

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-**

---

**DATE:** February 21, 2019

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

**FROM:** Office of the General Counsel (Schrader, Crawford, A. King) *ak jsc KS*  
Division of Economics (Merryday) *THM EJD PR R4*  
Division of Engineering (Ballinger, Graves) *R4*

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

**AGENDA:** 03/05/19 – Regular Agenda – Participation is at the Commission’s discretion.

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Brown

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

---

### Case Background

On May 23, 2018, Gulf Coast Electric Cooperative (GCEC) filed a complaint against Gulf Power Company (Gulf Power) seeking expedited enforcement of their Territorial Agreement.<sup>1</sup> GCEC claims that Gulf Power violated the Territorial Agreement by failing to properly notify GCEC of a customer’s request for service as required by the agreement. Gulf Power countered that it did notify GCEC pursuant to the Territorial Agreement, 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 Agreement.”

---

<sup>1</sup> Order Nos. PSC-01-0891-PAA-EU and PSC-01-0891A-PAA-EU, issued April 9, 2001, and March 26, 2002, in Docket No. 930885-EU, *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Co.*

Shortly after filing its answer to the complaint, Gulf Power filed a Motion for Summary Final Order arguing that the matter could be decided on the pleadings alone. Gulf Power contends that, at its core, the territorial dispute presented the Commission with a simple issue of contractual interpretation, and because the terms of the Territorial Agreement were plain and unambiguous, construing the agreement was a pure question of law that could be decided on a motion for summary final order. Specifically, Gulf Power claimed the parties agreed that GCEC received notice from Gulf Power on October 20, 2017, and the only remaining issue is whether Gulf Power's notice was sufficient under the terms of the Territorial Agreement.

GCEC responded in opposition to this Motion for Summary Final Order on June 13, 2018, arguing that a summary final order was premature and should be denied because numerous genuine issues of fact remained and there was pending discovery regarding whether "GCEC waived the right to contest Gulf Power providing service." GCEC argued that the parties disputed whether Gulf Power could notify GCEC by email; whether Gulf Power could notify GCEC through Peyton Gleaton, GCEC's Vice President for Engineering; and whether the email contained "all relevant information about the request" as required by the Territorial Agreement. Lastly, GCEC argued that it did not knowingly and intentionally waive its right to serve the customer because Gulf Power's email did not contain enough information to alert GCEC that it had a right to serve the customer. Put simply, GCEC could not waive a right it did not know it had. According to GCEC, these disputes raised issues of material fact that precluded entry of a summary final order.

On July 23, 2018, the Prehearing Officer issued an Order Setting Procedure, which 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>2</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.

Both parties filed briefs on September 11, 2018, in which they restated many of the arguments they raised in their previous filings. GCEC also included in its brief its own Motion for Summary Final Order and a separate request for oral argument. In its Motion for Summary Final Order, GCEC argued that it is entitled to a summary final order on the issue of waiver. Specifically, GCEC argued that although waiver is not typically decided on summary final order, the undisputed facts show that Gulf Power's notice was insufficient; thus, GCEC did not know enough about the customer request to knowingly and intentionally waive its right to serve that customer.

On September 18, 2018, Gulf Power responded in opposition to GCEC's Motion for Summary Final Order. Gulf Power argued that GCEC's position in its Motion for Summary Final Order was inconsistent with its previous position that waiver was a factual issue that could not be decided in a summary final order. Gulf Power also argued that waiver is not an issue in this case. Lastly, Gulf Power restated its argument that the notice was sufficient.

---

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

Docket No. 20180125-EU

Date: February 21, 2019

On November 29, 2018, staff filed a recommendation on the parties' motions for summary final order. Staff recommended that the Commission grant Gulf Power's motion, deny GCEC's motion, and close the docket.

On December 10, 2018, the day before the issue was to be heard at the Agenda Conference, GCEC filed a Notice of Supplemental Authority citing a recent decision from the First District Court of Appeal, *Holmes v. Florida A&M University*, 260 So. 3d 400 (Fla. 1st DCA 2018).

