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The Docket No. is 100304-EU Territorial Dispute between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company

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

The Posthearing Statement of Choctawhatchee Electric Cooperative, Inc.'s

Total number of pages is 42

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June 9, 2011

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

Re: Docket No. 100304-EU

Dear Ms. Cole:

Enclosed for filing on behalf of Choctawhatchee Electric Cooperative, Inc. is an electronic version of the Posthearing Statement of Choctawhatchee Electric Cooperative, Inc. in the above referenced docket.

Thank you for your assistance.

Sincerely,

Norman H. Horton, Jr.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U. S. Mail this 9th day of June, 2011.

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Norman H. Horton, Jr.

BEFORE THE FLORIDA *PUBLIC SERVICE COMMISSION*

In re: Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company	))))	Docket No. 100304-EU Filed: June 9, 2011

POSTHEARING STATEMENT OF
CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.

Comes now, Choctawhatchee Electric Cooperative, Inc. ("CHELCO"), through undersigned counsel, and pursuant to Order No. PSC-10-0615-PCO-EU, Order Establishing Procedure dated October 13, 2010, as subsequently amended, and the schedule directed at the conclusion of the hearing and herewith submits this posthearing statement. References to the record are indicated with "Tr." for transcript and "Ex." for exhibit.

BASIC POSITION

SUMMARY OF POSITION: *CHELCO has demonstrated that it satisfies the criteria of Chapter 366.04, Florida Statutes, and is the appropriate utility to provide electric service to the area in dispute. CHELCO has the ability and capability to fully meet the needs of its members without duplicating any facilities and without unplanned additions.*

ANALYSIS AND ARGUMENT: This docket was initiated by CHELCO because Gulf Power Company ("Gulf Power") has expressed its intent to provide electric service to an undeveloped parcel of property which is planned to be developed into what has been named the Freedom Walk development. CHELCO historically served this area and presently has existing lines and facilities that are adequate to provide service to the proposed development and surrounding area without any unplanned upgrades. (Tr. 69; Ex. 6; Tr. 120, 126). The area at issue is heavily wooded, undeveloped and surrounded by undeveloped or minimally developed property. It is by no means urbanized and is not in direct proximity to other urban areas. (Tr. 62). CHELCO has

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the ability to provide service to Freedom Walk through its Auburn substation and existing distribution facilities, including a three phase line along the northern boundary of the disputed territory, which are capable of providing adequate and reliable service now and at full build out. (Tr. 61, 120-121, 141). CHELCO has a planned upgrade to a conductor segment from the Auburn substation in its current Construction Work Plan ("CWP") that was developed independent of the projected development. (Tr. 136, 186, 187). That upgrade will be implemented to serve all anticipated growth in the area, and is sufficient to meet the projected Freedom Walk load plus the previously anticipated additional load growth. (Tr. 141). Thus, CHELCO has no additional costs to serve this area and the development.

In contrast, Gulf Power will have to extend lines just to get to CHELCO's existing line, at a cost of approximately $90,000. Gulf does not have the capacity at its Airport Road substation to serve Freedom Walk, which has resulted in Gulf's current proposal to replace the existing 10.5 MVA transformer bank with a "fully depreciated," 45 year-old 12.5 MVA transformer bank, at a cost of $40,000, which does not include a number of necessary costs. (Tr. 281-282). Even with that upgrade, the demand in December 2014, with the full 4700 kW Freedom Walk load, will exceed the transformer's rated load capacity. Gulf Power has admitted that it has not even begun to include the anticipated Freedom Walk load in its load studies. (Ex. 24, Item 43). Although Gulf Power has asserted that it will be performing a massive upgrade of the Airport Road substation at some unspecified time in the next 5 years, at a cost of at least $1,600,000, it has no current timetable, no current planning document, no current land use approvals, and no current budget. (Tr. 287, 290). In short, Gulf has no present ability that would allow it to serve the full projected load by December 31, 2014.

Gulf Power has never provided service to the property, and prior to the proposed Freedom Walk development, had no plan to extend their service to the area at issue (Ex. 24, Item 49). Gulf Power's costs to provide service to the area would be significantly greater than CHELCO's, and any service by Gulf Power to the area of the Freedom Walk development would be an uneconomic duplication of CHELCO's existing facilities.

Gulf Power has raised issues under Chapter 425, F.S., as to CHELCO's legal ability to serve the area in dispute, but recognizes that it is the "district court, circuit court types of venues" that would enforce Chapter 425, F.S., issues (Ex. 20, p. 84). The jurisdictional and practical implications of Gulf Power's positions are discussed in detail in specific issues.

Despite the efforts of Gulf Power to shift the focus from criteria established in Chapter 366, F.S., the facts favor CHELCO in this territorial dispute.

ANALYSIS AND ARGUMENT: SPECIFIC ISSUES AND POSITIONS

Issue 1: What are the boundaries of the area that is the subject of this territorial dispute known as Freedom Walk Development?

SUMMARY OF POSITION: *The boundaries of the area are Old Bethel Road on the north, Normandy Road on the west, Jones Road on the east and a surveyed line on the south. The boundaries correspond to the development plat shown as an overlay on the exhibits attached to the petition and testimony.*

ANALYSIS AND ARGUMENT: The parties differ as to the area that is subject to this dispute, and the testimony of Gulf Power demonstrates clearly the amount of "wordsmithery" they have put into this case. CHELCO has correctly identified the area in dispute as that depicted on the proposed plat prepared by the developer's consultants (Tr. 77). Gulf Power disagrees that the disputed territory includes "outparcels" depicted as part of Freedom Walk on the developers plat, but which are outside the city limits. (Ex. 49, p. 20; Tr.350-351). The

obvious reason for the disagreement is that Gulf's position allows it to ignore the fact that CHELCO currently provides service to members within the boundary of the disputed territory. (Tr.352)

In its Petition CHELCO described the boundaries of the area to be ". . . located in north Crestview, Florida, west of Highway 85N and south of Old Bethel Road . . ." (Ex. 26, par. 6). In responding to discovery from Gulf Power, in which it requested a definition of the disputed area in the petition, CHELCO responded:

> 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 (Ex. 38, Interrogatory No. 7).

Notwithstanding CHELCO's clear position on what constitutes the area in dispute, Gulf Power has continued to ignore the plain language in paragraph 6 of the Petition, i.e., ". . . south of Old Bethel Road . . ." even after CHELCO consistently and repeatedly confirmed that the boundaries of the area were as described and shown by the proposed plat of the development (Tr. 60, 77-78; Ex. 49, p. 22; Ex. 50, pp. 7-10).

Instead of accepting CHELCO's description, Gulf Power has gone to great lengths to parse words to demonstrate that CHELCO did not really mean what CHELCO said. Gulf Power devotes much effort to convince the Commission that, despite the massive body of evidence as to the boundary of the development to which the developer expects service to be provided, CHELCO really meant to limit the area in dispute to that within the "bold black line" on Exhibit "A" to the Petition (Tr. 350). Nowhere in the petition is there any reference to a "bold black line." Rather, the Petition - and every pleading filed subsequent thereto - is clear that the area in

dispute includes all of the roads, cul-de-sacs, and lots in Freedom Walk as depicted by the developer, including those within the "bold, black lines."

Each of the aerial exhibits attached to the Petition contain an overlay of the proposed plat provided to CHELCO by Moore-Bass, the consulting engineer for Freedom Walk (Ex. 26; Ex. 50, p.____). That same Moore-Bass plat was also provided to CHELCO by Gulf Power through discovery (Ex. 25). Gulf Power argues that the plat is not final or that there is another version (Tr.352) Although CHELCO acknowledges that the plat may not be final (Tr. 98; Ex. 21, p. 144), CHELCO had no other plat when it filed its petition, and could not have been referring to any other plat. Gulf has offered a map of the Community Development District ("CDD") (Ex. 21, Exhibit 1; Tr. 304) but that map was produced by Gulf in discovery subsequent to the filing of the Petition, thus CHELCO would not have known of it. Gulf Power also points to the CDD as evidencing the appropriate boundaries, (Tr. 351-352) but any portion outside of the city limits would not have been included on the CDD map since the CDD ordinance would only be effective within the municipal limits. (Tr. 78; Ex.34).

