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

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee Florida Public Service Commission is referred to as the Commission. Appellee Gulf Power Company is referred to as Gulf Power or GPC. Appellant Gulf Coast Electric Cooperative, Inc. is referred to as Gulf Coast or GCEC.

References to the April 29-30, 1997 hearing and June 18, 1998 view in this case are designated Tr.____. References to the Record of this proceeding are designated R.____.

STATEMENT OF THE CASE AND FACTS

Appellee Florida Public Service Commission (Commission) adopts that part of appellant Gulf Coast Electric Cooperative, Inc.'s (Gulf Coast or GCEC) Statement of the Case and Facts presented in the Initial Brief, p. 1 through p. 3, ¶(c). The remainder of Gulf Coast's Statement is rejected as erroneous and argumentative, with the exception that the Commission agrees that there are 27 areas in Bay County and South Washington County where the electric facilities of Gulf Coast and Gulf Power Company are in close proximity to each other and are commingled as shown by Gulf Coast's Exhibit 2 and GPC's Exhibit 6. Initial Brief, p. 3-4.

To the foregoing, the Commission would also add the following:

Gulf Coast is a rural electric cooperative subject to the provisions of Chapter 425, Florida Statutes. Tr. 17. As Gulf Coast acknowledges, Gulf Power Company (GPC or Gulf Power) is as capable of serving the disputed areas as Gulf Coast. Tr. 28. Gulf Coast also acknowledges that "least cost to serve" is one of the criteria utilized by the Commission in resolving territorial disputes. Tr. 37. Gulf Coast's rates are essentially unregulated by the Commission and are, both currently and historically, higher than the rates made available by Gulf Power.

Exh. 5 (GEH-1). Gulf Power's rates are subject to the regulatory oversight of the Commission. Tr. 136-7; 157.

Gulf Coast's suggested territorial boundary lines are not based on either equidistance between the existing facilities or the concept of least cost. Tr. 48. Gulf Coast believes that the exercise of customer choice will lead to uneconomic duplication of facilities. Tr. 51. Gulf Coast would accord little, if any, weight to customer choice even though that is used in the Commission's rules as a factor in resolving territorial disputes. Tr. 114-116. Gulf Coast acknowledges that the concept of service area integrity it favors is not stated in the statutes or rules and that the Legislature has rejected mandated territorial boundaries when those have been proposed. Tr. 99. Drawing territorial boundary lines in Northwest Florida, where there are vast areas of undeveloped property, would preclude Gulf Power from serving new customers for whom GPC would be the economic choice for service. Tr. 156.

Territorial boundaries would subject not only future residential, but also commercial and industrial customers to Gulf Coast's significantly higher rates. Tr. 157-8. The frequency of territorial disputes involving Gulf Coast and Gulf Power has been low since 1972 and there is no actual dispute as to a particular customer in this proceeding. Tr. 165.

Gulf Power's obligation to serve on request is, inter alia, statutory. Tr. 371. Unlike Gulf Power, Gulf Coast is not subject to rate regulation by the Commission or any other regulatory body and is not subject to any legal or regulatory obligation to provide cost-effective electric service. Tr. 530. See also, Tr. 539-541.

The construction of lines in close proximity does not necessarily reflect uneconomic duplication. Tr. 549. If distribution lines are in such close proximity, the incremental cost to serve a customer between them is so low, that no "uneconomic" or even incremental duplication is likely. Tr. 550-1. The drawing of lines and forced transfers of customers will in many cases themselves cause uneconomic duplication. Tr. 561-2.

Gulf Coast's witness Gordon admitted he could determine which utility could provide service at least incremental cost for any geographic area in Washington or Bay County. Tr. 696-7. Witness Gordon did not know of any state commission or legislative body which based resolution of territorial disputes on the six factors Gulf Coast utilized in the suggested territorial boundaries. Tr. 697. Witness Gordon was unaware of any Commission decision in the direction of not supporting least cost alternatives. Tr. 700.

The two public witnesses testified against the drawing of territorial boundaries, with particular concerns as to transfers of territory or customers to higher rate service and the effect of that on prospects for commercial and industrial development, as well as the reliability of current facilities. Tr. 714-717. If the difference in costs between the utilities to serve is, as indicated here, insignificant, customer choice should decide. Tr. 761.