At the December 11, 2018 Agenda Conference, the Commission heard oral argument from Gulf Power and GCEC on staff's recommendation. When asked about the applicability of *Holmes* at the Agenda Conference, staff stated that it was inapplicable to this case because *Holmes* dealt with the interpretation of a contract; the Commission, however, was dealing with the interpretation of one of its own orders. The Commission granted Gulf Power's Motion for Summary Final Order and denied GCEC's Motion for Summary Final Order as moot. The Commission has yet to issue a Final Order.

Upon further review, staff believes it incorrectly advised the Commission on Gulf Power's Motion for Summary Final Order. This recommendation addresses whether the Commission should vacate its December 11, 2018, votes to grant Gulf Power's Motion for Summary Final Order, deny GCEC's Motion for Summary Final Order, and close the docket. The Commission previously voted to allow oral argument, and staff is not recommending that the Commission vacate that vote. Participation is still at the Commission's discretion.

The Commission has jurisdiction pursuant to Section 366.04, Florida Statutes (F.S.).

## Discussion of Issues

**Issue 1:** Should the Commission vacate three previous votes in this docket by which it granted Gulf Power's Motion for Summary Final Order, denied GCEC's Motion for Summary Final Order, and closed the docket?

**Recommendation:** Yes. The Commission should vacate its previous votes. (A. King)

**Staff Analysis:** Staff is recommending that the Commission vacate its votes made at the December 11, 2018 Agenda Conference that granted Gulf Power's Motion for Summary Final Order, denied GCEC's Motion for Summary Final Order, and closed the docket. Below is staff's explanation as to why the votes should be vacated.

### **Staff's Recommendation Caused the Commission to Make a Mistake of Law**

#### ***General Description of the Motion Originally Before the Commission***

Gulf Power filed its Motion for Summary Final Order just days after answering GCEC's complaint, which alleged that Gulf Power had violated the parties' Territorial Agreement. Gulf Power claimed the dispute boiled down to "a single issue involving a simple matter of contract interpretation" that could be decided on the pleadings alone. It argued that the terms of the Territorial Agreement were plain and unambiguous, Gulf Power's email to GCEC was sufficient notice under those plain terms, and GCEC was foreclosed from challenging Gulf Power's decision to fulfill the customer's request for service because GCEC failed to timely respond to Gulf Power's notice as required by the Territorial Agreement.

GCEC responded to Gulf Power's motion, arguing, among other things, that a summary final order was inappropriate because there were several genuine issues of material fact. Chief among those issues was whether Gulf Power's notice included "all relevant information about the request" as required by the terms of the Territorial Agreement.

#### ***Staff Incorrectly Applied the Standard for Summary Final Order***

In its November 29, 2018, recommendation, staff correctly recited the standard for granting a motion for summary final order contained in Section 120.57(1)(h), F.S. That standard mirrors the standard used in civil cases for motions for summary judgment. Essentially, the Commission can grant a motion for summary final order *only* if there are no genuine issues of material fact and the moving party is entitled to the entry of a final order as a matter of law. Staff noted that the Commission has previously observed that the standard for granting a summary final order is very high. The motion cannot be granted unless the moving party has conclusively demonstrated that there is no material issue of fact, and in granting the order, the Commission must draw every possible inference in favor of the nonmoving party. Staff still believes this is the correct standard applicable to the parties' motions for summary final order.

Staff also relied upon *Jaar v. University of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985), for the proposition that the "interpretation of a written document, such as the Territorial Agreement here, presents a question of law." However, this proposition was an incomplete statement of the rule in that case. As the court correctly and completely stated in *Jaar*, "the construction of a written document, such as the contract before us, presents a question of law *if its language is clear and unambiguous.*" *Id.* (emphasis added) (citations omitted). Staff's incomplete analysis

and misapprehension of the law in *Jaar* was a foundational flaw in staff's previous recommendation, the result of which will be discussed in more depth in Issue 2.

