

**Diamond Williams**

100304-EU

**From:** Michelle Hershel [mhershel@feca.com]  
**Sent:** Monday, May 16, 2011 8:30 AM  
**To:** Filings@psc.state.fl.us  
**Cc:** Bill Willingham  
**Subject:** FW: CHELCO/Gulf petition  
**Attachments:** scan0002.pdf

Please find attached for filing the Florida Electric Cooperatives Association, Inc.'s Petition for Leave to Intervene and to respond to Gulf Power Company's Motion for Summary Final Order in Docket No. 100304-EU.

Sincerely,

s/Michelle L. Hershel

Michelle Hershel  
Director of Regulatory Affairs  
Florida Electric Cooperatives Assoc.  
2916 Apalachee Parkway  
Tallahassee, FL 32301  
(850)877-6166 ext.3  
(850)656-5485 (fax)

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# FECA

**Florida Electric Cooperatives Association, Inc.**

2916 Apalachee Parkway  
Tallahassee, Florida 32301  
(850) 877-6166  
FAX: (850) 656-5485

May 16, 2011

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

RE: Docket No. 100304-EU

Dear Ms. Cole:

Enclosed for filing for the Florida Electric Cooperatives Association, Inc. is an electronic version of its Petition for Leave to Intervene and to Respond to Gulf Power Company's Motion for Summary Final Order in the above-referenced docket.

Thank you for your assistance.

Sincerely,

William B. Willingham, Esq.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Territorial Dispute Between )  
Choctawhatchee Electric Cooperative, Inc. ) Docket No. 100304-EU  
And Gulf Power Company ) Filed: May 16, 2011

**FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.'s PETITION FOR  
LEAVE TO INTERVENE AND TO RESPOND TO GULF POWER COMPANY'S  
MOTION FOR SUMMARY FINAL ORDER**

Pursuant to Rule 25-22.039, F.A.C., the Florida Electric Cooperatives Association, Inc. ("FECA"), petitions the Commission for leave to intervene in the above-referenced docket as an entity who has a substantial interest in the proceeding and to respond to Gulf Power Company's ("GPC") Motion for Final Summary Order, and states in support thereof:

1. The name and address of the Petitioner are:

Florida Electric Cooperatives Association, Inc.  
2916 Apalachee Parkway  
Tallahassee, FL 32301

2. All notices, orders, pleadings and other communications in this proceeding should be sent to:

William B. Willingham, Esquire  
Michelle Hershel, Esquire  
Florida Electric Cooperatives Association, Inc.  
2916 Apalachee Parkway  
Tallahassee, FL 32301

3. FECA is a not-for-profit trade association organized under Chapter 617, Florida Statutes.

FECA is the service organization for fifteen electric distribution cooperatives and two generation and transmission electric cooperatives.<sup>1</sup>

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<sup>1</sup> FECA Members: Central Florida Electric Cooperative, Inc., Choctawhatchee Electric Cooperative, Inc., Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenoke Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., PowerSouth Energy Cooperative (G&T), Seminole Electric Cooperative, Inc., (G&T), Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., Withlacoochee River Electric Cooperative, Inc.

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4. FECA believes that, through its Motion for Final Summary Order, GPC is attempting to turn the territory dispute of the Freedom Walk Property into a request for declaratory statement on the issue of whether Chapter 425, F.S., precludes every electric cooperative from serving customers located within the incorporated limits of a municipality that has a population greater than 2,500. In its Motion, GPC asks the Commission to determine that pursuant to Chapter 425, F.S., CHELCO is prohibited from serving the property at issue because the property is “non-rural”.<sup>2</sup> GPC expands on this on page 11 of the Motion by stating that:

There are only three factual issues that are material to the resolution of this motion: (1) whether CHELCO is a rural electric cooperative under Chapter 425, Florida Statutes; (2) whether the City of Crestview is an incorporated city having a population in excess of 2,500 persons; and (3) whether the Freedom Walk development area constitutes a “rural area” as defined by section 425.03(1), Florida Statutes.

GPC further states that “the requested relief hinges entirely on a threshold question of law and is therefore particularly appropriate for disposition pursuant to a summary final order.”<sup>3</sup>

5. Due in large part to both the creation of new municipalities and the expansion of municipalities through annexations, every electric cooperative in Florida serves at least one customer that is located within a city that has a population of 2,500 or more. Moreover, there are situations where the local electric cooperative is the only provider of electricity in the municipality. In many cases, if it is determined that the electric cooperative is prohibited by Chapter 425, F.S., from providing new services in the municipality there will not be another service provider for new customers. In many other cases, new customers would be able to receive service from another provider, but that provider would have to build facilities that would uneconomically duplicate the electric cooperative’s facilities and would result in

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<sup>2</sup> GPC Motion at page 2.

