BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Florida Electric Cooperatives Association, Inc.

Appellant,

v.

The Florida Public Service Commission, Art Graham, in his official capacity of Chairman of the Florida Public Service Commission; and Lisa Polak Edgar, Ronald A. Brisé, Julie Imanuel Brown, and Eduardo E. Balbis, in their official capacities as Commissioners of the Florida Public Service Commission

Appellees.

Docket No. 100304-EU

In re: Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.

NOTICE OF ADMINISTRATIVE APPEAL

NOTICE IS GIVEN that the Florida Electric Cooperatives Association, Inc. ("FECA"), Appellant, appeals to the Florida Supreme Court the Florida Public Service Commission's Order No. PSC-11-0340-FOF-EU, *Order Resolving A Territorial Dispute And Awarding Territory In Okaloosa County To Gulf Power Company*, rendered on August 15, 2011, in the above-referenced docket. The nature of the order is a final order awarding the right to serve certain territory in Okaloosa County, Florida to Gulf Power Company. A conformed copy of said Order is attached hereto.

Respectfully submitted,

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Florida Bar No. 302066
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COM ____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was furnished by U. S. Mail this 13th day of September, 2011, to the following:

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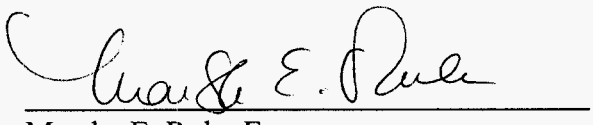

Marsha E. Rule, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.	DOCKET NO. 100304-EU ORDER NO. PSC-11-0340-FOF-EU ISSUED: August 15, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ

ORDER RESOLVING A TERRITORIAL DISPUTE AND AWARDING TERRITORY IN OKALOOSA COUNTY TO GULF POWER COMPANY

APPEARANCES:

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On behalf of Choctawhatchee Electric Cooperative, Inc.

RUSSEL A. BADDERS and STEVEN R. GRIFFIN, ESQUIRES, Beggs and Lane, 501 Commendencia Street, Pensacola, Florida 32502
On behalf of Gulf Power Company.

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On behalf of Florida Electric Cooperatives Association, Inc.

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On behalf of the Florida Public Service Commission (Staff).

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Advisor to the Commission

BY THE COMMISSION:

I. Background

This proceeding involves a territorial dispute between Choctawhatchee Electric Cooperative, Inc. (CHELCO) and Gulf Power Company (Gulf) in Okaloosa County for service to the Freedom Walk development (Freedom Walk or development).

Our jurisdiction to resolve territorial disputes is governed by Sections 366.04(2)(e) and (5), Florida Statutes (F.S.). Section 366.04(2)(e), F.S., grants us the power:

> [t]o 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.

Section 366.04(5), F.S., gives us:

> 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.

To implement the above statute, Rule 25-6.0441, Florida Administrative Code (F.A.C.), requires each party to the dispute to file certain information including a description of the disputed area, a description of the existing and planned load to be served in the area, and a description of the type, costs, and reliability of facilities and services to be provided within the disputed area. Rule 25-6.0441(2), F.A.C., provides that, in resolving territorial disputes, we may consider, but not be limited to consideration of:

> (a) The capability of each utility to provide reliable service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
> (b) The nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
> (c) The cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and
> (d) Customer preference if all other factors are substantially equal.

On May 24, 2010, CHELCO filed with us its Petition to Resolve a Territorial Dispute (Petition) between it and Gulf involving Freedom Walk.[1] On June 18, 2010, Gulf filed its answer to that Petition.

On February 11, 2011, Gulf filed its first Motion for Summary Final Order (First Motion).[2] However, on April 25, 2011, Gulf withdrew its First Motion, "reserving its right to re-file another Motion for Summary Final Order following the close of discovery in this proceeding." Gulf filed its second Motion for Summary Final Order on May 6, 2011 (Second Motion).[3] Further, on May 9, 2011, Gulf filed its Motion to Strike certain portions of CHELCO's testimony.

A Prehearing Conference was held on May 9, 2011, which resulted in the issuance of Order No. PSC-11-0217-PHO-EU (Prehearing Order). The Prehearing Order noted the two pending Gulf motions, set forth the agreements reached by the parties, and set out the decisions reached by the Prehearing Officer for conducting the formal hearing scheduled for May 17, 2011.

One day prior to commencement of the formal hearing, the Florida Electric Cooperatives Association, Inc. (FECA) filed its Petition for Leave to Intervene and Respond to Gulf's Motion for Summary Final Order (Second Motion). Attached to the petition was an affidavit alleging certain factual matters and issues.

At the beginning of formal hearing held on May 17, 2011, Gulf withdrew its Motion to Strike. In regards to FECA's Motion to Intervene, neither CHELCO nor Gulf objected to this intervention. However, Gulf argued that the prefiling of testimony and identification of issues was complete, and that FECA should have to take the case as it finds it and not be allowed to add any issues or testimony. Based on the above, we allowed FECA to intervene, but noted that FECA took the case as it found it, and that there was a general prohibition against friendly cross. Also, we denied Gulf's Second Motion for Summary Final Order.

Subsequent to the formal hearing, all parties timely filed their briefs/post-hearing statements on June 9, 2011. This Order addresses the appropriate disposition of the territorial dispute between CHELCO and Gulf.

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[1] Freedom Walk is a Community Development District created by Ordinance No. 1378, consisting of approximately 179 acres (undeveloped), and is projected to contain 489 single-family and 272 multi-family lots, a YMCA, commercial outlets, an upscale clubhouse, ponds, nature trails and various other urban characteristics such as sidewalks, underground utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection.

