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Subject: Gulf Power Company's Post-Hearing Brief and Statement of Issues and Positions

Attachments: 6.9.11 Post Hearing Brief and Statement of Issues and Positions.pdf; Docket No 100304-EU_Gulf Power Company's Post-Hearing Brief.doc

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B. Docket No. 100304-EU

C. Gulf Power Company

D. Document consists of 39 pages

E. The attached document is Gulf Power Company's Post-Hearing Brief and Statement of Issues and Positions.

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GULF POWER
A SOUTHERN COMPANY

June 9, 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 for Official Filing are Gulf Power Company's Post-Hearing Brief and Statement of Issues and Positions in the above referenced docket. A copy of the Post-Hearing Brief and Statement of Issues and Positions as prepared in Microsoft Word is also included as an attachment to Gulf's electronic filing.

Regards,

Susan Ritenour (rwd)

nbm

Enclosures

cc: Beggs & Lane
Jeffrey A. Stone, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

GULF POWER COMPANY'S POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS

GULF POWER COMPANY ("Gulf Power," "Gulf," or "the Company"), by and through its undersigned counsel, files the following as its post-hearing brief and post-hearing Statement of Issues and Positions in this proceeding pursuant to Order No. PSC-11-0217-PHO-EU and Rule 25-106.215, Florida Administrative Code.

STATEMENT OF BASIC POSITION

The relief sought in Choctawhatchee Electric Cooperative Inc.'s ("CHELCO") petition should be denied and the right to serve the Freedom Walk development should be awarded to Gulf Power Company. The Freedom Walk development will unquestionably be non-rural and urban in nature, and the land on which the development is to be built is presently non-rural in nature.[1] Consequently, CHELCO lacks authority to serve the development under Chapters 366 and 425, Florida Statutes. Additionally, Gulf Power should be awarded the right to serve the development based on application of all factors contained in section 366.04 Florida Statutes, and Rule 25-6.0441(2), Florida Administrative Code. Gulf Power is capable of providing adequate and reliable electric service to the development at a cost substantially below CHELCO's cost. Gulf Power's serving the development will not result in "further uneconomic duplication" of CHELCO's existing facilities. The customer has unequivocally indicated its preference that Gulf Power provide electric service to the development.

[1] The Freedom Walk area is presently undeveloped. Nevertheless, the area clearly is not "rural" as defined by section 425.03(1), Florida Statutes.

GENERAL DISCUSSION

This dispute involves the right to serve a planned, 170-plus acre mixed use development in the City of Crestview, Florida, known as Freedom Walk. [Tr. 233] Emerald Coast Partners, LLC, the developer of Freedom Walk, has unequivocally indicated its preference that Gulf Power provide electric service to the development. [Tr. 232] Because there are presently no residents in the development, the developer is the "customer" for purposes of this dispute. [Tr. 237-38] Despite the customer's stated preference, CHELCO initiated the present dispute. As the Petitioner, CHELCO is the party asserting the affirmative of the issue and therefore bears the burden of proof in this proceeding. See, In Re Complaint of Hugh Keith, 90 F.P.S.C. 2:440 (Docket No. 890450-WS, Order 22605, Feb. 26, 1990) ("It is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue.") CHELCO has failed to satisfy that burden. At its core, CHELCO's case is premised on the fact that CHELCO owns distribution lines which abut portions of the Freedom Walk development and the fact that Gulf Power will need to extend its existing three-phase feeder 2,130 feet to serve the development. Gulf Power readily acknowledged these facts at the outset of the litigation and acknowledges them today. While simplistic in its appeal, CHELCO's position in this case ignores the inadequate capabilities of its existing facilities, the plain language of section 366.04, Florida Statutes, Rule 25-6.0441, Florida Administrative Code, and a wealth of Commission and Florida Supreme Court precedent governing the resolution of territorial disputes under Florida law.

1. CHELCO lacks the legal authority to serve Freedom Walk.

As detailed below, the record evidence demonstrates that Gulf Power prevails on each of the disputed[2] elements set forth in section 366.04, Florida Statutes, and the Commission's territorial dispute rule. However, consideration of all elements contained in the statute and rule is not necessary to the resolution of this case because CHELCO does not possess the legal authority to serve the development. The Freedom Walk development will unquestionably be non-rural and urban in nature, and the land on which the development is to be built is presently non-rural in nature as defined by section 425.03(1), Florida Statutes. Therefore, CHELCO lacks authority to serve the development under Chapters 366 and 425, Florida Statutes.

Pursuant to section 366.04(2)(e), Florida Statutes, the Commission possesses exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and other utilities. See, In 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)

Section 366.04(2)(e), Florida Statutes, sets forth a number of factors, including the "nature of the area involved," which the Commission may consider in resolving territorial disputes. Moreover, the plain language of the statute appropriately recognizes that the Commission is not limited to consideration of the factors listed in the statute in resolving territorial disputes. See, West Florida Electric Coop. v. Jacobs, 887 So.2d 1200, 1203, 1205

[2] The parties' respective costs to provide service within the development are substantially equal. See, Order No. PSC-11-0217-PHO-EU, Issues 5(c) and 5(d). Consequently, Gulf Power does not address this issue in its post-hearing brief.

(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 25-6.0441, Florida Administrative Code.

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)

Certainly, a determination of whether an area is "rural" under Chapter 425 is a proper consideration in assessing the "nature of the area involved" under section 366.04(2)(e). Moreover, a utility's basic legal authority to serve an area in dispute is clearly a threshold matter which must be resolved by the Commission 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.[3] 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

[3] CHELCO contends that the Commission lacks jurisdiction to consider and apply Chapter 425, Florida Statutes. [Tr. 82, 84-85, 207, 209-10] This contention cannot be reconciled with the long line of Commission precedent cited herein which does just that. Moreover, it is important to recognize that the Commission is only being asked to apply Chapter 425 in the exercise of its exclusive jurisdiction to resolve territorial disputes under section 366.04, Florida Statutes –not in a broader context. CHELCO's jurisdictional argument begs an important question. Even CHELCO acknowledges that Chapter 425 places some limitations on cooperatives' abilities to serve non-rural areas. **[Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham, p. 50, lines 5-12] Given that acknowledgment and given the Commission's exclusive jurisdiction over territorial disputes, CHELCO's position would result in no forum having jurisdiction to apply Chapter 425 in the context of territorial disputes. This result is untenable and is precisely why numerous Commissions have applied Chapter 425 in past disputes and why this Commission should do so in the present dispute.

Escambia River Electric Cooperative 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)

In each of the Commission orders cited above, the Commission determined that a cooperative was not legally prohibited from serving a disputed area because of the area's rural nature. Certainly, under this same precedent, CHELCO would be legally prohibited from serving Freedom Walk if it is found to be non-rural or urban in nature.[4] Based on the record evidence, there can be no doubt that the Freedom Walk area is presently not "rural" as that term

[4] CHELCO has acknowledged as much. In its response to Gulf Power's Motion for Summary Final Order dated February 11, 2011, CHELCO stated as follows: " [C]HELCO asserts --with the written authority of the legislature, the Supreme Court, and the Commission behind it-- that it is clear and unambiguous that CHELCO is entitled, as a matter of law, to serve Freedom, so long as the Commission determines that, as a matter of fact, CHELCO has the capability to do so, and that the disputed area does not exhibit characteristics of urbanization under standards established in Section 366.04(2)(e), Florida Statutes." See, Response to Gulf Power's Motion for Summary Final Order (Document No. 01316-11) at page 10, n. 4. (emphasis supplied)

is defined in section 425.03(1) and will be quite urbanized as that term is used in section 366.04(2)(e) and the Commission's rule.