The evidence is clear that even Gulf Power believes the Freedom Walk boundary to include all of the property south of Old Bethel Road. In June, 2010, Gulf Power prepared a map of the development showing the proposed service drops and facilities to the individual Freedom Walk lots. (Ex. 25) That map shows the area to which Gulf Power anticipates installing facilities, and includes Gulf Power service to lots within the areas described as "outparcels" by Gulf Power (Tr.293). The June 2010 map is the clearest and most recent depiction of the actual area in dispute, is consistent with CHELCO's Petition, and establishes the "boundaries of the area that is the subject of this territorial dispute known as Freedom Walk Development."

Issue 2(a): Does the Commission have jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, in the context of the instant territorial dispute?

SUMMARY OF POSITION: *No. The Commission has only those powers granted by the legislature. Gulf Power wants the Commission to declare that CHELCO is prohibited by Chapter 425, F.S., from serving the area in dispute. The jurisdiction over cooperatives is restricted to the issues found in Chapter 366, F.S.*

ANALYSIS AND ARGUMENT: In the case of *In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc. in Holmes County*, Docket No. 870235-EI, Order No. 18886 issued Feb. 18, 1988, the Commission stated:

> This criteria relates only to Chapter 425, Fla. Stats., which grants no rights under our jurisdiction over territorial disputes. (Emphasis Supplied). (Order 18886 at 13).

In spite of this clear language, Gulf Power argues that CHELCO is precluded by Chapter 425, F.S., from serving the disputed Freedom Walk territory. (Tr. 332; Ex. 20, pp 83-95; Ex. 23, Item 28; Ex. 24, Item 37). Gulf Power argues that CHELCO is only authorized to serve "rural areas" - defined in Section 425.03(1) as "any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons" - and that Freedom Walk is not a "rural area" since most of it is within the city limits of Crestview. (Tr. 328, 329; Ex. 20, p. 82). However, Section 425.04(4) authorizes cooperatives to serve members, entities, and persons, including "other persons not in excess of 10 percent of the number of its members." An analysis of Sections 425.03 and 425.04, including Gulf's creation of a new class of political subdivision – based on the completely fabricated "Greater Area" of recognized entities – a class that exists nowhere in Florida law, is provided in Issue 2(c). As a matter of the basic delegation of authority by the legislature to the Commission to construe, interpret and apply Chapter 425 in a territorial dispute under Section 366.04, CHELCO asserts the following:

The Commission was created by the legislature to exercise regulatory jurisdiction over public utilities under the standards and to the extent established in Chapter 366, F.S. The Commission has a very limited authority over cooperatives, as set forth in Section 366.11, F.S. Chapter 425, F.S., grants no interpretive or regulatory authority to the Commission over that chapter, a fact that Gulf does not dispute. (Ex. 20, pp 92, 93). The limitation on the exercise of jurisdiction by the Commission is best expressed in the case of *Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493 (Fla. 1973), in which the Florida Supreme Court held that:

> All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission. ... As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.... Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, ... and the further exercise of the power should be arrested. The Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities. Throughout our history, each time a public service of this state has been made subject to the regulatory power of the Commission, the Legislature has *first* enacted a comprehensive plan of regulation and control *and then conferred upon the Commission the authority to administer such plan*. (Emphasis in original)(Citations omitted)

Id. at 495-496; *see also, Lee County Elec. Coop. v. Jacobs*, 820 So. 2d 297, 300 (Fla. 2002).

Section 366.04(2)(e) establishes the Commission's jurisdiction to be one of determining

> 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. (e.s.)

The Legislature's use of the word "including" indicates that the Commission is not necessarily limited to those precise items. However, the breadth of the Commission's review is limited to those areas of inquiry reasonably related to the listed criteria over which jurisdiction has been

conferred by Section 366.04, F.S. That limitation is consistent with the generally accepted doctrines of statutory construction of *ejusdem generis* and *noscitur a sociis*, which have been defined and applied as follows:

> This interpretation is consistent with the statutory canon of *ejusdem generis*, which means that "'where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated[.]'"
> ...
> The doctrine of *ejusdem generis* is "'actually an application of the broader maxim '*noscitur a sociis*' which means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the specific words.'" (citations omitted)

Quarantello v. Leroy, 977 So. 2d 648, 652-653 (Fla. 5th DCA 2008). That rule of construction is well-established and uniformly applied. *State v. Hearns*, 961 So. 2d 211 (Fla. 2007); *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201 (Fla. 2003); *Green v. State*, 604 So. 2d 471 (Fla. 1992). Thus, the Commission should consider those factors that are reasonably related to those listed in Section 366.04, F.S., and not go far afield as urged by Gulf Power.

The Commission was correct in the Gulf Power/WFEC case - there is nothing pertaining to territorial disputes that grants jurisdiction to the Commission to engage in a broad exercise of construing Chapter 425, F.S., to determine the overall scope of the rights, powers, and duties of rural electric cooperatives, or to enforce or apply provisions of Chapter 425, F.S. Rather, the Commission is limited to those inquiries reasonably related to determining "the ability of the utilities to expand services within their own capabilities and the nature of the area involved."

Issue 2(b): If the Commission determines that it has jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, is the Freedom Walk Development a "rural area" as defined in section 425.03(1), Florida Statutes?

SUMMARY OF POSITION: *While maintaining its legal position, CHELCO acknowledges that the portion of the Freedom Walk development that was annexed by the City of Crestview does not meet the definition of a "rural area" in Section 425.03(1), F.S., but that fact is not relevant to or dispositive of the instant dispute.*

ANALYSIS AND ARGUMENT: CHELCO has never denied that a significant portion of the proposed Freedom Walk development is within the area annexed by the City of Crestview in conjunction with the establishment of a community development district that was recognized in the petition filed by CHELCO. However, as previously noted, a cooperative is not prohibited from serving within a "non-rural" area. CHELCO has candidly acknowledged that a portion of the property does not meet the legal definition of "rural area" contained in Section 425.03(1), Florida Statutes. The remainder of the area within the proposed development plan is not within the area annexed, and thus meets the legal definition of "rural area" in Section 425.03(1), F.S.

Issue 2(c): If the Commission determines that it has jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, and if the Freedom Walk Development is not found to be "rural" in nature, is CHELCO prohibited from serving the Freedom Walk Development by virtue of section 425.02 or 425.04, Florida Statutes?

SUMMARY OF POSITION: *No. Nothing in Chapter 425, F.S., prohibits CHELCO from serving non-rural areas. In addition to the fact that Section 366.04, F.S., does not make service to "rural areas" a criteria for territorial disputes, service by rural cooperatives to members in non-rural area is specifically acknowledged by the courts.*

ANALYSIS AND ARGUMENT: The nature of the area in dispute is but one issue to be considered by the Commission, it is not the issue. Whether the nature of the area is urbanized or whether the nature of the area is "rural," all of the criteria established by Section 366.04, F.S.,

including the restriction on uneconomic duplication, must be balanced by the Commission in reaching its conclusion as to the most appropriate entity to serve the disputed territory.

The problem inherent in this issue is that it mixes and confuses terms applicable to territorial disputes. In that context, it must be kept in mind that Section 366.04(2)(e), F.S., provides that a territorial dispute may include consideration of, among other things, "the degree of urbanization of the area, [and] its proximity to other urban areas." The term "rural" is not used in Section 366.04(2)(e), F.S. However, as a matter of law, CHELCO is not prohibited from serving the Freedom Walk development by virtue of Section 425.02, F.S., or 425.04, F.S., nor does Chapter 425, F.S., prohibit cooperatives from serving areas that are not "rural areas."

If the legislature had intended to apply the Chapter 425, F.S., "rural area" definition to territorial disputes, it would have done so. The case law is clear that the legislature's use of different words is strong evidence that the legislature intended those words to mean different things, and in that regard, the courts have uniformly held that "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." (citations omitted) *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997); accord, *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006); *Clarke v. Schimmel*, 774 So. 2d 7, 9 (Fla. 2d DCA 2000). That determination of a different meaning is not lessened by any policy considerations:

> We have held that "[t]he legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended." *Beshore v. Dep't of Fin. Servs.*, 928 So. 2d 411, 413 (Fla. 1st DCA 2006). Thus, we reject appellant's public policy argument as one more appropriate for the legislature. *Cf. Thorkelson v. NY Pizza & Pasta Inc.*, 956 So. 2d 542, 544-45 (Fla. 1st DCA 2007) (noting that the "policy implications" of the Legislature's definition of misconduct in section 440.02(18), Florida Statutes, "are for the Legislature, not the courts.").