SUMMARY OF THE ARGUMENT

Prior to hearing evidence, the Commission stated its intent in previous orders to draw a territorial boundary between Gulf Coast and Gulf Power if the parties did not submit their own agreed boundary. The Commission's subsequent decision not to do so was not "arbitrary" because it was based on the evaluation of the evidence and argument presented at the hearing. Such was well within the Commission's discretion. Ameristeel Corp. v. Clark; R. 626-7.

Appellant's main argument, based on "uneconomic duplication", misinterprets the function of that concept in utility regulation. "Uneconomic duplication", in its most fundamental aspect, refers to any second provider's competition with the presumed "natural monopoly" provider of utility services. City Gas Company v. Peoples Gas System, Inc.; Bonbright, et al., Principles of Public Utility Rates. Based on a comparison of Chapters 366 and 425, where no factual distinctions exist, the Chapter 366 provider, in this case Gulf Power, is the presumed natural monopoly provider, not Gulf Coast. Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission. Therefore, Gulf Coast's broad-brush claim that its suggested boundary must be drawn so as to avoid further "uneconomic duplication" of Gulf Coast's utility is unsupported as a matter of fact and law. Gulf Coast's attempted reversal of

this Court's holding in Escambia County violates the principle of stare decisis.

Where, as here, both utilities can serve equally well, the fact that a given customer would be on one side of the line Gulf Coast draws rather than the other would not constitute a factual distinction that, in and of itself, could negate the presumption of Escambia County in favor of the Chapter 366 provider. Thus, Gulf Coast's theory, though claimed to be based on "using even the most simple logic", is simply incorrect. Moreover, where, as here, Gulf Coast's residential, industrial and commercial rates are significantly higher than Gulf Power's, the implementation Gulf Coast seeks of its unsupported theory would impact negatively on the general body of ratepayers and would therefore be contrary to the public interest. Section 366.01, Florida Statutes.

In the case-by-case approach taken by the Commission, Gulf Coast may, as has already been demonstrated previously, be chosen as the least cost provider. Gulf Power Co. v. Public Service Commission. However, Gulf Coast's assumption that it can compete for broad-brush awards of customers and territory with Chapter 366 natural monopoly providers in areas where, by stipulation, either utility could serve equally well, is unsupported by the statutes or case law. Therefore, a territorial boundary imposed on that unsupported assumption would be infirm with respect to

its state action immunity from antitrust scrutiny. Columbia Steel Casting Co., Inc. v. Portland General Electric Company. Moreover, that imposed boundary would also result in uneconomic duplication of Gulf Power's natural monopoly in the fundamental sense presented in the foregoing analysis.

The challenged order, in contrast, is supported by competent, substantial evidence and comports with the essential requirements of law. The Commission's finding that there was no assurance that the requested territorial boundary was going to be the most economic way of providing service is amply supported in the record of this proceeding. Moreover, no request of a specific customer was at issue. Therefore, no claim can be made that a territorial dispute relevant to any specific customer was being -- or will be -- left unresolved.

Since experts from both utilities indicated their ability to ascertain appropriate choices for extending future service, the Commission had a competent, substantial evidentiary basis on which to order that guidelines for such decisions be presented to the Commission for review by a time certain. The Commission did not err in substituting this solution for drawing boundaries which would not assure the provision of least cost service, were not in the public interest, and would impact negatively on the general body of ratepayers. The Commission also noted that customer choice would play a role in those extensions of future

service, since the incremental cost for both utilities to serve additional customers in the commingled areas was negligible. Rule 25-6.0441(2), Florida Administrative Code.

Finally, appellant's claim that the Commission had to draw the lines based on the intent stated in prior orders is, on these facts, contrary to the very authority cited by appellant. Matthews v. State. The Commission heard, and accepted, voluminous evidence to the effect that these lines should not be drawn. Moreover, that possible outcome was contemplated subsequent to the initial statements of intent in the prior orders, but prior to the evidentiary hearing in this case. R. 626-7. It is frivolous on the appellant's part to argue that the panel, having reviewed the evidence and arrived at the conclusion that the suggested line drawing would be harmful and counter-productive, must then have been constrained to draw the lines anyway, regardless of those conclusions.

