Dorothy Menasco

100304-EU

From: Ann Bassett [abassett@lawfla.com]
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Cc: Steven Griffin; Matthew Avery; Leigh Grantham; Doc Horton; Ralph Jaeger; Susan Ritenor
Subject: Docket No. 100304-EU
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The Docket No. is 100304-EU Territorial Dispute between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company

This is being filed on behalf of Choctawhatchee Electric Cooperative, Inc.

Choctawhatchee Electric Cooperative, Inc.'s Response to Gulf Power Company's Second Motion for Summary Final Order

Total number of pages is 25

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May 16, 2011

BY ELECTRONIC FILING
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 100304-EU

Dear Ms. Cole:

Enclosed for filing on behalf of Choctawhatchee Electric Cooperative, Inc. is an electronic version of Choctawhatchee Electric Cooperative, Inc.'s Response to Gulf Power Company's Second Motion for Summary Final Order in the above referenced docket.

Thank you for your assistance.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosure
cc: Ms. Leigh V. Grantham
Parties of Record

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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 Filed: May 16, 2011

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.'S RESPONSE TO GULF POWER COMPANY'S SECOND MOTION FOR SUMMARY FINAL ORDER

COMES NOW Choctawhatchee Electric Cooperative, Inc. ("CHELCO"), through its undersigned counsel and files this response to Gulf Power Company's Motion for Summary Final Order and states:

On May 6, 2011, Gulf Power filed its second Motion for Summary Final Order pursuant to Section 120.57(1)(h), Florida Statutes, Rule 28-106.204(4), Florida Administrative Code, and Rule 1.510, Florida Rules of Civil Procedure.[1] By agreement of the parties at the prehearing conference, the time for service of the response was established as May 16, 2011.

Section 120.57(1)(h), Florida Statutes provides, in pertinent part, that:

> Any party to a proceeding ... may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the [finder of fact] determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

Rule 28-106.204(4), Florida Administrative Code, is consistent with the statute.

By its motion Gulf Power is seeking to have the Commission determine that the City of Crestview's annexation of the disputed territory into the Crestview city limits, in and of itself,

[1] The Florida Rules of Civil Procedure, except for those pertaining to discovery, are not applicable to administrative proceedings pursuant to Chapter 120, Florida Statutes and the Uniform Rules promulgated thereunder. Therefore, argument will be directed to the applicable APA standard, rather than the rule regarding judicial summary judgments.

constitutes an absolute bar to CHELCO serving the planned Freedom Walk development. Gulf's Motion is predicated not only on the Commission's jurisdiction to interpret and apply Chapter 425, Florida Statutes, but on the premise that the "nature of the area involved" acts as a territorial dispute trump card, converting all other factors established in Section 366.04, including those in the Grid Bill, into "collateral factual issues." As discussed herein, there is absolutely no authority for the Commission to disregard the standards created by the Legislature for resolving territorial disputes, and the motion must therefore be denied.

STANDARD FOR MOTIONS FOR SUMMARY FINAL ORDER

The Commission has considered motions for summary final orders on several occasions. The applicable standard for granting such a motion can be found in *In Re: Qwest Communications Co., LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et al.*, Docket No. 090538, Order PSC-10-0296-FOF-TP, May 7, 2010, wherein the Commission stated:

> The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.
>
> Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." . . . The burden is on the movant to demonstrate that the opposing party cannot prevail . . . . "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law . . . . "Even where the facts are undisputed, issues as the interpretation of such facts may be such as to preclude the award of summary judgment." . . . If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper . . . .[2]

[2] Docket No. 090538, Order No. PSC-10-0296-FOF-TP (May 7, 2010).

In addition, this Commission has acknowledged that policy considerations should be taken into account in ruling on a motion for summary final order. For example, the Commission has held:

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of the Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
>
> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. *Coastal Caribbean Corp. v. Rawlings,* 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. *Page v. Staley,* 226 So. 2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.[3]

When analyzed under this well-established standard, Gulf Power's motion must fail because disputed issues of material fact pervade this docket and the issues of law are not such to demonstrate that CHELCO cannot prevail in this docket, and because Gulf Power has failed to demonstrate that it is entitled to judgment as a matter of law.

