

Marguerite McLean100304-EU

From: Marchman, Vickie L. [VLMARCHM@southernco.com]
Sent: Friday, June 18, 2010 3:02 PM
To: Filings@psc.state.fl.us
Subject: Gulf Power Company's Answer to Petition of Choctawhatchee Electric Cooperative, Inc
Attachments: Answer to Chelco Petition 6-18-10.pdf

- A. s/Susan D. Ritenour
Gulf Power Company
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- B. Docket No. 100304-EU
- C. Gulf Power Company
- D. Document consists of 16 pages.
- E. The attached document is Gulf Power Company's Answer to Petition of Choctawhatchee Electric Cooperative, Inc.

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DOCUMENT NUMBER-DATE

05116 JUN 18 2010

FPSC-COMMISSION CLERK

6/18/2010

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June 18, 2010

Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Ms. Cole:

Re: Docket No. 100304-EU

Submitted for electronic filing is Gulf Power Company's Answer to Petition of
Choctawhatchee Electric Cooperative, Inc.

Sincerely,

Susan D. Ritenour (sw)

vm

Enclosures

cc: Beggs & Lane
Jeffrey A. Stone, Esq.

DOCUMENT NUMBER-DATE

05116 JUN 18 2

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between)
Choctawhatchee Electric Cooperative, Inc.)
and Gulf Power Company)
_____)

Docket No. 100304-EU
Date: June 18, 2010

**ANSWER OF GULF POWER COMPANY TO PETITION
OF CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.**

GULF POWER COMPANY ("Gulf Power," "Gulf," or "the Company"), by and through its undersigned counsel, and pursuant to Uniform Rule 28-106.203, Florida Administrative Code, hereby submits the Company's Answer to Choctawhatchee Electric Cooperative, Inc.'s ("Chelco") Petition to Resolve Territorial Dispute in this docket as follows:

A. Gulf Power is a corporation with its headquarters at 500 Bayfront Parkway, Pensacola, Florida 32501. The Company is an investor-owned electric utility operating under the jurisdiction of this Commission. Notices and communications with respect to this docket should be addressed to:

Jeffrey A. Stone
Russell A. Badders
Steven R. Griffin
Beggs & Lane
501 Commendencia Street
Pensacola, Florida 32502
(850) 432-2451

Susan D. Ritenour
Secretary and Treasurer
Gulf Power Company
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(850) 444-6026 (fax)

B. Gulf responds to Chelco's petition as follows with respect to each numbered allegation:

1. Not contested.
2. Not contested.
3. Gulf Power is without knowledge of the assertions contained in this paragraph

and therefore denies the same.

4. Admitted.

5. Gulf Power acknowledges that under section 366.04(5), Florida Statutes, the Florida Public Service Commission (“FPSC” or “the Commission”) has jurisdiction over the planning, development and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities. Gulf further acknowledges and admits that pursuant to section 366.04(2)(e), Florida Statutes, the FPSC has authority to resolve territorial disputes between and among rural electric cooperatives such as Chelco and other electric utilities under the FPSC’s jurisdiction, such as Gulf Power.

6. Gulf Power admits that it intends to serve a proposed development known as Freedom Walk (the “Customer” or “the Freedom Walk Development” or “the Development”) based on Gulf’s statutory obligation under 366.03, Florida Statutes, and pursuant to the request for service Gulf received from the Customer. A copy of the Customer’s written request for service is attached hereto and incorporated herein as Exhibit “A.” Gulf further acknowledges and admits that the Customer is located within the corporate boundaries of the City of Crestview as more particularly depicted in Exhibit “A” to Chelco’s petition. Gulf does not contest Chelco’s general description of the physical environment and community surrounding the Customer except that Gulf objects to and denies Chelco’s suggestion that the Customer is located within Chelco’s “historic service area.” Further, it is settled law in Florida that in resolving territorial disputes “neither [section 366.04, Florida Statutes, nor Rule 25-6.0441, Florida Administrative Code] requires the Commission to consider a utility’s historical presence in an area.” West Florida Electric Cooperative Ass’n. v. Jacobs, 887 So.2d 1200, 1205 (Fla. 2004). Gulf Power

acknowledges and admits that Chelco currently serves customers within the City of Crestview pursuant to a franchise agreement. Gulf Power notes that Gulf also serves approximately 9,965 customers within the City of Crestview pursuant to a franchise agreement and over 108,000 customers in Okaloosa County. Gulf has provided continuous service to the City of Crestview since 1928 –nearly thirteen years before Chelco’s formation. Gulf Power is without knowledge as to whether Chelco staffs a payment center inside the Auburn Water System offices and therefore denies the same.