[2] In this First Motion, Gulf argued that a Summary Final Order in its favor was appropriate because CHELCO was precluded as a matter of law from serving Freedom Walk.

[3] Again, Gulf argued that a Summary Final Order in its favor was appropriate because CHELCO was precluded as a matter of law from serving Freedom Walk.

II. Approved Stipulations

We found that the stipulations reached by the parties and supported by our staff were reasonable, and accepted the stipulated matters set forth below at the hearing.

> (1) The parties stipulated that the cost of necessary facilities for CHELCO and Gulf to provide adequate and reliable service within the Freedom Walk development is that set forth by each of the parties as to its respective cost. Therefore, there was no additional testimony or evidence presented at the hearing as to these costs.

III. Boundaries of the Area That is the Subject of This Territorial Dispute

In December 2007, pursuant to Chapter 190, F.S., the City of Crestview (City) enacted Ordinance Number 1378 which established a Community Development District (CDD), known as the Freedom Walk Community Development District (Freedom Walk or development). According to the Ordinance, the CDD encompasses approximately 179 acres within the city limits of Crestview. A preliminary plat of the development, prepared by the developer's consultant, includes three additional contiguous out-parcels totaling five acres which are not within the CDD. While there is no dispute as to whether the CDD is a part of the disputed area in CHELCO's Petition, the parties do not agree as to whether the additional out-parcels, outside of the CDD but included in the preliminary plat of the development, were included in CHELCO's Petition and, therefore, should be considered part of the disputed territory.

For this issue, although FECA took a position, it provided no argument under this issue in its Post-Hearing Brief.

A. CHELCO's Argument

According to CHELCO, the area in dispute includes the entire Freedom Walk development as depicted on the proposed plat prepared by the developer's consultant. In its Petition, CHELCO described the boundaries of the area to be ". . . located in north Crestview, Florida, west of Highway 85N and south of Old Bethel Road . . . ." Each of the aerial exhibits attached to the Petition contains an overlay of the proposed plat provided to CHELCO by Moore-Bass, the consulting engineer for Freedom Walk. That same Moore-Bass plat was also provided to CHELCO by Gulf through discovery. Although CHELCO acknowledges that the plat may not be final, CHELCO states that it had no other plat when it filed its Petition.

Exhibit A to the Petition is a map showing the overlay of the entire development which was prepared from the development plat. The map shows the portion of the development that is included in the city limits, as well as the portion of the development plat that is outside the city limits; the area within the city limits is surrounded by a bold black line. According to CHELCO, the map shows that the disputed area is bounded by Old Bethel Road on the north, Normandy Road on the west, Jones Road on the east, and a metes and bounds description on the south.

CHELCO witness Grantham acknowledged that a portion of the disputed area is not owned by the developer of Freedom Walk and falls outside of Crestview's city limits. However, the witness opined that the development could extend beyond the city limits if the developer purchases the out-parcels in the future and includes them in the Freedom Walk subdivision. She further testified that this area could, then, eventually be annexed into the city limits. CHELCO witness Avery noted that the plat has not been approved by Okaloosa County, was preliminary in nature, and could be changed. Witnesses Grantham and Avery testified that CHELCO serves three members which represent four active accounts located on the out-parcels.

In its brief, CHELCO argues that Gulf "has gone to great lengths to parse words to demonstrate that CHELCO did not really mean" its position on what constitutes the area in dispute. Further, CHELCO argues that Gulf "devotes much effort to convince the Commission that, despite the massive body of evidence as to the boundary of the development to which the developer expects service to be provided, CHELCO really meant to limit the area in dispute to that within the 'bold black line' on Exhibit 'A' to the Petition." However, CHELCO notes that "[n]owhere in the Petition is there any reference to a 'bold black line.'" Rather, the Petition, and every pleading filed subsequent thereto, "is clear that the area in dispute includes all of the roads, cul-de-sacs, and lots in Freedom Walk as depicted by the developer, including those within the 'bold, black lines.'" CHELCO points out that the CDD that Gulf relies on as evidencing the appropriate boundaries does not include any portion outside of the city limits, "since the CDD ordinance would only be effective within the municipal limits." Also, a June 2010 map prepared by Gulf shows that Gulf anticipates providing service to lots within the areas described as out-parcels and is consistent with the Freedom Walk boundary in CHELCO's petition. According to CHELCO, the obvious reason for the disagreement is that Gulf's position allows it to ignore the fact that CHELCO currently provides service to members within the boundary of the disputed territory.

B. Gulf's Argument

Gulf's position is that the disputed area is limited to the CDD, which is within the city limits of Crestview. According to Gulf, paragraph 6 of CHELCO's Petition "states that the boundaries of the disputed area are set forth on Exhibit 'A,' that '[t]he development is within the City of Crestview's corporate limits,' and that the area immediately surrounding the proposed development is '[n]ow within the city limits of . . . Crestview.'" The bold black lines shown on Exhibit A reflect the boundaries of the development within the city limits of Crestview and clearly do not encompass the unincorporated out-parcels that CHELCO now claims are part of the development. The legend on Exhibit A does not speak to the purpose of the bold black lines. However, any question as to whether the bold black lines are intended to reflect CHELCO's understanding of the development's boundaries is resolved by the legend at the bottom of Exhibits C and D to CHELCO's Petition. The legends on these exhibits clearly state that the bold black line is intended to reflect the Freedom Walk Property. The Petition's description of the development being located within the Crestview city limits is consistent with CHELCO Supervisor of Engineering Mike Kapotsy's description of the development in a February 19, 2008 email. In that email, Mr. Kapotsy noted, in part, as follows: "[I]t has come to my attention

that there is a project in Crestview city limits that falls within our service territory." (emphasis added)

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

According to Gulf, having clearly acknowledged in its Petition that the Freedom Walk development is "within the City of Crestview's corporate limits," CHELCO cannot depart from its pleadings. Gulf alleges that by CHELCO's own pleadings, the Freedom Walk development area is located entirely within the City of Crestview's corporate limits and is therefore not "rural" as defined by Section 425.03(1), F.S. However, at the hearing, CHELCO took the position that a small portion of the development will fall outside of the present city limits.