ARGUMENT

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

Appellant's first argument at p. 12-15 of the Initial Brief appears to allege that the Commission must have abused its discretion if it stated an intent in Order No. PSC-95-0271-FOF-EU (Order 0271) to draw a territorial boundary line and then "arbitrarily" decided not to do so in Order No. PSC-98-0174-FOF-EU, the order challenged on appeal (Order).

However, this assertion fails at both ends. Prior to hearing and the evaluation of the evidence and argument, the Commission stated its intent to draw the boundary if none was submitted by agreement of the parties. Of course, if this intent were, as appellant apparently believes, "binding", holding the hearing would not have been necessary at all. Obviously, the statement of intent was not in any sense "binding" because a hearing was necessary to inform the Commission's subsequent decision in this matter. Conversely, it was the very process of evaluating the evidence and argument that caused the Commission to elect not to impose a boundary. Presentation of evidence in support of that decision was heard at length. Therefore, the decision was not "arbitrary", even though Gulf Coast may disagree with it, because it was the direct result of the Commission's

evaluation of the evidence and argument presented. Such was well within the ambit of the Commission's discretion. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); See also, R. 626-7.[1]

Appellant's next argument, the main point of the appeal and one which is then presented numerous times in various reformulations, is that there is evidence of commingled areas between Gulf Coast and Gulf Power. Thus, according to Gulf Coast, avoiding "uneconomic duplication" requires that territorial boundary lines, preferably those offered by Gulf Coast, must be drawn and this Court must order the Commission to draw them.

While Gulf Coast believes its conclusions are matters of "using even the most simple logic", the Commission believes Gulf Coast's argument to be unsupported by either the facts of this case or the applicable law. Gulf Coast's most fundamental mistake is its incomplete, and therefore misleading, understanding of "uneconomic duplication" as that concept applies to utility regulation. Since "uneconomic duplication" is repeated like a mantra in Gulf Coast's arguments, those arguments, too, are mistaken and fundamentally misleading.

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[1] An expanded version of appellant's initial argument is later presented as "Argument III", Initial Brief, p. 29-32. In order to track the Initial Brief, the Commission will later readdress this point as well.

While Gulf Coast disparages Gulf Power's definition of "uneconomic duplication", Gulf Coast never briefs its own definition. Instead, Gulf Coast allows the Court to assume the definition of "uneconomic duplication" from such apparently "self-evident" observations as:

> Needless duplicative construction at the expense of a utility's ratepayers is uneconomic using even the most simple logic.

Initial Brief, p. 24.

While this is undoubtedly true as far as it goes, it is incomplete. Commingled facilities, their proximity, crossed-wires, confusion of customers, i.e., "the facts on the ground", are all germane to evaluating any particular instance of utility duplication but, contrary to Gulf Coast, they are not the complete picture. Indeed, the more fundamental aspect of "uneconomic duplication" inheres in the economic theory relevant to natural monopoly utility regulation as enshrined in decades of this Court's jurisprudence.

For example, in City Gas Company v. Peoples Gas Systems, Inc., 182 So. 2d 429, 433 (Fla. 1965), this Court evaluated, not the facts on the ground of a specific territorial dispute, but the status of territorial agreements based on relevant economic principles:

> ...[competition] is not necessarily the most efficient protective device in all circumstances. In short, in some circumstances, reliance has

been placed rather upon the principle of regulated monopoly.

This principle is explicated in Principles of Public Utility Rates, Bonbright, Danielson and Kamerschen, 2nd Ed., 1988, which explains why a public utility is a "natural monopoly":

> ...public utilities operate under conditions of decreasing costs ... the larger the output of a utility plant per day or per month or per year, the lower will be the cost of production and distribution per kilowatt-hour.... Consequently, only a company enjoying a monopoly in the supply of service in a given area, assuming some kind of barrier to entry, can operate at maximum efficiency. [e.s.]

