

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** November 29, 2018

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Schrader, Crawford)  
Division of Economics (Merryday) *THM PD ESD JSC*  
Division of Engineering (Ballinger, Graves) *W R*

**RE:** Docket No. 20180125-EU – Complaint against Gulf Power Company for expedited enforcement of territorial order, by Gulf Coast Electric Cooperative, Inc.

**AGENDA:** 12/11/18 – Regular Agenda – Oral Argument Requested – Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Brown

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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### Case Background

This docket pertains to a territorial dispute between Gulf Coast Electric Cooperative, Inc. (GCEC) and Gulf Power Company (Gulf Power) over new service to a sewage treatment lift facility (Lift Facility) that was constructed and operated by St. Joe Company (St. Joe). The ultimate customer of the Lift Facility is to be Bay County, and the Lift Facility was scheduled to be transferred to Bay County upon completion and commissioning of the facility. The Commission has authority, pursuant to Section 366.04(2)(e), Florida Statutes (F.S.), “to resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.” The Commission’s authority is intended to avoid the uneconomic duplication of facilities between utilities.

In 1998, in Docket No. 930885-EU, *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*, in response to a long-standing dispute between GCEC and Gulf Power regarding electric service in certain areas of Washington and Bay Counties, the Commission ordered the parties “to establish detailed procedures and guidelines addressing subtransmission, distribution, and requests for new service which are enforceable with the respective company.”<sup>1</sup> Subsequently, the Commission approved, in that same docket and pursuant to Order Nos. PSC-01-0891-PAA-EU, issued April 9, 2001, and PSC-01-0891A-PAA-EU, issued March 26, 2002 (collectively referred to herein as the Territorial Order),<sup>2</sup> a Territorial Agreement executed between GCEC and Gulf Power in 2000 (Territorial Agreement).

The Territorial Order states that its purpose was to “avoid further uneconomic duplication of the facilities of each other” and, specifically, “to assist in determining whether or not they should agree to honor the request for electric service by a Customer or should otherwise proceed with the construction of additional facilities.” Owing to the unique territorial issues identified in the Docket, including the close proximity and commingling of GCEC and Gulf Power’s electric facilities, the Territorial Agreement approved by the Territorial Order does not use a traditional “lines-on-the-ground” territorial boundary. Rather, the Territorial Agreement utilizes several procedures for the parties to follow upon receiving a request for service from a customer—these procedures are primarily based upon the distance from the requested utility’s closest existing facilities to the requested service location and the load requirements of the requested service location, or, alternatively, whether the cost of service of the requested utility would not be significantly more than that of the other utility.

In October of 2017, Gulf Power received a verbal request from St. Joe to provide electric service to the Lift Facility. Subsequently, in December of 2017, GCEC received a request from Bay County for electric service to the Lift Facility.<sup>3</sup> On January 17, 2018, an email from St. Joe’s Vice President of Regulatory Affairs informed GCEC that St. Joe did not plan to move forward with GCEC on the Lift Facility and that it was “committed to Gulf Power” for servicing the Lift Facility.<sup>4</sup>

On October 20, 2017, an Engineering Supervisor for Gulf Power, Joshua Rogers, sent an email to Peyton Gleaton, the Vice President for Engineering at GCEC, stating the following:

Pursuant to section 2.3(a) of the agreement between Gulf Power and GCEC, I am notifying GCEC of a customer's request for electrical service from Gulf Power for

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<sup>1</sup> Order No. PSC-98-0174-FOF-EU, issued January 28, 1998, in Docket No. in Docket No. 930885-EU, *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*.

<sup>2</sup> See Order No. PSC-01-0891-PAA-EU, issued April 9, 2001, in Docket No. 930885-EU, *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*; and Order No. PSC-01-0891A-PAA-EU, issued March 26, 2002, in Docket No. 930885-EU, *In Re Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*.

<sup>3</sup> See GCEC br. pg. 11-12, and 14 (DN 05966-2018), and Gulf Power br. pg. 8-9 (DN 05966-2018).

<sup>4</sup> GCEC br., Ex. 3, January Emails, 20180125-GPC POD 8-028.

a new lift station on parcel 26597-000-000. Construction would not result in any duplication of facilities.<sup>5</sup>

Section 2.3 of the Territorial Agreement provides that, if a utility receives a bonafide request for service from a customer, and that requested utility does not meet the requirements to provide electric service without notice pursuant to Section 2.2, that requested utility may provide electric service if that requested utility believes that its cost of service would not be “significantly more” than that of the other utility. To provide such service under Section 2.3, the requested utility must notify the other utility of the requested utility’s intent to provide service, after which the other utility has five days to notify that the other utility objects to such provision of service. If the other utility fails to respond within this time frame, the requested utility may provide the requested electric service under the terms of Section 2.3.