ISSUES OF FACT

As noted in the cited order, and by Gulf Power, a summary final order is appropriate only when there is no genuine issue as to <u>any</u> material fact. In this docket virtually every material issue remains in dispute. For example, in the Factual Summary portion of Gulf's motion there is a discussion of the area in dispute. Gulf asserts that it is undisputed that "Freedom Walk is

[3] Docket No. 070126-TL, Order No. PSC-07-1008-PAA-TL (Dec. 19, 2007) (*quoting* Docket Nos. 970657-WS and 980261-WS, Order No. PSC-98-1538-PCO-WS (Nov. 20, 1998) at n.8).

located entirely within the municipal boundaries of the City of Crestview, Florida." Even that fundamental issue is disputed. Each and every pleading filed by CHELCO in this case identify the disputed territory as all of that south of Old Bethel Road (Petition par. 6). The exhibits attached to the CHELCO petition include an overlay of the developer's map of the planned development, all of which CHELCO considers to be the area in dispute. That area in dispute has been recited numerous times in discovery and testimony. It was CHELCO's specific intent to include all of the areas identified by the developer as being within its plat of Freedom Walk, and for which it would require service, for consideration by the Commission in this territorial dispute. (See Affidavit of Leigh Grantham at ¶4). Gulf has been perfectly aware of the territory in dispute from the very beginning, and cannot credibly argue that it was confused or misled about the territory disputed by CHELCO. Although Gulf argues that all of the disputed territory is within the city limits, its own Gulf Power service plan – prepared in June 2010 – belies its assertion. Gulf Power's service diagram depicts all of the area south of Old Bethel Road as being part of Freedom Walk, exactly as alleged by CHELCO. (See stipulated exhibit CSE-6, page 15). In addition, many of Gulf's so-called "undisputed facts" are a selective and, more importantly, disputed series of points to support Gulf Power's distorted history of service to the area in dispute. For example, Gulf Power states that "Gulf has provided continuous service to the city of Crestview since 1928 – nearly thirteen years before CHELCO's formation," but neglects to note that Gulf has never served the actual territory in dispute – as has CHELCO – or that until the very recent annexation, the territory in dispute was far removed from the city of Crestview.[4]

[4] Though not discussed as part of this docket, it is highly unlikely that the city limits of Crestview in 1928 were anywhere near the city limits today. What has been discussed is the fact that Gulf Power had no interest in serving the territory in dispute until it became economically advantageous for Gulf to encroach on CHELCO's service area, which area CHELCO has served and invested in its members for decades.

Based on CHELCO's pleadings and discovery, there are other disputed issues of material fact that must be considered under the requirements of Section 366.04, Florida Statutes, including a) the nature of the area, b) whether there will be duplication of facilities, c) whether Gulf has facilities capable of serving the planned load, d) the extent of the cost to Gulf of not only extending lines to where CHELCO is now, but of upgrading its substation for the specific purpose of serving the development, and e) historic and current service to the area, among others. There is nothing in Section 366.04, Florida Statutes that makes any one factor preeminent over the others. Rather, the orders and opinions demonstrate that the Commission is to weigh and balance each of the statutory factors in order to determine which utility is best situated to provide service to a particular territory.

As will be developed in this response, the issue of whether CHELCO can serve the area in dispute has factual and legal elements to be resolved. There is no single issue of fact or law that is, by itself, dispositive of the dispute.

ISSUES OF LAW

Standards for Determining Territorial Disputes

Gulf Power's motion and argument seeks to have the Commission interpret Chapter 425, and construe the statutory purposes and authority of rural electric cooperatives under that chapter. However, for purposes of resolving territorial disputes, the relevant statutory requirements are found in Chapter 366, Florida Statutes, not in Chapter 425. Except for specifically identified and narrow grants of authority in Chapter 366, the Commission has no jurisdiction over cooperatives. (See Section 366.0211, Florida Statutes).

Relevant to this proceeding, the Commission has been granted limited jurisdiction over cooperatives for purposes of resolving territorial disputes and for implementation of the "grid

bill." As to territorial dispute resolution, the Commission has the following authority under Section 366.04(2)(e):

> (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. (emphasis supplied)

As to issues regarding Florida's coordinated electric power grid, the Commission has the following authority under Section 366.04(5):

> (5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.(emphasis supplied)

Chapter 366, Florida Statutes, was amended in 1974 in part to establish the authority and standards under which the Commission is to resolve territorial disputes. Since that time, Section 366.04, Florida Statutes, has been uniformly applied as the basis for jurisdiction and criteria for consideration in territorial disputes. *See, Gainesville-Alachua County Regional Electric Water & Sewer Utilities Board v. Clay Electric Cooperative, Inc.*, 340 So.2d 1159 (Fla. 1976); *Gulf Coast Electric Cooperative Inc. v. Fla. Public Service Commission*, 462 So.2d 1092 (Fla. 1985); *Gulf Power Co. v. Public Service Comm.*, 480 So.2d 97 (Fla. 1985); *Gulf Coast Electric Cooperative, Inc. v. Clark*, 674 So.2d 120 (Fla. 1996); *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So.2d 259 (Fla. 1999); *West Florida Electric Cooperative Association Inc. v. Jacobs*, 887 So.2d 1200 (Fla. 2004).

