

Diamond Williams

100304 - EU

From: Webb, Linda C. [LCWEBB@southernco.com]
Sent: Tuesday, January 18, 2011 12:01 PM
To: Filings@psc.state.fl.us
Cc: wthompson@chelco.com; nhorton@lawfla.com; Ralph Jaeger; Griffin, Steven R. (Beggs & Lane)
Subject: E-Filing, Docket No. 100304-EU
Attachments: Motion for Reconsideration 01-18-11.pdf

- A. Susan D. Ritenour
Gulf Power Company
One Energy Place
Pensacola FL 32520
850.444.6231
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- B. Docket No. 100304-EU
In re: Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company
- C. Gulf Power Company
- D. Document consists of 10 pages
- E. The attached document is Gulf Power Company's Motion for Reconsideration.

Linda Webb
Gulf Power Company
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1/18/2011

DOCUMENT NUMBER DATE
00401 JAN 18 =
FPSC-COMMISSION CLEAR

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January 18, 2011

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

Enclosed is Gulf Power Company's Motion for Reconsideration filed by
electronic mail.

Sincerely,



lw

Enclosure

cc: Beggs & Lane
Jeffrey A. Stone

DOCUMENT NUMBER-DATE

00401 JAN 18 =

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: January 18, 2011

GULF POWER COMPANY'S MOTION FOR RECONSIDERATION

Gulf Power Company, by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, respectfully requests that the Commission reconsider certain aspects of its decision memorialized in Order No. PSC-11-0020-PCO-EU issued on January 11, 2011, and states as follows:

1. On January 11, 2011, the Commission entered Order No. PSC-11-0020-PCO-EU which granted in part and denied in part Gulf Power's Motion to Compel Responses to Gulf Power's Second Interrogatories in which Gulf requested that Chelco be required to answer Interrogatory Nos. 23-25 and 29-46.

2. Through its Order, the Commission required Chelco to respond to Interrogatories 23-25 and 44-46 and denied Gulf's request for responses to Interrogatories 29-31, 36-38 and 41-43. Gulf Power respectfully requests that the Commission reconsider the portion of its order denying Gulf's request to compel responses to Interrogatories 29-31, 36-38 and 41-43. Reconsideration is proper where the Commission has overlooked or failed to consider specific facts or points of law in rendering an order. See, In re: Petition of Rate Increase by Tampa Electric Company, 2009 WL 2589104 (Fla. P.S.C. Aug. 21, 2009) (citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962) and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981)).

3. Interrogatories 29-31, 36-38 and 41-43 seek Chelco customer and member counts for certain unincorporated areas abutting the municipal boundaries of the cities of Crestview, DeFuniak Springs and Freeport, Florida. As the Commission recognized in its Order, the unincorporated areas included within Gulf's description of "Greater DeFuniak Springs," "Greater Crestview," and "Greater Freeport" are limited to those areas which possess the "same non-rural characteristics of the cit[ies]." (Order at p. 2) Despite the fact that the interrogatories are limited to unincorporated areas which possess non-rural characteristics, the Commission denied Gulf's motion on the ground that these areas are, *by definition*, "rural" as that term is defined in section 425.03(1), Florida Statutes. (Order at p. 3)

4. Gulf respectfully submits that this finding overlooks the fact that section 425.03(1), Florida Statutes, specifically recognizes that unincorporated areas can be "non-rural" under certain circumstances. As the Commission recognized in its Order, one such circumstance may involve "stand alone" unincorporated developments like Bluewater Bay or Seagrove Beach. Importantly, however, the definition is not limited to such stand alone developments. The fact that an unincorporated area abuts a municipal boundary does not result in *de facto* designation of the area as being "rural" in nature. This precise issue has previously been decided by the Commission. See, In Re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company, 1977 WL 370785 (Fla. P.S.C. Sept. 16, 1977).¹ Suwannee Valley involved facts which, in many regards, are similar to the facts of the instant dispute. Specifically, the dispute arose over the right to serve a proposed 160 acre subdivision which was located in an unincorporated area adjacent to the municipal boundaries of the city of Live Oak, Florida. Id. at 1. The developer requested that FP&L serve the subdivision. Id. SVEC contended that the subdivision was located in an area that had been exclusively served by SVEC