After receipt of the October 20, 2017, email, GCEC did not object or otherwise respond to Gulf Power within the 5 days as provided in Section 2.3. However, on January 8, 2018, GCEC did send an email notice to Gulf Power that GCEC had received a request from Bay County to provide service to the Lift Facility.<sup>6</sup> On January 12, 2018, Gulf Power informed GCEC that Gulf Power had already begun preparations to serve the Lift Facility and that GCEC was “foreclosed” from objecting to Gulf Power providing service to the Lift Facility, pursuant to the Territorial Order, due to GCEC’s failure to respond to the October 20 email from Gulf Power.<sup>7</sup> According to the parties, during an informal meeting with Commission staff on June 21, 2018, Gulf Power has subsequently completed its connection to the Lift Facility and the Lift Facility is now receiving electric service from Gulf Power.

On May 23, 2018, GCEC filed its Complaint against Gulf Power seeking expedited enforcement of the Territorial Agreement as approved by the Commission and embodied in the Territorial Order. GCEC claims that Gulf Power is in violation of the Territorial Order, in part, because the October 20, 2017, email from Gulf Power was “opaque” and “failed to provide all relevant information about the request,” and thus, did not provide adequate notice as required under Section 2.3 of the Territorial Agreement.<sup>8</sup> Gulf Power argued that the notice was sufficient, and, consequently, GCEC “is foreclosed from objecting to [Gulf Power] honoring its customer’s request for service, and there is no requirement or need to compare costs or take any additional actions under the remaining terms of the Territorial [Order].”<sup>9</sup>

On June 6, 2018, Gulf Power filed a Motion for Summary Final Order arguing, primarily, that neither party disputes that GCEC received the notice from Gulf Power, that the Territorial Order and notice “speak for themselves,” and that the matter “can be resolved as a matter of law and

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<sup>5</sup> GCEC Comp. Ex. D (03887-2018).

<sup>6</sup> GCEC states that this was done only as a “courtesy” to Gulf Power and it was not required to do so under Section 2.2 of the Territorial Order because GCEC’s “Existing Facilities are no more than 1,500 feet further from the Point of Delivery than the Existing Facilities of” Gulf Power. However, this email cites Section 2.3(a) of the Territorial Agreement, not Section 2.2, as its basis. *See* Gulf Power br., Ex. N.

<sup>7</sup> Gulf Power Resp. to Comp. ¶ 5-8 (DN 03970-2018) . *See also* GCEC br. pg. 13.

<sup>8</sup> GCEC Comp. ¶ 27.

<sup>9</sup> Gulf Power Resp. to Comp. ¶ 10.

contract interpretation based upon the undisputed facts set forth in the parties' pleadings."<sup>10</sup> GCEC responded in opposition to this Motion for Summary Final Order on June 13, 2018, arguing that summary final order in this case was premature and should be denied because discovery had not been completed, numerous genuine issues of fact remained, and that there was pending discovery regarding whether "GCEC waived the right to contest Gulf Power providing service."<sup>11</sup> On July 23, 2018, the Prehearing Officer issued an Order Setting Procedure to Consider Motion for Summary Final Order, Order No. PSC-2018-0357-PCO-EU (Procedural Order). The Procedural Order stated that "the threshold question for this dispute is whether the October 20, 2017, email was sufficient notice under the terms of the Territorial Agreement."<sup>12</sup> The Procedural Order allowed for limited discovery and the filing of briefs regarding this issue and whether the Commission should grant Gulf Power's Motion for Summary Final Order.<sup>13</sup> Both parties filed briefs on September 11, 2018. GCEC also included in its brief its own Motion for Summary Final Order and a separate request for oral argument. On September 18, 2018, Gulf Power responded in opposition to GCEC's Motion for Summary Final Order.

Staff's recommendation addresses GCEC's request for Oral Argument, and Gulf Power and GCEC's Motions for Summary Final Order. The Commission has jurisdiction pursuant to Section 366.04, F.S.

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<sup>10</sup> Gulf Power Mot. for Summ. Final Order and Protective Order, pg. 19-20 (DN 04110-2018).

<sup>11</sup> GCEC Resp. to Gulf Power's Mot. for Summ. Final Order and for Protective Order, pg. 1-2 (DN 04201-2018).

<sup>12</sup> Order No. PSC-2018-0357-PCO-EU, issued July 23, 2018, in Docket No. 20180125-EU, *In re: Complaint against Gulf Power Company for expedited enforcement of territorial order, by Gulf Coast Electric Cooperative, Inc.*, pg. 2.

<sup>13</sup> *Id.* at 3. The Procedural Order also established controlling dates in the docket that included deadlines for the completion of discovery and submission of briefs regarding Gulf Power's Motion, and set a date for consideration of the Motion at Agenda Conference. These dates were subsequently revised in Order Nos. PSC-2018-0431-PCO-EU and PSC-2018-0468-PCO-EU.

