IN THE SUPREME COURT OF FLORIDA

WEST FLORIDA ELECTRIC COOPERATIVE ASSOCIATION, INC.,	)	
Petitioner/Appellant,	)	Case Number: SC02-176
vs.	)	
E. LEON JACOBS, JR., CHAIRMAN, FLORIDA PUBLIC SERVICE COMMISSION,	)	
and	)	
GULF POWER COMPANY,	)	
Respondents/Appellees.	)	

AMENDED REPLY BRIEF
OF
WEST FLORIDA ELECTRIC COOPERATIVE, INC.

John H. Haswell, Esquire
Florida Bar Number: 162536
Chandler, Lang, Haswell & Cole, P.A.
Post Office Box 23879
Gainesville, Florida 32602
(352) 376-5226 telephone
(352) 372-8858 facsimile

and

Frank E. Bondurant, Esquire
Post Office Box 854
Marianna, Florida 32447
(850) 526-2263 telephone

(850) 526-5947 facsimile

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REFERENCES TO THE RECORD

References to the record on appeal will be listed in several ways to accommodate the Commission Clerk's Index listing:

"R" means Record, followed by a page number.

"T" means Transcript, followed by a page number to the Transcript, which may include five numbers.

"Exhibit" followed by a number refers to the numbered exhibits referenced in the Commission Clerk's Index.

"Final Order" means the Order appealed from, Order Number PSC-01-2499-FOF-EU.

"GPC" means Gulf Power Company.

"PSC" means The Florida Public Service Commission.

INTRODUCTION

Having read the Answer Briefs of the Appellees, it is now time to get back to reality, to what this case is really about. GPC has built a line extension 6 miles into West Florida Electric Cooperative, Inc.'s ("WFEC") historic service territory to provide electric service to a customer already being served by WFEC. GPC did this through a series of transactions with an alleged new customer, Enron Compression Services ("Enron") that makes it appear that Florida Gas Transmission ("FGT") is not buying electricity, but is buying only horsepower.

The PSC's departure from, and abandonment of, its years of recognizing historic service area, its attempt, again, to depart from its statutory authority (see, Tampa Electric Co. v. Garcia, 767 So.2d 428 (Fla. 2000), and its approval of a structured paper transaction that is nothing more than defacto retail deregulation, all add up to a reversal of the PSC's Final Order.

WFEC is not asking this court to reweigh the evidence or to second guess the PSC. Nothing needs to be reweighed in this case to reverse the PSC Order.

1. **The PSC Disregards Historic Service Area:** Both Appellees

claim that WFEC is trying to add to the current Rule 25 - 6.0441 by insisting on the consideration of historic service in resolving a territorial dispute. Again, nothing is further from the truth. WFEC is not asking this Court, nor did it ask the PSC to add anything to the Rules. Simply stated, the PSC has by its own precedent in the decisions cited in WFEC's Initial Brief and again cited by the PSC in its Final Order, included historic service as the first criteria in resolving territorial disputes. All one need do is review the Final Order at Pages 3 and 4. The PSC would have you believe that it has never awarded territory based on historic service when in fact the PSC in its own cited Order says: "We awarded service to the electric cooperative because it historically and currently served customers in the area while FPC did not". (Final Order Page 4). Appellant calls attention to the cases cited in its Initial Brief and in the Staff Recommendation (R-242-263), on historic service areas. Hence, this is not an issue that was made up or created by WFEC. Note also that the PSC's Final Order recognizes that the four-mile radius around Hinson Crossroads is the disputed area and except for the intrusion by GPC to serve the electric motors of WFEC's customer, FGT, the area is served exclusively by WFEC(R-033-034). Appellees refer to WFEC's position in this case as an attempt to draw a unilateral boundary line and to "capture service" (Page 23, Brief of GPC), which quite frankly is a

humorous argument, silly indeed, as WFEC has already been exclusively serving the area for over 40 years without any effort by GPC to provide service in this area (R-033, 034, 059, 165,170). What the Appellees are trying to say is that even if a utility is serving an area with adequate and reliable service, and has done so for over 40 years, and is capable of expanding that service at no greater cost than the neighboring utility (and indeed is currently serving the specific customer at a specific site), the PSC should allow a nonresident utility to move directly into the same building currently served by the host utility to provide electric service to motors owned by the host utility's customer. Both Appellees are telling this Court that historic service areas are not appropriate matters to be considered in resolving a territorial dispute. Nothing could be further from the purpose of the territorial dispute rule adopted by the PSC following its rule making hearing in Docket Number 870372-EU, held on Monday, October 30, 1989. Excerpts from that Rule Making Hearing are attached hereto as the Appendix. The discussion by the Commissioners clearly indicated that they intended the Rule to apply to geographic areas. The following quote from Commissioner Easley is quite instructive:

