

Marguerite McLean

100304-EU

From: Webb, Linda C. [LCWEBB@southernco.com]
Sent: Wednesday, December 22, 2010 2:59 PM
To: Filings@psc.state.fl.us
Cc: wthompson@chelco.com; nhorton@lawfla.com; Ralph Jaeger; Griffin, Steven R. (Beggs & Lane)
Subject: E-Filing, Docket No. 100304-EU
Attachments: 12-22-10 Motion to Compel.pdf

- A. Susan D. Ritenour
 Gulf Power Company
 One Energy Place
 Pensacola FL 32520
 850.444.6231
sdriteno@southernco.com
- B. Docket No. 100304-EU
 In re: Territorial Dispute Between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company
- C. Gulf Power Company
- D. Document consists of 15 pages
- E. The attached document is Gulf's Motion to Compel Responses to Gulf Power's Third Interrogatories to Choctawhatchee Electric Cooperative, Inc.

Linda Webb
 Gulf Power Company
 850.444.6254

DOCUMENT NUMBER-DATE

10106 DEC 22 2010

FPSC-COMMISSION CLERK

12/22/2010

Susan D. Ritenour
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December 22, 2010

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850

Dear Ms. Cole:

Re: Docket No. 100304-EU

Enclosed is the Motion to Compel Responses to Gulf Power's Third Interrogatories to Choctawhatchee Electric Cooperative, Inc. filed by electronic mail.

Sincerely,

lw

Enclosure

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

DOCUMENT NUMBER-DATE

10106 DEC 22 0

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between)
Choctawhatchee Electric Cooperative, Inc.)
and Gulf Power Company)
_____)

Docket No. 100304-EU
Date: December 22, 2010

MOTION TO COMPEL RESPONSES TO GULF POWER'S THIRD INTERROGATORIES TO CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.

Pursuant to Rules 28-106.204 and 28-106.206 Florida Administrative Code, and Rule 1.380, Florida Rules of Civil Procedure, Gulf Power Company ("Gulf Power") hereby moves for an order compelling Choctawhatchee Electric Cooperative, Inc. ("Chelco") to respond to interrogatory number 52 of Gulf Power's Third Interrogatories (Nos. 52-55):

BACKGROUND

This territorial dispute involves the provision of electric service to a proposed mixed-use development consisting of approximately 171 acres which is located entirely within the municipal boundaries of the City of Crestview, Florida (the "Freedom Walk Development"). (Chelco's Petition at ¶ 6) The Freedom Walk Development is projected to include 761 new residential service customers. (Chelco's Petition, Exhibit "F") This matter was initially scheduled for a final evidentiary hearing on March 1 and 2, 2011. On November 29, 2010, the Commission rescheduled the final evidentiary hearing for May 17 and 18, 2011. See, Order No. PSC-10-0708-PCO-EU.

ANALYSIS

Under Florida law, the conditions to obtaining discovery from another party are not stringent. The Florida Rules of Civil Procedure provide that:

[p]arties may obtain discovery regarding any matter, not privileged that is relevant to the subject matter of the pending action...[I]t is not a ground for objection that the information sought will be inadmissible at

the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fla. R. Civ. Pro. 1.280(b)(1).

“Relevant evidence,” in turn, is defined as “[e]vidence tending to prove or disprove a material fact. See, § 90.401, Fla. Stat. Florida’s discovery rules should be liberally construed insofar as “Florida favors complete disclosure in discovery matters, limited only by certain considerations such as privilege, work product and relevancy.” ACandS, Inc., v. Askew, 597 So.2d 895, 898 (Fla. 1st DCA 1992).

GULF’S THIRD INTERROGATORIES

On November 5, 2010, Gulf Power issued its Third Interrogatories to Chelco.¹ On December 6, 2010, Chelco served its responses and objections to Gulf’s Third Interrogatories.²

Included within Gulf’s Third Interrogatories was interrogatory number 52. Gulf’s interrogatory number 52 reads as follows:

Please identify, in electronic database or electronic spreadsheet file format, the physical address of each member currently receiving electric service from Chelco. Member names and/or account numbers need not be included.

Chelco objected to interrogatory number 52 on the grounds that the interrogatory was overly broad, not relevant to any issue in this proceeding, not reasonably calculated to lead to the discovery of admissible evidence and duplicative of previous discovery requests.

Gulf’s rationale for seeking the above-referenced information from Chelco is simple. Section 425.04, Florida Statutes, sets forth the powers of rural electric cooperatives in Florida. Section 425.04(4), provides that cooperatives shall have the power

¹ A true and correct copy of Gulf’s Third Interrogatories is attached hereto as Exhibit “A.”

² A true and correct copy of Chelco’s Objections and Responses to Gulf’s Third Interrogatories is attached hereto as Exhibit “B.”

[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).

Section 425.03(1), in turn, provides that “‘Rural area’ means any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons.” § 425.03(1), Fla. Stat. (emphasis supplied)

In Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, the U.S. Court of Appeals for the Eleventh Circuit held that section 425.04(4), Florida Statutes, “allows a rural coop to serve up to a ten-percent non-rural membership.” 684 F.2d 789, 792 (11th Cir. 1982). (emphasis supplied) Thus, under Florida law, a cooperative lacks legal authority to serve more than ten percent non-rural membership.