Witness Spangenberg disagrees with CHELCO's witnesses concerning whether the three contiguous parcels totaling five acres that are not currently owned by the developer should be included in the disputed area. The out-parcels are depicted on the preliminary plat of the development which has not been approved for final use. As explained by Gulf witness Spangenberg, these unincorporated out-parcels are not owned by the developer, are not included within the boundaries of the Freedom Walk CDD established for the development pursuant to Chapter 190, F.S., are not currently within the municipal limits of the City of Crestview, and represent only three percent of the development. Nevertheless, witness Spangenberg asserted, even if it is determined that these out-parcels will, at some point, be part of the Freedom Walk development, their inclusion would not have any impact on the nature or character of the disputed area as they would possess all of the same urban amenities and characteristics as the rest of the development.[4]

C. Commission Analysis and Conclusion

CHELCO's position is that the area in dispute should be the area depicted on the preliminary development plat, which includes the out-parcels not within the CDD or the city

[4] See Order No. 7961, issued September 16, 1977, in Docket No. 760510-EU, In re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company (Suwannee Valley I), ("A subdivision located in the unincorporated area of an immediately adjacent urban area does not exist as a social, economic or commercial unit separate and apart from the adjoining municipality. Such an area would normally be considered part of the suburban territory of the municipality and therefore would not fall within the definition of 'rural area' as stated in section 425.03(1) F.S.")

limits. CHELCO argues that the development could extend beyond the city limits if the developer purchases the out-parcels and includes them in the Freedom Walk CDD.

Gulf argues that the area should be the metes and bounds legal description as described in the CDD, which is within the city limits and which is depicted on Exhibit A to CHELCO's Petition. We find that CHELCO's argument is not compelling because no evidence was provided to show: (1) that the developer would purchase these out-parcels; (2) that the developer would include them in the Freedom Walk development; and (3) that the out-parcels would eventually be annexed into the city limits. We find that Gulf's argument is persuasive because the area, as defined within the CDD, is owned by the developer.

Based on the evidence, we find that the boundaries of the disputed area are the metes and bounds description of the Freedom Walk CDD as depicted within the bold black lines on Exhibit A to CHELCO's Petition. We note that CHELCO is currently serving the out-parcels; and, if the ultimate determination is that the area contained within the CDD should be served by Gulf, it will have no impact on CHELCO's ability to continue serving the out-parcels.

IV. Commission's Jurisdiction to Enforce or Apply Provisions of Chapter 425, F.S.

The applicability of Chapter 425, F.S., was primarily raised by Gulf. Therefore, we will consider Gulf's arguments first. CHELCO's and FECA's arguments were primarily in response to Gulf's arguments.

A. Gulf's Argument

Based on the definition of "rural" found in Section 425.03(1), F.S., Gulf argues that "CHELCO does not possess the legal authority to serve the development . . .," and that the "Freedom Walk development will unquestionably be non-rural and urban in nature . . . ." Gulf notes as follows:

> Chapter 425, Florida Statutes, is known as the Rural Electric Cooperative Law. See, § 425.01, Fla. Stat. The Rural Electric Cooperative Law sets forth the purpose, powers, and duties of rural electric cooperatives operating in the State of Florida. Section 425.02, Florida Statutes, titled "*Purpose*" provides that rural electric cooperatives such as CHELCO are organized for the sole purpose "[o]f supplying electric energy and promoting and extending the use thereof in rural areas." § 425.02, Fla. Stat. (emphasis supplied) Section 425.03(1), Florida Statutes, defines a "rural area" as "[a]ny area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." § 425.03(1), Fla. Stat. Section 425.04(4), Florida Statutes, titled "*Powers*" further provides that a cooperative shall have the power "[t]o generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions,

> and to other persons not in excess of 10 percent of the number of its members." § 425.04(4), Fla. Stat.

(emphasis supplied by Gulf)

Citing Order No. PSC-92-1468-FOF-EU[5] and Section 366.04(2)(e), F.S., Gulf notes that we possess "exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and other utilities." Gulf also notes that Section 366.04(2)(e), F.S., "sets forth a number of factors, including the 'nature of the area involved,' which we may consider in resolving territorial disputes," but that by the plain language of the statute, "the Commission is not limited to consideration of the factors listed in the statute in resolving territorial disputes. See West Florida Electric Coop. v. Jacobs, 887 So. 2d 1200, 1203, 1205 (Fla. 2004) . . . [B]ecause the listed factors are not exclusive, the commission is free to consider other factors." This would also be true of the factors listed in Rule 25-6.0441, F.A.C.