**Issue 1:** Should GCEC's request for oral argument be granted?

**Recommendation:** Yes. GCEC's request for oral argument for its Motion for Summary Final Order should be granted and Gulf Power should also be permitted oral argument for its Motion for Summary Final Order. The parties should be allowed 5 minutes, in total, per side, for oral argument. (Schrader)

**Staff Analysis:** Rule 25-22.0021(3), Florida Administrative Code (F.A.C.), specifies that informal participation is not permitted on dispositive motions and participation on such is governed by Rule 25-22.0022, F.A.C. Rule 25-22.0022(7), F.A.C., states that oral argument at Agenda Conference will only be entertained for dispositive motions, such as a motion for summary final order.

Rule 25-22.0022(1), F.A.C., provides that the Commission may grant a request for oral argument if the request: 1) is contained in a separate document; 2) is filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed; and 3) states with particularity why oral argument would aid in understanding and evaluating the issues to be decided. The request must also state the amount of time requested for oral argument. Failure to file a timely request for oral argument constitutes waiver of that request. Rule 25-22.0022(3), F.A.C., provides that granting a request for oral argument is solely at the Commission's discretion. Further, Rule 25-22.0022(2), F.A.C., provides that the Commission may request oral argument on matters over which it presides, and Rule 25-22.0022(7), F.A.C., states that the Commission can request oral argument on any issue to be decided by dispositive motion.

Here, GCEC's Request for Oral Argument on its Motion for Summary Final Order was filed on September 11, 2018, concurrent with that Motion. This is within the deadline required by Rule 25-22.0022(1), F.A.C. However, the request does not state with particularity why oral argument would aid the Commission in understanding the issues to be decided in this case, nor does it specify the amount of time requested for oral argument. No request for oral argument was timely filed with respect to Gulf Power's Motion for Summary Final Order.

Staff believes that, due to the complexity of this case, oral argument would be helpful for the Commission to better understand the entirety of the series of events and legal issues in this case. Thus, staff recommends that the Commission 1) allow oral argument on both of the Motions for Summary Final Order in this case, and 2) grant each party five minutes, in total, for oral argument.

## Discussion of Issues

**Issue 2:** Should Gulf Power’s Motion for Summary Final Order be granted?

**Recommendation:** Yes. Gulf Power’s Motion for Summary Final Order should be granted. (Schrader)

**Staff Analysis:** The Procedural Order specified three issues for consideration on whether to grant or deny Gulf Power’s Motion for Summary Final Order:

- (1) Whether Section 2.3 of the Territorial Agreement is the proper procedure, pursuant to the Territorial Order, to determine which utility should provide electric service to the lift facility.
- (2) If Section 2.3 is the proper procedure, whether the October 20, 2017, email notice provided by Gulf Power to GCEC under Section 2.3 of the Territorial Agreement concerning electric service to the lift facility was sufficient for Gulf Power to provide service.
- (3) Should Gulf Power’s Motion for Summary Final Order be granted?

Commission staff’s analysis of these issues for consideration is detailed below.

### Standard for Motion for Summary Final Order

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from case “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.” The Commission has previously stated that “the standard for granting a summary final order is very high.”<sup>14</sup>

In general, “a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law,” and “must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.” *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *see also City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (5th DCA 2000), and *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.1977). The interpretation of a written document, such as the Territorial Agreement here, presents a question of law. *See Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985). As discussed below, staff recommends that Gulf Power has conclusively demonstrated that there is no genuine issue of material fact remaining in this case. All that remains is for the Commission to interpret the Territorial Agreement and the Territorial Order into which it is embodied, and for the Commission to rule on Gulf Power’s Motion for Summary Final Order as a matter of law.

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<sup>14</sup> Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, pg. 4.

### **Whether Section 2.3 of the Territorial Agreement is the Proper Procedure to Determine which Utility Should Provide Service to the Lift Facility**

Section 2.1 of the Territorial Agreement states that “upon receiving a bona-fide request for service from a Customer, a Utility may agree to provide the requested service if the conditions of either Section 2.2 or Section 2.3 below are met.” (emphasis added) In this case, Gulf Power does not argue that it meets the load and distance criteria of Section 2.2. However, Gulf Power does claim that it meets the criteria of Section 2.3 of the Territorial Agreement, which states:

2.3 In any instance where the Load and distance criteria of Section 2.2 are not met but the requested Utility believes that its Cost of Service would not be significantly more than that of the other Utility, the following procedure shall be used to determine if the requested Utility may agree to provide service:

(a) The requested Utility is to notify the other Utility of the Customer's request, providing all relevant information about the request.

