

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

DOCKET NO. 20180125-EU

COMPLAINT AGAINST GULF  
POWER COMPANY FOR  
EXPEDITED ENFORCEMENT OF  
TERRITORIAL ORDER, BY GULF  
COAST ELECTRIC  
COOPERATIVE, INC.

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PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 3

COMMISSIONERS  
PARTICIPATING: CHAIRMAN ART GRAHAM  
COMMISSIONER JULIE I. BROWN  
COMMISSIONER DONALD J. POLMANN  
COMMISSIONER GARY F. CLARK  
COMMISSIONER ANDREW G. FAY

DATE: Tuesday, December 11, 2018

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: ANDREA KOMARIDIS  
Court Reporter and  
Notary Public in and for  
the State of Florida at Large

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## 1 P R O C E E D I N G S

2 MR. SCHRADER: Commissioners, Kurt Schrader,  
3 for legal staff. Item 3 is staff's recommendation  
4 regarding two motions for summary final order, one  
5 by Gulf Power Company, one by Gulf Coast Electric  
6 Cooperative, regarding a dispute over which utility  
7 should service a lift facility in Bay County.

8 Issue 1 is request for oral argument. Staff  
9 would recommend the parties each be given five  
10 minutes in total to address both motions.

11 Issue 2 is staff's recommendation to grant  
12 summary final order motion by Gulf Power.

13 And Issue 3 is staff's recommendation to deny  
14 GCEC's summary -- motion for summary final order.

15 Representatives are present from Gulf Power  
16 and GCEC to address the Commission, if oral  
17 argument is to be granted. And staff is available  
18 to answer any questions.

19 CHAIRMAN GRAHAM: Okay. Well, I guess we'll  
20 start with Gulf.

21 MR. GRIFFIN: Good morning, Commissioners,  
22 Mr. Chairman. My name is Steve Griffin with the  
23 Beggs & Lane Law Firm on behalf of Gulf Power  
24 Company. We're here in support of your staff's  
25 thorough recommendation. We think that they did a

1           fabulous job of synthesizing the salient points.

2           We did not request oral argument in connection  
3 with our motion for final summary order because,  
4 quite frankly, we didn't believe that the  
5 complexity of this particular case rose to the  
6 level to warrant it. And that is the case today.

7           So, I don't have extended prepared comments  
8 for you. My role is to answer any questions that  
9 you may have and respond to argument as necessary,  
10 but we do believe it to be a very simple matter of  
11 interpretation of a territorial agreement that can  
12 be resolved as a matter of law here today.

13           CHAIRMAN GRAHAM: Well, we haven't decided yet  
14 on oral argument. I just kind of want to hear your  
15 opening statements.

16           Mr. May?

17           MR. MAY: I'm Bruce May with Holland & Knight  
18 Law Firm. We represent Gulf Coast Electric  
19 Cooperative, GCEC. With me today is Mr. Pat Floyd.  
20 He's the general counsel for the cooperative. And  
21 we do have -- we -- we would respectfully request  
22 five minutes to explain what we believe to be  
23 complex issues regarding this case and also some  
24 principles of law that we think that the staff  
25 recommendation overlooked, particularly with

1 respect to -- to summary judgment.

2 And we filed a notice of supplemental  
3 authority yesterday regarding a case involving  
4 Florida A & M University -- which the First  
5 District Court of Appeal just overturned the  
6 Circuit Court's summary judgment motions. We think  
7 that plays into this case, and you should have that  
8 before you.

9 In staff's defense, this case was issued by  
10 the First District Court of Appeal on  
11 November 27th, right around the same time of  
12 staff's recommendation.

13 So, I'm not casting any dis- -- aspersion  
14 towards staff. We just think some additional  
15 information and oral argument will allow us to  
16 provide that to you.

17 CHAIRMAN GRAHAM: Commissioners, first layer  
18 of this onion we have to peel is decide if we're  
19 going to grant oral argument or not for -- on Item  
20 No. 3, Issue No. 1.

21 Any comments or questions on that question?

22 COMMISSIONER FAY: I just have --

23 CHAIRMAN GRAHAM: Commissioner Fay.

24 COMMISSIONER FAY: -- a procedural question,  
25 probably for Mr. Schrader.

1           So, the -- the request for oral argument,  
2           they're -- there are mandated requirements to  
3           satisfy that request for the Commission to allow  
4           that going forward. Can you explain if those have  
5           been met?

6           MR. SCHRADER: It -- you know, at the end of  
7           the day, granting oral arguments is the -- at the  
8           discretion of the Commission. So, staff believes  
9           that, given the complexity of the -- of the issue  
10          and -- excuse me -- and, you know, the finality of  
11          the motion, that it was -- it was reasonable to  
12          grant oral argument.

13          COMMISSIONER FAY: So, if it's overall  
14          beneficial for us --

15          MR. SCHRADER: Yes. Yes, sir.

16          COMMISSIONER FAY: -- to hear that -- that  
17          information, then some of these specifics aren't  
18          necessarily mandated to be in that request.

19          MR. SCHRADER: Yes. That's correct.

20          COMMISSIONER FAY: Okay. Thank you.

21          CHAIRMAN GRAHAM: Commissioner Brown?

22          COMMISSIONER BROWN: I would move approval of  
23          staff recommendation on Issue 1, allowing oral  
24          argument and limit it to five minutes.

25          COMMISSIONER FAY: Second.

1           CHAIRMAN GRAHAM:  It's been moved and second.  
2           Any further discussion on oral arguments?

3           Seeing none, all in favor, say aye.

4           (Chorus of ayes.)

5           CHAIRMAN GRAHAM:  Any opposed?

6           By your action, you've approved the motion.

7           All right.  Mr. May, we'll start with you.

8           You have five minutes.  If you want to leave part  
9           of that to speak after Gulf has spoken, then I will  
10          allow that.

11          MR. MAY:  Thank you, Mr. Chairman.  Again, I'm  
12          Bruce May with Holland & Knight.  We represent  
13          GCEC, and respectfully disagree with staff's  
14          recommendation.

