

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 )

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Case No.: 92,479

**FILED**

SID J. WHITE

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Chief Deputy Clerk

REPLY BRIEF  
 OF  
GULF COAST ELECTRIC COOPERATIVE, INC.

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## SYMBOLS AND DESIGNATIONS

When referring to the record, exhibits, and the transcript the following symbols and designations will be used:

References to the record - "[R/ \_\_\_\_\_]";  
to exhibits - "[Ex./ \_\_\_\_\_]";  
to the transcripts - "[Tr./ \_\_\_\_\_]".

The Florida Public Service Commission shall be referenced in this brief as "the PSC" or "the Commission". Gulf Coast Electric Cooperative, Inc. is referred to in this brief sometimes as "GCEC", "Gulf Coast" or the "Appellant". Gulf Power Company is referenced in this brief as "Gulf Power" or "GPC".

## **STATEMENT OF THE CASE AND FACTS**

In addition to Gulf Coast's statement of the case and facts in its Initial Brief, it is instructive to add in rebuttal that the PSC set out seven (7) issues to be resolved in Order No. 96-1191 [R/532] a copy of which is included for reference in the Appendix to this brief.

Those issues were previously identified by the PSC in Order No. PSC-96-1191-PSO-EU [R/532]. GPC sought clarification of Order No. 96-1191-PSO as to whether that order was a final statement of the issues to be addressed. In Order No. 96-1331 [R/550] the PSC clarified Order No. 96-1191, and said: "The purpose of these proceedings is to establish a boundary delineating Gulf's and Gulf Coast's territories." (Order 96-1331 at p. 2). It then reiterated Order No. 96-1191 stating that the issues to be addressed at the hearing are those approved by Order No. 96-1191. The PSC said that either party may present additional issues for consideration at the Prehearing Conference. Following the Prehearing Conference, the PSC again limited the issues to be determined to Issues 1 through 7 (see Appendix).

GPC also filed a motion to dismiss [R/441] in which GPC essentially argued that the PSC had no jurisdiction to involuntarily impose a territorial boundary between GPC and Gulf Coast. The PSC denied Gulf Power's motion to dismiss in Order No. 96-1358 [R/568].

## **SUMMARY OF ARGUMENT**

The PSC has over thirty-three (33) years of prior practice and policy of encouraging and approving territorial boundaries to avoid duplication of facilities, unnecessary facilities, and uneconomic duplication of facilities. It has for over thirty-three (33) years allocated territories and set boundaries between investor owned utilities and cooperatively owned utilities. This court has admonished the PSC when the PSC has faltered from that policy



and practice. The PSC in this case said clearly and bluntly, not in one order, nor in two or three, but in six orders that if it found conflict, commingling, close proximity and overlapping in the facilities of GPC and Gulf Coast, it would draw a boundary. It conducted a hearing to resolve the seven (7) issues it decided were determinative. It found conflicting facilities that are commingled and in close proximity in twenty-seven (27) areas. It then departed from its prior practice and policy, the policy of Section 366.04(5), and this court's prior decisions by essentially deciding that boundaries are not in the public interest and that utilities may in fact continue to duplicate each others facilities either uneconomically, unnecessarily, or both, and it will not interfere unless a utility files a formal complaint with the PSC on a case-by-case basis. This change to a passive policy collides dangerously with the PSC's duty under Section 366.04(5), Story v. Mayo, Lee County Electric Cooperative, Inc. v. Marks, and could subject all existing territorial agreements to anti-trust challenges based on the PSC's failure to actively supervise, police and direct the state mandated regulatory scheme. The PSC's arguments on obligation to serve, rate differences, regulatory differences between a profit motivated utility (GPC) and a cooperatively owned non-profit utility (Gulf Coast), natural monopoly arguments, economic theories, and references to a publication outside the record, are not only improper arguments and references, they were designed to deliberately mislead this court and should be stricken. Those arguments were not issues to be resolved, were not specifically argued below, and cannot be heard now.

