

IN THE SUPREME COURT OF FLORIDA

WEST FLORIDA ELECTRIC COOPERATIVE)
ASSOCIATION, INC.,)
)
Petitioner/Appellant,)
)
v.) Case No.: SC02-176
)
E. LEON JACOBS, JR., CHAIRMAN,)
FLORIDA PUBLIC SERVICE COMMISSION,)
and GULF POWER COMPANY,)
)
Respondents/Appellees.)
)
)
-----)

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE GULF POWER COMPANY

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

References to the Record shall be identified by "[R. ____]." References to the transcript of the September 19, 2001, hearing before the Florida Public Service Commission shall be identified by "[Tr. ____]." References to hearing exhibits shall be identified by "[Exhibit ____ at ____]."

Appellee Gulf Power Company shall be referred to in this brief as Gulf Power Company, Gulf Power, or the Company. The Florida Public Service Commission shall be referred to as the Commission. Appellant West Florida Electric Cooperative shall be referred to as WFEC.

STATEMENT OF THE CASE AND FACTS

Appellee Gulf Power Company rejects the Statement of the Case and Facts of the appellant, West Florida Electric Cooperative, as incomplete, inaccurate, irrelevant and argumentative. In lieu thereof, Gulf Power would submit the following:

(a) Nature of Case: This case involves an appeal from a Final Order entered in an administrative proceeding involving the Commission's exercise of its statutory jurisdiction over the electric grid in Florida and territorial matters involving electric utilities. The matter before the Commission involved a territorial dispute between WFEC and Gulf Power regarding electric service to a new customer in Washington County, Florida.

(b) Course of Proceedings and Jurisdiction: Enron Compression Services Company and Gulf Power jointly filed a petition for declaratory statement on February 26, 2001 seeking a determination by the Commission that, under the facts in this case, the customer had the right to select Gulf Power as its electricity provider and that Gulf Power had the obligation to honor that selection. The Commission was scheduled to make a decision regarding the petition for declaratory statement on May 1, 2001. WFEC filed a petition to resolve territorial dispute on April 10, 2001. [R. 5] An

evidentiary hearing regarding the dispute was held on Wednesday, September 19, 2001. Having considered all of the evidence and arguments of the parties, the Commission entered its Final Order resolving the territorial dispute, Order No. PSC-01-2499-FOF-EU, on December 21, 2001. [R. 264] WFEC filed its notice of appeal to the Supreme Court of Florida on January 18, 2002. [R. 279]

The Commission had proper jurisdiction to hear the dispute pursuant to the jurisdictional grant found in Section 366.04(2)(e), Florida Statutes. This Court has jurisdiction to hear the appeal pursuant to Section 3(b)(2), Article V, Florida Constitution, and Section 366.10, Florida Statutes.

(c) Disposition in Lower Tribunal: Having considered all of the evidence and arguments of the parties, the Commission entered its Final Order defining the service area as the footprint of the two new, very large electric motors for which the new electric service was needed and awarding Gulf Power the right to provide electric service to the new customer.

(d) Statement of Facts: Gulf Power Company is an investor-owned public utility with a statutory obligation to serve customers as long as such service would not uneconomically duplicate the facilities of another utility.

[Tr. 116] The Company was established in 1926 and has

continually served customers in Northwest Florida, including customers in Washington County, for more than 75 years.

[Exhibit 6 at 2-3] As an investor-owned public utility, Gulf is regulated by the Florida Public Service Commission pursuant to Chapter 366, Florida Statutes. [Tr. 116]

Florida Gas Transmission (FGT) owns and operates a natural gas pipeline spanning the breadth of Northwest Florida. [Exhibit 11] Compression stations are installed along the pipeline in order to pressurize the gas and move it downstream. [Exhibit 14 at 20] One of those compression stations, designated Station 13, is located on a 35 acre site in the vicinity of the Hinson Crossroads in Washington County, Florida. [Tr. 60] The area surrounding Hinson Crossroads is a generally remote, low density, rural setting comprised mainly of single family residences, fish camps, farm operations, a few small businesses and FGT's compression station. [Tr. 60]

Station 13 operates using natural gas fired compression. [Tr. 113-14, Exhibit 11] WFEC currently serves the basic electricity needs of Station 13 with 120/240 volt service extending from a 25,000 volt (25 kV) line that is part of their local distribution network. [Tr. 106, 152] This service is used to operate fans, lights, computers and the like that are necessary for the station's operations. [Tr. 106]