Guckenberger v. Seminole County, 979 So. 2d 407, 409 (Fla. 1st DCA 2008); *see also, Department of Revenue v. Central Dade Malpractice Trust Fund*, 673 So. 2d 899, 901 (Fla. 1st DCA 1996); *Ocasio v. Bureau of Crimes*, 408 So. 2d 751, 753 (Fla. 3rd DCA 1982); *Myers v. Hawkins*, 362 So.2d 926 (Fla. 1978); 30 Fla.Jur. Statutes § 96 (1974). The courts have similarly held that the use of the same words in different statutes is evidence that the legislature intended for them to have the same meaning. *Thorkelson v. NY Pizza & Pasta, Inc.*, 956 So. 2d 542, 544 (Fla. 1st DCA 2007). There is, however, absolutely no suggestion in any case, in any tribunal, that when the legislature has used different words in different statutes, as it has done here, it intended for them to mean the same thing.

The issue under Section 366.04, F.S., is the "nature" of the disputed territory. The "nature" of the territory is "the inherent character or basic constitution of a person or thing: ESSENCE." Webster's Ninth New Collegiate Dictionary (1991). The character of the area is a decidedly factual matter. Whether the Freedom Walk development property meets the legal definition of a "rural area" under Section 425.03, F.S., has little to do with the factual "nature" of the area as urban or rural. The "nature" of the territory in dispute is discussed in detail in Issue 3. However, to the extent "rural" is to be used as a synonym of "not urban" when determining the "nature" of the property under Section 366.04, Freedom Walk is "rural" in nature.

If the Commission determines it has jurisdiction - using its authority under Chapter 366, F.S., - to interpret and apply Chapter 425, F.S., and to determine whether Chapter 425 limits CHELCO's service to the area, it should be noted that Section 425.04(4), F.S., grants the following legislative authority to rural electric cooperatives:

> [t]o generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and

> political subdivisions, and to other persons not in excess of 10 percent of the number of its members . . . However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation.

Section 425.03(1), F.S., defines "rural area" as "any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons."

Gulf Power argues that the Commission must undertake a complete analysis of CHELCO's entire, multi-county service area to determine whether more than 10% of CHELCO's members are served in the boundaries of various political subdivisions, or their "Greater Areas." Never before has the Commission been asked to undertake a comprehensive analysis of Chapter 425 service issues, and consider areas far removed from the territory in dispute to determine the utility best situated to serve. It is, and will respectfully remain the position of CHELCO, that the Commission has neither the jurisdiction nor the expertise to calculate percentages of cooperative members, to determine undefined and indefinite fringes of population around incorporated areas throughout their service areas, or interpret what, under Florida law, constitutes an "unincorporated city, town, village or borough."

In support of its argument, Gulf Power cites to a number of cases in which the Commission has applied "urban" and "rural" concepts to territorial disputes. None of the cases suggest that the issue of whether a disputed territory is urban or rural is the sole, dispositive issue. Each of those cases have weighed and balanced the statutory criteria and related matters including duplication of facilities. Thus, those cases do not support Gulf Power's requested creation of a single, overriding factor, preeminent over all others, in a territorial dispute.

Gulf Power asserts that CHELCO is prohibited from serving customers within the Crestview city limits because serving such customers would not be providing service "in rural areas to its members." (Tr.332) Gulf ignores the remainder of Section 425.04 that, at a minimum, allows for service to persons other than members in non-rural areas up to 10% of its total membership, and which allows a cooperative to serve within any town, city or area where there is not currently central station service. CHELCO meets both of those criteria in this case.

In its order in *In Re: Petition of Peace River Electric Cooperative Inc. against Florida Power & Light Co.*, 85 FPSC 10:120 (Docket No. 840293-EU, Order No. 15210, October 8, 1985) ("PRECO"), the Commission found that:

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

Gulf Power cites the case of *Alabama Electric Cooperative, Inc. v. First Nat'l Bank*, 684 F.2d 789, 791-792 (11th Cir. 1982) for the proposition that the "10% provision" applies only to the continuation of existing service within municipal boundaries, but not to "initiating" service within municipal boundaries. (Tr.332-333) There is not a shred of authority to support Gulf's contrived distinction. The *Alabama Electric* case, though it deals with a generating and transmission cooperative, rather than a distribution cooperative, specifically provides that:

> Fla.Stat.Ann. § 425.04(4) (West 1973) authorizes a rural electric co-op to serve some non-rural areas, indicating that AEC's service to the four municipalities did not deprive it of its "rural" character.

This assessment of the Florida law is supported by Fla.Stat.Ann. § 425.04(4) (West 1973):

> A cooperative shall have power: . . . (4) To 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 ten percent of the number of its members. . . .

> The language of the statute allows a rural coop to serve up to a ten percent non-rural membership and certainly four municipalities are well within that limit. . . . Consequently, we hold that § 425.04(4) does permit service to some non-rural areas. (emphasis supplied)

In addition to the standards in Section 366.04(2)(e), F.S., the Supreme Court and the Commission have cited Section 366.045(5), F.S., the grid bill, as appropriate for consideration in resolving territorial disputes and agreements. The grid bill constitutes the most recent expression of the will of the Legislature establishing the avoidance of uneconomic duplication of facilities as a basic goal of resolving territorial disputes. The acceptance of Gulf's position would, in Gulf's own words, render compliance with both Sections 366.04(2)(e) and 366.04(5), F.S., unnecessary as immaterial "collateral factual issues." (Gulf Motion for Summary Final Order at 10-11) Gulf has admitted that its service to the disputed territory will result in duplication of CHELCO's existing facilities (Ex. 23, Item 13). Thus, the award of the territory to Gulf will create a precedent of encouraging duplication when the projected load is in the financial interests of the encroaching utility. Such a result is directly contrary to *Lee County Electric Cooperative v. Marks*, 501 So.2d 585 (Fla. 1987), in which the Supreme Court held that:

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

Id. at 586.

Section 366.04(2)(e) clearly permits cooperatives to provide service to incorporated cities, towns, villages, or boroughs with a population less that 2500, i.e., a "rural area." In that regard, Gulf admits that "the only specific metric referenced in the relevant definition of 'rural area' is the population within the boundaries." (Tr.328) Mr. Spangenberg admitted that "[d]efining the 'boundaries' for areas that are not incorporated can become subjective and might rely on things like natural topography and, more certainly, on residential dwelling densities." Tr. 328) However, to support its contrived argument that CHELCO serves more than 10% of its membership in "non-rural" areas, Gulf applies those "subjective" standards to create an additional, non-statutory "Greater Area" for the cities of Crestview, DeFuniak Springs and Freeport, and for the unincorporated Bluewater Bay subdivision in order to create "non-rural" members where none exist by law. (Tr.333, 336, 338-339)

Crestview has a population of 21,321 (Tr. 309, 336), and DeFuniak Springs has a population of 5,061 (Tr. 309, 338). CHELCO provides electric service to 8 members in the city limits of Crestview and to 319 members in the city limits of DeFuniak Springs (Ex. 39, Item 27; Ex. 40, Item 33; Tr. 338). CHELCO has 34,727 total members. (Tr. 58). CHELCO serves 327 members within the city limits of Crestview and DeFuniak Springs, which is less than 1% of CHELCO's total members. Freeport has a total population of 1,787 persons (Ex. 63). Thus, Freeport is well under the statutory 2500 population threshold, and is a "rural area" area by definition. The correct conclusion, and the only conclusion the Commission can reach absent any judicial or legislative guidance, is that CHELCO does not serve more than 10% of its members within "non-rural" areas.

In order to create a "10%" issue, Gulf Power seeks to convince the Commission of the existence of a new entity, previously unknown in Florida law, created by expanding city limits to include areas outside the municipal boundaries, areas "rural" by definition, which Gulf Power refers to as the "Greater Area" of the chosen city. Gulf Power has fabricated those areas using its own definition, rather than any established by the legislature or the Commission. Mr. Spangenberg acknowledged there is no legal definition of "Greater Area" anywhere; no judicial guidance, and no statutory guidance. He simply looked at a map and drew the lines as he wanted. (Ex. 20, pp. 95-96) He sought to support his effort by noting that municipal limits do not necessarily keep track with growth, and that residents often want to be excluded from corporate limits because they do not want the taxation that goes with annexation, do not want the urban services, or for various other reasons. (Tr. 337). That may be, but it does not change the fact that corporate boundaries are determined by the governing body of a municipality, not by Gulf Power. Presumably Gulf Power is relying on that portion of Section 425.03, F.S., that refers to "unincorporated cities, towns, villages, or boroughs." However, Florida law does not define what constitutes an unincorporated city, town, village, or borough. In Florida one either resides in an incorporated municipality or in an unincorporated area. There is no legal hybrid of the two, and no extra-statutory "in between." Until the legislature decides to provide guidance as to the meaning of the term, it is not within the statutory duties of the Commission to create one.