Bonbright, et al., Principles, p. 19-20. Thus, it is not surprising that, under these circumstances,

> ...[competition] is wasteful of resources because it involves unnecessary duplication of facilities. [e.s.]

Bonbright, et al., Principles, p. 18-19. In effect, if the competing facility's production were added to that of the presumptive natural monopoly, the cost per unit of production would be reduced. Thus, competition constitutes "uneconomic duplication."

An explanation for rate regulation of such natural monopoly utilities is also given in Principles:

> ...the sole [natural monopoly] producer ... could restrict output, raise prices, and reap monopoly profits. Hence, regulation may be needed to thwart this temptation.

Bonbright, et al., Principles, p. 33.

That these economic principles are contained in the provisions of Chapter 366 and govern the Commission's regulation of Chapter 366 public utilities, such as Gulf Power, is easily demonstrated. First, it is clear that the Chapter 366 public utility is treated as a natural monopoly within the area in which it is capable of rendering service, with not only the right, but the obligation to serve every requesting customer:

> 366.03 General Duties of public utility. - Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. [e.s.]

Chapter 366 natural monopoly regulation is not "pure", however. Section 366.051, for example, encourages the production of capacity and energy by cogenerators. The limit on that is that cogenerators cannot receive payment for the power they sell to utilities in excess of "avoided cost", i.e., the cost of new plant avoided by the utility when purchasing from the cogenerator. In Panda-Kathleen, L.P. v. Florida Public Service Commission and Florida Power Corporation, 701 So. 2d 322 (Fla. 1997), this Court agreed with the Commission that encouragement of cogeneration could not extend to meeting a cogenerator's demand for payments which exceeded the limit of avoided cost prescribed by state and federal statutes.

The interaction in this case between a Chapter 366 natural monopoly utility, Gulf Power, and a Chapter 425 rural electric

cooperative, Gulf Coast, raises similarly complex issues. At the outset, review of Chapter 425 indicates that aspects of the natural monopoly model embodied in Chapter 366 are absent in Chapter 425. . . . . .

For example, where Chapter 366 obligates public utilities to provide adequate service to <u>each person</u> requesting it, Chapter 425 severely limits the ability, let alone obligation of a co-op to serve:

> 425.02 Purpose - Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof <u>in rural areas</u>. [e.s.]

Section 425.03 defines a "rural area" as:

> ...any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons;

Section 425.04 further limits cooperative electric company activities in such rural areas to its members, governmental agencies, political subdivisions and ... other persons not in

> excess of 10 percent of the number of its members.... <u>no cooperative shall distribute or sell any electricity, or electric energy to any person</u> residing within any town, city or area which person is <u>receiving adequate central station service</u> or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation; [e.s.]

Moreover, unlike Sections 366.04, 366.041, 366.05 and many other Chapter 366 provisions by which public utility rates are subjected to outside regulation, Chapter 425 lacks any provisions subjecting the rates of a rural electric co-op to outside regulation. Indeed, the lack of such rate regulation is consistent with the subsidized status of rural electric co-ops, the aim of which is to prioritize the provision of electric service in exceptional circumstances where other service is unavailable and therefore with less emphasis on efficiency, achieving ultimate economies of scale, or the lowest possible rates, than the Chapter 366 natural monopoly model. As noted in Principles,

> ... governmental policy may confer priority status on selected enterprises and their customers.... An example of conferring priority status is provided by the REA, which makes loans to electric cooperatives...

Bonbright et al., Principles, p. 121.

To summarize, the Chapter 366 public utility model is a declining cost natural monopoly intended to serve every requesting customer, realize maximum economies of scale and provide service at the lowest rates that outside regulatory scrutiny can achieve. Competition with such a utility not only causes duplication based on facts on the ground, but more significantly, "uneconomic duplication" which deprives ratepayers of additional revenues intended by Chapter 366 to spread the

burden of the monopoly's overhead in order to achieve the lowest possible rates. On the other hand, competition with a rural electric co-op may certainly cause duplication as reflected by facts on the ground, but the claim of "uneconomic duplication" in the more fundamental sense described above is, to some degree, less certain. Though a rural electric co-op is just as much a declining cost enterprise as a public utility, the applicable regulation in Chapter 425 is aimed at other priorities than extracting the maximum economic efficiency possible on behalf of ratepayers. The aim is, instead, the provision of service in exceptional circumstances, even if the cost is higher than usual, efficiency is sub-optimal, subsidies are required, or ultimate economies of scale are not achieved.