(b) If the other Utility believes that its facilities would be uneconomically duplicated if the request is honored, it has five (5) working days from receipt of notice to request a meeting or other method to be conducted within ten (10) working days for the purpose of comparing each Utility's Cost of Service. Absent such a request or upon notification from the other Utility of no objection to the requested Utility's providing the service, the requested Utility may agree to provide service.

(c) At the meeting scheduled pursuant to 2.3(b) or in some other mutually acceptable method, each Utility is to present to the other Utility its estimated Cost of Service, including all supporting details (type and amount of equipment, labor rates, overheads, etc.). For Loads greater than 1,000 kVA information as to the percentage of substation and feeder capacity that will be utilized and the amount and nature of the cost allocations of such utilization included in the Cost of Service are to be provided.

(d) Upon agreement as to each Utility's Cost of Service, the requested Utility may agree to provide service to the Customer if either of the following conditions are met:

(i) The requested Utility's Cost of Service does not exceed the other Utility's Cost of Service by more than \$15,000.

(ii) The requested Utility's Cost of Service does not exceed the other Utility's Cost of Service by more than twenty-five percent (25%).

(e) Notwithstanding the other provisions of this Section 2.3, no Utility shall agree to provide service to a Customer under the provisions of this Section 2.3 if the Load is less than or equal to 1000 kVA, the requested Utility's Existing

Facilities are further than 10,000 feet from the Point of Delivery, and the other Utility's Existing Facilities are located in a roadway or other right-of-way abutting the Customer's premises.

GCEC essentially argues that since Gulf Power did not receive a “bona fide” request for service from St. Joe as required by Section 2.1 of the Territorial Agreement, it cannot invoke Section 2.3 of the Territorial Agreement. As a result, any attempt by Gulf Power to provide service to the Lift Facility would be void.

To support its allegation that the request from St. Joe to provide service to the Lift Facility was not “bona fide,” GCEC appears to argue that the request received by Gulf Power from St. Joe was verbal, and that Gulf Power had not finalized its cost estimates prior to sending notice to GCEC.<sup>15</sup> The Territorial Agreement does not define what constitutes a “bona fide request.” Bona fide is Latin for “good faith” and Black’s Law Dictionary defines the term as “in or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense.”<sup>16</sup> GCEC does not present any facts that demonstrate the request from St. Joe to Gulf Power was anything other than in good faith. Whether the request was verbal in nature, or whether Gulf Power still had cost estimates to complete, does not indicate that the request was not in good faith, nor could one infer such a conclusion from those facts. Further, if GCEC had questions as to the sufficiency or genuineness of the request from St. Joe to Gulf Power, it had every opportunity to address those when it received the notice from Gulf Power. GCEC did not do so.

Secondly, even if the request from Gulf Power was a “bona fide” request, GCEC asserts that Gulf Power did not have a reasonable basis to believe that it could provide electric service for not significantly more than GCEC. GCEC first argues that Gulf Power’s basis or conclusion is unreasonable because Gulf Power’s estimated cost of service, by comparison, exceeds GCEC’s estimated cost of service by an amount or percentage greater than those specified in Section 2.3 of the Territorial Agreement. However, by failing to respond to Gulf Power’s notice, GCEC gave up its right to compare estimated costs. The plain terms of the Territorial Agreement in Section 2.3(b) require that GCEC exercise its right to object to Gulf Power’s notice under Section 2.3 as a condition precedent to comparing cost of service. Therefore, even if GCEC correctly believed that “its facilities would be uneconomically duplicated” if Gulf Power provided service to the Lift Facility, those facts would be irrelevant in determining, in this circumstance, whether Gulf Power has the right to provide service under Sections 2.3(a) and (b) of the agreement.

GCEC also asserts that Gulf Power’s belief was unreasonable because Mr. Rogers “has no documents showing how he compared Gulf Power’s cost of serving” and that he completed the cost comparisons “in his head.”<sup>17</sup> However, the Territorial Order, in specifying what a utility must review and calculate upon agreeing to provide service under the Territorial Agreement,<sup>18</sup> does not specify how such calculations must be arrived at, nor does it require records be kept of these calculations. Furthermore, it is not unreasonable, especially given the undisputed difference

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<sup>15</sup> GCEC br. pg. 15.

<sup>16</sup> BONA FIDE, Black's Law Dictionary (10th ed. 2014).

<sup>17</sup> GCEC br. pg. 15-16.

<sup>18</sup> See Order No. PSC-01-0891-PAA-EU, pg. 2-3.



in the distance of the existing facilities of GCEC and Gulf Power from the lift station,<sup>19</sup> that an experienced engineer, with significant experience in calculating cost of service, could arrive at a reasonable belief that the cost of service would not differ significantly between GCEC and Gulf Power without making intensive calculations. Regardless, if GCEC believed that Gulf Power could not provide electric service for not significantly more than GCEC, GCEC had every opportunity to address such beliefs when it received the notice from Gulf Power. GCEC did not exercise this opportunity under the terms of the Territorial Agreement.

