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Sent: Monday, February 28, 2011 3:42 PM
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Subject: Docket No. 100304-EU
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The Docket No. is 100304-EU Territorial Dispute between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company

This is being filed on behalf of Choctawhatchee Electric Cooperative, Inc.

Total Number of Pages is 13

Choctawhatchee Electric Cooperative, Inc.'s Response to Gulf Power Company's Motion for Summary Final Order

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February 28, 2011

BY ELECTRONIC FILING
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 100304-EU

Dear Ms. Cole:

Enclosed for filing on behalf of Choctawhatchee Electric Cooperative, Inc. is an electronic version of Choctawhatchee Electric Cooperative, Inc.'s Response to Gulf Power Company's Motion for Summary Final Order in the above referenced docket.

Thank you for your assistance.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosure
cc: Ms. Leigh V. Grantham
Parties of Record

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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 Filed: February 28, 2011

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.'S RESPONSE TO GULF POWER COMPANY'S MOTION FOR SUMMARY FINAL ORDER

COMES NOW Choctawhatchee Electric Cooperative, Inc. ("CHELCO"), through its undersigned counsel and files this response to Gulf Power Company's Motion for Summary Final Order and states:

On February 11, 2011 Gulf Power filed a Motion for Summary Final Order pursuant to Section 120.57(1)(h), Florida Statutes, Rule 28-106.204(4), Florida Administrative Code, and Rule 1.510, Florida Rules of Civil Procedure.[1] The motion was served on CHELCO on February 16, 2011, and the Commission granted an extension of time to file a response to February 28, 2011.

Section 120.57(1)(h), Florida Statutes provides, in pertinent part, that:

> Any party to a proceeding ... may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the [finder of fact] determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

Rule 28-106.204(4), Florida Administrative Code, is consistent with the statute. By its motion Gulf Power is seeking to have the Commission determine that, despite numerous disputed issues

[1] The Florida Rules of Civil Procedure, except for those pertaining to discovery, are not applicable to administrative proceedings pursuant to Chapter 120, Florida Statutes and the Uniform Rules promulgated thereunder. Therefore, argument will be directed to the applicable APA standard, rather than the rule regarding judicial summary judgments.

of material fact related to the nature of the territory in dispute, CHELCO is prohibited by Chapter 425, Florida Statutes, from serving the planned Freedom Walk development. As discussed herein, the motion must be denied.

The Commission has considered motions for summary final orders on several occasions. The applicable standard for granting such a motion can be found in *In Re: Qwest Communications Co., LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et al.*, Docket No. 090538, Order PSC-10-0296-FOF-TP, May 7, 2010, wherein the Commission states:

> The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.
>
> Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." . . . The burden is on the movant to demonstrate that the opposing party cannot prevail. . . . "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. . . . "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." . . . If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. . . .
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> The appropriate time to seek summary final order is after testimony has been filed and discovery has ended. . . . However, once a movant has tendered competent evidence through discovery to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. . . . Until the parties have had the opportunity to proceed with discovery and file testimony, it is premature to decide whether a genuine issue of material fact exists. (extensive citations omitted)

Id. at. pp. 7-8.

As noted in the cited order, and by Gulf Power, a summary final order is appropriate only when there is no genuine issue as to any material fact. In this docket virtually every issue remains in dispute. For example, in the Factual Summary portion of Gulf's motion there is a discussion of the area in dispute. The parties do not agree on the boundary of the area in dispute. CHELCO has identified the area as all of that south of Old Bethel Road (Petition par. 6). The exhibits attached to the CHELCO petition include an overlay of the developer's map of the planned development which CHELCO considers to be the area in dispute. That area has been recited numerous times in objections and response to discovery. Gulf does not consider the portion of the planned development outside the city limits to be part of the dispute. Thus, the most fundamental issue, i.e. the area in dispute, clearly is an issue between the parties. That is but one example of the numerous disputes of material fact that exist in this proceeding. Based on CHELCO's pleadings and discovery, and arguments presented by Gulf in its Motions to Compel and Motion for Reconsideration, there are other disputed issues of fact including the nature of the area, the planned load, whether there will be duplication of facilities, and historic and current service to the area, among others.

As will be developed in this response, the issue of whether CHELCO can serve the area in dispute has factual and legal elements to be resolved. There is no single issue of fact or law that is, by itself, dispositive of the dispute. Moreover, discovery has not been completed in this docket and that may reveal further differences on issues. Clearly the motion does not meet the standards articulated by the Commission and should be denied.