In order to serve an increased need for natural gas in

Central and South Florida, FGT began what it has dubbed the Phase V Expansion Project. [Exhibit 11] As part of the Phase V Expansion Project, it was determined that approximately 133,000 horsepower of additional compression capability was needed along the length of the pipeline. [Exhibit 11] Approximately 24,000 horsepower of this new compression capability was to be installed at a new facility called Station 13A, located in Washington County next to the existing Station 13. [Exhibit 11] As part of the determination as to how to supply the additional compression capability at Station 13A, FGT sought proposals from outside entities such as Enron Compression Services Company (ECS). [Exhibit 14 at 29] It was eventually determined that the needed compression at Station 13A would be provided by the installation of two new, very large, 15,000 horsepower electric motors. [Tr. 99, Exhibit 11]

To operate these electric motors, FGT turned to ECS. [Exhibit 13 at 1] ECS is in the business of contracting to provide mechanical energy for pipeline compression using electric motors. [Exhibit 14 at 8] In essence, ECS contracts to deliver mechanical energy for a fixed price, allowing pipeline operators like FGT to effectively eliminate a variable cost. [Exhibit 14 at 8-9] In doing so, ECS takes on some of the potential risks (and likewise, the potential benefits) associated with variability in energy pricing

(natural gas as compared to electricity). [Exhibit 14 at 29]

Though ECS and FGT have a corporate relationship, they are two separate corporate entities in two very different businesses. ECS is a wholly-owned subsidiary of Enron North America, itself a subsidiary of Enron Corporation. [Exhibit 13 at 2] FGT is a subsidiary of Citrus Corp., a joint venture between Enron Corporation and another, unrelated corporation, El Paso Energy. [Id.] ECS is a valid corporate entity with eight employees, and is authorized to do business in Florida. [Exhibit 14 at 8] ECS has separate ownership and management from FGT and the two entities operate at arms-length. [Exhibit 13 at 1] In fact, ECS has bid on other compression projects for FGT and not been awarded the contract. [Exhibit 14 at 23-27]

Early in the planning stages for Station 13A, ECS contacted both WFEC and Gulf Power concerning service to the proposed motors. [Tr. 42, 91] Gulf Power, which has been serving customers in Washington County continuously since its formation in 1926, responded to this customer request. [Tr. 91] The Company worked closely with ECS for over two years, in an effort to demonstrate the viability of providing the additional compression horsepower designated for Station 13A via electricity. [Tr. 91] Providing the customer electric service in a timely manner was paramount given the customer's

need to have the compression online in a specific timeframe. [Tr. 91] To help the customer meet its deadline for electric service and as part of Gulf's efforts working with ECS over the two years leading up to ECS's selection of Gulf as the preferred electricity supplier, Gulf committed to pre-engineer the necessary transmission additions and plan right-of-way acquisitions. [Tr. 91, Exhibit 6 at 6] Furthermore, when concern arose around WFEC's contention that it was entitled to serve Station 13A, ECS and Gulf prepared a joint petition for declaratory statement with the intent to resolve the uncertainty as quickly as possible. [Tr. 93-94, Exhibit 6]¹

The new motors planned for Station 13A have very specific starting, operating, and reliability requirements that dictate service from the low side buss of a distribution substation served directly by a 230,000 volt (230 kV) source. [Tr. 99] These requirements far outstrip the capacity of WFEC's 25 kV distribution system currently serving FGT and the other existing customers in the area. In fact, no utility had adequate distribution facilities in the area capable of meeting this need. [Tr. 74, 99, 112, 153] Station 13 has a

¹ The ECS/Gulf Power petition was filed on February 26th, 2001. The Commission's decision on the ECS/Gulf Power petition was scheduled for May 1st, 2001 but was delayed following WFEC's April 10, 2001, petition to resolve territorial dispute. The ECS/Gulf Power petition was eventually rendered moot after the Commission entered its Final Order in this case granting the same relief.

peak monthly demand of 159 kilowatts. [Tr. 62] The new service at Station 13A is expected to have a peak demand that may reach as high as 19,000 or 20,000 kilowatts, or more than 100 times the existing peak load found at Station 13. [Tr. 120, 194]

The only nearby facility that is adequate to serve this new load is Gulf Power's 230 kV transmission system, located approximately six miles to the south-west. [Tr. 99-101, Exhibit 2] In order to serve this new load, Gulf committed to design and build a new, six mile long, 230 kV transmission line and related substation equipment in time to meet the customer's deadline for electric service to Station 13A. [Tr. 99-101] In addition to the normal service requirements, the customer requested and Gulf agreed to provide a dedicated backup transformer which is being paid for by ECS. [Tr. 145] This transformer and related substation equipment is dedicated to the exclusive use of ECS, and cannot be used to serve any other load. [Tr. 145, Exhibit 7 at 22-23] To serve other customers from the 230 kV transmission line would require significant additional equipment. [Tr. 145] The equipment being installed to serve Station 13A is so electrically remote from the system serving WFEC's customer in the area so as to be imperceptible to them, and will not impact their current service. [Tr. 145]