15          Granting summary final order in favor of Gulf  
16          Power would contradict fundamental principles of  
17          law and prevent you from fulfilling your statutory  
18          charge to ensure against uneconomic duplication.

19          To begin with, staff's recommendation  
20          overlooks the fact that Gulf Power had the burden  
21          to notify GCEC of the customer service request and  
22          to include in that notice all relevant information  
23          about the request, so that GCEC could quickly  
24          calculate its cost to serve the customer.

25          Under staff's reading of Section 2.3, Gulf

1 Power was only required to generally mention to  
2 GCEC that it had received a request for service.  
3 And then, according to staff, it was GCEC's burden  
4 to gather the details, but that's not what Section  
5 2.3A says. It plainly requires Gulf Power to  
6 provide GCEC with, "... All relevant information  
7 about the request," and Gulf Power did not do that.

8 "Relevant information" is defined in the law  
9 dictionary as any data that applies to a situation  
10 or problem that can help towards finding a  
11 solution.

12 The solution in this case is the calculation  
13 that GCEC needed to make to quickly determine if  
14 its facilities would be duplicated if Gulf Power  
15 served the lift station. To make that  
16 determination, GCEC needed the precise location of  
17 the customer, the size of the customer's load and,  
18 of course, the customer's name.

19 Gulf Power had all of that information in hand  
20 when it sent the e-mail to Mr. Gleaton; yet, Gulf  
21 Power provided none of that vitally-relevant  
22 information in its e-mail.

23 Gulf Power's failure to provide all relevant  
24 information led Mr. Gleaton to mistakenly believe  
25 that the lift station referenced in the e-mail was

1 the lift station visible from the road located near  
2 the airport that was almost immediately adjacent to  
3 Gulf Power's facilities.

4 Mr. Gleaton reasonably concluded that Gulf  
5 Power could serve that lift station without  
6 duplicating GCEC's facilities, and thought nothing  
7 more of the e-mail. That's why he didn't respond.

8 To grant the motion for summary judgment and  
9 deprive GCEC of its rights under the procedures-  
10 and-guidelines agreement would, in effect, reward  
11 Gulf Power for sending defective notice and  
12 concealing vitally-relevant information. We don't  
13 believe that's appropriate in a summary judgment  
14 proceeding.

15 Another problem with staff's recommendation is  
16 that it applied the wrong standard for summary  
17 judgment. Staff mentions that the standard is very  
18 high, but fails to follow that very-high standard  
19 in its analysis.

20 The facts confirm that Gulf Power failed to  
21 provide GCEC with all relevant information about  
22 the customer request, and such failure caused GCEC  
23 not to respond to the e-mail within five working  
24 days.

25 Now, to be fair to Gulf Power, Gulf Power



1 draws a different inference from those same facts,  
2 but the Court in *Albelo vs. Southern Bell* warned --  
3 and I quote -- "Even where the facts are  
4 uncontroverted, the remedy of summary judgment is  
5 not available if different inferences can be drawn  
6 from the uncontroverted facts."

7 Given the different inferences drawn by Gulf  
8 Power and GCEC in this case, summary judgment, we  
9 submit, is certainly not appropriate. This was  
10 recently reinforced by the First District Court of  
11 Appeal's opinion in *Holmes vs. Florida A & M*, which  
12 overturned Judge Shelfer's summary judgment  
13 motions, and which we filed that case with you as  
14 supplemental authority yesterday.

15 I see my time is about up. We believe there  
16 are other serious problems with the staff's  
17 mischaracterization of our motion for summary final  
18 order, its analysis of the waiver theories, and its  
19 insistence on construing the agreement in favor of  
20 its drafter, Gulf Power.

21 Hopefully we can address some of these issues  
22 in further discussion, but in closing, I'd ask you  
23 to please keep in mind that the procedures and  
24 guidelines that are before you were always intended  
25 to -- to provide a process for Gulf Power and GCEC

1 to compare their respective costs in order to avoid  
2 uneconomic duplication.

3 The threshold for uneconomic duplication under  
4 the agreement is where one utility's cost would  
5 exceed the other's by \$15,000, or 25 percent.  
6 Based on estimates in the record, Gulf Power's cost  
7 will exceed both of those thresholds. Gulf Power's  
8 projected cost to serve the lift station exceeds  
9 GCEC's by more than \$58,000, which is 335 percent  
10 higher than GCEC's cost.

11 For those reasons, we would ask that you deny  
12 Gulf Power's motion for summary final order and set  
13 the matter for hearing so that you can see for  
14 yourselves this very wide cost differential.

15 Thank you. And I'll be glad to answer any  
16 questions.

17 CHAIRMAN GRAHAM: You must have practiced  
18 that. That was four minutes and 49 -- 59 seconds.

19 MR. MAY: I'll -- could I reserve the ten  
20 seconds?

21 (Laughter.)

22 CHAIRMAN GRAHAM: Gulf.

23 MR. GRIFFIN: Thank you, Mr. Chair. And as I  
24 said, we don't have any prepared comments, but I  
25 will do my best to respond to a few of the -- the

1           assertions that were made.

2           We -- we did not request discovery in this  
3 proceeding because we believe that it was ripe for  
4 determination on the pleadings. The prehearing  
5 officer in this case determined that limited  
6 discovery would be appropriate on the sufficiency  
7 of the notice.

8           In retrospect, I think that was probably a  
9 prudent decision. We did conduct relatively-  
10 extensive discovery, including depositions of both  
11 the Gulf Power individual who sent the notice, and  
12 the GCEC vice president who received it.

13           And what that revealed was that, not only was  
14 that notice received by that individual on the day  
15 that it was sent -- excuse me -- but that he  
16 immediately, within less than an hour, forwarded  
17 that document to his chief operating officer, and  
18 they subsequently had a discussion about it.

19           Contemporaneously with that exercise,  
20 approximately, Mr. Gleaton, the VP who initially  
21 received that e-mail, entered the parcel ID that  
22 was identified in our notice into the Bay County  
23 property appraiser's website. He was able to view  
24 the website parcel.

