts: The Commission declined to establish territorial boundaries in this proceeding because drawing territorial boundaries or "lines on the ground" is not necessary to prevent further uneconomic duplication of electric facilities and is therefore not in the public interest. According to evidence presented at the hearing in this case, "lines on the ground" would actually lead to and compel the further uneconomic duplication of electric facilities, contrary to the specific statutory mandate the Commission is charged with enforcing. [Tr. 161-62] The record contains numerous examples of instances where the existence of a territorial boundary would lead to and in fact mandate uneconomic duplication of facilities by either Gulf Power or GCEC. [Tr. 123-24, 495-97] Given the established guidelines of the Florida Public Service Commission and the Florida Supreme Court regarding the resolution of territorial disputes, further uneconomic duplication of facilities is not likely to occur in either south Washington County or Bay County unless a fixed boundary is imposed by this Commission. [Tr. 244]



The dynamic system that Florida presently uses to allocate utility territory provides the Commission and the utilities in this case with an inherent flexibility that allows the public interest to be served. [Tr. 161] This flexibility has been useful and effective in the resolution of territorial issues in the past and is still needed with regard to territorial issues that may arise in the future. [Tr. 176] The present “innovative” system provides continuity, without imposing a single rigid model or predetermined result on the citizens that may be served by these utilities in the future. [Tr. 160-61; Composite Exhibit. 5] The current territorial dispute resolution rules provide an effective set of guidelines by which further uneconomic duplication of facilities can be avoided. [Tr. 160-61, 163, 191] The Florida legislature has consistently declined to mandate such a rigid policy for the state whenever such proposals have been presented during legislative sessions. [Tr. 160-61] Since the enactment of the current regulatory scheme in 1974, the legislature has revisited this area of the law on more than one occasion and has continued the current regulatory scheme in lieu of mandating lines on the ground or designating exclusive territorial areas to each of the electric utilities in the state. [Tr. 99, 161-62]

In the course of the hearing in this case, there was no active, bona fide dispute between the two utilities over service to a particular customer or group of customers actively seeking electric service. [Tr. 420] Commission policy has historically recognized that Subsection 366.04(2)(e) of the Florida Statutes speaks in terms of an existing territorial dispute. Until an actual and real controversy arises, the Commission has declined to intercede in and preclude a potential dispute by establishing territorial boundaries. [Tr. 162] Only one dispute between these two utilities, the dispute over

service to the Washington County Correctional Institute, has come to the Commission for resolution in over twelve years. [Tr. 191]

The cost to extend service in areas where the two utilities' facilities are in close proximity of each other, commingled, or both is de minimis in most instances. [Tr. 550] Often, only a service drop is required of either utility. [Tr. 464] Evidence in this record defining the term "close proximity" suggests that the outer limits of "close proximity" is no greater than 1,000 feet. Although it is undisputed that there were 27 maps containing areas where the two utilities' facilities are in close proximity to each other, commingled, or both, it was never agreed that the entire area on each of these 27 maps had facilities of both utilities in close proximity to each other. The facilities of the two utilities are considered to be in close proximity of each other, commingled, or both only in those places on the referenced maps where one utility's facilities are within 1000 feet of the other utility's facilities. [Tr. 268] In these areas it is most likely that no uneconomic duplication of facilities could occur. [Tr. 550] Where the electric facilities are commingled and/or in close proximity the further uneconomic duplication of facilities is not likely to occur since the cost for either utility to serve a new customer in such an area would be de minimis. [Tr. 172, 549-51] The same is true in areas where the lines of two utilities cross. [Tr. 290]

The basic electric infrastructure to provide electric service in the identified areas for both Gulf Power and GCEC was constructed prior to the legislature's statutory directive to the Commission charging it with the prevention of further uneconomic duplication of electric facilities. [See Tr. 297; Ex. 8] The growth rate is gradual and only