WFEC is a rural electric distribution cooperative, owning no transmission facilities of its own. [Tr. 118-22] It does not have an approved rate tariff for the type of service required by ECS. [Tr. 45-46] Although WFEC can gain access to Gulf Power's 230 kV transmission facilities, such access can come only through and with the assistance of WFEC's supplier of generation and transmission services, Alabama Electric Cooperative ("AEC"). [Tr. 154] AEC would in turn obtain service from Gulf's 230 kV transmission line via the Southern Company's Open Access Transmission Tariff with FERC². [Tr. 154] If ECS were required to receive electric service from WFEC rather than from Gulf Power, it would have the effect of placing an additional intermediary, AEC, between the customer and the actual transmission service provider. [Tr. 121-22] Gulf Power, however, is the owner of the transmission facilities from which service to Station 13A must come and therefore the customer can obtain the full bundle of retail electric service directly from the provider of the facilities used to serve them. [Tr. 117]

² Gulf Power is a wholly-owned subsidiary of The Southern Company.

SUMMARY OF ARGUMENT

The Commission's decisions defining the disputed service area as the footprint of the new electric motors installed at Station 13A and awarding Gulf Power the right to provide electric service to ESC at the station are clearly supported by competent, substantial evidence contained in the record below. Furthermore, under the standard of review approved by this Court, the Commission's decisions are to be presumed reasonable and proper, and this Court should not attempt to re-weigh the evidence heard by the Commission. Nevertheless, WFEC's petition asks this Court to ignore evidence presented to the Commission and, contrary to established public policy in this state, prematurely draw a line in the sand as a territorial boundary around a rural area where service to no other customer is currently in dispute or likely to be disputed in the future. The Commission's decisions are consistent with the facts established in the record, the Commission's rules and the relevant precedent, including this Court's decision in Gulf Coast Electric Cooperative, Inc., v. Clark, 674 So. 2d 120, (Fla. 1996) [hereinafter referred to as "Gulf Coast I"]. There is no lack for substantial, competent evidence, nor does the Commission's order fail to meet any of the essential requirements of law.

WFEC has attempted to divert this Court's attention from

the Commission's analysis of the record by second-guessing the Commission's review of historical service, mischaracterizing ECS as a dummy corporation, ignoring the specific service requirements of Station 13A, and accusing the Commission of administratively creating new law. None of WFEC's diversionary arguments are supported by the record below, rather, they are simply an attempt to have this Court reconsider evidence the Commission has already reviewed. The record below reveals that the Commission properly reviewed the evidence submitted before it, including evidence on historical service, and then carefully applied the factors set forth in Rule 25-6.0441(2), Florida Administrative Code, before determining that service should be awarded to Gulf. The Commission's decision is supported by competent, substantial evidence and meets the essential requirements of the law.

ARGUMENT

The Commission's decision to award Gulf Power the right to provide service to ECS at Station 13A is clearly supported by competent, substantial evidence contained in the record below. The Commission's decision is consistent with the facts established in the record, the Commission's rules and the precedent established in Gulf Coast I. There is no lack of substantial, competent evidence, nor does the Commission's order fail to meet any of the essential requirements of law.

I. WFEC has asked this Court to go beyond the well defined limited standard of review and improperly re-evaluate the factual evidence presented to the Commission.

Commission orders come before this Court with the presumption that the decisions contained therein are reasonable, proper, and were made within the Commission's jurisdiction and powers. [Gulf Coast Electric Cooperative v. Johnson, 727 So. 2d 259, 262 (Fla. 1999) (hereinafter referred to as "Gulf Coast II")]. Any party challenging such orders must show that the decisions depart from the essential requirements of the law. [Id.] As long as the Commission's decisions are not clearly erroneous and are supported by substantial competent evidence, this Court should uphold the Commission's findings. [Id.] The Court should not attempt to re-visit or re-weigh evidence which has already been subject

to the Commission's review. [Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 328 (Fla. 1987)]

Furthermore, an agency's interpretation of a statute that it must enforce should be given great deference. [Id.]

Likewise, the same deference should be given to longstanding administrative rules. [Pan American World Airways, Inc., v. Florida Public Services Commission, 427 So. 2d 716, 719 (Fla. 1983)] Such a deferential standard of review is appropriate given the Commission's particular expertise in the area.

[Gulf Coast II at 262] Nevertheless, WFEC has repeatedly tried to convince this Court to re-interpret Commission rules such as Rule 25-6.0441(2), and to re-weigh evidence presented to the Commission regarding, among other things, historical service and the corporate parentage of ECS. This can only be because an application of the well established limited standard of review outlined above clearly supports the Commission's decision in favor of Gulf Power.

