IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF
OF
WEST FLORIDA ELECTRIC COOPERATIVE, INC.
(Amended)

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

and

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

(850) 526-5947 facsimile

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REFERENCES TO THE RECORD

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

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

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

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

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

STATEMENT OF THE CASE AND FACTS

(a) Nature of Case: This is a territorial dispute between West Florida Electric Cooperative, Inc. ("West Florida") and Gulf Power Company ("Gulf"), both "electric utilities" as defined in Florida Statute § 366.02(2) over service to a 35-acre site located in Washington County, Florida, currently served by West Florida Electric Cooperative, Inc. The case was a proceeding before the Florida Public Service Commission.

(b) Course of Proceedings and Jurisdiction: The territorial dispute was heard by the Florida Public Service Commission ("Commission") pursuant to its jurisdictional grant in Section 366.04(2)(e), Florida Statutes. This court has jurisdiction pursuant to Section 3(b)(2) of Article V of the Florida Constitution and Section 366.10, Florida Statutes (2001). The Commission rendered its Final Order (R-264) on December 21, 2001 resolving the dispute (Order No. PSC-01-2499-FOF-EU). West Florida appealed the Final Order (R-279) by filing a Notice of Appeal to the Supreme Court of Florida on January 18, 2002.

(c) Disposition in Lower Tribunal: The Commission's Staff issued a primary recommendation to award service to West Florida (R-242 - 257) on November 19, 2001. The Commission determined that the disputed area was the area within a four-mile radius of Florida Gas Transmission's ("FGT") facility, but declined to

resolve that dispute (R-268). The Commission then awarded service to FGT's new 15,000 horsepower motors to Gulf (Final Order, Page 9; R-272) and determined that the service area, "shall be the footprint of the two 15,000 horsepower motors…" (Final Order, Page 11; R-274). Commissioner Palecki dissented from the Commission's decision, and his dissent is set forth in the Final Order, Pages 12 to 15 (R-275-278).

(d) Statement of Facts: West Florida has been serving FGT's Compression Station at Hinson's Crossroads on the specific 35 acre tract that is the subject of the dispute since 1962, and has been serving the Hinson Crossroads area since 1946 (Final Order, Page 3; R-266). The nearest Gulf customer is over 4 miles away in a direct line and over 6 miles away by road. The nearest single phase service of Gulf is 4 miles away from FGT's property and the nearest 3-Phase service of Gulf is 9 miles away. (Final Order, Page 3; R-266) Mr. Rimes' Exhibit 2 (WR-1 and WR-2) shows the overall service area of West Florida and the area around the specific site at Hinson Crossroads. There are no service facilities of Gulf's near the site, which is currently served by West Florida, and West Florida has additional service facilities surrounding the area, running all the way down and past Gulf's 230 kV transmission facility. FGT has owned the 35-acre site where the electric motors will be installed since the 1960's, and FGT calls this Station 13 (T-

59/3 – 4, 23 – 25). West Florida has provided service to FGT on that site since 1962 (T-31/18 – 19), has served the general area since 1946 (T-62/2) and has an easement to serve the site (T-31/1 – 3), Exhibit 2 (WR-3).

FGT is located on a 35-acre parcel known as Station 13 (R-266). Compressor Station 13-A is an addition to FGT's Station 13, defined as a project to increase the compression at the facility by 24,000 horsepower as shown by FGT's filing with the Federal Energy Regulatory Commission (Exhibit 11 (RD-8), and as Exhibit 4 (GC-5) shows, (See Appendix) Station 13 and 13-A are all part of the same facility. Enron Compression Services Company ("Enron") is an 8 employee subsidiary of Enron North America, which is wholly owned by Enron Corp., and says it is in the business of providing "the marketing, packaging, financing, hedging, and related services for the sale of natural gas compression services that employ electric powered motor driven compressors (Exhibit 14, Page 9).