a moderate number of customers are added by Gulf Power each year in the identified areas. [Tr. 448, 457] Gulf Power's planning is based on reasonable projections of growth. [Tr. 448] Gulf Power and GCEC plan to serve an expected aggregate load growth in an area. [Tr. 128, 361-63] Historical growth trends, known customer additions and the presence of GCEC's facilities are utilized by Gulf Power in projecting its future load growth. [Tr. 449] Nothing in the identified area is expected to change enough to have any impact on Gulf Power's transmission system or its planning. [Tr. 462] The same is true with regard to Gulf Power's capacity resource needs. [Tr. 462] Fixed territorial boundaries provide no benefit to planning of the distribution system in the identified areas. [Tr. 463] No one can accurately predict today how growth patterns will occur in the future in the now-undeveloped parts of the two counties at issue. [Tr. 388] Reasonable system planning neither requires nor supports the need for such precision. [Tr. 467] Gulf Power's expansion in the identified area is driven by specific customer requests for service which are met by Gulf Power with specific construction to provide the requested service. Utilities do not serve areas; they serve customers. [Tr. 364] It is almost impossible for Gulf Power and GCEC to be planning to serve the same specific electric load. [Tr. 363] Expected load growth is the basis of planning not what area is being served. [Tr. 364]

The Coop's proposed boundary lines would carve out for GCEC most of the vast unserved territory and eliminate all expansion by Gulf Power while forcing GCEC to expand uneconomically to serve new loads and customers that could otherwise be economically served by Gulf Power. [Tr. 495-97, 511-12] GCEC's proposed territorial

boundary was formulated without regard to either utility's cost to serve. Cost to serve is not one of the factors listed by GCEC's witness as important in establishing a territorial boundary or resolving a territorial dispute. [See Tr. 25-26] Cost to serve is listed as a consideration in the Commission's rule regarding the resolution of a territorial disputes. [Chapter 25-6.0441(2)(c), Florida Administrative Code] The record contains many examples of instances where GCEC's witness apportioned more area to GCEC by failing to follow his own proposed guidelines. [Tr. 512-13] GCEC's boundary lines proposal would preclude the type of customer choice that the Florida Supreme Court found to be proper in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996). [Tr.511] Boundary lines would preclude statutorily protected customer choice even in cases where the difference in cost to serve is de minimis, no uneconomic duplication of facilities will occur and all other factors are substantially equal. [Tr. 171-72, 326]

Evidence was presented to show that future uneconomic duplication of electric facilities can be avoided by Gulf Power and the Coop through the application of and compliance with guidelines previously established by the Commission or through refinements such as those contemplated by the Commission's order under review in this case. [Tr. 154, 160-64, 166-69] Gulf Power witnesses offered proposals which serve as refinements to the current regulatory scheme that will aid in the prevention of the further uneconomic duplication of electric facilities in South Washington and Bay Counties. Each proposal contains requirements that supplement, rather than replace the current regulatory scheme. [Tr. 168-69] These guidelines allow for the least cost expansion of both Gulf Power and GCEC in the unserved areas of Bay and South Washington Counties

without the further uneconomic duplication of facilities. [Tr. 275-76] The guidelines proposed by Gulf Power are a reasonable, less restrictive alternative to boundary lines because they prohibit the extension of distribution lines to serve future speculative growth and require the utilities to discuss potential disputes. [Tr. 167-68; Composite Exhibit 5] Mediation by the Commission staff would occur if the utilities found they could not resolve a potential dispute through this consultation process. [Tr. 167-68] A provision allowing for an award of attorney's fees to the prevailing party would provide further incentive to the utilities to reach agreement short of contested litigation. [Tr. 167-68, 277] These proposed guidelines would allow the economic expansion of both utilities to the benefit of all ratepayers of Northwest Florida and reduce the need for direct Commission resolution of territorial disputes. [Tr. 168]

## SUMMARY OF ARGUMENT

The Commission's decision in Order No. PSC-98-0174-FOF-EU should be affirmed by this Court. Competent, substantial evidence supports the Commission's finding that a territorial boundary in this instance is not in the public's best interest and that the public interest is better served through case-by-case determinations aided by guidelines and detailed procedures consistent with Commission and judicial precedent. Competent substantial evidence in the record shows that where both utilities have facilities in place, the incremental cost to serve for either utility is negligible and further uneconomic duplication of facilities will not occur.

Mere existence of duplication or commingling of facilities is not per se uneconomic duplication. Statutory and case law support a distinction between mere duplication and uneconomic duplication. The case law arising from the Commission's approval of territorial agreements are not applicable to this case. There is no territorial agreement in this present case. The Commission's longstanding policy regarding resolution of territorial matters is based on a case-by-case determination. That policy provides the Commission and the utilities needed flexibility to assure the most economic expansion of electric facilities and is therefore in the public's best interest.