### **ARGUMENT I**

- I. **WHEN THE PSC'S STATED PURPOSE OF THE PROCEEDING BELOW WAS TO ESTABLISH A BOUNDARY BETWEEN GPC AND GULF COAST, AND WHEN THE PSC DETERMINED TO DRAW SUCH A LINE WHERE THE FACILITIES OF**

**THE TWO UTILITIES ARE COMMINGLED, CONFLICT, OR ARE IN CLOSE PROXIMITY, AND WHEN THE UNDISPUTED RECORD EVIDENCE SHOWS TWENTY-SEVEN AREAS WHERE THE FACILITIES ARE IN FACT IN CONFLICT, ARE COMMINGLED AND ARE IN CLOSE PROXIMITY, THE PSC'S ORDER REFUSING TO DRAW A BOUNDARY BETWEEN THE TWO UTILITIES IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW AND IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

- A. BOTH THE PSC'S AND GPC'S ARGUMENTS THAT THE FACTS ARE DISPUTED, THAT THE DUPLICATION, CONFLICTS, AND COMMINGLING IN THIS CASE ARE NOT UNECONOMIC, THAT PRIOR CASES AND PRIOR PSC ORDERS ARE NOT APPLICABLE TO THIS CASE ARE NOT SUPPORTED BY THE RECORD, BY CASE LAW, OR BY PRIOR PSC PRECEDENT.

". . . 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." [R/311, PSC Order No. 95-0271, p. 11]. "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." [R/358, PSC Order No. 95-0913, p. 4, emphasis in original]. "The purpose of these proceedings is to establish a boundary delineating Gulf's and Gulf Coast's territories". [R/550, PSC Order No. 96-1331, p. 2]. "If the parties are unable to resolve their differences, we stated that we would conduct additional evidentiary proceedings to establish that boundary. In a clarifying and amendatory order, we reiterated that if the parties were unable to agree to a boundary, then we would draw boundary lines." [R/568, PSC Order No. 96-1358, p. 2]. "Because the parties have been unable to agree on a boundary, this matter is scheduled for an evidentiary hearing so that the Commission may determine the appropriate boundary for the utilities." [R/820, PSC Order No. 97-0466, p. 1, the Prehearing Order].

The sole purpose of the hearing was to establish a territorial boundary between GPC and Gulf Coast if the PSC found that there were areas where the facilities of the parties were commingled, in close proximity, or were in conflict. While the PSC panel did say, in denying GPC's motion to add new issues and to modify Issue No. 6, that it could decide not to draw boundary lines after a hearing, those statements were wholly consistent with the PSC's stated intent. If it did not find conflict, facilities commingled, or not in close

proximity, then it would not draw a boundary line [R/358, PSC Order No. 95-0913]. The PSC then found, and what is clearly undisputed, that there is conflict in twenty-seven (27) areas identified in the PSC's decision:

"It is clear from the record that there are multiple areas where Gulf Coast and Gulf Power have existing facilities which are commingled and in close proximity in South Washington and Bay Counties. The extent of the conflict, at a minimum, is the twenty-seven (27) areas both parties agree on". [R/999, PSC Order No. 98-0174, p. 2, the order subject to this appeal].

The PSC, in the face of its prior precedent and orders, which GPC and the PSC now say are not applicable, declined to draw a boundary and even went so far as to agree that if a customer is willing to build or to pay GPC to build the necessary facilities for GPC to serve it, the cost would not be included in the cost to serve [R/999, PSC Order No. 98-0174, p. 3]. This directly contradicts this court's decision in Lee County Electric Cooperative, Inc. v. Marks, 501 So. 2d 585 (Fla. 1987), where the PSC allowed a customer to build transmission facilities at its cost to reach Florida Power & Light ("FPL"), when Lee County Electric's facilities were closer and on the site of the customer's facilities. This court rejected that notion, refused to allow FPL to duplicate the facilities of Lee County Electric and noted that the court ". . . repeatedly has approved the Commission's efforts to end the economic waste and inefficiency resulting from utilities "racing to serve". . ." (Id., at 587). The PSC again says that practice is acceptable. This court did not allow it in Lee County Electric Cooperative, Inc. v. Marks, and should not allow it now.

If the PSC and this court were to follow GPC's arguments that no one can predict how growth patterns will occur (GPC Answer's Brief at p. 6) that utilities do not serve areas, they serve customers (Id.) and that expected load growth is not based on geographic areas being served (Id.), then there is no rational basis for the PSC to ever approve a territorial

agreement between any two or more utilities that allocates territory. Indeed, the PSC's order in this case, if followed through its logical conclusion, deems it uneconomic and unwise for any utility to ever agree to a territorial agreement.

