IN THE SUPREME COURT OF FLORIDA

WEST FLORIDA ELECTRIC COOPERATIVE ASSOCIATION, INC.,	)	CASE NO. SC02-176
Appellants,	)	
v.	)	
E. LEON JACOBS, JR. ET AL.	)	
Appellees.	)	

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission is referred to as the Commission or FPSC. Appellant West Florida Electric Cooperative Association, Inc. is referred to as West Florida or the Coop. Gulf Power Company is referred to as Gulf Power or GPC. Enron Compression Services, Inc. is referred to as ECS. Florida Gas Transmission is referred to as FGT.

References to the transcript of the September 19, 2001 hearing are designated Tr.___. References to the record are designated R. ___. References to exhibits are designated Exh. ___.

STATEMENT OF THE CASE AND FACTS

Appellee, Florida Public Service Commission (Commission) rejects the Statement of the Case and Facts of Appellant, West Florida Electric Cooperative Association (West Florida or WFEC) as largely irrelevant and, therefore, misleading.[1] Pursuant to Florida Rule of Appellate Procedure 9.210(c), the Commission provides the following Statement of the Case and Facts:

The challenged Commission Order resolved a territorial dispute concerning 230,000 volt service to a new electric pipeline compressor support facility in Washington County designated station 13A. The Commission resolved the dispute in favor of Gulf Power Company based on Rule 25-6.0441(2). Tr. 90-92; 99; R. 290-292.

Florida Gas Transmission (FGT) owns and operates a natural gas pipeline that runs through Florida. Enron Compression Services (ECS) has contracted with FGT to supply compression services for the planned capacity pipeline expansion known as the Phase V Expansion, scheduled for operation in the Spring of 2002. More than 95% of the volume of natural gas to be transported via the new pipeline expansion is anticipated to

[1] The Commission accepts, however, Section (b) of West Florida's Statement, Initial Brief, p. 1., entitled "Course of Proceedings and Jurisdiction".

serve natural gas fired electric generation in Florida. Tr. 92-93.

While both West Florida and Gulf Power Company (Gulf or GPC) were contacted in 1995-1996 about the project, West Florida describes its preliminary negotiations as having "fizzled out". Tr. 43; 91.[2] Both West Florida and Gulf were contacted again about the project in late 1998 by ECS, but only Gulf indicates that it responded to that contact at that time. Tr. 91; Exh. 14, p. 10.

Gulf's ensuing discussions with ECS over a two-year period included consideration of the benefits of electric motor pipeline compression as an alternative to compression by natural gas powered turbines, the construction of electric facilities that would be required to serve the new electric load, as well as reliability, quality of service, and economic issues involved in the project. Tr. 91.

The nature of the new electric load to be served is defined by the two 15,000 horsepower electric motors that are to be utilized to provide the power for pipeline compression. These motors must, in accordance with the manufacturer's specifications, be started "across the line", necessitating

[2] West Florida describes the initial 1995-1996 contact as involving Enron Capital and Trade Resources. ECS was incorporated in November 1998. Exh. 14, p. 8.

service from a 230,000 volt transmission source, rather than a source operating at 115,000 volts or less. Tr. 99; R. 24.

Gulf has a 230,000 volt transmission source located 6 miles from Station 13A, where the electric compressor installation is sited. West Florida has an Alabama Electric Cooperative (AEC) 115,000 volt transmission line located 14 miles from the site. Neither utility had any on-site capability to serve this load when ECS contacted them late in 1998. Tr. 74; 99-101; 153.[3]

Gulf's analysis of ECS' requirements for adequate, reliable service for this major component of Florida's utility infrastructure concluded that a 230,000 volt power source was necessary and that any source of 115,000 volts was inadequate "from both operational and reliability standpoints".[4] Gulf also noted that

> ECS has chosen to pay an additional fee to have Gulf install a dedicated [i.e., exclusively used by ECS] spare transformer in the substation because of its desire to have a higher level of reliability that would minimize any down time as a result of a possible transformer failure. Tr. 99-101.

Because, as earlier noted, the electric compression installation had to be operational by Spring 2002, time was of

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[3] West Florida supplies only 25 KV power in the area. Tr. 152.

[4] Gulf also has a 115,000 volt transmission line in the area. Tr. 74.

the essence from ECS' standpoint. Based on that, and the expectation of a formal request for service, Gulf began pre-engineering the project in October 2000 and performed preliminary work to support the acquisition of easements and right-of-way as well as long-lead time equipment such as transformers. Tr. 93; R. 25.

Gulf's discussions with ECS over a two-year period and its pre-engineering and other preliminary activity were within weeks of resulting in a contract (signed February 13, 2001) when West Florida belatedly sought information in December 2000 about the status of the project as to which its negotiations had "fizzled out" in 1996. Tr. 91; 56.

West Florida's communications to ECS were triggered by word of Gulf's activities in seeking right-of-way for a transmission line to serve ECS. These communications included a January 29, 2001 notice to ECS of West Florida's "intent to file a territorial dispute", a March 6, 2001, letter to ECS advising that "this [electric compressor] load was rightfully WFEC's" and a March 21, 2001 letter advising Gulf that

> WFEC would consider dropping its pursuit of this [electric compressor] load in exchange for a PSC approved territorial agreement that would assign certain other loads [to West Florida] that had expressed interest in being served by the cooperative or loads that we believe were taken unfairly by GPC but never challenged. Tr. 55-56. [e.s.]

Given the time constraints of the project, ECS' decision as to a final choice of electric power supplier for the project was necessarily made in early 2001. However, West Florida's Petition to Resolve Territorial Dispute was not filed until April 10, 2001. R. 25; 6. Though, at R. 185, West Florida apparently conceded the need for a 230,000 volt power source for the project by stipulation 8 days prior to the September 19, 2001, hearing, earlier pre-filed testimony of West Florida's witnesses demonstrates ambivalence on this point. Thus, ECS would have had to consider the following West Florida/AEC perspective on meeting ECS' needs during the time period of late 2000 to early 2001 when the decision on choosing a utility had to be made:

> However, it is not clear that any investigation was ever made using a soft start approach to starting these motors on the 115 KV system. Normally, a utility would be interested in minimizing its investment and the impact on its system by using a soft starting technique. It is unclear why that was not considered here. Apparently, only "across the line" starting was considered from Gulf's 115 KV system. We can only wonder if part of the reason for considering "across the line" starting was to support Gulf Power's contention to this Commission and ECS that only Gulf can provide the service since Gulf has the only 230 KV source nearby. We have asked Southern Company Services, Inc., in our transmission service request regarding this load, to investigate "across the line" and soft start from both Gulf Power's 115 KV and 230 KV lines nearby. Tr. 129.