7. Gulf Power denies that Chelco has “openly served the disputed area since the 1940’s.” Further, Gulf Power denies that an “area” is even in dispute --there is no “disputed area.” The only “dispute” at issue in this proceeding involves the right to serve an electric customer --the Freedom Walk Development. As Chelco clearly recognizes in paragraph 6 of its petition, the Freedom Walk Development location is currently wooded and no build-out has occurred. There is currently nothing for Chelco to serve within the Freedom Walk Development. Chelco alleges that it provided single phase service to a single residence that was once located on a parcel of property that is now subsumed within the footprint of the Freedom Walk Development. (Petition at ¶ 9(c)). Provision of single phase service to a single residence located within a 170-plus acre parcel of property does not amount to historical service to the Freedom Walk Development nor does it establish a right in Chelco to serve the Customer. See generally, West Florida Electric Cooperative Ass’n. v. Jacobs, 887 So.2d 1200, 1205-06 (Fla. 2004) (awarding Gulf Power the right to serve natural gas compression station in rural Washington County; defining the disputed area as the footprint of the station, rather than the entire rural area; and upholding Commission’s decision to assign little weight to cooperative’s

“historical presence” in the area). Gulf Power is without knowledge as to whether Chelco currently serves customers adjacent to the proposed development and therefore denies the same.

8. Gulf Power is without knowledge as to how Chelco derived its estimates for initial and anticipated loads at the Freedom Walk Development. Based on estimates provided by the Customer,¹ Gulf Power anticipates that the full load for the Development will be closer to 5.1 MW upon full build-out. Gulf Power is without knowledge as to whether the south circuit of Chelco’s Auburn substation is designed to handle the full build-out load of the Freedom Walk Development and therefore denies the same. However, if the foregoing allegation is correct, it suggests that Chelco may have engaged in a “race to serve” the Customer which is improper and reason alone to deny Chelco’s petition. See, Gulf Coast Electric Coop., Inc. v. Clark, 674 So.2d 120, 122 (Fla. 1996) (the FPSC/Court will not reward the winner of a “race to serve” a disputed customer). Gulf Power is without knowledge as to whether the south circuit of Chelco’s Auburn substation is loop-fed and therefore denies the same. Gulf Power denies that a loop-fed power line is necessarily more reliable than a radial power line. The appropriate inquiry is whether Gulf can provide reliable service to the Customer using a radial power line. Gulf clearly has the ability to do so, as evidenced by the fact that the radial power line Gulf will use to serve the Customer has a five-year reliability average of 1.6 minutes SAIDI and .018 SAIFI. Gulf is without knowledge concerning the number of customers served by Chelco through its Auburn substation and therefore denies the same. Gulf notes, however, that Gulf intends to serve the Customer using its Airport Substation. Gulf’s Airport Substation serves approximately 911 customers and has more than adequate capacity to serve the Development and the surrounding area. Moreover, Gulf Power’s Airport Substation is located approximately 2.6 miles from the

¹ This estimate is based on a 495 units/lot projection provided by the Customer to Gulf Power on June 15, 2010.

Freedom Walk Development as compared to Chelco's Auburn Substation which is located 3.7 miles from the Development.

9. Gulf Power admits only that Exhibit C to Chelco's petition speaks for itself. Gulf Power is without knowledge concerning the precise location and nature of Chelco's facilities and easements and therefore denies the same. Gulf Power notes, however, that the easement referenced in paragraph 9(c) --and recorded in Okaloosa County Records OR Book 438, Page 671-- could not be used by Chelco to provide service to the Development as the easement is specific to a single residence that was once located on the parcel. Similarly, the "1994" easement referenced in paragraph 9(d) of Chelco's petition --and recorded in Okaloosa County Records OR Book 1857, Page 343-- is equally inappropriate for service to the Development as it too is limited to a single family residence and is specific to overhead distribution facilities.

10. Gulf Power is without knowledge of the assertions contained in paragraph 10 of Chelco's petition and therefore denies the same.