GPC claims a boundary would carve out "vast unserved territory" and eliminate all expansion by GPC, but offered no evidence to substantiate the "vast unserved territory" argument, and none is in the record to support this claim which was also parroted by the PSC. It is ironic that GPC and the PSC squabble over Gulf Coast's proposed boundary, when in fact, the PSC ordered the utilities to develop and submit a proposed boundary. Only Gulf Coast complied with the order and now the PSC attacks Gulf Coast for doing so.

Both the PSC and GPC have ignored this court's pronouncements in Story v. Mayo, 217 So. 2d 304 (Fla. 1968), and Lee County Electric Cooperative, Inc. v. Marks, that a customer has no right to select his power supplier merely because he deems it to be to his advantage. Customer choice is a factor (not a decision) that is only to be considered if all other factors are substantially equal (Rule 25-6.0441(2)(d), F.A.C.).

The PSC's arguments on customer choice, public interest, and natural monopoly are entirely circuitous. If Chapter 366 allows the PSC to allocate exclusive territory to an investor owned utility such as GPC, then customer choice has no meaning. If competition is to be allowed, as suggested by both GPC and the PSC, then there is no rational basis for allowing a monopoly. The PSC cannot have it both ways.

Gulf Coast has stated that drawing boundary lines will not always result in the most economic service in the short term. But in the long term, territorial boundaries will result in benefits to the ratepayers of both utilities and will follow the legislative mandate, prior PSC precedent, and decisions of this court to avoid uneconomic duplication of electric

facilities [see Tr./66, 77, 125, 134-135, 140]. The PSC and GPC both focus on Section 366.04(2) and entirely ignore Section 366.04(5). Indeed, in the PSC's order denying GPC's motion to dismiss, the PSC itself referenced its authority granted by Section 366.04(5) over the planning, development and maintenance of electric systems to avoid further uneconomic duplication of electric facilities. [R/568, PSC Order No. 96-1358, p. 5]. Prior orders of the PSC that both the PSC and GPC deem to be irrelevant include this long standing policy statement:

"We recognize, of course, that one of the values to be realized from encouraging territorial agreements between utilities providing the same kind of service in adjacent areas is that each may then have a greater degree of certainty as to the limits of their expansion and may plan its growth and the financing of it in advance without fear of an invasion by the other that might make a committed investment a partially wasted venture. In Re: Investigation of Territorial Agreement between People's Gas System, Inc. and City Gas Company of Florida as it relates to providing natural gas service within the City of Pompano, Docket No. 6231-GU, Order No. 3835 issued June 24, 1965

This policy clearly follows the testimony of Gulf Coast's witnesses [Tr./65-70, 76, 91, 140].

The PSC reiterated its policy regarding territorial agreements and boundaries in Order No. 20808:

"The Commission has long recognized that in order to have effective planning each utility must identify the customers it is obligated to serve. Territorial agreements set the boundaries that establish which utility is obligated to serve a new customer." (In Re: Petition of Florida Power & Light Company for the Declaratory Statement regarding request for Wheeling, Docket No. 881326-EI, Order No. 20808 issued February 24, 1989, p. 6)

Order No. 20808 referenced a 1965 order of the PSC:

"The advantages of having a territorial agreement are manifold: if there is no agreement, there will be duplications of service as a result of unrestrained competition, which in turn has several undesirable results. Unrestrained competition leads to attempted pre-emption of areas by 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. It means duplication of facilities. . .all to the detriment of the customer, and accordingly, not in the public interest." (Order No. 3799, p. 5)

In Order No. 20808 the PSC reviewed cases and statutes regarding territorial agreements and PSC authority, noting that this Court ". . .decried the situation created prior to territorial agreements." This court said in Story v. Mayo, the lack of a territorial agreement:

". . .required duplicating, paralleling, and overlapping distribution systems in the effected areas. This duplication. . .not only marred the appearance of the community but it also increased the hazards of servicing the area. Such overlapping distribution systems substantially increase the cost of service per customer because they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient." (Story v. Mayo, at 306) [see also, Tr./140]