The criteria of Section 366.04(2)(e), Florida Statutes, have been incorporated into Rule 25-6.0441, Florida Administrative Code - *Territorial Disputes for Electric Utilities.* It is those criteria and standards that define the issues to be considered by the Commission in resolving territorial disputes. Nowhere in Chapter 366, Florida Statutes, or Rule 25-6.0441, F.A.C. is there any suggestion that the Commission has regulatory or interpretive authority over Chapter 425, Florida Statutes. Equally important is the fact that Chapter 425, Florida Statutes, contains no reference to, or even a hint of any Commission jurisdiction or authority to interpret, construe, or enforce the provisions of that chapter, or to establish bright-line jurisdictional prohibitions on rural electric cooperative service areas.

Gulf's Changed Position Regarding the Interpretation of the Law

Gulf asserts in its present Motion that simply because a large portion of Freedom Walk is within the city limits of Crestview, it is not a "rural area" as defined in Section 425.03, Florida Statutes, thus prohibiting CHELCO from serving the area. Aside from the fact that Gulf's assertion is not supported by law, its present position is not consistent with its previous position put forth in this docket. For example in response to the following question posed in CHELCO's First Set of Interrogatories:

> 28. Is it the contention of Gulf Power that CHELCO may not expand service to new members who are within the city limits even if CHELCO has provided service to members in that area before the area came within the city limits?

Gulf responded as follows:

> Yes, if expanding service to customers within the city limits would result in more than 10 percent of CHELCO's membership being located in non-rural areas. See Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789 (11th Cir. 1982). Moreover, even if expanding service to customers within the city limits would not result in more than 10 percent of CHELCO's membership being located in non-rural areas, it is Gulf Power's contention that the urbanization of the area

> in which a disputed customer or customers are located continues to be a relevant consideration in resolving a territorial dispute of this nature. See, 366.04(2)(e), Fla. Stat.; 25-60441 (2)(b), F.A.C. (emphasis supplied)

(Interrogatory No. 28, CHELCO's First Set of Interrogatories).

Gulf admitted then that CHELCO may serve within the city limits, subject to Gulf's understanding of the 10% "limitation" regarding CHELCO's membership in its entire, multi-county service area. This admission of CHELCO's legal authority to serve within municipal boundaries is further demonstrated in Gulf's Motion to Compel dated October 26, 2010, at pages 3 and 4, in Gulf's Motion to Compel dated December 22, 2010, pages 3 and 4, and in Gulf's Motion for Reconsideration dated January 18, 2011, in which Gulf demanded responses to discovery requests regarding the percentage of members within municipal boundaries to enable it to determine whether CHELCO was limited in its *prima facia* ability to serve members in the area in dispute. Even under Gulf's restrictive definition of the 10% "limitation," far less than 10% of CHELCO's membership is within municipal boundaries, and will remain that way with the award of the disputed territory to CHELCO. (Affidavit of Leigh Grantham at ¶6). Gulf's own previous interpretation of Chapter 425 demonstrates that CHELCO's service of the disputed territory involves both factual and legal issues.

Gulf's argument, if it were to include Gulf's previously advanced interpretation and construction of all of the provisions of Section 425.04(4), rather than the incomplete portion advanced in its current motion, would require that the Commission's resolution of any territorial dispute involving any area within a municipal boundary include a comprehensive analysis of the entire rural cooperative service area, a task nowhere contemplated in Section 366.04, Florida Statutes. The assessment would necessarily involve, at a minimum, a determination of the full membership of the cooperative in and out of municipal boundaries, how many "other persons"

the cooperative serves, the significance of such "other persons" under the statutory program created by Chapter 425, the boundaries of all undefined, indeterminate, and constantly changing "greater areas" of all incorporated municipalities in the cooperative's service area, and the boundaries of any other "areas" that fit Gulf's interpretation of an "unincorporated area." CHELCO respectfully suggests that the Commission's lack of regulatory or interpretive authority under Chapter 425 precludes it from undertaking that system-wide analysis. From a more practical standpoint, the Commission must decide if it wants to expand the scope of its review - now limited under Sections 366.04(2)(e) and 366.04(5) to an assessment of the nature of the area involved, the existing and future capabilities of the providers, and the avoidance of uneconomic duplication of facilities – to a full scale analysis of the cooperative's legal authority and jurisdiction to serve members in its service area each and every time a dispute is raised as to a new residential or commercial building that extends into a municipal boundary.

