BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.	DOCKET NO. 100304-EU ORDER NO. PSC-11-0021-PCO-EU ISSUED: January 11, 2011

ORDER GRANTING CHELCO'S MOTION FOR EXTENSION OF TIME AND DENYING GULF'S MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 52

On November 5, 2010, Gulf Power Company (Gulf) issued its Third Set of Interrogatories consisting of interrogatories 52 through 55 to Choctawhatchee Electric Cooperative, Inc. (Chelco). On December 6, 2010, Chelco served its Objections and Responses to Gulf's Third Set of Interrogatories (Nos. 52-55), in which it objected to Interrogatory Number 52.

On December 22, 2010, Gulf filed a Motion to Compel seeking to have the Commission direct Chelco to provide a response to Interrogatory No. 52. A Response to the Motion (Response) would have been due December 29, 2010. However, on December 27, 2010, noting that this was during the holiday schedule and there were shorter work periods, Chelco filed its Motion for Extension of Time to January 3, 2011, to file its Response.

I. Chelco's Motion for Extension of Time

Gulf has indicated that it has no objection to the Response being filed on January 3, 2011, and Chelco filed its Response on that date. Therefore the Motion for Extension of Time is granted, and the Response to the Motion to Compel filed on January 3, 2011, shall be considered timely filed.

II. Gulf's Motion to Compel Response to Interrogatory No. 52

As noted above, Chelco served its responses and objections to Gulf's Third Interrogatories, in which it objected to Gulf's Interrogatory No. 52, which reads as follows:

> Please identify, in electronic database or electronic spreadsheet file format, the physical address of each member currently receiving electric service from Chelco. Member names and/or account numbers need not be included.

Chelco objected to Interrogatory No. 52 on the grounds that the interrogatory was overly broad, not relevant to any issue in this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and duplicative of previous discovery requests.

A. Gulf's Analysis/Argument

In its Motion to Compel, Gulf notes Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides in pertinent part as follows:

> [p]arties may obtain discovery regarding any matter, not privileged that is relevant to the subject matter of the pending action. . . .[I]t is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Further, Gulf notes that "Relevant evidence," in turn, is defined in Section 90.401, Florida Statutes (F.S.), as "[e]vidence tending to prove or disprove a material fact." Finally, citing ACandS, Inc. v. Askew, 597 So. 2d 895, 898 (Fla. 1st DCA 1992), Gulf notes that "Florida's discovery rules should be liberally construed insofar as 'Florida favors complete disclosure in discovery matters, limited only by certain considerations such as privilege, work product and relevancy.'"

Gulf argues that the information sought is relevant and is reasonably calculated to lead to the discovery of admissible evidence. As regards relevance, Gulf cites Section 425.04(4), F.S., and notes that cooperatives shall have the power

> [t]o generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of 10 percent of the number of its members. . . .

(emphasis supplied)

Further, Gulf states that Section 425.03(1), F.S., provides that "'Rural area' means any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." (emphasis supplied) Citing Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789, 792 (11th Cir. 1982), Gulf states that the U.S. Court of Appeals for the Eleventh Circuit held that Section 425.04(4), F.S., "allows a rural coop to serve up to a ten-percent non-rural membership." (emphasis supplied) Thus, under Florida law, Gulf argues that a cooperative lacks legal authority to serve more than ten percent non-rural membership, and that the information sought will help determine whether Chelco is in fact serving greater than a ten-percent non-rural membership.

Citing Chelco's response to Interrogatory No. 3 of Gulf's First Interrogatories, Gulf argues that Chelco currently has 42,299 active accounts throughout portions of Okaloosa and Walton counties. Also, Gulf notes that the Freedom Walk Development is located within the

boundaries of the City of Crestview and therefore, by definition, does not constitute a "rural area" under section 425.03(1), F.S. If Chelco presently serves a number of persons in non-rural areas which exceeds ten percent of its total membership, or, if serving the proposed development would cause it to do so, Gulf argues that Chelco is barred, as a matter of law, from serving the Freedom Walk Development.

