

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

11 MAY -9 AM 8:57

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

100304-EU

Docket No. 100304-EU  
Date: May 9 2009  
COMMISSION CLERK

GULF POWER COMPANY'S MOTION TO STRIKE

COMES NOW, Gulf Power Company ("Gulf" or "Gulf Power"), pursuant to section Rule 28-106.204(4), Florida Administrative Code, and Order No. PSC-10-0615-PCO-EU, and moves to strike those portions of Choctawhatchee Electric Cooperative, Inc.'s ("CHELCO") testimony which characterize the area in dispute as non-urban, rural or otherwise use the terms "Freedom Walk," "disputed area" or "area in dispute" in a context that infers a reference to anything other than Freedom Walk as fully developed. In support thereof, Gulf Power states as follows:

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

2. It is clear from CHELCO's Petition that this dispute involves the planned Freedom Walk development and not simply the land as it exists in its present state. This is further borne out in CHELCO's pre-filed testimony and in deposition testimony. For example, at

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page 3 of her direct testimony, CHELCO Witness Grantham characterizes Freedom Walk as a “high density, high revenue development” and explains that allowing Gulf Power to serve the development will preclude CHELCO from maximizing its investment in the area. Similarly, during her deposition in this case, Ms. Grantham was asked the following question:

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

A. Yes, sir.

(March 30, 2011, Deposition of Leigh Grantham, page 35, lines 6-9)

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

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

A. Right.

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

A. Repeat the question, please.

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

A. I would say yes.

(March 30, 2011, Deposition of Matthew Avery at page 70, lines 16-25 and page 71, line 1)

3. Despite CHELCO's own admissions that the dispute involves the proposed Freedom Walk development --not the underlying land in its current form-- CHELCO's pre-filed testimony contains numerous assertions that the area in dispute is “rural” and “not urban.” As support for these assertions, CHELCO points to the fact that the land, in its present state, is

undeveloped. For example, at page 11, lines 22-23 and page 12, lines 1-5 of her rebuttal testimony, Witness Grantham states a follows:

By any definition Freedom Walk is not an urban area in nature. There are three (3) parcels occupied at present and the area of Freedom Walk is nothing but heavy woods, surrounded by more woods and pasture lands. There are no roads or other utility services, other than the CHELCO lines, on the property. This property is not urban in character as that term is used in Section 366.04, Florida Statutes, nor is it urban under the definitions he cites on p. 8 of his direct testimony. What it may become in the future is speculative.

And again, on page 12, line 23 and page 13, lines 1-2, Ms. Grantham notes that:

Freedom Walk is far from “urban” and would meet any reasonable person’s idea of being rural “in nature.” Freedom Walk is nothing but pine, pasture and palmetto. The area around Freedom Walk is more of the same, interspersed with low-density rural residential and a sand mine.

Similarly, on page 17, line 22, of his rebuttal testimony CHELCO Witness Blake testifies that the Freedom Walk area is “a decidedly rural area that is projected to be developed to a higher density area.”

4. It is evident from this testimony that CHELCO is departing from the position adopted in its Petition that the dispute involves a large, 170-plus acre, mixed use development. Any doubt in that regard is resolved by reference to CHELCO’s Prehearing Statement. CHELCO’s position under Issue 2(c) in its Prehearing Statement, states, in part, as follows:

[T]he “nature” of Freedom Walk is far from “urban,” and would meet any reasonable person’s idea of being rural “in nature.” Freedom Walk is agricultural and silvicultural property, surrounded by more of the same, interspersed with rural residential properties and sand mine.

Similarly, CHELCO’s position under Issue 3 regarding the “nature of the area” states, in part, as follows:

The area which will be the location of the Freedom Walk development is currently heavily wooded with no roads other than those on the boundaries and no other utilities other than those serving the three

residents on the north part of the property and an existing line of CHELCO's which runs to the center of the property. Although the area north and west of Old Bethel Road, which is served by CHELCO, has low-density residential development, the adjacent land south and east is vacant. The property on which Freedom Walk will be located and that in close proximity to the disputed area is not urbanized.

5. The law in Florida is very clear that a party is bound by its pleadings. For example, in Fernandez v. Fernandez, the Florida Supreme Court held as follows: “[a] party is bound by the party’s own pleadings. There does not have to be testimony from either party concerning facts admitted by the pleadings. Admissions in the pleadings are accepted as facts without the necessity of further evidence at the hearing.” 648 So.2d 712, 713 (Fla 1995). Similarly, in Zimmerman v. Cade Enterprises, Inc., the Florida First District Court of Appeal held that “[i]t is well settled that facts admitted in pleadings are conclusively established on the record and require no further proof.” 34 So.3d 199, 203 (Fla. 1<sup>st</sup> DCA 2010) (emphasis supplied).

6. CHELCO’s Petition plainly frames the dispute as relating solely to Freedom Walk, as fully developed. Having chosen to frame the dispute in this manner, CHELCO cannot now take the contrary position that the area in dispute is “nothing but pine, pasture and palmetto.” The dispute involves a substantial mixed-use development, not sand and trees. For this reason, Gulf Power moves to strike all portions of CHELCO’s pre-filed testimony which state or suggest that the area in dispute is rural or not urban because of the land in its present form, or otherwise use the terms “Freedom Walk,” “disputed area” or “area in dispute” in a context that infers a reference to anything other than Freedom Walk as fully developed.

Gulf Power requests oral argument on this motion.

Respectfully submitted this 9<sup>th</sup> day of May, 2011.



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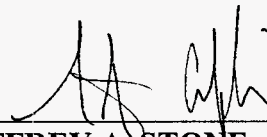
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the foregoing were furnished by hand delivery and U.S. Mail to the following persons on this 9<sup>th</sup> day of May, 2011:

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