<sup>3</sup> GPC Motion at page 18.

numerous electric cooperative facilities that would be underutilized and generally lead to economic waste for all utilities involved. GPC's prayer for relief has broad implications for every electric cooperative in Florida and would affect the electric cooperative consumer-owners that reside in 57 of Florida's 67 counties.

6. Although GPC's Motion is not so titled, it has the effect of a request for a declaratory statement and thus the Commission must comply with the requirements of Section 120.565(3), F.S., before it considers the Motion. Section 120.565(3), F.S., requires state agencies to give notice of the filing of a petition for a declaratory statement in the Florida Administrative Weekly and to transmit copies of each petition to the committee. FECA has not been able to find where proper notice was given in this instance and due process requires such notice.
7. FECA requests that the Commission forgo considering GPC's broad sweeping interpretation of Chapter 425 that will affect every electric cooperative in Florida without first giving Florida's electric cooperatives a chance to present evidence and oral argument on this very important issue. At a minimum, FECA would like the opportunity to participate in this proceeding for the purpose of addressing issues related to Chapter 425, F.S., and requests that the attached affidavit of Mr. Scott Newberry which is attached hereto as Exhibit "A" and Commission Order No. 25127 that was entered on September 27, 1991, in Docket No. 910765-EU and is attached hereto as Exhibit "B" be submitted into the record of this proceeding.

#### **FECA's Right to Participate**

8. This petition is being filed by FECA on behalf of all of its members, each of whom has standing to bring a similar petition in their own right. One of FECA's purposes is to provide

regulatory advocacy for our members. Standing for FECA to file this petition is appropriate pursuant to Florida Home Builders Association v. Department of Labor and Security, 412 So. 2d 351 (Fla.1982), and Farm Worker Rights Organization, Inc. v. Department of Health and Rehabilitative Services, 417 So. 2d 753, (1<sup>st</sup> DCA, 1982). FECA notes that the instant petition potentially replaces seventeen individual petitions by its members which would substantially diminish the review and decision process required by staff and the Commission, thereby, contributing to administrative economy.

9. The substantial interests of FECA's members are subject to determination in this proceeding. Thus, FECA is a necessary party to this proceeding, which potentially will set precedent that directly impacts all of Florida's electric cooperatives, their consumer-owners, and others that may need to request service from an electric cooperative in the future. FECA is entitled to participate in this proceeding to ensure that any change in regulatory policy or legal interpretation of Chapter 425, F.S., and the territorial dispute jurisdiction of the Commission under Section 366.04, F.S., will not hinder the ability of electric cooperatives to plan for the future needs of their consumer-owners, will not impact the economic viability of Florida's electric cooperatives, and will not thwart the obligation of electric cooperatives to serve existing and future members that may now be situated in a city or in areas that may be annexed in the future.
10. FECA realizes that it is filing this Petition late in the process. However, GPC's Motion for Summary Final Order was filed on Friday, May 6, 2011, and FECA did not become aware of the document until the afternoon of Monday, May 9, 2011. Once FECA determined that the prayer for relief in GPC's Motion extends well beyond the disputed Freedom Walk property, and that the prayer for relief, if granted, will cause substantial harm to its members, FECA

had to obtain expedited approval to intervene from each of the ten directors that serve on its Executive Committee. The last affirmative vote from FECA's Executive Committee to proceed with the intervention was received Tuesday night, May 10, 2011. FECA finalized and filed this Petition and had the attached affidavit executed as soon as possible thereafter. FECA realizes that we must take the case as we find it and we do not intend to sponsor any witnesses or exhibits other than the attached Exhibits "A" and "B". FECA believes that we can add a broader perspective for the Commission as it addresses this very important issue. FECA notes that this petition is filed within the time for parties to file a response to GPC's motion and believes that GPC will not be prejudiced by the filing.

#### **Response to GPC's Motion**

11. GPC is asking the Commission to resolve a territorial dispute based exclusively on Chapter 425, F.S. If the request is granted, FECA believes that this would be the first time since the enactment of Sections 366.04(2) through (5), F.S., (the "Grid Bill") that a territorial dispute would be resolved by the Commission without considering the enumerated factors in the Grid Bill or in Rule 25-6.0441, F.A.C. Clearly, GPC is asking the Commission to resolve the dispute pursuant to Chapter 425, F.S., before the dispute is even heard. FECA believes the Commission does not have the authority to interpret Chapter 425, F.S., separate and apart from its authority to resolve territorial disputes pursuant to Section 366.04(2)(e), F.S. In the other territorial disputes where Chapter 425 has been raised, the Commission has considered Chapter 425 within the context of the Grid Bill to reach its decision.<sup>4</sup>

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<sup>4</sup> In re: Petition of West Florida Electric Cooperative, Inc. to resolve a territorial dispute with Gulf Power Company in Holmes County, 88 F.P.S.C. 280, (Docket No. 870944-EU, Order Nu. 19044, March 25, 1988); In re: Petition of Peace River Electric cooperative, Inc. against Florida Power and Light Company for resolution of a Territorial Dispute, 85 F.P.S.C. 120, (Docket No. 840293-EU, Order No. 15210), October 8, 1985; In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90 (Docket No. 830271-EU, Order No.