(a) The Freedom Walk area is presently non-rural.

In paragraph 6 of its Petition, CHELCO states that the boundaries of the disputed area are set forth on Exhibit "A,"[5] 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."[6] **[Hearing Exhibit 26]** (emphasis supplied) The Petition's description of the development being located within the Crestview city limits is consistent with CHELCO Supervisor of Engineering, Mike Kapotsy's description of the development in a February 19, 2008 email. In that email, Mr. Kapotsy noted, in part, as follows: "[I]t has come to my attention that there is a project in Crestview city limits that falls within our service territory." [**Hearing Exhibit 50**, March 30, 2011, Deposition of Matthew Avery at p. 11, lines 10-25, and page 12, lines 1-25] (emphasis supplied)

The law in Florida is 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

[5] 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."

[6] Crestview is an incorporated city having a population in excess of 2,500 persons and is therefore, by definition, not "rural" under section 425.03(1), Florida Statutes. [Tr. 309]

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 depart from its pleadings. 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. At the hearing, CHELCO took the position that a small portion of the development will fall outside of the present city limits. [Tr. 60] As explained by Gulf Witness Spangenberg, these unincorporated out-parcels are not owned by the developer, not included within the boundaries of the Freedom Walk Community Development District established for the development pursuant to Chapter 190, Florida Statutes, and represent only three percent of the development. [Tr. 325, 351] Nevertheless, even if it is determined that these out-parcels will, at some point, be part of the Freedom Walk development, their inclusion would not have any impact on the nature or character of the disputed area as they would possess all of the same urban amenities and characteristics as the rest of the development.[7] [Tr. 353]

(b) The Freedom Walk development will be highly urbanized.

CHELCO has suggested that the land on which Freedom Walk will be built is presently wooded and therefore, as a factual matter, the area in dispute lacks any "urban" characteristics. [Tr. 78-79] This contention again ignores the subject of the instant dispute, as framed by CHELCO's own pleadings. CHELCO states in its Petition that "[t]he purpose of this petition is

[7] 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.")

to resolve a dispute which exists between CHELCO and gulf as to the utility which will provide electric service to a new development. The disputed territory is a proposed new development known as Freedom Walk which is in CHELCO's historic service area....[T]he development, consisting of approximately 171 acres is currently wooded area but upon buildout will contain both residential and commercial customers." (Petition ¶ 6) (emphasis supplied) "The initial load in Freedom Walk will be approximately 112 kW, and upon full build out, the anticipated load will be 3.7 MW."[8] (Petition ¶ 8) (emphasis supplied)

It is clear from CHELCO's Petition that "disputed territory" is the planned Freedom Walk development and not simply the land as it exists in its present state. This is further borne out in CHELCO's pre-filed testimony and in deposition testimony. For example, at page 3 of her direct testimony, CHELCO Witness Grantham characterizes Freedom Walk as a "high density, high revenue development" and suggests that allowing Gulf Power to serve the development will preclude CHELCO from maximizing its investment in the area. [Tr. 57] Similarly, during her deposition in this case, Ms. Grantham was asked the following question:

> Q. Okay. And so, as filed in the petition, the dispute is over a new development, a proposed new development known as Freedom Walk, correct?
>
> A. Yes, sir.

[**Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham, page 35, lines 6-9]

[8] In light of CHELCO's repeated averments concerning what Freedom Walk "will be" and "will contain," it is more than ironic that CHELCO now takes the position that what Freedom Walk "may become in the future is speculative." [Tr. 79] Indeed, on re-direct examination during her deposition Ms. Grantham was asked the following question and gave the following answer: Q. "Ms. Grantham, Mr. Griffin asked you about Freedom Walk development and your views about its going forward and when it would be built out. As far as you know, is the Freedom Walk development proceeding as of today?" A. "Yes, sir." **[Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham, p. 64, lines 18-22]

In depositions, Gulf posed a similar line of questions to CHELCO Witness Avery. Mr. Avery was asked the following questions and gave the following answers:

Q. You state that Freedom Walk will not develop to full build out overnight, correct?

A. Right.

Q. Isn't it also a fair statement to say that this dispute involves Freedom Walk as fully developed and not the land in its current status right now?

A. Repeat the question, please.

Q. Isn't it also fair to say that this dispute involves Freedom Walk as fully developed, not just in its early needs, not just the early needs of the development?

A. I would say yes.

[**Hearing Exhibit 50**, March 30, 2011, Deposition of Matthew Avery at page 70, lines 16-25 and page 71, line 1]

CHELCO's Petition plainly frames the dispute as relating solely to Freedom Walk, as fully developed. Having chosen to frame the dispute in this manner, CHELCO cannot permissibly take the contrary position that the "disputed territory" is a wooded, non-urbanized tract. As detailed in the un-rebutted testimony of Gulf Witness Johnson, Freedom Walk will be a substantial, urbanized mixed-use development, not sand and trees. Among other things, Mr. Johnson explains that: the development will be located within the City of Crestview; the development has been approved as a Community Development District pursuant to Chapter 190, Florida Statutes; and that the development will contain 489 single-family and 272 multi-family

lots, a YMCA, commercial outlets, an upscale clubhouse, ponds, nature trails and various other urban characteristics such as sidewalks, underground utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection.[9] [Tr 234-237]

In summary, because the Freedom Walk development area is presently non-rural and will be highly urbanized in nature, CHELCO is prohibited as a matter of law from serving it. These facts alone require an award in Gulf Power's favor.

(c) CHELCO is presently in excess of Chapter 425's statutory "10 percent limitation."

For the reasons outlined above, Gulf Power submits that the Commission's precedent and Chapter 425, Florida Statutes, are clear that the non-rural nature of the Freedom Walk development imposes a complete bar to CHELCO's serving new members in the area. Consequently, Gulf does not believe it is necessary for the Commission to reach a determination on what has been described in testimony as the "10 percent limitation." However, should the Commission determine that Chapter 425 does not act as a complete bar to CHELCO's serving new members in the area, it is clear that CHELCO is nevertheless barred from serving Freedom Walk because it presently serves a number of persons in non-rural areas which number is in excess of 10 percent of its total membership. Section 425.04(4), Florida Statutes, titled "*Powers*" 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." §

[9] Compare, In Re: Petition of Gulf Coast Electric Cooperative, Inc. against Gulf Power Company, 86 F.P.S.C. 5:138 (Docket No. 850087-EU, Order No. 16106, May 13, 1986) (finding that area in dispute had "no urban characteristics at all" due to the number of inhabitants, proximity to other communities, and lack of municipal services such as "fire protection, water systems, sewer systems, sanitary systems, police protection, storm water drainage, paved streets or post offices, and no other utilities except telephone service.")