Legal Issues for Consideration

A. Limitation on the Commission's Delegated Legislative Authority

CHELCO asserts, consistent with its position as expressed in the Prehearing Order, that fundamental principals of delegated legislative authority and agency jurisdiction substantially limit the Commission's exercise of authority over rural electric cooperatives. Consistent with that position, CHELCO believes that the Commission is not the body politic charged with the duty of interpreting, construing and applying the provisions of Chapter 425 so as to determine legal limitations on the ability of a cooperative to serve an area. Rather, Section 366.04, Florida Statutes establishes a number of factual issues related to the territory in dispute, the capabilities of the parties to serve that territory and the uneconomic duplication of facilities. It is that determination of the factual "nature" of the territory over which the Commission has jurisdiction,

not the legal effect of whether the territory is in a "rural area" and whether that designation serves to limit a cooperative's lawful service area as established by Chapter 425, Florida Statutes.

CHELCO believes that the Commission order in *In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc.*, Docket No. 87-0235-EI, Order No. 18886 (Feb. 18, 1988), is instructive. In that case, the Commission assessed the area in dispute as "urban" or "rural" using the factual construction of those terms consistent with Section 366.04, Florida Statutes, rather than a strict legal interpretation of "rural area" from Chapter 425 ("the rural nature of the area, although somewhat mitigated by the area's proximity to the Town of Ponce DeLeon, qualifies it as an area that that both utilities are able to serve."). In assessing the effect of the proposed customer's status as an existing member of the cooperative, the Commission determined that "[t]his criteria relates only to Chapter 425, Florida Statutes, which grants no rights under our jurisdiction over territorial disputes."(emphasis supplied). Clearly the Commission's statement was in recognition of the limits of its jurisdiction over issues arising under Chapter 425 and not an assertion of broad authority subject to a narrow exception. In addition, though addressing rate structures under Section 366.04(2)(b), rather than territorial disputes under Section 366.04(2)(e), the case of *Lee County Electric Cooperative, Inc. v. Jacobs*, 820 So.2d 297 (Fla. 2002) is equally instructive. In that case, the Commission was asked to extend its jurisdiction over cooperatives' rate structures to include wholesale rate schedules. The Commission determined its jurisdiction over the cooperative under Chapter 366 to be narrow. As stated by the Court:

> For this reason, the PSC concluded that it did not have jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative. To support this conclusion, the PSC contends that any reasonable doubt regarding its regulatory power compels the

> PSC to resolve that doubt against the exercise of jurisdiction....We agree. (citation omitted)

Id. at 300.

CHELCO agrees that the Commission has jurisdiction to apply Section 366.04 standards to the territory in dispute, and in so doing may consider whether, as a factual matter, the area in dispute is "urban" or, as a convenient shorthand, "rural" in nature. Furthermore, despite the acknowledged lack of direct regulatory jurisdiction over cooperatives, CHELCO agrees that by bringing this dispute to the Commission, the Commission may require CHELCO to serve anyone requesting service in the disputed territory, and may enforce that requirement.[5] However, unless and until the legislature grants the Commission the authority to construe Chapter 425, and to make qualitative and quantitative judgments as to the scope of a cooperative's overall service area, CHELCO will assert that the Commission's jurisdiction under Chapter 366 is limited to those elements of Chapter 425 necessary to determine the characteristics of the area in dispute, and the capability of the cooperative's facilities to provide adequate and reliable service to the area.