25           And we -- we submit that, had he done more

1           than simply glance at that, it would have been  
2           immediately apparent to him that the lift station  
3           to which we were referring was not, in fact, the  
4           lift station that was immediately adjacent to Gulf  
5           Power's lines down the road, but -- but a different  
6           lift station.

7                         Similarly, that same individual has  
8           acknowledged, that he was not even aware of the  
9           existence of a territorial agreement between the  
10          parties, despite his role as the vice president of  
11          engineering for the company.

12                        The COO, to whom he forwarded that me- -- that  
13          e-mail, has also acknowledged he was not aware of  
14          the existence of a territorial agreement between  
15          the parties. These are the individuals who are  
16          responsible for running the company. And so, the  
17          fact that they were not aware of the agreement was  
18          somewhat surprising to us.

19                        What is also surprising is that, despite  
20          having received our notice, which identified  
21          Section 2.3A of the parties' agreement, neither of  
22          them took it upon themselves, at that point in  
23          time, to ask anyone else within their organization  
24          about the existence of a territorial agreement with  
25          Gulf Power Company or do any due diligence.

1           Instead, as Mr. May acknowledged, they filed it  
2           away without giving it a second thought.

3           So, your -- your staff has discussed this  
4           extensively in their recommendation, as we have in  
5           our pleadings and in the briefs, but what -- what  
6           the law says is that when a person is possessed  
7           with information that would lead a reasonable  
8           individual to conduct further inquiry, they're  
9           obligated to do that at their own peril.

10           Our submission is that the notice was  
11           certainly, certainly sufficient on its face to  
12           alert GCEC to the fact that Gulf Power Company had  
13           received a request for service under the  
14           territorial agreement and that they were invoking  
15           their notice rights under Section 2.3A of that  
16           agreement. That -- that's apparent on the face of  
17           the document.

18           What we are also supporting, and we believe is  
19           wholly supported by the law, is the fact that, had  
20           they done any degree of due diligence in response  
21           to that notice, including picking up the phone and  
22           calling and indicating, we're not sure exactly what  
23           you're talking about, could you provide us with  
24           more information, then this -- this entire issue  
25           would -- would be a non-issue, as a practical

1 matter.

2 So, that -- that -- that's some preliminary  
3 commentary on my part. I'm happy to answer any  
4 questions that you may have.

5 CHAIRMAN GRAHAM: Thank you.

6 Okay. Commissioners, Issue No. 1 has been  
7 handled.

8 We're on Issue No. 2: Should Gulf's -- Gulf  
9 Power's motion for summary final order be granted.  
10 Questions? Concerns? Discussion? Go.

11 Commissioner Fay.

12 COMMISSIONER FAY: Thank you, Mr. Chairman.

13 I have a quick question for Mr. Schrader. So,  
14 we -- we got this -- a copy of this case from GCEC  
15 regarding the Florida A & M University -- do you  
16 have that with you?

17 MR. SCHRADER: Yes, I do.

18 COMMISSIONER FAY: Could you just quickly  
19 address how that ruling would potentially impact  
20 the analysis of this?

21 MR. SCHRADER: Certainly, yeah. Yeah, we --  
22 we received that yesterday afternoon, but our  
23 looking into that case, we don't think that it --  
24 it's relevant to this matter.

25 It is a -- as a case involving contract law.

1 And staff recommends it's actually -- at matter  
2 here is the Commission's interpretation of its  
3 territorial order. So, we don't believe that this  
4 case is actually relevant to this -- the case cited  
5 yesterday is relevant to this -- this proceeding.

6 COMMISSIONER FAY: Okay. So, even with the  
7 submission of this, the analysis stays the same.

8 MR. SCHRADER: Yes, it does, Commissioner.

9 COMMISSIONER FAY: Okay. Thank you.

10 CHAIRMAN GRAHAM: Commissioner Brown.

11 COMMISSIONER BROWN: I have a question for  
12 Mr. May. I -- I think the facts are pretty  
13 unambiguous. I also think that the contract is  
14 unambiguous, in my opinion, just looking at the  
15 pleadings.

16 I want to know, though, why GCEC did not  
17 respond to the e-mail until January. When I --  
18 is -- was it, then, operational and Gulf was  
19 operating the sta- -- the lift station -- I mean,  
20 the station?

21 MR. MAY: Sure. Thank you, Commissioner  
22 Brown. As I indicated, the -- the e-mail that  
23 Mr. Gleaton received from -- from Gulf Power did  
24 not include all the relevant information.

25 As a result, it did -- it didn't -- it didn't

1 even include the location. It provided just a  
2 parcel number without the county. The parcel  
3 number was a -- one-square mile. So, there's no  
4 way that anyone could determine from that e-mail  
5 where the location of the lift station was.

6 In fact, Gulf Power has admitted that  
7 providing the parcel number without the associated  
8 county -- it would be impossible to identify and  
9 locate the lift station, so --

10 COMMISSIONER BROWN: Where have they admitted  
11 that?

12 MR. MAY: It -- they -- they said it in  
13 their -- in their briefs that they acknowledged  
14 that the -- and it -- Mr. Rogers said it in his  
15 deposition. He said that, by not providing -- he  
16 said, it was a mistake not to provide the county  
17 with the parcel number, and it was impossible to  
18 locate the precise location of the lift station  
19 without that county number.

20 COMMISSIONER BROWN: But GCEC knew which lift  
21 station it was.

22 MR. MAY: No -- no, ma'am. So, as a result of  
23 the vagueness of the e-mail, GCEC knew of only one  
24 lift station in the area. And that lift station  
25 was located immediately adjacent to Gulf's



1 facilities, away from GCEC's facilities, near the  
2 airport.

3 So, it assumed that that lift station was  
4 closer to Gulf's power -- Gulf Power's facilities  
5 and, therefore, would be more economical for Gulf.  
6 That's the reason that -- that GCEC didn't respond  
7 to the e-mail.