This pre-filed testimony of West Florida's witness, dated August 22, 2001, post-dated by 6 months the February 26, 2001, Petition for Declaratory Statement (Gulf/ECS petition) signed by Gulf Power and ECS which states, as earlier noted, that

> the newly installed electric motors ECS will use to supply compression services pursuant to its contract with FGT must, in accordance with the manufacturer's recommendations, be started "across the line"...[5] R. 24 [e.s.]

The Gulf/ECS petition further noted that

> In late November 2000, Alabama Electric Cooperative (AEC) contacted ECS on behalf of WFEC to express interest in serving the load. ECS indicated to AEC that ECS would review any proposal they wanted to send, but that this timing was late and ECS was expecting to formalize arrangements for electrical service very shortly and they would need to respond quickly with the general details of their proposal. ECS provided AEC a load profile on December 7, 2000. No proposal has been received from AEC or WFEC to date in response to the load profile sent on December 7, 2000. R. 26-27.

Moreover, despite ECS' requirement of a dedicated spare transformer for ECS' exclusive use to insure its ability to provide compression service, which ECS paid for, West Florida testified that it should have "access to the second spare transformer" to provide "more economical and reliable service to

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[5] West Florida itself attached the Gulf/ECS petition as Exhibit 7 to its April 10, 2001 Petition to Resolve Territorial Dispute. R. 20. The Gulf/ECS petition was abated (while West Florida's Petition to Resolve Territorial Dispute was adjudicated) and then dismissed when the Order in this case granted the same relief sought in the Gulf/ECS petition.

its customers in the Hinson Crossroads area". Tr. 156. The same West Florida witness also testified about West Florida's present service to existing customers:

> The distribution circuit is operating at a strong 25 KV distribution voltage level providing for more than adequate capacity as well as stable service voltage conditions. Tr. 152.

STANDARD OF REVIEW

[The Supreme Court has] long recognized that administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. The same deference has been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration. Pan American World Airways v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983). A party challenging an order of the Public Service Commission bears the burden of overcoming the presumptions that the order was made within the PSC's jurisdiction and powers and that it is reasonable and just, by showing a departure from the essential requirements of law. Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999).

SUMMARY OF THE ARGUMENT

In this case, the Commission applied the relevant facts of record to the actual provisions listed in Rule 25-6.0441(2), F.A.C. In contrast, appellant seeks to apply peripheral facts to its own re-drafted version of the rule, in which appellant excises a provision it dislikes and substitutes a new provision it prefers.

The distinguishing fact of this case, nowhere even hinted at in appellant's summary, is well stated by West Florida's own witness:

> Neither Gulf Power nor West Florida have adequate facilities to serve the added load at the FGT [Florida Gas Transmission] site. Any distribution provider will have to build new distribution facilities to serve the size load being added. [e.s.]

The load added consists of two 15,000 horsepower motors by means of which Enron Compression Services (ECS) will supply contracted-for mechanical power to operate an FGT pipeline compressor. These motors require 230,000 volt service, whereas the only service already available in the area was West Florida's 120/240 volt (25 KV) service. Appellee Gulf Power Company has a 230,000 volt transmission line 6 miles from the site. Appellant West Florida has a 115,000 volt Alabama Electric Cooperative (AEC) transmission line 14 miles from the site.

The area in question is not the subject of a Commission-approved territorial agreement. In pre-hearing stipulations approved by the Commission, West Florida and Gulf Power agreed, inter alia, that both utilities could serve the new load adequately and reliably from Gulf Power's 230,000 volt line, that the area was rural, but this was not a relevant consideration as to the electric compressor project at issue, and that the cost to serve the electric compressor load was approximately equal for both utilities. Since these stipulations effectively eliminated reference to Rule 25-6.0441(2)(a), (b), or (c) to differentiate between the utilities, the Commission awarded the disputed service territory, consisting of the footprint of the motors, to Gulf, based on (2)(d) of the rule:

> (2)(d) customer preference, if all other factors are substantially equal. [e.s.]

The competent, substantial evidence supporting the Commission's findings as to Rule 25-6.0441(2)(a), (b), and (c), were the parties' own stipulations. The competent, substantial evidence supporting (2)(d), the customer's preference for Gulf, were ECS' request for service from Gulf and the Petition for Declaratory Statement as to that effect signed by ECS and Gulf and, as attached to West Florida's Petition in this case, made part of the record.

Though West Florida claims that all other factors were not substantially equal if West Florida's "historic presence" in the area were "considered", neither the rule nor Section 366.04(2)(e) mentions "historic presence" or requires it to be given some mandatory weight in the analysis. The Commission did not err in refusing to accord substantial weight to "historic presence" where no utility had any historic or contemporary 230,000 volt "presence" whatsoever in the area. Moreover, the historic presence and area cases cited by West Florida demonstrated instances of "uneconomic duplication" and "cost" disparities, issues stipulated away in this case as equal between the two utilities. "Historic presence" is not a listed factor in Rule 25-6.0441(2) despite West Florida's attempt to re-draft the rule to include it.

West Florida's further attempt at rule re-drafting would excise "customer preference" from (2)(d) of the rule by equating it with the "customer choice" issue in Storey v. Mayo and Lee County v. Marks. This re-draft is again, futile, since these concepts are not related and neither case concerns Rule 25-6.0441(2)(d).

The Storey and Lee County cases establish instead that when a customer located within an approved territorial (or municipal) boundary is receiving adequate service, that customer cannot

exercise a "choice" to receive the same service from a provider located outside the approved territorial (or municipal) boundary. This policy precludes customers from abandoning service already provided in order to get lower cost extra-territorial service and then reinstating service when the relative costs shift back to favor the in-boundary provider.