CHELCO acknowledges that a number of orders of the Commission have referenced, and to some extent relied upon, Chapter 425. However, those orders have generally been issued in the context of determining whether the nature of the area is "urban" or "rural." Not one of the orders involved, as Gulf urges here, an exercise of pure statutory construction to establish a bright line, jurisdictional prohibition on the right of a rural electric cooperative to serve based on the location of the customer. For example, in *In re: Petition of Suwannee Valley Electric Cooperative, Inc. against Florida Power and Light Company*, Docket No. 76-0510-EU, Order No. 7961 (Sept. 16, 1977), cited by Gulf as perhaps the strongest statement of the Commission's

[5] *In re: Petition of Peace River Electric Cooperative, Inc. against Florida Power and Light Company* , Docket No. 84-0293-EU, Order No. 15210 (Oct. 8, 1985) ("PRECO")

implied jurisdiction over Chapter 425, the Commission used "rural area" in a mixed legal and "dictionary" sense. The area in dispute was not within the Live Oak city limits, and thus met the technical legal definition of a "rural area" under the Chapter 425 definition. However, the subdivision was directly adjacent to and surrounded by urbanized areas, including established residential areas and the airport, allowing the Commission to determine that the disputed area shared those urban characteristics.

Gulf's suggestion that service within the municipal boundary is dispositive is contrary to the Commission's finding in *Suwannee Valley*, which it made without any apparent legal concern, that SVEC provided service both inside and outside of the city limits of Live Oak. In a mixing of factual and legal concepts, the Commission determined that the disputed territory was not a "rural area" under Section 425.03. The Commission did not stop with that conclusion, but continued with its analysis and considered and applied issues of uneconomic duplication, cost of extending service, and historic service to the area. Thus, the Commission balanced all of the Chapter 366 factors in making its decision, contrary to Gulf's present assertion that such factors are irrelevant "collateral factual issues" if the disputed territory is not a "rural area" as defined by law.[6]

Gulf Power asserts that its position that it is illegal for a cooperative to serve in areas that are not "rural areas" under 425.03, Florida Statutes, is not intended to result in cooperatives being displaced from serving existing customers in such "non-rural areas." There is simply no foundation in Florida law for such a limit on the effect of Gulf's position. As Gulf states, there would be only 3 relevant questions – 1) is the provider a cooperative, 2) is the municipality incorporated with a population of over 2,500, and 3) is the area in dispute within that

[6] It should also be kept in mind that the City of Crestview is sufficiently satisfied with CHELCO's legal authority to serve its citizens that it has granted a franchise agreement to CHELCO to serve within its municipal boundaries.

municipality. (Motion for Summary Final Order at 11). Nothing else – not the criteria of Section 366.04(2)(e) and not the grid bill's prohibition of uneconomic duplication – would matter. To soften the absurd effect of its argument, Gulf cites to several cases from South Carolina[7] to support its position that there would be some implied exclusion from the harsh effect of its argument. However, the South Carolina cases are founded on the provisions of S.C. Code 33-49-250, which provides a far more detailed set of parameters under which cooperatives operate, and which have specific provisions regarding service to new and existing customers when areas are annexed. Such a comprehensive statutory scheme has not been enacted by the Florida Legislature, and cannot be applied by implication.

Pursuant to Section 366.04(2)(e), Florida Statutes, the "nature of the area in dispute," and its degree of urbanization, is one of several criteria to be weighed in a territorial dispute. The effect of the relief sought by Gulf would be to make that the sole, determinative factor in any case involving existing or annexed municipal boundaries. There is absolutely no authority for the creation and application of a single, overriding criteria based on Chapter 425 in a territorial dispute. Thus, Gulf Power's Motion for Summary Final Order must be denied.

B. Standards for Consideration if the Commission Determines to Assume a Limited Degree of Implied Authority

To the extent that the Commission determines it has jurisdiction - using its authority under Chapter 366 - to interpret and apply Chapter 425, Florida Statutes, it should be noted that Section 425.04(4), Florida Statutes, grants the following legislative authority to rural electric cooperatives:

> [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

[7] It should be noted that both of the South Carolina cases arose in circuit court and not in the South Carolina PSC since, as in Florida, cooperatives in that state are not subject to regulation by the PSC. *See* S.C. Code §33-49-50.

> political subdivisions, and to other persons not in excess of 10 percent of the number of its members . . . However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation.

In addition, Section 425.03(1), defines "rural area" as "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."