Both GPC and the PSC would have us believe that (1) a passive case-by-case approach to resolving disputes is better than a defined geographic area where disputes will be avoided, and (2) that the PSC should not approve any territorial assignment with a cooperative. Such arguments are contrary to the prior policy and precedent. In an order approving a territorial agreement between Florida Power Corporation and Withlacoochee River Electric Cooperative, Inc. in 1988 the PSC said:

"Having reviewed the joint petition [seeking approval of a territorial agreement], we conclude that the proposed agreement has the potential of avoiding future duplication of electric service and facilities by FPC and WREC. We further conclude that it will allow the utilities to make orderly and economical long range plans for expansion of electric facilities necessary to serve customers in Citrus and Pasco Counties. We, therefore, find that the agreement is in the public interest and should be approved." (In Re: Joint Petition of Florida Power Corporation and Withlacoochee River Electric Cooperative, Inc. for approval of territorial agreement, Docket No. 880234-EU, Order No. 19480, issued June 10, 1988);

See also In Re: Petition of Suwannee Valley Electric Cooperative, Inc. to resolve territorial dispute with Florida Power Corporation in Hamilton County, Docket No. 890780-EU, Order No. 23178, issued July 12, 1990, where the PSC approved an agreement between Suwannee Valley Electric Cooperative, Inc. and Florida Power Corporation and said:

"We find that this agreement will prevent the future duplication of electric service and facilities in Hamilton County and is in the public interest". (at p. 2);

In Re: Petition to Resolve Territorial Dispute between Clay Electric Cooperative, Inc. and Florida Power Corporation, Docket No. 900064-EU, Order No. 24312, issued April 2, 1991:

"The proposed agreement [submitted after a territorial dispute had been initiated], entered into on January 22, 1991, between FPC [Florida Power Corporation] and Clay [Clay Electric Cooperative, Inc.] apportions the area in dispute to FPC and establishes the service territories of FPC and Clay in Alachua County. Under the proposed agreement each electric utility would have exclusive authority to furnish retail electric service for use within its territorial area. . . . We believe that this agreement will help eliminate duplication of facilities and provide for a coordinated electrical system in Alachua County." (Id. at p. 1-2).

Similar cases approving of territorial agreements: In Re: Joint Petition of Clay Electric Cooperative, Inc. and City of Newberry, Florida for approval of Territorial Agreement, Docket No. 910678-EU, Order No. 25080 issued September 18, 1991; In Re: Joint Petition of Florida Keys Electric Cooperative Association, Inc. and the Utility Board of the City of Key West for approval of a Territorial Agreement, Docket No. 910765-EU, Order No. 25127 issued September 27, 1991; In Re: Joint Stipulation between Florida Power Corporation and Clay Electric Cooperative, Inc. for a Territorial Agreement, Docket No. 840022-EU, Order No. 13023 issued February 23, 1984; In Re: Application of Florida Power Corporation and the Sumter Electric Cooperative, Inc. for approval of a Territorial Agreement, Docket No. 830189-EU, Order No. 12269 issued July 18, 1983.

The foregoing is not the entire list, but they serve to illustrate the PSC's prior policy of approving territorial boundaries to avoid unnecessary duplication. Contrary to what GPC says in its answer brief, the PSC's decision is not consistent with the PSC's prior precedent nor with judicial precedent (see p. 11 of GPC's Answer Brief).

Next GPC argues that this court's decision in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996) renders any cost differential of \$15,000.00 or less as negligible. Although the PSC adopted that view in its order subject to this appeal, it first rejected that notion when it denied Gulf Power's motion to dismiss:

"It appears that Gulf Power believes the ruling establishes a \$15,000.00 standard. Gulf Power contends that when the differential is \$15,000.00 or less, the customer should be permitted to choose its electric service provider. . . . To argue that the court's ruling in such a unique case somehow rises to a judicial declaration that in all cases where the additional cost is \$15,000.00 or less, a duplication is not uneconomic, goes beyond the bounds of reason and common sense. The statutes empowering the Commission do not establish a numerical jurisdictional limit. Neither did the Supreme Court." [R/568, Order No. 96-1358, at p. 3].