The extreme and illogical approach that Gulf Power would have this Commission embrace is clearly shown with the discussion regarding the City of Freeport (Tr. 383-385). The population of Freeport, according to the 2011 U. S. Census, is 1,787 (Tr. 385; Ex. 63). Both Dr. Harper and Mr. Spangenberg knew the exact population of Crestview (Tr.309, 328) and DeFuniak Springs (Tr. 309), and in fact used U.S. Census Bureau data for those figures (Tr.

328). However, neither testified as to the population of Freeport, but used only the numbers for the "Greater Area of Freeport," a contrived figure created by Mr. Spangenberg. (Tr.314) Gulf claimed to have no information as to the actual population of Freeport, with Mr. Spangenberg going so far as to testify to "calling the town clerk" for an estimate, and to then estimating the population to be between 2,000 and 2,500. (Tr. 383, 384). That Gulf Power did not provide the population for Freeport even though it is available from the same U. S. Census Bureau from which it gathered other population figures (Ex. 63) is not surprising since the population is less than 2,500. Gulf Power did not want to use that number, since it did not support their argument, so instead they chose to invent their own standard.

Electric service in Freeport is available only from CHELCO. Gulf Power's nearest service is from 8 to 25 miles away, and there are no other utilities that can readily provide service (Tr. 386-387). Gulf expects CHELCO to continue to serve existing members and growth in Freeport, with no expectation that CHELCO would be allowed to serve the customers for which its facility investments were made if Gulf decides to extend service. However, Gulf Power considers the area to be "urbanized," using the "Greater Area" approach. Thus, under Gulf's interpretation, CHELCO's extension of service to new members in the "Greater Area" of Freeport is illegal under Chapter 425, F.S., which Mr. Spangenberg believes presents CHELCO with a "conundrum." (Tr. 388). Mr. Spangenberg's "conundrum" exists because of his belief that cooperatives established service to and kept serving in areas where they should not have, so that they are now faced with having to comply with the 10% limit. (Ex.20, p. 84) His approach is that a co-op has to stop serving new members when they start "bumping up against the limit." (Ex. 20, p. 85). Thus, investment and service decisions that were perfectly proper and consistent with the law when made years ago are now "illegal." Such a result is not compliant with the

non-duplication of facilities of the grid bill, makes network planning impossible, and is not in the best interest of the consumers of this State,.

Gulf Power also argues that Bluewater Bay, also served by CHELCO, should be considered to be a "non-rural" area under Section 425.03, F.S., despite the fact that it is not within the limits of any political subdivision, and is a "rural area" by definition. (Tr. 310, 333-334; Ex. 20, p. 91) CHELCO serves Bluewater Bay as a result of a territorial dispute and order of this Commission issued in 1976 (*In re: Choctawhatchee Electric Cooperative v. Gulf Power Company*; Docket No. 74551-EU, Order No. 7516, issued Nov. 19, 1976). In that case, Gulf Power argued, among other things, that the plans for Bluewater Bay indicated that it would become "urbanized" and because of that future growth, CHELCO could not serve it. (Order 7516 at 8, 9). The Commission rejected Gulf's position as "speculative." (Order 7516 at 9). Despite the well-reasoned order of the Commission, which was affirmed after a hearing on reconsideration, (Order No. 8578, issued Nov. 28, 1978) Gulf Power now maintains that it has been shown to have been correct in that case and the Commission was wrong (Ex. 20, p. 102). Inserting Bluewater Bay into the current dispute is little more that an "I told you so" argument and should be given no consideration by the Commission. CHELCO made a reasonable and good-faith investment to serve Bluewater Bay, but its ability to continue to serve would be jeopardized if the Commission accepts Gulf Power's argument.

The Commission should accept a more reasoned application of the law and acknowledge that, where a cooperative has initiated service and made investments with the good faith expectation that it would be able to make reasonable use of its investment, without duplication of those facilities and encroachment from other utilities, it will be allowed to continue such service as allowed by Section 366.04, F.S. without punishment. When a cooperative has extended

service in rural areas, it should not be displaced when that area experiences growth. Though "urbanization" is a factor under 366.04, F.S., it is not the only factor. Other factors, including the avoidance of uneconomic duplication of facilities, serve to allow a cooperative to use its existing facilities to serve new members in its historic service areas.

Issue 3: What is the nature of the Freedom Walk Development with respect to its population, the type of utilities seeking to serve it, degree of urbanization, proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services?

SUMMARY OF POSITION: * Neither the disputed territory nor the surrounding area show any degree of urbanization. Its "nature" is decidedly rural. The population is low, with CHELCO having four metered connections in the disputed territory. If built out, the area in dispute will be relatively dense residential, but not necessarily "urban" in nature. *

ANALYSIS AND ARGUMENT: Commission Rule 25-6.0439(2), F.A.C., provides that "'[t]erritorial dispute' means a disagreement over which utility has the right and the obligation to serve a particular geographical area." The geographical area at issue in this case is that bounded by Old Bethel Road to the north, Normandy Road to the west, portions of Jones Road to the east, and pasture and farmland to the south. The area has not changed at all in the 5 years since Gulf became aware of the proposed Freedom Walk development. It was undeveloped, non-urbanized – "rural" – property then, and remains so today. The area which will be the location of the Freedom Walk development is currently heavily wooded with no interior roads, and is accurately described in CHELCO's Petition. (Tr. 62, 78, 79; Ex. 26) CHELCO serves three members with four active accounts in the north part of the territory along Old Bethel Road. (Tr. 62, 120) CHELCO also has an existing single phase line which runs to the interior of the territory, though the residence that it served burned, and is no longer active. (Ex. 50, pp. 17-18; Ex. 21, pp. 111-112) The areas north of Old Bethel Road, and west of Normandy Road consist of low-density

residential development and commercial sand mining and are served by CHELCO using its existing facilities. The adjacent land south and east of the area in dispute is either wooded or pasture. There is a farmhouse near the southeast corner of the disputed area that is served by Gulf. (Tr.360-361) Under no reasonable construction of the term can the area in dispute and the area in proximity be currently regarded as urbanized.

The current development plan for the area in dispute is as a relatively dense residential area consisting of single family and multi-family homes. However, there has been no final plat approved for the area (Tr.98), so the final plan is still open to speculation. If the territory is fully built out as depicted in the Emerald Coast Partners renderings for Freedom Walk, the area could have a significant but currently undetermined population. However, any precise number is similarly open to speculation. An area for undetermined commercial use has been sectioned off, as has space for a proposed YMCA but there are no firm commitments for either. (Tr.122, 355-356) Whether Freedom Walk comes to fruition, or falls victim to common economic vagaries, CHELCO stands ready to continue service to the geographic area regardless of whether one house is built on the property, or whether 800 units are built on the property, as it has any member requesting service for decades. That service can and will be provided by means of its existing facilities serving on and adjacent to the property.

Neither Gulf Power nor CHELCO would provide any utility service other than electric. Reasonably foreseeable future requirements of the area for utility services include water service, wastewater, cable, and telecommunications service.

As a final point, just prior to the hearing, Gulf Power filed a Motion to Strike portions of CHELCO's testimony which addresses the area in dispute as anything other than Freedom Walk as fully developed. Although Gulf Power withdrew the Motion at the hearing (Tr. 26), it is

anticipated that Gulf Power will raise similar points made in the motion in their arguments. Since the beginning of this dispute CHELCO has referred to the nature of the area as undeveloped, non-urban and rural in nature. Gulf Power cannot credibly claim to have been confused or misled as to CHELCO's position. The pleadings, discovery and testimony of both parties provide a clear picture that the nature of the area currently was being addressed.

Issue 4: What is the existing and planned load to be served in the Freedom Walk Development?