West Florida first learned of FGT's interests in increasing its compression capacity in November of 1995 when Enron requested a proposal for utility service for "new incremental drive and compressor set at FGT Pumping Station" (T-43). Station 13-A will share all common facilities, including offices, parking lots, driveways, and employees with Station 13 (Exhibit 4 (GC-5), Exhibit 11 (RD-8). FGT will own and operate

the additional compression capacity represented by the two 15,000 horsepower motors (Exhibit 11, RD-8). FGT will own the motors (Exhibit 14, Page 21, Lines 17 – 20). FGT ordered the motors (Exhibit 14, Page 21, Lines 17 – 20). FGT determined the size and specifications of the motors (Exhibit 14, Page 27, Lines 17 – 25, and Page 28, Lines 1 – 3). FGT will operate the motors (Exhibit 14, Page 21, Lines 21 – 25). FGT will maintain the motors (Exhibit 14, Page 27, Lines 6 – 11). FGT says it will lease the motors to Enron, but Enron will contract back the operation and maintenance to FGT (Exhibit 14, Page 27, Lines 12 – 16). FGT owns or will own the building and structures around the motors (Exhibit 14, Page 21, Lines 13 – 16). There will be additional electric needs at Station 13-A, which will not be provided by Gulf, which is providing electricity only to the two 15,000 horsepower motors (Staff Recommendation, Page 7, R-248; Gulf Witness Howell, T-106, Lines 21 – 23).

The nearest transmission facility to Hinson Crossroads is Gulf's 230 kV transmission line approximately 6 miles south of the area [Gulf Witness Anthony, Exhibit 6 (TSA-1)]. West Florida has access to the same transmission facilities that Gulf has access to (Stipulated Issue Number 8, R-254) and the Commission found "consequently, there is no material difference in the adequacy or reliability between West Florida and Gulf in providing service to Station 13-A". (Final Order, Page 7, R-

270). West Florida identified a potential reliability benefit if West Florida were allowed to provide service to Station 13-A, because it would seek to integrate the new facilities with those currently used to serve existing customers in the area (Final Order, Page 7, R-270). Hence, there is an opportunity for a greater benefit to West Florida by utilizing additional equipment, a benefit available to West Florida, but not to Gulf, because Gulf has no customers in this area. (T-155/15 – 25 and T-156/1 – 4). The parties stipulated that neither party could adequately serve the new motors with their existing facilities and both agree that the cost to either of them to provide that service would be approximately the same (Pre-Hearing Order, Page 14 Stipulated Issue 4, R-185). Enron stated a preference for service from Gulf to be the provider of electricity to the two 15,000 horsepower motors (Pre-Hearing Order, Page 14, Stipulated Issue 7, R-185). West Florida always expressed an interest in serving the new compression capacity at the FGT site. (T-42/11 – 19; Exhibit 3, RD-2, 3, 4, 5; T-53, Line 19 – T-57/25; T-34/12 – 13).

West Florida can adequately and reliably serve the FGT facility by extending service (with Alabama Electric Cooperative) from the same transmission facilities that Gulf can (R-254; T-082).

It is also undisputed that the specific site of FGT's

facilities, together with an area within a four-mile radius, is the historic service area of West Florida [T-30, Exhibit 2 (WR-2)] and is also the service area that is in dispute (R-268, Final Order, Page 5).

SUMMARY OF ARGUMENT

Enron and Gulf have effectively led the Commission down a path that will wreck havoc with the current policy of the Legislature, the Commission itself, and this Court for promoting territorial agreements, avoiding territorial wars, and resolving territorial disputes. See Lee County v. Marks, 501 So.2d 585 (Fla. 1987), Storey v. Mayo, 217 So.2d 304 (Fla. 1968). Through clever arrangements between FGT (a customer of West Florida for over 40 years), Enron and Gulf, Enron is claiming to be a "new" customer under an agreement to provide "horsepower" for two large electric motors on FGT's 35-acre site at Hinson Crossroads in Washington County, Florida. FGT is, and has been, a customer of West Florida (T-34, Lines 1 – 3). If this device prevails, then the Commission will have done the opposite of resolving territorial disputes and avoiding range wars, and will in fact open up the historic service area of West Florida to further incursion by Enron, Gulf, or by anyone else, and such action will essentially eliminate the concept of "historic service area" as a factor in resolving disputes or in determining who has the right to serve in what area. The Commission's Final Order itself, standing alone, provides ample basis for reversal, because its decision is contrary to the facts it determined to be true in the Order itself. In the Final Order the Commission at page 4 quotes its own prior conclusion of law stated in Order

#PSC-98-0174-FOF-EU, page 21, that:

