Diamond Williams 100304-EU

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Sent: Friday, May 06, 2011 4:30 PM
To: Filings@psc.state.fl.us
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Subject: Gulf Power Company's Motion for Summary Final Order
Attachments: 5.6.11 Gulf Power Company's Motion for Summary Final Order.pdf

A. s/Terry A. Davis
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B. Docket No. 100304-EU

C. Gulf Power Company

D. Document consists of 56 pages

E. The attached document is Gulf Power Company's Motion for Summary Final Order.

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GULF POWER
A SOUTHERN COMPANY

May 6, 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 Summary Final Order, filed by electronic mail in the above referenced docket.

Sincerely,

Terry A Davis

nbm

Enclosure

cc: Beggs & Lane
Jeffrey A. Stone

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company	Docket No.	100304-EU
	Date:	May 6, 2011

GULF POWER'S MOTION FOR SUMMARY FINAL ORDER

COMES NOW, Gulf Power Company ("Gulf" or "Gulf Power"), 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, and moves for a summary final order determining that Choctawhatchee Electric Cooperative, Inc. ("CHELCO") is prohibited, as a matter of law, from serving the area that is the subject of the instant territorial dispute.

PRELIMINARY STATEMENT

On February 11, 2011, Gulf Power filed a motion for summary final order seeking the same relief that is sought in the instant motion. On April 14, 2011, Commission Staff issued a recommendation that the Commission deny Gulf Power's motion. Staff's recommendation stated as follows: "Until the parties have had the opportunity to proceed with discovery and file rebuttal testimony, staff recommends that it is premature to decide whether a general issue of material fact exists." (Id. at page 13) In light of Staff's view that the motion was premature, Gulf Power withdrew its motion and reserved its right to file another motion for summary final order prior to the commencement of the evidentiary hearing. Rebuttal testimony was filed on April 27, 2011, and discovery is now complete. Gulf submits that its motion is now ripe for resolution and respectfully requests that the Commission enter a ruling on the motion at the outset of the evidentiary hearing scheduled for May 17-18, 2011.

SUMMARY OF RELIEF REQUESTED

Gulf Power seeks a summary final order determining that CHELCO is prohibited, as a matter of law, from serving the area that is the subject of the instant territorial dispute. The area in dispute is decidedly non-rural in nature. Due to the non-rural nature of the area, CHELCO is prohibited from serving it by virtue of the limitations contained in Chapter 425, Florida Statutes.

APPLICABLE STANDARD

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined 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 entry of a final order. Similarly, Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact." Summary judgment is a device which "[a]llows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting the courts to husband scarce judicial resources." 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 56.02 (3d ed. 1999).

FACTUAL SUMMARY

The relevant facts for purposes of this motion are not subject to dispute. Gulf Power is an investor-owned electric utility subject to the jurisdiction of the Florida Public Service Commission (the "Commission") pursuant to Chapter 366, Florida Statutes. (CHELCO Petition at ¶ 4) CHELCO is a rural electric cooperative organized and existing under Chapter 425, Florida Statutes. (CHELCO Petition at ¶ 2) The Commission has jurisdiction over CHELCO, pursuant to section 366.04(5), Florida Statutes, for the planning, development and maintenance

of a coordinated electric power grid to avoid uneconomic duplication of distribution, transmission and generation facilities. (CHELCO Petition at ¶ 5) Moreover, pursuant to section 366.04(2)(e), Florida Statutes, the Commission possesses exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and investor-owned utilities. (CHELCO Petition at ¶ 5)

This territorial dispute involves a proposed mixed-use development known as Freedom Walk. According to the plain language of CHELCO's petition, Freedom Walk is located entirely within the municipal boundaries of the City of Crestview, Florida. (CHELCO Petition at ¶ 6 and Exhibit "A" thereto) Section 425.03(1), Florida Statutes, defines a "rural area" as "[a]ny 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." § 425.03(1), Fla. Stat. Crestview, Florida is an incorporated municipality with a population in excess of 2,500 persons. (Affidavit of Theodore S. Spangenberg, Jr. at ¶ 4)[1] Gulf Power serves approximately 9,965 customers within the City of Crestview pursuant to a franchise agreement. (Gulf Answer at ¶ 6 and Affidavit of Spangenberg at ¶ 4) Gulf has provided continuous service to the City of Crestview since 1928 –nearly thirteen years before CHELCO's formation. (Id.) In its First Request for Admissions to CHELCO (Nos. 1-10), Gulf Power asked CHELCO to admit that the Freedom Walk development does not constitute a "rural area" as defined by section 425.03(1), Florida Statutes. (Request No. 4)[2] In response to this request, CHELCO stated the following:

> Without admitting or denying whether the term "rural area" as Gulf Power has defined it is dispositive of any issue in this territorial dispute,

[1] A true and correct copy of the affidavit of Theodore S. Spangenberg, Jr., is attached hereto and incorporated herein as Exhibit "A."

[2] A true and correct copy of Gulf Power's First Request for Admissions to CHELCO (Nos. 1-10) is attached hereto and incorporated herein as Exhibit "B."

> CHELCO admits that a majority of the Freedom Walk Development (with the exception of a portion of the proposed Development bordering the south side of Old Bethel Road between Jones Road and Normandy Road) does not constitute a "rural area" as Gulf Power has defined that term in the Definitions section of its First Request for Admissions.

(CHELCO's Response to Request No. 4 of Gulf's First Request for Admissions)[3] (emphasis supplied)

The area described as an "exception" in CHELCO's response consists of three contiguous parcels, totaling approximately five acres, which are bordered on the west by property owned by Emerald Coast Partners, L.L.C., --which is the developer of Freedom Walk--, on the south by property owned by the YMCA of Florida's Emerald Coast, Inc., --which will be part of the Freedom Walk development--, and on the north/east by Old Bethel Road. (Affidavit of Spangenberg at ¶ 5) The parcels are owned, respectively – going from east to west, by Shirley Burt, James Moore, and Ruby Hughes. (Id.) The parcels are not currently within the municipal limits of the City of Crestview, are not reflected as part of the disputed area on Exhibit "A" to CHELCO's petition and are not included within the boundaries of the Freedom Walk Community Development District that was formed by the developer and the City of Crestview pursuant to Chapter 190, Florida Statutes, for the purpose of financing the infrastructure for the development. (Id.) However, even if these excepted parcels were to be included in the "disputed area" for the purposes of the summary relief requested in this motion, no less than approximately 97% --substantially all-- of the land area on which the Freedom Walk development will be

[3] A true and correct copy of CHELCO's Response to Gulf Power's First Request for Admissions to CHELCO (Nos. 1-10) is attached hereto and incorporated herein as Exhibit "C."

located, will lie within the municipal limits of the City of Crestview and is subject to CHELCO's admission as not constituting a "rural area."[4] (Id.)

ARGUMENT AND ANALYSIS

The issue presented in this motion hinges solely on a basic question of statutory interpretation, and is therefore particularly appropriate for summary resolution. Chapter 425, Florida Statutes, is known as the Rural Electric Cooperative Law. See, § 425.01, Fla. Stat. The Rural Electric Cooperative law sets forth the purpose, powers, and duties of rural electric cooperatives operating in the State of Florida. Section 425.02, Florida Statutes, titled "*Purpose*" provides that rural electric cooperatives such as CHELCO are organized for the sole purpose "[o]f supplying electric energy and promoting and extending the use thereof in rural areas." § 425.02, Fla. Stat. (emphasis supplied) Section 425.03(1), Florida Statutes, defines a "rural area" as "[a]ny 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." § 425.03(1), Fla. Stat. Section 425.04(4), Florida Statutes, titled "*Powers*" further provides that a cooperative 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." § 425.04(4), Fla. Stat. (emphasis supplied) "Where the words of a statute are clear and unambiguous, judicial interpretation is not

[4] The remaining three percent of the land area would still be considered non-rural under section 425.03(1), Florida Statutes. See, In Re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company, 77 F.P.S.C. 321 at * 2 (Docket No. 760510-EU, Order No. 7961, Sept. 16, 1977) ("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.")

appropriate to displace the expressed intent." Citizens v. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983).

Chapter 425, Florida Statutes, clearly and unambiguously places limitations on the purpose and powers of Florida's rural electric cooperatives. The Commission and Florida's courts have a rich history of recognizing these purposeful limitations. Indeed, "[t]he case law is clear that the intent of Chapter 425, Florida Statutes, should be strongly considered in determining whether a cooperative should serve a particular area." In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90 at *4 (Docket No. 830271-EU, Order No. 12324, Aug. 4, 1983). (emphasis supplied)

This rich history dates back to at least 1960. In Tampa Electric Co. v. Withlacoochee River Coop., the Florida Supreme Court held that

> [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 Chapter 425 Florida Statutes:

> 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)

In In Re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company, 77 F.P.S.C. 321 (Docket No. 760510-EU, Order No. 7961, Sept. 16, 1977) the Commission reached a similar conclusion:

> 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. (emphasis supplied)

In clear recognition of the statutory purpose of, and limitations on, rural electric cooperatives, the Commission has repeatedly required a threshold determination in cooperative territorial disputes of whether the area in dispute is "rural" in nature. For example, in In Re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc. 84

F.P.S.C. 9:121 (Docket No. 830484-EU, Order No. 13668, Sept. 10, 1984), the Commission observed as follows: "In the past, we have looked to whether the area is urban in determining whether a cooperative is precluded from serving the area. In this case, because the area is rural, we find that the cooperative is not legally prohibited from serving the area." Id. at 2. (emphasis supplied) In the "Conclusions of Law" section of the same order, the Commission reiterated that "[e]vidence was presented at the hearing that the disputed area is a 'rural area.' (TR 247). As such, Chapter 425 would permit Gulf Coast to serve the disputed area." Id. at 7. (emphasis supplied)

Similarly, in In Re: Petition of Gulf Power Company Involving a Territorial Dispute with Gulf Coast Electric Cooperative, 84 F.P.S.C. 146 (Docket No. 830154-EU, Order No. 12858, Jan. 10, 1984), the Commission concluded that "[b]ecause the disputed area has been determined to be rural for purposes of this proceeding, Chapter 425 does not prohibit the cooperative from serving it." Id. at 5. (emphasis supplied)

In Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Company in Washington County, 86 F.P.S.C. 5:132 (Docket No. 850247-EU, Order No. 16105, May 13, 1986) the Commission found that:

> The area has no urban characteristics at all. It is unincorporated, and has less than 2500 inhabitants; the nearest urban centers are Chipley and Southport, which are approximately 18 miles away. There is only one paved road within the subdivision boundary. There are no municipal services such as fire protection, water systems, sewer systems, sanitary systems, police protection, storm water drainage, post offices and no other utilities, except possibly telephone service. The "nature of the area" is raised as an issue because of its reference in Section 366.04(2)(e), Florida Statutes. We find that the disputed area is rural for the purposes of this docket. In the past, we have looked to whether the area is urban in determining whether a cooperative is precluded from serving the area. In this case, because the area is rural, we find that the cooperative is not legally prohibited from serving the area.