The Commission was not obligated to draw territorial boundary lines in this case. The ultimate issue of whether to draw lines on the ground was held open pending the results of the second evidentiary hearing. Competent substantial evidence introduced at that hearing (as supplemented by the Commission's first-hand review of the identified areas) showed that a territorial boundary would not be in the public's best interest. The

Commission determined that further conflict in the identified areas was unlikely. To enhance the Commission's current policy, the Commission contemplates requiring the parties to comply with detailed procedures and guidelines addressing new electric subtransmission and distribution facilities, and requests for new service. In this regard the Commission fulfilled its stated intent to resolve the continuing dispute between these two utilities.

## ARGUMENT

**I. THE COMMISSION'S ORDER DETERMINING THAT A TERRITORIAL BOUNDARY SHALL NOT BE ESTABLISHED BETWEEN GULF POWER AND GCEC IN EITHER SOUTH WASHINGTON COUNTY OR BAY COUNTY COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW AND IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE OF RECORD**

Following an evidentiary proceeding which consisted of testimony presented for two days in April 1997 and a Commission field visit in June 1997 that included extensive travel through Bay County and south Washington County during which the Commission stopped and viewed 15 different locations in the identified areas, the Commission concluded that a territorial boundary between Gulf Power and GCEC should not be established in south Washington County or Bay County. After considering all the evidence and resolving conflicting testimony based on its first hand evaluation of the witnesses during their examinations, the Commission, mindful of its statutory obligations to prevent the further uneconomic duplication of electric facilities, found that there is no assurance that a territorial boundary is going to be the most economic way of providing electric service. Based on an evidentiary record consisting of over 700 pages of transcript and 18 exhibits, the Commission concluded that in contrast to a territorial boundary imposed without agreement of the parties, the public interest is better served by the Commission actively supervising territorial matters involving these two utilities by requiring their compliance with specific guidelines and detailed procedures consistent with established Commission and judicial precedent. The Commission further decided



that it will continue to appropriately exercise its jurisdiction and, if a dispute arises, determine on a case-by-case basis which utility should serve customers in specific areas.

In its role as the fact finder in this case, the Commission is entitled to great deference from this Court. The Court has repeatedly stated that it will not reweigh or reevaluate evidence presented to the Commission. Instead, the Court will examine the record only to determine whether the order subject to review meets the essential requirements of law and whether the Commission had available to it competent and substantial evidence to support its findings. Pan American World Airways, Inc v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983); Citizens v. Public Service Commission, 464 So.2d 1194 (Fla. 1985); McCaw Communications v. Clark, 679 So.2d 1177 (Fla. 1996).

Although the Appellant would have this Court believe that the record consists exclusively of undisputed facts, that is simply not the case. As the Commission noted in its order here under review, the ultimate question whether a territorial boundary should be drawn was vigorously contested by the parties. 98 FPSC 1:647, 655 For its part, Gulf Power presented evidence that further uneconomic investment will not occur in areas where the two utilities are in close proximity or commingled because the facilities and investment of both utilities are already in place. [Tr. 171-72, 245-46, 549-51] Under such circumstances, the incremental cost for either utility to serve additional customers is negligible. [Tr. at 171-72, 549-51] Under these circumstances, customer choice will be an appropriate factor for future electric service. See Gulf Coast at 123 Territorial boundary lines would preclude the opportunity for such customer choice. Failure to

consider customer preference if all other factors are substantially equal constitutes reversible error. Id.

**II. APPELLANT'S ARGUMENT IN PART II OF THE INITIAL BRIEF MERELY REFORMULATES THE ARGUMENTS IN PART I (AND IN APPELLANT'S STATEMENT OF FACTS) AND IS WITHOUT MERIT AS REFORMULATED**

**A. NOT ALL DUPLICATION OF ELECTRIC FACILITIES RISES TO THE LEVEL OF STATUTORILY PROSCRIBED UNECONOMIC DUPLICATION**

As noted previously, the Coop would have the Court believe that there were no evidentiary disputes for the Commission as fact finder to resolve. To the contrary, the Commission as fact finder had to resolve many disputed questions of fact presented by the various witnesses testifying in the proceeding below. As fact finder, the Commission heard the evidence, evaluated the demeanor of the witnesses appearing before it, and determined the relative weight to give the testimony of each witness in light of the Commission's own first-hand observation of the electric facilities in the identified areas. As such, the Commission was in a better position to resolve factual issues than this Court finds itself when reviewing a cold record.