II. The Commission's decision that the service area is the footprint of the two 15,000 horsepower motors located at Station 13A is supported by substantial, competent evidence and meets the essential requirements of law.

The Commission found the only service area in dispute to be the footprint of the two 15,000 horsepower motors at Station 13A. [R. 270] The record is clear that the only active dispute in this case was over service to ECS at Station

13A. [Tr. 92, 110-11, 193] Despite its effort to enlarge this dispute to a broader geographic area than the scope of Station 13A, WFEC failed to show that any active controversy exists over any other customer request for service at any location other than that covered by the request for electric service by ECS at Station 13A. In reaching its decision, the Commission found that to establish any other territorial boundary in the disputed area would be "premature" and against the prior policy of the Commission. [R. 270]

In the past, the Commission has wisely declined to rule on hypothetical disputes. For example, in Order No. 20892 issued March 14, 1989 in Docket No. 881262-EU, the Commission granted a motion to dismiss and ruled (at page 3):

CHELCO's Petition and Complaint should also be dismissed. CHELCO has only offered speculation as to a future fact pattern and has not alleged facts constituting a present territorial dispute. The Commission's authority to resolve such disputes stems from Section 366.04(2)(e), Florida Statutes (1987) which the Commission itself has expressly limited to "actual and real" controversies; no statutory basis for interceding in a potential dispute exists." [sic] See, Order No. 15348 issued on November 12, 1985 in Docket No. 850132-EU. Thus, CHELCO's complaint is, at best, premature. If and when Gulf actually attempts to serve a customer within CHELCO's service area, the cooperative will have a cause of action.

[In re: Petition of Alabama Electric Cooperative Inc., 89 F.P.S.C. 3:179 (1989)] In Order No. 15348, the Commission rejected CHELCO's allegation that a controversy over customers

or territory was "imminent" as sufficient to invoke the jurisdiction of the Commission to resolve a territorial dispute. [In re: Petition of Choctawhatchee Electric Cooperative, Inc., 85 F.P.S.C. 11:74 (1985)] The Commission stated that "unless and until an actual and real controversy arises, no statutory basis for interceding in a potential dispute exists." [Id.]

Neither Gulf Power nor WFEC has received a request for new service from any other customer in the area around Station 13A that is being disputed by the other utility. [Tr. 193] Gulf Power assured the Commission that it does not intend to serve any present customer of WFEC. [Tr. 111] Therefore, this case does not involve an active or imminent dispute over existing customers of either utility. In addition, Gulf assured the Commission that it will not serve any future prospective customer in the vicinity of Station 13A where such service would constitute uneconomic duplication of WFEC's facilities. [Tr. 111] The Commission considered this fact as shown at page 5 of the Final Order. [R. 269] Therefore, the Commission is justified in its determination that there is not likely to be a dispute over potential new customers in the area.

As a practical matter, Gulf would not be able to serve the largely residential load of the other customers typical of

the area without adding additional facilities, substantial voltage conditioning equipment and the like due to the type of service being provided and the effects of voltage dips during Station 13A motor starts. [Tr. 101-02; Exhibit 8 at 15-16; R. 271] This need for additional equipment to allow Gulf to serve the type of customers represented by WFEC's existing load in the area is a result of the fact that the type and character of electric service required by the new electric load of ECS at Station 13A is substantially different from the "normal" electric services required in the Hinson Crossroads area.

All of these facts were relied on by the Commission in making its decision regarding disputes over electric service in the general area around Station 13A. [R. 269] The Commission determined that no other active controversy exists or is reasonably foreseeable in the general area around Station 13A. [R. 269-70] Therefore, the Commission properly declined to expand the definition of disputed area in this case into an area that is not currently the subject of an actual and real dispute. [Id.]

The Commission's decision limiting the size of the "disputed" service area is consistent with its stated goal of not prematurely establishing territorial boundaries. In the absence of an active dispute over a specific customer request,

a determination regarding service rights to an area greater than the footprint of Station 13A, as WFEC suggests, would encompass areas that are presently undeveloped. The Commission has found such a proposition to be adverse to the public policy that seeks to avoid uneconomic duplication of facilities. [Tr. 112] The Commission addressed this issue in Order No. PSC-98-0174-FOF-EU, which was later affirmed by this Court in Gulf Coast II.