Id. at 2-3. (emphasis supplied)

In In Re: Petition of West Florida Electric Cooperative Association, Inc. to Resolve a Territorial Dispute with Gulf Power Company in Washington County, 85 F.P.S.C. 11:12 (Docket No. 850048-EU, Order No. 15322, Nov. 1, 1985) the Commission found as follows: "In the past, we have looked to the urbanization of a disputed service territory in determining whether a Cooperative is precluded from serving the area. We find that the area lacks sufficient urban characteristics which would exclude electric service by the Cooperative." Id. at 2. (emphasis supplied)

In In Re: Petition of Gulf Power Company to Resolve a Territorial Dispute with West Florida Electric Cooperative, Inc. in Holmes County, 88 F.P.S.C. 2:184 (Docket No. 870235-EI, Order No. 18886, Feb. 18, 1988) the Commission determined that "[t]he rural nature of the area, although somewhat mitigated by the area's proximity to the Town of Ponce de Leon, qualifies it as an area that both utilities are able to serve." Id. at 4. (emphasis supplied)

The clear import of the precedent and statutory authority outlined above is that a rural electric cooperative lacks statutory authority under Florida law to prospectively serve non-rural areas. Rather, the organic intended purpose of rural electric cooperatives is to serve rural areas which cannot otherwise reasonably be served by existing public utilities. In the present case, the Freedom Walk development is plainly not a "rural area" as defined by section 425.03(1), Florida Statutes. Consequently, CHELCO is prohibited, as a matter of law, from serving it. In response to this motion, CHELCO will undoubtedly note that it --and other rural electric cooperatives in Florida-- currently provide electric service in some limited non-rural areas. To Gulf's knowledge, those limited areas were rural in nature at the time service was initially commenced. (Affidavit of Spangenberg at ¶ 6) Areas do change in character over time and some change from

rural to non-rural. (Id.) Section 425.04(4), Florida Statues, has been interpreted to allow cooperatives to continue to serve a number of persons in non-rural areas which does not exceed 10 percent of the cooperative's total membership. The most specific evidence of this can be found in a ruling by the United States Court of Appeals for the Eleventh Circuit in the case of Alabama Electric Cooperative v. First National Bank of Akron, 684 F.2d 789 (11th Cir. 1982). Clearly, however, a distinction must be drawn between initiating service to an existing, non-rural area and maintaining service to a rural area which, over time, develops non-rural characteristics. The former instance being in clear contradiction to the existing statutory scheme and the Commission's interpretation of the same. By this motion, Gulf Power is not seeking a determination that CHELCO must relinquish service to non-rural areas which it presently serves. Rather, Gulf simply requests that the Commission determine that CHELCO is not entitled to extend service to this additional non-rural area --a result clearly in keeping with Chapter 425, Florida Statutes, and the Commission's territorial dispute precedent. This result is also in keeping with precedent from other states. For example, in two separate cases the Supreme Court of South Carolina interpreted statutes similar to Chapter 425, Florida Statutes, as barring rural electric cooperatives from initiating service to areas which had recently been annexed into municipalities.[5]

DISPUTED ISSUES OF MATERIAL FACT

As stated above, entry of a motion for summary final order is not proper if there remain outstanding any disputed issues of material fact. Gulf expects CHELCO will contend that there are a number of facts which are still in dispute. These facts include the necessary facilities and associated costs for both parties to extend service to the development, uneconomic duplication of facilities, and historical service to the area. Gulf would readily agree with such a contention.

[5] Copies of these decisions are attached hereto as Exhibit "D" for convenience.

Importantly, however, those factual issues only become material --the applicable standard in this proceeding-- if CHELCO has the legal authority to serve the development. Because CHELCO does not have that authority, it is not necessary to resolve these collateral factual issues. In fact, it is Gulf Power's view that doing so would be an unnecessary and unproductive expenditure of this Commission's time and resources.

There are only three factual issues that are material to the resolution of this motion: (1) whether CHELCO is a rural electric cooperative under Chapter 425, Florida Statutes; (2) whether the City of Crestview is an incorporated city having a population in excess of 2,500 persons; and (3) whether the Freedom Walk development area constitutes a "rural area" as defined by section 425.03(1), Florida Statutes. CHELCO will concede that it is a rural electric cooperative under Chapter 425, Florida Statutes, and that the City of Crestview is an incorporated city having a population in excess of 2,500 persons. Gulf anticipates that CHELCO will contend that a dispute exists with respect to issue (3) because of CHELCO's position that there are a very small number of out-parcels on the northern boundary of the proposed development that do not fall within the Crestview city limits. However, CHELCO's argument is in direct contradiction to the plain wording of its Petition. In paragraph 6 of its Petition, CHELCO states that the boundaries of the disputed area are set forth on Exhibit "A"[6]; that "[t]he development is within the City of Crestview's corporate limits"; and that the area immediately surrounding the proposed development is "[n]ow within the city limits of the City of Crestview." (emphasis supplied) In its Answer, Gulf agreed with these assertions and continues to agree with

[6] Note that the boundaries of the development are reflected on CHELCO's Exhibit "A," by bold black lines. These lines only include areas within the city limits of Crestview and clearly do not encompass the unincorporated out-parcels that CHELCO now claims are part of the development. The legend on Exhibit "A," does not speak to the purpose of the bold black lines. However, any question as to whether the bold black lines are intended to reflect CHELCO's understanding of the development's boundaries is resolved by the legend at the bottom of Exhibits "C" and "D" to CHELCO's Petition. The legends on these exhibits clearly state that the bold black line is intended to reflect the "FreedomWalk Property."

them today. The law in Florida is very clear that a party is bound by its pleadings. For example, in Fernandez v. Fernandez, the Florida Supreme Court held as follows: "[a] party is bound by the party's own pleadings. There does not have to be testimony from either party concerning facts admitted by the pleadings. Admissions in the pleadings are accepted as facts without the necessity of further evidence at the hearing." 648 So.2d 712, 713 (Fla 1995). Similarly, in Zimmerman v. Cade Enterprises, Inc., the Florida First District Court of Appeal held that "[i]t is well settled that facts admitted in pleadings are conclusively established on the record and require no further proof." 34 So.3d 199, 203 (Fla. 1st DCA 2010) (emphasis supplied).

Having clearly acknowledged in its Petition that the Freedom Walk development is "within the City of Crestview's corporate limits," CHELCO cannot now depart from its pleadings in an attempt to manufacture a disputed issue of material fact. By CHELCO's own pleadings, the Freedom Walk development area is located entirely within the City of Crestview's corporate limits and is therefore not "rural" as defined by section 425.03(1), Florida Statutes. Consequently, there is no need for the Commission to engage in any additional fact-finding, including, but not limited to, an assessment of whether CHELCO serves a number of persons in other non-rural areas which exceeds 10% of its number of members.

COMMISSION JURISDICTION

In its Prehearing Statement, CHELCO contends that the Commission lacks jurisdiction to interpret and apply Chapter 425, Florida Statutes, in resolving this territorial dispute. See, CHELCO's position statement concerning Issue 2(a). Gulf Power respectfully submits that this contention is belied by the plain language and purpose of Chapter 366, Florida Statutes and an abundance of Commission precedent.

Chapter 366, Florida Statutes, provides the Commission with exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and other utilities. See, § 366.04(2)(e), Fla. Stat. and Re Florida Power Corporation, 1992 WL 457462 at *3 (Docket No. 920949-EU, Order No. PSC-92-1468-FOF-EU (Fla. 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)

Chapter 366, Florida Statutes, also provides the Commission with jurisdiction over cooperatives and other electric utilities for the planning, development and maintenance of a coordinated electric power grid to avoid uneconomic duplication of distribution, transmission and generation facilities. See, § 366.04(5), Fla. Stat. and In Re: Petition to Resolve Territorial Dispute in Clay County between Clay Electric Cooperative, Inc. and Florida Power & Light Company, 90 F.P.S.C. 10:529 at * 1 (Docket No. 900284-EU, Order No. 23653, Oct. 23, 1990)

In its Prehearing Statement, CHELCO states that the Commission's jurisdiction is limited to addressing the factors outlined in 366.04(2)(e), Florida Statutes, --the intended implication being that section 366.04(2)(e), Florida Statutes, precludes the Commission from consideration of Chapter 425 in resolving territorial disputes. Section 366.04(2)(e), Florida Statutes, provides guidance as to the factors the Commission may consider in resolving territorial disputes:

> 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)

Foremost, CHELCO's argument ignores the fact that section 366.04(2)(e) allows the Commission to consider the "nature of the area involved." Certainly, a determination of whether an area is "rural" is a proper consideration in assessing the "nature of the area involved." As evidenced by the precedent cited at pages seven through nine above, the Commission has routinely assessed whether areas are "rural" under Chapter 425 in deciding whether a cooperative was "legally prohibited" or "precluded" from serving them. Moreover, 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.