### ***Applicability of Contract Law***

The day before the Agenda Conference, GCEC filed a notice of supplemental authority that cited *Holmes v. Florida A&M University*, 260 So. 3d 400 (Fla. 1st DCA 2018). *Holmes* dealt with a contractual dispute between the University and two members of its coaching staff.<sup>3</sup> *Id.* at 402. At the Agenda Conference, staff was asked about the effect of *Holmes* on the case. Staff advised the Commission that the case was inapplicable because contract law did not apply to this case. Further research by staff after the Agenda Conference has led staff to conclude that it incorrectly analyzed the applicability of contract law to the matter at hand.

Staff originally believed contract principles did not apply based on *Public Service Commission v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). In *Fuller*, the Florida Supreme Court held that a territorial "agreement has no existence apart from the PSC order approving it." *Id.* In other words, the territorial agreement merges with and becomes part of the order approving it. *Id.* A Court of Appeals of Indiana made a similar finding: "a settlement agreement that must be filed with and approved by a regulatory agency 'loses its status as a strictly private contract and takes on a public interest gloss.'" *Ind. Bell Tel. Co. v. Office of Util. Consumer Counselor*, 725 N.E.2d 432,435 (Ind. Ct. App. 2000) (quoting *Citizens Action Coal. of Ind., Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)). "[S]uch an agreement is 'more closely akin to an order of the Commission . . .'" *Id.* (quoting *Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1135 (D.C. Cir. 1991)). Staff originally believed that because the Territorial Agreement was subsumed into the Commission order that approved it, it was no longer a contract and contract law was therefore not applicable.

Upon further review and research, it appears that staff incorrectly concluded that contract law did not apply after the Territorial Agreement became part of the order that approved it. When a territorial agreement is approved by the Commission, it takes on two natures. It has characteristics of both a contract and a Commission order. Because a territorial agreement takes on both of these natures, it is subject to both contract law and the law surrounding Commission orders. *City of Homestead v. Beard*, 600 So. 2d 450, 453 (Fla. 1992); see *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000). The *Beard* Court specifically held that though the law of contracts applies to the interpretation of territorial agreements, the law surrounding Commission orders applies to the modification or termination of those agreements. *Beard*, 600 So. 2d at 453.

In *Johnson*, 760 So. 2d at 84, the Court acknowledged and impliedly approved of the Commission's use of "well-settled principles of contractual construction" to resolve an ambiguity in a territorial agreement between the city of Homestead and Florida Power & Light Company. Thus, even though territorial agreements become part of the order that approved them, the Commission still applies contract law if it is asked to interpret those agreements.

---

<sup>3</sup> GCEC did not cite a particular proposition the case stood for relative to any issue in the current matter.

### **The Commission Should Vacate its Previous Votes and Reconsider the Parties' Motions**

The Commission is permitted to reconsider an action that was based upon a mistake of law.<sup>4</sup> Staff believes that under its guidance, the Commission's previous votes in this docket were based on a mistake of law. Therefore, staff recommends that the Commission vacate<sup>5</sup> its votes to grant Gulf Power's Motion for Summary Final Order, deny GCEC's Motion for Summary Final Order, and close the docket so that it might reconsider those motions under the proper legal standard.

### **The Doctrine of Administrative Finality is not yet Applicable**

The doctrine of administrative finality attaches to agency orders that by the passing of time have become final and are no longer within the Commission's control.<sup>6</sup> *See Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 337–39 (Fla. 1966). Because the Commission has yet to issue a final order memorializing its previous votes, the issue is still within the Commission's control and the doctrine of administrative finality is not yet applicable.

### **Conclusion**

Because the Commission's previous votes in this docket are based on a mistake of law, staff recommends that the Commission vacate these votes in order to reassess them under the correct legal standard.