¹ For ease of reference, a copy of the Suwannee Valley order is attached hereto as Exhibit "A."

and that SVEC had existing distribution lines across the property. Id. at *2. FP&L had two existing distribution lines that were located within 400/500 and 1,500 feet of the subdivision boundaries, respectively. Id. Ultimately, the Commission awarded the right to serve the subdivision to FP&L. Id. at *3. Central to the Commission's decision was its finding that the subdivision was "non-rural" in nature as defined by section 425.03(1), Florida Statutes. In reaching its conclusion, the Commission held as follows:

A subdivision located in the unincorporated area of an immediately adjacent urban area does not exist as a social, economic or commercial unit separate and apart from the adjoining municipality. Such an area would normally be considered part of the suburban territory of the municipality and therefore would not fall within the definition of 'rural area' as stated in section 425.03(1) F.S.

Id. at *2. (emphasis supplied)

The Commission proceeded to note that:

Rural electric cooperatives are organized for the purpose of supplying, promoting and extending the use of electric energy in rural areas. A co-op cannot sell or distribute electric energy to any person not located in a rural area who is receiving adequate service from any municipally or privately owned utility. It 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, and 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.

Id. at *3.

5. At this preliminary stage in the litigation, Gulf Power is not seeking a determination by the Commission that the areas it has designated as "Greater DeFuniak Springs," "Greater Crestview," and "Greater Freeport" are, in fact, non-rural in nature. However, the Company does not believe that the foregoing conclusion is foreclosed, as a matter of law, by

virtue of section 425.03(1), Florida Statutes. Indeed, the Commission's own precedent stands for the contrary proposition. In light of the foregoing and Florida's broad discovery rules, Gulf Power respectfully requests that the Commission reconsider its previous denial of Gulf Power's motion to compel and require Chelco to respond to Interrogatories 29-31, 36-38 and 41-43. Alternatively, if the Commission is not amenable to providing the foregoing relief, Gulf Power requests that the Commission order Chelco to produce the member address list which was the subject of Gulf Power's Motion to Compel Responses to Gulf Power's Third Interrogatories. See, Order No. PSC-11-0021-PCO-EU (denying Motion to Compel Responses to Gulf Power's Third Interrogatories).

6. Gulf Power has conferred in good faith with counsel for Chelco in this matter and is authorized to represent that Chelco objects to the relief sought herein.

Respectfully submitted this 18th day of January, 2011.

/s/ Steven R. Griffin

JEFFREY A. STONE

Florida Bar No. 325953

RUSSELL A. BADDERS

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EXHIBIT "A"

Westlaw.

77 FPSC 321, 1977 WL 370785 (Fla.P.S.C.)

Page 1

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In Re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company and the Defendant's Answer Thereto.
760510-EU (CP)
7961

Florida Public Service Commission
September 16, 1977

APPEARANCES: Henry L. Gray, Jr., 211 Northeast First Street, Gainesville, Florida 32601 and Dean Lewis, 105 North Ohio Avenue, Live Oak, Florida 32060, for the complainant. Hugh M. Taylor and Wilton R. Miller, 700 Barnett Bank Building, Tallahassee, Florida 32301, for the defendant. M. Robert Christ, 700 South Adams Street, Tallahassee, Florida 32304, for the Florida Public Service Commission staff and the public generally.

Before Paula F. Hawkins, Chairman, William T. Mayo and William H. Bevis, Commissioners.

