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100304 - EU

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Sent: Friday, January 28, 2011 4:25 PM
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Subject: Gulf Power Company's Response to CHELCO's Cross-Motion for Reconsideration
Attachments: GP Response to CHELCO Cross Motion for Reconsideration 1-28-11.pdf

- A. s/Susan D. Ritenour
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- B. Docket No. 100304-EU
- C. Gulf Power Company
- D. Document consists of 10 pages.
- E. The attached document is Gulf Power Company's Response to CHELCO's Cross-Motion for Reconsideration.

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DOCUMENT NUMBER DATE
 00704 JAN 28 =
 FPSC-COMMISSION CLERK

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January 28, 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 Response to CHELCO's Cross-Motion for Reconsideration filed by electronic mail in the above referenced docket.

Sincerely,

Susan D. Ritenour (lw)

vm

Enclosure

cc: Beggs & Lane
Jeffrey A. Stone

DOCUMENT NUMBER DATE
00704 JAN 28 =
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100304-EU

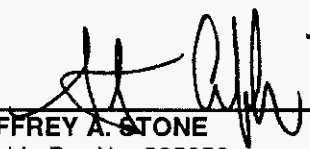
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by electronic mail this 28th day of January, 2011, on the following:

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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 28, 2011

**GULF POWER COMPANY'S RESPONSE TO
CHELCO'S CROSS-MOTION FOR RECONSIDERATION**

Gulf Power Company, by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby responds to Chelco's Cross-Motion for Reconsideration of portions of 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 (the "Order") 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, 35-37 and 41-43.

3. On January 18, 2011, Gulf Power filed a Motion for Reconsideration of that part of the Order which denied Gulf's motion to compel responses to interrogatories 29-31, 35-37,¹ and 41-43. (Document No. 00401-11)

4. On January 25, 2011, Chelco filed its Response to Gulf Power's Motion for Reconsideration and Cross-Motion for Reconsideration. (Document No. 00588-11) In its cross-motion, Chelco asks the Commission to reconsider the portion of the Order compelling responses

¹ As noted in footnote 1 to Chelco's Motion, Gulf's Motion for Reconsideration incorrectly refers to interrogatories 36-38, rather than 35-37. This same error appears in the first sentence of the "Conclusion" section of the Order.

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to Gulf's interrogatories 23-25 and 44-46. The foregoing interrogatories seek Chelco's customer/member counts in the communities of Bluewater Bay and Seagrove Beach, Florida.

5. 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)).

6. For the reasons stated in Gulf's Motion to Compel and the Commission's Order, Gulf believes that the Commission was correct to require responses to interrogatories 23-25 and 44-46. Moreover, Chelco has failed to identify any facts or law which the Commission overlooked in rendering its Order. Instead, Chelco raises an array of new arguments which are more proper for consideration, if at all, during the evidentiary hearing --not a discovery dispute.² Chelco acknowledges that interrogatories 23-25 and 44-46 "may be pertinent to Section 425.04(4), Florida Statutes," but nevertheless suggests that the information has no relevance or application to resolution of this territorial dispute. (Chelco Motion at ¶ 4)

7. As sole support for this argument, Chelco contends that the Commission lacks jurisdiction to consider Chapter 425, Florida Statutes, in resolving territorial disputes. As an initial matter, it bears noting that Chelco did not raise a jurisdictional objection in response to Gulf's interrogatories or in response to Gulf's Motion to Compel. Instead, Chelco contended that Bluewater Bay and Seagrove Beach would be considered "rural" under the definition found in section 425.03(1), Florida Statutes, and that customer data regarding these communities would therefore lack relevance to the instant dispute. (Chelco's Response to Motion to Compel at ¶ 6)

² The Commission's jurisdiction to interpret or apply Chapter 425, Florida Statutes, in the context of this territorial dispute has specifically been identified by the parties and Commission Staff as an issue for resolution by the Commission in this proceeding.

(Document No. 09116-10) Tellingly, only now, after the Commission has rejected these arguments, has Chelco resorted to a jurisdictional argument. Chelco's jurisdictional argument is both premature, without merit and in conflict with their earlier position. Indeed, Chelco's initial reliance on section 425.03(1), Florida Statutes, as a basis for not producing data regarding Bluewater Bay and Seagrove Beach constitutes an admission of the Commission's jurisdiction to interpret and apply Chapter 425, Florida Statutes, in resolving this territorial dispute.