This case, in contrast, lacks either of the predicates in Storey and Lee County. There is no approved territorial agreement or boundary at issue here and there is no adequate 230,000 volt service already being provided which ECS seeks to replace or abandon. In fact, Rule 25-6.0441(2)(d) "customer preference" has nothing to do with the "customer choice" cases. Here, the parties' stipulations determined that the factors listed in (2)(a), (b) and (c) of the rule were substantially equal. Therefore, the Commission had the option under (2)(d) of the rule to consider ECS' preference for Gulf as a fall-out of the equivalence resulting from those stipulations. Since the standard of review only concerns the competent, substantial evidentiary support for these findings, or clear error, West Florida's claims that "historic presence" should be re-weighed and that Storey and Lee County somehow cause the Commission's consideration of ECS' preference for Gulf to be clearly erroneous, are totally without merit. Moreover, ECS' preference

for Gulf no more substitutes “customers” for “territory”, than this Court’s decision did in Gulf Coast v. Clark. There, the Court noted that, but for Gulf Coast’s actions “there would be no prison to serve”. The same principle governs here. But for Gulf’s timely, prudent actions and early recognition of the need for 230,000 volt power, there would be no electric compressor motors to serve. A natural gas compressor alternative would have been chosen. Further, West Florida’s prediction of the imminent demise of the regulatory scheme is reminiscent of the coop’s equally hysterical and dire warnings in Gulf Coast v. Johnson, and just as inaccurate.

Finally, the Commission denies West Florida’s assertion that any new policy is involved here or that any “mischief” of any kind will result from the Commission’s decision. The record established that ECS has contracted with FGT to supply electric compression services for the FGT pipeline. ECS is, therefore, the customer regardless of which electric utility provides the service. West Florida’s attempt to denigrate ECS without any record support for doing so creates the anomaly that ECS is a “mischief” maker and developer of “a set of documents to make it look like it is a ‘new’ customer selling ‘horsepower’” if served by Gulf Power, but as a customer West Florida itself wishes to serve, a fine and deserving customer in every way if West

Florida provides the service. This position is nonsensical on its face.

ARGUMENT

I. THE COMMISSION'S ORDER IS WELL SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND PROPERLY REFLECTS THE CIRCUMSTANCE THAT WEST FLORIDA'S HISTORIC PRESENCE IN THE AREA OF THIS PROJECT IS HARDLY RELEVANT, LET ALONE DISPOSITIVE, WHERE NEITHER UTILITY HAD ANY CAPABILITY WHATSOEVER IN PLACE TO PROVIDE THE NEEDED 230,000 VOLT SERVICE.

In any case, there are facts which are leading and highly relevant, as well as facts which are peripheral and only marginally relevant. West Florida's argument, which applies a large number of past cases to the peripheral facts of this case, while ignoring completely the central, relevant facts, does not and cannot meet the burden imposed on appellant by the standard of review.

The central fact which distinguishes this case is well summarized by West Florida's own witness at Tr. 153:

> Neither Gulf Power nor West Florida have adequate facilities to serve the added load at the FGT site. Any distribution provider will have to build new distribution facilities to serve the size load being added. [e.s.]

In Order No. PSC-01-2499-FOF-EU (Order), the Commission Order challenged in this appeal, the Commission found that the first three listed factors in Rule 25-6.0441(2)(a), (b), and (c) did not weigh substantially in favor of either utility.[6]

[6] Rule 25-6.0441(2) provides: (2) In resolving territorial disputes, the Commission may consider, but may not be limited to consideration of: (a) the capability of each utility to provide reliable electric service within the

Therefore, the Commission awarded the service to Gulf, since Rule 25-6.0441(2)(d) provides for

> customer preference if all other factors are substantially equal. See, generally, R. 290-292 [e.s.].

Based on the analysis in the Order, (2)(a) was not dispositive because both utilities would have to access Gulf's 230,000 volt power and neither had adequate facilities at the site; (2)(b) was not dispositive because, although the project's surroundings were rural, that was irrelevant to the unique service needs of the ECS electric compressor motors; and (2)(c) was not dispositive because the costs for both utilities to provide 230,000 volt power from Gulf's transmission line were stipulated to be equal.

Significantly, West Florida does not challenge these findings, except for its (2)(a) "reliability" issue, discussed below. It is also important to note that, while (2)(b) is moot

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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. Rule 25-6.0441(3) provides: (3) The Commission may require additional relevant information from the parties to the dispute if so warranted.

as irrelevant, (2)(a) and (2)(c) were only found to be non-dispositive between the two utilities because of stipulations between the parties 8 days before the hearings. R. 185-186. Those September 11, 2001, stipulations by which West Florida finally assumed the need for 230,000 volt power for this project marked a decided change of position from the earlier pre-filed testimony of West Florida's witnesses which, as noted earlier, persisted in reiterating the possible sufficiency of 115,000 volt power. It should be kept in mind that the earlier approach of West Florida was more relevant to the period of time in early 2001 when ECS had to finalize its electrical supply arrangements, not the later approach reflected in the September 11, 2001 pre-hearing stipulations.

Though West Florida believes that it is helped by going beyond the listed elements in Rule 25-6.0441(2) and asking the Court to consider other factors, the Commission believes the analysis in the Order to be West Florida's best showing, even though a losing position, because the stipulations make the case appear to be closer than it is. Even if other factors could be considered on review beyond the factors listed in the rule, and that is by no means clear, the result would more lopsidedly favor Gulf and the affirmance of the Commission's Order. Moreover, as will be demonstrated, West Florida's (2)(a)

"reliability" issue merely strengthens the case for affirming the Commission's Order.

West Florida's analytical template for going beyond the factors listed in Rule 25-6.0441(2) is stated as follows:

> there was no dispute regarding Rule 25-6.0441(2)(b) and (c). Essentially this left (a) and (d) of Rule 25-6.0441(2) and historic service to be considered. [e.s.]

Initial Brief, p. 10.

This analysis is incorrect. What Rule 25-6.0441(2) states is that

> In resolving territorial disputes, the Commission may consider, but not be limited to consideration of: [listed factors (a), (b), (c), and (d)]. [e.s.]

In this case, the Commission found that considering the listed factors was a sufficient basis to award the service territory to Gulf. It does not follow, that, if West Florida challenges the Order's resolution of (2)(a) and (2)(d), that

> Essentially this left (2)(a) and (d) of Rule 25-6.0441(2) and historic service to be considered. [e.s.]