GPC and the PSC now opine that incremental cost differentials on a case-by-case basis is not uneconomic duplication, yet as Commissioner Clark aptly pointed out in her dissent, "The majority's holding that future uneconomic duplication in the identified areas will not occur because of the low incremental costs to extend additional facilities is illogical and has the effect of institutionalizing uneconomic duplication." [R/999, Order No. 98-0174, at p. 12).

The PSC's order in this case is, as Commissioner Clark stated, a significant departure from established PSC precedent. (Id. at p. 13). Not only has the PSC incorrectly interpreted its obligations under Section 366.04(5), its action is totally inconsistent with its prior agency policy and prior practice.



- B. THE PSC'S RELIANCE ON ESCAMBIA RIVER IS MISPLACED, SINCE THIS COURT EFFECTIVELY REVERSED THAT DECISION IN Gulf Coast Electric Cooperative, Inc. v. Clark, AND SHOULD NOT BE HEARD ON APPEAL.

The PSC next riddles its brief with citations to Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1384 (Fla. 1982), arguing that case dictates a decision in favor of GPC. First, that argument was not made by either the PSC nor by GPC, and therefore the PSC ought not to be heard on this and its other "coop versus investor owned utility" issues because such issues were not raised or argued below. Escambia River is inapplicable because the effect of its holding was reversed by this court's subsequent decision in Gulf Coast Electric Cooperative, Inc. v. Clark, supra. By awarding the prison site to Gulf Coast when all things were essentially equal, the court disavowed its prior decision that in such cases the investor owned utility (GPC) would prevail.

## **ARGUMENT II**

- II. THE PSC'S ARGUMENTS PROPORING TO CLAIM THAT INVESTOR OWNED UTILITIES SUCH AS GULF POWER COMPANY SHOULD BE AWARDED SERVICE AREAS BECAUSE THEY ARE NATURAL MONOPOLIES, HAVE AN OBLIGATION TO SERVE, WHILE ALSO ARGUING THAT GULF COAST, AS A RURAL ELECTRIC COOPERATIVE SHOULD NOT BE AWARDED EXCLUSIVE TERRITORIES, TOGETHER WITH THE PSC'S CITATIONS TO BONBRIGHT AND REFERENCES TO THE RATES OF THE TWO UTILITIES, PRESENT ISSUES AND ARGUMENTS THAT WERE NOT MADE BEFORE THE PSC AND MAY NOT BE CONSIDERED ON APPEAL.

The PSC, which itself set the issues to be resolved as those seven (7) Issues listed infra., then went outside the record to raise for the first time on appeal arguments relating to regulatory differences between Gulf Coast and GPC, rate differentials, comparisons of Chapter 366 and 425, the Escambia River holding, obligation to serve issues of Section 366.03, natural monopoly arguments, economic theory, and alleged subsidies to cooperatives, all of which the PSC then used to not only defend its decision, but also to

ambush Gulf Coast with arguments not made below. Arguments not specifically made at the trial court level cannot be raised on appeal. Kozich v. Hartford Ins. Co., 609 So. 2d 147 (Fla. 4th DCA 1992), Lipe v. City of Miami, 141 So. 2d 738 (Fla. 1962); Mariai v. Schleman, 94 So. 2d 829 (Fla. 1957); see also Florida Statute, Section 120.68(4). The obvious reason for disallowing such outside the record arguments is that Gulf Coast has had no opportunity to prepare for and argue the issues raised. In the first phase of this case GPC sought to raise similar arguments by submitting the rebuttal testimony of Russell L. Klepper. The PSC granted Gulf Coast's motion to strike his testimony [R/151, Tr./-26 (Volume 1 of transcript of hearing held on October 19, 1994)]. GPC again filed pre-filed testimony for Mr. Klepper in this Phase II of the case in response to which Gulf Coast filed the rebuttal testimony of Cockey, Hedburg, and Pratt. Gulf Coast again filed a motion to strike Klepper's testimony [R/650] following which Gulf Power and Gulf Coast stipulated to the withdrawal of the direct testimony of Klepper, and the rebuttal testimony of Cockey, Hedburg, and Pratt [R/818]. Hence any issues that may have been raised by the testimony of those witnesses was removed from this proceeding. The issues to be resolved in this case do not include any issues relating to rate differentials, natural monopolies, differences between rural electric cooperatives and investor owned utilities, government subsidies or economic theories cited by the PSC. Had those issues been raised, Gulf Coast would have had the opportunity to challenge such issues and to show: that investor owned utilities such as Gulf Power are subsidized to a far greater extent than cooperatives; the rates of GPC would be higher if it were allocated the less dense service areas of Gulf Coast; rates vary over time; Gulf Coast's rates are not unregulated; dispute the PSC's notion of economic theories relating to natural monopoly utility regulation; and that