Gulf argues in its brief that:

> a utility's basic legal authority to serve an area in dispute is clearly a threshold matter which must be resolved by the Commission in exercising its jurisdiction to resolve territorial disputes under Section 366.04(2)(e) and to plan, develop and coordinate the electric power grid under Section 366.04(5), F.S.[3]
>
> [3]CHELCO contends that the Commission lacks jurisdiction to consider and apply Chapter 425, Florida Statutes. [TR 82, 84-85, 207, 209-10] This contention cannot be reconciled with the long line of Commission precedent cited herein which does just that. Moreover, it is important to recognize that the Commission is only being asked to apply Chapter 425 in the exercise of its exclusive jurisdiction to resolve territorial disputes under section 366.04, Florida Statutes –not in a broader context. CHELCO's jurisdictional argument begs an important question. Even CHELCO acknowledges that Chapter 425 places some limitations on cooperatives' abilities to serve non-rural areas. [Hearing Exhibit 49, March 30, 2011, Deposition of Leigh Grantham, p. 50, lines 5-12] Given that acknowledgment and given the Commission's exclusive jurisdiction over territorial disputes, CHELCO's position would result in no forum having jurisdiction to apply Chapter 425 in the context of territorial disputes. This result is untenable and is precisely why numerous Commissions have applied Chapter 425 in past disputes and why this Commission should do so in the present dispute.

Moreover, citing Order No. 12324,[6] Gulf notes that we are aware that Chapter 425, F.S., places limitations on the purpose and powers of Florida's rural electric cooperatives, and that we have stated the provisions of that chapter should be strongly considered in determining whether a cooperative should serve a particular area.

Gulf notes that in Tampa Electric Co. v. Withlacoochee River Cooperative. (Withlacoochee), the Florida Supreme Court held that:

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[5] Issued December 17, 1992, in Docket No. 920949-EU, In re: Joint Petition of Florida Power Corporation and Sebring Utilities Commission . . . .

[6] Issued August 4, 1983, in Docket No. 830271-EU, In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation (hereinafter Suwannee Valley II).

> [i]t is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory.

(122 So. 2d 471, 473 n.6 (Fla. 1960) -- emphasis by Gulf). See also, Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1384 (Fla. 1982) (Escambia River), and Order No. 7961, issued September 16, 1977, in Docket No. 760510-EU, In Re: Complaint of Suwannee Valley Electric Cooperative, Inc. against Florida Power & Light Company (Suwannee Valley I).

In concluding its argument on this issue in its brief, Gulf cites to five different orders[7] where it claims we have "repeatedly required a threshold determination in cooperative territorial disputes of whether the area in dispute is 'rural' in nature." Citing Order No. 13668 in its brief, Gulf states that we "observed as follows: 'In the past, we have looked to whether the area is urban in determining whether a cooperative is precluded from serving the area. In this case, because the area is rural, we find that the cooperative is not legally prohibited from serving the area.'" (emphasis by Gulf) Later in that same order, Gulf noted that we determined that the evidence showed the area in dispute was rural, and, "[a]s such, Chapter 425 would permit Gulf Coast to serve the disputed area." (emphasis by Gulf) Similarly, in Order No. 12858, Gulf notes that we concluded that "[b]ecause the disputed area has been determined to be rural for purposes of this proceeding, Chapter 425 does not prohibit the cooperative from serving it." (emphasis by Gulf)

In Order No. 16105, Gulf notes that we stated the following:

> The area has no urban characteristics at all. It is unincorporated, and has less than 2500 inhabitants; the nearest urban centers are Chipley and Southport, which are approximately 18 miles away. There is only one paved road within the subdivision boundary. There are no municipal services such as fire protection, water systems, sewer systems, sanitary systems, police protection, storm water drainage, post offices and no other utilities, except possibly telephone service. The "nature of the area" is raised as an issue because of its reference in Section 366.04(2)(e), Florida Statutes. We find that the disputed area is rural for the

[7] Order No. 13668, issued September 10, 1984, in Docket No. 830484-EU, In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc.; Order No. 12858, issued January 10, 1984, in Docket No. 830154-EU, In re: Petition of Gulf Power Company Involving a Territorial Dispute with Gulf Coast Electric Cooperative; Order No. 16105, issued May 13, 1986, in Docket No. 850247-EU, In re: Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Company in Washington County; Order No. 15322, issued November 1, 1985, in Docket No. 850048-EU, In re: Petition of West Florida Electric Cooperative Association, Inc. to Resolve a Territorial Dispute with Gulf Power Company in Washington County; Order No. 18886, issued February 18, 1988, in Docket No. 870235-EI, In re: Petition of Gulf Power Company to Resolve a Territorial Dispute with West Florida Electric Cooperative, Inc. in Holmes County.

> purposes of this docket. In the past, we have looked to whether the area is urban in determining whether a cooperative is precluded from serving the area. In this case, because the area is rural, we find that the cooperative is not legally prohibited from serving the area.

(emphasis by Gulf) See also, Order No. 15322, where we stated: "In the past, we have looked to the urbanization of a disputed service territory in determining whether a Cooperative is precluded from serving the area. We find that the area lacks sufficient urban characteristics which would exclude electric service by the Cooperative." (emphasis by Gulf) Finally, in Order No. 18886, Gulf quotes that Order as follows: "[t]he rural nature of the area, although somewhat mitigated by the area's proximity to the Town of Ponce de Leon, qualifies it as an area that both utilities are able to serve." (emphasis by Gulf)

In each of the five orders cited immediately above, Gulf notes that we "determined that a cooperative was not legally prohibited from serving a disputed area because of the area's rural nature." Under this same precedent, Gulf argues that "CHELCO would be legally prohibited from serving Freedom Walk if it is found to be non-rural or urban in nature." Based on the record evidence, Gulf argues "there can be no doubt that the Freedom Walk area is presently not 'rural' as that term is defined in section 425.03(1) and will be quite urbanized as that term is used in section 366.04(2)(e) and the Commission's rule." Therefore, by application of the above, Gulf argues that CHELCO is legally barred from providing service.