Instead, the Court should review the record to see if the Commission's resolution of (2)(a) and (2)(d) are supported by competent, substantial evidence, and, if so, affirm the Order. "Historic service" is not a listed factor in Rule 25.6-0441(2), and while the Commission could not be precluded from considering it if the Commission deemed it relevant, nothing in Rule 25-

6.0441(2) required the Commission to consider "historic service" or any other non-listed factor.[7] West Florida's formula simply re-writes Rule 25-6.0441(2) to add "historic service" as a listed factor. Moreover, West Florida's formula invites the Court to re-weigh the evidence and to find that "historic service" was not only a more important consideration in this case than the Commission deemed it to be, but well-nigh dispositive of the outcome. There is ample authority for the Court to deny West Florida's invitation to re-write Rule 25-6.0441(2)[8] and to re-weigh the evidence.[9]

In Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983), this Court stated:

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous.... The same deference has

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[7] Rule 25-6.0441(3) allows the Commission to seek "additional relevant information from the parties to the dispute if so warranted", but does not require the Commission to consider additional issues. [e.s.]

[8] West Florida's argument would re-write Section 366.04(2)(e) as well by adding "historic service" as a listed factor.

[9] The Commission "considered" historic service when it evaluated West Florida's arguments on that point. West Florida's arguments here imply that those arguments had to be accorded more weight, which is incorrect.

> been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration. [e.s.]

427 So. 2d at 719.

In this case, even West Florida's own witness testified that

> Neither Gulf Power nor West Florida have adequate facilities to serve the added load at the FGT site. Any distribution provider will have to build new distribution facilities to serve the size load being added. [e.s.]

In this circumstance, wholly different from the "historic service" cases cited by West Florida, it was not clearly erroneous for the Commission to deem West Florida's historic service of 120/240 volt service in the area irrelevant to the decision of which utility should supply 230,000 volt power to the ECS project. Moreover, West Florida's belief that the Court should re-weigh "historic service" as significant to the point of being dispositive of the case is contrary to the standard of review as articulated by this Court in, inter alia, Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 328 (Fla. 1987):

> [The Supreme Court] will not re-weigh or re-evaluate the evidence presented to the [Public Service] Commission.

A. IF THE COURT GOES BEYOND THE LISTED FACTORS IN RULE 25-6.0441(2) TO CONSIDER "HISTORIC SERVICE", IT SHOULD ALSO CONSIDER OTHER NON-LISTED FACTORS OF FAR GREATER SIGNIFICANCE TO THIS CASE.

Even if the "historic service" issue were somehow to be considered, once factors beyond those listed in Rule 25-

6.0441(2) become relevant to the Court's review of the Order, West Florida has not explained why "historic service" would be the only non-listed factor considered. Given the unique circumstances of the specialized power needs of this project, including the fact that "any distribution provider" would have to build new facilities to meet that need, and the critical time constraints that had to be met if electric pipeline compression rather than natural gas was to be the chosen alternative, the relative responsiveness of the two utilities is a far more significant issue in this case than "historic presence".

The facts of record indicate that at each of the critical stages in the extremely time-limited development of this electric compressor project, one utility was responsive and the other was not. In 1998, when both Gulf and West Florida were contacted by ECS about the project, Gulf responded. There is no indication of record that West Florida responded.

In the two following years, Gulf developed the pre-engineering and right-of-way acquisition necessary to "build new distribution facilities to serve the size load being added". West Florida, for its part, was apparently content that its preliminary discussions in 1996 had "fizzled out", only becoming re-involved four years later when word reached West Florida that Gulf was acquiring right-of-way to provide the service.

At that point in December 2000, after an inquiry by AEC on West Florida's behalf, ECS provided a load profile to AEC/West Florida along with a request for a quick response with whatever West Florida's proposal would be, given the critical shortage of time for ECS to finalize its arrangements for electricity supply to the project. Neither AEC nor West Florida ever made any proposal in response.

Instead of a proposal to provide service, West Florida threatened ECS with litigation, while informing Gulf that it might drop its pursuit of the electric compressor load "in exchange for a PSC approved territorial agreement that would assign certain other loads" to West Florida. In other words, while non-responsive to ECS' invitation for a proposal, West Florida announced its intention to litigate unless 'given something' to go away.

On February 26, 2001, ECS and Gulf jointly petitioned the Commission for a declaratory statement based on, inter alia, the need for power from Gulf's 230,000 volt transmission line located 6 miles from the project site. The petition noted that the project's two 15,000 horsepower electric compressor motors had to be started "across the line" pursuant to the recommendations of the manufacturer, and that less power was inadequate to do that. Though the Gulf/ECS petition was

attached as Exhibit 7 to West Florida's April 10, 2001 Petition to Resolve Territorial Dispute, West Florida, which has a 115 KV AEC transmission line 14 miles from the electric compressor site, supported the following testimony, which was pre-filed on August 22, 2001:

> We can only wonder if part of the reason for considering only "across the line" starting was to support Gulf Power's contention to this Commission and ECS that only Gulf can provide the service since Gulf has the only 230 KV source nearby. We have asked Southern Company Services, Inc., in our transmission service request regarding this load, to investigate "across the line" and soft start from both Gulf Power's 115KV and 230 KV lines nearby. [e.s.][10]

Moreover, despite ECS' need for a dedicated spare transformer (paid for by ECS for its exclusive use) to minimize any reliability concerns for this major element in Florida's utility infrastructure, West Florida supported the following testimony:

> If West Florida...had access to the second spare transformer, WFEC could provide more economical and reliable service to its customers in the Hinson Crossroads area.

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[10] Shortly before the September 19, 2001 hearing, West Florida stipulated to the need for 230,000 volt power. This belated recognition by West Florida of the need came almost a full year after Gulf began the pre-engineering necessary to supply that power and seven months after ECS and Gulf finalized arrangements for supplying that electric power to the project.

This, despite the same witness's testimony that West Florida's service to present customers "is operating at a strong 25 KV distribution voltage level providing for more than adequate capacity as well as stable service voltage conditions." [e.s.]

In Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996), this Court held that Gulf Coast should serve the prison at issue in that territorial dispute because,

> [a]s acknowledged by the Commission, but for the actions of Gulf Coast, there would be no prison to serve.