For the reasons stated above, staff recommends that Section 2.3 of the Territorial Agreement is the proper procedure to determine the utility that should provide service to the Lift Facility.

### **Whether the Notice was Sufficient**

GCEC argues that the notice received from Gulf Power was deficient, and did not meet the requirements of the Territorial Agreement in three ways:

- 1) The notice was sent to a person, Mr. Gleaton, that was “never authorized or designated” to receive such notice, and that the Vice President for Engineering of GCEC was not a person that was contemplated under the Territorial Agreement that could receive such notice.<sup>20</sup>
- 2) An email was not an acceptable method to deliver notice under the Territorial Agreement.<sup>21</sup>
- 3) The notice did not “provide all relevant information” regarding the request for service for the Lift Facility.<sup>22</sup>

One of the major difficulties in this docket is that the Territorial Agreement is silent on the person or persons who can receive a notice pursuant to the Territorial Agreement; what form the notice must take, i.e., email, U.S. Mail, or certified mail; and what information must be included in the notice, i.e., what type of information would provide “all relevant information about the request” as required under Section 2.3(a) of the Agreement. GCEC makes several arguments to read additional terms into the Territorial Agreement in order to address this lack of specificity. In this case, however, reading additional requirements into the Territorial Agreement is unnecessary. This case can be determined by looking at the four corners of the Territorial Agreement, which is embodied into the Territorial Order.

GCEC states that there are a number of public policy implications to consider in this matter, including costs to serve and uneconomic duplication of facilities. While this is true, it is also very important that parties to agreements ratified by the Commission should be able to rely upon the plain written terms of such agreements which are embodied into Commission orders. These orders also carry the Commission’s “public interest” imprimatur. Otherwise, parties may be less inclined to reach the settlements and agreements that the Commission encourages. To this end,

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<sup>19</sup> The existing facilities of Gulf Power and GCEC were approximately 11,000 feet and 8,000 feet from the Lift Facility, respectively. *See* Gulf Power br. pg. 4, and GCEC br. pg. 9 and 16.

<sup>20</sup> GCEC br. pg. 2 and 24.

<sup>21</sup> GCEC br. pg. 21-23.

<sup>22</sup> GCEC br. pg. 17.

the Commission should generally avoid reading terms into an agreement unless there is an overriding necessity to do so.<sup>23</sup> Staff believes that there is no such necessity to do so in this case.

Notice may be of two types, actual or constructive. Constructive notice is derived from an inference of knowledge by operation of law, such as with a recording statute. *McCausland v. Davis*, 204 So. 2d 334, 334–36 (Fla. 2d DCA 1967). Actual notice may be of two kinds: “express, which includes what might be called direct information” and “implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was [that person’s] duty to use and...did not use.” *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932), *see also* 38 Fla. Jur 2d *Notice and Notices* § 2.

It is also well settled that when a party has “either actual or constructive information and notice sufficient to put him on inquiry,” such party, for their own protection, should engage in such inquiry. If such party declines to make such inquiry, that party “must suffer the consequence of [their] neglect.” *Sickler v. Melbourne State Bank*, 159 So. 678, 679 (Fla. 1935).

While GCEC makes a number of claims as to the deficiency of the notice provided by Gulf Power, staff recommends it is clear, as shown below, that GCEC had adequate information to put it on notice to inquire further of Gulf Power if it was unclear as to Gulf Power’s intentions. Certainly, after receiving the email from Gulf Power, GCEC had the means to inquire further of Gulf Power or to object to Gulf Power’s provision of service to the Lift Facility within the timeframe specified in Section 2.3 of the Territorial Agreement. This is not a case of “waiver” as GCEC claims.<sup>24</sup> Rather, it is a case of GCEC failing to take reasonably prudent care to protect or assert its own rights under the Territorial Agreement. GCEC should not now be insulated from the consequences of its inaction.