Gulf Power's motion and argument seeks to have the Commission interpret Chapter 425, and construe the statutory purposes and authority of rural electric cooperatives under that chapter. However, for purposes of resolving territorial disputes, the relevant statutory

requirements are found in Chapter 366, Florida Statutes, not in Chapter 425. Except for specifically identified and narrow grants of authority in Chapter 366, the Commission has no jurisdiction over cooperatives. (See Section 366.0211, Florida Statutes).

Relevant to this proceeding, the Commission has been granted limited jurisdiction over cooperatives for purposes of resolving territorial disputes and for implementation of the "grid bill." As to territorial dispute resolution, the Commission has the following authority under Section 366.04(2)(e):

> (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. 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. (emphasis supplied)

As to issues regarding Florida's coordinated electric power grid, the Commission has the following authority under Section 366.04(5):

> (5) The commission shall further have 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.

Chapter 366, Florida Statutes, was amended in 1974 in part to establish the authority and standards under which the Commission is to resolve territorial disputes. Since that time, the Commission has uniformly applied the criteria of Section 366.04, Florida Statutes, to territorial disputes. No fewer than six (6) Supreme Court opinions have confirmed that Section 366.04(2)(e) provides the basis for jurisdiction and criteria for consideration. *See, Gainesville-*

Alachua County Regional Electric Water & Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So.2d 1159 (Fla. 1976); *Gulf Coast Electric Cooperative Inc. v. Fla. Public Service Commission*, 462 So.2d 1092 (Fla. 1985); *Gulf Power Co. v. Public Service Comm.*, 480 So.2d 97 (Fla. 1985); *Gulf Coast Electric Cooperative, Inc. v. Clark*, 674 So.2d 120 (Fla. 1996); *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So.2d 259 (Fla. 1999); *West Florida Electric Cooperative Association Inc. v. Jacobs*, 887 So.2d 1200 (Fla. 2004).

The criteria of Section 366.04(2)(e), Florida Statutes, have been incorporated into Rule 25-6.0441, Florida Administrative Code - *Territorial Disputes for Electric Utilities.* It is those criteria and standards that define the issues to be considered by the Commission in resolving territorial disputes. Nowhere in Chapter 366, Florida Statutes, or Rule 25-6.0441, F.A.C. is there any suggestion that the Commission has regulatory or interpretive authority over Chapter 425, Florida Statutes. Equally important is the fact that Chapter 425, Florida Statutes, contains no reference to, or even a hint of any Commission jurisdiction or authority to interpret, construe, or enforce the provisions of that chapter.

Gulf asserts in its Motion that simply because a large portion of Freedom Walk is within the city limits of Crestview, it is not "rural," precluding CHELCO from serving the area. Aside from the fact that Gulf's assertion is not supported by law, its present position is not consistent with its previous position put forth in this docket. For example in response to the following question posed in CHELCO's First Set of Interrogatories:

> "Is it the contention of Gulf Power that CHELCO may not expand service to new members who are within the city limits even if CHELCO has provided service to members in that area before the area came within the city limits?"

Gulf responded as follows:

> "Yes, if expanding service to customers within the city limits would result in more than 10 percent of CHELCO's membership being located in non-rural areas. See Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789 (11th Cir. 1982). Moreover, even if expanding service to customers within the city limits would not result in more than 10 percent of CHELCO's membership being located in non-rural areas, it is Gulf Power's contention that the urbanization of the area in which a disputed customer or customers are located continues to be a relevant consideration in resolving a territorial dispute of this nature. See, 366.04(2)(e), Fla. Stat.; 25-60441 (2)(b), F.A.C." (emphasis supplied)

(Interrogatory No. 28, CHELCO's First Set of Interrogatories).

Clearly Gulf admitted then that CHELCO may serve within the city limits, subject to Gulf's understanding of the statutory "limitation" regarding the nature of CHELCO's membership in its entire, multi-county service area.[2] This recognition of CHELCO's legal authority to serve within municipal boundaries is further demonstrated in Gulf's Motion to Compel dated October 26, 2010, at pages 3 and 4, in Gulf's Motion to Compel dated December 22, 2010, pages 3 and 4, and in Gulf's Motion for Reconsideration dated January 18, 2011, in which Gulf demanded responses to discovery to enable it to determine whether CHELCO was limited in its *prima facia* ability to serve members in the area in dispute. Gulf's own efforts have made CHELCO's service of the area both a factual issue and a legal issue.