Chapter 425, Florida Statutes, is clearly a factor which the Commission has considered in past disputes --and must consider in the present dispute-- in exercising its jurisdiction to resolve territorial disputes under section 366.04(2)(e) and to plan, develop and coordinate the electric power grid under section 366.04(5), Florida Statutes. 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. 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, 85 F.P.S.C. 10:120 (Docket No. 840293-EU, Order No. 15210, Oct. 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 an impediment to resolution of the dispute.

CHELCO's contention that the Commission lacks jurisdiction to determine issues under Chapter 425, Florida Statutes, 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, Florida Statutes, in resolving territorial disputes. Indeed, the Commission has explicitly held that "[t]he intent of Chapter 425, Florida Statutes, should be strongly considered in determining whether a cooperative should serve a particular area." In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90 at *4 (Docket No. 830271-EU, Order No. 12324, Aug. 4, 1983). (emphasis supplied) See also, In Re: Petition of Gulf Power Company Involving Complaint and Territorial Dispute with Alabama Electric Cooperative, Inc., 84 F.P.S.C. 12:103 (Docket No. 830428-EU, Order No. 13926, Dec. 21, 1984) (interpreting Chapter 425, Florida Statutes, as a whole, including an analysis of "the purpose behind it" in determining that cooperative was not precluded from changing wholesale suppliers under section 425.04(4), Florida Statutes); In Re: Territorial Dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., 84 F.P.S.C. 9:121 (Docket No. 830484-EU, Order No. 13668, Sept. 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, 84 F.P.S.C. 146 (Docket No. 830154-EU, Order No. 12858, Jan. 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, 77 F.P.S.C. 321 (Docket No. 760510-EU, Order No. 7961, Sept. 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, Docket No. 74551-EU, Order No. 7516, Nov. 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, Docket No. 74585-EU, Order No. 7040, Dec. 9, 1975 (determining area in dispute was "rural" as defined by section 425.03(1), Florida Statutes).

The Commission clearly has the authority to interpret and apply Chapter 425, Florida Statutes, in the context of resolving territorial disputes and in complying with its duty to plan, coordinate and maintain a coordinated electric power grid. In fact, 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.

CONCLUSION

Gulf Power requests that the Commission enter an order determining that CHELCO is prohibited, as a matter of law, from serving the Freedom Walk development at the outset of the evidentiary hearing scheduled for May 17-18, 2011. The relevant facts for the purpose of this

motion are not subject to dispute. The granting of the requested relief hinges entirely on a threshold question of law and is therefore particularly appropriate for disposition pursuant to a summary final order. Issuance of a summary final order will conserve the parties' and the Commission's valuable resources and, to the extent appellate resolution is sought, will facilitate appellate resolution of the threshold legal issues without the necessity of an evidentiary hearing.

CONFERENCE WITH COUNSEL

Gulf Power has conferred with counsel for CHELCO regarding this motion and is authorized to represent that CHELCO objects to the relief requested herein.

REQUEST FOR ORAL ARGUMENT

Gulf Power requests an opportunity to present oral argument on this motion.

Respectfully submitted this 6th day of May, 2011.

JEFFREY A. STONE
Florida Bar No.: 325953
RUSSELL A. BADDERS
Florida Bar No.: 007455
STEVEN R. GRIFFIN
Florida Bar No.: 0627569
Beggs & Lane
P.O. Box 12950
Pensacola, Florida 32591
(850) 432-2451
Attorneys for Gulf Power Company

EXHIBIT "A"

Affidavit of Theodore S. Spangenberg, Jr.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company	Docket No.	100304-EU
	Date:	May 6, 2011

AFFIDAVIT OF THEODORE S. SPANGENBERG, JR.

BEFORE ME, the undersigned authority, personally appeared Theodore S. Spangenberg, Jr., who is sworn and says the following information is true and correct according to Affiant's best knowledge and belief:

1. I am competent to testify, and have personal knowledge of the facts herein.

2. I am the Director of Military Affairs and Special Projects for Gulf Power Company. My business address is One Energy Place, Pensacola, Florida 32520.

3. As the Director of Military Affairs and Special Projects for Gulf Power Company, I have been closely involved with the instant territorial dispute and have advised the Company in connection with various other territorial disputes in which Gulf Power has been a party over the past thirty years.

4. I am personally familiar with the area that is the subject of the instant dispute known as the Freedom Walk Development. The Freedom Walk Development is located in Crestview, Florida. Crestview, Florida is an incorporated municipality with a population in excess of 2,500 persons. Gulf Power serves approximately 9,965 customers within the City of Crestview pursuant to a franchise agreement. Gulf has provided continuous service to the City of Crestview since 1928 – nearly thirteen years before Chelco's formation.

5. In its First Request for Admissions to Chelco (Nos. 1-10), Gulf Power asked Chelco to admit that the Freedom Walk Development does not constitute a "rural area" as defined by section 425.03(1), Florida Statutes. (Request No. 4) In response to this request, Chelco stated the following:

> Without admitting or denying whether the term "rural area" as Gulf Power has defined it is dispositive of any issue in this territorial dispute, CHELCO admits that a majority of the Freedom Walk Development (with the exception of a portion of the proposed Development bordering the south side of Old Bethel Road between Jones Road and Normandy Road) does not constitute a "rural area" as Gulf Power has defined that term in the Definitions section of its First Request for Admissions.

(Chelco's Response to Request No. 4 of Gulf's First Request for Admissions) (emphasis supplied)

The area described as an "exception" in Chelco's response consists of three contiguous parcels, totaling approximately five acres, which are surrounded on the west by property owned by Emerald Coast Partners, L.L.C. --which is the developer of Freedom Walk--, on the south by property owned by the YMCA of Florida's Emerald Coast, Inc. --which will be included within the Freedom Walk development--, and on the north/east by Old Bethel Road. The parcels are owned, respectively – going from east to west, by Shirley Burt, James Moore, and Ruby Hughes. The parcels are not currently within the municipal limits of the City of Crestview, are not reflected as part of the disputed area on Exhibit "A" to Chelco's petition and are not included within the boundaries of the Freedom Walk Community Development District that was formed by the developer and the City of Crestview pursuant to Chapter 190, Florida Statutes, for the purpose of financing the infrastructure for the development.[1] Even if these excepted parcels were to be included in the "disputed area" for the purposes of the summary relief requested in Gulf Power's Motion for Summary Final Order, no less than approximately 97% --substantially all-- of the land area on which the Freedom Walk Development will be located will lie within the municipal limits of the City of Crestview and is subject to Chelco's admission as not constituting a "rural area."

[1] A true and correct copy of the Crestview ordinance establishing the Freedom Walk Community Development District is attached hereto and incorporated herein as Exhibit "1."

6. Chelco --and other rural electric cooperatives in Florida-- currently provide electric service in some limited non-rural areas. However, at the time service was initially commenced, those areas were rural in nature. Areas do change in character over time and some change from rural to non-rural.

FURTHER AFFIANT SAITH NOT:

THEODORE S. SPANGENBERG, JR.

STATE OF FLORIDA

COUNTY OF ESCAMBIA

SWORN TO AND SUBSCRIBED BEFORE ME this 6th day of May, 2011, by affiant, who is personally known to me or who produced _____ driver's license as identification, and who took an oath.

Janie S. Payne
Notary Public, State of Florida
My Commission Expires: March 19, 2013

JANIE S. PAYNE
MY COMMISSION # DD872135
EXPIRES March 19, 2013
(407) 398-0153 FloridaNotaryService.com

EXHIBIT "1"

Ordinance No. 1378

Establishing the Freedom Walk Community Development District

ORDINANCE NO. 1378

AN ORDINANCE ESTABLISHING THE FREEDOM WALK COMMUNITY DEVELOPMENT DISTRICT PURSUANT TO CHAPTER 190, FLORIDA STATUTES; NAMING THE DISTRICT; DESCRIBING THE EXTERNAL BOUNDARIES OF THE DISTRICT; DESCRIBING THE FUNCTIONS AND POWERS OF THE DISTRICT; DESIGNATING PERSONS TO SERVE AS THE INITIAL MEMBERS OF THE DISTRICT'S BOARD OF SUPERVISORS; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Emerald Coast Partners, LLC, (hereinafter "Petitioner"), having obtained written consent to the establishment of the District by the owner of one hundred percent (100%) of the real property to be included in the District, petitioned The City of Crestview (the "City") to adopt an ordinance establishing the Freedom Walk Community Development District (the "District") pursuant to Chapter 190, Florida Statutes (2004); and

WHEREAS, Petitioner is a Limited Liability Company authorized to conduct business in the State of Florida and whose address is 4598 Paradise Isles, Destin Florida 32541; and

WHEREAS, all interested persons and affected units of general-purpose local government were afforded an opportunity to present oral and written comments on the Petition at a duly noticed public hearing conducted by the City on December 10, 2007; and

WHEREAS, upon consideration of the record established at that hearing, The City of Crestview determined that the statements within the Petition were true and correct, that the establishment of the District is not inconsistent with any applicable element or portion of the state comprehensive plan or the local government comprehensive plan, that the land within the District is of sufficient size, is sufficiently compact, and sufficiently contiguous to be developable as a functionally interrelated community, that the District is the best alternative available for delivering community development services and facilities to the area served by the District, that the services and facilities of the District will not be incompatible with the capacity and uses of existing local and regional community development services and facilities, and that the area to be served by the District is amenable to separate special-district governance; and

WHEREAS, establishment of the District will constitute a timely, efficient, effective, responsive and economic way to deliver community development services in the area described in the Petition.