> Chapter 366 speaks to "territory", not to customers as the Florida Supreme Court has ruled, a customer has no organic, economic or political right to choose an electric supplier merely because he deems it to be to his advantage, [Storey v. Mayo, 217 So.2d 304 (Fla. 1968), Lee County v. Marks, 501 So.2d 585 (Fla. 1987)]. (See Appendix)

and cites its own prior orders holding historic service area to be an important and often deciding issue in resolving territorial disputes. (Final Order, Page 4). The Commission then ignores its precedent, ignores historic service area, and ignores the transparent transaction of Enron purporting to sell "horsepower" to FGT, and while agreeing with West Florida that the service area in dispute is the entire area within a four-mile radius of FGT Station 13, it then determines that the only part of the disputed area that it will settle is the footprint of the motors to be installed at the FGT facility (Final Order, Page 10). The Commission bottoms its decision on customer choice after considering the three other factors of Rule 25-6.441(2). The Commission failed to address historic service at all, and, therefore, gave no reason or basis for deciding that customer choice should prevail when all other things are not equal. First, it is not customer "choice" that the rule refers to; it is customer "preference". The Commission is supposed to decide the dispute, not the customer (Storey v. Mayo, Lee County v. Marks). Customer preference is only considered if all other

factors are substantially equal, which they are not. The determination that the Commission's Order is unsupported by any evidence is quite simply made.

When the factors utilized by the Commission in all of its prior decisions are considered, when it is clear that Chapter 366 refers to territory, not customers, when it is undisputed that the disputed area is and has been served solely by West Florida since 1947, that the electric facilities requiring service are owned and operated by FGT, an existing customer of West Florida since 1962 and that West Florida is as capable as Gulf to provide the necessary service, then the evidence in this case supports only one conclusion, and that is, that West Florida should be providing the power to the motors owned by its own customer, FGT, not Gulf through the thinly veiled device of having Enron act as a paper corporation claiming it is providing "horsepower" to the compressors of FGT. The idea, let alone a state wide policy, that a disputed service area or a part thereof, can be created around the footprint of an appliance inside a building already being served by another utility defies common sense as well as the law of this state. But what the Commission has really done is to implement customer choice through the backdoor, while the legislature has refused to adopt deregulation and customer choice. The Commission is an administrative agency governed by the legislature. It has

overstepped its defined authority, defied its mandate, and indeed, has ignored its own rules and precedent. As Commissioner Palecki quite properly stated, such a major shift in policy should be done through legislation (R-278). What the Commission has done here, if allowed to stand, will materially affect not only West Florida and Gulf, but all other electric utilities in the State. In its zeal to promote deregulation and customer choice, neither of which are the law of the land in Florida, the Commission has significantly and materially departed from the essential requirements of law. What we have here is an administrative agency attempting to overrule this court's decision in Storey v. Mayo and Lee County v. Marks. Great mischief will be done in this state if Enron and Gulf Power are allowed to get away with what the Commission has authorized them to do.

ARGUMENT

I. THE COMMISSION'S ORDER DETERMINING THAT GULF POWER COMPANY SHOULD BE AWARDED THE SERVICE AREA IN DISPUTE IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD AND IS CONTRARY TO ESTABLISHED COMMISSION POLICY AND PRECEDENT THAT THE COMMISSION CONSIDER WHETHER A PARTY HAS HISTORICALLY SERVED THE AREA IN DISPUTE AS A MAJOR CRITERIA IN DETERMINING A TERRITORIAL DISPUTE.

Any action of the Public Service Commission regarding utility services or rates for electric, gas, or telephone service that is appealed, is reviewable by the Florida Supreme Court. Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997). However, a final order of an administrative agency will not be disturbed on appeal if there is competent, substantial evidence in the record as a whole to support the agency's decision. Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976). "Substantial evidence" is defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred." De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). It is not evidence which merely arouses a suspicion or "which gives equal support to inconsistent inferences." Florida Rate Conf. v. Florida Railroad & P.U. Com'n, 108 So.2d 601 (Fla. 1959). "Competent evidence," on the other hand, "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Id. In any case, when a Commission order is challenged, the burden of proof is on the party claiming that

the Commission's order is unsupported by the evidence. Shevin v. Yarborough, 274 So.2d 505, 508 (Fla. 1973). Accordingly, in the instant case, West Florida has the burden to show that Commission Order No. 01-2499-FOF-EU is not supported by competent, substantial evidence or is invalid on other grounds. This burden is easily met in this case.

Rule 25-6.0441(2) of the Florida Administrative Code, provides that the Commission may consider:

> "(a) The capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
> (b) The nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
> (c) The cost of each utility to provide distribution and 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(2), Florida Administration Code).