In its Motion (p. 9) Gulf states that "CHELCO has previously suggested the Commission lacks jurisdiction to interpret and apply Chapter 425, Florida Statutes, in resolving this territorial dispute." Gulf overstates CHELCO's position. As set forth herein, CHELCO agrees that the

[2] Gulf's argument would require that the resolution of any territorial dispute involving any area within a municipal boundary include a comprehensive analysis of the entire rural cooperative service area. The assessment would involve a determination of how many "other persons" the cooperative serves, and the significance of such "other persons" under the statutory program created by Chapter 425. Section 425.04(4), Florida Statutes. CHELCO respectfully suggests that the Commission's lack of regulatory or interpretive authority under Chapter 425 precludes it from undertaking that system-wide analysis. From a more practical standpoint, the Commission must decide if it wants to expand the scope of its review - now limited under Section 366.04(2)(e) to an assessment of the nature of the area involved and the existing and future capabilities of the providers – to a full scale analysis of the cooperative's service area each and every time a dispute is raised as to a new subdivision or commercial plaza that extends into municipal boundaries.

Commission has jurisdiction to apply Section 366.04 standards to the area subject to the dispute, and in so doing may consider whether, as a factual matter, the area in dispute is "rural" or "urban" in nature. However, unless and until the legislature grants the Commission the authority to construe Chapter 425, and to make qualitative and quantitative judgments as to the scope of a cooperative's overall service area, CHELCO will assert that the Commission's jurisdiction under Chapter 366 is limited to those elements of Chapter 425 necessary to determine the characteristics of the area in dispute, and the capability of the cooperative to serve that area.

Section 425.04(4), Florida Statutes, grants the following legislative authority to rural electric cooperatives:

> [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 . . .

In addition, Section 425.03(1), defines "rural area" as "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." Gulf Power has argued that the Commission must undertake a complete analysis of CHELCO's multi-county service area in order to determine the ability of CHELCO to serve Freedom Walk, and in so doing interpret and construe Chapter 425, determine how many members CHELCO serves in what it characterizes as "non-rural areas," and determine what percentage of CHELCO's members are served in and out of the boundaries of various political subdivisions throughout the CHELCO service area. It is, and will remain the position of CHELCO that the Commission has neither the jurisdiction nor the expertise to decide percentages of cooperative members, whether the cooperatives are, throughout their entire

service areas, operating in "rural areas," or even such fundamental issues as what, under Florida law, constitutes an "unincorporated city, town, village or borough."

With respect to the Commission jurisdiction issue, Gulf recited the decision in *In Re: Petition of Peace River Electric Cooperative Inc. against Florida Power & Light Co.*, 85 FPSC 10:120 (Docket No. 840293-EU, Order No. 15210, October 8, 1985) ("PRECO") as instructive. (Motion pp. 12, 13). Indeed, there is agreement that *PRECO* is instructive. However, Gulf has misconstrued or failed to acknowledge those portions of that order pertaining to the limits of the Commission's jurisdiction over Chapter 425 and rural electric cooperatives.

In *PRECO*, FPL argued, in part, that because the Commission did not have regulatory authority over PRECO, it could not compel the cooperative to serve all customers in a disputed area, as it could with FPL. Thus, FPL asserted that the Commission could not resolve the dispute in favor of the unregulated PRECO. The Commission did not agree. Gulf included a portion of the Commission's order in its motion (p. 12) but omitted the following:

> FPL maintains that the Commission could not compel PRECO to serve an application for service because the Commission does not have regulatory jurisdiction over cooperatives. This proposition is erroneous. FPL is ignoring the Legislature's grant to the Commission of jurisdiction over rural electric cooperatives expressly for the purpose of resolving territorial disputes. This grant of jurisdiction carries with it the implied power to enforce any such decision pursuant to that jurisdiction. Any other interpretation of the law would render the Commission's jurisdiction over cooperatives, for the purpose of resolving territorial disputes, meaningless.
>
> Additionally, FPL is ignoring the fact that PRECO is permitted, by Florida Statutes, to serve customers who are not members of the cooperative. Although this permission is limited by the statute, the fact remains that the ability to do so does exist. This is not to say that the Commission can, in any circumstance, require PRECO to serve any customer within the state who may request service or that PRECO has an absolute duty to serve anyone requesting service. Although this issue was raised in this proceeding, the issue is truly irrelevant to any present determination by the Commission because the Commission is

> attempting to only deal with the disputed area. Therefore, we find that although a cooperative comes within the Commission's jurisdiction to resolve territorial disputes pursuant to Section 366.04(2)(e), Florida Statutes, by either petitioning for relief or responding to a petition filed by another utility and acknowledging that a dispute exists, then the cooperative cannot refuse to serve a customer located in that disputed area resolved by the Commission. Chapter 366, Florida Statutes, specifically gives the Commission jurisdiction over cooperatives for this purpose. The Commission's jurisdiction is not inconsistent with Chapter 425, Florida Statutes, which does not prohibit cooperatives from serving non-members and in fact, actually provides for it. Sections 425.04(4) and 425.09(1), Florida Statutes.