In making its decision in this case, the Commission was mindful of its statutory obligation to prevent further uneconomic duplication of electric facilities. The Coop contends that the mere existence of commingled electric facilities makes further uneconomic duplication inevitable. The Commission rejected this contention, specifically noting that although the electric facilities of two utilities may be commingled or in close proximity to each other, it does not necessarily follow that further uneconomic duplication of facilities will automatically occur. 98 FPSC 1:647, 654

The fact that the legislature included the words "further" and "uneconomic" as modifiers of the word "duplication" when it created Section 366.05(4) of the Florida Statutes is significant. The legislature's mandate clearly contemplated that there may be instances of duplication that do not constitute uneconomic duplication. This Court also recognized that such instances occur when it decided the earlier appeal arising from the Commission's docket below.

In Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996), the Court found that the duplication of electric facilities that the Coop was forced to make in order to serve the Washington County Correctional Institution did not constitute uneconomic duplication of Gulf Power's established electric facilities that were adjacent to and on the same side of the highway as the then proposed prison. Nevertheless, Appellant's argument throughout its initial brief in this appeal conveniently omits the distinction between mere duplication and uneconomic duplication. In the previous appeal arising from the Commission's docket below, the Coop successfully argued that unnecessary electric facilities costing approximately \$15,000 did not constitute uneconomic duplication of electric facilities. Notwithstanding its previous position, the Coop now claims that any duplication constitutes uneconomic duplication. The Commission declined to follow the Coop's duplicitous and self-serving argument in this regard because the Commission is constrained to follow the law. The Court should likewise not countenance such inconsistent arguments by Appellant and should affirm the Commission's order in this case.

**B. PRIOR CASES ADDRESSING TERRITORIAL BOUNDARY AGREEMENTS NOT APPLICABLE IN THIS CASE**

It is well established that past decisions of the Commission and this Court encourage territorial agreements between electric utilities where such agreements are in the public interest. It follows that there are some instances where territorial agreements may not be in the public interest. That this is true is borne out by the requirement that proposed territorial agreements must be submitted to the Commission for review and approval before they would be binding on the parties. See Rule 25-6.0440(1), Florida Administrative Code; In re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 95 FPSC 7:343, 345 (1995). Gulf Power objected to territorial boundaries in this case on the basis that they do not serve the public's best interest. As a result, Gulf Power's basis for its refusal to agree to territorial boundaries in this case is consistent with the Commission's policy of encouraging territorial agreements. Gulf's position in this regard has been vindicated by the Commission's review of the evidence in this case and its subsequent conclusion that drawing lines on the ground in the undeveloped areas identified in this case will eliminate the flexibility needed to determine which of the two utilities is in the most economic position to extend service to a given area in response to specific requests for electric service. On finding that such flexibility will result in the least cost service provision, the Commission concluded that it would be inappropriate for the Commission to draw lines in undeveloped areas of south Washington County and Bay County. 98 FPSC 1:647, 655

Appellant's initial brief cites a number of cases involving the Commission's authority to approve territorial agreements. As is obvious from the record below, there is neither a territorial agreement in this case for the Commission to approve nor does this case involve a violation of a territorial agreement previously approved. As a result, the territorial agreement cases cited by Appellant have no application to the decision presently before the Court. The Commission's decision not to impose a territorial boundary in this case does not invalidate territorial boundaries established elsewhere under different circumstances. The Commission's order specifically states:

It is not our position that establishing a territorial boundary is never appropriate. In this instance, the purpose of the hearing was to explore the situation in south Washington and Bay Counties in its entirety. In Order No. PSC-95-0913-FOF-EU, issued July 27, 1995, we ordered the parties to establish a territorial boundary in those areas "where facilities are commingled . . . and where further conflict is likely." (Order page 4, emphasis in the original) As stated previously, the evidence in the record is that while the facilities are commingled, further conflict is not likely because the facilities are already in place. If a specific dispute occurs, such as a prison being built in an undeveloped area, we have jurisdiction to, on a case-by-case basis, draw a line within the given area and we will continue to appropriately exercise our jurisdiction to do so. This Order is limited to the identified areas of south Washington and Bay Counties and shall have no effect on established territorial boundaries throughout Florida that have heretofore been created and approved.