---

<sup>4</sup> Order No. PSC-12-0400-FOF-EI, issued on August 3, 2012, in Docket No. 110138-EI, *In re: Petition for Increase in Rates by Gulf Power Co.*

<sup>5</sup> *E.g.*, Order No. PSC-07-0570-FOF-TP, issued on July 9, 2007, in Docket No. 070118-TP, *In re: Phone 1 Smart LLC*; Order No. 17640, issued on June 2, 1987, in Docket No. 860413-WU, *In re: Application of Wildwood Water Co., Inc. for a Certificate Authorizing Water Service to Customers in St. Johns County under Grandfather Rights.*

<sup>6</sup> *See* Order No. PSC-98-1621-FOF-EQ, issued on December 4, 1998, in Docket No. 980509-EQ, *In re: Florida Power Corp.* (stating that administrative finality did not attach to a PAA for which a final order was never issued).

**Issue 2:** Should the Commission deny Gulf Power’s Motion for Summary Final Order?

**Recommendation:** Yes. The Commission should deny Gulf Power’s Motion for Summary Final Order. (A. King)

**Staff Analysis:** Staff is recommending that the Commission deny Gulf Power’s Motion for Summary Final Order because the parties’ dispute about the meaning of the Territorial Agreement raises an issue of material fact.

The Procedural Order specified three issues for consideration on whether to grant 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?

### **Standard for Summary Final Order Where Contracts are Involved**

A summary final order may be granted *only* where there are no genuine issues of material fact and the moving party is entitled to the entry of a final order as a matter of law.<sup>7</sup> Section 120.57(1)(h), F.S.; *see Thomas v. Eckerd Drugs*, 987 So. 2d 1262, 1263 (Fla. 1st DCA 2008) (applying the same standard that is used for summary judgment in civil cases to motions for summary final order). “A material fact is a fact that is essential to the resolution of the legal questions raised in the case.” *State of Fla. Dep’t of Env’tl. Reg. v. C.P. Developers, Inc.*, 512 So. 2d 258, 261 (Fla. 1st DCA 1987). The Commission has previously recognized that “the standard for granting a summary final order is very high.”<sup>8</sup> “[E]ven if the facts are not in dispute, ‘issues as to the interpretation of such facts may be such as to preclude the award of summary judgment.’”<sup>9</sup>

When a dispute is based on a contractual agreement, what the parties intended the agreement to mean becomes a material fact. *E.g., Holmes*, 260 So. 3d at 407; *Fecteau v. Se. Bank, NA*, 585 So. 2d 1005, 1009 (Fla. 4th DCA 1991). The best evidence of their intentions is the plain meaning of the contractual terms. *Fecteau*, 585 So. 2d at 1007. As long as the terms of the contract are

---

<sup>7</sup> Order No. PSC-12-0652-PCO-EI, issued on December 12, 2012, in Docket No. 120015-EI, *In re: Petition for Increase in Rates by Florida Power & Light Co.*

<sup>8</sup> Order No. PSC-11-0244-FOF-GU, issued on 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.*

<sup>9</sup> *Id.* (quoting *Franklin Cty. v. Leisure Props., Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1983)).

unambiguous, the court's interpretation of those terms is a pure question of law.<sup>10</sup> *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985). "However, '[w]here the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent [that] cannot properly be resolved by summary judgment.'" *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001) (quoting *Universal Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.*, 513 So. 2d 218, 219 (Fla. 1st DCA 1987)), cited in *Holmes*, 260 So. 3d at 404.

A contract term is ambiguous when it "may be fairly understood in more ways than one." *Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla. 1952). When determining whether contractual language is ambiguous, the language at issue should be read in the context of the document as a whole. *Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc.*, 929 So. 2d 729, 732 (Fla. 4th DCA 2006). The plain meaning of a term may also be ascertained by referencing a dictionary. *Debaun v. State*, 213 So. 3d 747, 751 (Fla. 2017).

## **The Parties' Arguments**

### ***Gulf Power's Motion for Summary Final Order***

Gulf Power argues that the terms of the Territorial Agreement are plain and unambiguous, and there are no issues of material fact. It asserts that Gulf Power's email to GCEC satisfied its duty to "notify" GCEC of the customer's request and provide "all relevant information about the request." It further argues that GCEC failed to timely respond to Gulf Power's request, so Gulf Power could fulfill the customer's request. Thus, based on the plain meaning of the Territorial Agreement and the undisputed facts, Gulf Power concludes that it is entitled to a judgment as a matter of law.

