IN THE SUPREME COURT OF FLORIDA

GULF COAST ELECTRIC COOPERATIVE, INC.
Petitioner/Appellant

vs.

JULIA L. JOHNSON, as Chairman FLORIDA PUBLIC SERVICE COMMISSION, and GULF POWER COMPANY
Respondents/Appellees

Case No.: 92,479

INITIAL BRIEF
OF
GULF COAST ELECTRIC COOPERATIVE, INC.
(Substituted)

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases — Page

Cases Page

Florida Statutes

Florida Administrative Code

Florida Constitution

Commission Decisions and Orders

STATEMENT OF THE CASE AND FACTS

(a) Nature of Case: This is Phase II of the case initially heard by this court in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996) wherein, as this court noted: "The Commission also ordered the two companies to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries." (Id, at 122).

(b) Course of Proceedings and Jurisdiction: On September 9, 1993, Gulf Power Corporation ("GPC") filed a petition to resolve a territorial dispute with Gulf Coast Electric Cooperative, Inc. ("Gulf Coast"). The issues to be resolved in that proceeding were whether electric service to the Washington County Correctional Facility should be provided by GPC or Gulf Coast and to identify other areas where conflict existed or was likely. A two day hearing was held on October 19 and 20, 1994, and Order No. PSC-95-0271-FOF-EU was issued on March 1, 1995, (R/311) awarding service to the correctional facility to GPC and determining that in areas where the facilities of the two utilities are commingled, in close proximity, or where future conflict is likely, the parties were to establish a territorial boundary. The part of the decision awarding the correctional facility to GPC was overturned by the Florida Supreme Court on May 23, 1996. Gulf Coast Electric Cooperative, Inc. vs. Clark, supra. Although the appeal by Gulf Coast to this court did not address the portions of the Commission order which directed GPC and Gulf Coast to negotiate in good faith to develop a territorial agreement to resolve duplication of facilities and establish a territorial boundary in South Washington and Bay counties, this

court nonetheless noted that: "The Commission also ordered the two companies to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries." (Id, at 122). Order No. 95-0271 further stated that if GPC and Gulf Coast ". . .are unable to negotiate an agreement, then (the Commission) will conduct an additional evidentiary hearing to resolve the continuing dispute between them". On March 16, 1995, GPC filed exceptions to Order No. 95-0271 and requested clarification of it. On July 27, 1995, the Commission issued its clarifying and amendatory Order No. PSC-95-0913-FOF-EU (hereinafter referred to as "95-0913") in which the Commission stated in page three:

> "Our Order does intend to establish a territorial boundary in the areas identified in the record where the utilities facilities are commingled or are in close proximity, and where further territorial conflict and uneconomic duplication of facilities is likely to occur."

The Commission further stated on page four:

> "A territorial agreement implicitly, logically, and necessarily contemplates the establishment of a territorial boundary. That is clearly what we intend the parties to do in areas of South Washington and Bay counties where facilities are commingled or are in close proximity and where further conflict is likely." [emphasis in the original]

During the two years following the issuance of Commission Order's 95-0271 and 95-0913, Gulf Coast and GPC where unable to agree on a territorial boundary. Hence the continuing dispute over twenty-seven (27) identified service areas of Gulf Coast and GPC where their facilities are commingled and in close proximity was heard by the Commission pursuant to its jurisdictional grant in Section 366.04(2)(e) and Section 366.04(5), Florida

Statutes. This court has jurisdiction pursuant to Section 3(b)(2) of Article V of the Florida Constitution and Section 366.10, Florida Statutes (1997). The Commission rendered Order PSC-98-0174-FOF-EU (R/999) on January 28, 1998, and Gulf Coast filed its Notice of Appeal on February 26, 1998 (R/1026).

(c) Disposition in Lower Tribunal: The Commission found that there are twenty-seven (27) areas in South Washington and Bay counties where the electric facilities of the two utilities are commingled and in close proximity as shown on Composite Exhibits 2 and 6, determined that future uneconomic duplication of electric facilities in the twenty-seven (27) areas will not occur because the facilities are already in place and the incremental cost to serve additional customers is, in the opinion of the Commission, "minimal". The Commission also determined that future duplication can be avoided by the two utilities through the application of and compliance with guidelines developed through the cooperative efforts of the two utilities and through applications of service territory precedent of the Commission. The Commission found that both utilities are capable of providing adequate and reliable service in the twenty-seven (27) identified areas, ordered the parties to establish procedures and guidelines addressing subtransmission, distribution and request for new electric service, determined that it would not establish a boundary in the twenty-seven (27) identified areas and held that territorial disputes will continue to be resolved on a case-by-case basis.

(d) Statement of Facts: The facts of this phase of the case are really not significantly in dispute. It is undisputed that there are no less than twenty-seven (27) areas in Bay County and South Washington County where the electric facilities of Gulf Coast and

GPC are in close proximity to each other and are commingled as shown by Gulf Coast's Exhibit 2 and GPC's Exhibit 6. Indeed, GPC, Gulf Coast, the Commission Staff and the Commission itself all agree that in at least the twenty-seven (27) identified areas there are existing facilities which are commingled and in close proximity. Because these utilities do not have a territorial agreement with established territorial boundaries, GPC and Gulf Coast have both constructed facilities in areas already served by the other utility (Exhibits 3 and 8, T/760, 762-763). Both utilities have independently planned to serve the same areas (T/110-112, 140, 184, 190-192, 246, 247, 282, 290, 464, 550, 640-642). Both utilities are constructing facilities to serve significant numbers of duplicative customers (T/110-111). Independent planning by the two utilities may result in overlapping facilities on one hand or underplanned facilities on the other (T/112). Lack of a territorial boundary encourages uneconomic duplication (T/134-135).