Chelco currently has 42,299 active accounts throughout portions of Okaloosa and Walton counties. See, Chelco’s response to interrogatory number 1 of Gulf’s First Interrogatories. As noted above, the Freedom Walk Development is located within the boundaries of the City of Crestview and therefore, by definition, does not constitute a “rural area” under section 425.03(1), Florida Statutes. If Chelco presently serves a number of persons in non-rural areas which exceeds ten percent of its total membership, or, if serving the proposed development would cause it to do so, Chelco is barred, as a matter of law, from serving the Freedom Walk Development. The above-referenced interrogatory is narrowly tailored to determine how many members/customers Chelco serves in non-rural areas. Consequently, Chelco’s suggestion that the information sought is not relevant, i.e., that it has no tendency to prove or disprove a material fact in this case is untenable. Similarly, Chelco’s suggestion that the interrogatory is overbroad

is also without merit. Interrogatory number 52 reflects Gulf Power's third attempt to obtain information from Chelco which would enable the parties and the Commission to determine whether Chelco possesses the statutory authority to serve the Freedom Walk Development.

In its first interrogatories, Gulf asked Chelco how many of its members were currently located in "rural areas" as defined by section 425.03(1), Florida Statutes. Chelco objected to this interrogatory stating that it could not "[r]easonably ascertain how many of its 42,299 active accounts are currently in a 'rural area' as Gulf Power has defined that term...." See, Chelco's Response to interrogatory number 3 of Gulf's First Interrogatories. In response to this objection, and in an attempt to provide further clarity, Gulf Power issued its second interrogatories which precisely delineate the geographical areas at issue and request that Chelco identify the number of members served within the specific geographical areas. Chelco objected to Gulf's second interrogatories on grounds of burden, relevance and the "arbitrary" manner in which Gulf defined the geographical areas at issue. See, Chelco's Objections and Responses to Gulf's Second Interrogatories. In response to these objections, Gulf filed a Motion to Compel Responses to Gulf's Second Interrogatories. See, Document Number 08917-10. That motion is still pending before the Commission.³

In light of Chelco's objection to the geographical descriptions proposed by Gulf, and in a good faith attempt to alleviate the "burden" complained of by Chelco, Gulf issued its third

³ Following the filing of Gulf's Motion to Compel, Chelco supplemented its previous responses to Gulf's Second Interrogatories. In its supplement, Chelco provided the number of members served within the municipal boundaries of Crestview, DeFuniak Springs and Freeport but maintained its objection to production of membership data in unincorporated areas. In its Objections and Responses to Gulf Power's Third Interrogatories, Chelco reiterates its suggestion that information concerning members located outside of incorporated areas is not relevant to the analysis under section 425.04, Florida Statutes. This suggestion ignores the definition of a "rural area" under section 425.03(1), Florida Statutes. Section 425.03(1) defines a "rural area" as follows: "'Rural area' means any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." (*emphasis supplied*) The statute specifically recognizes that unincorporated areas can be "non-rural" under certain circumstances. Therefore, information concerning Chelco's service to members in unincorporated areas is clearly relevant and discoverable.

interrogatories seeking a simple address listing for all of Chelco's members. Gulf Power expects that this information will enable Gulf Power to demonstrate that Chelco is prohibited from serving the Freedom Walk Development as a matter of law. While Chelco may disagree with Gulf's interpretation of Chapter 425, Florida Statutes, mere disagreement with Gulf's position is not a basis for refusing to produce relevant information. The issue is ultimately one for the Commission to decide. The information is not privileged, is readily available and can be produced by Chelco without undue burden. The relevance of the data is not subject to legitimate debate. This data is necessary to resolve a threshold legal issue in this case and, in fairness to the parties and the Commission, should therefore be produced to Gulf Power without further delay.

WHEREFORE, Gulf Power respectfully requests that the Commission issue an order compelling Chelco to produce information responsive to Gulf Power's interrogatory number 52.⁴

Pursuant to Rule 28-106.204(3), Florida Administrative Code, and Rule 1.380(a)(2), Florida Rules of Civil Procedure, Gulf Power has conferred in good faith with counsel for Chelco in this matter and is authorized to represent that Chelco objects to the relief sought herein.

⁴ Gulf Power is not presently seeking to compel production of information sought in other interrogatories. Gulf's choice to limit this motion to interrogatory number 52 should not be construed as a waiver of its right to compel production of additional information in the future.

Respectfully submitted this 22nd day of December, 2010.



JEFFREY A. STONE

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RUSSELL A. BADDERS

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EXHIBIT "A"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between)
Choctawhatchee Electric Cooperative, Inc.) Docket No. 100304-EU
and Gulf Power Company) Date: November 5, 2010
_____)

**GULF POWER'S THIRD INTERROGATORIES TO
CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC. (No. 52-55)**

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.340, Florida Rules of Civil Procedure, Gulf Power Company ("Gulf Power") requests that Choctawhatchee Electric Cooperative, Inc. ("Chelco") submit separate and complete written responses to Gulf Power's interrogatories within thirty (30) days after service thereof.