674 So. 2d at 123. Based on the chronology presented above, it is equally apparent that, but for the actions of Gulf Power in this case, there would be no electric compressor load to serve. Instead, the natural gas alternative would have been chosen, thus depriving the pipeline of diversity in compression resources which may be important if natural gas supplies or prices become uncertain. Moreover, Washington County and Gulf's customers would have been deprived of both the economic and environmental benefits of the electric compression project.

West Florida was not only non-responsive at critical stages of this project, but simply unwilling to meet this customer's needs. For example, West Florida was, at best, slow to recognize ECS' need for 230,000 volt power, despite having a load profile on December 7, 2000 and the ECS/Gulf declaratory

petition on February 26, 2001 setting out the facts in support of that need. Regardless, West Florida's pre-filed testimony of July/August 2001 continually asserted the possible sufficiency of 115,000 volt power. Although West Florida stipulated that position away just before the hearing, the pre-filed testimony demonstrates that, but for the actions of Gulf, there would be no electric compressor load to serve. ECS had to finalize electric supply arrangements for the project long before July/August 2001, when West Florida's testimony was prefiled, not in September 2001 when West Florida changed its position just in time for the hearing.

West Florida's Rule 25-6.0441(2)(a) "reliability" issue further confirms West Florida's pattern of refusing to meet this customer's needs, even to this day. According to West Florida, its disagreement with the Commission's (2)(a) analysis is not with the basic finding that both utilities lacked adequate facilities at the electric compressor site and would have to access Gulf's 230,000 volt source. Instead, West Florida argues that <u>it</u> could use ECS' spare transformer to increase the reliability of its service to its customers in the area. Since Gulf has no other customers in the area, West Florida argues that Gulf cannot claim this "reliability benefit", that the listed factors in Rule 25-6.0441(2) are, therefore, not "equal",

and that ECS' "customer preference" for Gulf under subsection (d) is, accordingly, not allowed.

The problem with West Florida's reasoning is that the record contains competent, substantial evidence supporting ECS' need for the exclusive use of the transformer in order to insure the reliability of the electric compressor. Indeed, ECS paid for the transformer in order to have exclusive use of it for that very reason. As earlier noted,

> ECS has chosen to pay an additional fee to have Gulf install a dedicated spare transformer in the substation because of its desire to have a higher level of reliability that would minimize any downtime as a result of a possible transformer failure. [e.s.]

In contrast, West Florida's own witness testified as to the reliability of its service to its present customers. The idea that the Court should reverse the Order because the Commission failed to 'trade away the reliability of this major infrastructure electric compressor in order to increase hypothetically the already established reliability of West Florida's current service' is totally without merit. It is just one more glaring example of West Florida's refusal to meet ECS' needs. It also confirms that the Commission's findings that the utilities were substantially equal under Rule 25-6.0441(2)(a), (b), and (c), are supported by competent, substantial evidence and that allowing the customer's preference for Gulf is in

accord with the rule. See also, Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1384, 1385 (Fla. 1982) (When no factual or equitable distinction exists in favor of either the REA Cooperative Utility or the privately owned utility, the territorial dispute is properly resolved in favor of the privately owned utility).

As the Commission noted in the Order, West Florida states that the disputed area is the area within a four-mile radius of Station 13A (the electric compressor site). That determines the area of dispute, but not an obligation to establish territorial boundaries throughout the disputed area at this time. The Commission does not resolve hypothetical territorial disputes, only "actual and real" controversies.[11] In this case, the actual and real controversy is only about which utility will serve in the area designated by the footprint of the electric compressor motors. Allegations by West Florida that possible future conflict exists elsewhere are insufficient to require the establishment of a territorial boundary elsewhere and it is the Commission's policy not to prematurely establish territorial boundaries. This Court upheld that policy in Gulf Coast

[11] In re: Petition of Alabama Electric Cooperative, Inc. and complaint against Gulf Power Company, 89 FPSC 3:179, 181. (Order No. 20892)

Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999).[12]

There is a further reason supporting the Commission's rejection of West Florida's attempt to coerce acceptance of its unilaterally drawn territorial boundary lines in this case. There is competent, substantial evidence that ECS' exclusive use of a dedicated spare transformer is an important element in ensuring the reliability of the electric compressor, a major element in the statewide natural gas pipeline. West Florida's refusal to accede to the customer's requirement in this regard would result in a territorial boundary that, if allowed, would work a public detriment. This Court held in Fort Pierce Utilities Authority v. Beard, 626 So. 2d 1356, that

> In exercising its jurisdiction to approve utility territorial agreements, the Commission must ensure that the total effect of any decision reached will not result in public detriment. [e.s.]

Here, there is not even a territorial agreement, only a unilateral boundary asserted by appellant, just as in Gulf Coast v. Johnson, supra. Both that case and Fort Pierce support the Commission's rejection of it in this case as well.

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[12] In Gulf Coast v. Johnson, the Commission argued successfully that appellant's unilateral line drawing was properly rejected and that both parties should instead propose a territorial agreement to the Commission for approval. The parties did so and the Commission approved the territorial agreement in Order No. PSC-01-0891-PAA-EU.

Finally, as to this section of argument, the seven cases discussed by West Florida do not demonstrate some preoccupation with historic service or broadening out territorial disputes as ends in themselves. They demonstrate instead that the adjudication of territorial disputes is performed case-by-case on a fact-intensive basis. Where historic service or extending the dispute area beyond a single building is discussed, it is often in connection with concerns about uneconomic duplication. In this case, the Commission approved the parties' stipulation that activities by either utility to serve ECS would not cause uneconomic duplication. R. 185-186, Issue 8; Tr. 19.