GPC agrees that duplication of facilities will likely occur in the twenty-seven (27) areas identified in Exhibit 2 (T/269, Order 98-0174, p. 3).

GPC defines uneconomic duplication in terms of the costs and benefits accruing solely to GPC from serving or not serving a given area, load or customer such as the incremental cost to serve, expected revenues or other exclusive benefits (T/43, 290, 366, 369, 370, 564, 699 and Exhibit 12). GPC states that four or more utilities could be on one or both sides of a street and that would not constitute uneconomic duplication (T/194). In addition GPC states that parallel lines are not necessarily uneconomic (T/252) and that a crossing is also not uneconomic duplication where one utility is on one side of the road and crosses over the other utility on the other side of the road to serve a new customer (T/290,

372). GPC's policy on uneconomic duplication will allow alternating service within a subdivision between two different utilities (T/248). GPC's official definition of uneconomic duplication is: "Uneconomic duplication is the duplication of one utility's facilities by another utility at a cost that is significantly above any corresponding exclusive benefit" (T/366, Exhibit 12). Further commingling and uneconomic duplication of electric facilities in the twenty-seven (27) areas identified on Exhibit 2 is likely to occur, as stated by Mr. Gordon (T/20) and uneconomic duplication has been occurring in these areas since 1947 when GPC built its line into Youngstown (T/20). It is not necessary to have two utilities in the same area to reliably meet the needs of a customer (T/140).

GPC's plan is to serve all customers in Northwest Florida (T/189), and that of course is the ten (10) county area west of the Apalachicola River (T/90). It is also GPC's position that territorial agreements lead to uneconomic duplication (T/199). GPC's concept of territory is not related to geographic areas, but to a collection of individual customers who are served by GPC regardless of their geographic location. In determining whether to serve a particular customer, GPC makes an assessment as to whether or not such service is economic for the company (T/184) regardless of whether another utility is present (T/290).

There is no real dispute over, nor issues for this court to review, regarding the expected load, energy, and population growth of the area. Both companies forecasts were determined to be reasonable (Exhibits 2, 4, 6, T/110-112, 128, 198, 361-363). In addition the parties did not disagree on where their existing facilities are now located as well as the purpose, type and capacity of their facilities in the twenty-seven (27) identified areas (Order

98-0174, p. 6). Each utility is capable of providing adequate and reliable service, and although GPC claimed its service was more reliable, when the statistics and data were limited to the comparable areas identified in the Commission docket as shown on Exhibits 7 and 17, Gulf Coast's customers experienced less outage time than GPC's customers in 1991 and 1992. (see also, Order No. 98-0174, p. 7). GPC believes all customers should have the right to choose their own service provider (T/172, 220, 335). If customers have the right to choose their electric service provider and require the utility of choice to install facilities to serve them, it will lead to uneconomic duplication of facilities (T/51). When a utility installs service to serve one load, all future loads along the route taken by the utility become fair game for competition in an area where there is already another utility serving (T/252, 253, 692). The incremental least cost to serve the new load does not always reflect the supporting investment in the distribution systems to arrive at the current incremental costs (T/399). GPC's methodology will only encourage a race to serve (T/134-135).

Gulf Coast's criteria for establishing a territorial boundary and resolving the continuing disputes with GPC are:

1. Routes along natural topographical or geographical features which of themselves tend to discourage electric facility commingling and construction in close proximity. This includes bays, rivers, creeks, swamps, etc.
2. Routes along land lines and property ownerships.
3. Routes along or between roads, streets, recorded plat subdivisions and where existing electric facilities are already commingled and/or in close

proximity.

4. Areas where historic electrical service has been established and provided.

5. Areas that will provide opportunity for additional development and electrical load growth.

6. Areas where the electrical utilities have made a choice and commitment to provide service, or declined to provide service during the past historical operating period. (T-26/1-14).

The general factors the Commission should use include the following:

a. The avoidance of further uneconomic duplication;

b. The assignment of the right to serve an area must recognize the historical presence of the respective competing utilities in identified area(s), including the physical location of existing facilities;

c. Minimization of the transfers of customers and facilities, taking into account, among other things, reintegration costs and administrative costs of such transfers, whether immediate or over a transition period;

d. The readiness, willingness, and ability of the respective utilities to serve identified area(s);

e. The continuity of planning and operation of the respective competing systems;

f. The continuity of service areas;

g. Reliability;

h. Natural physical boundaries;

i. Resolutions of prior service area disputes; and

j. The respective utilities' cost to serve identified area(s). (T-64/1-15).

Critical amongst the factors to consider is service area integrity (T-65/11-7) due to the capital intensive nature of providing electric service, the lead times necessary for planning and construction and planning for anticipated load in a defined area (T-65/19-23, T-66/1-7). Without service area integrity, neighboring utilities may tend (and would have no constraints) to engage in service area competition (T-66/8-12). Historical presence is also an important consideration. If a utility is already present in an area capable of providing service from either existing facilities, or additions to its facilities, it is not necessary or economic for another utility to move in to compete for the same customers (T-69/11-23, T-70/1-23). (see also T-110/16-25 through T-111/12-16 and T-140/10).

Gulf Coast filed a proposed boundary line between the two utilities as mandated by the Commission (Exhibit 2). GPC did not submit or define any proposed boundary. Hence, the only boundary line in evidence in the record of this case is the boundary submitted by Gulf Coast (Exhibit 2).