425.04(4), Fla. Stat. (emphasis supplied) The U.S. Court of Appeals for the Eleventh Circuit has interpreted this statutory language to allow rural electric cooperatives to serve up to ten percent non-rural membership. See, Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789 (11th Cir. 1982). While there is little guidance in legislative history or case law regarding the purpose of this statutory provision, it appears that the language was intended to prevent rural cooperatives from being forced to relinquish service to existing members in areas that evolve from being rural to non-rural over time, through municipal annexation or otherwise. This would be consistent with other rural electric cooperative statutes, such as South Carolina's, which include provisions to protect against just such a situation. Numerous South Carolina courts have interpreted South Carolina's rural electric cooperative statute as barring rural electric cooperatives from initiating service to non-rural areas, absent qualification under a statutory "annexation exception." See e.g., City of Camden v. Fairfield Electric Cooperative, Inc., 643 S.E.2d 687, 689 (S.C. 2007) (noting that "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" and describing a statutory "annexation" exception which is intended to "prevent the ouster of co-ops from areas they have historically served due to population growth or annexation."); Duke Power Company v. Laurens Electric Cooperative, Inc., 543 S.E.2d 560, 562 (S.C. Ct. App. 2000) (same) City of Newberry v. Newberry Electric Cooperative, Inc., 692 S.E.2d 510 (S.C. 2010).

Because the instant case does not involve relinquishment of service to existing customers, but, instead, prospective service to new customers, resorting to the 10 percent limitation is not necessary. However, should the Commission disagree, Gulf Power witnesses Harper and Spangenberg provide conclusive evidence that CHELCO is presently serving a number of

members and persons in non-rural areas which exceeds ten percent of its total membership. As of February 2011, CHELCO served a total of 34,722 members. [Tr. 333] As of that same date, CHELCO served a total of 8 members inside the City of Crestview [Tr. 338], 319 members inside the City of DeFuniak Springs [Id.], and 4,741 members inside the town of Bluewater Bay [Tr. 334]. These services alone place CHELCO well in excess of the 10 percent limitation based simply on member-counts.[10] The cities of Crestview and DeFuniak Springs both have populations in excess of 2,500 persons and therefore do not constitute "rural" areas under section 425.03(1), Florida Statutes. [Tr. 309] CHELCO does not dispute this. CHELCO does, however, dispute Dr. Harper's and Mr. Spangenberg's definition of Bluewater Bay as a non-rural area under section 425.03(1), Florida Statutes. CHELCO emphasizes the fact that Bluewater Bay is "unincorporated." [Tr. 77, 83] However, CHELCO's argument ignores the plain language of section 425.03(1), Florida Statutes, which applies to "any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." (emphasis supplied) CHELCO reads the statute as though the word "unincorporated" does not exist. CHELCO further suggests that Bluewater Bay cannot constitute a non-rural area because the Florida Statutes do not provide any definition for an unincorporated city, town, village or borough. [Tr. 84] This position ignores the general principle that "[w]hen a word in a statute is not expressly defined, it is appropriate to refer to dictionary definitions ... in order to ascertain the plain and ordinary meaning of the word." Sanders v. State, 35 So.3d 864, 871 (Fla. 2010) (alteration in original) (citations omitted) Black's Law Dictionary defines a "town" as follows:

[10] Note that section 425.04(4) speaks to numbers of "persons" not in excess of 10 percent of the number of members. CHELCO's criticism of Gulf Power's use of "persons" in calculating the 10 percent limitation [Tr. 75-76] is therefore without merit. The term "person" is defined in section 425.03(2) as "any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof, or any body politic." The number of "persons" served by CHELCO in non-rural areas is even higher than the number of "members" served in those same areas.

"A center of population that is larger and more fully developed than a village, but that (traditionally speaking) is not incorporated as a city. BLACK'S LAW DICTIONARY 1498 (7th ed. 1999) (emphasis supplied) Similarly, Merriam-Webster's dictionary defines a "town" as "1. a compactly settled area as distinguished from surrounding rural territory. 2. a compactly settled area usually larger than a village but smaller than a city. 3. a large densely populated urban area" See, www.merriam-webster.com/dictionary.

By any of the definitions provided above, Bluewater Bay qualifies as a "town."[11] As discussed by Dr. Harper, the approximate resident population of Bluewater Bay in 2010 was 10,487. [Tr. 311] Bluewater Bay is an unincorporated residential and golf resort community located between Niceville and Destin in Okaloosa County, Florida. [Tr. 310] It has substantial non-rural characteristics that include multiple golf courses, marina and other recreational facilities, underground utilities, water, sewer, private parks, along with fire and police services. [Id.] In fact, the voters in Bluewater Bay approved the establishment of a Municipal Services Benefit Unit ("MSBU") for their local area. [Id.] A MSBU is established by county government pursuant to section 125.01, Florida Statutes. [Tr. 311] It allows the county government to levy additional ad valorem taxes and special assessments on properties within the boundaries of the MSBU for the purpose of providing certain essential facilities and municipal services. [Id.] Such services include, but are not limited to, law enforcement, fire protection, recreation, garbage collection, sewage collection, indigent health care services, and mental health care services. [Tr. 311-12] The fact that a MSBU has been established for the substantial majority of Bluewater Bay further supports the conclusion that the community is not "rural" in nature. [Tr. 312]

Dr. Harper and Mr. Spangenberg also provide data on the number of members and persons served by CHELCO in various other non-rural areas such a Freeport, Greater Crestview

[11] Even CHELCO agrees that Bluewater Bay is a "rather compactly settled area." [Tr. 111-12]

and Greater DeFuniak Springs. Because CHELCO's service in Crestview, DeFuniak Springs and Bluewater Bay alone causes CHELCO to exceed the ten percent limitation, there is no need to address that data here. Suffice it to say, the exceedance is even greater if these services are considered. The fact that CHELCO is already in excess of the ten percent limitation also acts as a bar to CHELCO's serving Freedom Walk.

2. Gulf Power will provide adequate and reliable service to Freedom Walk at a cost substantially below that of CHELCO.

Pursuant to Rule 25-6.0441(2)(c), Florida Administrative Code, the Commission may consider "[t]he cost of each utility to provide distribution and subtransmission facilities to the area presently and in the future." The record evidence demonstrates that Gulf Power will provide adequate and reliable electric service to the development at a cost substantially below that of CHELCO.

(a) CHELCO's necessary facility upgrades and associated costs

While CHELCO does own distribution facilities which abut portions of the development, the record evidence conclusively demonstrates that CHELCO cannot provide adequate and reliable service to the development using those facilities without undertaking significant and costly upgrades.