98 FPSC 1:647, 654.

Contrary to the superficial analogy provided by Appellant, the case of Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So2d 1159 (Fla. 1976) [hereinafter RUB v. Clay Electric] is not at all similar to the instant case. RUB v. Clay Electric was the result of a territorial dispute centered around plans by a municipal water, sewer and electric utility to require

that customers in a specific area (known as "the Copeland Settlement") previously unserved by that utility who wanted to receive water and sewer service from the municipal utility would also have to take electric service from the municipal utility. Such a tying arrangement would have allowed/required the municipal utility to construct new electric facilities into the Copeland Settlement area to serve existing electric customers of Clay Electric. The Commission's decision in RUB v. Clay Electric, as part of its jurisdiction to prevent the further uneconomic duplication of electric facilities, required the municipal utility to refrain from offering electric service or constructing duplicate electric facilities in the area known as the Copeland Settlement. It was significant to the Commission's decision that Clay Electric had existing facilities that had been providing electric service to the Copeland Settlement for over 25 years. As previously noted, the municipal utility was not providing electric service to the Copeland Settlement and would have had to construct new facilities into the area to do so. The Commission's order in RUB v. Clay Electric did allow the two utilities the flexibility to consider transfer of electric service customers in the Copeland Settlement area from one utility to the other "as part of an overall service area delineation" created by a possible territorial agreement between the two utilities that was specifically encouraged by the Commission. 340 So.2d at 1161.

Unlike the facts presented in RUB v. Clay Electric, the issues presented to the Commission in the case now under review in this Court did not involve the prospective displacement of electric service to existing customers of one utility by the construction of new electric facilities into an area by another utility. The existence of commingled

electric facilities in the identified areas means that both utilities are providing electric service to existing customers in those areas. Neither utility has advocated the transfer of customers from one utility to the other.

Mandatory territorial boundary lines on the ground between electric utilities is not the law in Florida. [See, Richard C. Bellak & Martha Carter Brown, Drawing Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. U.L. Rev. 407(1991)] A comprehensive review of the subject matter in the Florida State University Law Review shows that Florida has a long-standing and effective policy of resolving territorial matters on a case-by-case basis. The present "innovative" system provides continuity, without imposing a single rigid model or predetermined result on the citizens that may be served by Florida's electric utilities in the future. The Florida legislature has consistently declined to mandate such a rigid policy for the state whenever such proposals have been presented during legislative sessions. [Tr. 99, 161-162]



### III. APPELLANT'S REITERATED ARGUMENT THAT THE COMMISSION'S PRIOR ORDERS IN THIS CASE REQUIRE THAT BOUNDARIES BE DRAWN IS WITHOUT MERIT

There is a recurring theme throughout Appellant's initial brief that mistakenly indicates that the Commission was obligated to draw boundary lines in this case because of statements of Commission intent for future action contained in two earlier orders issued in this same docket. As demonstrated in Part I of this answer brief, the Commission's decision not to draw territorial boundaries in this case is supported by competent, substantial evidence bearing on the ultimate issue in this case. Based on competent, substantial evidence in record, the Commission concluded that territorial boundaries are not necessary either to prevent the further uneconomic duplication of facilities or to resolve any perceived ongoing conflict between the two utilities. In fact, from the evidence presented regarding the identified areas subject to review in this case, the Commission concluded that territorial boundaries would contribute to rather than prevent further uneconomic duplication of electric facilities. Having reached this conclusion based on competent, substantial evidence in the record, it would have been error for the Commission to ignore its own conclusions regarding the public interest and draw boundary lines on the ground anyway.

The Commission's prior expressions of intent, made before the Commission received evidence bearing directly on the ultimate issue to be decided, cannot legitimately constrain the Commission in the discharge of its statutory duties. The doctrine of administrative finality does not dictate a different result. The Commission's prior orders

in the docket below clearly were not final agency action with regard to the issue of territorial boundaries or the resolution of any perceived ongoing conflict between the utilities. The Commission's prior orders expressly left the docket open for further evidentiary proceedings. The prior orders reserved the Commission's right, indeed the obligation, to hold further proceedings in the docket below whether or not agreement between the parties was achieved. The Commissioners responsible for hearing this case clearly intended to allow themselves the ability to determine how best to resolve the territorial issues between Gulf Power and GCEC after considering the evidence that would be presented at the hearing that was ultimately held in April 1997. Each of the Commissioners on the panel hearing this matter (including Commissioner Clark who dissented from the majority) agreed that the decision whether to draw a boundary line was to be made after the evidentiary hearing. Each Commissioner acknowledged that they had the authority to chose not to draw a line if that is what the evidence showed to be in the public's best interest. [R. 616-29] This makes legal sense in that the Commission's decision must be based on the evidence which had not yet been heard. Had an agreement between the two utilities been reached, proceedings would have been held for the purpose of careful review of the resulting agreement under applicable law and Commission policy to ensure that the public interest is protected. [See, 95 FPSC 7:343, 346-7] Since an agreement between the parties was not reached, the Commission held further evidentiary proceedings to determine the appropriate solution to impose on the parties. [See, 95 FPSC 3: 24]