Another important issue driving cases cited by West Florida is the difference between the utilities' cost to provide service. In this case, again, the Commission approved the parties' stipulation that the costs for either utility to serve ECS are approximately equal. R. 185, Issue 4; Tr. 19. Where these fundamental issues were strongly contested in the cases West Florida cites, historic service and the size of the disputed area played some role in the adjudication. However, where the parties correctly stipulated them away in this case, the Commission's analysis is not incorrect merely because it is simple and straightforward. Moreover, the Commission's analysis is supported by competent, substantial evidence, whereas West

Florida's attempt to complicate matters with its specious Rule 25-6.0441(2)(a) "reliability benefit" is wholly unsupported. Similarly, West Florida cannot re-write Commission Rule 25-6.0441(2) or Section 366.04(2)(e) by forcing the Commission or the Court to weigh as significant issues which may be relevant to other cases, but are irrelevant here. None of the cases cited by West Florida are nearly on point with this unique case, and in none of them were so many potential controversies stipulated away. The relevant cases are those cited in the Order on appeal and the Court should, accordingly, affirm that Order. The central distinguishing fact of this unique case is that no utility, including West Florida, had any component of 230,000 volt historic or contemporary presence at Station 13A.[13]

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[13] The instant case is plainly distinguishable from those cited by West Florida. For example, in Clay Electric Cooperative v. FPL, Order No. PSC-98-0178-FOF-EU, the Commission found that uneconomic duplication would result if only the building, rather than the area, were considered in dispute, and that the cost was lower for FPL to serve than for Clay. In Suwannee Valley Electric Cooperative, Order No. 12324, the Commission found, "In order for FPC to provide service to the prison site, much more extensive construction would be required". [e.s.] In Suwannee Valley Electric Cooperative, Order No. 18425, the Commission did recognize that FPC had customers in the area, but also that FPC's cost to serve was lower. In Gulf Power (Holmes County), Order No. 18886, the Commission rejected West Florida's "historic presence" and "invasion" arguments and noted that Gulf's costs were the same. Moreover, West Florida's activities were uneconomic duplication, whereas Gulf's were not. In Gulf Power v. Gulf Coast, Gulf Power's cost to serve was 700% higher than Gulf Coast's and constituted uneconomic

B. GULF COAST ELECTRIC COOPERATIVE, INC. V. JOHNSON, 727 SO. 2d 259 (FLA. 1999), IS NOT DISTINGUISHABLE FROM THIS CASE GIVEN THAT THE COOPERATIVE'S UNILATERALLY DRAWN BOUNDARY ASSERTED IN THIS CASE HAS EVEN LESS JUSTIFICATION THAN THE LINE DRAWING REJECTED THERE.

In Gulf Coast v. Johnson, this Court recognized that the appellant electric cooperative utility in that case could not bootstrap the fact of discrete instances of commingled utilities, whose commingling occurred long before the advent of utility regulation, into an excuse to validate the coop's unilaterally asserted territorial line drawing in Northwest Florida in areas where there was no current territorial dispute. A number of principles were involved. First, the areas of commingling ostensibly justifying the coop's line drawing occurred so long ago that no further uneconomic duplication was likely. Second, the coop's unilateral line drawing lacked the

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duplication. In Gulf Coast v. Gulf Power, Order No. 16106, the Commission found that Gulf Power's cost to serve "greatly exceeded" Gulf Coast's costs and constituted uneconomic duplication. In Gulf Coast v. Gulf Power, Order No. PSC-95-0271-FOF-EU, the Commission's Order was reversed by this Court in Gulf Coast Elec. Coop. v. Clark, 674 So. 2d 120 (Fla. 1996), because absent Gulf Coast's actions, "there would be no prison to serve". 674 So.2d at 123. The Commission relies on that holding in this case. Moreover, this Court rejected Gulf Coast's unilateral line drawing to resolve the broader territorial dispute in Gulf Coast Elec. Coop. v. Johnson, 727 So.2d 259 (Fla. 1999). The Commission relies on that holding in this case as well. Because the issues of cost to serve and uneconomic duplication were stipulated away in this case, none of the cited cases are on point, except this Court's opinions in Gulf Coast v. Clark and Gulf Coast v. Johnson, which, as noted, support the Commission's Order, not West Florida.

benefit of reflecting a rational accommodation of economic activity on the ground the way territorial agreements between two utilities do. The unilateral line drawing was more like a central planning approach to drawing lines on a grid without any information as to where the lines should be optimally placed in the public interest. That approach, which has always been rejected by the Florida Legislature and the FPSC, was rejected by this Court as well in Gulf Coast v. Johnson. Third, the Court agreed with the Commission that the coop should negotiate a territorial agreement with Gulf Power and submit it to the Commission for approval. This was done and the Commission approved the agreement in Order No. PSC-01-0891-PAA-EU.

As to this case, West Florida now argues, "there is no duplication of facilities, no commingling of facilities between the utilities, and no expansive unserved area in dispute". Initial Brief, p. 16. This means that even the weak excuses forwarded by the coop in Gulf Coast v. Johnson for unilateral line drawing are absent here. If the "intrusion" of Gulf's provision of 230,000 volt service to ECS causes West Florida to be in need of "reassurance", West Florida need only look to Gulf Coast v. Johnson. The record in this case supports a prediction of slow future growth in this rural area, with no more likelihood of an actual territorial controversy about West

Florida's 120/240 volt service than in the past. However, if a dispute emerges, West Florida should negotiate an agreement with Gulf Power, as did Gulf Coast, and submit it to the Commission for approval. Failing that, the cases cited by West Florida in Section I.A of the Initial Brief demonstrate that the coops and the investor-owned utility have each won their fair share of these controversies and that the system works.

What West Florida cannot do, any more than Gulf Coast, is to bootstrap an excuse for cordoning off territory for itself through unilateral line drawing in areas where there is no dispute, from the unique factual circumstances of this 230,000 volt service. Indeed, the unique circumstances in this case are like the already commingled utilities in Gulf Coast v. Johnson in that no uneconomic duplication is at issue in either situation. There is, therefore, no excuse in either case for the coop to sound an alarm of 'wide ranging territorial dispute' in an attempt to justify the coop's unilateral line drawing.

As noted by West Florida, citing Gainesville-Alachua v. Clay Elec. Co-op, 340 So. 2d 1159, 1161 (Fla. 1976), territorial agreements "are encouraged to avoid costly competition and wasteful duplication." [e.s.] In a case such as this, where West Florida stipulated with Gulf Power that both utilities' cost of service would be equal and that neither utility's service would

cause uneconomic duplication, the conclusion is obvious. Nothing in this case justifies imposing territorial boundaries beyond the footprint of the motors requiring 230,000 volt service. Moreover, West Florida's unilateral line drawing is not a "territorial agreement", nor is there any "unnecessary duplication" in this case.