B. CHELCO's Argument

Citing Order No. 18886, one of the orders previously cited by Gulf above, CHELCO notes that we stated as follows:

> This criteria relates only to Chapter 425, Fla. Stats., which grants no rights under our jurisdiction over territorial disputes.[8]

Order 18886, at 13 (emphasis by CHELCO) CHELCO notes that despite our being given no authority in regards to Chapter 425, F.S., that Gulf is arguing that based on the definition of "rural area" found in Section 425.03(1), F.S.,[9] CHELCO is precluded from serving the disputed Freedom Walk territory. CHELCO notes that Gulf argues Freedom Walk is not a "rural area" because most of it is within the city limits of Crestview. CHELCO believes that this argument ignores Section 425.04(4), F.S., which "authorizes cooperatives to serve members, entities, and persons, including 'other persons not in excess of 10 percent of the number of its members.'" CHELCO's analysis of Sections 425.03 and 425.04, F.S., is set out below.

However, as regards our enforcing or applying the provisions of Chapter 425, F.S., CHELCO notes that we were "created by the legislature to exercise regulatory jurisdiction over

[8] There was a discussion of whether the school board's membership in the cooperative was a dispositive factor – we found that it was only applicable to Chapter 425, F.S., and made the statement as shown.
[9] 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."

public utilities under the standards and to the extent established in Chapter 366, F.S.," and that as regards cooperatives, we only have very limited authority pursuant to Sections 366.11, 366.04(2)(e) and (5), F.S. Moreover, as regards to Chapter 425, F.S., neither in Chapter 366, F.S., nor in Chapter 425, F.S., are we granted an interpretive or regulatory authority over Chapter 425, F.S. As regards the exercise of our jurisdiction, CHELCO cites the case of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973), in which the Florida Supreme Court held that:

> All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission. . . . As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . and the further exercise of the power should be arrested. The Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities. Throughout our history, each time a public service of this state has been made subject to the regulatory power of the Commission, the Legislature has *first* enacted a comprehensive plan of regulation and control *and then conferred upon the Commission the authority to administer such plan.*

Id. at 495-496 (Emphasis in original)(Citations omitted); See also, Lee County Elec. Coop. v. Jacobs, 820 So. 2d 297, 300 (Fla 2002).

CHELCO argues that Section 366.04(2)(e), F.S., establishes our jurisdiction to be one of determining:

> 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 by CHELCO) Although CHELCO admits that we are not limited to those precise items, CHELCO argues that pursuant to the generally accepted doctrines of statutory construction of *ejusdem generis* and *noscitur a sociis*, "the breadth of the Commission's review is limited to those areas of inquiry reasonably related to the listed criteria over which jurisdiction has been conferred by Section 366.04, F.S." In Quarantello v. Leroy, 977 So. 2d 648, 652-653 (Fla. 5th DCA 2008), the Florida Fifth District Court of Appeal defined the above-noted doctrines as follows:

> This interpretation is consistent with the statutory canon of *ejusdem generis*, which means that "where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated[.]"
> . . .

> The doctrine of *ejusdem generis* is "actually an application of the broader maxim *'noscitur a sociis'* which means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the specific words."

(citations omitted). See also, State v. Hearns, 961 So. 2d 211 (Fla. 2007); Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201 (Fla. 2003); and Green v. State, 604 So. 2d 471 (Fla. 1992) (Noting that this rule of construction is well-established and uniformly applied). Thus, CHELCO argues that we "should consider those factors that are reasonably related to those listed in Section 366.04, F.S., and not go far afield as urged by Gulf Power."

Based on the above, CHELCO argues as noted in Order No. 18886, this Commission was correct in that regards to territorial disputes, there is nothing:

> that grants jurisdiction to the Commission to engage in a broad exercise of construing Chapter 425, F.S., to determine the overall scope of the rights, powers, and duties of rural electric cooperatives, or to enforce or apply provisions of Chapter 425, F.S. Rather, the Commission is limited to those inquiries reasonably related to determining "the ability of the utilities to expand services within their own capabilities and the nature of the area involved."[10]

C. FECA's Argument

FECA argues that our jurisdiction to resolve territorial disputes was created by the Grid Bill, which, for the first time, gave this Commission limited jurisdiction over electric cooperatives and municipals for territorial and grid issues. FECA alleges that the we are expressly required to resolve territorial disputes pursuant to the provisions of Sections 366.04(2)(e) and (5), F.S. Section 366.04(2)(e), F.S., lists several factors we may consider when resolving disputes, and FECA acknowledges that other factors may be considered. FECA notes that Section 366.04(5), F.S., gives us [j]urisdiction over 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."

FECA also notes that Chapter 366, F.S., "does not include any references to Chapter 425." Citing the same case as CHELCO, City of Cape Coral, at 496, FECA argues that our "powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." FECA argues that nowhere in either Chapter 366 or 425, F.S., are we given any authority to enforce Chapter 425, F.S.

FECA does admit that in the past, we have "looked to Chapter 425 to determine whether an area is rural in nature for resolving a dispute between a cooperative and another utility." However, FECA concludes its argument on this issue by stating:

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[10] The above quotation is from CHELCO's Brief, page 8, and not Order No. 18886.

> [T]he Commission has always recognized that it must resolve the dispute pursuant to Chapter 366. The Commission has no powers to enforce Chapter 425, but has discretion to consider Chapter 425 and other factors when resolving disputes, and it cannot resolve a dispute in such a way that it conflicts with any portion of the Grid Bill.