SUMMARY OF ARGUMENT

The Commission has reached the wrong conclusion based on undisputed evidence in the record of this case, just as it did in the initial proceeding (Order No. PSC 95-0271, R/311). This court found that the Commission's order was not supported by competent, substantial evidence and reversed it. Gulf Coast Electric Cooperative, Inc. v. Clark, supra, at 122.

In this second phase of the proceeding the Commission, ". . . ordered the two companies [Gulf Coast and GPC] to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries." (Id). If the two utilities were unable to agree on a boundary, the Commission said, "We will conduct additional evidentiary proceedings to establish a boundary ourselves. We intend to resolve the continuing dispute between these utilities once and for all." (Order No. 95-0271, p. 11 and Order No. 95-0913, p. 3). By way of clarification, the Commission explained that the boundary line would be established where facilities are commingled or are in close proximity and where future conflict is likely (Order 95-0913, p. 4).

The utilities did not agree on a territorial boundary. The Commission conducted an evidentiary hearing on April 29-30, 1997, and the Commissioners themselves visited the disputed areas on June 18, 1997. The Commission found that there are indeed twenty-seven (27) areas in South Washington and Bay counties where the facilities of the two utilities are commingled and are in close proximity (Order 98-0174, p. 10) and the record evidence clearly indicates that where facilities are commingled and in close proximity,

conflict is likely as best shown by the Commission's visit to fifteen (15) of the selected sites (T/711-779). The record is also clear that these two utilities have a history of territorial conflict and have not been able to reach a territorial agreement.

The Commission, and this court have long established policies and precedent that clearly support and define the duty of the Commission to end the economic waste and inefficiency resulting from utilities "racing to serve" [Lee County Electric Cooperative, Inc. v. Marks, 501 So. 2d 585, 587 (Fla. 1987)], to encourage territorial agreements, to stop threatened encroachment (Order No. 3835), to prevent overlapping distribution systems (Order No. 20808), to prevent the erection of more lines than are needed for immediate service (Order No. 3799), to resolve the larger issues of territorial conflict and duplication of facilities [Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159 (Fla. 1976)] and to avoid unnecessary duplication of facilities. (Id, at 1161).

Hence there are three undisputed elements to support, indeed, to dictate, an order establishing a boundary between these two utilities:

1. The Commission's own orders, 95-0271 and 95-0913.
2. The factual findings and undisputed evidence.
3. Established Commission policy and precedent.

In the face of these three elements all clearly determining that a territorial line must be drawn, the Commission, contrary to its own Staff recommendation (R/925) and with one Commissioner dissenting, refused to establish the very boundary it said it would, and instead determined that it would prefer to hear the continuing conflicts on a case-by-case

basis.

The only boundary line submitted was one developed by Gulf Coast. GPC refused to file one, and even said it would not agree to any boundary line (T/218, 384).

The Commission's order is, therefore, unsupported by competent, substantial evidence and departs from the essential requirements of law. The effect of the majority's holding will be to institutionalize uneconomic duplication, and as Commissioner Clark stated in her dissent, the Commission's decision that the currently commingled electric facilities will not be subject to future uneconomic duplication is, at best, illogical, and that ". . .it is our responsibility [the Commission's] to cautiously but conclusively terminate the uneconomic duplication by establishing a territorial boundary between the utilities in the disputed area". (Dissent, Commissioner Clark, Order 98-0174, p. 13). Instead of a once and for all solution, the Commission has ruled that it will continue to entertain the continual disputes between the utilities.

ARGUMENT I

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 IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD AND IS CONTRARY TO THE COMMISSION'S OWN FINDINGS THAT IN AT LEAST THE TWENTY-SEVEN (27) IDENTIFIED AREAS THE FACILITIES OF THE TWO UTILITIES ARE COMMINGLED AND IN CLOSE PROXIMITY.

A final order of an administrative agency will not be disturbed on appeal if there is competent, substantial evidence in the record as a whole to support the agency's decision. Citizens of Florida v. Mayo, 333 So. 2d 1 (Fla. 1976). When a Commission order is challenged, the burden of proof is on the party claiming the order of the Commission to be unsupported by the evidence. Shevin v. Yarborough, 274 So. 2d 505, 508 (Fla. 1973). Clearly then, Gulf Coast has the burden to show that Commission Order No. 98-0174 is unsupported by competent, substantial evidence or is invalid on other grounds. This section of Gulf Coast's arguments deals with the lack of competent, substantial evidence.

Rule 25-6.0441(2), Florida Administrative Code, requires the Commission to consider:

> "(a) The capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
>
> (b) The nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
>
> (c) The cost of each utility to provide distribution and sub-

transmission facilities to the disputed area presently and in the future; and

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

This Rule was promulgated pursuant to Florida Statute, Section 366.04(2)(e). In the case at bar, the Commission found that there was no dispute or issue regarding (a), (b), or (d). The Commission did not specifically address Section (c) of the Rule either except to the extent that it may be inferred that the Commission's order has determined that it will not cost one utility any more than it would cost the other utility to provide distribution and subtransmission facilities in the disputed areas presently and in the future.

This case goes beyond a simple case of a single instance, such as the Washington County Correctional Facility (the "Prison"), of an issue of unnecessary or uneconomic duplication, because it involves at least twenty-seven (27) areas of South Washington and Bay counties where the facilities of the two utilities cross over each other, are commingled, and in close proximity. The Commission's flawed logic in this case is its notion that once facilities have been duplicated, any further incremental extension by either utility from its then existing facilities is no longer uneconomic even if the net result, over time, would result in wholly intermingled facilities, with both utilities unnecessarily being capable of serving all the customers in the identified geographic areas.