11. Gulf Power admits that it currently has no power lines on the Freedom Walk property and that Gulf Power does not have a history of service to any customer within the Freedom Walk property itself. Gulf denies that a lack of history of service to customers within the Freedom Walk property --currently a wooded, undeveloped land area-- is a relevant consideration in this proceeding. The relevant consideration is service to the Customer who has requested service in the instant case. See, Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259, 260 (Fla. 1999) (recognizing that key consideration in territorial disputes is "current or future identifiable customers," not merely undeveloped "areas") and West Florida Electric Cooperative Ass'n. v. Jacobs, 887 So.2d 1200, 1206 (Fla. 2004) (same). It is undisputed that neither Gulf, nor Chelco has any history of serving the Customer. Gulf Power does, however,

currently provide three phase service along Highway 85 N approximately 3,154 feet to the east of the Freedom Walk property and three phase service along Old Bethel Road approximately 2,130 feet to the east of the property. Gulf also provides single phase service to numerous customers in the immediate vicinity of the Freedom Walk property including a residence and farm located approximately 30 feet from the property's southern boundary. Gulf currently serves approximately 168 customers within a one mile radius of the Development, including Davidson Middle School which is located approximately 2,130 feet from the eastern property line. The steps Gulf Power needs to take in order to serve the Customer are minimal and routine. In order to provide service to the Customer, Gulf intends to extend its three-phase radial feeder approximately 2,130 feet to the eastern boundary of the Freedom Walk property at a cost of approximately \$90,000. When viewed in relation to the expanding urban nature of the location and the projected load of the Development, this cost is truly de minimis.

12. Gulf Power is without knowledge as to communications between Chelco and the developer of the Freedom Walk Development and therefore denies the same. Gulf Power, upon the request of the Customer, has agreed to serve the Freedom Walk Development and has erected signage to that effect.

13. Gulf Power admits that its representatives have met with Chelco representatives to discuss the provision of electric service to the Customer; that the parties possess conflicting views on which of them have the legal right to serve the Customer; and that there has been no resolution to this conflict.

14. Gulf Power acknowledges that Chelco has indicated that it is willing and able to provide service to the Customer. Gulf Power denies the remainder of paragraph 14. Gulf is prepared to provide ample evidence to demonstrate the following: (1) both Gulf and Chelco

have been serving the City of Crestview and customers in the immediate vicinity of the Freedom Walk property for many years; (2) both Gulf and Chelco have a comparable ability to serve the Customer; (3) the Customer to be served is easily defined and not subject to reasonable dispute; (4) the differential between the two utilities' cost to serve the Customer is de minimis; and (5) the Customer has clearly expressed its preference that Gulf Power provide service to the Development.

The law is well-settled in Florida that, under such circumstances, the right to serve the Freedom Walk Development must be awarded to Gulf Power. Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120, 123 (Fla. 1996) is instructive. Clark, involved a dispute between Gulf Power and GCEC over the right to serve a prison in Washington County, Florida. Id. at 121. The FPSC determined that Gulf Power had the right to serve the customer because Gulf Power had an existing three-phase line which was capable of serving the prison. Id. at 121-22. In contrast, GCEC had expended \$14,583² to upgrade and relocate an existing single-phase line in order to serve the prison. Id. GCEC's new line was located across the road from Gulf's existing three-phase line. Id. at 121. In awarding the right to serve to Gulf, the Commission found that GCEC engaged in a "race-to-serve" the prison and that GCEC "uneconomically duplicated" Gulf's existing facilities. Id. at 121-122. The Florida Supreme Court reversed the Commission's order and determined that GCEC should serve the customer. The Court applied the factors set forth in the Commission's rule for resolving territorial disputes --Rule 25-6.0441(2), Florida Administrative Code. The Court found, and the parties agreed, that both utilities had a comparable ability to serve the customer and that the nature of the disputed area was not at issue. Thus, subparts (a) and (b) of Rule 25-6.0441(2) did not favor either party. Id.