12. The only recorded case that we have been able to find outside of the Commission's orders that mentions Section 425.04(4), F.S., is Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F 2d 789 (11<sup>th</sup> Cir. 1982). AEC was an eminent domain case and did not even mention Chapter 366, but it is significant that the court held that Section 425.04(4), F.S., "does permit service to some non-rural areas." Id. at page 792. The court further stated that "the statute allows a rural coop to serve up to a ten percent non-rural membership and certainly four municipalities are well within that limit." Id. It is important to note that the court only determined what the statute allows, and did not determine what the statute prohibits.
13. GPC's allegation that CHELCO is precluded from serving a new customer that is situated within a municipal's limits would upend electric cooperatives' ability to plan for future growth and could cause large areas of Florida to have uneconomic duplication of facilities as well as stranded facilities. Moreover, it is possible that some areas would not be able to receive service from any utility if the cooperative is prevented from providing service. The most obvious example of this is in the Florida Keys. The Florida Keys Electric Cooperative Association, Inc.'s ("FKEC") service territory is defined by an agreement that was entered into on June 17, 1991, with the Utility Board of the City of Key West, and approved by this Commission on September 27, 1991, in Order Number 25127 in Docket No. 910765-EU, which is attached hereto as Exhibit "B". As evidenced by the attached affidavit of Scott Newberry, which is attached hereto as Exhibit "A", FKEC provides service in the cities of Marathon and Islamorada, both of which have populations in excess of 2,500. Marathon was incorporated in 1999 and Islamorada was incorporated in 1997. More than 40% of the

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12324, August 4, 1983); In re: Choctawhatchee Electric Cooperative v. Gulf Power Company, Order No. 7516 (November 19, 1976).

cooperative's members are situated within the corporate limits of either Marathon or Islamorada. FPL is the next closest utility to Islamorada and FPL's facilities are 25 miles away. The Keys Energy Service's ("KES") is the next closest utility to Marathon, and its closest facilities are 8 miles away. However, pursuant to the Commission approved territorial agreement, KES is prohibited from serving in Marathon. Under GPC's argument, new customers in either city would be prohibited from taking service from FKEC. At best this means either FPL or KES would have to uneconomically duplicate FKEC's facilities. At worst, the customer would not be able to receive service from an electric utility. Certainly this cannot be what the Legislature intended.

14. Since the Rural Electric Cooperative Law was enacted in 1939, at least 166<sup>5</sup> municipalities have incorporated in Florida, and numerous square miles have been annexed by municipalities. In many cases, facilities owned by electric cooperatives that were built in

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<sup>5</sup> Alford, Atlantis, Aventura, Bal Harbour, Bascom, Bay Harbor Islands, Bay Lake, Bellair Beach, Bellair Bluffs, Bellair Shore, Beverly Beach, Bonita Springs, Bradenton Beach, Branford, Briny Breezes, Bristol, Bronson, Brooker, Callaway, Cape Canaveral, Cape Coral, Caryville, Casselberry, Century, Cinco Bayou, Cloud Lake, Coconut Creek, Cooper City, Coral Springs, Cutler Bay, Davie, Daytona Beach Shores, DeBary, Deltona, Doral, Ebro, Esto, Everglades City, Fanning Springs, Freeport, Ft. Myers Beach, Ft. Walton Beach, Glen Ridge, Glen St. Mary, Golf, Grand Ridge, Grant-Valkaria, Gulf Breeze, Haverhill, Hialeah Gardens, Highland Beach, Hilliard, Holmes Beach, Horseshoe Beach, Hypoluxo, Indianlantic, Indian Harbour Beach, Indian River Shores, Indian Rocks Beach, Indian Shores, Inglis, Islamorada, Jacob City, Jay, Juno Beach, Jupiter Inlet Colony, Jupiter Island, Kenneth City, Key Biscayne, Key Colony Beach, LaCrosse, Lake Buena Vista, Lake Clarke Shores, Lake Mary, Lauderdale Lakes, Lauderhill, Laurel Hill, Layton, Lazy Lake, Lexhatchee Groves, Lighthouse Point, Longboat Key, Madeira Beach, Madison, Malafar, Mangonia Park, Marathon, Marco Island, Margate, Marineland, Mary Esther, Medley, Melbourne Village, Melbourne, Mexico Beach, Miami Gardens, Miami Lakes, Midway, Miramar, N. Palm Beach, N. Redington Beach, Noma, North Bay Village, North Lauderdale, North Point, Ocean Breeze Park, Orchid, Otter Creek, Palm Bay, Palm Beach Gardens, Palm Beach Shores, Palm Coast, Palm Shores, Palm Springs, Palmetto Bay, Panama City Beach, Parker, Parkland, Paxton, Pembroke Park, Pembroke Pines, Pinecrest, Plantation, Pompano Beach, Ponce DeLeon, Ponce Inlet, Port St. Lucie, Raiford, Redington Beach, Redington Shores, Royal Palm Beach, S. Palm Beach, S. Pasadena, S.W. Ranches, Sanibel, Satellite Beach, Sea Ranch Lakes, Seminole, Sewalls Point, Shalimar, Sopchoppy, South Bay, South Daytona, St. Augustine Beach, St. Lucie Village, St. Marks, St. Pete Beach, Sunny Isles Beach, Sunrise, Sweetwater, Tamarac, Tequesta, Treasure Island, Virginia Gardens, Wausau, Webster, Weeki Wachee, Wellington, West Melbourne, West Miami, West Park, Weston, Westville, Wewahhitchka, Wilton Manors, Winter Springs, Worthington Springs.