NOW THEREFORE BE IT ORDAINED by the City of Crestview, Florida.

SECTION 1. AUTHORITY.

This ordinance is adopted in compliance with and pursuant to the Uniform Community Development District Act of 1980, Chapter 190, Florida Statutes as amended (the "Act").

SECTION 2. DISTRICT NAME.

There is hereby created a community development district situated entirely within The City limits of Crestview Florida, which District shall be known as "Freedom Walk Community Development District."

SECTION 3. EXTERNAL BOUNDARIES OF THE DISTRICT.

Encompassing approximately 179 acres, the external boundaries of the District are described in Exhibit A attached hereto.

SECTION 4. FUNCTION AND POWERS.

Pursuant to general law, the exclusive charter for each independent community development district established under Chapter 190, Florida Statutes, is the uniform community development district charter (the "Uniform Charter") as set forth in §190.006 through §190.041, Fla. Stat. This Uniform Charter is not subject to modification pursuant to §190.005(2)(d), Fla. Stat. The Uniform Charter grants certain general and special powers among which include the following:

(A) General Powers. The District and the District's Board of Supervisors are authorized to exercise all powers granted pursuant to the Uniform Charter of the Act as amended through the date hereof and as such may be amended from time to time. Said powers include, but are not limited to the power:

(1) To sue and be sued in the name of the district; to adopt and use a seal and authorize the use of a facsimile thereof; to acquire, by purchase, gift, devise, or otherwise, and to dispose of, real and personal property, or any estate therein, and to make and execute contracts and other instruments necessary or convenient to the exercise of its powers.

(2) To apply for coverage of its employees under the state retirement system in the same manner as if such employees were state employees, subject to necessary action by the District to pay employer contributions into the state retirement fund.

(3) To contract for the services of consultants to perform planning, engineering, legal, or other appropriate services of a professional nature. Such contracts shall be subject to public bidding or competitive negotiation requirements as set forth in §190.033, Florida Statutes.

(4) To borrow money and accept gifts; to apply for and use grants or loans of money or other property from the United States, the state, a unit of local government, or any person for any district purposes and enter into agreements required in connection therewith; and to hold, use, and dispose of such moneys or property for any district purposes in accordance with the terms of the gift, grant, loan, or agreement relating thereto.

(5) To adopt rules and orders pursuant to provisions of Chapter 120, Florida Statutes, prescribing the powers, duties, and functions of the officers of the district; the conduct of the business of the district; the conduct of the business of the district; the maintenance of records; and form of certificates evidencing tax liens and all other documents and records of the district. The board may also adopt administrative rules with respect to any of the projects of the district and define the area to be included therein. The board may also adopt resolutions which may be necessary for the conduct of district business.

(6) To maintain an office at such place or places as it may designate within the county in which the district is located or within the boundaries of a development of regional impact or a Florida Quality Development, or a combination of a development of regional impact and a Florida Quality Development, which includes the district, which office must be reasonably accessible to the landowners. Meetings pursuant to §189.417(3), Florida Statutes, of a district within the boundaries of a development of regional impact of Florida Quality Development, or a combination of a development of regional impact and a Florida Quality Development, may be held at such office.

(7) (a) To hold, control, and acquire by donation, purchase, or condemnation, or dispose of, any public easements, dedications to public use, platted reservations for public purposes, or any reservations for those purposes authorized by this act and to make use of such easements, dedications, or reservations for any of the purposes authorized by this act.

(b) When real property in the district is owned by a governmental entity and subject to a ground lease as described in §190.003(13), Florida Statutes, to collect ground rent from landowners pursuant to a contract with such governmental entity and to contract with the county tax collector for collection of such ground rent using the procedures authorized in §197.3631, Florida Statutes, other than the procedures contained in §197.3632, Florida Statutes.

(8) To lease as lessor or lessee to or from any person, firm, corporation, association, or body, public or private, any projects of the type that the district is authorized to undertake and facilities or property of any nature for the use of the district to carry out any of the purposes authorized by this act.

(9) To borrow money and issue bonds, certificates, warrants, notes, or other evidence of indebtedness as hereinafter provided; to levy such tax and special assessments as may be authorized; and to charge, collect, and enforce fees and other user charges.

(10) To raise, by use charges or fees authorized by resolution of the board, amounts of money which are necessary for the conduct of the district activities and services and to enforce their receipt and collection in the manner prescribed by resolution and not inconsistent with law.

(11) To exercise within the district, or beyond the district with prior approval by resolution of the governing body of the county, if the taking will occur in an unincorporated area or with prior approval by resolution of the governing body of the municipality if the taking will occur within a municipality, the right and power of eminent domain, pursuant to the provisions of Chapters 73 and 74, Florida Statutes, over any property within the state, except municipal, county, state and federal property, for the uses and purposes of the district relating solely to water, sewer, district roads, and water management, specifically including, without limitation, the power for the taking of easements for

the drainage of the land of one person over and through the land of another.

(12) To cooperate with, or contract with, other governmental agencies as may be necessary, convenient, incidental, or proper in connection with any of the powers, duties, or purposes authorized herein or by the Act.

(13) To assess and impose upon lands in the district ad valorem taxes as proved by the Act.

(14) To determine, order, levy, impose, collect, and enforce special assessments pursuant to the act and Chapter 170, Florida Statutes. Such special assessments may, in the discretion of the district, be collected and enforced pursuant to the provisions of §197.3631, 197.3632, and 397.3635, or Chapter 170, Florida Statutes.

(15) To exercise all of the powers necessary, convenient, incidental, or proper in connection with any of the powers, duties, or purposes authorized by the Act.

(16) To exercise such special powers as may be authorized by this Section and the Act.

(B) Special Powers. The District and the District's Board of Supervisors are authorized to exercise all special powers granted pursuant to the Uniform Charter of the Act as amended through the date hereof and as such may be amended from time to time.

(1) To finance, fund, plan, establish, acquire, construct, reconstruct, enlarge or extend, equip, operate, and maintain systems, facilities, and basic infrastructures for the following:

(a) Water management and control for the lands within the district and to connect some or any of such facilities with roads and bridges.

(b) Water supply, sewer and wastewater management, reclamation, and reuse or any combination thereof, and to construct and operate connecting intercepting or outlet sewers and sewer mains and pipes and water mains, conduits, or pipelines in, along, and under any street, alley, highway, or other public place or ways, and to dispose of any effluent, residue, or other byproducts of such system or sewer system.

(c) Bridges or culverts that may be needed across any drain, ditch, canal, floodway, holding basin, excavation, public highway, tract, grade, fill, or cut and roadways over levees and embankments, and to construct any and all of such works and improvements across, through, or over any public right-of-way, highway, grade, fill, or cut.

(d) 1. District roads equal to or exceeding the specifications

of the city in which such district roads are located, and street lights.

2. Buses, trolleys, transit shelters, ridesharing facilities and services, parking improvements, and related signage.

(e) Investigation and remediation costs associated with the cleanup of actual or perceived environmental contamination within the district under the supervision or direction of a competent governmental authority unless the covered costs benefit any person who is a landowner within the district and who caused or contributed to the contamination.

(f) Conservation areas, mitigation areas, and wildlife habitat, including the maintenance of any plant or animal species, and any related interest in real or personal property.

(g) Any other project within or without the boundaries of a district when a local government issued a development order pursuant to §380.06 or §380.061, Florida Statutes, approving or expressly requiring the construction or funding of the project by the district, or when the project is the subject of an agreement between the district and a governmental entity and is consistent with the local government comprehensive plan of the local government within which the project is to be located.

(C) Additional Powers. Consent is hereby given to the District and the District's Board of Supervisors to plan, establish, acquire, construct or reconstruct, enlarge or extend, equip, operate, and maintain systems and facilities for parks and facilities for indoor and outdoor recreational, cultural, and educational uses as authorized and described by Section 190.012(2), Florida Statutes.

SECTION 5. BOARD OF SUPERVISORS.

The five [5] persons designated to serve as initial members of the District's Board of Supervisors are as follows: BRUCE HOULE, JAMES MOORE, DAN MARCH, SAM COBB, and KEN WRIGHT. All of the above-listed persons are residents of the State of Florida and citizens of the United States of America.

SECTION 6. SEVERABILITY.

If any provision of this ordinance is held to be illegal or invalid, the other provisions shall remain in full force and effect.

SECTION 7. EFFECTIVE DATE.

This Ordinance shall take effect pursuant to general law.

DONE AND ADOPTED in regular session this 10th day of December, 2007.

