

FLORIDA PUBLIC SERVICE COMMISSION  
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M E M O R A N D U M

March 7, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MLB RVE*  
DIVISION OF ELECTRIC & GAS (BASS, DUDLEY) *CSL* *JDJ*

RE: DOCKET NO. 930885-EU - PETITION TO RESOLVE TERRITORIAL  
DISPUTE WITH GULF COAST ELECTRIC COOPERATIVE, INC. BY  
GULF POWER COMPANY

AGENDA: 03/19/96 - REGULAR AGENDA - MOTION FOR STAY PENDING  
APPEAL OF ORDER RESOLVING TERRITORIAL DISPUTE - POST  
HEARING DECISION - NO ORAL ARGUMENT REQUESTED -  
PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\930885MS.RCM

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CASE BACKGROUND

On September 8, 1993, Gulf Power Company filed a petition to resolve a territorial dispute with Gulf Coast Electric Cooperative, Inc.. Gulf Power asserted that it had the right to serve a new correctional facility in Washington County, and Gulf Coast had constructed facilities that duplicated Gulf Power's existing facilities in order to provide service to the prison. The Commission conducted a hearing on October 19 and 20, 1994, and on March 1, 1995, the Commission issued Order No. PSC-95-0271-FOF-EU resolving the dispute. On July 27, 1995, the Commission issued Order No. PSC-95-0913-FOF-EU to clarify certain portions of its earlier order.

On March 31, 1995, Gulf Coast filed a notice of appeal of Order No. PSC-95-0271-FOF-EU to the Supreme Court of Florida. Gulf Power filed a notice of cross-appeal on September 14, 1995. Thereafter, on September 26, 1995, Gulf Coast filed a Motion for Stay Pending Judicial Review of Order No. PSC-95-0271-FOF-EU, as clarified by Order No. PSC-95-0913-FOF-EU. On October 11, 1995, Gulf Power filed a response to Gulf Coast's motion. This is Staff's recommendation to grant the Motion to Stay.

DOCUMENT NUMBER-DATE

02845 MAR-7 96

FPSC-RECORDS/REPORTING

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Gulf Coast's Motion for Stay Pending Judicial Review?

RECOMMENDATION: Yes. By the provisions of Rule 25-22.061(2), Florida Administrative Code, the Commission should grant the Motion for Stay.

STAFF ANALYSIS: Rule 25-22.061(2), Florida Administrative Code, provides that the Commission may exercise its discretion to grant a stay of an order pending judicial review. The rule states that the Commission may, among other things, consider three factors in determining whether to grant the stay:

- (a) Whether the petitioner is likely to prevail on appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Gulf Coast asserts that it is reasonably likely to prevail on appeal because the Commission's Order does not address the following areas: 1) the necessity for Gulf Coast to construct a replacement line on County Road 279; 2) the reasonableness of and economic justification for upgrading the line to 3 phase; 3) the cost differential; 4) customer choice in the area; and 5) the "equities" of the case. Gulf Coast asserts that there is no evidence in the record that Gulf Coast's actions were unnecessary or uneconomic; thus, it has a reasonable chance to prevail on appeal. Gulf Power's response does not address these assertions.

Staff believes that Order PSC-95-0271-FOF-EU is soundly based on competent, substantial evidence in the record, and sufficiently addresses all issues required by Section 366.04, Florida Statutes, and Rule 25-6.0441, Florida Administrative Code. Staff does recognize, however, that the Supreme Court may take a different view of the weight accorded to the evidence in this case and the effect of the applicable statute and rules. It is difficult to recommend with any certainty the likely outcome of Gulf Coast's appeal, but it does appear to staff that there is at least a reasonable possibility that Gulf Coast may prevail on its appeal.

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Gulf Coast is currently serving the correctional facility. Gulf Coast asserts that it will suffer irreparable harm if the stay is not granted, because it has made a substantial investment of \$100,000 to serve the Washington County Correctional Facility. The loss of that investment, Gulf Coast argues, would be detrimental to the cooperative's ratepayers. Gulf Power does not address this assertion in its response.

While Gulf Coast may well lose some of its investment to serve the prison if when the case is concluded, the Court affirms the Commission's decision, the loss would be the outcome of the final decision in the case, not the outcome of a decision to deny a stay pending the Court's decision. While Gulf Coast might then have to expend additional funds to reinstitute service to the correctional facility if the stay is denied and then Gulf Coast prevails on appeal, staff does not believe that such an expense would cause irreparable harm to Gulf Coast. The real harm in denying a stay in this case, is the disruption that would be caused to the customer from switching electric suppliers temporarily, with the reasonable chance that the customer would then have to switch suppliers again when the Court makes its decision on the appeal.

Gulf Coast asserts that the delay that would result from a stay will not cause substantial harm to either Gulf Power or the public interest. Gulf Coast also asserts that Gulf Power would benefit from the delay because it would allow Gulf Power to refrain from reimbursing Gulf Coast for the relocation of its facilities.

Gulf Power responds that it would suffer if the stay is granted. Gulf Power argues that although it will have to reimburse Gulf Coast for relocation of facilities, the substantial revenues accrued by serving the correctional facility will more than make up for the amount of the reimbursement. Gulf Power asserts that if the stay is granted, Gulf Power will suffer an increase in lost revenues for not being allowed to serve the correctional facility.

Staff does not agree that further delay will cause further substantial harm to the parties or the public. The delay may, in fact, prevent unnecessary disruption should Gulf Coast prevail on appeal. While Gulf will not receive revenues from service to the prison until the case is finally resolved, it also will not incur any costs to serve the prison. To avoid unnecessary disruption to the customer, staff recommends that it is appropriate to preserve the status quo until Gulf Coast's appeal is resolved. For this and the foregoing reasons, staff recommends that Gulf Coast's Motion for Stay Pending Judicial Review should be granted.

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**ISSUE 2:** If the motion for stay is granted, should Gulf Coast be required to post a bond or corporate undertaking, as provided for in Rule 25-22.061, Florida Administrative Code?

**RECOMMENDATION:** No. Gulf Coast should not be required to post a bond to protect Gulf Power's interests because Gulf Coast is expending the funds necessary to serve the Washington County Correctional Facility and should be allowed keep the revenue produced by serving the facility.

**STAFF ANALYSIS:** In its response to Gulf Coast's motion, Gulf Power requests that if the Commission grants Gulf Coast's motion, then the Commission should also require Gulf Coast to post a bond or corporate undertaking to protect Gulf Power's interests in the revenue lost by not being allowed to institute service to the Washington County Correctional Facility.

Because Gulf Coast has expended the necessary funds to serve the correctional facility, and is presently bearing the costs to provide service, staff believes that Gulf Coast should be allowed to retain any revenues derived from that service until the issues on appeal are resolved. No bond is required or necessary in this case.

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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending resolution of the remaining substantive issues in the case.

**STAFF ANALYSIS:** This docket should remain open until the hearing scheduled in this docket for September 4 and 5, 1996, is held and the Commission resolves the remaining substantive issues in the case. The September hearing will address the establishment of a boundary between the utilities in other disputed areas of south Washington and Bay counties, as addressed in Order No. PSC-95-0271-FOF-EU.