ORDER

BY THE COMMISSION:

Pursuant to notice, the Florida Public Service Commission, by its duly designated Hearing Examiner, John R. Marks, III, held a public hearing on the above matter in Live Oak, Florida, on November 19, 1976 and January 7, 1977.

This docket involves a complaint to resolve a territorial dispute between Suwannee Valley Electrical Cooperative, Inc. (SVEC or complainant) and Florida Power & Light Company (FP&L or defendant), initiated pursuant to §366.04(2), F.S. Although this pleading was initially styled a petition, it is properly treated as a complaint under this Commission's rules. The cause was commenced by the filing on June 30, 1976 of a petition by SVEC before the Florida Public Service Commission seeking to prevent FP&L from constructing distribution facilities

and offering electric service to an area of some 160 acres constituting a subdivision being developed for approximately 100 single family residences.

Suwannee Valley is a rural electric cooperative organized under Chapter 425, Florida Statutes. The defendant, FP&L, is a public utility as defined by §366.02, F. S. The disputed territory involves an area of service immediately west of the municipal limits of the city of Live Oak, Suwannee County, Florida. The land abuts for a distance of more than 2,000 feet on Sunkist Road, a paved street of the city of Live Oak. The dispute arose when the developer, Ralph Cox, requested that the proposed subdivision be served by defendant, FP&L. Through petition to the Florida Public Service Commission, SVEC objected to such action asserting the area was one served by Suwannee Valley exclusively. Subsequent to the filing of the petition, the defendant extended its distribution facilities at a cost of some \$15,000 and began serving the electrical needs of one house in the disputed area. At this point, Suwannee Valley filed a motion seeking a temporary injunction against FP&L to preserve the status quo pending a final determination of the dispute. Neither party constructed or extended any additional distribution facilities into the area. The criteria for resolving territorial disputes is set forth in §366.04(2)(d) and (e), F.S. and dealt with through the following captioned headings.

THE Ability of the Utilities to Expand

Presently SVEC serves the area immediately to the east of the disputed property, which includes the Colosseum, the National Guard Armory, the Live Oak Women's Club and the Live Oak Garden Club. There are three existing residences which lie contiguous to the proposed new subdivision and they are served by the complainant. Suwannee Valley also has some customers to the west of the disputed area. To the south, SVEC, has service lines and there is an unused energized line to the north lying

across the proposed subdivision. The local requirements of the initial phase of the development are somewhat routine and SVEC could serve the eleven lot subdivision by making a service drop from existing facilities. However, the lines to be used to serve the area run for a distance of nearly two miles partly on the right-of-way of a public road without any present alternative source of power. The complainant's consulting engineer also indicated that in order to serve the projected 100 lot development, SVEC would have to convert part of a line section from two to three phase. But considering normal growth, the engineer concluded that present SVEC facilities would be adequate to serve the proposed new area for the next five to ten years. SVEC conducts a major system review every two years and plans improvements based upon actual growth and residential development. The 1974-75 work plan includes the construction of alternate distribution facilities which could serve the disputed area. These system improvements are designed to serve what SVEC characterizes as the growing area to the west. The improvements are scheduled to be completed in late 1977 and conceivably could provide a two way feed, or "loop" service, to the entire area west of Live Oak.

Early in 1976, the plans for the subdivision were prepared and the developer requested that Florida Power & Light provide electric service to the area and particularly to the first building being constructed. At the time, FP&L had in use a line running along Newburn Road (south of the subdivision) which was within four or five-hundred feet of the first building. They also had a line running to within 1,500 feet of the north end of the development area. In order to provide service to the entire disputed area, it was FP&L's intent to connect its lines north and south of the subdivision so as to provide "loop" service. Before this line was completed, SVEC filed its petition in this cause. Presently, Florida Power & Light has the ability to generate all of its electricity whereas Suwannee Valley purchases power from Florida Power Corporation and the defendant. The outage reports indicate the ser-

vice records of both SVEC and FP&L are within accepted standards. An analysis of the present rate structures of both utilities show the cost to the consumer for electric utility service would be less with FP&L than with Suwannee Valley.