While no one questions the sincerity of Commissioner Palecki's dissent, passages from which West Florida quotes at p. 16 and 17 of the Initial Brief, the dissent does not strengthen West Florida's case. For example, the assertion therein that the majority decision in this case "establishes for the first time a non-exclusive service territory, allowing different electrical providers to serve the same territory..." is incorrect. The providers in various areas were commingled in Gulf Coast v. Johnson, and it would have been wasteful and inefficient to separate them. The Commission's pragmatic solution was to leave them that way and neither utility disagreed. In short, the ideal of pristine neatness, while desirable, was less significant than other factors. Similarly, concern over the pristine neatness of West Florida's "service area" is simply outweighed by the fact that, absent Gulf Power's actions, there would be no electric compressor to serve. Indeed, given West Florida's quixotic insistence on sharing the

ECS spare transformer, without Gulf Power, there would be no appropriate service now. The Commission believes that the Florida system is better than a central planning approach of a pre-determined grid, and that neatness, while laudable, is not always dispositive. Just as in Gulf Coast v. Johnson, other, more significant, factors outweigh the concern about neatness in the unique facts of this case.

Moreover, Commissioner Palecki's point that the majority "does not cite to a single past decision wherein this Commission has based its decision on a similarly clever analysis [of the unique power needs of the electric compressor motors]" may be correct, but still does not strengthen West Florida's case. Territorial disputes are adjudicated case-by-case, and the lack of decisions based on the same analysis merely reflects the lack of any cases involving even nearly similar facts. See, n. 13, supra.

Finally, as to this section of argument, the Commission denies West Florida's assertion that any new policy is involved here or that any "mischief" of any kind will result from the Commission's decision. Nor should the Court accede to West Florida's invitation to assume "mischief" by its reference to

the customer in this case, ECS, as "an Enron subsidiary".[14] There are two reasons the Court should reject West Florida's attempt to "Enronize" this case. First, it invites the Court to look to matters beyond the record, which can never be proper appellate advocacy and disserves the Court. Second, the record establishes that ECS has contracted with FGT to supply electric compression services for the FGT pipeline. ECS is, therefore, the customer, regardless of which electric utility provides the service. West Florida's attempt to denigrate ECS without any record support for doing so creates the anomaly that ECS is a "mischief" maker and developer of "a set of documents to make it look like it is a 'new' customer selling 'horsepower'" if served by Gulf Power, but, as a customer West Florida itself wishes to serve, a fine and deserving customer in every way if West Florida provides the service. This position is nonsensical on its face.

Moreover, West Florida's rhetoric on p. 17 of the Initial Brief that "this device and similar ones, can be used anywhere in the State of Florida to undo all the work prior Commission Orders have done in carrying out the legislative policy of avoiding territorial wars and avoiding duplicative facilities"

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[14] With one exception, West Florida's witnesses forwarded such a campaign before the Commission by usually referring to "Enron" rather than the actual entity involved.

is equally nonsensical. An easy demonstration of this is to try out West Florida's hypothetical example of how this would occur, presented at p. 20 of the Initial Brief as the conclusion thereof.

There, West Florida hypothesizes that an entity called "Enron Court Services" could offer "illumination" services to this Court for less than the rate charged by the City of Tallahassee, "claim it is a new customer and ask for service from Gulf Power, Talquin Electric, Florida Power Corp., or any one else." West Florida goes no further than hypothesizing rhetorically about what could be 'claimed' or 'asked for' because the disposition of those claims and requests would disprove West Florida's argument. First, unlike the present case, the Court is located in an area subject to Commission-approved territorial agreements designating the City of Tallahassee as the provider.[15] Second, unlike the present case, there is a provider in the area, the City, capable of providing electric service adequate to the Court's needs. The Court needs 120 volt electric service, not 230,000 volt service, as in this case. In the present case, there was no approved territorial agreement and no provider in the area capable of providing electric service adequate to ECS' specialized needs.

[15]See, also, Section 366.04(2)(f).

Therefore, if the Court is the customer in the hypothetical, service would be provided by the City of Tallahassee, even if utilities located elsewhere could provide power at cheaper rates, as the cases discussed infra will illustrate. Most significantly, this result would not change, even if "Enron Court Services" contracted with the Court to provide "illumination" services, claimed to be a "new" customer, and asked for service from other, cheaper, utilities. Enron Court Services would still be required to take service from the City at the City's rates.[16]

The Commission heard West Florida's "third party provider" scenarios, realized they were incapable of demonstrating what West Florida rhetorically claimed, and ignored them:

> One issue presented in this proceeding was whether, as a matter of law or policy, an existing customer of an electric utility could enter into a contract for electricity with a third party, when the third party gets the electricity from a different electric utility. We find that this issue need not be decided. The territorial dispute can be resolved without reaching this issue. R. 289.

West Florida's hypotheticals are only rhetoric, unaccompanied by any analysis. They are not on point with the facts of this

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[16] West Florida's hypothetical is also off-point because "illumination" services would be subject to Section 366.02(1), Florida Statutes. "Horsepower" is not. It is a sale of mechanical power to operate a pipeline compressor. Mechanical power is not electricity even if it is created by electric-powered motors.

case, and therefore irrelevant. The Court should disregard them.

II. THE COMMISSION'S DECISION ALLOWING ECS' PREFERENCE FOR GULF POWER TO PROVIDE 230,000 VOLT POWER FOR ECS' ELECTRIC COMPRESSOR SERVICE AT STATION 13A PURSUANT TO RULE 25-6.0441(2)(d) COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW, IS WITHIN THE COMMISSION'S AUTHORITY AND IS CONSISTENT WITH–AND DOES NOT "OVERRULE"–THIS COURT'S DECISIONS IN LEE COUNTY ELECTRIC COOP. V. MARKS AND STOREY V. MAYO.

West Florida's argument at p. 18-19 of the Initial Brief may be "simply stated", but disserves the Court by being inaccurately stated. The Commission's Order in this case resolves the current dispute over who should serve ECS[17] and encourages West Florida to seek a territorial agreement with Gulf Power in the unlikely event that any broader dispute arises, rather than indulge in unilateral line drawing. This is not only consistent with Gainesville-Alachua v. Clay Elec. Co-op and Lee County v. Marks, but with Gulf Coast v. Johnson as well.