The first necessary upgrade involves a 1.3 mile segment of conductor that CHELCO would use to serve the development. CHELCO has acknowledged that this conductor segment must be upgraded, at a cost of $227,404, in order to serve the projected load for the development. [Tr. 155-56] CHELCO nevertheless contends that the costs of this upgrade should not be included in CHELCO's cost to serve the development because the upgrade was projected for potential completion in 2014 before CHELCO had any plans to serve the development. [Tr. 156] The upgrade was included in CHELCO's 2011-2014 Construction Work Plan ("CWP") because

CHELCO's year 2009 load forecast for the Freedom Walk area estimated that the conductor would be loaded to 63 percent of its maximum summer operating capacity by year 2014. [Tr. 156-58] CHELCO's System Design and Operational Criteria ("SDOC") provide that "[p]rimary conductors are not to be loaded for long periods of time, over 60% of operating capacity for summer loading conditions and 75% for winter."[12] [Tr. 161 and **Hearing Exhibit 15** at p. 245] The 2009 load forecast did not specifically identify or include any load for the Freedom Walk development itself. [Tr. 158] However, the forecast did include projections of load growth in and around the area where the Freedom Walk development will be built. [Tr. 158-59] Consequently, if Gulf Power is awarded the right to serve Freedom Walk, a portion of the load growth projected for the Freedom Walk area in CHELCO's 2009 load forecast --the same load growth that led to the upgrade being included in CHELCO's CWP-- would not materialize. [Tr. 159] In fact, CHELCO conceded that it is likely that the loading on the 1.3 mile segment of conductor would not reach 60 percent of the line's operating capacity in year 2014 if Gulf Power is awarded the right to serve Freedom Walk. [Tr. 161] CHELCO further acknowledged that the upgrade could be delayed for five, or even ten years, depending on the then current load growth projections.[13] [Tr. 160] In light of the foregoing, CHELCO's contention that the upgrade will take place in 2014 regardless of whether CHELCO serves Freedom Walk is simply without merit. The upgrade will not be needed at any time in the near future to serve CHELCO's load, absent CHELCO's serving Freedom Walk. Consequently, CHELCO's cost of performing the upgrade --$227,404-- must be included in CHELCO's cost to serve the development.

[12] CHELCO characterizes its SDOC as representing "guidelines," not "mandates," [Tr. 139] and further contends that Auburn South Circuit (03) could be safely operated at 100 percent of its rated capacity. [Tr. 140] This testimony further highlights the fact that this conductor upgrade will not be needed in the near term if CHELCO does not serve Freedom Walk.

[13] See also, **Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham at p. 19, lines 9-13 (Q. "[I]f the 2010 load forecast demonstrates that the growth projections that were included in 2009 were overstated, it's possible that those projects in the CWP may be deferred or they may not be built at all." A. "It is possible.")

The second category of necessary upgrades includes various critical substation components. CHELCO would provide service to Freedom Walk using PowerSouth's Auburn substation. [Tr. 161] On cross-examination, CHELCO confirmed that serving the projected load for Freedom Walk would result in: (a) the Auburn substation's low-side bank breaker, low-side buswork, and bypass switches operating at 97 percent of their maximum operating capacity, and (b) the Auburn Circuit 03 recloser operating at 93 percent of its maximum operating capacity. [Tr. 163-64] CHELCO's own SDOC for substations provide that substation components such as breakers, reclosers, busses and bypass switches should not be operated in excess of 100 percent of their maximum operational ratings based on "CHELCO's extreme load forecast." (emphasis supplied) [Tr. 169-170, 366 and **Hearing Exhibit 15** at p. 244] Importantly, CHELCO acknowledged that the 97 and 93 percent figures were based upon the "normal load growth assumptions included in CHELCO's probable load forecast." (emphasis supplied) [Tr. 164] CHELCO's "extreme" load forecasts are higher than the "probable" load forecasts. [Tr. 167] Consequently, using CHELCO's "extreme load forecast" --as directed by CHELCO's SDOC-- the above-referenced substation components would almost certainly be operated in excess of 100 percent of their maximum rated capacity. In his rebuttal testimony, Mr. Avery suggests that, in spite of these inadequate operating margins, CHELCO would not need to upgrade any of the lowside buswork, switches or breakers in the Auburn substation. [Tr. 142] Mr. Avery's testimony is in direct conflict with testimony of CHELCO's own expert engineering consultant, Nicole Sullivan. In her supplemental direct testimony, Ms. Sullivan recognized that CHELCO would need to address these loading problems at the Auburn substation if it were to serve Freedom Walk and provided two alternatives: CHELCO could either make upgrades to lowside

buswork and recloser, or construct an entirely new 1.5 mile segment of line running out of the substation. [Tr. 195-96] Both of Ms. Sullivan's alternatives come with significant costs.

As explained by Messrs. Spangenberg and Feazell, operating substation components under these planned loading conditions is highly irresponsible from an engineering and planning perspective because it fails to account for wide variations in actual loading that can be caused by weather extremes. [Tr. 263, 366-70] CHELCO's own experience in recent loading at the Auburn substation provides an excellent case in point. During the winter of 2010, the load actually experienced at the Auburn substation exceeded CHELCO's 2009 probable load forecast for 2010 by nearly 15 percent. (emphasis supplied) [Tr. 170, 366-67] While a 15 percent variation due to weather extremes may not be typical, variations of 10 percent on projected winter peak loads must be readily considered in projecting a need for facility upgrades. [Tr. 367] Even under this conservative estimate, the Auburn substation components would be operating substantially in excess of their maximum rated capacity. Failing to upgrade these substation components could very well result in catastrophic failure of the components or even the substation itself. [Tr. 369-370] It is paradoxical in the extreme for CHELCO to hold to its position that upgrading a 1.3 mile segment of conductor is necessary because that segment is projected to be loaded at 63 percent of its operating capacity, while also contending that critical substation elements with projected loadings of at least 97 percent do not need to be upgraded or otherwise addressed.[14] [Tr. 365] If CHELCO is awarded the right to serve Freedom Walk, the upgrades will be necessary to serve the development. [Tr. 264, 373] The cost associated with

[14] CHELCO's suggestion that the Auburn substation components would be operated under such loading conditions is also inconsistent with how CHELCO actually operates its own distribution system. In 2010, CHELCO did not operate any of its three-phase feeders in excess of 100 percent of their maximum rated capacities. **[Hearing Exhibit 47]**

these upgrades --$70,781-- must therefore be included in CHELCO's cost to serve Freedom Walk.[15] **[Hearing Exhibit 32]**

The final category of necessary upgrades involves the addition of capacitors and voltage regulators on Auburn Circuit 03. These upgrades are identified by Mr. Avery and Ms. Sullivan in their supplemental direct testimony. [Tr. 134-35, 192-93] Mr. Feazell confirms the necessity of these upgrades and provides the cost --$44,083-- associated with the same. [Tr. 264-65, 301 and **Hearing Exhibit 32**]

(b) Gulf Power's necessary facility upgrades and associated costs

In order to provide adequate and reliable service to the Freedom Walk development, Gulf Power will be required to extend its existing three-phase line 2,130 feet at a cost of $89,738. [Tr. 252] Gulf Power will serve Freedom Walk using its Airport Road substation. [Tr. 253] There are no planned upgrades to the Airport Road substation in order to serve the Freedom Walk development. **[Hearing Exhibit 13**, p. 1] In February 2008, Gulf Power commenced the planning process for a large-scale conversion project involving Gulf Power's Airport Road, South Crestview, Milligan, Baker and Laurel Hill substations in North Okaloosa County, Florida. [Tr. 300 and **Hearing Exhibit 13**, p. 3] The project involves the conversion of Gulf's older 46 kV system in North Okaloosa County to Gulf's 115 kV standard voltage, which is also consistent with Southern Company's present standards. **[Hearing Exhibit 13**, p. 3] The conversion project is intended to maintain reliability and reduce maintenance costs on Gulf's system and is not related in any way to serving Freedom Walk. **[Hearing Exhibit 13**, p. 1] The first step of the

