BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.	DOCKET NO. 100304-EU ORDER NO. PSC-11-0020-PCO-EU ISSUED: January 11, 2011

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL DISCOVERY

On August 24, 2010, Gulf Power Company (Gulf) issued its Second Interrogatories consisting of interrogatories 23 through 51 to Choctawhatchee Electric Cooperative, Inc. (Chelco). On September 23, 2010, Chelco served its Objections and Responses to Gulf's Second Set of Interrogatories (Nos. 23-51) (Objections), in which it initially objected to Interrogatory Numbers 23-25, and 29-46. In its Objections, Chelco stated that each interrogatory was "not relevant to the issues in the pending territorial dispute nor is it reasonably calculated to lead to the discovery of admissible evidence," in that the "number of customers/members in areas other than the area in dispute have no relevance to the issues to be resolved in the dispute."

On October 26, 2010, Gulf filed its Motion to Compel Responses to Gulf Power's Second Interrogatories to Chelco (Motion to Compel), in which it requested that Chelco be required to answer Interrogatory Nos. 23-25, and 29-46. Subsequent to the filing of Gulf's Motion to Compel, on November 2, 2010, Chelco filed both a Supplemental Response to Gulf's Second Set of Interrogatories, in which it answered Gulf's Interrogatory Numbers 32 through 34, and Numbers 38 through 40, and its Response to Motion to Compel. Moreover, Chelco filed a Supplemental Response to Motion to Compel on November 4, 2010. Based on Chelco's response to Interrogatories Nos 32-34, and 38-40, the only interrogatories that remain in dispute are interrogatories 23-25, 29-31, 35-37, and 41-46. Gulf seeks to have Chelco be compelled to answer those interrogatories.

Gulf's Motion to Compel

In its Motion to Compel, Gulf notes Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides in pertinent part as follows:

> [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.

Further, Gulf notes that "relevant evidence," in turn, is defined in Section 90.401, Florida Statutes (F.S.), as "[e]vidence tending to prove or disprove a material fact." Finally, citing ACandS, Inc. v. Askew, 597 So. 2d 895, 898 (Fla. 1st DCA 1992), Gulf notes that "Florida's

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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.'"

Gulf argues that the information sought is relevant and is reasonably calculated to lead to the discovery of admissible evidence. As regards relevance, Gulf cites Section 425.04(4), F.S., and notes that cooperatives shall have the power

> [t]o generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of 10 percent of the number of its members. . . .

(emphasis supplied)

Further, Gulf states that Section 425.03(1), F.S., 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." (emphasis supplied) Citing Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789, 792 (11th Cir. 1982), Gulf states that 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." (emphasis supplied) Thus, under Florida law, Gulf argues that a cooperative lacks legal authority to serve more than ten percent non-rural membership, and that the information sought will help determine whether Chelco is in fact serving greater than a ten-percent non-rural membership.

In its interrogatories, Gulf is seeking to discover how many customers and members Chelco has in: (1) Bluewater Bay (Interrogatories 23-25); (2) Greater Crestview (Interrogatories 29-31); (3) Greater DeFuniak Springs (Interrogatories 35-37); (4) Greater Freeport (Interrogatories 41-43); and (5) Seagrove Beach (Interrogatories 44-46). For each of these areas, Gulf requests Chelco to provide the number of customers and members Chelco has, and if the number of customers and members differ to explain the difference. In defining what it meant by "greater," Gulf explained that it was those unincorporated areas of the county abutting the city limits and having the same non-rural characteristics of the city. For Bluewater Bay and Seagrove Beach, it again noted that these developments were in the unincorporated portions of the counties, and gave a description by metes and bounds.

Chelco's Responses

As state above, Chelco objects to these interrogatories stating that the information sought is not relevant to the issues in this docket and, moreover to the very issue raised by Gulf as to whether Chelco is serving greater than 10 percent non-rural customers. Chelco notes that the very definition of rural cited by Gulf in Section 425.03(1), F.S., states 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 . . . .

Chelco argues that by the very definition that Gulf uses for its "Greater" Crestview, "Greater" Freeport, and "Greater" DeFuniak Springs, the area for which the information sought is defined as being outside the incorporated limits of the referenced town or city. Therefore, by the definition of "rural area" in Section 425.03(1), F.S., town, and relied on by Gulf, Chelco argues that these areas would be rural. Further, Chelco argues that Bluewater Bay and Seagrove Beach are not unincorporated cities, towns, villages or boroughs. Therefore, based on the above Chelco requests that Gulf's Motion to Compel be denied as the information sought is not relevant to the issues in this docket.

Conclusion

As regards Interrogatories 29-31, 36-38, and 41-43 and concerning "Greater Crestview," "Greater DeFuniak Springs," and "Greater Freeport," respectively, and noting the definition of "greater" found in Gulf's interrogatories, I find that the very definition found in Section 425.03(1), F.S., and relied on by Gulf, would classify these areas as rural. Therefore, it appears that the information sought in those interrogatories is not reasonably calculated to lead to the discovery of admissible evidence, and Gulf's Motion to Compel responses to those interrogatories shall be denied. Although Chelco argues that Bluewater Bay and Seagrove Beach are not unincorporated cities, towns, villages or boroughs as those terms are used in Section 425.03(1), F.S., it is not clear from the information provided whether those "developments" would come under the provisions of Section 425.03(1), F.S. Therefore, because Florida's discovery rules should be liberally construed, Gulf's Motion to Compel on those interrogatories is granted, and Chelco shall respond to Interrogatories 23-25 and 44-46.

Based on all the foregoing, it is

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that Gulf Power Company's Motion to Compel is denied in part, and granted in part as set forth in the body of this Order. It is further

ORDERED that Gulf Power Company's Motion to Compel responses to Interrogatories 29-31, 35-37, and 41-43 is denied and Choctawhatchee Electric Cooperative, Inc., shall not be required to respond to those interrogatories. It is further

ORDERED that Gulf Power Company's Motion to Compel responses to Interrogatories 23-25, and 44-46 is granted and Choctawhatchee Electric Cooperative, Inc., shall be required to respond to those interrogatories.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 11th day of January, 2011.

RONALD A. BRISÉ
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.