SUMMARY OF POSITION: * The existing load to members residing on the property is approximately 53kW. Both parties have used 4700 kW as the load at full build out.*

ANALYSIS AND ARGUMENT: For the purposes of developing common numbers, both parties have used 4700 kW as the load at full build out. It is not anticipated that the full load will occur immediately, if it actually occurs at all, but will phase in over several years as has been the experience of both parties (Tr. 143). As discussed in Issue 5, even if the full load developed next week, CHELCO would be able to supply it with no unplanned upgrades; Gulf would not.

Issue 5(a): What are the necessary facilities and associated costs for CHELCO to extend adequate and reliable service to the Freedom Walk Development?

SUMMARY OF POSITION: * CHELCO has facilities in place at the connection point for the proposed Freedom Walk development to provide adequate and reliable service immediately. CHELCO will not have to extend any lines, and can serve the 4700 kW projected load without any unplanned substation or system additions and with no additional costs.*

ANALYSIS AND ARGUMENT: CHELCO has lines and facilities in place at the property now that would be used to provide adequate and reliable service without the need to extend any of its lines. CHELCO would be able to serve the projected load of 4700kW without any substation additions and without any upgrades that are not already anticipated and planned.

CHELCO has a current Construction Work Plan ("CWP") project that would upgrade a conductor segment on the feeder that serves the Freedom Walk area. (Tr. 126, 128, 136, 141, 186, 187). Those upgrades were planned to handle projected load growth in the area without consideration of any load for Freedom Walk. (Tr. 175, 180, 187; Ex. 21, pp. 16-20). Although the Freedom Walk load is not specifically identified in the CWP, the upgrade will have the capacity to allow CHELCO to handle the load of Freedom Walk and other anticipated growth in the area for some time to come. (Tr.141)

Since the upgrades were planned and scheduled independent of the demand created by the proposed Freedom Walk development, the $227,404 upgrade costs cannot be attributed to CHELCO as costs to extend adequate and reliable service to the Freedom Walk Development. (Tr. 154-156) The Commission has addressed the issue of attribution of independently planned costs to service to a disputed territory on several occasions and has determined that such independent costs are not to be allocated as costs of providing service.

In the matter of *In Re: Territorial Dispute between Suwannee Valley Electric Cooperative, Inc., and Florida Power Corporation*, 1987 Fla. PUC LEXIS 201, (Docket No. 870096-EU, Order No. 18425, November 16, 1987), the Commission considered the extent to which the FPC's costs of upgrading a transformer to serve a proposed prison site should be attributed as a cost of service. The Order noted that "the FPC argues that its decision to upgrade the Jasper substation was, and is, independent of the additional load that will be created by the prison." In its decision, the PSC ruled that:

> we agree with FPC....Prior to the selection of Hamilton County as a site for a correctional institute, FPC had already determined that the upgrade would be needed and acted on that determination via

> the REI.[1] The addition of HCI as a customer was not the 'trigger' for the upgrade of the Jasper substation.

Order 18425 at 11. The Commission also considered Suwannee Valley's cost of upgrading a single phase line to a three-phase line. The Commission attributed those costs to SVEC because "the inclusion of this upgrade in its October 1986 workplan was 'triggered' by the needs of the prison site." The Commission concluded that:

> Based on the record before us we are of the opinion that the additional facilities needed to reliably meet the expected customer, load and energy growth in the disputed area should be limited to the upgrade of existing lines to three-phase and the construction of new three-phase lines. Our rationale for excluding the upgrade of the Jasper substation is discussed above. As for SVEC's "previous planning" argument concerning the upgrade of its single phase line, we are find the argument unconvincing. SVEC's own witness testified that, but for the prison the upgrade would have been undertaken at some future, unspecified date. SVEC's situation is thus not analogous to that of FPC where its SLAP model projected a substation upgrade based on the normal growth of the substation's demand notwithstanding the prison. Order 18425 at 12-13.

Gulf Power itself has taken the position that previously planned upgrades should not be attributed as a cost of providing service. In the matter of *In Re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc.*, 1988 Fla. PUC LEXIS 367, (Docket No. 870235-EU, Order No. 18886, February 18, 1988), there was a question as to whether certain costs of converting Gulf's substation should be allocated to its cost of service. The Commission Order provided that:

> There was some question whether the costs of converting Gulf's substation should be allocated to its cost of service. Gulf presented evidence that the conversion of the substation was in its long-range plans since 1979. The conversion was scheduled for 1986 to reduce line losses and improve service. We find that the plan to convert the substation was instituted prior to this dispute and

[1] The REI was a Request for Engineering Item that moved the projected upgrade forward from the summer of 1990 to May, 1988.

> though not actually done until 1987, was independent of the improvements associated specifically with service to the high school. Order 18886 at 8.

The Commission also considered West Florida's cost of upgrading certain lines. The Commission determined that the upgrade had not been part of West Florida's work plans until service to the disputed territory became an issue. Thus, the Commission concluded that:

> Not only did WFEC's work plan projections for 1986 exclude the line upgrade, but WFEC's own witness testified that, but for the school, he was unsure if the upgrade would have been undertaken at the time it was. Thus, WFEC's situation is not analogous to that of Gulf where budget allocations indicated that a substation conversion would be scheduled in 1986, based on growth and service criteria, notwithstanding the school. Order 18886 at 10.

In this case, CHELCO planned the upgrade of the conductor segment in advance of, and completely independent of any projected demand from the Freedom Walk territory that is in dispute. (Tr.151, 156, 158, 186-187, 275-276; Ex.50, p. 34) There is no evidence to the contrary. Given the expected Freedom Walk build-out schedule, CHELCO will be able to handle all projected load for Freedom Walk and its other forecasted load on December 31, 2014 without any changes whatsoever to its 2011-2014 Construction Work Plan. (Tr. 150, 175, 274) Even if 100% of the Freedom Walk load were to come on line immediately, a situation that even Gulf admits will not happen (Tr. 126, Ex.21, pp. 90-91; Ex. 39, Item 41), CHELCO could handle the load simply by moving the conductor segment upgrade schedule forward, which would result in no additional cost to CHELCO or its members. (Tr. 141, 165; Ex.21, pp.67-68) Under directly analogous and applicable Commission precedent, costs of the conductor segment upgrade is not properly attributable to CHELCO's cost to serve the disputed territory.

Electrical equipment can be operated safely at up to 100% of its rated capacity. (Tr.139-140, 271-273) When all of the projected 4700kW load of Freedom Walk is added to all of the

projected growth for the area served by the Auburn substation south circuit, the switches, buswork, and breakers serving that circuit will, at normal peak loads, operate at up to 93% to 97% of their rated capacities (Tr. 163-164) That figure is overstated since the Freedom Walk growth will account for an indeterminate but significant portion of the load forecast by CHELCO. (Tr.265, 371-372) Thus, adding 100% of CHELCO's forecast growth to 100% of the Freedom Walk growth would overstate the actual potential growth, and the demand on the switches, buswork, and breakers will be less. (Tr.174-175) Even though operating at 93% to 97% of capacity "would approach their maximum rating" (Tr.195), there is nothing to indicate that the switches, buswork, and breakers can not be safely operated at those capacities. (Tr. 139-140, 152) Since the maximum possible demand after the Freedom Walk buildout and all other growth in the area is added does not cause any of the substation equipment to exceed its rated capacity, there is no need to replace or upgrade that equipment (Tr.142) though it would be monitored for potential upgrades – consistent with its planning policy as expressed in its SDOC – as further growth occurs after 2014. (Tr.134, 138-140) There is no competent, substantial evidence to support a finding that the addition of the Freedom Walk load will require CHELCO to incur any expense to upgrading its facilities to provide adequate and reliable service to the disputed territory and the other areas to which CHELCO provides service. Therefore, there are no costs of providing service to be attributed to CHELCO as a result of its switches and breakers.

Gulf argues that since the Freedom Walk load accounts for some of the load forecast by CHELCO, the award of the disputed territory would eliminate the need for the upgrade, and the $227,404 cost should therefore be attributed to the cost of service to Freedom Walk. Gulf's suggestion that CHELCO would abandon its conductor segment upgrade in any circumstance is no more than speculation and supposition, without any support in the record. To the contrary,

the only evidence in the record demonstrates that CHELCO has planned to upgrade the segment, a plan that was developed and is being implemented independent of Freedom Walk. (Ex. 15, 31; Tr.141-142, 151, 186) Furthermore, the evidence in the record demonstrates that even if the projected loading on the conductor segment was less that 63% of its capacity, there are other reasons to perform that upgrade. (Tr.161) The feeder to the conductor segment is a 741 AAAC feeder, and it makes sense to upgrade the existing 394 AAAC conductor accordingly. (Tr.187) The Auburn South Circuit that provides service to the area on and around the disputed territory is a partially looped circuit. (Tr.126, 151, 157; Ex. 26, Exhibit. E) At the start of the looped segment, the load may be split. By upgrading the conductor segment, CHELCO will be able to accomplish that split and eliminate a "weak link." (Tr. 157, 187. In addition, the upgrade is expected to reduce losses on that segment, which provides long-term cost savings to CHELCO's members. (Tr.156).