By its Order No. 98-0174, the Commission reversed its prior two orders and refused to draw a territorial boundary between GPC and Gulf Coast in Washington and Bay counties.

The court will not overturn an order of the Commission merely because it would have arrived at a different result had it made the initial decision. Shevin, 274 So. 2d at 509. But, the court will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right. Shevin, 274 So. 2d at 509.

Under Florida Statute, Section 366.04(2)(e), the Commission has the authority to resolve territorial disputes. This argument will focus on whether the Commission's decision not to draw a territorial boundary was supported by competent substantial evidence. Substantial evidence has been defined as evidence which will establish a substantial basis of fact from which the fact at issue can reasonably be inferred. De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Competent evidence has been defined as relevant and material evidence that a reasonable mind would accept to support the conclusion reached. See Id. By refusing to establish a territorial boundary between GPC and Gulf Coast when the record evidence is undisputed that there are twenty-seven (27) areas where these utilities have conflicting facilities, the Commission's order is not merely unsupported by competent, substantial evidence, it is contrary to the undisputed evidence.

First, the Commission's order was arbitrary and contrary to its initial order, PSC 95-0271, which required a territorial boundary be drawn. The initial Order (95-0271) did not qualify the establishing of a territorial boundary upon uneconomic duplication. Instead, Order 95-0271 stated "the parties are to negotiate in good faith to develop a territorial agreement to resolve duplication of facilities and establish a territorial boundary in South Washington and Bay counties." The Commission intended to resolve the continuing

dispute between the utilities, and if GPC and Gulf Coast were unable to establish a boundary, the Commission would do it for them. Order 95-0271 at 11. In its opinion deciding the earlier dispute between these parties regarding service to the Prison, this court said of Order 95-0271: the "Commission also ordered the two companies to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries." Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120, 122 (Fla. 1996).

In its Clarifying and Amendatory Order, the Commission once again did not premise the establishing of a territory boundary on a specific finding of uneconomic duplication. It stated: "We believe that a territorial agreement implicitly, logically, and necessarily contemplates the establishment of a territorial boundary. That is clearly what we intend the parties to do in the area of South Washington and Bay counties where facilities are commingled or are in close proximity and where further conflict is likely." Order 95-0913 at 4. Thus, the purpose of the April 29-30 evidentiary hearing from which Order 98-0174 was issued, was not whether to draw a territorial boundary line, but where to draw that line. According to Order 95-0271 and 95-0913, the territorial boundary was to be drawn where (1) facilities were commingled or in close proximity; and (2) where further conflict was likely. The Commission arbitrarily changed the holding of its prior orders by refusing to draw the very boundary line it said it would do.

Second, even if the Commission had the authority to change its orders two years after their issuance, the evidence does not support the Commission's determination that future uneconomic duplication was not likely. Gulf Coast and GPC agreed that there are

at least twenty-seven (27) areas in South Washington and Bay counties where their existing facilities are commingled and in close proximity. Order 98-0174 at 2, but the parties disagreed on whether or not these twenty-seven (27) areas of commingled facilities constitute uneconomic duplication and are likely to produce future uneconomic duplication.

GPC defines "uneconomic duplication" in terms of the costs and benefits accruing solely to GPC from serving or not serving a given area, load or customer. (T/43, 290, 366, 369, 370, 564, 699, Exhibit 12). Based on this definition, GPC's position is that uneconomic duplication should be determined on a case-by-case basis. (T/241, 243). If it is beneficial to GPC, it will construct facilities in new areas. (T/290). GPC uses an internal cost-benefit analysis in deciding whether to serve a customer, and if the net benefit to GPC is greater than what it believes the net benefit would be to another utility, then GPC elects to serve the customer, whether or not another utility is in the same area. (T/290).

The Commission has adopted GPC's position, despite Commission precedent which focuses on the public interest, not the private utility interest in determining uneconomic duplication. The Commission even mentioned this precedent when it defined the test for determining "uneconomic duplication". According to the Commission, the "appropriate evidence to consider in determining whether uneconomic duplication will occur is the historical growth patterns of both utilities, whether these patterns are expected to continue, and the potential impacts on the general body of ratepayers." Order 98-0174 at 3. Based on this definition, the Commission's finding that there is no potential for future uneconomic duplication is totally unsupported by the evidence. The purpose of establishing a boundary is to serve the public interest by controlling costs, avoiding costly litigation, and providing

adequate and reliable service to customers. By not drawing a boundary, the Commission is not only approving continuing unnecessary and uneconomic duplication, but guaranteeing that it will occur.

The record shows a history of "racing to serve" customers in the same area by both utilities. The record also indicated that in the past, both utilities have entered areas served by the other. Furthermore, from the Commission's original order, it is evident that this pattern will continue.

The parties have a long history of territorial conflict. (T/21, Order 95-0271, p. 6, R/311). They have never successfully negotiated a territorial agreement, despite specific suggestions from the Commission and from the Florida Supreme Court. Territorial conflict appears to be a way of life for these utilities. (T/440). It boils over into litigation intermittently, but is always simmering beneath the surface, to the detriment of the utilities, their ratepayers, and the public interest. (Order 95-0271 at 10, T/440-441). Because of this history, the Commission ordered that a territorial boundary be established. (Order 95-0271, p. 12).