Therefore, Gulf Coast's claim that avoiding "uneconomic duplication" of its facilities requires its suggested boundaries is too facile. The claim, in effect, asserts disruption of regulatory goals which, based on Chapter 425, don't even apply to Gulf Coast. More is needed than Gulf Coast's reasoning "using even the most simple logic". This Court recognized that in Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1384 (Fla. 1982), when it held that, in the absence of factual or equitable distinctions in favor of a rural electric co-op or privately owned utility,

> the territorial dispute is properly resolved in favor of the privately owned utility. [e.s.]

421 So. 2d at 1385.

The Commission believes it has the discretion on a case-by-case basis to weigh specific factual and equitable distinctions and, thereby, resolve any given example of potential "uneconomic duplication" between these utilities in the best interest of the ratepayers. In a given example of territorial conflict, therefore, differences in the cost to provide service might be -- and have been -- resolved in favor of Gulf Coast because, in practical terms, service by Gulf Power might have entailed excessive costs. See, Gulf Power Co. v. Public Service Commission, 480 So. 2d 97 (Fla. 1985). Thus, the case-by-case approach elected by the Commission has the best prospects for appropriate use of the co-op resource, especially in view of the current transition of so many areas from rural to suburban.

The irony of this case is that Gulf Coast, far from applauding that case-by-case approach, condemns it. Gulf Coast demands the drawing of its suggested lines even though innumerable instances of conflict between the co-op and the private utility will thereby supposedly be "resolved" where no factual or equitable distinctions exist (except the de minimus concern as to which side of Gulf Coast's line the customer is on) and which this Court in Escambia County ruled should be resolved in favor of the private utility. Thus, the "simple logic" employed by Gulf Coast creates results contrary to this Court's

conclusion in Escambia County, is too simple to be correct and, indeed, is simply incorrect. The Commission should appropriately resolve duplication problems between these utilities on a case-by-case basis. But broad-brush solutions, and the resolution of "uneconomic duplication" in its fundamental sense, favor the presumptive Chapter 366 natural monopoly, in this instance Gulf Power, not Gulf Coast. In advocating broad-brush solutions and condemning the Commission's case-by-case approach, Gulf Coast is demanding that the result in Escambia County be reversed, without any basis therefor.

Gulf Coast, like the cogenerator in Panda, is therefore demanding relief beyond what the statutes can provide. Contrary to the holding in Escambia County, Gulf Coast insists that the territory be divided as if the issue were indistinguishable from mandating the separation of two Chapter 366 utilities to avoid "uneconomic duplication" of each other's equivalent service. In support of this extra-statutory position, Gulf Coast pillories Gulf Power's

> internal cost-benefit analysis in deciding whether to serve a customer [based on]...the net benefit to GPC... [e.s.]

Initial Brief, p. 16. The Commission, Gulf Coast argues, should focus on the public interest, not Gulf Power's "private utility interest". However, the Commission was not fooled, nor should this Court be, by the private/public "spin" offered by Gulf

Coast. Consistent with the economic theory described above, Gulf Coast's rates are in fact significantly higher than Gulf Power's. Accordingly, the Commission correctly concluded that

> There is no assurance that a territorial boundary is going to be the most economic way of providing service. ...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. [e.s.]

Order, p. 9.

While, in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996), Washington County may have been so grateful to Gulf Coast for aid in obtaining the prison facility at issue therein as to gladly select Gulf Coast's more expensive service, how many consumers whose choice of electric service is pre-determined to be Gulf Coast by the territorial lines Gulf Coast demands will believe that the public interest, rather than Gulf Coast's private interest, is served by their paying those higher rates when the lower cost utility could admittedly serve equally well? Premising that result on "the public interest" is sophistry.