Gulf witness Feazell attributes costs of $29,063 related to an upgrade of the Normandy Road single phase line to the cost to serve Freedom Walk. (Tr.250-251, 252) Although that line may provide some redundancy, the Normandy Road line is not necessary for CHELCO to provide service to the disputed territory. (Tr. 137) Thus, the $29,063 cost is not attributable to CHELCO.

Gulf devotes much of its argument to questioning whether forecasts and load projections could change depending on circumstances. (See Tr.159-160) Of course they could. Forecasting growth and demand into the future is an inexact science at best. However, utilities of all kinds use their best judgment to forecast growth and demand in order to plan for investments to meet that demand. Although Gulf goes to extremes to attack the validity of CHELCO's forecasts – alternatively complaining that the forecasts are too high, and complaining that the forecasts are

too low depending on which best suits its argument at the time (see Tr. 159-160, 164-167) the only competent substantial evidence in the record of this proceeding demonstrates that:

a. CHELCO has planned and is implementing the upgrade of the 394 AAAC conductor segment independent of any Freedom Walk load;

b. The conductor segment upgrade will proceed regardless of whether CHELCO is awarded the disputed territory;

c. The switches, buswork and breakers can be safely operated within their design capacity with the addition of 100% of CHELCO's forecast load and 100% of the projected Freedom Walk load.

Based on the foregoing facts and Commission precedent, CHELCO's existing facilities are adequate to serve Freedom Walk with no additional, unplanned additions, and no costs in addition to CHELCO's independent planned upgrades. Therefore, CHELCO will incur no costs to provide necessary facilities to extend adequate and reliable service to the Freedom Walk Development.

Issue 5(b): What are the necessary facilities and associated costs for Gulf to extend adequate and reliable service to the Freedom Walk Development?

SUMMARY OF POSITION: * Gulf Power will have to incur significant costs to extend new facilities, and upgrade existing facilities to serve the disputed territory. The admitted costs will be $139,738. Gulf has failed to account for all of the reasonable and necessary costs. The actual costs will be higher. *

ANALYSIS AND ARGUMENT: Gulf Power has no distribution facilities capable of providing adequate and reliable service to the disputed territory at or on the area that will become Freedom Walk. Gulf Power will have to extend new lines 2130 feet from their current line at a

cost of $89,738. (Tr. 252). Those lines will run parallel to and cross CHELCO's existing lines along Old Bethel Road. (Tr.130).

The Airport Road substation is inadequate to meet the projected load associated with the disputed territory.[2] (Tr.285-286; Ex. 21, pp. 63, 92) The current rating of the Airport Road substation is 10.5 MVA. The Airport Road substation will exceed its rated capacity of 10.5 MVA by 2013 upon the addition of only 1880 kW of the 4,700kW demand from Freedom Walk, when the load will be 11,430 kW (11.43 MVA). (Ex. 21, pp. 91-92; Ex. 24, Item 43) The demand in December 2014, with Gulf's non-Freedom Walk load projection and the full 4700 kW Freedom Walk load, will be at least 14,690 kW (14.7MVA). (Ex. 24, Item 43) Gulf has no planned upgrades to the Airport Road substation in order to serve Freedom Walk, and "[t]he probability of Freedom Walk developing has not yet reached a threshold where Gulf would begin to include the anticipated load in its load studies." (Ex. 24, Item 43).

Since the Airport Road substation cannot meet the projected 14.7 MVA load demand for the disputed territory, Gulf has proposed a stopgap upgrade to replace the existing 10.5 MVA transformer bank with a fully depreciated,[3] 45 year-old 12.5 MVA transformer at its Airport Road substation. Since the 12.5 MVA transformer will be expected to meet the 14,700kW (14.7MVA) projected load, it will be loaded to 120% of its nameplate rating. (Tr. 281; Ex. 21, pp.87-88). Despite the fact that the "operational issues" Gulf is experiencing with its 46kV system, which includes the Airport Road substation, are the result in part of its aging equipment (Ex.24, Item 41), Gulf Power proposes to provide "adequate and reliable" service to Freedom

[2] Gulf's admission came despite earlier assertions that it would not need to make investments or upgrades to its facilities to serve the disputed territory (see Tr.253)

[3] In general, "depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence." *Tamaron Homeowners' Association, Inc. v. Tamaron Utilities, Inc.*, 460 So.2d 347, 352 (Fla. 1984).

walk by replacing its aging and inadequate 10.5 MVA transformer with an aged and retired 12.5 MVA transformer that it has "in inventory." (Tr.301). Such a proposal, which comes with no evidence of reliability, is nothing more than a transparent attempt to allow Gulf Power to argue that it will incur no costs to provide service from its inadequate substation facilities.

Based on the evidence in the record of this proceeding, only the cost of labor "associated with the movement of the transformer or transformers," in the amount of $40,000, has been attributed as "costs for Gulf to extend adequate and reliable service to the Freedom Walk Development." (Tr.280, 301) Gulf has not attributed any costs for installing the transformers, testing the transformers, connecting the transformers to the existing lines, performing any required maintenance or repairs to the 45 year-old transformers, or any other costs whatsoever that are necessary and reasonable to ensure that the transformer can be safely operated. The Commission should not accept any implication through Gulf's omission that the costs of performing the substation upgrade are free or non-existent. Gulf has intentionally ignored, obscured and understated its cost to provide service to the disputed Freedom Walk area. It has done so here by relying on the artifice of using a 45 year-old transformer that it argues has no cost, failing to include any of the costs of installing, testing, connecting, repairing, or maintaining the transformer, and running it at 120% of its nameplate capacity.[4] The costs of providing service to the disputed Freedom Walk area necessarily include those costs. Thus, the admitted $139,738 cost of service is grossly understated by Gulf.

Finally, Gulf has asserted that it will be performing a massive system-wide substation upgrade at some unspecified time in the next 5 years, at a cost of at least $1,600,000 for the

[4] The irony of Gulf's position - i.e. to excoriate CHELCO for operating current and active equipment at less than 100% of its rated capacity, while relying on its ability to provide adequate reliable service by operating a 45 year transformer at 120% percent of its rated capacity - is not lost on CHELCO and should not be lost on the Commission.

Airport Road component, which project will be used in part to serve Freedom Walk. The "project" has no current timetable, no current planning document, no current land use approvals, and no current budget. The only "plan" for this massive system wide upgrade is the two page document drafted specifically as a response to discovery in this case. (Ex.24, item 41, Tr.287) When asked specifically, Gulf admitted that if anyone wanted to see the upgrade plan, they could not because it does not exist. (Tr.286-288; Ex.21, pp. 68-69, 71-72) Jotting down a "plan" as the reply to a request for discovery in an adversarial proceeding does not, without some more definite and concrete evidence, create a basis upon which the Commission can make findings of fact. Thus, for purposes of this proceeding, there is no competent, substantial evidence of a current, planned project to perform a comprehensive upgrade of the Airport Road Substation.

Issue 5(c): What are the necessary facilities and associated costs for CHELCO to provide adequate and reliable service within the Freedom Walk Development?

SUMMARY OF POSITION: * The total cost for CHELCO to serve all residential and commercial loads within the Freedom Walk development is $1,052,598.01 *

ANALYSIS AND ARGUMENT: Based on parameters agreed to by Gulf Power and CHELCO, the total cost for CHELCO to serve all residential and commercial loads within the Freedom Walk development is $1,052,598.01.

Issue 5(d): What are the necessary facilities and associated costs for Gulf to provide adequate and reliable service within the Freedom Walk Development?

SUMMARY OF POSITION: * The total cost for Gulf to serve all residential and commercial loads within the Freedom Walk development is $1,152,515.00. *

ANALYSIS AND ARGUMENT: Based on parameters agreed to by Gulf Power and CHELCO, the total cost for Gulf to serve all residential and commercial loads within the Freedom Walk development is $1,152,515.00. That figure is $99,916.99 greater than

CHELCO's costs to provide adequate and reliable service within the Freedom Walk Development.