Gulf Power has previously argued in this case that in order for the Commission to determine whether CHELCO can serve the disputed territory, the Commission must undertake a complete analysis of CHELCO's entire, multi-county service area, interpret and construe Chapter 425 to determine how many members CHELCO serves in what Gulf characterizes as "non-rural areas," and determine whether more than 10% of CHELCO's members are served in the boundaries of various political subdivisions and their "greater areas" throughout the CHELCO service area. It is, and will remain the position of CHELCO that the Commission has neither the jurisdiction nor the expertise to calculate percentages of cooperative members, to determine undefined and *indefinite penumbras of population* around incorporated areas throughout their entire service areas, or interpret what, under Florida law, constitutes an "unincorporated city, town, village or borough."[8]

Gulf Power's assertion that CHELCO is prohibited from serving customers within the Crestview city limits, presumably because such customers would not be providing service "in rural areas to its members" completely ignores the remainder of that provision that, at a minimum, allows for service to persons other than members in rural areas up to 10% of its total

[8] As to the one factor that is capable of determining through readily available and accurate means, far less than 10% of CHELCO's total membership resides within the boundary of any city, town, village, or borough.

membership, and which specifically allows a cooperative to serve within any town, city or area where there is not currently central station service. CHELCO meets both of those criteria in this case. Although Gulf has cited to the Commission's order in *In Re: Petition of Peace River Electric Cooperative Inc. against Florida Power & Light Co.*, 85 FPSC 10:120 (Docket No. 840293-EU, Order No. 15210, October 8, 1985) ("PRECO") Gulf omitted the following:

> Therefore, we find that although a cooperative comes within the Commission's jurisdiction to resolve territorial disputes pursuant to Section 366.04(2)(e), Florida Statutes, by either petitioning for relief or responding to a petition filed by another utility and acknowledging that a dispute exists, then the cooperative cannot refuse to serve a customer located in that disputed area resolved by the Commission. Chapter 366, Florida Statutes, specifically gives the Commission jurisdiction over cooperatives for this purpose. The Commission's jurisdiction is not inconsistent with Chapter 425, Florida Statutes, which does not prohibit cooperatives from serving non-members and in fact, actually provides for it. Sections 425.04(4) and 425.09(1), Florida Statutes.

Gulf Power also cites the case of *Alabama Electric Cooperative, Inc. v. First Nat'l Bank*, 684 F.2d 789, 791-792 (11th Cir. 1982) for the proposition that the 10% provision applies only to the continuation of existing service within municipal boundaries, but not to "initiating" service within municipal boundaries.[9] There is not a shred of authority in the *Alabama Electric* case to support Gulf's contrived distinction. The *Alabama Electric* case, though it deals with a generating and transmission cooperative, rather than a distribution cooperative as is CHELCO, does specifically provide that:

> Fla.Stat.Ann. § 425.04(4) (West 1973) authorizes a rural electric co-op to serve some non-rural areas, indicating that AEC's service to the four municipalities did not deprive it of its "rural" character. This assessment of the Florida law is supported by Fla.Stat.Ann. § 425.04(4) (West 1973):

[9] Gulf's argument raises yet another factual dispute, i.e., the extent to which CHELCO's service to the annexed portion of the territory in dispute itself – though not active due to a fire at the served residence – should be considered in the context of the current and historic service to the area.

> A cooperative shall have power: . . . (4) To 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 ten percent of the number of its members. . . .
>
> The language of 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. . . . Consequently, we hold that § 425.04(4) does permit service to some non-rural areas. (emphasis supplied)

That case does not support Gulf's argument. According to Gulf, a cooperative is prohibited from serving any area that is not a "rural area." There is nothing in Chapter 425 that would soften that effect. Gulf's effort to create a non-statutory exception to its bright-line, jurisdictional prohibition, intended solely to obfuscate the harsh and absurd consequence of its position, finds no support in the statute, case law, or Commission orders. Therefore, the harsh and absurd consequence of its position must be considered in any ruling on Gulf's Motion for summary Final Order.

CHELCO takes no issue with the scope of the Commission's jurisdiction as set forth in *PRECO*, and does not argue that the Commission is without authority to compel it to serve any person requesting service within Freedom Walk, regardless of whether that person is a member or a non-member. What CHELCO does assert is that the decision must be limited to the nature of and the service to the affected area, and not be based on issues that are far removed - physically, legally, and jurisdictionally - from the disputed area.