GPC's witness Weintritt conceded that duplicated facilities will likely occur in these twenty-seven (27) commingled areas. (T/282) (Order 98-0174 at 3). In fact, duplication of facilities is so prevalent that the question has become who will place a service drop first. The Commission's determination that future uneconomic investment will not occur because the facilities and investment of both utilities are already in place, ignores the fact that in the larger picture, in the longer term, both utilities will have entirely duplicated the service facilities of the other, and will be, and in twenty-seven (27) areas currently are, capable of

serving the same customers.

In cases where competent competing evidence is presented, the court will not reweigh or reevaluate the evidence presented to the Commission, nor will the court substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. McCaw Communications v. Clark, 679 So. 2d 1177, 1178 (Fla. 1996); Florida Statute, Section 120.68(1). The facts in this case are not in dispute. The only factual evidence presented in this case is that the parties have engaged in races to serve, duplication of facilities, planning to serve the same areas and customers, sued each other numerous times over customers, and can not agree on a territorial boundary or any form of a territorial agreement. The facts that support a conclusion to draw the very boundary the Commission said it would draw are the only facts in evidence. It is not a question that there was or may be some evidence, competent and substantial or otherwise, that the two utilities are not building and have not historically built, and are not planning to build duplicative facilities. Those facts do not exist.

The Commission found that the facilities of the two utilities are indeed commingled and in close proximity. The record does show, however, what close proximity and commingled means: lines on both sides of the same street, numerous crossings, and adjacent houses served by a different utility. (Field visit, T/708-2279). These facts are not disputed, and serve to confirm the Commission's finding that territorial conflict is a way of life for these two utilities.

What is difficult to comprehend is the Commission's decision, in the face of these facts, that since the two utilities have already built facilities capable of serving the same

customers, have already commingled their lines, and continue to build in areas where they are in close proximity, that small incremental additions that result in a continuation of duplication of facilities in the entire twenty-seven (27) identified areas is not uneconomic. Indeed, the Commission did not stop there, it actually held that uneconomic duplication will not occur in those same areas. (Order 98-0174, p. 10).

The only evidence in the record shows that without a boundary, these two utilities will continue repeated unnecessary duplication of facilities, which in the aggregate has in the past and will in the future, amount to unnecessary and uneconomic duplication.

GPC further contended that future uneconomic duplication will be prevented by self-regulation and compliance with Commission guidelines for establishing boundaries. The fact is that these techniques have never been successful for resolving disputes between these two utilities. Here is what the Commission determined in this proceeding:

1. It determined that territorial conflict is a way of life between GPC and Gulf Coast,
2. Territorial disputes are always simmering,
3. Both parties have historically raced to serve,
4. Both parties have built facilities to serve the same customers,
5. Both parties are planning to a greater or lessor extent to serve the same areas,
6. It was going to settle the conflicts between these two utilities "once and for all",
7. It determined it was going to establish a boundary line between the two

utilities if they did not agree, and

8. The utilities did not agree on a territorial boundary line.

The record, as previously noted, establishes that GPC claims the ten county area west of the Apalachicola River as its service area, and that it is not necessary for two utilities to build services in the same area to be capable of serving the same customers. Having made those determinations and in the face of the record evidence, the Commission then decided that territorial conflict is acceptable on an incremental basis, continuing the historical practice of crossings, parallel lines, commingling, and other duplicative activities, and instead of resolving these conflicts once and for all, the parties should continue to bring disputes to the Commission on a case-by-case basis. (Order 98-0174, p. 11).

The record evidence supports the opposite conclusion. The existing state of commingled electric facilities and the expected growth of these utilities in the same areas (these are undisputed facts), can only lead to the conclusion that uneconomic duplication will continue. The historical growth patterns of both utilities, their existing facilities, and the reasonable expectation that the areas where both utilities currently serve will continue to grow can only lead to the conclusion that unnecessary and uneconomic duplication will continue. The Commission's decision is illogical and will have the effect of institutionalizing uneconomic duplication, as ably stated by Commissioner Clark (see Dissent, Order 98-0174, p. 12). Even the Commission's own Staff recommended adoption of the territorial boundary proposed by Gulf Coast (R/925-954, p. 21 of Staff's memorandum), to avoid future uneconomic duplication, and concluded that ". . . the Commission should not continue to use the narrow case-by-case concept or incremental approach with these utilities in the disputed area because it has not worked." (Id, p. 17).

ARGUMENT II

II. THE COMMISSION'S ORDER DETERMINING THAT FURTHER UNECONOMIC DUPLICATION OF ELECTRIC FACILITIES WILL NOT OCCUR IN THE TWENTY-SEVEN (27) IDENTIFIED AREAS, THAT IT WILL NOT ESTABLISH A BOUNDARY BETWEEN THE TWO UTILITIES, AND THAT IT WILL HANDLE CONTINUING DISPUTES ON A CASE-BY-CASE BASIS IS ILLOGICAL, UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, IS CONTRARY TO ESTABLISHED COMMISSION POLICY AND PRECEDENT TO AVOID UNNECESSARY AND UNECONOMIC DUPLICATION OF ELECTRIC FACILITIES, AND HENCE IS CONTRARY TO THE ESSENTIAL REQUIREMENTS OF LAW.

A. THE COMMISSION'S ORDER DETERMINING THAT FURTHER UNECONOMIC DUPLICATION OF ELECTRIC FACILITIES IN THE TWENTY-SEVEN (27) IDENTIFIED AREAS WILL NOT OCCUR IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, IS ILLOGICAL WHEN CONSIDERING THE UNDISPUTED HISTORICAL GROWTH PATTERNS AND CONSTRUCTION OF FACILITIES BY THE TWO UTILITIES THAT ARE CAPABLE OF SERVING THE SAME CUSTOMERS, AND IGNORES THE UNDISPUTED FACT THAT IT IS NOT NECESSARY FOR TWO UTILITIES TO BUILD FACILITIES IN THE SAME AREA TO MEET THE NEEDS OF CUSTOMERS IN THAT AREA.