8 COMMISSIONER BROWN: So, you're focusing,  
9 under the territorial agreement, on 2.3A. You're  
10 focusing on the relevant information was not  
11 sufficient because, obviously, e-mail is -- is  
12 sufficient.

13 MR. MAY: Well, I meant, I -- I -- I think  
14 that, you know, we -- to go back, to kind of answer  
15 Commissioner Fay's and your questions at the same  
16 time, if you -- the -- the significance of the  
17 Holmes case is that it -- the Court made it  
18 clear -- the First District Court made it clear  
19 that, when you're interpreting a contract -- and  
20 this is a contract. This is an agreement that was  
21 negotiated by Gulf Power and GCEC. It was drafted  
22 primarily by Gulf Power.

23 So, the significance of the Holmes case, which  
24 the First DCA just -- is that, No. 1, in contract  
25 construction, you always construe the contract

1           against the drafter thereof.

2           In this case, staff's recommendation gives  
3           Gulf Power every benefit of the doubt. They  
4           construe the contract every way in favor of Gulf.  
5           And we think that's -- that's one of the -- the  
6           reasons why we wanted to file this -- this Holmes  
7           case.

8           The contract is -- is -- doesn't say that  
9           notice can be provided by e-mail. We have an  
10          aff- --

11          COMMISSIONER BROWN: I --

12          MR. MAY: We have an affidavit -- this -- this  
13          contract was executed in -- 28 years ago. That was  
14          before Al Gore invented the internet. And it --  
15          there was no intention or no -- no -- no -- no  
16          consent or any kind of agreement that you would  
17          file notice by e-mail, so --

18          COMMISSIONER BROWN: I -- I got it. I got it.  
19          Thank you.

20          MR. MAY: Okay.

21          CHAIRMAN GRAHAM: Well, I guess I have a  
22          question, ties right into that. On Page 12 of the  
23          staff recommendation, the big paragraph, close to  
24          the bottom, about halfway down, it says:  
25          Mr. Gleaton's own admission -- he correctly

1 summarized the parcel number was in Bay County,  
2 since he looked up the parcel number in Bay County  
3 property appraiser's website. And based on --  
4 based on -- blah, blah, blah, blah.

5 COMMISSIONER BROWN: Looked up the parcel  
6 number.

7 CHAIRMAN GRAHAM: His assumption was located.  
8 The lift station on the map generate- -- excuse  
9 me -- map location generally -- generated by that  
10 search -- I mean, so, he knows what -- he knew  
11 where the lift station was, according to what's  
12 here in the staff recommendation.

13 MR. MAY: That's -- that's one of the reasons  
14 we think staff has overlooked some critical  
15 information in the record. That's not what  
16 Mr. Gleaton said in his deposition. That's not  
17 what Mr. Gleaton said in his -- his affidavit.

18 Mr. Gleaton made it very clear in his  
19 deposition that, because of the deficiency in the  
20 notice, he thought the e-mail that was referenced  
21 in that -- he thought the lift station that was  
22 referenced in the e-mail was a lift station further  
23 to the north, near the airport, which was right  
24 next to Gulf's facilities. He, therefore,  
25 concluded that there was -- you know, it was

1           clearer that Gulf could serve that more  
2           economically than GCEC.

3           The -- the lift station that we're talking  
4           about was not visible from the road. No one knew  
5           of that lift station's existence, except Gulf  
6           Power. No one knew that St. Joe and Bay County  
7           wanted to put that lift station in there but Gulf  
8           Power.

9           For some reason, Gulf Power doesn't -- didn't  
10          include that vitally-relevant information in their  
11          e-mail. And, as a result, it caused confusion and  
12          it led Mr. Gleaton to mistakenly believe that the  
13          lift station that was referenced in the e-mail was  
14          the one much further to the north, which was next  
15          to GCEC -- to Gulf Power's facilities.

16          CHAIRMAN GRAHAM: So, your argument here today  
17          is because he assumed it was the other lift  
18          station; therefore, he didn't see a problem with it  
19          and wasn't going to challenge Gulf's ability to  
20          provide power to that lift station.

21          MR. MAY: My argument, Mr. Chairman, today, in  
22          a nutshell is that the -- the agreement clearly  
23          calls for -- put the burden on Gulf to provide all  
24          relevant information regarding the request.

25          Our argument is that looking at the facts

1 that's before you, none of the vitally-relevant  
2 information was included in the e-mail, as required  
3 by the territorial agreement.

4 Because of that failure to include vitally-  
5 relevant information, there was confusion.

6 Mr. Gleaton assumed that the lift station was a  
7 different lift station; and, therefore, he didn't  
8 respond.

9 And I guess, the final argument that we're  
10 making is, under the standard -- for this -- it's a  
11 very high standard for -- to -- for summary  
12 judgment. The reason the standard is so high --  
13 it's a Draconian remedy. What it does is it  
14 forecloses someone's day in court.

15 In this case, it not only does that -- not  
16 only does it deprive GCEC of its rights to have a  
17 cost comparison -- it deprives you, as the  
18 regulator, of an opportunity to really look at the  
19 cost comparison to determine if there is uneconomic  
20 duplication.

21 So, for all of those reasons, we think that a  
22 summary final order in this particular case is --  
23 is inappropriate, particularly when the -- when the  
24 court in Albelo said, even if you have  
25 uncontradicted facts -- if you have un- -- and --

1 and parties can -- can draw different inferences  
2 from the same facts, then summary judgment is not  
3 appropriate.

4 And that's -- we submit that's what's happened  
5 here. We would, again, urge that you -- you deny  
6 the motion for summary final order, set this for  
7 expedited hearing, and look at the cost because the  
8 cost comparison will show you that the -- at least  
9 at this juncture, Gulf Power's costs are  
10 significantly higher than -- than the -- the cost  
11 of Gulf -- Gulf Coast's. And they exceed the  
12 thresholds that the territorial agreement provides.