“rural areas” are now within the limits of a municipality, and municipalities continue to expand. Despite GPC’s statements, its interpretation of Section 425.04(2), F.S., could force electric cooperatives to abandon members and service territory and prevent the provision of electric service to some areas in the cooperative’s service territory. Such a result would clearly undermine the clear language of the Grid Bill regarding a coordinated grid and preventing the further uneconomic duplication of facilities. Sec. 366.04(5), F.S.

15. The Grid Bill was enacted in 1974 to give the Commission exclusive jurisdiction to resolve territorial disputes between utilities<sup>6</sup> and to end the disputes with municipal electric utilities that attempted to utilize annexation to expand their service territories. Sec. 366.04(2), F.S. While the legislative history is somewhat sparse, it is clear that the Legislature wanted a coordinated grid and wanted to avoid further uneconomic duplication of facilities. Sec. 366.04(5), F.S. Section 425.04(4), F.S., was last amended in 1971 and was in place when the Grid Bill was enacted. The Legislature is presumed to know existing law when it enacts a statute<sup>7</sup> and Section 425.04(4), F.S., must be considered in pari materia with the later enacted Grid Bill. FECA believes that the Commission has correctly balanced Chapter 425 and the Grid Bill in the territorial disputes where the issue has been raised, and has never allowed a dispute to be resolved exclusively on Chapter 425.<sup>8</sup>

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<sup>6</sup> 366.04(2)(e), F.S.

<sup>7</sup> See, e.g., Holmes County School Board v. Duffell, 651 So.2d 1176 (S. Ct. 1995).

<sup>8</sup> In re: Petition of West Florida Electric Cooperative, Inc. to resolve a territorial dispute with Gulf Power Company in Holmes County, 88 F.P.S.C. 280, (Docket No. 870944-EU, Order No. 19044, March 25, 1988); In re: Petition of Peace River Electric cooperative, Inc. against Florida Power and Light Company for resolution of a Territorial Dispute, 85 F.P.S.C. 120, (Docket No. 840293-EU, Order No. 15210), October 8, 1985; In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90 (Docket No. 830271-EU, Order No. 12324, August 4, 1983); In re: Choctawhatchee Electric Cooperative v. Gulf Power Company, Order No. 7516 (November 19, 1976).

16. GPC's interpretation of the law would lead to an unacceptable outcome by allowing municipalities, not the Legislature or the Commission, to be the ultimate decision maker as to where a utility can serve. GPC's illogical prayer for relief would mean that the simple act of annexation is enough to prevent an electric cooperative from serving a new member, even if the electric cooperative has historically served the area, has facilities in place to serve the prospective customer, and the customer prefers the electric cooperative over another utility. The statutes clearly require the Commission to resolve territorial disputes based on the criteria in Section 366.04, F.S., and surely the Legislature did not intend to give municipalities powers that are superior to the Commission's in this area.