### ***1) Mr. Gleaton as Recipient of Notice***

In its brief to the Commission, GCEC states that Mr. Gleaton was never authorized, nor was a person under his title, Vice President of Engineering, ever authorized to receive notice under the Territorial Agreement.<sup>25</sup> GCEC also cites to the sworn statement of its lead counsel in the Territorial Order docket that it was never “anticipated, intended, or agreed that ‘notice’ required to be provided under the Territorial Orders could be effected by service of notice to anyone at GCEC, other than through notice to its General Manager and its two attorneys of record, myself and J. Patrick Floyd, at their mailing addresses.”<sup>26</sup> These requirements, however, are not

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<sup>23</sup> Order No. PSC-01-2515-FOF-EI, issued Dec. 24, 2001, in Docket No. 950379-EI, *In re: Tampa Elec. Co.*, which states that “the actual language used in the agreement is the best evidence of the intent of the parties, and the plain meaning of the language controls.” Cf. *Hahamovitch v. Hahamovitch*, 174 So. 3d 983, 986 (Fla. 2015), which states “where a contract is clear and unambiguous, it must be enforced pursuant to its plain language...In such a situation, the language itself is the best evidence of the parties’ intent, and its plain meaning controls.” (While the Territorial Agreement is not a contract per se, the reasoning here is similar. The best evidence of the intention of the parties to the Territorial Agreement, and the Commission in the Territorial Order that adopted it, should be found within the plain language of the Territorial Agreement and Territorial Order).

<sup>24</sup> GCEC br. pg. 25.

<sup>25</sup> GCEC br. pg. 2 and 24.

<sup>26</sup> GCEC br. pg. 2 and 24. and Aff. of J. Haswell, ¶ 5 (DN 04633-2018).

expressly enumerated in the Territorial Agreement or the Territorial Order into which the agreement is embodied.

GCEC seems to assert that the only persons who could receive notice pursuant to the Territorial Agreement are its General Manager and two attorneys of record from a docket opened 25 years ago and which was closed in 2002. Staff believes that such an assertion and interpretation would make little practical sense, nor could it be reasonably implied from the Territorial Agreement. Moreover, such an explicit requirement could have been contained within the Territorial Agreement, but it was not.

Mr. Gleaton is an upper-level employee of GCEC, with significant high-level responsibilities within that organization, including the following:

- 1) “Leading the technical aspects of planning, design and development of GCEC’s electric distribution system;”
- 2) “To ensure that GCEC’s distribution systems are in compliance with cooperative, governmental and legal guidelines and standards to ensure both safety and delivery of the best possible level of service to cooperative members;”
- 3) “Communicat[ing] and coordinat[ing] work with managers and employees of other agencies, such as PowerSouth, Tyndall Air Force Base, HiLine Engineering...and the Florida Public Service Commission to ensure that GCEC’s system meets all professional and legal standards;” and
- 4) “Manag[ing] the day to day operations of the Engineering Department, GIS-IT department and the warehouse.”<sup>27</sup>

Furthermore, Mr. Gleaton stated that it is not uncommon for him to respond to and assist with requests for electrical service from customers,<sup>28</sup> and he is prominently featured on the “Contact Us” page of GCEC’s website along with other top executives of GCEC including its Chief Executive Officer/General Manager and Chief Operating Officer.<sup>29</sup> Mr. Gleaton is clearly held out by GCEC as not only a high-level executive of the company, but also one that can receive correspondence and inquiries on its behalf.

Given these facts, staff recommends that the Commission should find that a person such as Mr. Gleaton may receive notice under the Territorial Agreement, and that GCEC was reasonably put on notice by communication with Mr. Gleaton.

## ***2) Emailing of Notice***

GCEC argues that email notice was never contemplated under the Territorial Agreement and, further, that custom and usage would dictate the use of mail or certified mail.<sup>30</sup> However, neither

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<sup>27</sup> Dep. of P. Gleaton, pg. 12-15, as provided in Gulf Power br., Ex. H.

<sup>28</sup> Dep. of P. Gleaton, pg. 21-22.

<sup>29</sup> Gulf Power br. pg. 10.

<sup>30</sup> GCEC br. pg. 23.

was email notice expressly prohibited. In fact, the form of notice was not limited or specified in the Territorial Agreement.

Regardless, even taking GCEC's arguments regarding the use of email as true, it does not change the fact that, on Mr. Gleaton's own admission, he received the email and that he forwarded the email on to another GCEC employee, Francis Hinton, for further consideration.<sup>31</sup> Thus, not only did a high-level executive of GCEC receive the email from Gulf Power, that executive took action upon it. From these facts, staff believes it is clear that GCEC was not prejudiced by the notice sent from Gulf Power being sent via email versus another method. Staff believes that such receipt would have placed GCEC on reasonable notice to inquire further of Gulf Power.

### ***3) Information Included in Notice***

GCEC also argues that the email from Mr. Rogers to Mr. Gleaton "failed to provide" certain "vital information that would allow GCEC to make any 'knowing' decision" in regards to the Territorial Agreement.<sup>32</sup> Furthermore, GCEC states that Mr. Gleaton had no knowledge of the Territorial Agreement at the time of the email. However, it is not disputed that the email did contain the following information:

- 1) Gulf Power received a request for electrical service from a customer.
- 2) A citation to an agreement between the parties along with a citation to a particular provision of that agreement.
- 3) The parcel number for the customer property in question (albeit without the county where the parcel number is located).