In contrast, the Order's case-by-case approach will insure that the facts on the ground will appropriately determine a decision consistent with the provision of least-cost service, whether Gulf Coast's or Gulf Power's. Moreover, while Gulf Power's definition of "uneconomic duplication" is expressed in

terms of the utility's interests, the Chapter 366 natural monopoly model assures ratepayers a legitimate stake in that interest because rate regulation is designed to accord them the benefits of the utility's economies of scale. While the co-op's members may also hope for that result, it is simply not the focus of Chapter 425 or assured thereby. Gulf Coast's assumption that its "uneconomic duplication" argument transmutes it from a Chapter 425 entity to a Chapter 366 entity is incorrect, harmful to the interests of the general body of ratepayers (both Gulf Power's ratepayers and those ratepayers who unjustifiably may be forced to pay Gulf Coast's higher rates), and violates the principle of stare decisis as applied to the holding in Escambia County. The Court should reject that unfounded assumption and affirm the Commission's case-by-case approach as comports with the essential requirements of law and as amply supported by the competent, substantial evidence of record.

As indicated by the recent opinion in Columbia Steel Casting Co., Inc. v. Portland General Electric Company, et al., 111 F. 3d 1427 (9th Cir. 1996), cert. denied, 140 L.Ed. 2d 824 (1998), the antitrust state action immunity of a state-approved territorial agreement is dependent on the clear articulation by the Legislature that such activity is the state's policy. The Commission is clearly authorized to resolve duplication problems in this case so as to provide for least cost service in the

interest of the general body of ratepayers, i.e., the public interest. Section 366.01, Florida Statutes. However, the Legislature has not articulated at all, let alone clearly, the intent in Chapter 425 or in Chapter 366 that rural electric co-ops solve their problem of decreasing "rural areas" by contesting for broad-brush awards of territory and customers with Chapter 366 natural monopoly providers in circumstances where, by stipulation, either utility could serve equally well. Columbia strongly counsels against any such misguided attempt now to reverse Escambia County by allowing rural electric co-ops to pose as Chapter 366 utilities manqué, with the ratepayers bearing the unjustified added costs. Gulf Coast has not challenged the Commission's conclusion that "carving up the two counties, in this instance, will not result in the most economic provision of electric service". Order, p. 10. Yet, Gulf Coast itself noted at p. 16 of its Initial Brief that

> the "appropriate evidence to consider in determining whether uneconomic duplication will occur is ... [inter alia] the potential impacts on the general body of ratepayers. [e.s.]

This supports the Commission's Order as a matter of fact and law.

It is undisputed that either utility could serve these areas equally well. Tr. 28. The fact that one customer might be on one side of a line drawn by Gulf Coast rather than the other side of that line would hardly constitute a factual or equitable distinction which would justify, without other specific facts in

a case-by-case analysis, imposing Gulf Coast's more expensive service in that instance rather than Gulf Power's. Escambia County, supra. Where not justified on a case-by-case basis, Gulf Coast's provision of service would itself then constitute a blatant instance of uneconomic duplication of Gulf Power's natural monopoly in the fundamental sense presented in the foregoing analysis. Such "uneconomic duplication" comprehends more than just the issues of commingling, proximity, crossed-wires, customer confusion and even the cost to extend service, important as those issues are. It also portends a continuing, abusive and negative impact on the general body of ratepayers through the imposition of higher, "special circumstances" rates where no justification has been found for them.

Solving the dilemma of decreasing rural areas is an important interest of the co-ops, as noted in Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, R. Bellak and M. Brown, 19 FSU L. Rev. 407, 434 (1991) (Exh. 5, GEH 2):

> Rural electric cooperatives, experiencing the encroachment of urbanization on their territory, sought to draw the lines to protect against further intrusion.[2] [e.s.]

However, the Commission properly noted that drawing territorial boundaries in this case would not insure the provision of least

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[2] Since the undersigned's contribution to this co-authored law review article only concerned matters other than rural electric co-ops, the citation of the above observation is not believed to be "self-attribution".

cost service. While Gulf Coast's private interests might be furthered, the Commission had to consider, as Gulf Coast itself admits, "the impact on the general body of ratepayers".