#### Conclusion

17. FECA believes the interpretation of Chapter 425 set forth in GPC's Motion lacks merit. The Commission has consistently resolved territorial disputes based upon its jurisdiction under Chapter 366, F.S., including the Grid Bill, and it should not depart from the Legislature's directive in this case. Chapter 425 has been a factor in some territorial disputes, but the Commission has not, and should not, rely exclusively on Chapter 425 to resolve this or any other territorial dispute. GPC's motion prays for relief that has the potential to affect every electric cooperative in Florida, as well as numerous individuals that may want to receive service from electric cooperatives in the future. FECA believes that if the Commission decides to consider GPC's Motion, it also must consider the facts set forth in the attached affidavit, Exhibit "A". FECA believes there may be numerous other persons that may not be aware of the issues that GPC has raised in its Motion and those affected persons should be provided notice of the proceeding and an opportunity to be heard.

WHEREFORE, the Florida Electric Cooperatives Association, Inc., respectfully requests that the Commission enter its order granting this Petition for Leave to Intervene and to Respond to Gulf Power Company's Motion for Summary Final Order in the territorial dispute between CHELCO and Gulf Power Company, and enter the attached Commission Order that is Exhibit "B" hereto, and the attached affidavit of Mr. Scott Newberry that is Exhibit "A" hereto, into the record of this proceeding.

Counsel

FECA has conferred with counsel for GPC and CHELCO regarding this petition, the attached affidavit, and the response to GPC's motion, and is authorized to represent that GPC objects to all three and CHELCO has no objections.

Dated this 16th day of May, 2011.

Respectfully submitted,

  
\_\_\_\_\_  
William B. Willingham, Esquire  
Florida Bar No. 0879045  
Michelle Hershel, Esquire  
Florida Bar No. 0832588  
Florida Electric Cooperatives Association, Inc.  
2916 Apalachee Parkway  
Tallahassee, FL 32301  
(850) 877-6166

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 16th day of May, 2011.

Ralph Jaeger, Esq.  
Mary Ann Helton, Esq.  
Office of the General Counsel  
Florida Public Service Commission  
[rjaeger@psc.state.fl.us](mailto:rjaeger@psc.state.fl.us)

Ms. Leigh V. Grantham  
CHELCO  
P.O. Box 512  
DeFuniak Springs, FL 32435-0512  
[wthompson@chelco.com](mailto:wthompson@chelco.com)

Ms. Susan D. Ritenour  
Gulf Power Company  
One Energy Place  
Pensacola, FL 32520-0780

Steven R. Griffin, Esq.  
Russell Badder, Esq.  
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Tallahassee, FL 32317  
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William B. Wingham, Esquire

EXHIBIT "A"  
Affidavit of Scott Newberry

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## AFFIDAVIT

1. My name is Scott Newberry and I am the Chief Executive Officer of the Florida Keys Electric Cooperatives Association, Inc. ("FKEC").
2. FKEC is an electric cooperative incorporated pursuant to Chapter 425, Florida Statutes, that provides retail service to its members in the upper Florida Keys. FKEC's electric facilities and all of its members are located in Monroe County. All of the consumers served by FKEC are members of the cooperative.
3. FKEC's service territory is defined by the east end of the Seven Mile Bridge on Knight Key and continuing to, and including, Key Largo. FKEC's service territory is approximately 64 miles long. No other electric utility owns or operates electric distribution facilities within the footprint of FKEC's service territory.
4. The only other electric utility that provides retail electric service in the Florida Keys is the Keys Energy Services ("KES"). The service territories of FKEC and KES are defined in a territorial agreement that was approved by the Florida Public Service Commission in Order Number 25127 on September 27, 1991.
5. FKEC's service territory includes the incorporated cities of Islamorada, Key Colony Beach, Layton and Marathon, and FKEC is the exclusive provider of electricity in those cities. Key Colony Beach and Layton have populations of less than 1,000, but Islamorada has a population of approximately 7,000 persons and Marathon has a population of approximately 10,000 persons.
6. Islamorada and Marathon both have populations that exceed 2,500.
7. FKEC provides service to 31,050 accounts (number of meters) throughout its service territory. 6,639 of those accounts (number of meters) are in Islamorada and 7,216 of those accounts (number of meters) are in Marathon.
8. The closest utility, other than FKEC, to Islamorada is Florida Power and Light Company and its closest distribution facilities are approximately 25 miles from the City.



EXHIBIT "B"

Commission Order No. 25127

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21 of 29 DOCUMENTS

In Re: Joint Petition of Florida Keys Electric Cooperative Association, Inc. and the utility board of the City of Key West for approval of a territorial agreement

DOCKET NO. 910765-EU; ORDER NO. 25127

Florida Public Service Commission

1991 Fla. PUC LEXIS 1522

91 FPSC 9:490

September 27, 1991

**PANEL: [\*1]**

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman; SUSAN F. CLARK; J. TERRY DEASON; MICHAEL McK. WILSON

**OPINION: NOTICE OF PROPOSED AGENCY ACTION**

**ORDER APPROVING TERRITORIAL AGREEMENT**

**BY THE COMMISSION:**

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, *Florida Administrative Code*.