8. Chapter 366, Florida Statutes, provides the Commission with exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and other utilities. See, Re Florida Power Corporation, 1992 WL 457462 at *3 (Fl. P.S.C. Dec. 17, 1992) (Chapter 366 grants the Commission "[e]xclusive jurisdiction over rates and charges of investor-owned electric utilities, exclusive jurisdiction over the rate structures of all electric utilities in the state, and exclusive jurisdiction over territorial agreements and disputes between all electric utilities.") (emphasis supplied)

9. Chelco cites to selected portions of section 366.04(2)(e), Florida Statutes, as support for its jurisdictional argument --the intended implication being that section 366.04(2)(e), Florida Statutes, precludes the Commission from consideration of Chapter 425 in resolving territorial disputes. (Chelco Motion at ¶ 3)³ Section 366.04(2)(e), Florida Statutes, provides guidance as to the factors the Commission may consider in resolving territorial disputes:

³ Chelco also cites In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc. in Holmes County, Order No. 18886, Docket No. 870235-EI, issued February 18, 1988, as support for the proposition that the Commission lacks jurisdiction to consider Chapter 425 in resolving territorial disputes. (Chelco Motion at ¶ 5) However, a review of the order suggests that the Commission's jurisdiction to consider or apply Chapter 425 in the context of a territorial dispute was not at issue in that case. The language cited by Chelco appears in the last sentence of the order without significant explanation. While not clear from the order, it appears that the cooperative may have argued that it should be entitled to serve the high school because the Holmes County school board was a member of the cooperative. The Commission determined that this fact was not dispositive. Any question of whether the foregoing order stands for the proposition that the Commission lacks jurisdiction to consider Chapter 425 in resolving territorial disputes is resolved by the multitude of Commission orders --cited infra--which clearly interpret and apply Chapter 425.

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.

§ 366.04(2)(3), Fla. Stat. (emphasis supplied)

10. The plain language of section 366.04(2)(e), Florida Statutes, appropriately recognizes that the Commission is not limited to consideration of the factors delineated in the statute in resolving territorial disputes. See, West Florida Electric Coop. v. Jacobs, 887 So.2d 1200, 1203, 1205 (Fla. 2004) (“The statute also outlines certain factors that the commission ‘may consider, but not be limited to consideration of,’ in resolving a territorial dispute...[B]ecause the listed factors are not exclusive, the commission is free to consider other factors....”) The same is equally true of Rule 25.6.0041, Florida Administrative Code.

11. Chapter 425, Florida Statutes, is clearly a factor which must be considered by the Commission in the instant dispute. Chapter 425, Florida Statutes, sets forth the purpose and powers of Florida’s rural electric cooperatives. In the instant dispute, Gulf Power contends, among other things, that Chelco is precluded from serving the Freedom Walk Development by virtue of the limitations contained in sections 425.02 and 425.04, Florida Statutes. In order for the Commission to fulfill its exclusive statutory duty to determine which party --Chelco or Gulf-- should serve the Freedom Walk Development, it must determine, as a threshold matter, whether Chelco possesses the authority under law to even be considered a candidate utility for service. The information sought by Gulf Power through interrogatories 23-25 and 44-46 is necessary to make this determination. Chelco’s suggestion that the Commission is precluded from making such a fundamental determination ignores the plain language of section 366.04(2)(e), Florida

Statutes, and the Commission's plenary jurisdiction to resolve territorial disputes pursuant to Chapter 366, Florida Statutes.

In re: Petition of Peace River Electric Cooperative, Inc. against Florida Power and Light Company, Order No. 15210, Docket No. 870235-EI, issued October 8, 1985 ("Peace River") is instructive. Peace River involved a territorial dispute between PRECO and FPL over a proposed development in unincorporated Manatee County, Florida. Id. at 1-2. FPL contended, among other things, that FPL should be entitled to serve the development because the Commission lacked jurisdiction over PRECO. Id. at 8. In resolving the issue, the Commission held as follows:

The central legal issue before the Commission is whether it has jurisdiction over PRECO. The answer to that question is clearly yes, pursuant to section 366.04(2)(e), Florida Statutes. The Florida Legislature specified that the Commission shall resolve territorial disputes between investor-owned utilities, municipal utilities, and rural electric cooperatives. Although FPL argues that the Commission does not have jurisdiction over PRECO and that it cannot award the disputed area to PRECO, FPL ignores the clear language of Section 366.04(2)(e). That is not to say that the PSC has full jurisdiction over PRECO in all respects. Such is not the case under the statutes. However, Section 366.02 clearly states for what purposes the Commission does have jurisdiction over PRECO and one of those purposes is to resolve territorial disputes. Where a dispute is brought before the Commission and a cooperative is a party to the matter, the cooperative is holding itself out as ready, willing and able to serve any potential customer in the disputed area. This is particularly true in a case such as the present one where the cooperative is the petitioning party. In order for the Commission to carry out its authority to resolve such a dispute, the Commission must, of necessity, have the authority to enforce its decision...[T]he Commission's jurisdiction over cooperatives for certain stated purposes cannot be diminished because the Commission does not have full and complete jurisdiction over cooperatives. Moreover, the Florida Supreme Court has stated that the Commission should not consider the extent of its jurisdiction over cooperatives in exercising its jurisdiction pursuant to section 366.04(2)(e). Escambia River Electric Cooperative v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982).