As a final point, both the Supreme Court and the Commission have cited Section 366.045(5), Florida Statutes, the grid bill, as appropriate for consideration in resolving territorial disputes and agreements. That bill constitutes the most recent expression of the will of the Legislature establishing a basic goal of resolving territorial disputes, that of avoiding

uneconomic duplication of facilities. The acceptance of Gulf's position would, in Gulf's own words, render compliance with the express provisions of both Sections 366.04(2)(e) and 366.04(5), unnecessary as immaterial "collateral factual issues," (Gulf Motion for Summary Final Order at 10-11) and consign the issue of uneconomic duplication to the waste bin. Gulf does not dispute that an extension of its existing line will result in duplication of CHELCO facilities presently in place (Interrogatory 13, CHELCO's First Set of Interrogatories). Thus, if the Commission accepts the position of Gulf Power, it would be encouraging, not discouraging, duplication. Such a result would be directly contrary to *Lee County Electric Cooperative v. Marks*, 501 So.2d 585 (Fla. 1987), in which the Supreme Court held, in reversing the Commission's dismissal of the petition filed by LCEC, that:

> . . . the ruling establishes a policy which dangerously collides with the entire purpose of territorial agreements, as well as the PSC's duty to police "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." §366.04(3), Fla. Stat. (1985). (Emphasis supplied).[10]

Id. at 586.

To bring this response back to the issue at hand, it is clear that there is no strict legal requirement under either Section 366.04 or Chapter 425, Florida Statutes that compels the award of the disputed territory to Gulf, or that prevents CHELCO from serving the area. Gulf asserts that the law is "clear and unambiguous" that CHELCO cannot serve Freedom Walk because the area in dispute will be within the city limits of Crestview. As set forth herein, there is no support in any statute, judicial opinion, or Commission order for Gulf's assertion. Even Gulf admits by way of its discovery responses that there is no legal authority preventing CHELCO, or any other

[10] Ch. 89-292 renumbered subsection 366.04 (3) to subsection 366.04(5) but did not change the language.

rural electric cooperative, from serving a disputed area solely by virtue of its being within the limits of a political subdivision.[11]

C. An Order with the Scope and Effect of the Relief Sought by Gulf Would Constitute an Unadopted Rule

Gulf Power asks the Commission to determine that, as a matter of law, rural electric cooperatives are prohibited from serving within incorporated municipal boundaries under Chapter 425 F.S. If the Commission adopts that standard for application in territorial disputes, that standard will, due to the *stare decisis* effect of agency orders and precedent, and the obligation of agencies to apply its precedent consistently, clearly constitute a Commission statement of general applicability that implements, interprets or prescribes law or policy. Thus, the order would constitute a "rule" as defined in Section 120.52(16), Florida Statutes. An agency statement, including that issued as agency action in a published order, that satisfies the statutory definition of a rule but is not promulgated pursuant to Section 120.54, is an unpromulgated rule. The Commission's reliance on and general application of an interpretation of Chapter 425 that would serve as the establishment of a jurisdictional service area limitation to conclude that CHELCO is prohibited from serving the territory in dispute would constitute a rule. Section 120.57(1)(e), Florida Statutes, provides as follows:

> (e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.
>
> 2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

[11] To the extent the law is "clear and unambiguous," CHELCO asserts - with the written authority of the legislature, the Supreme Court, and the Commission behind it – that it is clear and unambiguous that CHELCO is entitled, as a matter of law, to serve Freedom Walk, so long as CHELCO has the capability to do so, and that other factors historically considered by the Commission, including the nature of the disputed area and issues of uneconomic duplication, are weighed and balanced under the standards established in Section 366.04, Florida Statutes.

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

It is well established that agencies only have such powers and authority as granted by the legislature and can adopt rules to implement those legislatively granted powers and authority. Gulf Power would have this Commission do indirectly i.e. regulate and establish jurisdictional service limitations for cooperatives; even though the legislature has given no authority to do so under Chapter 425 F.S. and only limited authority to do so under Chapter 366 F.S. The creation of a standard as argued by Gulf Power would not be within the powers, functions and duties delegated by the Legislature, and would therefore be invalid.

Conclusion

Based on the foregoing, there are disputes of fact and law that prevent the entry of a Summary Final Order. In that regard, the Commission should review the facts, and in so doing consider the lack of any urbanized characteristics of the disputed area; the fact that CHELCO is not "initiating" service to the area at issue but currently has lines on, at, and around the property;

that Gulf has never served the area in dispute and has no current ability to do so, that Gulf's nearest 3 phase lines are over 2,000 feet from the property, and would have to cross over CHELCO's lines to access the disputed area; that the award of the disputed territory to Gulf will result in the uneconomic duplication of facilities under Section 366.04(5); that such duplication materially and adversely affects CHELCO's existing and planned investment in the disputed area; that CHELCO has been serving the area for over 40 years; and that the area was in the past and is now "rural" in its nature and characteristics.