On July 10, 1991, Florida Keys Electric Cooperative (FKEC) and City Electric System (CES) filed with this Commission a joint petition seeking approval of a territorial agreement executed by the parties on June 17, 1991. The joint petition was filed pursuant to Rules 25-6.0439 and 25-6.0440, *Florida Administrative Code*. The territorial agreement including its terms and conditions and the identity of the geographic areas to be served by each utility are shown in Appendix A. There will be no facilities exchanged [\*2] or customers transferred as a result of the agreement.

The service areas of the parties with the unique typography of the Florida Keys affords a rationale for the boundary between the parties. Neither party has any distribution facilities located in the territory of the other party, and neither party will construct, operate, or maintain distribution facilities in the territory of the other party.

The agreement does not, and is not intended to prevent either party from providing bulk power supply to wholesale customers for resale wherever they may be located.

Having reviewed the joint petition, the Commission finds that it satisfies the provisions of Subsection 366.04(2)(d), *Florida Statutes* and Rule 25-6.0440, *Florida Administrative Code*. We also find that the agreement satisfies the intent of Subsection 366.04(5), *Florida Statutes* to avoid further uneconomic duplication of generation, transmission, and distribution facilities in the state. We, therefore, find that the agreement is in the public interest and should be approved.

In consideration of the above, [\*3] it is

ORDERED by the Florida Public Service Commission that the joint petition for approval of the territorial agreement between Florida Keys Electric Cooperative and City Electric System is granted. It is further

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ORDERED that the territorial agreement and attachment are incorporated in this Order as Appendix A. It is further

ORDERED that this Order shall become final unless an appropriate petition for formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission, this 27th day of SEPTEMBER, 1991.

## APPENDIX A

### AGREEMENT

Section 0.1 THIS AGREEMENT, made and entered into this 17th day of JUNE, 1991 by and between the Utility Board of the City of Key West, using the trade name "City Electric System," (referred to in this Agreement as "CES") organized and existing under the laws of the State of Florida and an electric utility as defined in Chapter 366.02(2) Florida Statutes, and Florida Keys Electric Cooperative Association, [\*4] Inc. (referred to in this Agreement as "FKEC"), a rural electric cooperative organized and existing under Chapter 425, Florida Statutes, and Title 7, Chapter 31, United States Code and an electric utility as defined in Chapter 366.02(2), Florida Statutes, each of whose retail service territories are subject to regulation pursuant to Chapter 366, Florida Statutes and which are collectively referred to in this Agreement as the "Parties";

#### WITNESSETH:

Section 0.2: WHEREAS, the Parties are authorized, empowered and obligated by their corporate charters and the laws of the State of Florida to furnish electric service to persons requesting such service within their respective service areas; and

Section 0.3: WHEREAS, each of the Parties presently

Section 0.4: WHEREAS, although the respective service areas of the Parties are contiguous, their respective areas have an existing and natural boundary between Knight Key and Little Duck Key, which boundary is intersected by the Seven Mile Bridge, and

Section 0.5: WHEREAS, the unique geographic location of the service areas of the Parties and the unique topography of the Florida Keys affords a rational [\*5] and non-controversial boundary between the Parties, and

Section 0.6: WHEREAS, the Parties desire to minimize their costs to their respective rate payers by avoiding duplication of generation, transmission, and distribution facilities, and by avoiding the costs of litigation that may result in territorial disputes; and

Section 0.7: WHEREAS, the Parties desire to avoid adverse ecological and environmental consequences that may result when competing utilities attempt to expand their service facilities into areas where other utilities have also constructed service facilities; and

Section 0.8: WHEREAS, The Florida Public Service Commission (referred to in this Agreement as the "Commission"), has previously recognized that duplication of facilities results in needless and wasteful expenditures and may create hazardous situations, detrimental to the public interest; and

Section 0.9: WHEREAS, the Parties desire to avoid and eliminate the circumstances giving rise to potential duplication of facilities and hazardous situations, and toward that end have established a Territorial Boundary Line to delineate their respective retail Territorial Areas; and

Section 0.10: WHEREAS, the Commission [\*6] is empowered by Section 366.04(2)(d), Florida Statutes, to approve and enforce territorial agreements between electric utilities, has recognized the wisdom of such agreements, and has held that such agreements, subject to Commission approval, are advisable in proper circumstances, and are in the public interest;

Section 0.11: NOW, THEREFORE, in consideration of the premises aforesaid and the mutual covenants and agreements herein set forth the Parties agree as follows:

### ARTICLE 1

## DEFINITIONS

Section 1.1: Territorial Boundary Line. As used in this Agreement, the term "Territorial Boundary Line" shall mean the boundary line shown on the map attached hereto as Exhibit "A", which differentiates and divides the FKEC Territorial Area and the CES Territorial Area.