Gulf further argues that Interrogatory No. 52 is narrowly tailored to determine how many members/customers Chelco serves in non-rural areas, and therefore cannot be considered overly broad or to have no tendency to prove or disprove a material fact in this case. Gulf states that this interrogatory is its third attempt to obtain information from Chelco which would enable the parties and the Commission to determine whether Chelco possesses the statutory authority to serve the Freedom Walk Development.

Gulf notes that in its First Set of Interrogatories, Interrogatory No. 3, it asked Chelco how many of Chelco's members were currently located in "rural areas" as defined by section 425.03(1), F.S., but that Chelco objected to this interrogatory stating that it could not "[r]easonably ascertain how many of its 42,299 active accounts are currently in a 'rural area' as Gulf Power has defined that term. . . ." In response to this objection, and in an attempt to provide further clarity, Gulf issued its Second Set of Interrogatories which precisely delineated the geographical areas at issue and requested that Chelco identify the number of members served within the specific geographical areas. However, Chelco again objected on grounds of burden, relevance and the "arbitrary" manner in which Gulf defined the geographical areas at issue.

In light of Chelco's objection to the geographical descriptions proposed by Gulf, and in a good faith attempt to alleviate the "burden" complained of by Chelco, Gulf states that it issued its Third Set of Interrogatories seeking a simple address listing for all of Chelco's members. Gulf believes that this information will enable it to demonstrate that Chelco is prohibited from serving the Freedom Walk Development as a matter of law. Gulf argues that Chelco's disagreement with Gulf's interpretation of Chapter 425, F.S., is not a basis for refusing to produce relevant information, and is an issue to be decided by this Commission. Therefore, Gulf concludes that the information sought is not privileged, is readily available and is relevant and necessary to resolve a threshold legal issue in this case and should therefore be produced.

B. Chelco's Response To Motion To Compel

In its Response, Chelco states that it has provided information relative to total members served and the number of members served within the incorporated areas of a municipality. Chelco states that it "continues to object to the relevance of requests for numbers of customers served in arbitrarily defined areas dictated by Gulf let alone addresses of all members served by Chelco." Chelco reiterates its position that Section 425.04(4), F.S., authorizes cooperatives to provide ". . . electric energy in rural areas to its members . . . and to other persons not in excess of 10 percent of the number of its members . . . ." Chelco notes that "rural area" means ". . . any area not included within the boundaries of any incorporated or unincorporated city, town, village or borough having a population in excess of 2,500 persons," and that the Commission has recognized that cooperatives are not prohibited from serving non-members. See Order No.

15210, issued October 8, 1985, in Docket No. 840293-EU, In re: Petition of Peace River Electric Cooperative Inc. against Florida Power & Light for resolution of a territorial dispute.

Chelco states that it "has provided responses to Gulf Power's requests for the number of customers served within the incorporated limits of several municipalities and this request for addresses of all members is not only not relevant to the issues but is repetitious and unnecessary." Chelco also argues that Gulf "seeks to develop a definition that would preclude Chelco, and other cooperatives in the state, from providing services to growing areas," and that:

> This Commission has rejected arguments by Gulf Power that CHELCO should not be permitted to serve an area because it may someday lose the characteristics of a "rural area" (In re: *Choctawhatchee Electric Cooperative, Inc. v. Gulf Power Co.,* Order No. 7516, Dkt. No. 74551-EU, Nov. 19, 1976, cert. denied *Gulf Power Co. v. Hawkins,* et al., 375 So. 2d 854, Fla. 1979)

Wherefore, Chelco requests this "Commission to deny the Motion to Compel the provision of addresses for all members," and find that Chelco ". . . has provided responses relative to the number of members in non-rural areas and the addresses of all members is unnecessary and not designed to lead to the discovery of admissible evidence.

C. Conclusion

Based on all the above, I find that Interrogatory No. 52 is not reasonably calculated to lead to the discovery of admissible evidence. Therefore Gulf's Motion to Compel discovery is denied.

Based on the foregoing, it is

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that Chelco's Motion for Extension of Time is granted as set forth in the body of this Order. It is further

ORDERED that the Motion to Compel Responses to Gulf Power's Third Interrogatories to Choctawhatchee Electric Cooperative, Inc., is denied as set forth in the body of this Order.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 11th day of January, 2011.

RONALD A. BRISÉ
Commissioner and Prehearing Officer

(SEAL)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.