13 The threshold for uneconomic duplication,  
14 again, is whether one utility's costs exceed the  
15 other's by \$15,000 or 25 percent. Here, we have  
16 Gulf Power's cost estimates exceeding GCEC's cost  
17 estimates by 335 percent.

18 CHAIRMAN GRAHAM: Well, I guess my biggest  
19 problem with -- I -- I hear what you're saying. I  
20 was not aware of the specifics in that testimony  
21 that you're speaking of. And I'll talk to staff  
22 in -- in a minute about why they drew the  
23 conclusion that they drew.

24 It wasn't like this e-mail went to, you know,  
25 the copying boy. Why didn't he pick up the phone

1 and call, if -- if the ambiguity was there, even  
2 after he talked to his own staffer?

3 MR. MAY: Again, I think, at the time he  
4 received the e-mail, he assumed, based upon the --  
5 you know, he had never -- well, let me -- let me  
6 back up. And I did- -- I apologize for not -- this  
7 territorial agreement, this --

8 CHAIRMAN GRAHAM: No. No. I understand what  
9 you're saying, and -- and actually --

10 MR. MAY: Let's -- let's --

11 CHAIRMAN GRAHAM: -- it was interesting when I  
12 talked to staff because I asked -- I said, well,  
13 how did they do this in the past. And staff told  
14 me, when this order same came out in 2002, this is  
15 the first time it's ever been used.

16 So, in 15, 16 years, I can understand how that  
17 was done and kind of -- it's got dust on it and,  
18 you know, it wasn't one of those things that was  
19 prevalent to everybody.

20 MR. MAY: It's --

21 CHAIRMAN GRAHAM: But --

22 MR. MAY: It's never been used before,  
23 Mr. Chairman. And not only that, the document,  
24 itself is called "Procedures and Guidelines."

25 There's no -- there's no -- there's no term -- the

1 term "agreement" doesn't appear anywhere in this  
2 document.

3 The e-mail that Mr. Gleaton got said:  
4 Pursuant to Section 2.3 of our agreement -- I mean,  
5 these two gentlemen had never spoken before. You  
6 know, again, hindsight is 20/20. I'm sure  
7 Mr. Gleaton, knowing what he knows now -- I mean,  
8 he would have picked up the phone.

9 But at the time -- I get e-mails all the time.  
10 And -- and e-mails don't convey -- to me -- I --  
11 they don't convey the level of importance that a  
12 letter or a Certified letter -- when you send  
13 notices to parties in dockets, you don't send it by  
14 e-mail. You send a Certified letter.

15 And that's -- it doesn't have the gravitas, an  
16 e-mail. And as a result, that -- I don't think it  
17 registered with Mr. Gleaton. I know it didn't.  
18 And that's why he didn't respond.

19 I mean, he -- the definition of "waiver" is  
20 you have to knowingly relinquish a known right.  
21 And his -- his -- his affidavit in this case makes  
22 it clear that he had no intention of waiving any  
23 rights that -- that Gulf Coast Electric Cooperative  
24 would have under your territorial orders.

25 CHAIRMAN GRAHAM: Staff, question about the



1 staff rec, Page 12, what I read out of there.

2 MR. SCHRADER: Yes, sir.

3 CHAIRMAN GRAHAM: If -- according to Mr. May,  
4 the -- his testimony -- how did you draw this  
5 conclusion?

6 MR. SCHRADER: Staff felt that when e-mails --  
7 and, certainly, it did not include the -- the  
8 county. And -- and the two thoughts of staff were,  
9 one, that, well, if -- the only way -- he's --  
10 Mr. May's assertion that there was confusion based  
11 on a lack of county seems odd to staff because  
12 that -- immediately took that parcel number and put  
13 it into the Bay County property appraiser's  
14 website.

15 And, so, if the -- if it was defective by not  
16 including the county, but the first thing someone  
17 did was put it into that county appraiser's  
18 website, it just doesn't seem to -- at least from  
19 that perspective, the lack of the county doesn't  
20 seem to have, in any way, prejudiced GCEC.

21 CHAIRMAN GRAHAM: Well, I understand that  
22 part, but what about the -- the fact that there's  
23 more than one lift station in that parcel area?

24 MR. SCHRADER: I really didn't give that that  
25 much -- you know, this was more from the

1 perspective of if -- does a failure to include the  
2 county make that defective. And it didn't seem  
3 that it did because he immediately knew what county  
4 was being referred to.

5 The fact that it was multiple lift stations in  
6 that county -- I don't know if it's relevant here.  
7 If -- if the confusion was on -- on Mr. Gleaton's  
8 end, that is a confusion he had internally. I  
9 don't think that would really be relevant here.

10 CHAIRMAN GRAHAM: Gulf.

11 MR. GRIFFIN: Thank you, Mr. Chair. I may be  
12 able to help you with that.

13 CHAIRMAN GRAHAM: Sure.

14 MR. GRIFFIN: So, the lift station number one,  
15 I'll refer to, is the lift station that Mr. Gleaton  
16 claims confused him. That lift station is located  
17 just east of the Bay County International Airport  
18 on Highway 388. So, we're talking about  
19 Highway 388 for both lift stations here.

20 Lift station number one was located very close  
21 to the airport, directly adjacent to Gulf Power's  
22 existing lines.

23 Lift station number two, which is a lift  
24 station -- lift station that's being contested  
25 here, was approximately three miles down

1 Highway 388, to the -- to the east, further down  
2 toward the east. They are on two entirely separate  
3 parcel ID numbers, first of all.

4 So, the parcel ID that Mr. Gleaton entered  
5 into the Bay County property appraiser's website  
6 was the parcel ID that was identified for lift  
7 station number two in the October -- the October 20  
8 note- -- notice that Gulf Power sent.

9 If you look at that parcel map on -- on the  
10 property appraiser's website, you have the ability  
11 to scroll around and -- and move, and zoom in, zoom  
12 out. It has distances. And -- and you can see,  
13 simply by virtue of looking at that -- that map,  
14 that this parcel is nowhere near or adjacent to the  
15 airport. It's nowhere near adjacent to the  
16 neighborhood that abuts lift station number one.