Issue 6: Will the provision of service to the Freedom Walk Development by CHELCO or Gulf result in uneconomic duplication of any existing facilities?

SUMMARY OF POSITION: *Yes. CHELCO has existing 3 phase lines at the disputed area. Gulf Power has no facilities in the area which are adequate to serve the property and would have to extend its existing lines nearly half a mile just to get to CHELCO's existing point of presence*

ANALYSIS AND ARGUMENT: CHELCO has made an investment to serve current and future members in this area, and has included projects as part of its normal planning schedule to handle anticipated growth. (Tr.57, 120-121) In responding to discovery as to whether it would have to duplicate existing facilities of CHELCO, Gulf Power responded:

> Gulf does not dispute that Gulf must extend its existing three-phase feeder approximately 2,130 feet in order to serve the Freedom Walk Development, nor does Gulf dispute that this extension will result in duplication of some CHELCO facilities which are presently in place. (Emphasis supplied). (Ex. 23, Item 13)

In direct contrast to this admission by Gulf Power is Mr. Spangenberg's testimony that Gulf Power's provision of service to Freedom Walk would not result in any duplication of facilities, whether uneconomic or not (Tr. 344).

Gulf Power knew from the initial contacts with the developer in 2006 that CHELCO had lines on the property, and internally analyzed what it would cost Gulf Power just to get where CHELCO is now (Ex. 6). At his deposition, in response to the question ". . . there was recognition that CHELCO had a presence?" Mr. Spangenberg replied "Oh yes, sir, absolutely. We were very well aware that CHELCO had a line on a portion of the property." (Ex.20, p. 55).

Gulf Power argues that there would be no uneconomic duplication and that whether there is uneconomic duplication or not should be made from the perspective of the utility making the

investment. (Tr. 345-347). Mr. Spangenberg offered four tests, each of which was intended to be used to determine if there is an incremental benefit to Gulf Power investors and ratepayers to make an investment to serve Freedom Walk (Tr. 345-347). The definition and tests he offers are not unlike those put forth by Gulf Power in *In re: Petition to resolve territorial dispute with Gulf Coast Cooperative Inc. by Gulf Power Co.*; Docket No. 930885-EU; Order No. PSC-98-0174-FOF-EU, January 28, 1998, which is referenced by Mr. Spangenberg in his testimony (Tr.342). That order was entered after the Supreme Court reversed the Commission's initial decision to award an area to Gulf Power. *Gulf Coast Electric Cooperative v. Clark*, 674 So. 2d 120, (Fla. 1976). The Commission directed the parties to enter into negotiations to develop a territorial agreement that would resolve disputes. When the parties could not develop an agreement, the Commission held hearings that resulted in the cited order. In its decision, the Commission discussed the fact that there was a significant amount of existing commingling and duplication of lines in the area, and found in part that ". . . further uneconomic investment will not occur in the instant case because the facilities, and investment of both utilities are already in place." (e.s.) (Order 95-0271 at 6 and 7). That is not the situation in the present case, where only CHELCO has facilities and investment in place and Gulf Power does not.

In analyzing Mr. Spangenberg's four "tests," Dr. Martin Blake, former Commissioner and Chair of the New Mexico PSC, testified that because of the relatively high density load, not only would the responses to the four questions as to Gulf Power be "yes" but the answer to those same four questions would be "yes" for CHELCO as well. He noted that the analysis performed by Gulf Power disregards the fact that allowing Gulf Power to serve the area ignores existing lines, facilities and investment of CHELCO, and gives no consideration to the question of whether the duplication of CHELCO's lines by Gulf Power would be uneconomic duplication

from CHELCO's perspective. Dr. Blake testified that it would be improper to consider the question of uneconomic duplication only from the financial interest of Gulf Power, and that a more objective analysis would be to consider whether the existing facilities a utility has constructed in good faith to serve consumers are duplicated in any manner (Tr. 201). That view is entirely consistent with *Gulf Coast v. Clark*, 674 So. 2d 120, 123 (Fla. 1996) which held that:

> In its argument before the Court, the Commission asserts that the actual cost is only one factor to be considered in determining uneconomic duplication. The Commission states that lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has been a "race to serve," and other concerns must be considered in evaluating whether an uneconomic duplication has occurred. We do not disagree that these factors must be considered.

Gulf Power cites the *Gulf Coast* case for the proposition that the costs to be incurred by Gulf Power in the instant case are "de minimus" and thus there is no uneconomic duplication. In *Gulf Coast*, the cost to upgrade was $14,583, an amount the Commission said was "relatively small" and the Court said was "de minimus." The cost for Gulf Power to duplicate where CHELCO's existing lines is approximately $90,000, which does not include the additional costs for transformers and other upgrades discussed in Issue 5(b) and which is beyond "de minimus."

CHELCO has an established presence, has made an investment to provide service to members in the area at issue and to allow Gulf Power to serve this area would be an uneconomical duplication of facilities and an economic waste and inefficient extension which should be avoided. *Lee County Electric Cooperative v. Marks*, 501 So. 2d 585 (Fla. 1987).

Issue 7: Is each utility capable of providing adequate and reliable electric service to the Freedom Walk Development?

SUMMARY OF POSITION: *CHELCO has existing distribution facilities to provide adequate and reliable electric service to the Freedom Walk Development. As a member of

PowerSouth Energy Cooperative, CHELCO has access to sufficient power to adequately and reliably serve the area.*

ANALYSIS AND ARGUMENT: Neither party has taken issue with availability of power to the other to provide adequate and reliable service. The ability to deliver that power is discussed in Issue 5. CHELCO, as a member of PowerSouth, has access to sufficient power to supply the requirements of its members with this additional load and acknowledges that Gulf Power has the generating capacity to do the same. Gulf Power presented testimony that since it had an operations center closer to the development than CHELCO, they could provide more reliable service (Tr. 256). As noted by Mr. Avery however, CHELCO is equally as capable of responding to the needs of members in the area (Tr. 148-149).

CHELCO has been serving the area in dispute for over 60 years and has a long history of service to members in and around the area. Gulf Power does not. Gulf Power makes the argument that CHELCO's historical presence and service to the area should be given little weight and is not an enumerated element for consideration by the Commission. (Tr. 358, 359). Gulf Power's position is contrary to virtually every order issued by the Commission resolving a territorial dispute. The Commission has given some consideration to the existing facilities and presence of the utilities in the disputed area and has accorded historical presence weight in resolving several disputes. *See In Re: Petition of Clay Electric Cooperative Inc. to Resolve Dispute With Florida Power and Light Co.*, Dkt 870358-EU, Order No. 18822, Feb. 9, 1988. *In Re: Territorial Dispute Between Suwannee Valley Electric Cooperative and Florida Power Corp.*, Dkt. 870096, Order No. 18425, Nov. 16, 1987; *In Re: Petition of Gulf Coast Electric Cooperative Inc. Against Gulf Power Co.*, Dkt. 850087-EU, Order No. 16106, May 13, 1986; *In*

Re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute With Florida Power Corp., Docket No. 830271-EU, Order No. 12324, Aug. 4, 1983.

Gulf Power argues that the Commission has typically given no weight to historical presence and strongly suggests that historical presence is not relevant. (Tr. 359, 360). In *West Florida v. Jacobs, supra,* which Gulf Power relies upon for their position, the court observed the historical presence of one utility may be relevant in determining whether uneconomic duplication occurs, thus it is appropriate to accord some weight to historical presence. 887 So. 2d 1200 at 1205. It is appropriate and consistent with Commission and Supreme Court precedent to consider historical presence.

Issue 8: What utility does the customer prefer to serve the Freedom Walk Development?

SUMMARY OF POSITION: *Customer preference is a criteria evaluated by the Commission when all other factors are equal and they are not in this case; they favor CHELCO. Moreover, the customer in this dispute is the developer and should be afforded little weight.*

ANALYSIS AND ARGUMENT: Gulf Power has provided letters from Emerald Coast Partners, LLC, the developer of Freedom Walk, that they have treated as a request for service from Gulf Power. (Tr. 226; Ex. 27). Those letters were presumably obtained in a manner consistent with Gulf Power's training policy to aggressively seek out such "choice" letters for use in a territorial dispute. According to Gulf Power, the letters constitute the customer's "choice" and under the "applicable law" that it is the customer who should make the initial choice of electric supplier. (Tr. 228). Gulf Power even states that this dispute exists because CHELCO has chosen to ignore the customer's choice (Tr. 69, 226, 323).