This Rule was promulgated pursuant to Florida Statute, Section 366.04(2)(e). However, the foregoing factors that are enumerated above are not exclusive. Gulf Power Co. v. Public Service Com'n, 480 So.2d 97, 98 (Fla. 1985). The Commission may consider other factors as it deems appropriate. Id. Indeed, Florida Statute Section 366.04(2)(e) clearly says that the Commission is not limited to the enumerated criteria of the rule. The Commission tries to suggest that the four factors set

out in Rule 25-6.0441(2) are “requirements” (Final Order, Page 9), when in fact that is not true. The Rule itself says the Commission “may” consider the four enumerated criteria. In practice, it has considered all four criteria, as well as historic service in virtually all of its disputes, but the point is this: by suggesting that Rule 25-6.0441(2) contains 4 required elements, the Commission is attempting to also say that those are the only elements to be considered. Such is not the case. Paramount amongst criteria not specifically enumerated is historic service to the area in dispute. In its Final Order in this case the Commission discusses in detail the Commission’s prior precedent and orders on historic service, which makes a compelling argument for West Florida (R-266-67, Final Order Pages 3 and 4), yet the Commission then totally ignores that well-established criteria to reach the result it did. In deciding territorial disputes, the Commission will determine whether "uneconomic duplication of facilities" is an issue. See Order No. 18886, Section 366.04(5), Florida Statutes. In this case, uneconomic duplication to serve the two motors on the specific site was not an issue. (R-271, Final Order, Page 8).

In the instant case, 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. Section (d) was basically stipulated to as a non-issue and the Commission

found both utilities capable of providing reliable service (R-273, Final Order, Page 10). However, issue number 5 outlined in the Pre-Hearing Order (R-179 - 180) raised an issue by West Florida that although both utilities could provide adequate and reliable service to the motors, service by West Florida would provide an additional benefit to West Florida customers. West Florida's position on this issue is quite simple. West Florida has nearly 400 customers in the disputed area; Gulf has none. Mr. Perry testified that service provided by West Florida would benefit those West Florida customers by having access to the second transformer in the sub-station to be built to serve FGT/Enron (Perry, T-155/15 – 25; T-156/1 – 4). Indeed, Gulf Power sought to strike this testimony at the hearing to keep the Commission from considering a detriment to West Florida if it does not provide the service. But even Gulf's witness Howell agreed that the second transformer could be used to serve other customers, although he was very reluctant to do so. He tried very hard to dodge the question (Exhibit 7, Page 21, Line 18 through Page 24, Line 18). And, as Mr. Cicchetti said:

> "The added load would be very beneficial to the customers of WFEC, the historical provider of service to the disputed area." (T-175/6 – 8).

In its Final Order the Commission reviewed this factor, did not dispute it, but disregarded it on the unusual basis that there was "no evidence supporting a need to improve West Florida

reliability" (R-270, Final Order, Page 7). While that in and of itself is a testament to the quality of West Florida's system, it totally ignores the benefit, as if to say that even though a benefit may exist in favor of West Florida, the Commission will not count it, hence clearly ignoring any increase in reliability to existing and future customers of West Florida. The fourth enumerated criteria, subsection (d), refers to customer preference. Note that it does not say customer "choice". The parties to this dispute did stipulate that Enron chose Gulf as its power supplier, because clearly, in fact, it did. West Florida did not stipulate that subsection (d) was a factor to be considered, because West Florida's position has always been that all things are not equal and that customer preference in such a case cannot be considered. Hence, if there is no competent substantial evidence that <u>all</u> the other factors are substantially equal, then the Commission's Final Order fails on that basis alone.

A. <u>By defining a service area awarded to Gulf Power Company as the footprint of the Florida Gas Transmission motors, the Commission has ignored historic service by West Florida for over 40 years, and has ignored its obligation to settle the disputed territory, which it agreed, was an area within a 4 mile radius of the FGT site.</u>

While West Florida recognizes that the Commission could award service to Gulf pursuant to Section 366.04(2)(e) and its

own Rule, 25-6.0441(2), if all other factors were substantially equal, as Commissioner Palecki so eloquently noted in his dissenting opinion, all factors are not substantially equal. The notion that a service area could be something as small as the footprint of a motor is not only patently ridiculous, it defies common sense, and is contrary to the Commission's own previous decisions.