### ***GCEC's Response***

GCEC responded to Gulf Power's motion by arguing that a summary final order was inappropriate for several reasons. It claims there were several issues of material fact, and discovery had not yet been completed. GCEC's main argument was that the email notice did not contain all the information required by the Territorial Agreement. GCEC also disputed whether the terms of the Territorial Agreement permitted Gulf Power to notify GCEC by emailing Peyton Gleaton. GCEC also argued that it did not waive its right to serve the Lift Facility, and waiver "involves factual issues that are *not* appropriate for decision by summary final order."

## **Interpreting the Territorial Agreement**

### ***Summary of the Territorial Agreement***

To properly determine whether the term "all relevant information" is ambiguous, the Commission should first consider the context of the entire document. The Territorial Agreement was designed to prevent the "uneconomic duplication of [one utility's] facilities" by the other. According to the Territorial Agreement, uneconomic duplication of the other utility's facilities is primarily dependent upon whether there is a significant difference in the cost of service for each of the utilities. In turn, "The likelihood of there being a significant difference in the Cost of Service is primarily a function of the size of the Load and the difference in distances between the Point of Delivery and the Existing Facilities of each Utility." In sum, there are two driving

---

<sup>10</sup> "The initial determination of whether the contract term is ambiguous is a question of law for the court." *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001).



factors that will determine which utility can serve: (1) the difference in the distances between each utility's existing facilities and the customer and (2) the requested load size.

Section 2.1 of the Territorial Agreement provides 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. Otherwise, the Utility should direct the Customer to request service from the other utility." Section 2.2 lays out different load size and distance thresholds within which the requested utility can provide service without consulting or notifying the other utility. Section 2.3 states:

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.

(Emphasis added). Section 2.4 provides that the "requested Utility bears the primary responsibility in determining whether or not the provisions of Sections 2.2 or Section 2.3 above have been met or if it otherwise believes that service can be provided to a Customer without uneconomic duplication of the other utility's facilities."

#### ***Interpreting "All Relevant Information"***

The parties agree that Gulf Power had to comply with Section 2.3 in order to serve the Lift Facility. They also agree that Joshua Rogers at Gulf Power sent Peyton Gleaton at GCEC an email notifying him that Gulf Power had received a request for service. They also agree to the substance of the email. However, they dispute, among other things, whether Gulf Power's email to GCEC contained "all relevant information" about the request for service. The parties' arguments are based on different interpretations of that term, and as previously discussed, if the Commission determines that "all relevant information" is ambiguous, an issue of material fact exists, and a summary final order is inappropriate.

On its face, the phrase "all relevant information" is vague, because the reader has no indication of what information is relevant. However, the phrase must be considered in context of the Territorial Agreement. First, the phrase "about the request" immediately follows "all relevant information." Since the Territorial Agreement is about customer requests for electrical service, the information will be relevant to a customer request for electrical service. The Territorial Agreement also contains other language that can help determine what information is relevant to

the customer's request. But even with the help of those other provisions, the term is susceptible to at least three different meanings and is therefore ambiguous.

GCEC argues that "all relevant information" includes three pieces of information: (1) the precise location for the point of delivery, (2) the load size requested, and (3) the precise location of the requested utility's existing facilities. GCEC claims this information is vitally important for determining whether its facilities would be uneconomically duplicated if the requested utility were to fulfill the customer's request.

On the other hand, Gulf Power argues that "all relevant information" only includes that information necessary to alert GCEC to the existence of a request that triggers the provisions of Section 2.3 of the Territorial Agreement. Gulf Power argues that it gave GCEC enough information to know it had a duty under Section 2.3 to request a meeting within five days if it objected to Gulf Power fulfilling the request.

Additionally, one might also argue that "all relevant information" simply means any and all information the requested utility has that pertains to the request for service.

All of these interpretations are reasonable, and there may be other reasonable interpretations as well. Because this term may be fairly understood in more than one way, it is ambiguous.