D. Commission Analysis and Conclusion

Gulf takes the position that in exercising our jurisdiction to resolve territorial disputes pursuant to Section 366.04, F.S., we must, as a threshold matter, determine whether a cooperative has the authority to serve the development. If the disputed area is not a "rural area," as defined in Section 425.03(1), F.S., Gulf argues, "Chapter 425 presents a complete bar to Chelco's serving the development."

CHELCO and FECA take the position that our only jurisdiction, authority, and power come from Sections 366.04(2)(e) and (5), F.S., and that we have no jurisdiction to engage in statutory construction regarding the overall scope of the rights, powers and duties of rural electric cooperatives, or to enforce or apply the provisions of Chapter 425, F.S., in the context of the instant territorial dispute.

As noted by CHELCO and FECA, we, as a creature of statute, derive our power solely from the Legislature. See United Telephone Co. of Florida Public Service Commission, 496 So. 2d 116 (Fla. 1986); and City of Cape Coral, at 496. Any reasonable doubt as to the lawful existence of a particular power must be resolved against our exercise thereof, and the further exercise of the power should be arrested. Id. at 496; see also Florida Bridge Company v Bevis, 363 So. 2d 799 (Fla. 1978).

Our grant of jurisdiction over rural electric cooperatives includes the approval of territorial agreements and resolution of territorial disputes under Section 366.04(2)(e), F.S., which states that we have jurisdiction:

> (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.[11]

As previously noted, Section 366.04(5), F.S., also provides that we "shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic duplication of

[11] Rule 25-6.0441, F.A.C., also addresses the factors to be considered in resolving a territorial dispute.

generation, transmission, and distribution facilities." Nothing in Chapter 425 or 366, F.S., grants us any power, authority, or jurisdiction under Chapter 425, F.S.

There is case law that interprets provisions of Chapter 425, F.S., in territorial disputes, in the context of the analysis required by Section 366.04(2)(e) and (5), F.S.[12] The Florida Supreme Court ruled that Section 366.04(2)(e), F.S., lists the factors that we should use in our evaluation of a territorial dispute between a privately owned utility and a rural electric cooperative and we have routinely considered those factors.[13]

In the Withlacoochee case,[14] the Florida Supreme Court interpreted the intent of Section 425.04(4), F.S., to preclude a rural electric cooperative from providing electricity to an area which was already receiving adequate central station service from Tampa Electric Company (TECO).[15] In that case, the chancellor had granted TECO's request for injunctive relief (restraining order) based on an interpretation of Section 425.04(4), F.S. However, based on a lack of standing, the District Court of Appeal (DCA) overturned the chancellor's order, and TECO appealed this decision to the Florida Supreme Court. The Florida Supreme Court ruled that TECO did have standing to seek such an injunction, quashed the orders of the DCA, and remanded for further proceedings in the Circuit Court of the Sixth Judicial Circuit.

Thereafter, the Florida Supreme Court interpreted Withlacoochee in Escambia River Electric Coop. v. Florida Public Service Commission, 421 So. 2d 1384 (Fla. 1982) (Escambia River). In Escambia River, the Court noted that, after consideration of Sections 366.04(2) and (5), F.S., we had found that no factual or equitable distinction exists in favor of either utility, and pursuant to the precedent in Withlacoochee resolved the dispute in favor of the privately owned utility. The Florida Supreme Court agreed that this was appropriate. We believe that this amounts to what would be called "a tiebreaker situation," i.e., all things being equal when it comes to the provision of service, then the investor-owned utility should be favored over the cooperative.

In Order No. 7961, Suwannee Valley I, even though the area in dispute was outside the city limits of Live Oak, and would appear to meet the definition of "rural area" found in Section 425.03(1), F.S., we found, applying the factors in Section 366.04(2)(e), F.S., that it was more urban in nature and awarded the area to what was then Florida Power Corporation. Also, in Order No. 7516,[16] the Bluewater Bay Order, Gulf argued that the area was likely to become

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[12] See Order Nos. 7961, 13668, 7516, 12324, 18886, etc.
[13] See Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092, 1094 (Fla. 1985).
[14] Cite is on page 8 of this Order.
[15] Section 425.04(4), F.S., provides in pertinent part: "However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing in 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."
[16] Issued November 19, 1976, in Docket No. 74551-EU, In re: Choctawhatchee Electric Cooperative v. Gulf Power Company (Bluewater Bay).

urbanized and that the area should be awarded to it. We rejected this argument as being too speculative, and awarded the area to CHELCO.

We believe the five Commission orders[17] cited by Gulf at the end of its argument should be addressed. All five of these orders reference Chapter 425, F.S., and find that the cooperative is not precluded from serving the disputed area because the area was "rural" in nature. However, in all five of the orders we did not appear to rely on Chapter 425, F.S., but, instead, relied on the provisions of Section 366.04(2)(e), F.S. Also, in all five orders, we either found that the area in question was rural or lacked sufficient urban characteristics, and, as such, the cooperative would not be precluded from serving on that basis. Further, even though in each instance we found the area in question was either rural or lacked sufficient urban characteristics, the cooperative was awarded the service area in only one instance, Order No. 13668, and this appeared to be based on the cooperative having lower costs. In reviewing the case law and our orders, we can find no order where we, in any territorial dispute, denied a cooperative the right to serve solely based on the definition set out in Section 425.03(1), F.S. Whether you consider Chapter 366 or Chapter 425, F.S., if the disputed area fails to meet the statutory definition of a "rural area" found in Section 425.03(1), F.S., we find this would not act as an absolute bar to the cooperative serving that area. As set forth in Section 366.04(2)(e), F.S., we should still determine "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." Therefore, we find that we have considered the definition of "rural area" found in Section 425.03(1), F.S., not as a threshold factor, but in the context of applying the criteria outlined in Sections 366.04(2)(e) and (5), F.S.