Resort to the Commission's prior Order PSC-98-0178-FOF-EU issued January 28, 1998, resolving a dispute between Clay Electric Cooperative, Inc. and Florida Power & Light Company ("FPL") (Docket Number 97-0512-EU), is very instructive. Clay Electric claimed the disputed area in that case to be the physical boundary line of the land purchased by the customer, while FPL argued that because there was potential for growth of commercial and industrial customers within a larger area, the Commission should not define the disputed area as just the customer's property boundaries. The Commission agreed with FPL (Order Number 98-0178 at Page 4). By adopting a larger view of the disputed area as one that could include future customers, the Commission also determined that FPL (which had facilities in the vicinity) had historically served the disputed area (Id., Page 6). Hence, not only has the Commission refused to consider a customer's equipment as the boundary of a disputed area, it has also refused to be restricted to the property boundary as

well, and considers historic service to be a factor in deciding territorial disputes. Commission Order Number 12324, issued August 4, 1983 in Docket Number 83-0271-EU involved a dispute between Suwannee Valley Electric Cooperative, Inc. and Florida Power Corporation in Lafayette County (the Mayo Prison case), where the Commission determined that the disputed area was not just the prison site, but an area of 36 square miles around it, where Suwannee Valley served 151 customers. Florida Power Corporation ("FPC") argued that it historically served the area due to the presence of its transmission line in the immediate vicinity. The Commission did not agree and then determined that FPC's action was an intrusion into Suwannee Valley's service area, and further determined that Suwannee Valley historically served the specific site itself. Hence, even if Gulf's transmission line ran through the disputed area in this case, the presence of those lines are irrelevant, and do not provide Gulf any advantage over West Florida. In this case, West Florida has served the disputed area for 55 years, and has nearly 400 customers in the area (T-165/9; T-59/23 – 25; T-60/4).

In another case involving Suwannee Valley and FPC (the Jasper Prison), Docket Number 87-0096-EU, the roles were reversed. FPC had provided service to the disputed area since 1959 and still provided service to Mr. Deas, the previous owner

of the disputed area where the Department of Corrections was planning to build a correctional institution (the DOC had purchased a portion of Mr. Deas property for the prison site). Suwannee Valley had a single-phase line traversing the property for over 30 years. The Commission awarded service to FPC, and noted two factors, the first being that FPC had been serving the area for many years, including Mr. Deas the prior owner, while Suwannee Valley served no one (Order Number 18425, issued November 16, 1987).

In 1988 the Commission (Docket Number 87-0235-EI) resolved a dispute between West Florida and Gulf over service to a new high school (Ponce deLeon) in Holmes County. In that case, Gulf was already serving the school board's elementary school, and had done so since 1979 with temporary construction service and later permanent service without objection from West Florida. The new high school was to be built on property adjacent to the elementary school. Although the school board requested service from West Florida, and although the Commission found the costs to the two utilities to provide service to the site were "not substantially different", nonetheless, one of the primary reasons service was awarded to Gulf was because Gulf Power was already providing permanent electric service to the school complex property and had done so since 1981 (Order Number 18886, issued February 18, 1988).

In Docket Number 83-0484-EU, a dispute between Gulf Coast Electric Cooperative and Gulf Power Company over service to the Leisure Lakes area in Washington County, the Commission determined that the disputed area could not be confined to just Leisure Lakes, but should include the surrounding area (Order Number 13668, issued September 10, 1984), concluding that Gulf Power had very little distribution in the surrounding area, that Gulf Coast had historically served the surrounding area, and that Gulf Power's "invasion into Gulf Coast's service area is unjustified" (Id., at Page 3). The Commission's award of service to Gulf Coast was upheld by the Florida Supreme Court in Gulf Power Co. v. Public Service Com'n, 480 So.2d 97 (Fla 1985).

In Docket Number 85-0087-EU, another dispute between Gulf Power Company and Gulf Coast Electric, Gulf Power constructed 2,900 feet of distribution line to serve a cemetery and one residential customer on Gap Pond Road. The Commission found that Gulf Coast had historically served the area southeast of Gap Pond since 1951, and prior to the Gulf Power extension into the area in 1985; all customers in the disputed area were exclusively served by Gulf Coast (Order Number 16106, issued May 13, 1986). The Commission's primary reason for awarding service to Gulf Coast was the cooperative's historical service to the area (Id., at Page 5).