THE CITY OF CRESTVIEW, FLORIDA

Charles F. Wells, Council President

Attest:

Janice Young, City Clerk

Approved as to form by The City of Crestview Attorney

Ben Holley, City Attorney

Approved as to form by The City of Crestview Mayor

David Cadle, Mayor

EXHIBIT 'A'

LEGAL DESCRIPTION:

COMMENCE AT THE NORTHWEST CORNER OF SECTION 5, TOWNSHIP 3 NORTH, RANGE 23 WEST; THENCE S 00°15'29" W A DISTANCE OF 2642.79'; THENCE S 89°50'53" E A DISTANCE OF 2628.52'; THENCE N 00°07'46" E A DISTANCE OF 2585.48'; THENCE WITH A CURVE TURNING TO THE LEFT WITH A RADIUS OF 11413.80', WITH A DELTA ANGLE OF 00°11'58", WITH AN ARC LENGTH OF 39.74', WITH A CHORD BEARING OF S 87°30'36" W, WITH A CHORD LENGTH OF 39.74', THENCE S 87°26'46" W A DISTANCE OF 782.02'; THENCE N 39°16'39" W A DISTANCE OF 130.26'; THENCE N 89°59'59" W A DISTANCE OF 523.66'; THENCE N 39°49'00" W A DISTANCE OF 118.40'; THENCE N 50°11'00" E A DISTANCE OF 104.61'; THENCE N 39°49'00" W A DISTANCE OF 430.00'; THENCE N 50°11'00" E A DISTANCE OF 305.93"; THENCE N 39°16'39" W A DISTANCE OF 2.45'; THENCE WITH A CURVE TURNING TO THE LEFT WITH A RADIUS OF 764.31'; WITH A DELTA ANGLE OF 18°11'53, WITH AN ARC LENGTH OF 242.76', WITH A CHORD BEARING OF N 49°09'12 W, WITH A CHORD LENGTH OF 241.74', THENCE S 17°19'58" W A DISTANCE OF 330.91'; THENCE S 72°50'58" W A DISTANCE OF 256.05'; THENCE N 17°09'02" W A DISTANCE OF 80.00'; THENCE N 72°50'58" E A DISTANCE OF 213.95'; THENCE N 17°19'58" E A DISTANCE OF 304.98'; THENCE WITH A CURVE TURNING TO THE LEFT WITH A RADIUS OF 768.40'; WITH A DELTA ANGLE OF 29°11'04", WITH AN ARC LENGTH OF 391.39', WITH A CHORD BEARING OF N 78°51'32" W, WITH A CHORD LENGTH OF 387.17', THENCE S 87°54'29" W A DISTANCE OF 484.47'; THENCE S 00°23'59" W A DISTANCE OF 940.53'; THENCE N 90°00'00" W A DISTANCE OF 33.00'; WHICH IS THE POINT OF BEGINNING, HAVING AN AREA OF 179.06 ACRES.

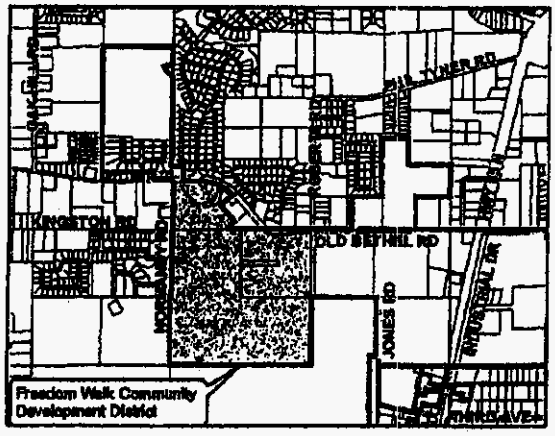
OLD TURNER RD
TURNER RD
KINGSTON RD
OLD BETHEL RD
JONES RD
WINDSOR LAKE DR
Freedom Walk Community Development District

EXHIBIT "B"

Gulf Power's First Request for Admissions to CHELCO

No. 1-10

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 30, 2010

GULF POWER'S FIRST REQUEST FOR ADMISSIONS TO CHOCTAWHATCHEE ELECTRIC COOPERATIVE INC. (NOS. 1-10)

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.370, Florida Rules of Civil Procedure, Gulf Power Company ("Gulf Power") requests that Choctawhatchee Electric Cooperative, Inc. ("Chelco") submit separate and complete written responses to Gulf Power's request for admissions within thirty (30) days after service.

DEFINITIONS

"You," "your," "Company" or "Chelco" refers to Choctawhatchee Electric Cooperative, Inc., its employees and authorized agents.

"Freedom Walk Development" or "Development" means the land area described as the "Freedom Walk Property" on Exhibit "A" to the petition filed by Chelco in this proceeding.

"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.

REQUEST FOR ADMISSIONS

1. Both Gulf Power and Chelco have served customers within the corporate boundaries of the City of Crestview and customers surrounding the Freedom Walk Development for in excess of ten years.

2. Both Gulf Power and Chelco are capable of providing reliable electric service to the Freedom Walk Development.

3. The "disputed area" referenced in paragraph 7 of Chelco's petition is limited to the boundaries of the Freedom Walk Development.

4. The Freedom Walk Development does not constitute a "rural area" as those terms are defined above.

5. The owner of the Freedom Walk Development has requested that Gulf Power Company provide electric service to the Freedom Walk Development.

6. Gulf Power's stated $90,000 cost to extend its existing three-phase power line to the eastern border of the Freedom Walk Development is de minimis in comparison to the nature of the project and projected load of the Development.

7. With the exception of the single residence identified in paragraph 9(c) of Chelco's petition, Chelco has not served, and does not currently serve, any members within the boundary of the Freedom Walk Development.

8. The single residence identified in paragraph 9(c) of Chelco's petition does not currently receive electric service from Chelco.

9. The Freedom Walk Development has not been platted.

10. The Freedom Walk Development has not received a development order from the City of Crestview or Okaloosa County.

JEFFREY A. STONE
Florida Bar No.: 325953
RUSSELL A. BADDERS
Florida Bar No.: 007455
STEVEN R. GRIFFIN
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Attorneys for Gulf Power Company

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 electronic mail and U.S. Mail this 30 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
POST OFFICE BOX 15579
TALLAHASSEE, FL 32317

RALPH R JAEGER, ESQ.
FL PUBLIC SERVICE COMMISSION
2540 SHUMARD OAK BLVD
TALLAHASSEE, FLORIDA 32399-7019

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Pensacola FL 32591-2950
(850) 432-2451
Attorneys for Gulf Power Company

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: **Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. And Gulf Power Company**	)	**Docket No. 100304-EU** Date Filed: June 30, 2010

GULF POWER COMPANY'S FIRST REQUEST FOR ADMISSIONS TO CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC. (NOS. 1-10)

GULF POWER COMPANY ("Gulf Power", "Gulf", or "the Company"), by and through its undersigned counsel, hereby submits the First Request for Admissions to Choctawhatchee Electric Cooperative, Inc.(Nos. 1-10)

Respectfully submitted the 30th day of JUNE, 2010.

JEFFREY A. STONE
Florida Bar No. 325953
RUSSELL A. BADDERS
Florida Bar No. 007455
STEVEN R. GRIFFIN
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P. O. Box 12950
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(850) 432-2451
Attorneys for Gulf Power Company

EXHIBIT "C"

CHELCO's Response to Gulf Power's

First Request for Admissions to CHELCO

No. 1-10

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.	))))	Docket No.: 100304-EU

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.'S RESPONSES TO GULF POWER COMPANY'S FIRST REQUEST FOR ADMISSIONS (NOS. 1-10)

Comes Now, Choctawhatchee Electric Cooperative, Inc. ("CHELCO") and serve these responses to Gulf Power Company's First Request for Admissions.

REQUEST FOR ADMISSIONS

1. Both Gulf Power and Chelco have served customers within the corporate boundaries of the City of Crestview and customers surrounding the Freedom Walk Development for in excess of ten years.

CHELCO'S RESPONSE:

CHELCO admits that both Gulf Power and CHELCO have served customers within the corporate boundaries of the City of Crestview for in excess of ten years.

Gulf Power has not provided a description or definition of the term "surrounding the Freedom Walk Development" and as a result CHELCO is unable to admit or deny. To the extent that "surrounding the Freedom Walk Development" is construed to mean that the Freedom Walk Development is within the historic service area of Gulf Power and CHELCO, the request for admission is denied as to Gulf Power and admitted as to CHELCO.

2. Both Gulf Power and Chelco are capable of providing reliable electric service to the Freedom Walk Development.

CHELCO'S RESPONSE:

Admitted.

3. The "disputed area" referenced in paragraph 7 of Chelco's petition is limited to the boundaries of the Freedom Walk Development.

CHELCO'S RESPONSE:

Admitted that the "disputed area includes all of the projected Freedom Walk Development as depicted by the street and lot layout on Exhibits "A" through "D" to the petition filed by CHELCO in this proceeding, which Development includes all of the property bordering the south side of Old Bethel Road between Jones Road and Normandy Road.

4. The Freedom Walk Development does not constitute a "rural area" as those terms are defined above.

CHELCO'S RESPONSE:

Without admitting or denying whether the term "rural area" as Gulf Power has defined it is dispositive of any issue in this territorial dispute, CHELCO admits that a majority of the Freedom Walk Development (with the exception of a portion of the proposed Development bordering the south side of Old Bethel Road between Jones Road and Normandy Road) does not

constitute a "rural area" as Gulf Power has defined that term in the Definition section of its First Request for Admissions.

5. The owner of the Freedom Walk Development has requested that Gulf Power Company provide electric service to the Freedom Walk Development.

CHELCO'S RESPONSE:

CHELCO is without direct knowledge of whether the "owner" of the Freedom Walk Development has requested that Gulf Power Company provide electric service to the Freedom Walk Development. CHELCO admits that Gulf Power has provided it with a copy of a letter purported to be from Emerald Coast Partners, LLC by which that entity requested that Gulf Power Company provide electric service to the Freedom Walk Development.

6. *Gulf Power's* stated $90,000 cost to extend its existing three-phase power line to the eastern border of the Freedom Walk Development is de minimis in comparison to the nature of the project and projected load of the Development.

CHELCO'S RESPONSE:

Denied.

7. With the exception of the single residence identified in paragraph 9(c) of Chelco's petition, Chelco has not served, and does not currently serve, any members within the boundary of the Freedom Walk Development.