Further, none of the factors listed in Sections 366.04(2)(e) or (5), F.S., appear to be absolutely controlling. We consider all the factors in reaching any final decision. In Gainesville-Alachua County Regional Elec., Water and Sewer Utils. Bd. v. Clay Elec. Coop., Inc., 340 So. 2d 1159 (Fla. 1976), the Court upheld our Order No. 7040 that resolved a territorial dispute in favor of the cooperative. Pursuant to Section 366.04(2)(e), F.S., our decision was based on analysis of the ability of the utilities to expand services, the nature of the area including the degree of urbanization, its proximity to other urban areas, and reasonably foreseeable future requirements of the area for other utility services. In discussing the nature of the area, we noted that:

> Therefore, it cannot be said that this area has achieved any substantial degree of urbanization. Conversely, the Copeland Settlement meets the statutory definition of "rural area" which under the Rural Electric Cooperative Law "means any area not included within the boundaries of any incorporated or unincorporated city, town, village or borough having a population in excess of twenty-five hundred persons." Section 425.03(1), Florida Statutes.

Order No. 7040, p. 6.

[17] Orders Nos. 13668, 12858, 16105, 15322, and 18886.

In Order No. 7516, the Bluewater Bay Order, we ruled in favor of the cooperative rejecting Gulf's argument that the provisions of Section 425.02, F.S., stating the purpose of cooperatives was to provide service to rural areas, and Section 425.03(1), F.S. defining rural area, would require the cooperative to abandon service to the area should the area become "urbanized." We found that Section 425.02, F.S. was not "an obstacle to service in the area by Chelco, where the criteria enumerated in Section 366.04(2)(e), Florida Statutes, and other relevant considerations indicate that such should be the result."

By Order No. 12324, Suwannee Valley II, we indicated that the provisions of Chapter 425, F.S., should be strongly considered, but based on all the above, we find that we do not have the power, authority or jurisdiction to enforce or apply the provisions of that chapter. In Order No. 12858, we considered the nature of the area, the ability of the utilities to expand, customer preference, contributions in aid of construction, and whether Gulf Coast's construction of approximately 4,000 feet of line to connect its existing line to the border of the subdivision amounted to an uneconomic duplication of facilities. We also considered the issue of whether Gulf Coast was prohibited from serving the disputed area, and found that Withlacoochee did not prohibit the cooperative from serving in the disputed area because Gulf did not establish that it previously served the disputed area. After considering the above listed factors and issues, we, in ruling on behalf of the cooperative, discussed the provisions of Chapter 425, F.S., and determined that the area was rural in nature.

In Order No. 18886, a case involving a dispute over service to a high school, we stated that the school board's membership in the cooperative was not a dispositive factor as the criteria related only to Chapter 425, F.S., "which grants no rights under our jurisdiction over territorial disputes." Order 18886, at 13.

In consideration of the above, we find that our jurisdiction over rural electric cooperatives in territorial disputes derives from the provisions of Section 366.04(2)(e) and (5), F.S. Further, while we may consider, and have found that we should strongly consider the definition of "rural area" found in Section 425.03(1), F.S., we are not bound by that definition or any provisions found in Chapter 425, F.S., but must proceed pursuant to our jurisdiction over territorial disputes granted by Sections 366.04(2)(e) and 366.04(5), F.S. We fail to see how Gulf can argue that pursuant to Section 366.04(2)(e), F.S., and Rule 25-6.0441, F.A.C., we may consider other factors, and then says once you do consider Chapter 425, F.S., we are bound by the definition of "rural area" found in that chapter.

In conclusion, we find we do not have the statutory authority to enforce or apply the provisions of Chapter 425, F.S. See Lee County Elec. Co-op., Inc. v. Jacobs, 820 So. 2d 297, 300 (Fla. 2002) (The Legislature did not intend for the wholesale rate schedules of rural electric cooperatives to be regulated by the PSC. These cooperatives were intended to be self-governing). Likewise, we have been given no authority to enforce or apply Chapter 425, F.S. However, we have repeatedly considered the provisions of Chapter 425, F.S., and have stated that its provisions should be strongly considered. Therefore, while we have no jurisdiction to enforce or apply the provisions of Chapter 425, F.S., we shall continue to consider those provisions in carrying out our duties under Sections 366.04(2)(e) and (5), F.S. Because we will

continue to consider the provisions of Chapter 425, F.S., we shall address the definition of "rural area" found in Section 425.03(1), F.S., and if the disputed area does not meet that definition, how that affects CHELCO's right to serve the area.

V. Is Freedom Walk Development a "Rural Area" as Defined in Section 425.03(1), F.S.

While we do not have the jurisdiction to enforce or apply the provisions of Chapter 425, F.S., we shall consider the definition of "rural area" found in Section 425.03(1), F.S., as it relates to the Freedom Walk development. As noted earlier in this order, we have accepted Gulf's argument that the disputed area is entirely within the city limits of Crestview, a city with a population greater than 2,500. As such, Gulf argues that the disputed area is completely within the city limits of Crestview, a city with a population greater than 2,500, and therefore does not meet the definition of "rural area" set out in Section 425.03(1), F.S.