Section 1.2: FKEC Territorial Area. As used in this Agreement, the term "FKEC Territorial Area" shall mean the geographic areas of Monroe County shown on Exhibit "A" designated "FKEC", and the balance of the geographic area of Monroe County, not shown on Exhibit "A" which lies North by Northeast of the Territorial Boundary Line.

Section 1.3: CES Territorial Area. As used in this [\*7] Agreement, the term "CES Territorial Area" shall mean the geographic areas of Monroe County, shown on Exhibit "A", designated "CES", and the balance of the geographic area of Monroe County not shown on Exhibit "A" which lies South by Southwest of the Territorial Boundary Line.

Section 1.4: Transmission Line. As used in this Agreement, the term "Transmission Line" shall mean any Transmission Line of either Party having a rating of 69 kV or greater.

Section 1.5: Distribution Line. As used in this Agreement, the term "Distribution Line" shall mean any Distribution Line of either Party having a rating of up to, but not including 69 kV.

Section 1.6: Person. As used in this Agreement, the term "Person" shall have the same inclusive meaning given to it in *Section 1.01(3), Florida Statutes*.

Section 1.7: New Customer. As used in this Agreement, the term "New Customer" shall mean any Person that applies to either FKEC or CES for retail electric service after the effective date of this Agreement.

Section 1.8: Existing Customer. As used in this Agreement, the term "Existing Customer" shall mean any Person receiving retail electric service from either [\*8] FKEC or CES on the effective date of this Agreement.

Section 1.9: End Use Facilities. As used in this Agreement, the term "end use facilities" means those facilities at a geographic location where the electric energy used by a customer is ultimately consumed.

## ARTICLE 2

### AREA ALLOCATIONS AND NEW AND EXISTING CUSTOMERS

Section 2.1: Territorial Allocations. During the term of this Agreement, FKEC shall have the exclusive authority to furnish retail electric service for end use within the FKEC Territorial Area and CES shall have the exclusive authority to furnish retail electric service for end use within the CES Territorial Area.

Section 2.2: Service to New and Existing Customers. The Parties agree that neither of them will knowingly serve or attempt to serve any New or Existing Customer whose end-use facilities are or will be located within the Territorial Area of the other Party.

Section 2.3: Bulk Power for Resale. Nothing herein shall be construed to prevent either Party from providing a bulk power supply for resale purposes to any other electric utility regardless of where such other electric utility may be located. Further, no other Section or provision of this Agreement [\*9] shall be construed as applying to a bulk power supply for resale purposes.

Section 2.4: Service Areas of Other Utilities. This Agreement between FKEC and CES does not constitute an agreement on or allocation of any geographic area of Monroe County, that is currently being provided electric service by electric utilities not parties to this Agreement.

Section 2.5: CES Facilities in FKEC Territorial Area. The Parties agree that the location, use, or ownership of transmission facilities by CES (or the use or right to the use of FKEC's transmission facilities) in FKEC's Territorial Area as defined herein, shall not grant CES any right or authority, now or in the future, to serve any consumers whose end use facilities are, or will be, located in FKEC's Territorial Area.

Section 2.6: Distribution Facilities. Neither Party has any distribution facilities located in the territorial area of the other Party, and neither Party shall construct, operate, or maintain distribution facilities in the Territorial Area of the other Party.

Section 2.7: No Transfer of Customers. Neither Party has any customers located in the Territorial Area of the other Party as of the date of this Agreement, [\*10] and no customers will be transferred from one Party to the other by virtue of this Agreement.

#### ARTICLE 3

##### OPERATION AND MAINTENANCE

Section 3.1: Facilities to Remain. Electric facilities which currently exist or are hereafter constructed or used by a Party in conjunction with its electric utility system, which are directly or indirectly used and useful in service to its customers in its Territorial Area, shall be allowed to remain where situated and shall not be subject to removal or transfer hereunder except as provided in the Transmission Agreement dated February 6, 1985 between the Parties or as provided in any successor agreement; provided, however, that such facilities shall be operated and maintained in such a manner as to minimize interference with the operations of the other Party.