> "COMMISSIONER EASLEY: Mr. Chairman, you know, there is another practical bottom line to this thing. Everybody gets all concerned about customer preference. I cannot envision a circumstance in which this Commission, or any utility, would say to a customer that, forget all other things being equal,

> that just because you prefer to be served by that utility over there you're going to be served by that utility over there whether you are in the territory, out of the territory, whether you don't like the rates, you do like the rates, it doesn't make any difference. If they are in the service territory they are going to go with the rest of the service territory." (Appendix, Page 30).

Other comments by the PSC include, by Commissioner Beard:

> "...the only reason that we are involved in territorial disputes is geographic..." (Appendix, Page 68); referring to range wars, "that is a geographic problem. It's just as simple as it can be." (Appendix, Page 69);

Commissioner Beard again:

> "I don't have a problem with that because a service area is a geographic term, okay." (Appendix, Page 73);

and the dialogue in the hearing transcript from Pages 84 through 86, which includes the testimony of GPC Witness Howell (also a witness in the case at bar), speaking for GPC. When asked specifically by Chairman Michael McK. Wilson, about a customer who is dead center in a cooperative's service area but wants service from GPC or as Chairman Wilson said: "...he's right smack dab in the middle of a coop's territory", Mr. Howell agreed that it would be difficult for GPC to claim that service because,

> "I would say you would have to have an overwhelming good case presented by a good lawyer before you could award it otherwise". (Appendix, Page 85).

The upshot of the PSC's own rule making hearing, and its finding referred to in our Initial Brief that territory refers

to Chapter 366 speaks to territory and not to customers clearly eliminates the Appellees' argument regarding historic service area. The fundamental premise of the entire dispute resolution rule is bottomed on the determination of historic geographic service areas.

The PSC's dramatic policy change in this case, allowing retail competition through customer choice, even to the point of having two different utilities serving the same building, is similar to its deregulation attempt in Tampa Electric Co. vs. Garcia, supra, where the PSC sought to go beyond its statutory authority and allow unregulated merchant plants to be built in this state. This Court reversed the PSC's Order, holding that the PSC had exceeded its authority, and noted that, "Pursuant only to ... legislative action will the PSC be authorized to consider the advent of the competitive market..." (Id., at 435). The PSC is again trying to promote a change that only the legislature can authorize.

What likely has already happened with the construction of the addition to Station 13 (which they call 13-A) is a designated service area of GPC, the size of two electric motors, albeit large ones, completely surrounded by the service area of another utility (WFEC), which has been serving the physical site and surrounding geographic area for 40 years, and indeed, is currently serving the very customer, the end user, (FGT) with

electricity in the same building. The disputed area is not the footprint of the motors as the Appellees claim. The PSC's Order in this case identifies the disputed area as "...the entire area within the four-mile radius...", of Hinson Crossroads, the location of the FGT facility. (Final Order, Page 5).

2. The PSC Did Not Consider The True Costs To Serve: GPC and WFEC stipulated that each had equal access to the same transmission facility (the 230 kV line) and that it would cost each utility the same to provide that 230 kV service to the motors to be installed by FGT. WFEC did not stipulate that it would cost the same for each utility to serve Station 13-A, which includes the motors and the building the motors are in (Appendix, Pg. 1). Having made that stipulation, GPC now suggests that since it happens to be the owner of the 230 kV line from which an extension can be made by either party, service by it would be better than service by WFEC. That makes absolutely no sense. The Appellees' also suggest that it would be easier if Enron could deal with only one electric utility provider (namely GPC) instead of two, WFEC and Alabama Electric Cooperative ("AEC"), claiming that AEC is a middle man. No where in the record is there any testimony or evidence that AEC is a middle man or an intermediary. WFEC, as a distribution system, and AEC as a transmission and generation system, provide the same service as GPC at standards of service just as good as

GPC's, and AEC is co-owned by WFEC (R-130, 131, 135, 136, 161, 162). There is nothing in the record to refute this statement. How can service by GPC be superior to WFEC/AEC when GPC stipulated they would both be using the same facilities and building the same facilities? The argument is nonsense and was not an argument considered by the PSC below.