"The holding [in the majority decision] that the currently commingled electric facilities will not be subject to *future* uneconomic duplication because of the incremental cost to continue to expand service facilities is, at best, illogical, [and]. . . is a significant departure from established Commission precedent". (Dissent, Commissioner Clark, Order 98-0174, p. 12, 13).

What the Commission has done in this case is to first determine that GPC and Gulf Coast have a history of territorial conflict, a history of racing to serve, a history of being unable to agree on a territorial boundary or on a territorial agreement of any kind, a history of bringing conflicts to the Commission, and a history of building facilities capable of serving the same customers. Secondly, the Commission determined that if the parties did

not agree on a boundary, it would draw one for them. Thirdly, the Commission found at least twenty-seven (27) areas where the facilities of GPC and Gulf Coast are in fact commingled and in close proximity. Fourthly, the Commission panel assigned to this case actually visited fifteen (15) sites and observed first hand where commingling exists. (T/711-779). Then astonishingly, the Commission decided there was nothing it would do about it.

The Commission did order the parties to: ". . . establish procedures and guidelines addressing subtransmission, distribution, and requests for new electric service as set forth in the body of this Order." In addition the Commission, "ordered that the procedures and guidelines shall be submitted to the Commission for review on or before July 31, 1998." Finally the Commission ordered that ". . . and that territorial disputes will be resolved on a case-by-case basis". (Order 98-0174, p. 11).

Everything in the record shows, without dispute, that the parties have *never* been able to agree on a mechanism, procedure, guideline, let alone a boundary, for resolving their continuing duplication of facilities. In the absence of a Commission mandated boundary these utilities will, based on historical precedent, and certainly based on GPC's policy of providing service anywhere when it benefits GPC, continue to do exactly what they have been doing in the past. The Commission has essentially held 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.

The Commission apparently bases its decision on the notion that when the uneconomic duplication is "minimal" in a particular instance, it is not really uneconomic

duplication. While the Commission itself did not cite this court's prior decision in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996), where this court found the difference in the cost to the same two utilities to serve the Prison to be "deminimus" it is clear the Commission relied on that decision to arrive at its "minimal" policy in this case. The court in Gulf Coast v. Clark clearly said that it reached its decision based on ". . . the unique factual circumstances" of that case (Id, at 122). The prison case was indeed unique. As one dictionary ably states it, "unique" means "being the only one of its kind"[1]. The prison case was a specific case involving one single customer and a major expense to Gulf Coast to relocate an existing line on the customer's property to accommodate the new service. GPC has already argued, and is likely to argue again, that any differential cost less than $15,000.00 is "deminimus" (T/214) or "minimal" as the Commission has said, hence, anywhere and any time the cost of an extension by GPC is no more than $15,000.00 greater than Gulf Coast's costs, it will not constitute uneconomic duplication to extend service to a customer who could have been served by Gulf Coast for $100.00 or less. As Commissioner Clark said, the Commission has failed to consider the systemic effect of repeated duplication, that is, the long term effect on the entire body of ratepayers of both utilities, when both utilities, incrementally and over time build duplicative service facilities in the same areas capable of serving the same customers. It is undisputed that it is not necessary for two utilities to build facilities in the same area to meet the needs of customers in that area (T/140, 246). Unnecessary means "needless". There is no need

[1]American Heritage Dictionary of the English Language, College Edition 1975.

for it. Needless duplicative construction at the expense of a utility's ratepayers is uneconomic using even the most simple logic. The Commission's order, then, has determined that numerous occurrences of small needless expenditures is acceptable, regardless of the cumulative effect, or at least that the Commission will not stop this kind of activity, now or in the future.

B. THE COMMISSION'S ORDER IS CONTRARY TO THE PUBLIC INTEREST, PAST COMMISSION POLICY AND PRECEDENT, DECISIONS OF THE SUPREME COURT THAT DIRECT THE COMMISSION TO ENCOURAGE UTILITIES TO ESTABLISH TERRITORIAL BOUNDARIES, TO AVOID TERRITORIAL DISPUTES, RANGE WARS, RACING TO SERVE, THE UNNECESSARY AND UNECONOMIC DUPLICATION OF FACILITIES, AND IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The Florida Supreme Court has noted that it, "....repeatedly has approved the Commission's efforts to end the economic waste and inefficiency resulting from utilities "racing to serve"....", Lee County Electric Cooperative, Inc. v. Marks, 501 So. 2d 585, 587 (Fla. 1987), and has clearly defined two duties of the Commission, in this regard: one, to encourage and enforce territorial agreements for the public good, and two, "to police the planning development, and maintenance of a coordinated electric power grid throughout Florida to assure....the avoidance of further uneconomic duplication....". Id, at 587. It makes no difference that there is not an immediate active dispute over an individual customer. Larger policies are at stake here, especially when it is clear that GPC will never agree to a territorial boundary establishing exclusive service territories (T/218, 384). This case is not limited to Section 366.04(2). It is also clearly within the Commission's responsibility under Section 366.04(5).