cooperatives have an obligation to serve as well as investor owned utilities. GPC witness Holland sought to include testimony that assigning exclusive territorial rights to Gulf Coast was contrary to public policy. That testimony was stricken by the PSC [Tr./-150, testimony stricken at Tr./156-157].

Although it is an improper argument by the PSC, the "obligation to serve" argument (referring to Section 366.03) has been held inapplicable by the PSC when that issue was raised by an investor owned utility in a dispute with a cooperative (see In Re: Petition of Gulf Coast Electric Cooperative, Inc. against Gulf Power Company, Docket No. 850087-EU, Order No. 16106 issued May 13, 1986:

" . . . Gulf Power asserts that it has the exclusive obligation or right to serve the disputed areas pursuant to Florida Statute, Section 366.03. We find that Gulf Power's statutory obligation to provide electric service is inapplicable in these proceedings because we have found that the cooperative is entitled to serve the disputed area. This PSC has jurisdiction to resolve territorial disputes among utilities involving service areas and Gulf Power cannot rely on its statutory obligation to provide service upon request to abridge our authority to resolve those disputes brought before us."

See also In Re: Petition of Clay Electric Cooperative, Inc. to resolve territorial dispute with Florida Power & Light Company, Docket No. 870358-EU, Order No. 18822 issued February 9, 1988, "Where a territorial dispute arises over provision of service to a particular customer, the Commission defines the duty to serve through resolution of the dispute."

### **ARGUMENT III**

III. REFERENCES TO A BOOK OR ANY OTHER PRIVATE PUBLICATION SUCH AS *Principles of Public Utility Rates* BY JAMES C. BONBRIGHT, CITED BY THE PSC, ARE OUTSIDE THE RECORD OF THIS CASE AND ARE IMPROPER WHEN SUCH PUBLICATION WAS NOT JUDICIALLY NOTICED, NO WITNESS REFERRED TO THE PUBLICATION, THE PUBLICATION WAS NOT ADMITTED IN EVIDENCE, AND NO WITNESS WAS CROSS-EXAMINED BY USE OF THE PUBLICATION AS ANY AUTHORITY.

The PSC cites *Principles of Public Utility Rates* by James C. Bonbright to support its outside the record economic theory arguments. This reference is improper and should be stricken because such publication was not judicially noticed, no witness referred to the publication, the publication was not admitted in evidence, and no witness was cross-examined by use of the publication as any authority. Cone v. Benjamin, 27 So. 2d 90 (Fla. 1946); Rice v. Clement, 184 So. 2d 678 (Fla. 4th DCA 1966); City of St. Petersburg v. Ferguson, 193 So. 2d 648 (Fla. 2d DCA 1967); Green v. Goldberg, 630 So. 2d 606 (Fla. 4th DCA 1993).

#### **ARGUMENT IV**

IV. THE PSC MISSTATES DIFFERENCES BETWEEN PSC JURISDICTION OVER INVESTOR OWNED UTILITIES UNDER CHAPTER 366 AND RURAL ELECTRIC COOPERATIVES (ORGANIZED UNDER CHAPTER 425) AND DELIBERATELY ATTEMPTS TO MISLEAD THIS COURT BY STATING THAT GULF COAST IS NOT SUBJECT TO THE REGULATION OF THE PSC.