#### ARTICLE 4

##### PREREQUISITE APPROVAL

Section 4.1: Commission Approval and Continuing Jurisdiction. The provisions of and the Parties' performance of this Agreement are subject to the regulatory authority of the Commission. Approval by the Commission of the provisions of this Agreement shall be an absolute condition precedent to the validity, enforceability and applicability hereof. This Agreement [\*11] shall have no effect whatsoever until Commission approval has been obtained, and the date of the Commission's order granting Commission approval of this Agreement shall be deemed to be the effective date of this Agreement. Any proposed modification to this Agreement shall be submitted to the Commission for prior approval. In addition, the Parties agree to jointly petition the Commission to resolve any dispute concerning the provisions of this Agreement or the Parties' performance of this Agreement. The Parties recognize that the Commission has continuing jurisdiction to review this Agreement during the term hereof, and the Parties agree to furnish the Commission with such reports and other information as requested by the Commission from time to time.

Section 4.2: No Liability in the Event of Disapproval. In the event approval of this Agreement pursuant to Section 4.1 hereof is not obtained, neither Party will have any cause of action against the other arising under this document.

Section 4.3: Supersedes Prior Agreements. Upon its approval by the Commission, this Agreement shall be deemed to specifically supersede any and all prior agreements between the Parties defining the [\*12] boundaries of their respective Territorial Areas in Monroe County.

#### ARTICLE 5

##### DURATION

Section 5.1: This Agreement shall continue and remain in effect for a period of thirty (30) years from the date of the Commission's initial Order approving this Agreement, and shall be automatically renewed for additional thirty (30) year periods unless either Party gives written notice to the other of its intent not to renew at least six (6) months prior to the expiration of any period; provided, however, that each such renewal of this Agreement shall require prerequisite approval of the Commission with the same effect as the original Commission approval of this Agreement as required and provided for in Article 4 hereof.

#### ARTICLE 6

##### CONSTRUCTION OF AGREEMENT

Section 6.1: Intent and Interpretation. It is hereby declared to be the purpose and intent of the Parties that this Agreement shall be interpreted and construed, among other things, to further the policy of the State of Florida to: actively regulate and supervise the service territories of electric utilities; supervise the planning, development, and maintenance of a coordinated electric power grid throughout Florida; avoid uneconomic duplication [\*13] of generation, transmission and distribution facilities; and to encourage the installation and maintenance of facilities necessary to fulfill the Parties' respective obligations to serve the citizens of the State of Florida within their respective service areas.

#### ARTICLE 7

##### MISCELLANEOUS

Section 7.1: Negotiations. Regardless of any other terms or conditions that may have been discussed during the negotiations leading up to the execution of this Agreement, the only terms or conditions agreed upon by the parties are those set forth herein, and no alteration, modification, enlargement or supplement to this Agreement shall be binding upon either of the Parties hereto unless the same shall be in writing, attached hereto, signed by both of the parties and approved by the Commission in accordance with Article 4, Section 4.1 hereof.

Section 7.2: Successors and Assigns; for Benefit Only of Parties. This Agreement shall be binding upon the Parties hereto and their respective successors and assigns. Nothing in this Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person other than the Parties hereto, or their respective successors or assigns, [\*14] any right, remedy, or claim under or by reason of this Agreement, or any provision or condition hereof; and all of the provisions, representations, covenants, and conditions herein contained shall inure to the sole benefit of the Parties or their respective successors or assigns.

Section 7.3: Notices. Notices given hereunder shall be deemed to have been given to FKEC if mailed by certified mail, postage prepaid to

General Manager  
 Florida Keys Electric Cooperative Association, Inc.  
 91605 Overseas Highway  
 Tavernier, Florida 33070

and to CES if mailed by certified mail, postage prepaid to:

General Manager  
 City Electric System  
 P. O. Box 6100  
 Key West, Florida 33041-6100

The person or address to which such notice shall be mailed may, at any time, be changed by designating a new person or address and giving notice thereof in writing in the manner herein provided.

Section 7.4: Petition to Approve Agreement. Upon full execution of this Agreement by the Parties, the Parties agree to jointly file a petition with the Commission seeking approval of this Agreement, and to cooperate with each other and the Commission in the submission of such documents and exhibits as are reasonably [\*15] required to support the petition.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed in duplicate in their respective corporate names and their corporate seals affixed by their duly authorized officers on the day and year first above written.

ATTEST:

UTILITY BOARD OF THE CITY OF KEY WEST, "CITY ELECTRIC SYSTEM"

Robert R. Padron, Secretary

By: William T. Cates, Chairman

ATTEST:

FLORIDA KEYS ELECTRIC COOPERATIVE ASSOCIATION, INC.

R. L. Barnes, Secretary

By: B. L. Schwartz, Title: President

EXHIBIT A TO TERRITORIAL AGREEMENT BETWEEN THE UTILITY BOARD OF THE CITY OF KEY WEST (C.E.S.) AND FLORIDA KEYS ELECTRIC COOPERATIVE ASSOCIATION INC. (F.K.E.C.)

[SEE ILLUSTRATION IN ORIGINAL]

**Legal Topics:**

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