The action taken by the Commission is wholly consistent with its prior orders in this case. The Commission, in declining to draw boundary lines, has determined that further conflict between the parties can be avoided through the establishment of and compliance with detailed procedures and guidelines addressing new electric subtransmission and distribution facilities, and requests for new service. The procedures and guidelines contemplated by the Commission shall take into account Commission precedent on resolving territorial disputes and will be enforceable with respect to each of the two utilities. The parties have been given an opportunity to cooperatively develop these detailed procedures and guidelines which shall be submitted to the Commission for review. In the absence of an agreement between the parties, as part of the Commission's commitment to prevent further uneconomic duplication of electric facilities and the Commission's active supervision of territorial matters involving the two utilities, it is expected to mandate that the two utilities comply with detailed procedures and guidelines specified by order. In this regard, the Commission has indeed accomplished its stated intent of resolving the continuing dispute between these two utilities

Even if the Commission's action declining to draw territorial boundaries in this case could not be reconciled with the statements of intent in its prior orders, the Commission's continuing supervisory jurisdiction as a regulatory agency requires that it modify pre-existing orders when new evidence is presented warranting such a change in the public interest. See, Matthews v. State, 149 So. 648 (Fla. 1933); McCaw Communications v. Clark, 679 So.2d 1177 (Fla. 1996). In the case presently before the Court, the Commission, consistent with competent, substantial evidence in the record,

concluded that drawing territorial boundaries was not in the public interest. Therefore, deviation from the intent expressed in prior orders was not only permissible, it is mandated under applicable judicial precedent. Id.; See also Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249, 253 (Fla. 1982).

Case authority cited by Appellant for the proposition that the Commission has limited ability to change its prior orders has no application to the case at bar. Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) involved a decision by the Commission to rescind its earlier approval of a territorial agreement between two gas utilities. Unlike the case at bar, the subsequent order was not issued in the same docketed matter but in a totally new proceeding. In Mason, the Florida Supreme Court placed particular emphasis on the fact that the Commission's order then under review did not contain a finding that the public interest was served by abrogating the Commission's prior approval of the territorial agreement. Id. At 340. In the case presently before the Court, the Commission has concluded that the public interest is not served by drawing lines on the ground. 98 FPSC 1: 647, 654-55

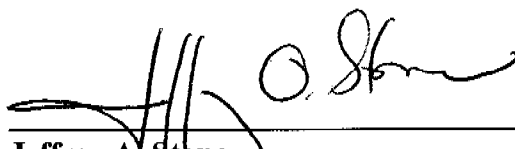
Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979) involved a Commission decision in a subsequent new proceeding that gave new life to a trucking certificate of convenience that had been found dormant some two years earlier. In that first case, the issue had been fully litigated and the finding of dormancy constituted final agency action. The Court concluded that the second case to address the same issue was a nullity since the certificate of convenience was effectively canceled by the prior Commission action. Unlike the situation presented in Austin Tupler Trucking, Inc., the

Commission's prior orders in the case presently before the Court expressly held the docket open for further evidentiary proceedings bearing on the ultimate issue to be decided. In other words, the question before the Commission had not yet been fully litigated.

## CONCLUSION

Appellant's arguments ignore the relevant statutes, including the Commission's statutory obligation to prevent further uneconomic duplication of electric facilities. The appellant also disregards provisions in the applicable administrative rules and relevant case law requiring consideration of customer preference when all other factors are essentially equal. In contrast, the Commission's order is supported by competent, substantial evidence in the record and is wholly consistent with the essential requirements of law. Therefore, Gulf Power Company joins the Florida Public Service Commission and respectfully requests that the Court affirm Commission Order No. PSC-98-0174-FOF-EU.

Respectfully submitted this 12th day of June 1998



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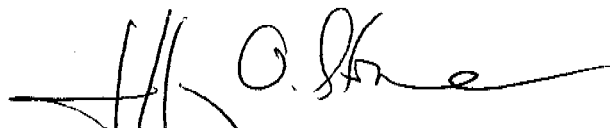
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail on this 12th day of June, 1998 to the following:

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