[15] The Auburn substation is owned and operated by CHELCO's power supplier, PowerSouth. [Tr. 369] However, this is not a basis for concluding that costs associated with the substation upgrades should be excluded from CHELCO's cost to serve the development. Costs associated with upgrading the Auburn substation would ultimately be reflected in the wholesale rates charged by PowerSouth to CHELCO. **[Hearing Exhibit 49**, p. 14.] In the determination of any duplication of facilities it is most appropriate to treat all necessary facility upgrade costs as if they were directly incurred by the utility seeking to provide service. [Tr. 369]

project --the conversion of the South Crestview to Airport Road transmission line from 46kV to 115 kV-- has already been completed. [**Hearing Exhibit 13**, p. 3 and **Hearing Exhibit 21**, April 20, 2011, Deposition of Mike Feazell, at p. 61, lines 15-22] The second step of the project -- involving the elimination of Gulf's 46 kV Baker substation and the transfer of the load associated with that substation to the Milligan substation-- was included in Gulf's 2011 budget forecast and will be completed in 2011. [Tr. 302] The Airport Road substation conversion will follow the Baker/Milligan conversion between 2011 and 2015 and will proceed regardless of whether Gulf serves Freedom Walk. [Tr. 288, 290 and **Hearing Exhibit 13**, p. 4] As a consequence of this conversion project, the Airport Road substation will have adequate capacity to serve the full projected load of Freedom Walk and other growth in the area. [Tr. 301-02] Absent these planned upgrades, Gulf would need to replace three single phase substation transformers at the Airport Road substation at a cost of approximately $40,000 in order to serve the full projected load for the development. [**Hearing Exhibit 13**, p. 1] The $40,000 cost figure represents the labor cost associated with transport and installation of three existing fully depreciated transformers which Gulf Power presently owns. [Tr. 301] Gulf would not need to purchase any replacement transformers or substation equipment in order to serve Freedom Walk. [Id.] Importantly, Gulf would have no need to proceed with the $40,000 replacement project if the Airport Road conversion occurs before Freedom Walk fully develops. [Id.]

Because the 46 kV to 115 kV conversion project is not related in any way to serving Freedom Walk, and because it will proceed regardless of whether Gulf Power serves Freedom Walk, it would be improper to attribute any of the project's cost to Gulf Power's cost to serve the development. To be clear, this must be distinguished from CHELCO's $227,404 conductor upgrade project. As demonstrated in section 2(a) above, CHELCO's conductor upgrade was

included in the 2011-2014 CWP based on load projections that will not materialize if CHELCO does not serve Freedom Walk. Therefore, unlike Gulf's Airport Road conversion project -- which is not load-related-- CHELCO's conductor upgrade will not be justified or needed at any point in the foreseeable future if CHELCO does not serve the development. For this reason, it is appropriate that the cost of the upgrade project be included in CHELCO's cost to serve.

In summary, Gulf Power's true cost to serve the Freedom Walk development is $89,738. If Freedom Walk fully develops before the Airport Road substation conversion is completed, Gulf would also incur a cost of $40,000 to install spare transformers at the Airport Road substation to accommodate load until the Airport Road conversion project is completed. Conversely, CHELCO's true cost to serve Freedom Walk is, at a minimum, $342,268 – representing the 1.3 mile conductor upgrade ($227,404), replacement of Auburn substation components ($70,781) and the addition of capacitors and voltage regulators for Auburn Circuit 3 ($44,083).

3. Gulf Power's provision of service to Freedom Walk will not result in uneconomic duplication of CHELCO's facilities.

Section 366.04(5), Florida Statutes, provides the Commission with jurisdiction over the avoidance of "further uneconomic duplication of generation, transmission and distribution facilities." On its face, this statute recognizes that some amounts of duplication are permissible, so long as they are not "uneconomic." [Tr. 110] CHELCO's position in this proceeding is that any amount of duplication by Gulf Power of CHELCO's facilities --no matter how small the cost-- is "uneconomic." [**Hearing Exhibit 39**, (CHELCO response to Interrogatory 49) and **Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham at p. 59, lines 10-23] This position is in direct conflict with existing Florida Supreme Court precedent. In Gulf Coast Electric Cooperative, Inc. v. Clark, the Florida Supreme Court overturned a Commission order

awarding Gulf Power the right to serve a prison in rural Washington County, Florida. 674 So.2d 120 (Fla. 1996). Gulf Power owned an existing line which directly abutted the proposed prison. Id. at 121. Gulf Power's line was capable of serving the full requirements of the new prison without any additional cost or modifications. Id. In contrast, the cooperative had to upgrade and relocate an existing line in order to serve the prison at a cost of $14,583.[16] Id. The cooperative's new line was constructed directly across the road from Gulf's existing line. Id. The Commission ruled in Gulf Power's favor, finding that the cooperative had uneconomically duplicated Gulf Power's existing line and engaged in a "race to serve." Id. at 122. The Florida Supreme Court reversed the Commission's order and determined that the cooperative should serve the prison based on the issue of customer preference. With respect to uneconomic duplication, the Commission took the position that actual cost is only one factor to be considered in determining uneconomic duplication. According to the Commission, other considerations included "lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, [and] whether there has been a 'race to serve.'" Id. The Court did not disagree with these factors, but ultimately held that any duplication by the cooperative of Gulf's existing facilities was not "uneconomic" because the cost differential was "de minimis." Id. at 123.

In 1998, the Commission issued a subsequent order which provided further guidance for determining the existence of uneconomic duplication. See, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc., 98 F.P.S.C. 1:647 (Docket No. 930885-EU, Order No. PSC-98-0174-FOF-EU, January 28, 1998). In this order, the Commission addressed a previous order wherein Gulf Power and Gulf Coast Electric Cooperative were directed to

[16] It is important to note that the $14,583 figure in Clark was expended to serve a load with approximately 372 kW diversified demand as compared to Gulf's cost of $89,738 in the instant case to serve a load with an expected diversified demand of 4,700 kW. In other words, the expected Freedom Walk load is more than twelve times larger than the load at issue in Clark. Consequently, Gulf's cost to serve the development would be considered "de minimis" in comparison to the development's projected load.

negotiate in good faith to develop a territorial agreement to resolve uneconomic duplication of facilities and establish a territorial boundary in south Washington and Bay Counties. Despite the passage of two years, the parties were unable to negotiate an agreement. The Commission rejected the cooperative's request to establish defined territorial boundaries and, instead, ordered the parties to develop detailed procedures and guidelines for addressing new service requests in the area. In doing so, the Commission observed as follows:

> Gulf Power's Witness Holland argues that the amount of duplication that rises to the level of uneconomic duplication is best determined on a case-by-case basis. When asked to evaluate their service area in south Washington and Bay Counties, Gulf Power responded that there will be no areas where further uneconomic duplication of electric facilities is likely to occur as long as fixed boundaries are not established and their proposed territorial policy is adopted. Gulf Power's conclusion is based on its definition of 'uneconomic duplication.' Gulf Power defines 'uneconomic duplication' in terms of the costs and benefits accruing solely to Gulf Power from serving or not serving a given area, load or customer such as the incremental cost to serve, expected revenues, or other exclusive benefits....[W]e agree with the evidence presented by Gulf Power."