² It is important to note that the \$14,583 figure in Clark was expended to serve a load with approximately 372 kw diversified demand as compared to the Gulf's cost of \$90,000 in the instant case to serve a load with an expected diversified demand of 3.4 MW.

at 212. The Court then applied subpart (c) of the rule relating to the cost of service. The Court disagreed with the Commission's conclusion that GCEC had "uneconomically duplicated" Gulf's existing facilities. Instead, the Court found that the cost-differential was "de minimis" and that GCEC's duplication of Gulf's existing facilities was therefore not "uneconomic." Id. at 123. In closing, the Court noted as follows:

As the Commission noted, both utilities have been serving the area for many years and both have a comparable ability to serve the prison; the nature of the disputed area is not in dispute; and the cost differential between the two utilities is relatively small. Consequently, we find that customer preference should have been considered in this case. See rule 25-6.0441(d) (Commission to consider customer preference if all other factors are substantially equal). Because both DOC and Washington County have indicated their desire to have Gulf Coast provide service to the prison, we conclude that Gulf Coast should be awarded service.

Id. at 123. See also, Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259, 263-64 (Fla. 1999) (duplication of facilities is not necessarily prohibited --key determination is whether duplication is "uneconomic"); West Florida Electric Cooperative Ass'n. v. Jacobs, 887 So.2d 1200, 1203, 1205 (Fla. 2004) ("The commission's overarching concern in settling [territorial] disputes is the avoidance of uneconomic duplication....[W]here no territorial agreement exists and no uneconomic duplication would result, however, utilities may serve adjacent areas."); and In re Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 1998 WL 101844 at *2-3, 7-8 (Fla. P.S.C. Jan. 28, 1998) (holding that "uneconomic duplication" will not occur where two utilities' facilities are "commingled and in close proximity" because incremental cost to serve additional customers in such cases will be minimal).

As was true in Clark, application of subparts (a) through (c) of Rule 25-6.0441(2) to the facts of the instant dispute reveals that they are substantially equal between the parties. Although

Chelco makes much of the fact that it maintains an existing three-phase line which reaches the border of the Development, this is a distinction without a difference from an analytical perspective. As Clark makes clear, Gulf is free to construct its own facilities to serve the Development so long as doing so does not amount to “further uneconomic duplication of generation, transmission or distribution facilities” under section 366.04(5), Florida Statutes. Here, Gulf Power’s and Chelco’s facilities are commingled and in close proximity to one another and Gulf’s incremental cost to serve the Development is negligible. Any further duplication of facilities is therefore not “uneconomic.” Unlike Clark, however, the customer in the instant dispute has indicated its preference that Gulf Power provide service. Consequently, in accordance with Rule 25-6.0441(2)(d), service must be awarded to Gulf Power. See, West Florida Electric Cooperative Ass’n. v. Jacobs, 887 So.2d 1200, 1205 (Fla. 2004) (“We previously have held that customer preference should be considered a significant factor where the other factors in rule 25-6.0441 are substantially equal.”).

Finally, the location and nature of the Freedom Walk Development itself favors Gulf Power as the service provider. See, § 366.04(2)(e), Fla. Stat. (“In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.”) As Chelco acknowledges in its petition, the Freedom Walk Development is located entirely within the corporate boundaries of the City of Crestview. (Petition at ¶ 6). Section 425.04, Florida Statutes, provides that “[c]ooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and

extending the use thereof in rural areas.” (emphasis supplied). Section 425.03(1), Florida Statutes, in turn, provides that: “[r]ural 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). In Tampa Electric Co. v. Withlacoochee River Coop., the Florida Supreme Court offered the following interpretation of section 425.04, Florida Statutes:

[i]t is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory.

122 So.2d 471, 473 n.6 (Fla. 1960). (emphasis supplied).

The Florida Supreme Court re-affirmed the principles articulated in Withlacoochee in Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982). Escambia River involved a territorial dispute between Gulf Power and EREC over provision of electrical service to the Exxon Blackjack Creek Miscible Gas Displacement Project in Escambia County, Florida. The Commission awarded service to Gulf Power. In its order, the Commission expressly relied on Withlacoochee, and the “plain language and spirit” of section 425.04, Florida Statutes:

[t]he facts in this dispute fail to demonstrate any significant advantage possessed by Gulf or Escambia with respect to capacity to provide the electrical power requirements requested by Exxon. The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes the dispute must be resolved in favor of Gulf Power...[W]hile we recognize the valuable service performed by the cooperatives, we believe that this case too presents an example of the type of electrical requirements that is beyond the basic

intent and purpose of cooperatives, especially when a privately owned utility can reasonably meet those requirements.

Id. at 1384-85. (emphasis supplied).