The PSC's argument that suggests the dispute should be decided in favor of GPC because GPC is a Chapter 366 "public utility", has an obligation to serve, that Gulf Coast is a Chapter 425 cooperative with no obligation to serve, were not raised as issues in the trial court and should not be considered on appeal. Even if it were argued below, the PSC misstates and misleads this court. Both GPC and Gulf Coast are subject to the PSC's jurisdiction under Chapter 366. Gulf Coast's tariffs are subject to PSC review and approval under Section 366.04(2)(b) just as Gulf Power's. While GPC is under the comprehensive jurisdiction of the PSC as a "public utility" as defined in Section 366.02(1), Gulf Coast is also subject to PSC jurisdiction as an "electric utility", just as GPC, as defined in Section 366.02(2). The PSC has jurisdiction over Gulf Coast under Section 366.031, 366.04(2), 366.04(4), 366.04(5), 366.04(6), 366.041(4), 366.051, 366.055, 366.095, 366.10, 366.14,

and 366.80 to 366.85, either as an "electric utility", or as a rural electric cooperative. The PSC's jurisdiction over GPC is more extensive than its jurisdiction over Gulf Coast, but as this court noted in Escambia River, and the PSC itself acknowledged in In Re: Petition of Peace River Electric Cooperative, Inc. against Florida Power & Light Company for resolution of a territorial dispute, Docket No. 840293-EU, Order No. 15210 issued October 8, 1985: "The Commission should not consider the extent of its jurisdiction, or lack thereof, and a basis for resolving territorial disputes. Although an REA cooperative is not subject to regulation for all purposes by a state or federal agency, that factor should not be relevant to a determination in this or any territorial dispute case". (Order No. 15210, at p. 11, Escambia River, at 1385).

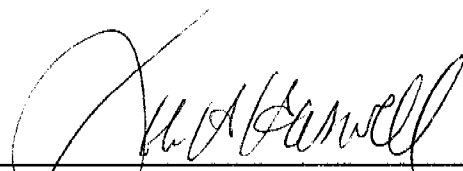
Consequently the PSC's argument in this regard is entirely false. The PSC cited Klepper's rebuttal testimony [Tr./530 and Tr./539-541] for its position. Not only do the statutes themselves belie Klepper's and the PSC's distorted view, but also Klepper admitted, on cross examination by the PSC, that he had conducted no analysis of Gulf Coast's operations to base his opinions on [Tr./511]. The issues in this case, therefore, did not include rate differentials for deciding territorial disputes, regulatory differences, natural monopoly/economic theories, obligation to serve issues, or Bonbright's *Principles*.

### **CONCLUSION**

Competent substantial evidence in this case rises to a level of undisputed evidence that dictates a reversal of the PSC order if the PSC has any obligation to follow its own directives, prior policies and practices, prior decisions of this court, and statutory mandates. The PSC has departed from the essential requirements of law by ignoring thirty-three (33) years of prior precedent, policy and case law. The court should reverse the PSC's order

and direct it to implement the recommendation of its own staff [R/925, memorandum dated October 23, 1997, p. 21-23] and draw a boundary.

At the very least, this case should be remanded to the PSC to offer a reasonable explanation of its change in prior practice and to support such change with expert testimony and documentation or other appropriate evidence. Section 120.68(7)(b) and (e); Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620 (Fla. 1st DCA 1998).

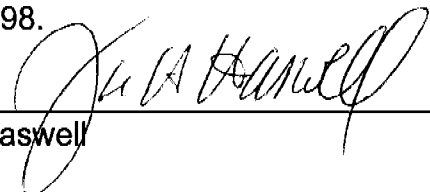


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to Russell Badders, Esquire, Jeffrey A. Stone, Esquire, Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32576-2950, Leslie J. Paugh, Esquire, Staff Counsel, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, Richard Bellak, Esquire, Division of Appeal, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, this 16 day of July, 1998.



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John H. Haswell

**APPENDIX**  
**TO**  
**REPLY BRIEF OF**  
**GULF COAST ELECTRIC COOPERATIVE, INC.**

Order No. PSC-96-1191-PCO-EU  
issued September 23, 1996

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to resolve )  
territorial dispute with Gulf )  
Coast Electric Cooperative, Inc. )  
by Gulf Power Company. )  
\_\_\_\_\_ )