In Gulf Coast II, the Commission had acknowledged that expansion of areas in dispute into undeveloped areas could lead to uneconomic duplication of facilities. [Id.] This Court concluded that "the PSC is not required as a matter of law to establish territorial boundaries in order to resolve a territorial dispute that does not involve service to current or future identifiable customers." [Id. at 264] This Court affirmed the Commission's conclusion that the establishment of fixed boundaries in rural areas hampered flexibility and would serve as a deterrent to the economic expansion of service, and that the Commission should not be placed in a "judicial straight-jacket". [Id. at 265] Prematurely awarding service rights in an undeveloped area to a utility hampers the Commission's ability to determine which utility is in the best economic position to extend service to the undeveloped area at such time as development occurs. [Tr. 112] Under the facts

of this case, designating either Gulf Power or WPEC as the service provider for an area larger than that of the footprint of Station 13A would, in effect, be drawing lines on the ground in the absence of an actual dispute.

III. The Commission's decision awarding Gulf Power the right to provide electric service to the two 15,000 horsepower motors located at Station 13A is supported by substantial, competent evidence and meets the essential requirements of law.

The Commission's rule for resolving territorial disputes is found in Rule 25-6.0441(2), Florida Administrative Code. In that rule, there are four specific factors spelled out for the Commission's consideration:

(2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:

(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 subtransmission facilities to the disputed area presently and in the future; and

(d) customer preference if all other factors are substantially equal.

Though this list is not intended to be exclusive, the fact that several factors are listed does appear to provide some indication that these factors are those that the Commission

found were especially important for it to consider in resolving territorial disputes. There is no requirement that the Commission consider any other factors in making its decision, though they are permitted, pursuant to Rule 25-6.0441(3), to seek additional relevant information if the Commission determines it to be necessary. [Fla. Admin. Code R. 25-6.0441(3)] Furthermore, this Court has recognized an administrative agency's right to interpret its own rules, as long as such interpretations are not clearly erroneous. [See Pan American World Airways, Inc., 427 So. 2d at 719] In the instant case, the Commission considered the evidence in the record and reasonably concluded that the first three of the four factors found above were equal and therefore that customer preference should be the determining factor. [R. 275]

The first factor, capability to serve, though arguably in favor of Gulf Power, was determined by the Commission to be equal. [R. 274] Gulf Power is the owner/operator of the only transmission facilities that are capable of providing the 230 kV source needed to serve this customer's load. [Tr. 99, 123; R. 273] Both utilities have access to Gulf's existing 230 kV facilities, since WFEC can access Gulf's transmission facilities through AEC by way of the Southern Company's Open Access Transmission Tariff with FERC. [Tr. 181; R. 273]

Arguably, this favors Gulf Power because the superior arrangement is for the customer to work directly with the owner/operator of the transmission facilities from which the electric service is to come rather than through multiple parties, such as WFEC through AEC, neither of whom own or operate the necessary transmission facilities in the area. The Commission ultimately decided that either utility would have to construct a transmission tap roughly equivalent to that planned by Gulf Power to connect its existing 230 kV transmission facilities to the new customer's load, therefore this factor is essentially equal. [Tr. 181, 195; R. 273]

Next, the Commission determined that the second factor, the nature of the disputed area, did not favor either utility. [R. 274] Both Gulf Power and WFEC have historically served rural customers in Washington County, and neither had existing facilities on site capable of handling the electric load proposed by ECS. [Tr. 116; R. 274] Likewise, the third factor, cost to serve, was also found to be equal among the utilities since the same new facilities had to be constructed no matter who would provide service. [Tr. 34, 74; R. 274] Therefore, under the unique circumstances of this case and consistent with the precedent established by this Court in Gulf Coast I, the fourth of the factors specifically listed in the Commission's rule, customer preference, is the only truly

relevant consideration. It is undisputed that the customer in this case, ECS, clearly prefers service from Gulf Power. [Tr. 91; Exhibit 6 at 6; R. 275]

As part of Gulf's commitment and statutory obligation to serve customers in Washington County, Gulf began working with ECS more than two years ago in an effort to bring this new electric load to Washington County. [Tr. 91] After more than two years of efforts and discussions, which included Gulf's willingness to pre-engineer the project and begin planning the right-of-way and equipment needs so that the new load could be served in a timely manner, ECS selected Gulf as its electric supplier at Station 13A. [Tr. 91, Exhibit 6 at 6] The Commission specifically recognized that Gulf Power acted responsibly and prudently in working with the customer to cost-effectively and reliably provide service to Station 13A. [R. 274] Gulf did so while meeting the customer's critical service deadline.

Gulf Power's role in helping to bring this new electric load to Washington County is very significant in the context of judicial precedent. In Gulf Coast I, this Court upheld a new customer's right to choose its electric supplier under circumstances that did not involve the uneconomic duplication of facilities or a "race to serve" by one of the utilities. [Gulf Coast I, 674 So. 2d at 123.] The Commission and this

Court each specifically noted the role that the utility chosen in that case to provide electric service had played in bringing the new electric load in question to Washington County. [Id.] But for the actions of the utility chosen in that case, there would have been no new load to serve. [Id. at 122.]