### **Conclusion**

The ambiguity in the terms of the Territorial Agreement raises an issue of fact, and that fact is material because Gulf Power relies on its own interpretation of "all relevant information" in its argument that it is entitled to a final order as a matter of law. Because both parties dispute the meaning of "all relevant information," they have raised a genuine issue of material fact, and Gulf Power's Motion for Summary Final Order cannot be granted. Staff recommends the Commission vote to deny Gulf Power's Motion for Summary Final Order.

**Issue 3:** Should GCEC’s Motion for Summary Final Order be denied?

**Recommendation:** Yes. The Commission should deny GCEC’s Motion for Summary Final Order. (A. King)

**Staff Analysis:** Staff is recommending that the Commission deny GCEC’s Motion for Summary Final Order because the parties’ dispute about the meaning of the Territorial Agreement raises an issue of material fact.

### **GCEC’s Motion and Gulf Power’s Response**

GCEC filed its own Motion for Summary Final Order in its September 11, 2018, brief on Gulf Power’s Motion for Summary Final Order. In this motion, GCEC argued that the undisputed facts demonstrate that it did not waive its right to serve the Lift Facility under the Territorial Agreement and GCEC is therefore entitled to a summary final order on that threshold issue. GCEC admitted that issues of waiver are typically not resolved on a motion for summary final order, but it claimed the undisputed facts in this case demonstrate that Gulf Power’s notice was insufficient under the terms of the Territorial Agreement. It asserts that because Gulf Power’s notice was insufficient, GCEC never knew it had the right to serve the Lift Facility. Because GCEC did not know it had the right to serve the Lift Facility, it could not have knowingly and intentionally waived that right.

Gulf Power responded to this Motion by pointing out that “[o]n 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 asserts that the ‘waiver’ issue is susceptible to summary adjudication.” Gulf Power also argues that waiver is not at issue in this case as it “has not raised a defense of ‘waiver’ in this proceeding.” It also argues that 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 placed on notice of Gulf Power’s intent to invoke the notice provisions of Section 2.3 of the Territorial Agreement.

### **Legal Standard for Waiver**

“‘Waiver’ is the ‘intentional relinquishment or abandonment of a known right or privilege, or conduct that warrants an inference of the intentional relinquishment of a known right.’ . . . Waiver does not arise merely from forbearance for a reasonable time.” *Hale v. Dep’t of Rev.*, 973 So. 2d 518, 522 (Fla. 1st DCA 2007) (citations omitted). Waiver is an affirmative defense raised by a defendant at the pleading stage of proceedings. *Derouin v. Universal Am. Mortg. Co., LLC*, 254 So. 3d 595, 600 (Fla. 2d DCA 2018). “An ‘affirmative defense’ is any defense that *assumes the complaint or charges to be correct* but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question.” *State v. Cohen*, 568 So. 2d 49, 51 (Fla. 1990) (emphasis added). Issues of waiver typically involve issues of fact that are inappropriate for summary final order. *Scheibe v. Bank of Am., N.A.*, 822 So. 2d 575, 575 (Fla. 5th DCA 2002).

**GCEC's Motion is Dependent on a Disputed Material Fact**

GCEC's entitlement to a summary final order rests on the finding that Gulf Power's notice was insufficient under the terms of the Territorial Agreement. That finding is dependent on the interpretation of the term "all relevant information," which, as previously discussed, is ambiguous and raises an issue of material fact. Because GCEC's entitlement to a summary final order is dependent on the resolution of an issue of material fact, it should be denied.

**Conclusion**

GCEC's Motion for Summary Final Order should be denied because it is dependent on at least one material fact that is in dispute. The existence of an issue of material fact precludes the issuance of a summary final order. Thus, staff recommends the Commission deny GCEC's Motion for Summary Final Order.

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

**Recommendation:** No. The docket should remain open. (A. King)

**Staff Analysis:** Should the Commission vote to deny both parties' Motions for Summary Final Order, the docket should remain open so this matter may proceed to hearing.