In Docket Number 93-0885-EU, another dispute between Gulf

Coast and Gulf Power involving the Washington County Correctional Institution site in south Washington County, Gulf Power alleged that the "disputed area" was just the site of the prison, while Gulf Coast claimed it was really all of south Washington County and portions of Bay County. Citing its decision in Docket 91-1141-EU (a dispute between Okefenoke and Jacksonville Electric Authority) the Commission determined that a much broader dispute existed, extending to all areas of south Washington County and Bay County where the facilities of the two utilities were in close proximity and where the potential for future conflict existed (Order Number PSC-95-0271-FOF-EU, issued March 1, 1995). Finally, Mr. Clark's Exhibit Number 4 (GC-5 and GC-6) shows the site itself in photographs as well as the diagram of the facility with the expansion plan as proposed by FGT (See Appendix). By awarding a portion of the disputed area currently being served by West Florida to Gulf, and defining the area as the footprint of two electric motors inside a building served by West Florida, the Commission has reversed years of progress in encouraging utilities to enter into territorial agreements and avoid costly range wars as well as having disregarded its own criteria for settling disputes.

B. <u>The Commission's claim that its Order Allowing Gulf Power Company to serve Enron electricity on a site no larger than the footprint of a motor, and refusing to draw territorial boundaries in the disputed area was</u>

based on its "prior policy" of not prematurely drawing territorial boundary lines, is distinguishable from the facts of the case that upheld that "policy".

This case is clearly distinguishable from Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259 (Fla. 1999) which was an appeal from the Commissions Order No. PSC 98-0174-FOF-EU. As the Commission noted in its Order in that case, uneconomic duplication had already occurred, the electric facilities of the two utilities were in close proximity, and were already commingled (Order 98-0174, Page 10). The Commission apparently decided that existing duplicated facilities were acceptable; hence, there was no need to draw a boundary line. This court upheld the Commission's decision in Gulf Coast Electric Cooperative, Inc. v. Johnson, supra. In the case at bar, there is no duplication of facilities, no commingling of facilities between the two utilities, and no expansive unserved area in dispute. Indeed, the undisputed evidence is that the entire area is being served solely by West Florida, as is the very site of FGT's new motors. What we have here is the creation of an intrusion into West Florida's service area by the Commission's Order itself. Gulf's promise not to serve other customers is not very reassuring:

> "Gulf Power is only seeking to serve the ECS [Enron] electric load at Station 13A; it has no intention of serving any present customer of West Florida Electric Cooperative Association, Inc. ("WFEC") or any future prospective customer where such service would constitute uneconomic duplication of WFEC's

> facilities. Because Gulf Power has no such intentions, no additional disputes in the general or larger area around Station 13A are reasonably foreseeable." (Gulf Power witness T.S. Spangenberg, Jr. (T-111, Lines 6 - 12).

Here is what Gulf Power witness M. W. Howell said at his deposition:

> "Q. (By Mr. Haswell) What I am saying is, if a customer came along in the general vicinity of that area [Gulf Power transmission line extension] and requested service, you would consider serving them by adding additional equipment; is that correct?
> A. (By Mr. Howell) We would consider it, yes." (Exhibit No. 7, Deposition of Mr. Howell, Page 16, Lines 15-19)

As Commissioner Palecki noted in his dissent, the majority decision, "establishes for the first time in Florida a non-exclusive service territory, allowing different electrical providers to serve the same territory, as long as they serve at different voltage levels requiring separate facilities." (Final Order, Page 13)

This Court has previously gone to great lengths to prevent races to serve and has, consequently, favored the creation of territorial agreements. In fact, this Court has explicitly stated that "such agreements are encouraged to avoid costly competition and wasteful duplication." Gainesville-Alachua, Etc. v. Clay Elec. Co-op., 340 So.2d 1159, 1161 (Fla. 1976). Furthermore, this Court has noted that, aside from simply having the statutory power to approve territorial agreements, the

Commission has the duty to "supervise planning of a statewide power system, in part to avoid unnecessary duplication of facilities." Id. (Citing Section 366.04(2)(e), Fla. Stat.)

The mischief that this new and unwarranted policy will create is not difficult to imagine. If an Enron subsidiary can develop a set of documents to make it look like it is a "new" customer selling "horsepower", and convinces this Commission (as it has done) to grant it a footprint in a building served by another utility, then 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. With this decision, the Commission has set in motion untold opportunities for clever arrangements to successfully intrude into the service areas of any utility, even into the same building currently served by the historic service provider.