While Mr. Rogers could, and perhaps should, have included the county for the parcel number cited in the email, Mr. Gleaton received enough information from the email that he could have gleaned, with any prudent or reasonable inquiry, the intentions of Gulf Power. Furthermore, by Mr. Gleaton's own admission, he correctly surmised the parcel number was in Bay County since he looked up the parcel number in the Bay County property appraiser's website and based, at least partly, his assumption of the location of the Lift Facility on the map location generated by that search.<sup>33</sup> Given this, it is difficult to reconcile GCEC's position that the notice was deficient due to the fact that it did not include a county. Mr. Gleaton's actions do not demonstrate that he was confused as to the county referenced in the notice; and even if he was confused, it would have been easy for him to inquire further of Mr. Rogers to ascertain it.

In regards to Mr. Gleaton's lack of knowledge of the Territorial Agreement, GCEC is certainly charged with knowledge of any order of the Commission pertaining to it. Thus, it is fair to expect that, with any reasonable inquiry into his own organization, Mr. Gleaton would have been able to determine the agreement Mr. Rogers was referencing in his email.

Finally, GCEC states that "in order to comply with and achieve the purpose of the 'Territorial Order' the utility receiving the request for service must, at a minimum, provide the other utility

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<sup>31</sup> Dep. of P. Gleaton, pg. 27.

<sup>32</sup> GCEC br. pg. 17 and 25.

<sup>33</sup> Dep. of P. Gleaton pg. 34-35.

with notice of the size of the load, the precise location of the point of delivery, and the precise location of the requested utility's existing facilities."<sup>34</sup> However, the Territorial Agreement does not contain such specificity. It simply states that the utility receiving the request provide "all relevant information about the request." If GCEC thought that the "minimum" information it claims was "integral to conducting a cost comparison and uneconomic duplication of facilities,"<sup>35</sup> it certainly had the opportunity to follow up with Gulf Power to request it, but it did not. If such information was so vital for GCEC to make a decision, it makes little sense as to why GCEC would fail to inquire further about a notice that did not include it.

***Staff recommends that Notice was Sufficient***

Staff believes that the essential material facts of this case, in regards to Gulf Power's notice, as demonstrated through, the pleadings, depositions, and discovery conducted in this case, are as follows:

- 1) Mr. Rogers of Gulf Power sent an email to Mr. Gleaton of GCEC on October 20, 2017.
- 2) This email stated, "pursuant to section 2.3(a) of the agreement between Gulf Power and GCEC, I am notifying GCEC of a customer's request for electrical service from Gulf Power for a new lift station on parcel 26597-000-000. Construction would not result in any duplication of facilities."
- 3) This email was received by Peyton Gleaton, the Vice President of Engineering for GCEC.

These facts are not in dispute. Given this, it is for the Commission to determine, as an issue of law, whether the notice sent by Mr. Rogers of Gulf Power to Mr. Gleaton of GCEC was sufficient notice under the terms of Section 2.3 of the Territorial Agreement.

Based on the undisputed facts shown above and the express requirements of the Territorial Agreement, staff believes that the email notice sent by Gulf Power was legally sufficient to place GCEC on notice of Gulf Power's intention to serve the Lift Facility. Mr. Gleaton was clearly held out by GCEC as not only a high-level executive of the company, but also one that can receive correspondence and inquiries on its behalf. GCEC was not prejudiced by the notice from Gulf Power being sent via email versus another method. Finally, the email contained adequate information to place GCEC on notice that Gulf Power planned to service the Lift Facility. Also, as shown above, if GCEC believed that Gulf Power's notice was deficient, it had every opportunity to inquire further of Gulf Power within the terms of the Territorial Agreement, but declined to do so.

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<sup>34</sup> GCEC br. pg. 18.

<sup>35</sup> *Id.*

### **Whether Gulf Power's Motion for Summary Final Order Should be Granted**

As stated, staff believes that Section 2.3 of the Territorial Agreement is the proper procedure to determine whether Gulf Power or GCEC should be allowed to provide service to the Lift Facility. There is no dispute regarding the material facts of this case; the parties do not dispute 1) that Mr. Rogers of Gulf Power sent the email notice, 2) the content of that email notice, 3) that Mr. Gleaton, a Vice President of GCEC, received that email notice, and 4) that GCEC did not respond to that email notice within 5 days. The undisputed material facts of this case demonstrate that the email notice from Gulf Power was sufficient notice under the terms of Section 2.3 of Territorial Agreement. Finally, staff also believes, as shown above, that it is undisputed that GCEC failed to respond to that notice within 5 days, as required in Section 2.3. Thus, staff recommends that the Commission should find, as a matter of law and under the terms of the Territorial Agreement, that GCEC's failure to respond to that sufficient notice within 5 days, as required in Section 2.3, forecloses it from objecting to Gulf Power servicing the Lift Facility.