DOCKET NO. 930885-EU  
ORDER NO. PSC-96-1191-PCO-EU  
ISSUED: September 23, 1996

**ORDER DETERMINING ISSUES TO BE  
RESOLVED AT EVIDENTIARY HEARING**

In Order No. PSC-95-0271-FOF-EU, the Florida Public Service Commission resolved a territorial dispute between Gulf Power Company (Gulf) and Gulf Coast Electric Cooperative (Gulf Coast) concerning which utility should provide electric service to the Washington County Correctional Facility. In that Order, the Commission also decided that the territorial dispute between the two utilities extended beyond the prison site to all areas of south Washington and Bay Counties where the utilities' facilities were commingled and in close proximity. The Commission directed the parties to submit a report identifying all parallel lines and crossings of their facilities, and all areas of potential dispute in south Washington and Bay counties. The Commission directed the parties to negotiate in good faith to develop a territorial agreement to resolve duplication of facilities and establish a territorial boundary. If the parties were unable to resolve their differences, the Commission stated that it would conduct additional evidentiary proceedings to establish that boundary itself. In a Clarifying and Amendatory Order, the Commission reiterated that if the parties were unable to agree to a boundary, then the Commission would draw boundary lines. Order No. PSC-95-0913-FOF-EU, issued July 27, 1995.

On February 19, 1996, the parties filed their reports pursuant to Order No. PSC-95-0271-FOF-EU. They reported that they were unable to agree on a boundary. Thereafter, Order No. PSC-96-0466-PCO-EU was issued to establish the procedural schedule for a Commission hearing pursuant to the directive of Order No. PSC-95-0271-FOF-EU. Staff then met with the parties to discuss the issues to be resolved at the evidentiary hearing scheduled for February 11-12, 1997. The parties and the staff disagree as to the scope of those issues. To facilitate discovery and the prehearing process, staff requested that a preliminary prehearing conference be held with the prehearing officer to consider the simplification of issues. That conference was held on July 29, 1996.



At the conference, Gulf Power argued that the threshold question of whether the Commission has authority to draw a territorial boundary when the parties are unable to reach a territorial agreement has never been addressed. Gulf further argued that Chapter 366, Florida Statutes, does not require the establishment of a boundary as the only means to resolve a territorial dispute. Gulf also claimed that a recent ruling by the Florida Supreme Court limits the Commission's authority to impose territorial boundaries when the parties are unable to reach an agreement on their own. In Gulf Coast Electric Cooperative Inc. v. Clark, 674 So. 2d 120 (Fla. 1996), the Supreme Court reversed the portion of Order No. PSC-95-0271-FOF-EU awarding electric service to the prison to Gulf Power. Gulf has raised the same arguments regarding the effect of the Court's ruling in a motion to dismiss filed on July 23, 1996.

Staff has proposed several issues for the Commission's consideration at the hearing. Upon consideration, it appears that those issues, with certain revisions suggested by Gulf, are appropriate. The revised issues are shown below. If Gulf would like to offer creative solutions to the territorial dispute, other than establishing a territorial boundary line, it may do so in the positions on the issues. Gulf's arguments with regard to whether the Commission has the jurisdiction to establish territorial boundary lines will be tested in the motion to dismiss to be decided by the Commission panel assigned to this docket. Thus, for the reasons discussed above, the following issues are approved for consideration in the February hearing:

1. What are the areas of South Washington and Bay Counties where the electric facilities of Gulf Power and Gulf Coast are commingled and in close proximity?
2. What are the areas in South Washington and Bay Counties where further uneconomic duplication of electric facilities is likely to occur?
3. What is the expected customer load, energy, and population growth in the areas identified in response to issues 1 and 2 above?
4. What is the location, type and capacity of each utility's facilities in the areas identified in response to issues 1 and 2 above?
5. Is each utility capable providing adequate and reliable electric service to the areas identified in response to issues 1 and 2 above?

6. How should the Commission establish the territorial boundary between Gulf Power and Gulf Coast in South Washington and Bay Counties where the electric facilities are commingled and in close proximity and further uneconomic duplication of facilities is likely to occur?
7. Where should the territorial boundary be established?

Based on the foregoing, it is

ORDERED that the issues identified in the body of this Order are hereby approved.

By ORDER of Chairman Susan F. Clark, as Prehearing Officer, this 23rd day of September, 1996.

/s/ Susan F. Clark  
SUSAN F. CLARK, Chairman and  
Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

( S E A L )

VDJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

ORDER NO. PSC-96-1191-PCO-EU  
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Any party adversely effected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.