Id. at 649-50.

Following the Commission's order, Gulf Power and Gulf Coast Electric Cooperative presented the Commission with detailed procedures governing new requests for electric service in south Washington and Bay Counties. The Commission approved the procedures, finding that they would avoid future uneconomic duplication. See, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc., 01 F.P.S.C. 4:46 (Docket No. 930885-EU, Order No. PSC-01-0891-PAA-EU, April 09, 2001) In doing so, the Commission observed the following with respect to uneconomic duplication:

> The proposed territorial agreement does not establish a traditional 'lines-on-the ground' territorial boundary. However, the proposal addresses all the necessary standards required for approval. When necessary to

> compare costs of service, the agreement provides a test of two alternatives. First, if the difference between the costs of service of the two companies is less than $15,000, that amount is to be considered *de minimis*, and the customer's choice of provider may prevail. This *de minimis* standard was derived from the Florida Supreme Court's decision in this docket in *Gulf Coast Electric Cooperative, Inc. v. Susan F. Clark*, et al., 674 So.2d 120 (Fla. 1996). However, the Supreme Court's opinion does not require that the *de minimis* standard be the only criterion for evaluating uneconomic duplication.
>
> If the foregoing *de minimis* test is exceeded, the agreement provides an alternative comparison of the companies' respective costs of service. If the differential is not more than 25%, the utility with the higher cost of service may provide service according to the agreement, if chosen by the customer. This provision provides a reasonable means for establishing the limit of economic duplication. In the context of a project where there is a significant load associated with the new service, the level of investment necessary by either party would be substantial, as would be the revenues provided by that customer. In such a case, a differential of $15,000 would likely not be a meaningful measure. Instead, the 25% threshold provides a reasonable measure of the outer limit of economic duplication and therefore the trigger for uneconomic duplication. It takes into account load and other factors that are a part of the determination of uneconomic duplication, while preserving the customer's ability to initially choose his or her provider. We find the agreement to be in the best interests of the companies and their rate-payers, and we expect the agreement to prevent uneconomic duplication of services, as intended.

Id. at 47-48.

It is clear from the precedent outlined above that determining the existence of uneconomic duplication is not --as CHELCO suggests-- simply a matter of asking whether one utility will duplicate another utility's existing facilities. As discussed in detail by Mr. Spangenberg, CHELCO's costs to serve the development are significantly higher than Gulf Power's. Therefore, Gulf Power's provision of electric service would not result in any duplication of CHELCO's facilities, let alone uneconomic duplication. [Tr. 344] Moreover, even if the Commission were to set aside all of CHELCO's costs to make necessary facility

upgrades, Gulf Power's cost to serve the development would still not result in uneconomic duplication. [Tr. 345] Mr. Spangenberg conclusively demonstrates why that is the case using four separate tests, each of which is grounded in Commission precedent. [Tr. 345-347]

In rebuttal testimony, CHELCO Witness Blake is highly critical of Mr. Spangenberg's analysis. [Tr. 206-207, 214, 222-23] According to Dr. Blake, a determination of uneconomic duplication should be based solely on "whether existing and adequate facilities are paralleled, crossed, or otherwise duplicated." [**Hearing Exhibit 54**, May 6, 2011, Deposition of Martin J. Blake, at p. 15, lines 11-19 and p. 16, lines 12-16] Dr. Blake's position, however, is in direct contradiction to the Florida Supreme Court and Commission precedent outlined above. During deposition, Gulf Power explored the foundation for Dr. Blake's opinions regarding Florida law governing territorial disputes generally and uneconomic duplication in particular. Dr. Blake testified that: prior to the instant dispute, he had never testified in any territorial dispute, let alone a territorial dispute in Florida. [Id. at p. 12, lines 9-25, p. 13, lines 1-4]; he was retained by CHELCO approximately one month prior to his deposition [Id. at p. 7, lines 22-25, p. 8, lines 1-3]; he had not previously reviewed Chapter 366 or 425, Florida Statutes, before being retained in the instant dispute [Id. at p. 9, lines 1-11]; he had not reviewed any Commission or Florida Supreme Court orders in reaching his conclusion that Gulf Power's definition of uneconomic duplication was erroneous [Id. at p. 14, lines 13-19, p. 17, lines 7-15]; and he had not reviewed any Commission orders or other Florida precedent addressing cooperatives' legal authority to serve non-rural areas.[17] [Id. at p. 19, line 17 through p. 21, line 22, and p. 40, lines 3-20]

[17] Dr. Blake conceded that he had not researched Commission and judicial precedents in formulating his opinions on Florida law because he "didn't have time." [**Hearing Exhibit 54**, May 6, 2011, Deposition of Martin J. Blake, at p. 40, lines 11-20 "I'm sorry. I did not go back and review the Florida precedents regarding this. What I reviewed was 425, uhm, 366, the testimony, direct testimony of both Gulf and CHELCO witnesses, the original complaint, the petition, and the answer to the petition. And as far as going back and doing a lot of research on Florida precedents and Florida Statutes, I frankly didn't have the time."] (emphasis supplied)

In light of the striking admissions above, the Commission should give no weight to Dr. Blake's opinions on what he believes to be the law in Florida. Indeed, the bulk of those opinions are contrary to existing precedent. Dr. Blake's testimony should be contrasted with testimony of Mr. Spangenberg who has over thirty years of first-hand experience as a witness and advisor for Gulf Power in a wide variety of territorial matters. [Tr. 321-22] Mr. Spangenberg conclusively demonstrates that there will be no uneconomic duplication of CHELCO's facilities under the law as it exists in Florida.

4. The customer has requested service from Gulf Power.

Pursuant to Commission Rule 25-6.0441(2)(d), the Commission may consider customer preference if all other factors in the rule are substantially equal. With the exception of the parties' relative costs to serve within the development --which costs are substantially equal-- the record evidence demonstrates that Gulf Power prevails on each of the factors addressed in the rule. This includes customer preference. The developer of Freedom Walk, Emerald Coast Partners, LLC, has unequivocally indicated its preference that Gulf Power serve the development. This is evidenced by two items of correspondence attached to Mr. Johnson's testimony. **[Hearing Exhibit 27]** The second item of correspondence is dated February 10, 2011, and reiterates the customer's preference despite the pendency of the territorial dispute. [Id.] Ms. Grantham contends that the developer is not the "customer" in this case and suggests, therefore, that the developer's preference should be given no weight by the Commission. [Tr. 65] However, Mr. Avery acknowledged during deposition that, if CHELCO had received the same correspondence from the developer, he would have construed it as an expression of the customer's preference that CHELCO serve the development. **[Hearing Exhibit 50**, March 30, 2011, Deposition of Matthew Avery at p. 21, lines 5-20] ("If this letter would have suggested