The Commission's decision was, accordingly, amply supported in law, fact and policy. Disputes in this area, if they arise, should be resolved, not left unresolved, but resolved as properly consistent with the Florida Statutes, the regulatory policies and goals therein contained, the intent of the Legislature, the precedents of this Court, and the interests of the general body of ratepayers.

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

As demonstrated, appellant incorrectly assumes that facts on the ground involving commingled facilities automatically establish, without more, uneconomic duplication of appellant's utility requiring this Court to mandate appellant's suggested boundary lines. However, because uneconomic duplication in its fundamental sense describes any service in competition with the presumptive natural monopoly, the facts presented, without more, are subject to a quantum of presumption, albeit rebuttable, that Gulf Power, not Gulf Coast, is being uneconomically duplicated. Chapter 366; Chapter 425; Escambia County, supra. The Commission's Order, in contrast, allows for the presumption to be rebutted, on a case-by-case basis.

While the theory of appellant's challenge to the Commission's Order is thus contrary to the relevant statutes, rules and case law, the challenged Order is supported by competent, substantial evidence and comports with the essential requirements of law. First, the Commission rejected the suggested territorial boundary because

> There is no assurance that a territorial boundary is going to be the most economic way of providing service.

Order, p. 9. In this case, there is agreement by the parties that both utilities are capable of serving the areas in question. Tr. 28; Tr. 156. Because Gulf Coast's rates are significantly higher than those of Gulf Power,

> [a]ssigning exclusive service rights for any geographic areas to GCEC would allow (in fact, force) a rural electric cooperative to serve some electric customers that an investor-owned utility, Gulf Power, would otherwise be willing and able to serve <u>at a lower cost</u>. [e.s.]

Tr. 156. Not only Gulf Coast's residential rates, but also its industrial and commercial rates are significantly higher. Tr. 158. Clearly, the Commission's conclusion is supported by competent, substantial evidence.

Moreover, appellant's arguments misrepresent the challenged Order as meaning that

> once two or more utilities have engaged in, and have gotten away with, the construction of duplicative facilities, the Commission is not going to stop them from continuing to do it.

Initial Brief, p. 22. That is not at all what the Order provides. Having determined that Gulf Coast's suggested line drawing would be harmful because there was no assurance that was going to be the most economic way of providing service, the Commission rejected it, based on competent, substantial evidence. However, the Commission also stated,

> If a specific dispute occurs..., 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. [e.s.]

Order, p. 9. Thus, the claim that any actual disputes would be left unresolved is meritless. As stated by witness Holland,

> This particular proceeding does not involve a dispute over which utility should serve a particular customer that has made a request for electric service. [e.s.]

Tr. 165. Instead, Gulf Coast's broad-brush claim that line drawing is needed is based on theories which are contrary to statute, rule and case authority, as previously noted.

Though the Commission rejected those infirm theories, the Commission had competent, substantial evidence that the utilities themselves could appropriately assist in determining "the most economic way of providing additional service".

Order, p. 9. As stated by GPC's witness Holland,

> The bottom line is that in 999 out of 1000 cases, it is relatively easy for the utilities to figure out which provider should serve a particular customer based on the criteria outlined by statute and rule. [e.s.]

Tr. 163.

On cross, GCEC's witness Gordon responded to the same issue as follows:

> Q. Mr. Gordon do you believe that there's any geographic area in Washington or Bay County where you could not determine who could provide service at least incremental cost?
>
> A. There may be such areas where I could not determine it. There may take some sort of consideration as to specific loads, et cetera.
>
> Q. But given that data you could make that determination; is that correct?
>
> A. Pretty well, sir. [e.s.]

Tr. 696-7.

Thus, the Commission had competent, substantial evidence to reject Gulf Coast's suggested line drawing for the reasons stated and to implement the following alternative approach:

> ...the companies shall establish detailed procedures and guidelines addressing subtransmission, distribution, and requests for new service which are enforceable with the respective company. The procedures and guidelines shall take into account Commission precedent on resolving territorial disputes and shall be submitted to the Commission for review on or before July 31, 1998. [e.s.]

Order. p. 10.

The Commission also found that, in the commingled areas, the incremental cost for either utility to serve additional customers is negligible.