DEFINITIONS

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

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

INTERROGATORIES

52. Please identify, in electronic database or electronic spreadsheet file format, the physical address of each member currently receiving electric service from Chelco. Member names and/or account numbers need not be included.

53. Please identify the substance and date of all communications between Chelco and agents or employees of the Florida Electric Cooperatives Association, Inc. which in any way mention or relate to the subject matter of this litigation.

54. Please identify the substance and date of all communications which have occurred since July 29, 2010, between Chelco and the owner/developer, or any agent or employee thereof, of the Freedom Walk Development.

55. Chelco objected to Gulf's interrogatory number 51 on the ground that project 300-RU 10-01 in Chelco's 2011-2014 CWP "would be built whether Freedom Walk is developed or not." Please provide all data which support Chelco's conclusion that the project 300-RU 10-01 will be undertaken regardless of whether Freedom Walk is developed, including a year-by-year forecast of peak load to be served by the feeder both with and without the Freedom Walk Development included and all related assumptions and planning criteria.

Submitted this 5th day of November, 2010.



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Attorneys for Gulf Power Company

EXHIBIT "B"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

**CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.'S
OBJECTIONS AND RESPONSES TO GULF POWER COMPANY'S
THIRD SET OF INTERROGATORIES (NOS. 52-55)**

Comes now, Choctawhatchee Electric Cooperative, Inc. ("CHELCO") and serves these responses to Gulf Power Company's Third Set of Interrogatories (Nos. 52-55).

INTERROGATORIES

52. Please identify, in electronic data base or electronic spreadsheet file format, the physical address of each member currently receiving electric service from Chelco. Member names and/or account number need not be included.

CHELCO'S RESPONSE: CHELCO objects to this interrogatory on the basis that it is overly broad, and is not relevant to any issue in this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. CHELCO also objects to this interrogatory to the extent that the interrogatory seeks information that has been provided in prior discovery responses.

CHELCO serves members in a three-county area and information with respect to the physical address of each of them is not germane to this proceeding. The physical address of each member currently receiving electric service from CHELCO has no relevance to the determination as to which party should provide service to the Freedom Walk development and customers in that development. Gulf Power has previously sought information as to the number of members served within named municipalities and other described areas

(Gulf Power's Second Set of Interrogatories Nos. 23-46) CHELCO has objected to several of those requests and to the extent necessary incorporates those objections herein. CHELCO has provided the number of members served within the municipal boundaries of Crestview, DeFuniak Springs, and Freeport, and the physical address of their members is not relevant to any issue in this proceeding. Gulf Power has previously explained the basis for seeking the number of members within municipalities and other described areas as being to determine whether CHELCO is serving in excess of 10% of its members in non-rural areas. CHELCO has provided the numbers within municipal boundaries and the request for the addresses of each member is not relevant.

53. Please identify the substance and date of all communications between Chelco agents or employees of the Florida Electric Cooperatives Association, Inc. which in any way mention or relate to the subject matter of this litigation.

CHELCO'S RESPONSE: CHELCO objects to this interrogatory as it calls for the disclosure of communications which are privileged pursuant to the attorney-client and work product privilege. The communications are detailed in the Privilege Log attached to the Second Request for Production of Documents.

54. Please identify the substance and date of all communications which have occurred since July 29, 2010, between Chelco and the owner/developer, or any agent or employee thereof, of the Freedom Walk Development.

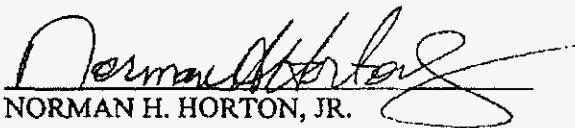
CHELCO'S RESPONSE: See documents provided in response to POD request no. 7. Also CHELCO has had employees or agents in attendance at meetings of the Freedom Walk District Community Development District board at which the owner/developer or representative may have been present but CHELCO has no record of the dates of the

meetings attended nor is there any recollection of any communications between the parties other than a social greeting.

55. Chelco objected to Gulf's interrogatory number 51 on the ground that project 300-RU 10-01 in Chelco's 2011-2014 CWP "would be built whether Freedom Walk is developed or not." Please provide all data which support Chelco's conclusion that the project 300-RU 10-01 will be undertaken regardless of whether Freedom Walk is developed, including a year-by-year forecast of peak load to be served by the feeder both with and without the Freedom Walk Development included and all related assumptions and planning criteria.

CHELCO'S RESPONSE: CHELCO incorporates its prior objections to this request but notwithstanding the objection and without waiving it provide documents marked as Response 55 appended hereto.

RESPECTFULLY SUBMITTED this 6th day of December, 2010.



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Territorial Dispute Between)
Choctawhatchee Electric Cooperative, Inc.)
and Gulf Power Company)
_____)

Docket No. 100304-EU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by electronic mail and U.S. Mail this 22nd day of December, 2010, on the following:

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