CHELCO takes no issue with the scope of the Commission's jurisdiction as set forth in *PRECO*. That jurisdiction is limited to resolving disputes over a particular area, and if such dispute is resolved in favor of the cooperative, to make sure that the cooperative provides adequate and reliable service to that area. It is not, as Gulf urges, a broad grant of jurisdiction to determine the appropriate scope and limitations regarding the cooperative's system-wide service area. CHELCO does not claim that the Commission is without authority to compel it to serve any person requesting service within Freedom Walk, regardless of whether that person is a member or a non-member, and has made no such argument in this case. What CHELCO does assert is that the decision must be limited to the nature of and the service to the affected area, and not be based on issues that are far removed - physically, legally, and jurisdictionally - from the disputed area.

As a final point, the Supreme Court and the Commission have cited Section 366.045(5), Florida Statutes, the grid bill, as appropriate for consideration in resolving territorial disputes and agreements. A key issue to be resolved in this docket is whether awarding CHELCO's historic and current service area to Gulf will result in uneconomic duplication. Gulf does not dispute that an extension of its existing line will result in duplication of CHELCO facilities presently in place (Interrogatory 13, CHELCO's First Set of Interrogatories). Thus, if the Commission accepts the

position of Gulf Power, it would be encouraging, not discouraging, duplication. In *Lee County Electric Cooperative v. Marks*, 501 So.2d 585 (Fla. 1987), a customer within the service area of LCEC as defined in a territorial agreement, constructed a line approximately 2 miles to a power delivery point within Florida Power and Light (FPL) territory in order to take service from FPL. In reversing the Commission's dismissal of the petition filed by LCEC, the court said:

> . . . the ruling establishes a policy which dangerously collides with the entire purpose of territorial agreements, as well as the PSC's duty to police "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." §366.04(3), Fla. Stat. (1985). (Emphasis supplied).[3]

Id.

To bring this response back to the issue at hand, it is clear that there is no strict legal requirement under either Section 366.04 or Chapter 425, Florida Statutes that compels the award of the disputed territory to Gulf, or that prevents CHELCO from serving the area. Gulf asserts that the law is "clear and unambiguous" that CHELCO cannot serve Freedom Walk because the area in dispute will be within the city limits of Crestview. As set forth herein, there is no support in any statute, judicial opinion, or Commission order for Gulf's assertion. Even Gulf admits by way of its discovery responses that there is no legal authority preventing CHELCO, or any other rural electric cooperative, from serving a disputed area solely by virtue of its being within the limits of a political subdivision.[4] Based on the foregoing, there are disputes of fact and law that prevent the entry of a Summary Final Order. In that regard, the Commission should review the

[3] Ch. 89-292 renumbered subsection 366.04 (3) to subsection 366.04(5) but did not change the language.

[4] To the extent the law is "clear and unambiguous," CHELCO asserts - with the written authority of the legislature, the Supreme Court, and the Commission behind it – that it is clear and unambiguous that CHELCO is entitled, as a matter of law, to serve Freedom Walk, so long as the Commission determines that, as a matter of fact, CHELCO has the capability to do so, and that the disputed area does not exhibit characteristics of urbanization under the standards established in Section 366.04(2)(e), Florida Statutes.

facts, and in so doing consider the lack of any urbanized characteristics of the disputed area; the fact that CHELCO is not "initiating" service to the area at issue but currently has lines on, at, and around the property; that Gulf's nearest 3 phase lines are over 2,000 feet from the property, and would have to cross over CHELCO's lines to access the disputed area; that the award of the disputed territory to Gulf will result in the uneconomic duplication of facilities under Section 366.04(5); that such duplication materially and adversely affects CHELCO's existing and planned investment in the disputed area; that CHELCO has been serving the area for over 40 years; and that the area was in the past and is now "rural" in its nature and characteristics. CHELCO believes that, if asked, Gulf might dispute some or all of the facts just recited. Therefore, they must be resolved through a fact-finding hearing. That hearing has been set, the parties are moving forward expeditiously and in good faith, and those efforts should not be derailed by Gulf's meritless Motion for Summary Final Order.

For the reasons set forth herein, Gulf Power has failed to demonstrate that a Summary Final Order is appropriate. There are genuine disputed issues of law and material fact, and those disputes must be resolved through a fact-finding hearing to reach a decision in this dispute pursuant to Chapter 366, Florida Statues.

Respectfully submitted this 28th day of February, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U. S. Mail this 28th day of February, 2011.

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