17 Mr. Gleaton testified that he traversed  
18 Highway 388 almost daily on his way to work. So,  
19 he was very familiar with this roadway. He was  
20 familiar with the construction activity that was  
21 ongoing on that road during this period of time.  
22 That's why he was confused, allegedly, by the  
23 existence of lift station number one.

24 But our -- our -- our position here is that,  
25 had he simply taken the time to do the due

1 diligence via the parcel map, it would have been  
2 immediately evident to him that lift station number  
3 one was -- was not the lift station that is at  
4 issue.

5 Similarly, had he taken the time to do the due  
6 diligence and research Section 2.3A of the  
7 territorial agreement, it would have been very  
8 clear to him that lift station number one was not  
9 the lift station at issue because lift station  
10 number one was sufficiently close to Gulf Power's  
11 lines that Gulf would have never issued notice  
12 under Section 2.3A for that particular lift  
13 station. It's right there adjacent to the lines.  
14 So, under Section 2.2 of the territorial agreement,  
15 there is no notice to be issued.

16 So, if someone had picked up the -- the  
17 document and said, okay, well, why are they sending  
18 notice pursuant to Section 2.3A for a lift station  
19 that directly abuts our facilities, that would --  
20 that would raise the question in a reasonable  
21 person's mind.

22 And lastly, if this is lacking relevant  
23 information, the easiest thing to do, we would  
24 submit, would be to reach back out to the  
25 individual at Gulf Power Company who sent it to you

1 and -- and seek the additional information that one  
2 believes to be relevant.

3 Of course, none of those things happened.

4 CHAIRMAN GRAHAM: Mr. May, did I just  
5 misunderstand you? It -- it sounds like these lift  
6 stations are two separate parcels and not the same  
7 parcel.

8 MR. MAY: That -- that's corr- -- that is  
9 correct, but if you look at the e-mail, again,  
10 what -- what Mr. Gleaton did was he assumed -- now,  
11 we know it's wrongfully assumed -- he assumed that  
12 the e- -- that the lift station in question was the  
13 lift station immediately adjacent to the -- to the  
14 airport. That's the only lift station he was aware  
15 of.

16 So, he clicks on the -- the Bay County  
17 property appraiser's website. He sees a parcel.  
18 The parcel is a one-square-mile, and he -- he -- he  
19 doesn't think anything of it.

20 Now, you know, again, Monday-morning-  
21 quarterbacking, should he have, perhaps -- but if  
22 you look at the e-mail, the -- the e-mail, itself,  
23 doesn't mention that he had five days to respond,  
24 you know. It -- it just says, you know, we've  
25 been -- we've been asked to serve -- been served a

1 lift station. And it doesn't put him on notice  
2 that he -- he had five working days or -- or else,  
3 gotcha.

4 He was -- he was -- he reasonably concluded  
5 that this lift station was located next to the --  
6 the airport. And it was more economical for Gulf  
7 Power to serve.

8 None of this would have ever occurred,  
9 Commissioners, if -- if Gulf Power would have used  
10 the 911 service address for the lift station, which  
11 its used internally in all of its communications.

12 The evidence that was adduced through the  
13 limited discovery in this proceeding shows that,  
14 before the e-mail was sent to Mr. Gleaton, Gulf  
15 Power always referenced the location of the lift  
16 station as 1900 Highway 338 West.

17 If that information were included in this  
18 e-mail, he could have plugged it in his Garmin or  
19 Google Maps and he would have seen precisely where  
20 the lift station was.

21 Gulf Power always used the locational  
22 information, the 911 service address, when it  
23 discussed its service with the customer and when it  
24 discussed the lift station internally. Only in its  
25 external communications with Mr. Gleaton did it

1 suddenly come up with a parcel number without a  
2 county. A parcel number without a county is  
3 legally deficient.

4 And we -- we believe that, because of that --  
5 I go back to, the burden was on Gulf to provide all  
6 relevant information. By not -- the -- the 911  
7 service address -- the emergency responder's  
8 service address would have been vitally relevant,  
9 but that information was not provided, and, as a  
10 result, it caused confusion. And Mr. Gleaton did  
11 not respond within five working days.

12 Again, I -- I know I've said a lot, and  
13 I'll -- I'll be quiet, but I did want to bring us  
14 back to the notion that this process was designed  
15 for a transparent exchange of information, so that  
16 both parties could compare their cost to serve so  
17 that you could determine whether there was  
18 uneconomic duplication.

19 We don't believe that occurred at all. Had  
20 the name of the customer been provided in the  
21 e-mail, had the 911 service address been provided,  
22 none of this information, none of this confusion  
23 would have occurred.

24 CHAIRMAN GRAHAM: Well, Mr. May, as much as I  
25 try to give you the benefit of the doubt, what gets

1 me on this e-mail that you're talking about that  
2 was sent -- and once again, this -- it did not go  
3 to the copying boy.

4 It went to an officer in the company, and also  
5 an engineer. And I can tell you, when I get  
6 something that says "Pursuant to Section So-and-  
7 so," I get all nervous and first thing I do is go  
8 read Section So-and-so.

9 And the fact that he did not do that -- I  
10 mean, he looked at the parcel number and figured  
11 out the right county, but if he didn't go to the  
12 agreement and look at what the details were in the  
13 agreement, then shame on him for not doing that.

14 Commissioner Polmann.

15 COMMISSIONER POLMANN: Thank you,  
16 Mr. Chairman. All of my questions have been asked  
17 and answered.

18 CHAIRMAN GRAHAM: Commissioner Clark.

19 COMMISSIONER CLARK: Mr. May, you've  
20 referenced the notice of the county, not- --  
21 notifying which county the parcel was located in.  
22 Does this agreement apply to any county other than  
23 Bay County? Is it a system-wide or --

24 MR. MAY: Yes, it's a system-wide agreement.  
25 This is not your traditional kind of line-in-the-



1 sand territorial agreement. It's -- it's a -- it  
2 requires that, if a customer approaches another  
3 utility and asks for service in that utility -- and  
4 that customer is located within the proximity of  
5 the other utility, the utility receiving the  
6 request has to give notice.