CHELCO, I would assume that the customer would be choosing CHELCO as their electric service provider.") (emphasis supplied) Ms. Grantham's contention also ignores the fact that the developer is the only reasonable proxy for the future residents of the development. [Tr. 226] CHELCO acknowledges that the developer is acting as an "agent" on behalf of the future residents. [Tr. 103] The developer oversees and orchestrates all aspects of the property development, from property purchase, obtaining permits for vegetation removal, obtaining development permits to initiating and overseeing installation of water, sewer, power and all other utilities. [Tr. 237-238] Under CHELCO's view, at the time the development might be subject to a dispute over an infrastructure provider, there could be no "customer" to express a preference. [Tr. 363] This view renders moot the Commission's own rule with respect to consideration of customer preference in territorial disputes. [Id.] The Commission has recognized that it is appropriate to give weight to a developer's preference in territorial disputes. See, In re Petition of West Florida Electric Cooperative Ass'n. to Resolve a Territorial Dispute with Gulf Power Company in Washington County, Florida, 86 F.P.S.C. 6:270 at *271 (Docket No. 850048-EU, Order No. 16246, June 17, 1986) (recognizing that it is "[a]cceptable to consider the preference of the developer, who in many cases pays for the CIAC for installed services before his lots are placed for sale....").

In support of CHELCO's attempt to discredit the customer's stated preference, Ms. Grantham testified that Gulf Power "chose to engage in a race to the developer." [Tr. 69] However, under cross-examination, Ms. Grantham conceded that she did not have any personal knowledge to support her testimony. [Tr. 104] CHELCO also suggests that the developer's preference in this case may be financially motivated. [Tr. 64-65] There is no evidence to support that suggestion. In fact, the record evidence --most specifically a March 2008 email

from Mr. Avery to the developer-- clearly indicates that the developer had a negative experience with CHELCO on at least one prior occasion. [Tr. 363-64 and **Hearing Exhibit 36**]

For all of the foregoing reasons, it is appropriate for the Commission to consider the developer as the "customer" in this dispute and to afford the developer's preference significant weight in determining which utility should serve the development.

*5. **CHELCO's "historical presence" argument is without merit.***

CHELCO has testified that Gulf Power "swooped" into an area that CHELCO has historically served in order to "poach" a profitable customer. [Tr. 70] These arguments are not supported by the facts in evidence. Foremost, CHELCO totally disregards Gulf Power's own substantial historic presence in the area. As described by Mr. Spangenberg, Gulf Power has been serving customers within the City of Crestview since 1928 --nearly thirteen years before CHELCO's formation. [Tr. 360] In fact, Gulf Power has been serving a customer situated immediately adjacent to the disputed development since 1955. [Id.] Mr. Spangenberg describes a great number of other commercial and residential customers which Gulf serves just to the south and east of the development. [Tr. 360-61 and **Hearing Exhibit 35**] Mr. Avery testified that Gulf Power also serves a number of residences just to the west of the development. [Tr. 153-54] CHELCO's blatant attempts to depict Gulf Power as a load-poaching newcomer to the area are, at best, distasteful and certainly without merit.

Moreover, while CHELCO portrays the Freedom Walk development as its historic service area, the evidence confirms that CHELCO serves absolutely nothing within the area denoted with bold black lines on Exhibit "A" to CHELCO's Petition. [Tr. 96-97] CHELCO contends that it presently has four services within the area "platted" for the development. [Tr. 62] Yet, Ms. Grantham has acknowledged that there is no final approved "plat" for the

development. [Tr. 98] The four services mentioned in her testimony are located on out-parcels which are not owned by the developer, not located within the boundaries of the Freedom Walk Community Development District established for the development and not identified by CHELCO's petition as being within the "disputed territory." [Tr. 98, 350-52] Further, even if these out-parcels were included in the development, CHELCO's existing service facilities on the out-parcels would have no legitimate use in serving the development and would have to be removed. [Tr. 353-54] This is true regardless of whether Gulf or CHELCO serves Freedom Walk. [Id.]

CHELCO also makes much of the fact that, in the past, CHELCO served a single residence located within the area planned for the development.[18] [Tr. 120-21, 128] However, past provision of single-phase service to a single residence located within a 170-plus acre parcel of property does not amount to historical service to the Freedom Walk development area, nor does it establish an intrinsic right in CHELCO to serve the development itself. See, 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) (finding that a cooperative's previous service to a single account within the area proposed for a large, mixed-use development did not establish a "historic claim to service" in the area in dispute)

CHELCO's claim of historic service to the area is premised largely upon the existence of a three-phase distribution line along Old Bethel Road, which is located to the north of the development. [Tr. 61-62, 120-21] This line was upgraded and extended by CHELCO in or about 1983. [Tr. 121] The costs associated with the line constitute a significant portion of the "investment" that CHELCO claims to be "protecting" by initiating this dispute. [Tr. 93] If

[18] This single phase line does not presently serve any CHELCO customers. [**Hearing Exhibit 50**, March 30, 2011, Deposition of Matthew Avery at p. 17, lines 11-18] The line would not be used to provide permanent service to the development. [Id. at p. 18, lines 18-24]

CHELCO is correct in its position that this line can accommodate the substantial load associated with the Freedom Walk development along with other normal load growth in the area, it is clear that CHELCO made this "investment" many years before it was actually needed. [Tr. 356] Indeed, CHELCO has acknowledged that "[w]e built to that area when it was uneconomic to do so, and our members were willing to make that investment at that time." [**Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham, p. 6, lines 19-25] (emphasis supplied) This could easily be construed as an attempt to "stake out territory" in a "race to serve," recognizing that Gulf Power has long been serving customers in the area. [Tr. 356] At best, it amounts to an uneconomic business judgment, the effects of which should have no bearing on the instant dispute.[19] The Commission has no obligation to protect a rural electric cooperative, or any other utility, from the consequences of investments that are speculative, uneconomic at the outset, or the result of efforts to "stake out territory." [Tr. 357] See also, Gulf Coast Electric Coop., Inc. v. Clark, 674 So.2d 120, 122 (Fla. 1996) (the FPSC/Court will not reward the winner of a "race to serve")

Finally, CHELCO's overarching reliance on historic presence as a basis for resolving this dispute ignores the fact that historic presence is mentioned nowhere in the Commission's territorial dispute rule or section 366.04, Florida Statutes. While the Commission does have the discretion to consider historic presence, it is certainly not required to do so. The Florida Supreme Court squarely addressed the issue in West Florida Electric Cooperative, Inc., v. Jacobs, 887 So.2d 1200 (Fla. 2004). There, the Court held that "neither [section 366.04, Florida

[19] CHELCO has acknowledged these business risks. [**Hearing Exhibit 49**, March 30, 2011, Deposition of Leigh Grantham, p. 10, lines 14-25, p. 11, line 1: Q: "When CHELCO made the uneconomic investment in the three-phase feeder at that time, do you agree that CHELCO took on a certain amount of business risk if that access [sic] capacity would not be maximized?" A: "Certainly." Q: "And you know, as CEO of CHELCO, you know that CHELCO and other utilities make business judgments every day?" A: "Certainly." Q: "And so there's no guarantee [sic], when you build that investment and construct those facilities, that you are going to be able to use them to their fullest extent?" A: "That's correct."]