Moreover, Section 366.04(5), Florida Statutes, does not direct the Commission to "avoid duplicative facilities", as misstated by West Florida. The statutes, and thereby the Legislature, direct the Commission to "avoid further uneconomic duplication" of facilities. West Florida's misstatement of the

[17] See, n. 14, supra, as to West Florida's reiterated and undefined references to "Enron", and discussion at p. 34-35, this Brief.

law is an attempt to evade the effect of having stipulated as follows:

> The construction of the facilities identified in proposed stipulation 1 by either West Florida or Gulf, will not cause uneconomic duplication of electric facilities with regard to serving new retail load at Station 13A. R. 185-186. [e.s.]

As to historic service, West Florida itself cited Order No. 18886, in which West Florida's historic service argument and claim that its service area had been invaded, were rejected. Though the Commission's Order in this case does not agree with West Florida that the issue should be weighed as well-nigh dispositive in these facts, that does not justify the re-weighing by the Court which West Florida seeks. See, Panda v. Clark, supra (Supreme Court will not re-weigh evidence presented to Public Service Commission).

That same Order No. 18886, cited by West Florida itself, differentiates "customer preference", considered by the Commission when all other factors in Rule 25-6.0441(2) are found to be equal, as in this case, from the "customer choice" issue in Storey v. Mayo, 217 So. 2d 304 (Fla. 1968) and Lee County Elec. Coop. v. Marks, 501 So. 2d 585 (Fla. 1987). As noted in Order No. 18886, customer preference is, as "a matter of policy", a factor informing, but not necessarily controlling, the Commission's decision-making under the circumstances just

described. "Customer choice", in contrast, is the demand by customers located within an approved territorial boundary or municipality for service from utilities located outside the approved boundary. Not only does West Florida's assertion attempt to confuse the two concepts, but West Florida overlooks the obvious. There is no approved territorial agreement or boundary in this case. Therefore, Storey and Lee County are not on point. Moreover, the Commission is not engaged in "deregulation" merely because it does not read "historic service" into the listed factors in Rule 25-6.0441(2) and "customer preference" out of the rule, as West Florida urges. The Court's deference is due the Commission's interpretation of its rules, not West Florida's attempted redrafts thereof. Pan American Airways v. FPSC, supra.

Notwithstanding these lapses, West Florida goes on to assert three "summarizing" rhetorical points on p. 19 of the Initial Brief. None of them are supported factually or legally.

As to the first point, already partially addressed above, what remains is to discuss West Florida's idea that the Commission has permitted "a neighboring utility to serve the host utility's existing customer (FGT) through the guise of a paper transaction (Enron)".[18]

[18] See, n. 14 and 17, supra.

Because there is no Commission-approved territorial agreement in place as to Station 13A, West Florida is not a "host utility" and Gulf Power is not a "neighboring utility". At most, West Florida has an historic presence in the area as a provider of 120/240 volt service. Though, in many instances, that might play a significant role in resolving some territorial disputes, that fact is overwhelmed in the unique circumstances of this case, where the need was for 230,000 volt power which no utility in the area had the historic or contemporary capability to provide.

As to West Florida's paper transaction claim, the record states that ECS is a wholly-owned subsidiary of Enron North America Corp. that has a contract services agreement to provide mechanical energy to operate FGT's pipeline compressor. Exh. 14, p. 6, 12-14, 16. Florida Gas Transmission Company (FGT) is wholly-owned by Citrus Corp. Citrus Corp. is owned 50% by Enron Corp. and 50% by El Paso Energy Corporation. Exh. 14, p. 24.

West Florida has brought forth no evidence at variance with these matters of record, which establish, inter alia, that ECS has a separate and distinct ownership from FGT, and that, if West Florida had prevailed below, West Florida would have been providing service to ECS.[19] West Florida lacks any support for

[19] See, also, Exh. 14, p. 8-9, 11, 31.

its “paper transaction” characterization. Indeed, serving ECS is West Florida’s supposed goal in this appeal.

West Florida’s second rhetorical point – about historic service and historic service areas – has already been addressed. Even cases cited by West Florida have sometimes rejected those arguments, which are not automatically dispositive, any more than other issues, of territorial disputes.[20] The Commission’s decision not to weigh the argument as heavily in this case as West Florida would have liked is not tantamount to a refusal to consider it or ignoring it. West Florida’s demand that the Court re-weigh it now is foreclosed by the standard of review. Panda v. Clark, supra.

West Florida’s third rhetorical point is, again, as unsupported as the lack of any citation of authority implies. Taking the last sentence first, by defining the footprint of the motors, owned by FGT but leased to ECS[21], as the service area, the Commission has not made a determination contrary to law. See, e.g., this Court’s determination in Gulf Coast v. Clark, 674 So. 2d 120, 123 Fla. 1996) that Gulf Coast should serve the prison at issue in that appeal. The fact that a single

[20] As noted, these issues are related to the fundamental issues stipulated to be equal between the parties in this case.

[21] Exh. 14, p. 27.

customer's provider was determined therein did not "effectively [determine] that disputes between electric utilities are disputes over customers and not over geographic areas" as West Florida argues, and neither did the Commission's Order in this case. Neither this Court's opinion in Gulf Coast v. Clark nor the Commission's Order in this case are determinations "contrary to law", on that basis.

Finally, as previously noted, the customer choice issue is not the same as the Commission's decision to allow for customer preference when the other factors in Rule 25-6.0441(2) are found, as here, to be substantially equal. For "customer choice" to be at issue, there must be an approved territorial boundary and customers within the boundary already receiving adequate service seeking to obtain the same service from a utility located outside of the boundary. There is no approved territorial agreement in this case and no approved boundary. There is no pre-existing 230,000 volt adequate service. There is, therefore, no "customer choice" issue in this case. It is not for West Florida to invent non-existent regulatory parameters and then to accuse the Commission of violating them.

CONCLUSION

Though the facts of this case are somewhat unusual, the Commission's well-supported and straightforward analysis under Rule 25-6.0441(2) naturally follows from the stipulation between the companies as to most of the fundamental issues in this case. Moreover, if the Court's review ranges beyond the listed factors in the rule, the record lopsidedly favors Gulf. Without Gulf's prudent actions at critical points in time, there would be no electrical compressor to serve. Order No. PSC-01-2499-FOF-EU is supported by competent, substantial evidence and comports with the essential requirements of law. Accordingly, appellee Florida Public Service Commission respectfully requests that the Court affirm the Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the font type used in this brief is Courier New 12 point.

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