7 And it -- the agreement applied not only to  
8 Gulf, but -- I mean, not only to Bay, but to  
9 Washington, Jackson, Calhoun, and I think parts of  
10 Gulf -- yeah, those are -- so, it did not just  
11 apply to Bay County.

12 COMMISSIONER CLARK: How could it apply to  
13 parts of Gulf? Were parts of Gulf excluded? Gulf  
14 County?

15 MR. MAY: I think that, for instance, Duke  
16 Energy serves Port St. Joe, but the -- the co-op  
17 serves Wewahitchka area.

18 COMMISSIONER CLARK: And Gulf Power serves  
19 customers in Gulf County?

20 MR. GRIFFIN: I -- I'm not aware of Gulf Power  
21 serving customers in Gulf County.

22 COMMISSIONER CLARK: I -- I wasn't either.  
23 That's why I was asking the question.

24 MR. MAY: But I -- we -- we read the agreement  
25 as applying wherever GCEC has service and, you

1 know -- but where the -- where the services  
2 interlap -- inter- -- interact or interpose  
3 themselves -- it may not be in Gulf County, but  
4 it's certainly in more counties than Bay County;  
5 Calhoun, Jackson, and Washington.

6 CHAIRMAN GRAHAM: Commissioner Fay.

7 COMMISSIONER FAY: Thank you, Mr. Chairman.

8 I guess my official question would be directed  
9 at Mr. Bruce May. So, I'm trying to stay on  
10 Issue 2 here because I know the relevance of  
11 dealing with that issue before moving on to -- to  
12 the next one.

13 But can you just explain part of your -- your  
14 comments related to the fairness and the  
15 presentation of facts and different issues coming  
16 up and -- and how a motion for final summary order  
17 wouldn't be appropriate -- can you explain how it  
18 may be appropriate in some situations and -- and  
19 not in others with the same set of facts?

20 MR. MAY: Okay. I -- I think what you're  
21 driving at is the -- the Albelo case -- and we  
22 think this is where staff's recommendation fails  
23 to -- to follow the -- the standard of review for  
24 summary judgment.

25 What -- the Albelo case says that, "Even where

1 the facts are uncontroverted, the remedy of summary  
2 judgment is not available if different inferences  
3 can be reasonably drawn from the uncontroverted  
4 facts."

5 And in this case, certainly, we've drawn  
6 different inferences from the facts. Gulf Power  
7 has drawn a different inference and -- but because  
8 those diff- -- inferences are different -- and I  
9 think because they are both reasonable -- that  
10 summary judgment is not appropriate in this case.

11 Now, what you -- you know, we have -- we have  
12 filed a motion for summary final order to find that  
13 the -- that the evidence adduced thus far clearly  
14 shows that Gulf Power has not met its burden to  
15 show that we have waived a right.

16 And that -- our -- and that's where I think  
17 staff has mis- -- mischaracterized our motion for  
18 summary -- we're getting on Issue 3, now, but --  
19 because our motion for summary judgment, for  
20 summary final order, is based on the long-standing  
21 principle articulated by the Henry Court that says,  
22 quote: Waiver is not a concept favored in the law  
23 and must be clearly demonstrated by the agency or  
24 the other -- other party claiming the benefit.

25 You know, based upon that standard, we don't

1 think that Gulf Power or the Commission staff has  
2 shown clearly that -- that GCEC has waived its  
3 rights under the territorial agreement.

4 COMMISSIONER FAY: So, without the -- the  
5 supplemental order that you pro- -- provided, is --  
6 just so I -- I have a clear understanding, the  
7 argument is still a -- different in interpretation  
8 of the law and not a disagreement with -- with the  
9 facts?

10 MR. MAY: Yeah, well, I think the facts at  
11 this juncture, the limited facts -- the facts show  
12 that -- that Gulf Power sent an e-mail to  
13 Mr. Gleaton and the facts show that Mr. Gleaton  
14 received that e-mail. That's all the facts show.

15 Now -- but, the staff in Gulf Power has  
16 inferred from those facts that -- that somehow GCEC  
17 has -- is foreclosed from exercising its rights  
18 under the territorial agreement or has waived its  
19 rights.

20 Again, we don't believe that's appropriate.  
21 There's -- waiver is never -- to -- to find that  
22 someone affirmatively waived a right in a summary  
23 judgment proceeding we don't believe is  
24 appropriate.

25 The -- the Holmes case really addressed the

1 issue of -- of contract interpretation and, if  
2 they're reasonable -- if there can be different  
3 reasonable inferences from one contract, then  
4 summary judgment is not appropriate. It's right on  
5 point. It -- it basically endorses the Albelo  
6 case, which we cited in our brief.

7 COMMISSIONER FAY: Yeah, and I -- and I  
8 appreciate that because, obviously, my concern is  
9 on -- on one end, we're sort of arguing that  
10 there's all these issues in play and you're --  
11 you're explaining a lot of these issues, and then,  
12 on the other, saying, we can basically move past  
13 some components of that to make a determination  
14 based on the case law that a final summary order  
15 would be appropriate, from your perspective.

16 And so, I just -- if I understand correctly,  
17 it's -- it's not a dispute of facts in any way.

18 MR. MAY: We -- we think that the -- the -- we  
19 don't dispute that we received the e-mail. And I  
20 don't think they dispute that they sent the e-mail.  
21 Where -- where the dispute is, is what  
22 inferences --

23 COMMISSIONER FAY: Interpretation, yeah.

24 MR. MAY: -- can be derived from those facts,  
25 and where there's different reasonable -- and

1 inferences can be -- that can be derived from the  
2 same set of facts. The courts have said that  
3 summary judgment is not appropriate.