CHELCO'S RESPONSE:

Denied.

8. The single residence identified in paragraph 9(c) of Chelco's petition does not currently receive electric service from Chelco.

CHELCO'S RESPONSE:

Admitted.

9. The Freedom Walk Development has not been platted.

CHELCO'S RESPONSE:

CHELCO is without direct knowledge of whether the Freedom Walk Development has been platted, and the request for admission is therefore denied.

10. The Freedom Walk Development has not received a development order from the City of Crestview or Okaloosa County.

CHELCO'S RESPONSE:

CHELCO is without direct knowledge of whether the Freedom Walk Development has received a development order from the City of Crestview or Okaloosa County, and the request for admission is therefore denied.

RESPECTFULLY SUBMITTED this 29th day of July, 2010.

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EXHIBIT "D"

Westlaw

692 S.E.2d 510
387 S.C. 254, 692 S.E.2d 510, Util. L. Rep. P 27,098
(Cite as: 387 S.C. 254, 692 S.E.2d 510)

H

Supreme Court of South Carolina.
CITY OF NEWBERRY, Petitioner,
v.
NEWBERRY ELECTRIC COOPERATIVE, INC., and Wal-Mart Stores East, L.P., and Wal-Mart Real Estate Business Trust, Respondents.

No. 26795.
Heard Nov. 3, 2009.
Decided April 5, 2010.
Rehearing Denied May 14, 2010.

Background: City brought declaratory judgment action seeking determination of which electric provider, city or electric cooperative, had legal right to provide service to approximately 26 acres of land. The Circuit Court, Newberry County, James E. Lockemy, J., determined that cooperative had right to serve property by virtue of contract with landowner. City appealed. The Court of Appeals affirmed. City petitioned for writ of certiorari.

Holdings: The Supreme Court, Toal, C.J., held that:
(1) cooperative did not have right to provide service pursuant to Electric Cooperative Act;
(2) cooperative's contract with landowner did not entitle it to provide service after annexation; and
(3) statute of limitations did not begin to run until cooperative began providing service to completed store.

Reversed.

Kittredge, J., dissented and filed opinion.

West Headnotes

[1] Statutes 361 ⇐176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial authority and duty. Most Cited Cases
Statutory interpretation is a question of law.

[2] Statutes 361 ⇐181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases
The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.

[3] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and associations. Most Cited Cases
Electric cooperative did not have legal right to provide electric service to property annexed by city pursuant to annexation exception contained in Electric Cooperative Act, where cooperative was not providing electric service to any premises in the area prior to annexation. Code 1976, § 33-49-250.

[4] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and associations. Most Cited Cases
Electric cooperative's contract with landowner did not entitle it to provide electric service after annexation of property by city; cooperative was not providing service to any premises in the area prior to annexation, and contract to provide service to building that would exist sometime in the future did

not function as existing service under Electric Cooperative Act. Code 1976, § 33-49-250.

[5] Limitation of Actions 241 ⟹58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In general. Most Cited Cases

Statute of limitations in action to determine whether city or electric cooperative had right to provide electric service to store that was being constructed on property annexed by the city did not begin to run until cooperative began providing service to completed store; city's exclusive right to provide electricity to the annexed premises was not invaded until cooperative exceeded it statutory grant of authority and began serving the premises. Code 1976, §§ 15-3-530, 33-49-250.

**511 Robert T. Bockman, of McNair Law Firm, of Columbia, for Petitioner.

Frank R. Ellerbe, III and Bonnie D. Shealy, both of Robinson, McFadden & Moore, of Columbia; Thomas H. Pope, III and Kyle B. Parker, both of Pope and Hudgens, of Newberry, for Respondents.

James M. Brailsford, III, of Edisto Island, for Amicus Curiae Municipal Association of South Carolina and the South Carolina Association of Municipal Power Systems.

Chief Justice TOAL.

*255 In this case, we granted a writ of certiorari to review the court of appeals' decision holding that the Newberry Electric Cooperative, Inc. (Cooperative) could provide electric service to an area annexed by the City of Newberry (City). We reverse and remand.

***256 FACTS/PROCEDURAL BACKGROUND**

This case concerns which electric provider, the City or the Cooperative, has the legal right to provide service to approximately 26 acres of land. When Wal-Mart began negotiations to construct a store on this site, the area was assigned to the Cooperative by the Public Service Commission (PSC), but the Cooperative was not providing services to any premises in the area. Wal-Mart wished for its property to be annexed into the City, but, nonetheless, wanted to obtain its electric services from the Cooperative.

In May 1999, the Cooperative initiated a suit in the PSC to enjoin the City from annexing the site and providing electric services. On June 21, 1999, the Cooperative and Wal-Mart entered into agreements for Wal-Mart to purchase its service from the Cooperative. The following day, the Cooperative voluntarily dismissed its case with the PSC as moot because of the service contracts; the City agreed to the dismissal. On July 27, 1999, the City annexed the property.

In January 2000, the Cooperative began supplying electric services for the construction site. In June 2000, the Cooperative began supplying electric services to the completed Wal-Mart store. The City did not object to this provision of services until January 2003. On June 2, 2003, the City filed the summons and complaint that initiated this action, seeking declaratory relief, an injunction, and damages.

The circuit court made several findings: (1) the statute of limitations barred the City's claim, (2) the City consented to the Cooperative's service, and (3) several equitable principles also proscribed the City's requested remedies. The court of appeals affirmed, holding that the Cooperative had the right to continue serving the property because it had a contract with Wal-Mart to provide electricity and the City's suit was barred by the **512 statute of limitations. *City of Newberry v. Newberry Elec. Coop., Inc.*, Op. No.2008-UP-200 (S.C. Ct.App. filed Mar. 24, 2008).

STANDARD OF REVIEW

[1][2] Statutory interpretation is a question of law. *Bryant v. State*, 384 S.C. 525, 683 S.E.2d 280, 282 (2009). The cardinal rule of statutory construction is to ascertain and give *257 effect to the intent of the legislature. *Id.* (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)).

ANALYSIS

I. Right to Provide Electric Service

A. Section 33-49-250

[3] The City argues that once it annexed the property, it had the sole right to provide electric service to the property, and any service provided by the Cooperative was unlawful. We agree.

The Cooperative is purely a creature of statute, and so has only such authority as the legislature has granted it under the Electric Cooperative Act, S.C.Code Ann. §§ 33-49-10, *et. seq.* (2006 & Supp. 2008). *See S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 489, 272 S.E.2d 793, 794 (1980) (stating that "regulatory bodies are possessed of only those powers which are specifically delineated").

The Electric Cooperative Act provides that an electric cooperative has the authority to provide electricity only in rural areas. S.C.Code Ann. § 33-49-250. Section 33-49-250 provides two exceptions: the "annexation exception" and the "principal supplier" exception. The annexation exception states that if a cooperative is providing electricity to premises in an area that is later annexed by a municipality, that cooperative may "continue serving all premises then being served." S.C.Code Ann. § 33-49-250(1). The principal supplier exception states that if a cooperative is serving a city or town of less than 2,500 persons, it will continue to have the right to serve that area even if the population later exceeds 2,500 persons. *Id.*

Neither of these exceptions applies here. Although the area had been assigned to the Cooperative, the Cooperative was not providing electric service to any premises in that area prior to the annexation.[FN1] Thus, the Cooperative does not have the right under the statutes to serve the Wal-Mart premises.

> FN1. The parties argue only the annexation exception; the principal supplier exception is not at issue in this case.

*258 *B. Contract for Services*

[4] The Cooperative contends, and the court of appeals held, that its service contract with Wal-Mart entitles it to continue providing service after annexation. We disagree.

In *City of Camden v. Fairfield Electric Cooperative, Inc.*, this Court held that a cooperative did not have the right to serve the premises post-annexation when the cooperative was not providing service to any premises pre-annexation. 372 S.C. 543, 643 S.E.2d 687 (2007). In *City of Camden*, Lowe's was planning to build a store in an unassigned area and had chosen Fairfield Electric Cooperative (Fairfield) as its supplier. However, the City of Camden annexed the property, and at the time of annexation, Fairfield was furnishing electric service only to a security light on the unimproved lot. This Court held that the statutes require a cooperative to be serving electricity to a "premises" prior to annexation, and that a security light is not a "premises" as defined in S.C.Code Ann. § 58-27-610(2).[FN2] This Court determined that a security light was not a structure within the contemplation of the annexation exception of section 33-49-250. Because Fairfield could not satisfy one of the statutory exceptions, this Court held that it had no legal right to serve the annexed property.

> FN2. This section defines a "premises" as a "building, structure or facility."

Here, the court of appeals determined that *City of Camden* is not controlling because: (1) the property was unassigned in that case, whereas the property in the instant case was assigned, and (2) Lowe's had merely selected Fairfield for its future service, but in this case Wal-Mart and the Cooper-

ative entered into a contract for services.

**513 The court of appeals incorrectly distinguished *City of Camden*, which is controlling here. First, the fact of assignment is irrelevant to the present analysis. Clearly, pre-annexation the Cooperative had the legal right to serve the area. However, after annexation the Cooperative could only provide service if it met one of the two explicit exceptions in section 33-49-250, which it did not.

Second, contrary to the court of appeals' conclusion, a contract to provide services to a building that will exist *259 sometime in the future does not function as "existing service" under the statutes to trigger the annexation exception. Section 33-49-250 clearly requires existing electrical service to existing premises at the time of annexation. The plain language of the statute simply does not allow the result reached by the court of appeals.