Id. at 9-10. (emphasis supplied)

Having voluntarily subjected itself to the jurisdiction of the Commission through initiation of the present dispute, Chelco cannot now invoke the Commission's limited jurisdiction over rural electric cooperatives as basis for refusing to produce relevant information. The information sought through interrogatories 23-25 and 44-46 is crucial to a determination of whether Chelco lacks statutory authority to serve the Freedom Walk Development, which, in turn is a threshold issue that must be determined by the Commission in exercising its jurisdiction to resolve this territorial dispute pursuant to Chapter 366, Florida Statutes.

12. Chelco's contention that the Commission lacks jurisdiction to determine issues under Chapter 425 in the context of territorial disputes is further belied by the sheer number of Commission orders which do just that. The Commission has routinely interpreted and applied Chapter 425 in resolving territorial disputes. See e.g., In re: Territorial Dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., Order No. 13668, Docket No. 830484-EU, issued September 10, 1984 (interpreting section 425.04(4) and rejecting argument that GCEC was prohibited from serving the disputed area by virtue of Chapter 425, Florida Statutes); In re: Petition of Gulf Power Company Involving a Territorial Dispute with Gulf Coast Electric Cooperative, Order No. 12858, Docket No. 830154-EU, issued January 10, 1984 (interpreting sections 425.02 and 425.03, Florida Statutes, and determining that GCEC was not barred from serving the disputed area by virtue of Chapter 425, Florida Statutes); In re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company, Order No. 7961, Docket No. 760510-EU, issued September 16, 1977 (interpreting section 425.03(1), Florida Statutes and determining that a subdivision in unincorporated Suwannee County, Florida was not "rural" in nature); In re: Choctawhatchee Electric

Cooperative v. Gulf Power Company, Order No. 7516, Docket No. 74551-EU, issued November 19, 1976 (interpreting sections 425.02 and 425.03, Florida Statutes, and rejecting argument that Chelco was barred from serving the disputed area by virtue of Chapter 425, Florida Statutes); In re: Complaint of Clay Electric Cooperative against Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board, Order No. 7040, Docket No. 74585-EU, issued December 9, 1975 (determining area in dispute was “rural” as defined by section 425.03(1), Florida Statutes).

13. The Commission clearly has the authority to interpret and apply Chapter 425, Florida Statutes, in the context of resolving territorial disputes. Indeed, in the present case, application of Chapter 425, Florida Statutes, is an integral component of the Commission’s exercise of its exclusive jurisdiction under Chapter 366, Florida Statutes.

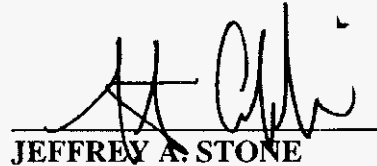
14. In addition to its jurisdictional argument, Chelco also contends that the Commission failed to consider two additional facts. First, Chelco notes that Seagrove Beach is located in a portion of Walton County that is subject to a territorial agreement with Gulf. (Chelco Motion at ¶ 6) Second, Chelco states that Bluewater Bay was found to be a “rural” area in 1976. (Chelco Motion at ¶ 7) Gulf respectfully submits that these observations have no bearing on the issue at hand –namely, whether Gulf Power should be barred from obtaining information concerning the number of customers/members served by Chelco in those communities. As the Commission properly recognized in its Order,

[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.

(Order at p. 1)

Relevance is defined broadly under Florida law and Florida's discovery laws should be liberally construed. (Order at p. 3) Chelco is free to raise all of its substantive legal arguments during the course of the evidentiary hearing in this case. The Commission may choose to agree or disagree with some or all of these arguments. Importantly, however, the narrower issue presently before the Commission is whether Gulf is entitled to obtain discovery regarding matters which are plainly relevant in nature. Gulf Power respectfully submits that it is entitled to do so and that Chelco's cross-motion for reconsideration should therefore be denied.

Respectfully submitted this 28th day of January, 2011.



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