4 COMMISSIONER FAY: Okay. Thank you.

5 CHAIRMAN GRAHAM: Mr. May, let me understand  
6 the facts that you're talking about. You said they  
7 sent the e-mail; that you received the e-mail. The  
8 fact that he looked up the parcel number -- is that  
9 not a fact?

10 MR. MAY: That's -- that's a fact. It's also  
11 a fact that they did not provide all relevant  
12 information.

13 CHAIRMAN GRAHAM: Well, he did look up the  
14 parcel number, correct?

15 MR. MAY: He did look at the website.

16 CHAIRMAN GRAHAM: And he did meet with  
17 somebody else in the building, one of his  
18 underlings, to talk about this e-mail.

19 MR. MAY: He sent the e-mail to his -- to  
20 Mr. Henson, and they both concluded that this must  
21 have been referencing the -- the lift station that  
22 was located right next to Gulf Power's facilities  
23 near the airport.

24 CHAIRMAN GRAHAM: So, then, those are the  
25 fore-facts. Okay. Just wanted to make sure.

1 MR. MAY: Okay.

2 CHAIRMAN GRAHAM: Commissioner Brown.

3 COMMISSIONER BROWN: Well -- well, kind of a  
4 follow-up to that, Mr. May, you allude that the  
5 only facts that have been shown are that an e-mail  
6 was sent by Gulf and received by Mr. Gleaton. But  
7 during the deposition that you were allowed some  
8 discovery, weren't additional facts shown as well?

9 MR. MAY: Sure. The -- the -- I think the  
10 additional facts showed that Mr. -- Mr. Gleaton was  
11 confused by the initial e-mail and thought that the  
12 lift station that was referenced in the e-mail was  
13 actually the e-mail the -- the lift station next to  
14 the -- to the -- to the airport near Gulf's  
15 facilities.

16 It also came out in the discovery that -- as I  
17 mentioned earlier, that in other correspondence  
18 internally, when -- when Gulf Power was discussing  
19 the lift station, they used the 911 service  
20 address. Only in the external communications to  
21 Mr. Gleaton for the first time did they use a  
22 parcel number without a county. We think that's  
23 legally deficient and it caused the confusion.

24 COMMISSIONER BROWN: Thank you.

25 Mr. Griffin, would you like to respond?

1 MR. GRIFFIN: Yes, Commissioner. Thank you.

2 On the 911-address issue, there's an exhibit,  
3 both to our motion for final summary order and in  
4 the brief and in affidavit from Mr. Josh Rogers,  
5 the employee who sent the notice, explaining why he  
6 didn't use the 911 address for purposes of this  
7 notice.

8 And as Mr. Rogers states in his affidavit,  
9 when he went into the Google mapping system to  
10 determine how best to characterize this parcel, for  
11 purposes of providing notice to GCEC, he entered  
12 the 911 address into Google Maps, and it was shown  
13 on Google Maps as being approximately three to four  
14 miles away from the location on the parcel ID.

15 And so, he felt that providing that physical  
16 address would be more misleading than helpful in  
17 terms of identifying the precise location of this  
18 lift station. That's the uncontroverted testimony  
19 in this case as it relates to that particular  
20 issue.

21 COMMISSIONER BROWN: How many days passed,  
22 from -- if you know specifically so we don't have  
23 to look at the e-mail -- from when the e-mail was  
24 sent and then from when GCEC got in touch with  
25 Gulf?



1 MR. GRIFFIN: The e-mail was sent on  
2 October 20th, 2017. The first communication that  
3 Gulf Power Company received from GCEC, in relation  
4 to the territorial agreement, was on January 8th.

5 COMMISSIONER BROWN: Thank you very much.

6 And I -- I know, Mr. May, you're saying  
7 different inferences from uncontradicted facts. In  
8 this case, I just don't see how different in- --  
9 inferences can be drawn. It was clear that the  
10 notice was sent and GCEC failed to respond within  
11 five days -- regardless five -- 30, 60, 90.

12 GCEC looked up the parcel number. It had  
13 notice -- should have had notice. I'm having a  
14 hard time understanding that there was not  
15 sufficient notice here.

16 And with that Mr. Chairman, I would move staff  
17 recommendation on Issue 2.

18 COMMISSIONER POLMANN: Second.

19 CHAIRMAN GRAHAM: It's been moved and second,  
20 staff recommendation on Issue No. 2. Any further  
21 discussion?

22 Seeing none, all in favor, say aye.

23 (Chorus of ayes.)

24 CHAIRMAN GRAHAM: Any opposed?

25 By your action, you've approved the staff

1 recommendation on Issue No. 2.

2 Okay. So, Issue No. 3 -- staff, Issue No. 3  
3 is moot because we've approved Issue No. 2 or --

4 MR. SCHRADER: That is correct, Chairman --  
5 Mr. Chairman. Yeah, we -- we would need a vote to  
6 that effect, sir.

7 CHAIRMAN GRAHAM: Okay. Commissioners.

8 COMMISSIONER POLMANN: Mr. Chairman, move  
9 approval of staff recommendation.

10 COMMISSIONER BROWN: Second.

11 CHAIRMAN GRAHAM: It's been moved and second,  
12 staff recommendation on Issues 3 and 4, correct?  
13 Is that what you meant to say?

14 COMMISSIONER POLMANN: Issues 3 and 4, yes,  
15 sir.

16 CHAIRMAN GRAHAM: Okay. Any further  
17 discussion?

18 Seeing none, all in favor, say aye.

19 (Chorus of ayes.)

20 CHAIRMAN GRAHAM: Any opposed?

21 By your action, you have approved staff  
22 recommendations on three and four, which concludes  
23 all staff recommendations on Item No. 3.

24 (Agenda item concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
COUNTY OF LEON )

I, ANDREA KOMARIDIS, Court Reporter, do hereby  
certify that the foregoing proceeding was heard at the  
time and place herein stated.

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financially interested in the action.

DATED THIS 20th day of December, 2018.



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ANDREA KOMARIDIS  
NOTARY PUBLIC  
COMMISSION #GG060963  
EXPIRES February 9, 2021