The Nature of the Area

Live Oak is an incorporated city of approximately 7,000 population; the disputed property is not within its boundaries. Several maps in evidence show the location of the subdivision in relation to the city and approaching highways. These maps also show that both SVEC and FP&L provide service to areas within Live Oak as well as areas not within the city limits. There are no natural boundaries or buffers separating the two utilities. With respect to areas outside the city limits, the two utilities are operating without territorial agreement or other service area restrictions, and are thus in potential competition and conflict throughout Suwannee County. The general area west of the city has been growing at a steady rate for the past several years and based on SVEC's system improvement plans, the projection is for this growth trend to continue. Further to the west of the proposed subdivision is an established residential development and just to the north of that area is the county airport. A subdivision located in the unincorporated area of an immediately adjacent urban area does not exist as a social, economic or commercial unit separate and apart from the adjoining municipality. Such an area would normally be considered part of the suburban territory of the municipality and therefore would not fall within the definition of "rural area" as stated in §425.03(1), F.S.

Requirements for Other Utilities

The development obtains water from the Live Oak Municipal Water System and the developer has installed the necessary water mains. Additionally, fire hydrants have been installed in the development area and benefit both the subdivision and the prop-

erty lying within the city limits immediately across the adjacent road. There is no ascertainable nexus between future electric utility needs and other utility requirements.

To summarize, the record indicates the following:

- (1) Each utility is capable of providing transmission and distribution facilities to the area in question.
- (2) FP&L generates all of its electricity whereas SVEC purchases power from FP&L and Florida Power Corporation.
- (3) Florida Power & Light is capable of providing electric power at a lower rate than Suwannee Valley Electrical Cooperative.
- (4) The disputed area abuts for a distance of more than 2,000 feet a paved street of the city of Live Oak.
- (5) The disputed property is within the unincorporated suburban territory of the city of Live Oak.
- (6) Both SVEC and FP&L serve customers in the Live Oak city limits and in the unincorporated areas of Suwannee County.
- (7) With respect to areas outside the city limits, the two utilities are operating without territorial agreement or other service area restrictions.
- (8) Prior to the filing of this petition, the disputed development area was not served by either SVEC or FP&L.
- (9) The area west of the city of Live Oak has been growing at a steady rate.
- (10) The owner-developer requested the disputed property be served by FP&L.

Service by a single utility in a particular territory is desirable and necessary. Unrestrained competition may foster duplicating and overlapping distribution systems and duplication of lines and other facilities is aesthetically unattractive, increases the hazards

of servicing the area, and substantially increases the costs of service per customer since two systems must be maintained when one is sufficient. *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968). Rural electric cooperatives are organized for the purpose of supplying, promoting and extending the use of electric energy in rural areas. A co-op cannot sell or distribute electric energy to any person not located in a rural area who is receiving adequate service from any municipally or privately owned utility. It 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, and 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. *Tampa Electric Co. v. Withlacoochee River Electric Co-op., Inc.*, 122 So.2d 471 (1960), on remand 148 So.2d 732, certiorari denied 158 So.2d 136, certiorari denied 84 S.Ct. 1628, 377 U.S. 952, 12 L.Ed.2d 497.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Suwannee Valley Electric Cooperative be and same is hereby ordered to refrain from offering electric service to any customers in the disputed area described herein.

By Order of Chairman PAULA F. HAWKINS, Commissioner WILLIAM T. MAYO and Commissioner WILLIAM H. BEVIS as and constituting the Florida Public Service Commission, this 16th day of September, 1977.

William B. DeMilly COMMISSION CLERK

(SEAL)

As printed in Florida Public Service Commission Reporter

END OF DOCUMENT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100304-EU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by electronic mail and U.S. Mail this 18th day of January, 2011, on the following:

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