The Commission has a long history of approving of territorial agreements between

utilities that define specific and exclusive service areas, and of discouraging utilities from racing to serve and building facilities that duplicate existing facilities. The Commission's previously established policy to allocate service territories in response to possible threatened encroachment by another utility dates back at least thirty-three (33) years to its Order No. 3835 dated June 24, 1965 (application of Florida Power & Light Company for approval of an agreement with Florida Power Corporation relative to service areas, Docket No. 7420-EU, 1964). In that case the Commission said:

> "We should not approve an agreement which awards to a utility territory with respect to which there is not a reasonably immediate possibility of duplicating service by one or the other of the parties to the agreement. In truth, what we call "territorial agreements" are more apply described in most cases as a boundary agreement and the extent of the boundary line should bear a reasonable relationship to the area in which the competition may be expected. . . in the case at hand we have such a boundary drawn across two counties, providing a line of demarcation beyond which neither utility may extend its facilities. While the contractual agreement between the parties went much farther and proported to secure to each company, inviolate from any competition by the other, all that part of the two counties on its side of the line, we do not think that we have the authority to grant our approval to this extent. Rather, our approval should be limited to the establishing of a line beyond which the utilities will not extend their service facilities, and the extent of such line should be limited to the area in which possible encroachment is threatened." (Commission Order No. 3835).

Later statements by the Commission have been in accord with its 1965 interpretation of boundary lines which allocate territory in areas where competition between utilities is expected. See, e.g., Order No. 3799 (finding that the "utilities. . . have entered into agreements where there has been or is about to be some conflict as to the boundaries

of the territory they seek to serve."); Order No. 20808 (finding that boundary lines serve to prevent overlapping distribution systems in affected areas).

Order No. 3835 made it clear that the Commission will allocate territory where there is an immediate possibility of duplicating service and the Commission will establish a line in areas where possible encroachment is threatened. This policy was in effect nine (9) years prior to the enactment of the "grid bill" which specifically granted the Commission its powers specified in Section 366.04(2) and 366.04(5).

This court has affirmed the Commission's pre-1974 authority to establish boundaries. City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965). The Commission has stated on many occasions that its authority over utilities is intended to eliminate the harmful effects of unrestrained competition on individual customers and on the public, which harmful effects include "unsatisfactory customer relations", "service inefficiencies", and "the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment, and, in effect, must be subsidized by other customers of the utility" (Order No. 3799, p. 4, dated April 28, 1965, In Re Proposed Territorial Agreement between Florida Power & Light Company and Florida Power Corporation, Docket No. 7420-EU). The Commission has routinely found since 1965 that territorial boundaries enable the economical expansion of utility facilities. (Utilities Commission of the City of New Smyrna Beach, 469 So. 2d 732 (Fla. 1985); in Re Joint Petition of Florida Power Corporation and Withlacoochee River Electric Cooperative, Inc. for Approval of Territorial Agreement, 88 Fla. Pub. Serv. Comm'n REP. 6:215 [Order No. 19480, June 10, 1988]).

The 1976 Supreme Court case of Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159 (Fla. 1976) clearly demonstrates the dramatic shift in Commission policy announced in the case at bar. In that case, Clay Electric Cooperative, Inc. ("Clay Electric") had been serving the Copeland Settlement east of the Gainesville city limits for at least twenty-five (25) years, adjacent to an area served by the Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board ("RUB"). Because Copeland needed a safe and reliable water supply, RUB agreed to extend water services to the area, but required its water customers to also purchase electricity from RUB pursuant to RUB's tie-in policy (Id, at 1161). The Commission ordered RUB and Clay Electric to develop a territorial agreement and barred RUB from offering electric service or constructing duplicative facilities in the area. The Commission noted: "This Commission must also consider the larger issues of territorial conflict, duplication of facilities and conservation of energy resources. At present the two utilities are operating without territorial agreement or other service area restrictions, and are thus in potential competition throughout much of Alachua County." (Id, at 1160). In upholding the Commission's action, this court quoted from the Commission's order: "Such agreements [territorial agreements] are encouraged to avoid costly competition and wasteful duplication. . . This Commission has the statutory power to approve such agreements, as well as the responsibility to supervise planning of a statewide power system, in part to avoid unnecessary duplication of facilities." (Id, at 1161).

RUB v. Clay Electric, therefore, is quite similar to the instant case where GPC and Gulf Coast are operating without a territorial agreement or other service area restrictions,

and are in actual and potential conflict throughout South Washington and Bay counties. Just as the Commission determined in RUB v. Clay Electric, the Commission ordered the parties in this case to develop a territorial agreement, for the obvious reason that, as it said in RUB v. Clay Electric, territorial agreements are encouraged to avoid costly competition and wasteful duplication. The Commission observed, and this court noted with approval in RUB v. Clay Electric that the Commission has the responsibility to avoid *unnecessary* duplication of facilities. That is exactly what the case at bar is about. The larger issues that the Commission and this court have long addressed are territorial conflict, duplication of facilities, conservation of energy resources, avoiding unnecessary duplication of facilities, and ending economic waste and inefficiency resulting from utilities "racing to serve". (Lee County v. Marks, supra). This court noted with approval the dissent by Commissioners Leisner and Marks in PSC Order No. 15,452 (December 12, 1985), that by the Commission's allowance of a utility to provide service to a customer in an area already served by another utility "violence is being done to our efforts to end the 'range wars' between competing utilities that have been unable or unwilling to reach territorial agreements". (Lee County v. Marks). It is ironic that as in Lee County v. Marks, it is a dissenting Commissioner who clearly recognizes the error of the majority's decision and its departure from the essential requirements of law, by abandoning its responsibility to end the conflicts between GPC and Gulf Coast once and for all, and allowing the historical conflict to continue, case-by-case.