Like the circumstances examined by this Court in Gulf Coast I, the electric load at the heart of this dispute may never have materialized had it not been for the persistent efforts of Gulf Power Company in working with the customer in this case to ensure that the new compression facility in Washington County would use electric motors rather than some form of natural gas fired compression equipment. [Tr. 91, Exhibit 6 at 8] Gulf was willing to work in a timely manner with the customer and find a way to provide the requested service in time to meet the critical service deadline under which ECS was operating. [Tr. 91; Exhibit 6 at 6]

To the contrary, WFEC did not attempt to meet the needs of the customer at Station 13A. WFEC continued until late in the proceeding to try to impose a type and character of service on ECS at Station 13A that did not meet that customer's needs or request for service. Specifically, WFEC sought to provide service from a 115,000 volt (115 kV) source, even though such service would be inadequate due to the unique

operating requirements of the motors at Station 13A. [Tr. 74-75, 99, 129] In addition, WFEC continues to ignore the customer's reliability needs by insisting that the spare transformer requested and paid for by ECS be used to serve WFEC customers instead of being a dedicated backup. WFEC apparently does not place any value in the type and character of service required by the customer, offering only what WFEC wants to give the customer. The spare transformer is just that, a spare. It is required and paid for by the customer, ECS, to provide backup for reliability purposes. [Exhibit 7 at 22] This spare transformer cannot be used to serve other customers or somehow improve the reliability of WFEC's service to other customers without jeopardizing its availability to ECS. [Exhibit 7 at 22]

IV. The Commission's determination that historical presence was not relevant to this case was supported by substantial, competent evidence and meets the essential requirements of law.

WFEC misleads the Court in saying that it is undisputed that Station 13A is within its historic service area. [WFEC Initial Brief 5] First, historical presence is not one of the four factors enumerated in Rule 25-6.0441(2). Of course, the four factors are not exclusive and the Commission may consider criteria or factors that are not enumerated in Rule 24.6.0441(2). However, WFEC wants this Court to interpret

"may" in the Commission's rule as "must" and determine that the Commission must consider a fifth factor not enumerated in the Rule 24.6.0441(2), so-called "historical presence", in every territorial dispute.

This interpretation is without any legal basis. As noted above, this Court has acknowledged that the Commission should be given broad deference with regards to the interpretation and application of the statutes and rules which govern their affairs. [Pan American World Airways, Inc., 427 So. 2d at 719] The Commission is not required to consider historical presence despite the fact that it has done so in one or more past disputes, and a decision in this case to not consider historical presence is within the essential requirements of law. Despite all of this, the order below clearly indicates that the Commission had evidence and heard arguments regarding the applicability of historical presence in this case, and furthermore went on to include a detailed discussion on the subject in its final order in this docket. [R. 267-68]

Simply put, the historical presence claimed by WFEC is not a factor in this case. WFEC operates 25 kV distribution facilities in the area around Station 13A which are not capable of meeting the electric service requirements of ECS at Station 13A. [Exhibit 6 at 7; R. 274] As noted earlier, ECS requires electric service from a 230 kV transmission source.

WFEC would have this Court find that the existence of these 25 kV distribution facilities in an area is sufficient to capture that area in its entirety for a utility regardless of the character of service that can be provided by those facilities and the character of service requested, indeed required, by future customers such as ECS.

Such a finding encourages utilities to grab territory and reward utilities who engage in a "race to serve". For example, a utility could build the smallest distribution facility available around or across an undeveloped area and then claim all future customers in that area by virtue of its so-called "historical presence", regardless of whether or not another utility could better serve the customer's needs without uneconomic duplication, etc. This position regarding "historical presence" is a complete reversal of well-settled precedent attempting to penalize and cease the "race to serve" by and between competing utilities. Allowing WFEC to capture entire areas as its exclusive service territory using 25 kV distribution lines without regard to economics or the adequacy of those facilities to serve a particular future customer will lead to further uneconomic expansion of utility facilities and encourage the "race to serve".

Gulf Power is the only provider of 230 kV service in all of Washington County. [Tr. 99, 123] Furthermore, Gulf has

been providing electric service to customers in Washington County for over 75 years, beginning with some of Gulf's very first customers in 1926. [Exhibit 6 at 2-3] Under WFEC's notion of historical presence, Gulf is the historic service provider for all of Washington County.