> "The manner in which the majority manages to reject consideration of West Florida's history of service is somewhat convoluted. First, the majority cleverly defines the area under dispute as "the footprint of two motors." Then, the majority considers that the motors require 69 kV service, which neither utility provides in the area. Therefore, the majority concludes, there is no history of service to the area. The majority decision is unprecedented. It does not cite to a single past decision wherein this Commission has based its decision in a territorial dispute on a similarly clever analysis. None exists." (Final Order, Page 13, Commissioner Palecki's dissent).

II. THE COMMISSION'S DECISION ALLOWING ENRON TO SELECT GULF POWER AS ITS POWER SUPPLIER ON A SITE WHOLLY WITHIN WEST FLORIDA'S SERVICE AREA, HISTORICALLY SERVED BY WEST FLORIDA FOR 55 YEARS, AND AT A SPECIFIC LOCATION ALL INSIDE A BUILDING ALREADY SERVED BY WEST FLORIDA FAILS TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW, EXCEEDS ITS AUTHORITY, AND IS AN ATTEMPT TO OVERRULE THE SUPREME COURT OF FLORIDA'S DECISIONS IN LEE COUNTY ELECTRIC COOP V. MARKS AND STOREY V. MAYO.

This argument is simply stated. The legislature has given the Commission the charge to resolve territorial conflicts, encourage territorial agreements, and avoid duplicative facilities (Sections 366.04(2) and 366.04(5), Fla. Stat.). This Court has affirmed that mandate (Gainesville-Alachua, Etc. v. Clay Elec. Co-op., supra; Lee County v. Marks, supra).

The Commission has always considered historic service to an area to be an important criteria as previously noted, until this decision.

This Court has stated, not once, but twice, that an electric customer has no right to select his electric service provider. Storey v. Mayo and Lee County v. Marks. The legislature of the State of Florida has refused to adopt customer choice or deregulation, proved by the mere fact that there is no statute allowing it.

The Commission's powers, duties and authority are only those that are conferred expressly or impliedly by statute. As this Court noted in Florida Bridge Company v. Bevis, 363 So.2d 799 (Fla. 1978): "Any reasonable doubt as to the lawful existence of

a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and further exercise of the power should be arrested" [at page 802, citing City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973)]. What the Commission has done in this case is to:

1. Abrogate its responsibility to avoid territorial conflicts and duplicative facilities by allowing a neighboring utility to serve the host utility's existing customer (FGT) through the guise of a paper transaction (Enron);

2. Refuse to consider or totally ignore the crucial criteria of historic service and historic service areas that it has repeatedly used in the past for evaluating and resolving territorial conflicts;

3. Has allowed an electric customer (whether it is a real customer or a paper one like Enron) to locate on the same property of an existing customer of the historic service provider (West Florida) and allowed "customer choice" to prevail whereby the "customer" chose a neighboring utility to provide service to the same building that West Florida is already serving. In short, the Commission has mandated, or at least allowed customer choice, when the legislature and the courts have refused to allow it.

By defining the service area as the footprint of FGT's motors the Commission has effectively determined that disputes

between electric utilities are disputes over customers and not over geographic areas, a determination contrary to law.

CONCLUSION

Consider this. If the Commission's order is allowed to stand, any "energy" company, whether real or a paper broker like Enron, could approach the administration of this Court and offer to provide "illumination" services at a price that may be less than the City of Tallahassee charges for electricity. The Court could lease all its light bulbs to say "Enron Court Services", which will agree to operate and maintain them, initially, then contract the operation and maintenance back to the Court administration for a nominal fee. Enron Court Services would then claim it is a "new" customer and ask for service from Gulf Power, Talquin Electric, Florida Power Corp., or any one else. This is what the Commission has set in motion. Should such a major shift in policy and law be dictated by the Commission, or should this be a determination for the legislature? West Florida respectfully suggests that it must be the legislature, and requests that the Court reverse the Commission's decision and order that service to the motors be provided by West Florida Electric Cooperative, Inc.

Respectfully submitted,

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

and

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

CERTIFICATE OF SERVICE

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

John H. Haswell, Esquire

CERTIFICATE OF COMPLIANCE

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

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John H. Haswell, Esquire