ARGUMENT III

III. THE COMMISSION'S ORDER IS CONTRARY TO ITS OWN ORDERS ENTERED OVER TWO YEARS AGO DECLARING THAT THE PURPOSE OF THIS PROCEEDING WAS TO ESTABLISH A TERRITORIAL BOUNDARY BETWEEN GPC AND GULF COAST.

Florida courts have held that administrative agencies do have an inherent power to reconsider final orders which are still under their control. Peoples Gas System, Inc. v. Mason, 187 So 2d 335, 338 (Fla. 1966). Orders of the Commission may be superseded by another order. The Commission has the power to modify, and, indeed, it is its duty to modify, pre-existing orders when new evidence is presented which warrants a change. Matthews v. State, 149 So. 648 (Fla. 1933). "However, the decisions of this Court, clearly say that this inherent authority to modify is a limited one." Peoples Gas, 187 So. 2d 335, 338 (Fla. 1966).

In Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966), the Commission entered an order approving a territorial service area agreement, that had been jointly submitted by both parties. Four and a-half years later the Commission entered another order rescinding and withdrawing the approval previously given. The only change in circumstances was that one party claimed that the other had violated the agreement. The court reasoned that orders of administrative agencies must eventually become final and no longer be subject to modification. Id, at 339. The court further stated that the Commission may withdraw or modify its approval, but this power may only be exercised after proper notice and hearing, "and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of

changed conditions or other circumstances not present in the proceedings. Id. The court held that the new order contained no finding that the public interest required changing of the prior agreement. Id, at 340. In quashing the new order the court stated this "kind of second guessing can not be sustained."

In Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1979), the court agreed with Peoples Gas System "that there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." Id, at 681. In Austin, two years had lapsed between the orders. The court found that respondents had failed to show any significant change in circumstances or great public interest which would be served. Id.

However in Reedy Creek Utilities v. Florida Public Service Commission, 418 So. 2d 249 (Fla. 1982), the court found the Commission could amend its order. While the court still recognized the doctrine of "administrative finality", only two and a-half months had passed. Id, at 253. The court found that Reedy Creek did not change its position during the lapse of time, and suffered no prejudice as a consequence. Id, at 254. The court reasoned that when the Commission "determined it had erred to the detriment of the using public, it had the inherent power and the statutory duty to amend its order to protect the customer." Id, at 253.

In the instant case, the Commission ordered "that, if the parties are unable to negotiate an agreement, we [PSC] will conduct an additional evidentiary proceeding to resolve the continuing dispute between them.", on March 1, 1995. In this Order 95-0271 Rev.

the Commission stated that, "If the parties are not able to resolve their differences, we will conduct additional evidentiary proceedings to establish a boundary ourselves. We intend to resolve the continuing dispute between these utilities once and for all." GPC filed a request for clarification. The Commission issued a clarifying Order, 95-0913 (R/358) on July 27, 1995, in which it stated, "We believe that a territorial agreement implicitly, logically and necessarily contemplates the establishment of a territorial boundary. That is clearly what we intend the parties to do in areas of South Washington and Bay counties where facilities are commingled or are in close proximity and where further conflict is likely. A boundary is not necessarily required in areas where there is no conflict and none is reasonably foreseeable." (emphasis in original order). The Commission further stated, "We also wish to reiterate that in areas of South Washington and Bay counties, where conflict and further duplication of facilities is likely, Order No. PSC-95-0271-FOF-EU requires that the parties clearly define their geographical areas of service." Order No. PSC-95-0913-FOF-EU.

It is clear from these orders that if the Commission found areas where the facilities of GPC and Gulf Coast were commingled, in close proximity, or where further conflict is likely, and if the utilities could not agree on a territorial boundary, then the Commission would establish one in South Washington and Bay counties. Gulf Coast relied on this order and in good faith followed the Commission's directives to submit a proposed boundary line. Two and a-half years passed before the Commission changed its original order and determined no lines should be drawn and no territorial agreement be established between them.

A significant amount of time had passed in the instant case, just as in Peoples Gas and Austin. Not only was there no significant change in circumstances or change in the public interest that would provide the basis for the Commission to change its prior two orders, but also the Commission actually determined that the very facts existed that it said would necessitate a boundary line.

This court in its prior decision awarding the Prison to Gulf Coast stated, "The Commission also ordered the two companies to develop a territorial agreement to avoid future duplication of facilities and to establish territorial boundaries." Gulf Coast Electric Cooperative, Inc v Clark, 674 So. 2d 120, 122 (Fla 1996). The Commission is now going back on its original order. This court recognized that the Commission's order clearly and unmistakably directed the establishment of geographic territorial boundaries. Indeed, neither Gulf Coast nor GPC challenged that portion of the Commission order. If the Commission found there were areas of South Washington and Bay counties where the facilities of the two utilities were commingled and in close proximity, which it did, then the only issues remaining were for the Commission to determine where the line should be drawn.

CONCLUSION

For the reasons stated herein, Gulf Coast respectfully requests that this court enter an order:

1. Reversing that part of Commission Order No. 98-0174 that determined that no territorial boundary should be drawn, that no further uneconomic duplication will occur in the twenty-seven (27) identified areas, and that territorial disputes will continue to be heard by the Commission on a case-by-case basis, and

2. Directing the Commission to establish a territorial boundary in the twenty-seven (27) identified areas as set forth in Exhibit 2 in order to stop the historical and continuing pattern and practices of these two utilities to build and to continue to build unnecessary duplicative facilities capable of serving the same customers that now and over time will result in unnecessary and uneconomic duplication of electric facilities.

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CERTIFICATE OF SERVICE

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