> In this situation, customer choice will be a factor for future electric service. Customer choice will

be based on a determination of which utility is the most efficient provider of service.

That is consistent with Rule 25-6.0441(2), Florida Administrative Code.

To summarize, the Commission rejected a bad solution and has mandated a better one, based on the evidence of record. Even though appellant devotes many pages to describing territorial boundary agreements and the policies favoring them, territorial boundary agreements involve the Commission's approval of agreed boundaries. None of them involve the unilateral imposition of boundaries drawn by a co-op on a Chapter 366 natural monopoly provider where, as in this case, there is no agreement.

Since the Commission's Order is supported by competent, substantial evidence and comports with the essential requirements of law, it should be affirmed. Florida Telephone Corp. v. Mayo, 350 So. 2d 775 (Fla. 1977). That standard of review should not be obscured by appellant's rhetoric on behalf of theories that are incorrect and results that would impact negatively on the interests of the general body of ratepayers, a standard noted by appellant as germane to the Commission's resolution of territorial disputes. Initial Brief, p. 16.

III. APPELLANT'S REITERATED CLAIM THAT THE COMMISSION'S PRIOR ORDERS REQUIRE THAT BOUNDARIES BE DRAWN IS WITHOUT MERIT.

This argument, or reargument, is simply one more opportunity for appellant to flog the same dead horse, i.e., that the mere

existence of any commingled facilities ineluctably supports, indeed mandates, all of appellant's ultimate conclusions. That those conclusions are wrong has already been demonstrated previously. To make matters complete, appellant's own citations confirm that the horse is still dead.

Appellant cites Matthews v. State, 149 So. 648 (1933), as authority that it is the Commission's duty to modify pre-existing orders when new evidence is presented which warrants a change. Gulf Power presented testimony covering hundreds of pages of transcript arguing that lines should not be drawn. The Commission explicitly noted Gulf Power's claim that there will be no areas

> where further uneconomic duplication of electric facilities is likely to occur as long as fixed boundaries are not established and their proposed territorial policy is adopted. [e.s.]

Order. p. 3. The Commission ultimately found, and was supported therein, that drawing lines in this instance would not assure

> the most economical way of providing service.

Order, p. 9.

Instead of drawing the suggested lines, the Commission required the utilities to establish detailed procedures and guidelines as to these territorial issues and to submit them to the Commission for review by a time certain. For appellant to argue that the Commission still had to draw the lines notwithstanding these findings ignores the authority appellant cites. No argument of appellant or authority cited required the Commission to act

contrary to the interests of the general body of ratepayers by drawing lines that would not assure the most economical way of providing service.

The agenda conference transcript, R. 955, presents as robust a debate about these issues among the Commission panel members as can be imagined. It is frivolous on the appellant's part to argue that the panel, having reviewed the evidence and arrived at the conclusion that the suggested line drawing would be harmful and counter-productive, must then have been constrained to draw the lines anyway because of statements of "intent" in prior orders.

The Commission's prior orders merely stated what the Commission intended to do in the future. Subsequent to the issuance of those orders, a hearing was held which considered, inter alia, whether what the Commission had intended to do (prior to hearing evidence on the issue) should, in fact, be done. In that sense, the Commission's prior orders have not even been modified. The fact of the Commission's intention at some point in the past prior to the hearing is not disputed. However, appellant's claim that the intention had to be carried out, though inconsistent with the evidence the Commission found persuasive at the hearing as debated at the decision conference, would nullify the very purpose of holding a hearing and debating the decision. See, R. 626-7. Therefore, the claim must be rejected.

CONCLUSION

Appellant's arguments conflict with the relevant statutes, rules and case law. The Commission's Order, in contrast, is supported by competent, substantial evidence and comports with the essential requirements of law.

Accordingly, the Florida Public Service Commission respectfully requests that the Court affirm the Commission's Order.

Respectfully submitted,

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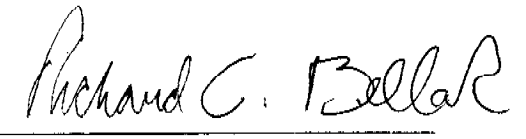

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 12th day of June 1998 to the following:

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