The Court affirmed the Commission's order and held that "[w]hen, as in the present case, no factual or equitable distinction exists in favor of either utility, [Withlacoochee] controls and the territorial dispute is properly resolved in favor of the privately owned utility." Id. at 1385.

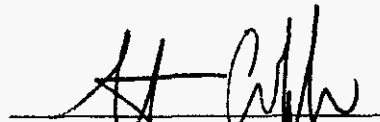
Gulf Power has continuously served the City of Crestview since 1928. Because the Freedom Walk Development is located within the City of Crestview it is, by definition, not a "rural" area. See, § 425.03(1), Fla. Stat. Even by Chelco's own estimate, the Development is expected to produce a load of at least 3.7 MW within a 171 acre footprint --clearly urban, rather than rural load characteristics. (Petition at ¶¶ 6, 8). Gulf Power has the capacity to provide reliable service to the Development and the surrounding community. Gulf Power currently serves numerous customers in the immediate vicinity of the Development and can serve the Development by simply extending its three-phase line less than 2,130 feet to the eastern boundary of the Development at a cost that is de minimis. The Customer has clearly expressed its preference that Gulf Power serve the Development. In light of all of the foregoing, Commission and Florida Supreme Court policy and precedent dictate that Gulf Power be awarded the exclusive right to serve the Development.

15. Gulf Power admits only that the exhibits referenced in paragraph 15 speak for themselves. Gulf Power notes that the cost estimates contained in Chelco's Exhibit "F" appear to be based on the assumption that the Freedom Walk Development will consist of 761 residential lots at full build-out and that full build-out will occur in five years. Gulf further notes that these assumptions differ from those that have been provided to Gulf by the Customer. While the foregoing issues may be uncertain, one thing is clear --the Development has yet to be

platted and a development order has yet to be issued. As a result, both Gulf's and Chelco's true cost to serve the Development upon full build-out is speculative at this point in time. Regardless of what the true cost to serve the Development upon full build-out might be, the cost figure is not likely to differ in any material respect between the parties due to the fact that the same labor and material will be required.

WHEREFORE, Gulf Power respectfully requests that the Commission enter an order denying Chelco's prayer for affirmative relief and declare that the Customer's request for electric service from Gulf Power is controlling in this case and, pursuant to that request, Gulf Power is both obligated and entitled to furnish the Customer with electric service pursuant to the rates, rules, regulations and other statements set forth in Gulf Power's Tariff for Retail Electric Service on file with and approved by the Commission.

Respectfully submitted this 18th day of June, 2010.



JEFFREY A. STONE
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RUSSELL A. BADDERS
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE:
Territorial Dispute Between)
Choctawhatchee Electric Cooperative, Inc.)
And Gulf Power)

Docket No.: 100304-EU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 18th day of June, 2010, on the following:

CHOCTAWHATCHEE ELECTRIC COOP.,
INC.
MS. LEIGH V. GRANTHAM
P. O. BOX 512
DEFUNIAK SPRINGS, FL 32435-0512

MESSER LAW FIRM (10C)
NORMAN H. HORTON, JR./G. EARLY
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FL PUBLIC SERVICE COMMISSION
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EXHIBIT "A"

Emerald Coast Partners, LLC

3180 Mathieson Drive

Unit 502

Atlanta, GA 30305

866-623-6763ph □ 404-874-0905f

September 16, 2008

Mr. Bernard H. Johnson
Key Accounts Specialist, Senior
140 Hollywood Boulevard
Ft. Walton Beach, Fl. 32548-4772

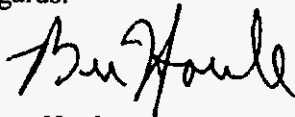
RE: Freedom Walk LLC development 179± Acres Crestview, FL

Bernard:

Please accept this letter as our request to have Gulf Power service our electrical needs for this aforementioned development in Crestview, FL. with Emerald Coast Partners. I've attached a site map as an exhibit for the exact location of this development. Presently, the plans are to develop 424 single family sites, 288 apartments, a YMCA, and 46,000 SF of commercial. The development will break ground first quarter of 2008 with the first phase and I have also attached a phase in site plan for your review.

I look forward to working with you and Gulf Power. Please contact me with any questions. Thank you Bernard.

Regards:



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Cc: Teresa Gaillard
Phil Weener
Ken Wright