Based upon the pleadings, depositions, and discovery conducted in this docket, staff concludes that the Commission should find that Gulf Power has conclusively demonstrated that a genuine issue of material fact does not remain in this case and that the Commission should rule upon this case strictly as a matter of law. Based upon the foregoing, staff recommends that Gulf Power's Motion for Summary Final Order be granted, and that, under the terms of the Territorial Agreement, Gulf Power may provide electric service to the Lift Facility.

**Issue 3:** Should GCEC's Motion for Summary Final Order be granted?

**Recommendation:** No. Staff recommends that GCEC's Motion for Summary Final Order should be denied as moot if the Commission grants Gulf Power's Motion for Summary Final Order in Issue 2. If the Commission does not grant Gulf Power's Motion, GCEC's Motion for Summary Final Order should be denied. (Schrader)

**Staff Analysis:** On September 11, 2018, GCEC filed its own Motion for Summary Final Order. In this Motion, GCEC requests that it be granted a Summary Final Order on the threshold issue of waiver in this case and that the Commission find that GCEC did not waive its right to provide electric service to the Lift Facility. GCEC states that "the undisputed evidence adduced through discovery in this case conclusively shows that GCEC did not in fact waive any right to serve the Lift Station...and is entitled to a summary final order."<sup>36</sup> GCEC further argues that the undisputed evidence of the case demonstrates that Gulf Power failed to properly notify GCEC of the request for service for the Lift facility as required under the Territorial Agreement. Specifically, GCEC claims that Gulf Power failed to provide "all relevant information about the [service] request."<sup>37</sup>

Gulf Power responded to this Motion by pointing out that "on one hand, GCEC claims in its Brief in Opposition that the 'waiver' issue is not susceptible to summary adjudication. On the other hand, GCEC's Motion [for Summary Final Order] asserts that the 'waiver' issue is susceptible to summary adjudication." Also, Gulf Power argues that waiver is not at issue in this case as it "has not raised a defense of 'waiver' in this proceeding...[and] waiver is an affirmative defense that must be pleaded and established by [a] defendant." Finally, Gulf Power re-states its arguments that the "plain language" of the Territorial Agreement must control, that the "Territorial Agreement does not specify that any of the elements identified by GCEC are essential for inclusion in notices issued under the Agreement," and that GCEC was sufficiently on notice of Gulf Power's intent to invoke the notice provisions of Section 2.3 of the Territorial Agreement.<sup>38</sup>

If the Commission grants Gulf Power's Motion for Summary Final Order in Issue 2, GCEC's Motion for Summary Final Order would be moot and should be denied on that basis. If the Commission decides not to grant Gulf Power's Motion for Summary Final Order, staff recommends that GCEC's Motion for Summary Final Order be denied. Staff believes that GCEC's Motion for Summary Final Order is inconsistent with its brief that argues that there are issues of fact in this case that are not ripe for summary final order. In particular, GCEC's argument in its brief that "waiver inherently involves factual issues that are not appropriate for decision by summary final order" would seem to be in direct conflict with GCEC's assertion that the Commission should find, on Summary Final Order, that GCEC did not waive any right to serve the lift station.<sup>39</sup> GCEC does not state that its Motion for Summary Final Order is in the alternative to the arguments in its brief. Given this, Commission staff is unable to reconcile GCEC's apparently disparate positions. Moreover, the issue of waiver, raised in GCEC's motion

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<sup>36</sup> GCEC br. pg. 26.

<sup>37</sup> *Id.* at 32.

<sup>38</sup> Gulf Power resp. to GCEC Motion for Summary Final Order, pg. 2-6 (DN 06120-2018).

<sup>39</sup> GCEC br. pg. 5, 25-26.

for summary final order, is beyond the scope of and irrelevant to the dispositive issues to be resolved in this matter as articulated on page 3 of the Procedural Order. As stated in Issue 2, staff believes that this is not a case of “waiver;” rather, it is a case of GCEC failing to take reasonably prudent care to protect or assert its own rights under the Territorial Agreement. For these reasons, staff recommends that the Commission deny GCEC’s Motion for Summary Final Order on the basis that this is not a case of waiver, and, therefore, a Summary Final Order on regarding waiver would be irrelevant to the material issues of this case.



**Issue 4:** Should this docket be closed?

**Recommendation:** Yes. If the Commission grants Gulf Power's Motion for Summary Final Order, no further action is necessary in this docket; it should be closed upon issuance of a Final Order. (Schrader)

**Staff Analysis:** If the Commission grants Gulf Power's Motion for Summary Final Order, no further action is necessary in this docket; it should be closed upon issuance of a Final Order.