Gulf Power's position that customer "choice" should be a guiding concern ignores a fundamental principle of utility regulation in Florida that a customer has no organic economic or

political right to service by a particular utility merely because he deems it advantageous to himself. *Storey v. Mayo*, 217 So. 2d 304 (Fla. 1968). The Commission has frequently cited *Storey v. Mayo*, in territorial dispute decisions to support the very proposition announced in the case – a consumer has no right to select their provider of utility service. If there was any doubt of this, the case of *Lee County Cooperative v. Marks*, 501 So. 2d 585 (Fla. 1987) should have put it to rest. In that case, a customer constructed a line from its plant to a point in the service area of Florida Power and Light Company ("FPL") in order to obtain service from FPL. Although the Commission approved the arrangement, the Court reversed the Commission and made it clear that such a conclusion was contrary to the law of Florida. 501 So. 2d 585 at 587. See also *West Florida Electric Cooperative Inc. v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004).

Customer choice is advocated by Gulf Power as a "foundational building block" in the free enterprise, competitive market (Tr. 228). But as Dr. Blake so clearly explained in his rebuttal and deposition, the provision of electric service is not a competitive enterprise; it is a natural monopoly (Tr. 204). If his rebuttal was not clear his deposition was:

> "This isn't a competitive business. It's a natural monopoly . . . anytime you say competition, I'm going to disagree with you. It is not a competitive business. (Ex. 54, p. 27).

Even Gulf Power acknowledges the provision of electric service is a monopoly as reflected in the deposition testimony of Mr. Spangenberg:

> ". . . and for the vast majority of our customers we have no effective competition . . . Therefore we represent a monopoly. The Public Service Commission represents a replacement for competition in that market." (Ex. 20, p. 30).

Customer preference has been considered by the Commission only when all other issues are equal. That is in accord with the Supreme Court which has held that customer preference should be considered a significant factor where other factors are substantially equal. *Gulf Coast Electric*

Cooperative Inc. v. Clark, 674 So.2d 120 (Fla. 1996); *West Florida Electric Cooperative Association, Inc. v. Jacobs*, 887 So.2d 1200 (Fla. 2004); *In re: Territorial Dispute between Suwannee Valley Electric Cooperative Inc. and Florida Power Corp.* Dkt No. 870096-EU, Order No. 18425, Nov. 16, 1987. In this case, issues of existing service capabilities, cost of providing service, uneconomic duplication of facilities, and the non-urban nature of the disputed area demonstrate that all issues in this docket are not equal and, in fact, favor CHELCO. Therefore, customer preference should not be given any consideration.

As addressed by Dr. Blake, the Commission should give lesser weight to customer preference in this docket because it is the developer and not the end user customers who would be expressing a preference, and the interest of developers do not necessarily coincide with those of customers. (Tr.220). In such cases the developer is not an "agent" or surrogate for the customer since the interests of the developer may be, and generally are, divergent from those of the future end use consumer. Mr. Jacob admitted that the developer may not reside at Freedom Walk, and that the developer does not know what future consumers may want (Ex. 22, p. 9). Moreover, it is possible that the developer would "prefer" Gulf Power in this case given the initial economic benefit to the developer of "choosing" Gulf Power over CHELCO. CHELCO would require the developer to pay a line extension charge up front and refund portions back to the developer as the development builds out (Tr. 64). This protects CHELCO's members from losing their investment if Freedom Walk does not build out as projected. Gulf Power, on the other hand, would require no CIAC and would let their rate payers bear the risk. CHELCO's approach is far more prudent on behalf of its members. Gulf Power has offered an argument that customer choice should dictate which utility serves the area of Freedom Walk; however, the law is clear that consumers have no organic right to choose their provider of utility service. The

Commission should give little weight to the developer's "preference" or "choice" in this case since his decision was very likely influenced by his own economic interests. (Tr. 221).

Issue 9: Which utility should be awarded the right to serve the Freedom Walk Development?

SUMMARY OF POSITION: *CHELCO.*

ANALYSIS AND ARGUMENT: CHELCO has established that it has the ability, resources and capacity to provide service to the area currently and upon full build out of the Freedom Walk development. In addition, CHELCO has a historic presence on the property. Gulf Power counters by saying they have been serving the City of Crestview since 1928 and areas south of the property since 1955 (Tr. 360). Gulf Power may have been serving customers in Crestview before CHELCO, but they certainly were nowhere near the area in dispute when CHELCO began serving members there. CHELCO satisfies all the criteria outlined in Chapter 366, F.S., and Rule 25-6.0441, F.A.C., to be considered in resolving the dispute and Gulf Power does not.

Gulf Power argues that it should prevail because customers of Gulf Power will enjoy the benefits provided by regulation and oversight by the PSC (Tr. 228). However, *Escambia River Cooperative, Inc. v. FPSC*, 421 So.2d 1384 (Fla. 1982), the Florida Supreme Count rejected that argument and held instead:

> We disagree, however, with the Commission's alternative finding that its more extensive jurisdiction over privately owned utilities is an additional consideration supportive of a policy decision in favor of Gulf Power. We disapprove the jurisdictional distinction as a valid reason to support a ruling for a privately owned utility and against a rural electric cooperative in a territorial dispute.

There is no reason to depart from that decision. Members of CHELCO have the benefits and protections afforded by a Board of Trustees whom they elect and whom they can replace. Customers of Gulf Power have no similar recourse. No basis has been offered as to why the holding of the Court should be ignored and the Commission should decline to do so.

Gulf Power has also argued that it should prevail because it has an "obligation to serve" a customer as a public utility, whereas CHELCO, as a cooperative, does not (Tr. 227). This too has been presented and thoroughly addressed by the Commission in the case of *Peace River Electric Cooperative Inc. against Florida Power and Light Company*, Docket No. 840293-EU, Order No. 15210, October 8, 1985. In that docket, Florida Power and Light Company ("FPL") argued, in part, that the Commission did not have jurisdiction over PRECO. Thus the Commission could not award the area in dispute to PRECO because the Commission could not compel PRECO to serve anyone in the area requesting service. The Commission rejected this position, concluding that even though a cooperative has no statutory duty to serve any customer anywhere in the state, when it comes within the Commission's jurisdiction to resolve disputes pursuant to Section 366.04(2)(e), F.S., the cooperative cannot refuse to provide service to anyone requesting service within the disputed area. The Commission reasoned that the ability to award an area to a cooperative carries with it the ability to enforce that award. At no time has CHELCO advocated a position inconsistent with the decision of the Commission in PRECO.

CONCLUSION

CHELCO has served the area on which the Freedom Walk development is planned for more than sixty years regardless of the economic burden or cost. CHELCO is not prohibited from serving the area in dispute and has demonstrated that it satisfies all of the elements to be considered under Chapter 366, F.S., while Gulf Power does not. To summarize, the record supports the following findings:

(1) CHELCO is capable of providing adequate substation facilities to, and has adequate existing distribution facilities in the area without any upgrades beyond that planned independently of the Freedom Walk demand;

(2) Gulf Power cannot provide substation and distribution facilities to the area without expending a minimum of $139,738, which cost does not include the cost

of installing, testing, connecting, maintaining or repairing the 45 year-old transformer upon which it relies to serve the area;

(3) Gulf Power's construction of approximately 2,140 feet line to the border of the Freedom Walk subdivision will duplicate CHELCO's existing facilities;

(4) The disputed area is currently not urbanized. The buildout of the Freedom Walk development – though nothing has progressed for years and remains speculative – will result in a relatively high density and primarily residential area that will be surrounded by areas that are rural in nature;

(5) CHELCO has historically served the disputed area, and serves members in the disputed area today.

(6) Gulf Power has never provided service to the disputed territory.

(7) The majority of the proposed development is within the annexed city limits of the city of Crestview, but that does not preclude service by CHELCO.

(8) Less than 1% of CHELCO's members reside within municipal boundaries of any city.

(9) All factors not being equal, customer/developer preference is not relevant in this docket.

WHEREFORE, based on the foregoing, the Commission should award the disputed territory to CHELCO.

RESPECTFULLY SUBMITTED this 9th day of June, 2011.

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