Notwithstanding the clear language of the section 33-49-250, the court of appeals determined section 58-27-670(1) [FN3] "precludes the City from interfering with an existing contract for services." This analysis is incorrect. In *City of Camden*, this Court was concerned that allowing Fairfield to provide service to the annexed area would "allow cooperative providers to effectively circumvent the statutory scheme set up by the Legislature simply by placing security lights in any areas in which it has distribution lines." 372 S.C. at 549, 643 S.E.2d at 690. If we followed the court of appeals' analysis, we would be allowing cooperatives to simply contract around a municipality's post-annexation rights as established by the Legislature, a situation very similar to the one we aimed to avoid in *City of Camden*. Thus, we reiterate our central holding in *City of Camden* that a cooperative must be providing existing electrical services to an existing premises prior to annexation to continue serving that premises after annexation. Otherwise, the cooperative does not satisfy the annexation exception.

FN3. This section provides:

> Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, electric cooperative, or electric utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58.
>
> S.C.Code Ann. § 58-27-670(1) (Supp.2007).

In this case, the Cooperative only had a contract for services and was not actually providing electricity to the completed premises at the time of annexation. Therefore, we hold the City has the legal right to serve the annexed area because the Cooperative was not providing service to existing premises at the time of annexation.

II. Statute of Limitations

[5] The court of appeals held the three year statute of limitations found in S.C.Code Ann. § 15-3-530 applies to this *260 action, and the statute began running when the City annexed the property. To the extent a statute of limitations applies here, we find it did not begin running until the Cooperative began providing service to the completed store.

To hold otherwise, as the dissent urges, would mark a departure from our current jurisprudence. We have repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded. *See Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (stating a statute of limitations begins to run when a party through the exercise of reasonable diligence would be put on notice that a legal right had been invaded); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some

promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist.").

The dissent concedes the Cooperative was not serving Wal-Mart when the premises were annexed. Nevertheless, the dissent would hold that at the time of annexation, the City was on notice that the Cooperative "had **514 taken steps to invade the rights of the City." Such a holding would turn our jurisprudence on its head, requiring parties to bring suit to defend rights that had not yet been invaded and ask the courts to intervene when injurious conduct is merely threatened and has not yet occurred.

Here, the City's exclusive right to provide electricity to the annexed premises was not invaded until the Cooperative exceeded its statutory grant of authority and began serving the premises. Thus, the City suffered no injury before that date and could not have brought suit. Therefore, the City's suit is not barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

*261 WALLER, PLEICONES and BEATTY, JJ., concur.
KITTREDGE, J., dissenting in a separate opinion.

Justice KITTREDGE, dissenting.

I respectfully dissent. The City of Newberry annexed the property in question (the Wal-Mart property) on July 27, 1999. I agree with the majority that because Newberry Electric Cooperative was not serving the Wal-Mart property on the date of annexation, the City of Newberry had the exclusive statutory right to provide electric service to the property. In my judgment, the City lost its right to provide electric service by failing to assert its claim within the statutory period of limitations. Based on the facts and circumstances presented, the three-year statute of limitations began on July 27, 1999. The City commenced this action on June 2, 2003. Because I believe the City of Newberry filed this action beyond the statute of limitations, I vote to affirm the court of appeals decision in result.

I agree with the majority in its analysis of South Carolina Code section 33-49-250. The annexation exception portion of the statute only allows a cooperative that "is serving" an area to continue serving that area after annexation. The majority's interpretation is in accord with the clear and unambiguous terms of the statute and is consistent with our holding in *City of Camden v. Fairfield Electric Cooperative, Inc.*, 372 S.C. 543, 643 S.E.2d 687 (2007). I additionally agree with the majority that the fact that the area was assigned to the Cooperative has no bearing on the applicability of the annexation exception.

Nonetheless, I believe the three-year statute of limitations bars the City's claim against the Cooperative. Statutes of limitations are not simply technicalities; rather, they have long been respected as fundamental to a well-ordered judicial system. *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008).

*262 As the court of appeals recognized, the City relied on the applicable statutes for its exclusive right to provide electric service to Wal-Mart. Under South Carolina Code section 15-3-530(2), a party must assert "an action upon a liability created by a statute" within three years. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and cir-

cumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. *Id.*

In this case, it became common knowledge in late 1998 and early 1999 that Wal-Mart intended to build a new store on the property and that the Cooperative and the City both wanted to provide electric service to the future structure. On May 28, 1999, the Cooperative filed a complaint with the Public Service Commission (PSC) seeking an injunction prohibiting the City from providing electric **515 service to the Wal-Mart site. On June 11, the PSC issued a cease and desist order against the City, thereby prohibiting it from attempting to supply the site with service until a hearing on the merits could be held.

On June 18, the Cooperative initiated an action in the circuit court seeking an injunction prohibiting the City from annexing the Wal-Mart property and prohibiting the City from requiring Wal-Mart to choose the City as the service provider as a condition for receiving other municipal services. This action was later dismissed by consent of the parties.

On June 21, 1999, the Cooperative and Wal-Mart entered into a contract in which the Cooperative agreed to provide Wal-Mart electric service. In accordance with the June 21 service contract, the Cooperative began clearing land and relocating electric poles and power lines. The following day, lawyers on behalf of the Cooperative and the City mailed a letter to the PSC on behalf of the Cooperative and the City informing it that "[t]he issues raised in the Petition and Complaint in the above matter have been resolved, and this *263 matter is now moot." The Cooperative and the City submitted a proposed consent order of dismissal signed by counsel for the parties. The order of dismissal was signed by the PSC and filed on August 4, 1999.

On July 26, 1999, the developer sent a letter to the City stating that it intended to select the City as the electric service provider for areas surrounding the Wal-Mart store. Significantly, however, the developer specifically stated, "please bear in mind that this letter should not be construed to include the Wal-Mart store ... as a part of the contract for electric service."

The next day, on July 27, 1999, the City annexed the entire property. The City knew on the annexation date that the Cooperative had not begun furnishing electric service to any premises on the property.

In my view, on July 27, 1999, the date of annexation, the City was on notice that it had the exclusive right to provide electric service to the Wal-Mart property. The City knew or should have known the Cooperative could not avail itself of the annexation exception, yet the City knew of the Cooperative's very visible efforts to promptly move forward with its plan to provide electric service to the annexed property. Therefore, under these facts and circumstances, on the date of annexation, the City was on notice that the Cooperative had taken steps to invade the rights of the City. Accordingly, I would hold that the statute of limitations began to run on July 27, 1999.

The City argues it first discovered it had a claim against the Cooperative on January 6, 2003, the day the court of appeals issued its opinion in *City of Newberry v. Newberry Electric Cooperative, Inc.*, 352 S.C. 570, 575 S.E.2d 83 (Ct.App.2003) (commonly referred to as the " *Burger King* " case). In essence, the City asserts it discovered its rights in the *Burger King* decision.

I reject the City's position for two, independent reasons. First, the City's right to provide electricity is not dependent on the holding of *Burger King*. Because the Cooperative was not "serving" Wal-Mart on the date of annexation, the City's exclusive right to serve the Wal-Mart property was established pursuant to the statutory scheme. This Court's 2007 *264 opinion in *City of Camden v. Fairfield Electric Cooperative*, as the majority compellingly demonstrates, confirmed existing law

and did not mark a departure from it. Second, the discovery rule may be invoked to delay the commencement of a statute of limitations based on the discovery of facts, not the discovery of law. *See Burgess v. American Cancer Soc'y., S.C. Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App.1989) (observing that under the discovery rule, the statute of limitations begins to run when "such facts as would have led to the knowledge" of a potential claim).[FN4]

> FN4. Misinterpretation of the law does not toll the statute of limitations. On June 21, 1999, Charles Guerry, the Utility Director for the City, executed an affidavit in which he stated the City was not requiring Wal-Mart to accept electric service as a condition for receiving other municipal services, and that "it is the City's position that annexation of the property would enable Wal-Mart to select the City as its electric service provider." Although the position that Wal-Mart had a right to choose its provider was contrary to the law, the City's erroneous position has no bearing on the statute of limitations. *See* 54 C.J.S. Limitations of Actions § 116 (2009) ("Mere ignorance of the existence of a cause of action ... generally does not prevent the running of a statute of limitations."); *Miller v. Pac. Shore Funding*, 224 F.Supp.2d 977, 986 (D.Md.2002) (recognizing that "[t]he discovery rule, in other words, applies to *discovery of facts, not to discovery of law.* Knowledge of the law is presumed.").

****516** Furthermore, the City's complaint in this matter also shows that it was well aware of its rights at the time of annexation. In its complaint, the City alleges the Cooperative could not look to the annexation exception as a source for authority to provide service because the Cooperative was not providing service to the Wal-Mart property at the time of annexation. In fact, the City argued "the Cooperative was aware that annexation would preclude its authority to provide electric service" in its brief to the trial court. Additionally, in its reply to the Cooperative's counterclaim, the City specifically averred that "upon annexation, [the Cooperative] lost its statutory authority to enter and agree to a contract to provide electric service to Wal-Mart under the law of South Carolina. Further responding the City would show that *upon its annexation it acquired the exclusive rights* to provide electric service to the subject tract on which Wal-Mart is located." (emphasis added).

***265** In my view, the City's assertions in the pleadings show that it was aware of all of the necessary facts at the time of annexation. I would reject the City's transparent attempt to delay the start of the statute of limitations until its purported discovery of the law. *See Epstein*, 363 S.C. at 376, 610 S.E.2d at *818* (noting that the statute begins to run at the point of discovery of facts and not when advice of counsel is sought or a full-blown theory of recovery is developed).

In my judgment, effective July 27, 1999, the City had three years to assert its right to provide electrical service to the Wal-Mart property. Having failed to do so, the City's action is time barred. I vote to affirm the court of appeals in result.