WFEC appears to be championing historical presence and historical service territory as designated service territories akin to the certificated areas of service found in other jurisdictions. However, Florida does not certificate service territories, rather it allows for the economic expansion of utilities throughout its territorial rule. If a utility is allowed to designate its territory by constructing the smallest of distribution facilities around and over a particular area, then the practical effect will be to essentially repeal Rule 26-6.0441(2) and reverse this Court's decisions in Gulf Coast II and other cases as a utility would merely need to build a line near, through, or around a given area and then claim that area as its historical service territory. The capability, cost and customer preference parts of Rule 26-6.0441(2) and this Court's interpretation thereof would be rendered meaningless. It makes no sense to allow a factor that is not enumerated in either the rule or the enabling statute to have such an effect on the four factors specifically listed in the rule.

V. WFEC has attempted to divert this Court's attention by describing the customer in this case, ECS, as a "paper" corporation.

WFEC argues that it is the historic provider of service to Station 13A because it provides service to FGT at Station 13. The crux of this argument is the false assumption that ECS and FGT are one and the same. This claim by WFEC is no more than an attempt to divert this Court's attention from the Commission's discussion of the relevant factors in resolving territorial disputes by questioning the authenticity of the customer, ECS.

Under WFEC's theory, the contract between FGT and ECS is merely a sham transaction intended as a subterfuge to allow FGT to have retail access to another supplier of electricity for the new electric load at Station 13A. This theory ignores the fact that FGT and ECS are clearly separate and distinct entities with different ownership and control.

[Exhibit 14 at 6, 10, 23-24] Quite simply, WFEC's argument is a thinly veiled attempt to capitalize on the financial woes of Enron Corporation, the owner of ECS. It is a characterization, however, that is completely unsupported by the record below and contrary to the evidence heard by the Commission.

Chris Hilgert, ECS's corporate representative and the only individual testifying on this issue with firsthand

knowledge of the relevant facts, was deposed by WFEC about the relationship between FGT and ECS. [Exhibit 14] Mr. Hilgert also provided an affidavit as to details of the contractual arrangements and ownership of ECS and FGT. [Exhibit 13] In those documents, Mr. Hilgert made it absolutely clear that ECS and FGT are not one and the same. [Exhibit 13, Exhibit 14 at 6, 10, 23-24]

ECS is a wholly-owned subsidiary of Enron North America Corp., itself a subsidiary of Enron Corp., the parent corporation. [Exhibit 13 at 2, Exhibit 14 at 5] FGT, on the other hand, is a wholly-owned subsidiary of Citrus Corp., which is a 50/50 joint venture between El Paso Energy Corporation and Enron Corp. [Exhibit 13 at 2] In other words, ECS is 100% owned by Enron Corp. whereas Enron Corp. has at most a 50% ownership interest in FGT. Viewed another way, El Paso Energy Corporation, the other principal owner of FGT, has no ownership risk in the obligations of ECS because it has no ownership interest in ECS.

Despite WFEC's claim that ECS is a "paper" corporation created to sneak customer choice past the Commission and this Court, a review of the record suggests otherwise. ECS is a Delaware corporation properly registered to do business in Florida. [Exhibit 14 at 8] It has eight employees and contracts with four different gas providers on four separate

pipelines. [Exhibit 14 at 8, 11] Its relationship with FGT is governed by a series of contracts negotiated as part of a bid process. [Exhibit 14 at 9-33] The primary agreement between ECS and FGT expressly states that ECS is not acting as FGT's agent. [Exhibit 14 at 23-24] Mr. Hilgert also indicated that ECS had bid on another contract with FGT, but was not the successful bidder. [Exhibit 14 at 31]

ECS provides a service to FGT in by contracting to provide mechanical energy in the form of horsepower, which, in the instant case, is used to drive compressors installed on a natural gas pipeline owned by FGT. [Exhibit 14 at 8-10] ECS provides that horsepower at a fixed price and thus eliminates price risks for its customer. [Exhibit 14 at 15-16] In other words, ECS bears the potential risks associated with changes in comparative energy prices (for example, natural gas v. electricity). ECS also allows its customers to pay for the mechanical energy it provides with commodities as well as cash. [Exhibit 14 at 9]

All of the above, the separate corporate identities, the arms-length contracting, the business risks undertaken by ECS, all of these point to ECS being a legitimate corporate entity, and thus a legitimate customer of Gulf. All of these facts were in the record before the Commission. [Exhibits 13, 14] A "paper" corporation would not have the separate ownership,

employees, contracts, competitive bidding, and business risk that ECS has. WFEC's characterization of ECS as a "paper" corporation should be recognized for what it is, a smokescreen designed to divert this Court's attention from the Commission's review of the record below. ECS is a new electric service customer with new electric load not previously served by any electric utility. [Tr. 92, 111] WFEC's brief has attempted to mislead this Court with mere supposition and conjecture regarding this subject.