For the reasons set forth herein, Gulf Power has failed to demonstrate that a Summary Final Order is appropriate. There are genuine disputed issues of law and material fact, and those disputes must be resolved through a fact-finding hearing to reach a decision in this dispute pursuant to Chapter 366, Florida Statues. That hearing has been set, the parties are moving forward expeditiously and in good faith, and those efforts should not be derailed by Gulf Power's meritless motion for summary final order. For the reasons set forth herein, Gulf Power has failed to demonstrate that a summary final order is appropriate, and CHELCO respectfully requests that the Commission deny the motion.

Respectfully submitted this 16th day of May, 2011.

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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.

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

Norman H. Horton, Jr.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

AFFIDAVIT OF LEIGH V. GRANTHAM

BEFORE ME, the undersigned authority, personally appeared Leigh V. Grantham, who is sworn and says the following information is true and correct according to Affiant's best knowledge and belief:

1. I am competent to testify, and have personal knowledge of the facts herein.

2. I am the Chief Executive Officer of Choctawhatchee Electric Cooperative, Inc. My business address is 1350 W. Baldwin Avenue, DeFuniak Springs, Florida 32435.

3. As Chief Executive Officer of Choctawhatchee Electric Cooperative, Inc., I have been closely involved with the instant territorial dispute, and was directly involved in the preparation of the Petition to Resolve Territorial Dispute filed on CHELCO's behalf.

4. It was CHELCO's specific intent to include all of the areas identified by the developer as being within Freedom Walk for which it would require service, as depicted in the plat provided by Moore-Bass Engineers, in the Petition for consideration by the Commission in this territorial dispute. For that reason, the entire platted area, including streets and lot lines, was overlaid on the Petition exhibits. For that reason the area was accurately described as "west of Highway 85N and south of Old Bethel Road as depicted on Exhibit "A" hereto." To the extent there is any misunderstanding as to CHELCO's intent in this matter, its intent was to include all of the area south of Old Bethel Road within the recognized and accepted plat of Freedom Walk within the area subject to this territorial dispute.

5. I am personally familiar with the area that is the subject of the instant dispute known as the Freedom Walk Development. The majority of the Freedom Walk Development was recently annexed by the City of Crestview, Florida. Crestview, Florida is an incorporated municipality with a population in excess of 2,500 persons. That portion of the Freedom Walk development within the annexed municipal boundary would not meet the definition of a "rural area" as defined in Section 425.03, Florida Statutes.

6. CHELCO serves a total of 34,722 members throughout its service area. CHELCO serves a total of 1,196 members within the boundaries of the three incorporated municipalities in its service area, which include Crestview, DeFuniak Springs, and Freeport. Thus, 3.45% of CHELCO's members are within a city, town, village, or borough. With the addition of approximately 760 new members in Freedom Walk, 5.5% of CHELCO's members would be within a city, town, village, or borough

7. The City of Crestview has granted a franchise to CHELCO to serve members within the city limits of Crestview.

8. Despite the location of the majority of Freedom Walk within the city limits of Crestview, the territory that is the subject of this dispute is not urbanized under any meaning of the term. The territory itself is entirely wooded and undeveloped, except for the three residences and out-buildings on the territory that are served by CHELCO. The contiguous surrounding areas consist of pasture, woods, a sand mine, and rural residential areas. When used within the factual meaning of the term, the "nature" of the disputed territory is decidedly rural.

9. CHELCO, and other rural electric cooperatives in Florida, often provide electric service to areas within municipal boundaries. Many of those occasions involved the initial commencement of service when the areas served were within existing municipal boundaries.

Although the initial extension of service to those areas would not have been to "rural areas" as strictly defined in Section 425.03, Florida Statutes, many of those areas would be considered, from a factual standpoint, rural in nature.

FURTHER AFFIANT SAYETH NOT:

LEIGH V. GRANTHAM

STATE OF FLORIDA

COUNTY OF LEON

SWORN TO AND SUBSCRIBED BEFORE ME this 16th day of May, 2011, by affiant, who is personally known to me or who produced _____ driver's license as identification, and who took an oath.

Barbara Morton
Notary Public, State of Florida

(SEAL)

My Commission Expires 3/29/13

BARBARA MORTON
Commission # DD 872820
Expires March 29, 2013
Bonded Thru Troy Fain Insurance 800-385-7019