The PSC failed to consider all the costs involved in providing service to the customer. At the Final Hearing, the Staff finally attempted to address the issue of who was going to provide the electric service to the building housing the motors (part of Station 13-A) and GPC's witnesses made it clear it was not GPC (R-106, Lines 8-23). The Staff properly concluded that WFEC would be providing that service (R-242-257).

3. There Was No Lack Of Interest By West Florida: The Appellees assert that it was WFEC's lack of interest in serving Enron that should lead this Court to confirm service by GPC. This entire claim of the Appellees is that as a result of one feeble contact made in 1998 by Enron to the general switchboard of WFEC, GPC should be awarded service. Their entire case is based on a statement by GPC witness Anthony:

> "It is my understanding that ECS contacted both AEC and WFEC around December 1998, well in advance of signing an agreement with Gulf Power but a lack of energetic interest on their part, coupled with the sincere interest expressed by Gulf Power, lead ECS to pursue service from Gulf." (R - 94).

This was not the direct testimony of any person who contacted

AEC, but merely Mr. Anthony's "understanding". When asked what discussions FGT or ECS had with WFEC between 1996 and 1998 about service, Mr. Anthony said (All questions "Q" are asked by Mr. Haswell and all answers "A" are responses of Mr. Anthony):

> Q. Okay. What discussions did Florida Gas Transmission or ECS, to your knowledge, have with West Florida between 1996 and 1998 about this service?
> A. I do not know.
> Q. You don't know whether they had conversations or not?
> A. Not particularly, no. The conversation that I had with Enron Compression services, they made mention that they had contacted West Florida Electric and AEC at some time interval during that time, but I don't recall the time that they discussed that.
> Q. Did Enron at any time during any discussions that you were privy to say, "we're coming with Gulf because we haven't gotten anywhere with West Florida or AEC"?
> A. I don't recall them saying that.
> Q. So, regarding your testimony at Page 3, Line 7, ECS asked questions about the type of facilities. Again, you don't know whether any of those questions were asked of West Florida or AEC?
> A. I do not know what they asked West Florida Electric or AEC.
> Q. Do you know if they asked them anything?
> A. No, I do not know if they asked them any specifics." (Exhibit 9, Pages 14-15).

This testimony of Mr. Anthony fits exactly with witness Dunaway of WFEC (T-159 - 160). When asked if he recalled any discussions between WFEC and Enron in December 1998, Mr. Dunaway's testimony, unrebutted is:

> "No, ECS did not make a formal request in December of 1998, for information regarding West Florida's interest in serving the additional load at the FGT Pumping Station. According to ECS' Answer to WFEC's

> informal Interrogatories, ECS made a phone call to WFEC's general number in December of 1998. The phone call was not returned. Our business records do not show any evidence of receiving the call. If the unconfirmed call was ECS' only attempt to request a proposal from West Florida, it was ECS that demonstrated a lack of interest in West Florida."

The Appellees also try to suggest that this alleged lack of interest is comparable to the lack of interest that GPC showed in Gulf Coast Electric Cooperative, Inc. vs. Clark, 674 So.2d 120 (Fla. 1996), (Gulf Coast I), where this Court, reversing the PSC, awarded service to a prison site to Gulf Coast. Both Appellees mischaracterized the case entirely and suggest that this Court awarded Gulf Coast the load because it had actively pursued the service while GPC sat back and did nothing. That view is wrong. In Gulf Coast I, the record is replete with evidence that GPC knew what Gulf Coast was doing, sat back and watched its efforts, and said nothing until after Gulf Coast had secured the location of the correctional facility in Washington County. In this case, Enron, FGT and GPC kept WFEC out of the loop and quite frankly kept their negotiations private. The only witness from Enron to testify in this case, Mr. Hilgert, (Exhibit 14, Page 18) acknowledges that GPC did not even tell Enron that there was another electric service provider in the area. Hilgert also stated that he did not know that WFEC was serving the current customer (FGT) until after Enron had already signed a contract with GPC. Finally, and even more importantly,