S.C.,2010.
City of Newberry v. Newberry Elec. Co-op., Inc.
387 S.C. 254, 692 S.E.2d 510, Util. L. Rep. P 27,098

END OF DOCUMENT

Westlaw

643 S.E.2d 687
372 S.C. 543, 643 S.E.2d 687
(Cite as: 372 S.C. 543, 643 S.E.2d 687)

C

Supreme Court of South Carolina.
CITY OF CAMDEN, Respondent,
v.
FAIRFIELD ELECTRIC COOPERATIVE, INC., Appellant,
and
Lowe's Home Centers Of Camden, South Carolina, Intervenor, Appellant.

No. 26298.
Heard Jan. 30, 2007.
Decided April 2, 2007.

Background: City which annexed store parcel brought action seeking an order to compel rural electric cooperative to cease and desist providing electricity to store, which was constructed after annexation. The Circuit Court, Kershaw County, James R. Barber, J., entered judgment for city, and rural electric cooperative appealed.

Holdings: The Supreme Court, Waller, J., held that:
(1) parcel was not a "premises then being served" under the Electric Cooperative Act, and
(2) security light placed on parcel was not a "structure" to which electricity was being fur- nished.

Affirmed.

West Headnotes

[1] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and Associations. Most Cited Cases

The purpose of the annexation and growth exceptions to the rule that a rural electric cooperative generally has the power to sell and distribute electricity only in rural areas is to prevent the ouster of co-ops from areas they have historically served due to population growth or annexation. Code 1976, § 33-49-250(1).

[2] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and Associations. Most Cited Cases

Unimproved annexed parcel was not a "premises then being served" under the Electric Cooperative Act, and thus rural electric cooperative did not have a right to continue supplying electricity to the parcel after annexation; although store owners had reached agreement to purchase parcel and construct store on parcel, parcel's only improvement at the time of the annexation was a security light installed by cooperative. Code 1976, §§ 33-49-250(1), 58-27-610(2).

[3] Statutes 361 ⇐212.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.1 k. Knowledge of Legislature. Most Cited Cases

There is a presumption that the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects.

[4] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and Associations. Most Cited Cases

A rural electric cooperative may continue serving customers due to a change in ownership;

the Electric Cooperative Act regarding annexation statute merely requires the co-op to be serving a building, structure, or facility at the time of annexation in order to continue serving that building, structure, or facility. Code 1976, § 33-49-250(1).

[5] Electricity 145 ⇐8.1(3)

145 Electricity
145k8.1 Franchises and Privileges in General
145k8.1(2) Service Areas; Competition
145k8.1(3) k. Cooperatives and Associations. Most Cited Cases

Security light placed on unimproved annexed parcel sold to store was not a "structure" to which electricity was being furnished and thus parcel was not a "premises then being served" by rural electric cooperative pursuant to the Electric Cooperative Act and cooperative did not have any right to continue servicing the parcel after the store was built. Code 1976, § 33-49-250(1).

**688 Marcus A. Manos and Manton M. Grier, Jr., both of Nexsen Pruet LLC, of Columbia, for *Primary Appellant Fairfield Electric Cooperative.*

Thomas H. Pope, III, of Newberry, for Secondary Appellant Lowe's Home Centers.

James M. Brailsford, III, of Edisto Island, for Respondent.

Justice WALLER:

*545 This is an appeal from an order of the circuit court granting the City of Camden summary judgment and holding that Fairfield Electric Cooperative, Inc. has no legal authority to provide electric service to a newly constructed Lowe's Store located in an area recently annexed by city. We affirm.

FACTS

This case involves a 12.981 acre tract of land, originally located just outside the city limits of Camden, SC, which was owned by Town and Country, Inc. In early 2002, Town and Country began negotiating to sell the property to Lowe's for construction of a Lowe's store. In the summer of 2002, Town and Country requested Fairfield Electric Cooperative to install a security light on the property.[FN1] Fairfield installed the security light on July 29, 2002. Thereafter, on September 10, 2002, Town and Country requested the City annex the property.

FN1. At the time, Fairfield had a distribution line which crossed the property, and the city of Camden had a sewer easement.

On September 3, 2002, prior to purchasing the property, Lowe's wrote a letter to Town and Country, indicating that it *546 had chosen Fairfield as its electric supplier for the proposed store in the "unassigned" area. Fairfield notified the City of this letter, and indicated it had been serving the premises and would "honor their request to serve this new store." On September 23, 2002, Camden's City Manager responded that Camden would not give Fairfield permission to serve any new customers in the current City limits, or any area which might be annexed in the future, stating, "[w]hen the site on which Lowe's proposes to build its new store becomes a part of the City, the City Council will assert its legal right to be the power provider, regardless of the customer's preference."

**689 Camden annexed the property on October 8, 2002. Town and Country thereafter sold the parcel to Lowe's on January 6, 2003, and Lowe's began to clear and grade the tract to begin construction of the store. Both the security light placed on the property by Fairfield Electric and the City's sewer easement were temporarily disconnected during construction. After completion of construction, Fairfield continued to provide the new Lowe's store with electricity, and the City of Camden brought this action pursuant to S.C.Code Ann. § 33-49-250 (1) for an order compelling Fairfield to cease and desist. The circuit court ruled Fairfield had no legal authority to provide electricity to the new Lowe's store. Fairfield appeals.

ISSUE

Did the circuit court err in ruling Fairfield was without authority to service the new Lowe's store?

DISCUSSION

[1] Pursuant to S.C.Code Ann. § 33-29-240, a rural electric cooperative generally has the power to sell and distribute electricity only in rural areas, i.e., those with a population under 2500. *Carolina Power and Light v. Town of Pageland*, 321 S.C. 538, 471 S.E.2d 137 (1996). There are two exceptions to this rule contained in South Carolina Code Ann. § 33-49-250(1), to wit:

> 1) a city's act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or *547 town for the cooperative to continue serving all premises then being served and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise, and
>
> 2) the right of a cooperative to continue to serve in a city or town in which it is the principal supplier of electricity shall not be affected by the subsequent growth of such town beyond a population of two thousand five hundred persons.

(emphasis supplied). The purpose of the exceptions is to "prevent the ouster of co-ops from areas they have historically served due to population growth or annexation." *Duke Power Co. v. Laurens Elec. Co-op., Inc.*, 344 S.C. 101, 105, 543 S.E.2d 560, 562 (Ct.App.2000).

[2] It is undisputed here that the second exception does not apply as Fairfield is not the principal supplier of the disputed area. Accordingly, the sole issue before us is whether the Lowe's store was a "premises then being served" at the time of annexation so as to come within the first exception. We find that it does not.

The term "premises" is not defined in S.C.Code Ann. § 33-49-10 et seq., the Electric Cooperative Act. The circuit court therefore looked to the definition of "premises" contained in S.C.Code Ann. § 58-27-610(2) of the Territorial Assignments Act of 1969. That section defines "premises" as follows:

> the building, structure or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises," except that any such building, structure or facility shall not, together with any other building, structure or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure or facility.

The circuit court ruled the security light placed on the unimproved lot owned by Town and Country did not constitute a "building, structure or facility" to which electricity was being *548 furnished, such that it was not a "premises then being served" pursuant to the statute and therefore did not come within this exception. Fairfield asserts the circuit court's reliance upon this definition of "premise" is misplaced inasmuch as the Territorial Assignments Act was enacted some six years after passage of the Electric Cooperative Act. Accordingly, it contends the Legislature could not have intended for this definition of "premises" to apply in the context of **690 § 33- 49-250(1). We disagree. We find the circuit court properly looked to the definition of "premises" as set forth in § 58-27-610(2), and the court properly applied that definition.

[3] There is a presumption that the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 174 (2003); *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993). Accordingly, the Legis-

lature is presumed to have had knowledge of the definition of "premises" contained in § 58-67-210. [FN2]

> FN2. S.C.Code Ann. § 33-49-250(1) was rewritten by 2004 Act No. 179, § 5, effective February 19, 2004 and now provides that an electric cooperative has power to:
>
> > to generate, manufacture, purchase, acquire, accumulate, and transmit electric energy and to distribute, sell, supply, and dispose of electric energy to ... persons ... provided that the premises to be served must be located in an area a cooperative is permitted to serve pursuant to Section 58-27-610 through Section 58-27-670.
> >
> > Section 58-27-610 is the section of the Electric Cooperative Act which specifically defines "premises."

Fairfield contends the trial court's holding will effectively require continuous ownership of a premises, and prohibit cooperatives from serving premises they have historically served when those premises changes ownership. We disagree with this contention.

[4] As noted in *City of Newberry*, "although the annexation exception also implies consent for cooperatives to serve additional premises, i.e., new customers, within an annexed area, the statute expressly limits a cooperative's authority to provide new or increased service by allowing it only until such time as the governing body of the city or town shall direct otherwise...." 352 S.C. at 576, 575 S.E.2d at 86. It is clear that a co-operative may continue serving customers due to a *549 change in ownership; the statute merely requires the coop to be serving a building, structure, or facility at the time of annexation.

[5] Finally, we decline to hold that the security light placed by Town and Country is a "structure" within the contemplation of § 33-49-250. Such a holding would allow cooperative providers to effectively circumvent the statutory scheme set up by the Legislature simply by placing security lights in any areas in which it has distribution lines. Such a result is untenable. Accordingly, we affirm the circuit court's ruling that Fairfield Electric Cooperative is without authority to serve the recently annexed Lowe's property.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

S.C.,2007.
City of Camden v. Fairfield Elec. Co-op., Inc.
372 S.C. 543, 643 S.E.2d 687

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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 6th day of May, 2011, on the following:

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