Statutes, nor Rule 25-6.0441, Florida Administrative Code] requires the Commission to consider a utility's historical presence in an area." Id. at 1205. The Jacobs decision serves as a reminder that what should be dispositive in the resolution of territorial disputes is what is to be served in the future, not what was served in the past. [Tr. 360] Simple presence in an area does not speak to the nature of the area, the nature of the utilities seeking to serve the area, the adequacy or cost of the facilities necessary to provide the requested service, or customer preference. [Tr. 359]

CONCLUSION

As a public utility providing electric service in Okaloosa County, Gulf Power has a statutory obligation to honor the customer's request for service unless doing so would result in further uneconomic duplication of CHELCO's existing facilities or otherwise violate Florida law. [Tr. 227] The record evidence conclusively demonstrates that there is no basis for Gulf Power's refusing to honor the customer's request in this case, and that Gulf Power prevails under each of the disputed elements contained in Rule 25-6.0441, Florida Administrative Code. CHELCO is seeking to provide service in a non-rural area where it is not legally entitled to serve under Chapter 425, Florida Statutes. Freedom Walk will be highly urbanized in nature as contemplated in section 366.04(4), Florida Statutes and Rule 25-6.0441, and will lie in close proximity to other urban neighborhoods located within the municipal boundaries of Crestview. Gulf Power is capable of extending adequate and reliable service to the development at a cost substantially below that of CHELCO. Gulf Power's serving CHELCO would not result in the uneconomic duplication of CHELCO's existing facilities. Finally, the customer has unequivocally indicated its preference that Gulf Power serve the development. For all of the foregoing reasons, Gulf Power respectfully requests that this Commission award it the right to serve Freedom Walk.

BRIEF STATEMENT OF 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?

POSITION: "[T]he disputed territory is a proposed new development, known as Freedom Walk...." (Petition ¶ 6) The boundaries of the development are as depicted within the bold black lines on Exhibit "A" to CHELCO's petition and the metes and bounds description of the Freedom Walk CDD. **[Hearing Exhibit 34**, p. 7][20]

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

POSITION: Yes. "[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, 83 F.P.S.C. 90 at *4.[21]

ISSUE 2B: 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?

POSITION: No. According to CHELCO's own Petition, the development will be located "within the City of Crestview's corporate limits." (Petition ¶ 6) The City of Crestview is an incorporated city having a population in excess of 2,500 persons. The development will not be a "rural area" under section 425.03(1), Florida Statutes.[22]

ISSUE 2C: 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?

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[20] This issue is discussed in section 1(a) of Gulf Power's brief.

[21] This issue is discussed in section 1 of Gulf Power's brief.

[22] This issue is discussed in sections 1(a) and 1(b) of Gulf Power's brief.

POSITION: Yes. In previous territorial disputes, the Commission has routinely determined that cooperatives were not "legally prohibited" from serving certain areas because such areas were "rural" in nature. Under this same precedent, CHELCO would be legally prohibited from serving Freedom Walk if it is determined to be non-rural or urban in nature.[23]

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?

POSITION: The nature of the Freedom Walk development area is presently non-rural, as it is located within the urbanized City of Crestview. The development itself will be an urban development encompassing many urban characteristics including underground utilities, parks, sidewalks, water, sewer, cable TV, garbage services and municipal police and fire protection.[24]

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

POSITION: The existing load to be served in the Freedom Walk development is zero. The planned load to be served in the Freedom Walk development is approximately 4,700 kW.[25]

ISSUE 5A: What are the necessary facilities and associated costs for CHELCO to extend adequate and reliable service to the Freedom Walk Development?

POSITION: CHELCO must, at a minimum, upgrade a 1.3 mile segment of conductor at a cost of $227,404, add voltage regulators and capacitors to Auburn Circuit 03 at a cost of $44,083 and upgrade critical substation components at a cost of $70,781.[26]

ISSUE 5B: What are the necessary facilities and associated costs for Gulf to extend adequate and reliable service to the Freedom Walk Development?

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[23] This issue is discussed in sections 1(a), 1(b) and 1(c) of Gulf Power's brief.

[24] This issue is discussed by Mr. Johnson and Mr. Spangenberg in testimony. [Tr. 233-35, 237, 325-29]

[25] This issue is discussed by Mr. Johnson in testimony. [Tr. 239]

[26] This issue is discussed in section 2(a) of Gulf Power's brief.

POSITION: Gulf must extend its three-phase conductor 2,130 feet at a cost of $89,738. If Freedom Walk fully develops before Gulf's planned Airport Road substation conversion project is completed, Gulf would also need to temporarily increase the capacity of its Airport Road substation at a cost of $40,000.[27]

ISSUE 5C: What are the necessary facilities and associated costs for CHELCO to provide adequate and reliable service within the Freedom Walk Development?

POSITION: Based on parameters agreed to by Gulf Power and CHELCO for purposes of responding to this issue, CHELCO's cost to provide adequate and reliable service within the development is $1,052,598. The parties' respective costs to serve within the development are substantially equal.[28]

ISSUE 5D: What are the necessary facilities and associated costs for Gulf to provide adequate and reliable service within the Freedom Walk Development?

POSITION: Based on parameters agreed to by Gulf Power and CHELCO for purposes of responding to this issue, Gulf Power's cost to provide adequate and reliable service within the development is $1,152,515. The parties' respective costs to serve within the development are substantially equal.[29]

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

POSITION: No. The Florida Supreme Court and this Commission have held that duplication of facilities is permissible so long as such duplication is not "uneconomic." This precedent also establishes numerous factors that should be considered in this analysis. Mr. Spangenberg conclusively demonstrates that no uneconomic duplication of existing facilities will occur. [30]

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

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[27] This issue is discussed in section 2(b) of Gulf Power's brief.

[28] See, Order No. PSC-11-0217-PHO-EU, Issue 5(c).

[29] See, Order No. PSC-11-0217-PHO-EU, Issue 5(d).

[30] This issue is discussed in section 3 of Gulf Power's brief.

POSITION: Each utility is physically capable of providing adequate and reliable service to the Freedom Walk Development. However, CHELCO's cost of doing so will exceed Gulf Power's cost.[31]

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

POSITION: The customer, Emerald Coast Partners, LLC, has unequivocally indicated its preference that Gulf Power serve the Freedom Walk development.[32]

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

POSITION: Gulf Power Company should be awarded the right to serve the Freedom Walk development.[33]

Respectfully submitted this 9th day of June 2011.

s/ Steven R. Griffin
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[31] This issue is discussed in sections 2(a) and 2(b) of Gulf Power's brief.

[32] This issue is discussed in section 4 of Gulf Power's brief.

[33] This issue is discussed by Mr. Jacob and Mr. Spangenberg in testimony [Tr. 229, 347-48] and in the Conclusion section of Gulf Power's brief.

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 9th day of June, 2011, on the following:

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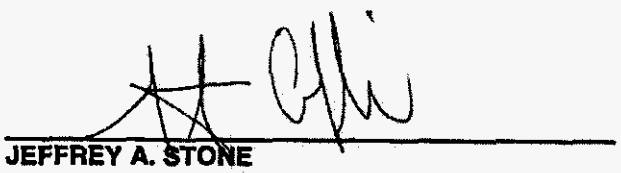

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