the "but for" issue in Gulf Coast I was not the determining factor in the case. That argument was used to counter a claim by GPC that Gulf Coast had raced to serve the site. This Court tossed out GPC's racing to serve argument, and found that the PSC erred in failing to consider customer preference and abused its discretion in awarding service to GPC, holding that there "is no competent, substantial evidence in the record to support the PSC's findings that Gulf Coast (1) uneconomically duplicated GPC's facilities, and (2) engaged in a "race to serve" the prison." (Id. at 123). It was that simple. The Appellees allege that this project would not have been built at all if GPC hadn't done its work (albeit behind the scenes without WFEC's knowledge). A review of Exhibit 3 (RD - 8), an Exhibit from the Phase V expansion project of FGT clearly shows that this project was part of a huge project and to argue that FGT would not have added compression capacity to this station regardless of who the power supplier would be is ridiculous. Their own documents indicate they had to increase the capacity of this station regardless of who was going to serve it.

4. Gulf Coast Electric Cooperative vs. Johnson, 727 So.2d 259 (Fla. 1999) (Gulf Coast II): Appellees also mischaracterized "Gulf Coast II", a continuing dispute between GPC and Gulf Coast Electric arising out of the Gulf Coast I case. Again, as WFEC noted in its Initial Brief, Gulf Coast II

is clearly distinguishable from this case because in the case at bar there are no co-mingled facilities, until the PSC allowed GPC to construct facilities right into the building currently served by WFEC. GPC misrepresents the case even further by stating in its Brief at Page 16 that "this court affirmed the PSC's conclusion that establishment of fixed boundaries **in rural areas** hamper flexibility...". (Emphasis added). What this Court said in Gulf Coast II, was: "Regarding the undeveloped areas, competent substantial evidence supports the PSC's decision...". (Id. at 264). The Court was not referring to rural areas.

5. Customer Preference/Customer Choice: Appellees also confuse customer choice and customer preference. The territorial dispute rule refers to "customer preference", not to "customer choice". Nothing could be more simple. No where in the statute, or in any PSC rule is customer choice provided, nor is it anywhere stated that customer preference rises to a level of an absolute choice by the customer. What the PSC has done in this case, and what the PSC refuses to recognize, is that its decision will in fact allow customer choice prior to any legislative authorization to do so. Whether it is a preference or a choice, this Court has already ruled that a customer does not have the authority or the right to pick its electric service provider. (Story vs. Mayo, 217 So.2d 304 (Fla. 1968) and Lee County vs. Marks, 501 So.2d 585 (Fla. 1987).

6. The Second Transformer and 115 kV Service Opportunities: Both Appellees go into feigned indignation claiming that WFEC should lose this case because it refused to agree to the customer's requested service of 230 kV service and that WFEC insisted that the second transformer be utilized by WFEC to benefit its customers whether Enron liked it or not. Remarkably the Appellees argued that WFEC showed no interest in the project until after Enron and GPC had already signed agreements for providing the service. WFEC never had a chance to make any formal proposal to Enron regarding the use of its 115 kV facility, or access to GPC's 230 kV facility. (R-57, 58). The record is clear that Enron never asked WFEC for a proposal, and conducted all of its negotiations with GPC in private and when finally asked, gave WFEC little information and only at the last minute. (R-47, 57, 58). WFEC had to guess about the service needs, but once it received sufficient information it then agreed with the customer request for 230 kV service. WFEC had no reason not to since it had equal access to the 230 kV facility available to both GPC and WFEC.

The assertion by the Appellees that WFEC was trying to force Enron to allow it to use the second transformer is ridiculous. GPC and Enron have contractually agreed to keep the second transformer as a dedicated spare, and why not? GPC has no other customers in the area and no system to utilize it. But, WFEC

does, and if WFEC were properly recognized as the historical service provider, and allowed to continue to provide service to its own customer, Enron and WFEC could easily have made other agreements beneficial to both. We don't know what those arrangements would be because WFEC was not given a chance. There is a potential benefit to WFEC that was never fully explored because WFEC was not given the opportunity to discuss the matter with Enron since it privately agreed to service from GPC without WFEC's knowledge.