VI. WFEC cannot improve reliability for its customers by utilizing the spare transformer required, and paid for, by ECS.

As part of the service requirements for Station 13A, ECS required that a spare transformer be installed to serve as a standby in the event of a primary transformer failure. [Exhibit 7 at 22] ECS agreed to carry the costs of installing this transformer in order to ensure that it would be dedicated to serve Station 13A. [Id.] Because of this, the additional transformer is not available to serve other customers. [Exhibit 16, 22-23] Nevertheless, WFEC contends that its existing customers would benefit by having access to this spare transformer. [Tr. 155-56]

This argument completely ignores the contractual arrangement sought by ECS. WFEC claims that Gulf's witness Mr. Howell tried to "dodge" its questions but eventually

"reluctantly" agreed that the spare transformer could be used to serve other customers. [WFEC Initial Brief at 13] What Mr. Howell actually said was that it was physically possible to add a transformer and other equipment to the planned facilities in order to serve other customers. [Exhibit 7 at 24] Mr. Howell consistently stated that the equipment planned for Gulf's service to Station 13A was tailored to the customer's service requirements. [Exhibit 7 at 14-15, 22-24] Furthermore, this equipment would not be available to serve other customers. [Tr. 101-02] Providing service to other customers in the area would necessarily require the addition of a substantial amount of equipment. [Tr. 101-02] For example, additional substation equipment would be necessary to maintain voltage levels and prevent voltage dips associated with motor starts at Station 13A. [Exhibit 8 at 15-16] All of this highlights the fact that the character and type of service required by ECS is fundamentally and significantly different from the electric service historically provided by WFEC in the area.

No detrimental impact on reliability or power quality to either Gulf or WFEC's existing or future customers will result from Gulf's provision of service to ECS at Station 13A. [Tr. 101-02; R. 271] In addition, the facilities being constructed to serve ECS at Station 13A cannot be utilized to serve any

other customer in the area around Station 13A. [Tr. 101-02; Exhibit 8 at 15-16] In his direct testimony, WFEC's witness Mr. Perry admitted that the new facilities to serve ECS at Station 13A are "being constructed to serve exclusively the load requirements of the new consumer" and will not cause a decline in reliability of service to existing or future customers of West Florida. [Tr. 80] WFEC has inappropriately reached a conclusion that they can tie the facilities to be used to serve Station 13A into their existing system to improve reliability. However, the facts in the record only support the Commission's decision that no increase or decrease in reliability will occur regardless whether electric service is provided to Station 13A by Gulf Power or WFEC.

VII. WFEC's "Enron Court Services" hypothetical found in the conclusion to its Initial Brief clearly ignores the Commission's analysis of the four factors found in Rule 25-6.0441(2) and the prohibition on uneconomic duplication.

In the conclusion to its initial brief, WFEC argues that the Commission's order has set in motion a process by which any existing customer of a utility could create a new company and then, through that company, choose its electric supplier. To make its argument, WFEC creates a hypothetical by which "Enron Court Services" contracts to provide "illumination services" to this Court, using the Court's light bulbs, for a price which is less than that charged by the City of

Tallahassee for the electricity needed to operate the bulbs. WFEC argues that, according to the Commission's decision in this case, "Enron Court Services" could then contract with Gulf Power or some other utility to provide the electricity.

What WFEC's hypothetical ignores, however, is that the Commission decided to award the right to serve to Gulf Power based on the specific, unique facts found in this case. Those facts, which significantly differ from those of the hypothetical, clearly support the Commission's finding that awarding Gulf Power the right to serve Station 13A would not result in any duplication of facilities, uneconomic or otherwise. [Tr. 111] WFEC's "Enron Court Services" hypothetical implies that some utility other than the City of Tallahassee would come in and build distribution facilities to this Court, facilities that would clearly be duplicative of distribution facilities already in place and adequate to serve the existing load. Under the Commission's decision in this case as well as past decisions of this Court, such extensive, new, construction activities would clearly result in uneconomic duplication and thus would be improper.

CONCLUSION

The Commission's decisions determining the service area as the footprint of the two motors and awarding electric service for Station 13A to Gulf Power are clearly supported by substantial, competent evidence and meet the essential requirements of the law. WFEC has asked this Court to go beyond the well-established standard of review and re-weigh evidence previously heard by the Commission. This Court should resist WFEC's invitation to take over as the trier of fact. In this case, where the Commission has properly determined that all other factors are equal, that there is no uneconomic duplication of facilities, and that Gulf has worked diligently to bring this new load to Washington County, Gulf Power Company respectfully requests that this Court affirm the Commission's decision awarding service to Gulf Power.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States mail on this the 31st day of May, 2002, to the following:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the text contained in this brief is formatted in Courier New 12-point font as required by Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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