7. Gulf Power Will Not Be Providing All Of The Electric Service To Station 13-A: Another patently absurd result of this case is that even though the Appellees claim that Station 13-A is a new service area and constitutes a new customer, GPC cannot serve all of the electrical needs of Station 13-A and will not serve all of those needs (R-106). The building that the motors are housed in is served by WFEC for all of the lighting, heating, air conditioning, and other ancillary services. For GPC to serve the entire facility it would have to install additional facilities, presumably another transformer (Exhibit 7, P. 24, Lines 14-18), and the cost of such facilities would then make it more costly for GPC to serve than WFEC since WFEC's service is already there and already serves the facility. We can infer that GPC knew it could not serve the entire new Station 13-A and would have to add additional facilities besides

the 230 kV service. Hence, it is quite convenient for GPC to claim that the disputed area is only the footprint of the motors inside the building owned by FGT, WFEC's customer. For GPC to provide service to all of Station 13-A, it would uneconomically duplicate service by WFEC. We have the absurd result of two utilities providing service in the same building.

8. Enron Court Services: Both Appellees got quite perplexed by the simple hypothetical posed by WFEC regarding "Enron Court Services". Of course, this is merely a hypothetical, hence there is no evidence in the record regarding any territorial agreements between the City of Tallahassee and any other utility, nor is there any evidence about what kind of electric service is being provided to the Supreme Court building. This hypothetical could apply to any other situation, and indeed, need not be hypothetical at all since the actual fact of this "mischief" is occurring at Hinson Crossroads. The PSC was particularly perturbed with WFEC for referring to ECS as "Enron"...rather than its full name. (PSC Brief, Page 34, Footnote 14). In short, the PSC was suggesting that WFEC was trying to "Enronize" this case, somehow trying to "look to matters beyond the record". Perhaps the PSC should look at Exhibit 3 (RD - 5) where the predecessor to Enron Compression Services, ECTR, or ENRON Capital and Trade Resources capitalized its first name and used it exclusively in the body of the letter

describing its confidential project description in May of 1996. Apparently the Company was proud of the name “ENRON” in May of 1996.

9. Story vs. Mayo and Lee County vs. Marks: The Appellees basically conclude that neither Story vs. Mayo nor Lee County vs. Marks support the position of WFEC in this case and are, therefore, not on point. In the first place, Story vs. Mayo was heard by this Court, and ruled on, prior to the passage of the “Grid Bill”, which gave the PSC specific jurisdiction over territorial agreements and territorial disputes. The Grid Bill did nothing to change the Supreme Court’s holding that an electric customer has “no organic, economic or political right to choose an electric supplier merely because he deems it to be to his advantage”. (Story vs. Mayo, 217 So.2d 304 (Fla. 1968), Lee County vs. Marks, 501 So.2d 585 (Fla. 1987). Nothing has changed in either this Court’s subsequent opinions, nor at the legislature to change that ruling. It was not conditioned on, nor applicable only to, customers inside the service territory that was approved by the PSC in advance. The Appellees simply have no answer to the current state of the law because the PSC has gone beyond it and has, as stated in WFEC’s Initial Brief done by the back door what the legislature has refused to do in the State of Florida.

CONCLUSION

The Appellees have stated nothing in their briefs that changes or alters the fact that the PSC has gone beyond the essential requirements of law and has entered an Order that is unsupported by competent substantial evidence in the record. The PSC has now created a mechanism for customer choice, deregulation, and basically the elimination of any notion of the historic service area of electric utilities. This is a major policy shift and as Commissioner Palecki said in his dissent,

> "...such a shift in policy should be done either through legislation or at the very least, an amendment to our existing rule. With a statutory change or rule making, all players will know the rules of the game in advance. West Florida as well as Gulf Power and other potential providers will be able to govern themselves with full knowledge that customer preference will be paramount in determining which utility will be awarded service to customers in dispute". (Final Order, Page 15).

The PSC's Order should be reversed and the PSC should be ordered to grant WFEC the right to continue to serve its existing customer and historic service area.

Respectfully submitted,

John H. Haswell, Esquire
Chandler, Lang, Haswell & Cole, P.A.
211 NE 1st Street (32601)
Post Office Box 23879
Gainesville, Florida 32602
(352) 376-5226 telephone
(352) 372-8858 facsimile
Florida Bar No.: 162536

and

Frank E. Bondurant, Esquire
Post Office Box 854
Marianna, Florida 32447
(850) 526-2263 telephone
(850) 526-5947 facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Jeffrey A. Stone, Esquire and Russell A. Badders, Esquire, Beggs & Lane, 3 West Garden Street, Post Office Box 12950, Pensacola, Florida 32576-2950; Richard C. Bellak, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by U.S. Mail, this _____ day of July, 2002.

John H. Haswell, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief (Amended) was prepared in Courier New, 12-point font, and complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

John H. Haswell, Esquire