CHELCO maintains its argument that "a cooperative is not prohibited from serving within a 'non-rural' area." Further, FECA maintains that we are required to determine "the nature of the area involved" when we resolve a territorial dispute, and that "what is there now is a bunch of trees and dirt roads." FECA further argues that just because an area is annexed into a city does not make that area become non-rural in nature. FECA notes that Section 366.04(2)(e), F.S., utilizes the phrase "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," and believes that it is noteworthy that the Legislature used these phrases and not the term "rural area" that is in Section 425.03(1), F.S. FECA believes that "'nature of the area involved' and 'rural area' are unique terms with different meanings and they should not be randomly substituted for each other in territorial disputes." FECA concludes its argument by saying it is not significant that the disputed area would not be defined as a "rural area," as that term is used in Section 425.03(1), F.S., because "the Grid Bill does not establish a bright line rule regarding cooperatives serving within the corporate limits of a municipality . . . and the Commission cannot resolve this matter in a way that is inconsistent with the Grid Bill."

In consideration of the above, as depicted within the bold black lines of Exhibit "A" to CHELCO's petition, and the metes and bounds description in the Community Development District, we find that the Freedom Walk development is entirely within the city limits of Crestview, a town with a population greater than 2,500. Thus, Freedom Walk would not meet the definition of "rural area" as found in Section 425.03(1), F.S.

VI. If the Freedom Walk Development Is Not Found to be "Rural" in Nature, Is CHELCO Prohibited From Serving the Freedom Walk Development?

Previously, we have found that we do not have the jurisdiction to enforce or apply the provisions of Chapter 425, F.S., but that we have in the past stated that the provisions of Chapter 425, F.S., should be strongly considered. Sections 425.02 and 425.04, F.S., provide in pertinent part:

> 425.02 Purpose.---Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas. Corporations organized under this chapter and corporations which become subject to this chapter in the manner hereinafter provided are hereinafter referred to as "cooperatives."
> * * *
> 425.04 Powers.---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 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 . . . .

A. Gulf's Argument

Gulf argues that by CHELCO's own pleadings (Petition ¶s 6 and 8), the dispute involves "a new development," which "upon buildout will contain both residential and commercial customers," with an anticipated load of 3.7 MW versus an initial load of approximately 112 kW (emphasis by Gulf) Based on these pleadings, Gulf argues that the "'disputed territory' is the planned Freedom Walk development and not simply the land as it exists in its present state." (emphasis by Gulf) Gulf then cites portions of CHELCO's prefiled testimony and deposition testimony where CHELCO's witnesses discuss the planned development of Freedom Walk.

Gulf claims that because "CHELCO's Petition plainly frames the dispute as relating solely to Freedom Walk, as fully developed, . . . CHELCO cannot permissibly take the contrary position that the 'disputed territory' is a wooded, non-urbanized tract." Citing its own testimony, which it alleges is uncontroverted, Gulf states that Freedom Walk "will be a substantial, urbanized mixed-use development, not sand and trees," "will be located within the City of Crestview," and "will contain 489 single-family and 272 multi-family lots, a YMCA, commercial outlets, an upscale clubhouse, ponds, nature trails and various other urban characteristics such as sidewalks, underground utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection." Gulf notes that in Order No. 16106,[18] we found that an area in dispute was rural because it "had 'no urban characteristics at all' due to the number of inhabitants, proximity to other communities, and lack of municipal services such as 'fire protection, water systems, sewer systems, sanitary systems, police protection, storm water drainage, paved streets or post offices, and no other utilities except telephone service.'" (Order No. 16106, pp. 4-5)

[18] Issued May 13, 1986, in Docket No. 850087-EU, In re: Petition of Gulf Coast Electric Cooperative, Inc. against Gulf Power Company.

Based on all the above, Gulf concludes that "the Freedom Walk development area is presently non-rural and will be highly urbanized in nature." Therefore, Gulf argues that "CHELCO is prohibited as a matter of law from serving it," and the disputed territory should be awarded to Gulf.

As argued earlier in this Order, Gulf concludes "that the non-rural nature of the Freedom Walk development imposes a complete bar to CHELCO's serving new members in the area," and "does not believe it is necessary for the Commission to reach a determination on what has been described in testimony as the '10 percent limitation.'" However, if we disagree that Chapter 425 acts as a complete bar, Gulf argues that CHELCO is presently serving persons in non-rural areas which are "in excess of 10 percent of its total membership." Citing Section 425.04(4), F.S., and Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F.2d 789 (11th Cir. 1982) (Alabama Electric Cooperative), Gulf states that rural electric cooperatives are allowed to serve only up to ten percent non-rural membership. Admitting there is little case law on this "10 percent limitation" exception, Gulf states that it believes the purpose of this statutory provision "was intended to prevent rural cooperatives from being forced to relinquish service to existing members in areas that evolve from being rural to non-rural over time, through municipal annexation or otherwise." Gulf argues this would be consistent with other rural electric cooperative statutes, such as South Carolina's, which include provisions to protect against just such a situation.

Because the instant case does not involve relinquishment of service to existing customers, but, instead, prospective service to new customers, Gulf argues that resorting to the 10 percent limitation is not necessary. However, should we disagree, Gulf argues that its witnesses provide "conclusive evidence that CHELCO is presently serving a number of members and persons in non-rural areas which exceeds ten percent of its total membership." Gulf notes that as "of February 2011, CHELCO served a total of 34,722 members," with "8 members inside the City of Crestview, . . . 319 members inside the City of DeFuniak Springs,[19] . . . and 4,741 members inside the town of Bluewater Bay," for total members in non-rural areas of 5,068. This number of members is significantly greater than 3,472 (10 percent of 34,722).

Gulf acknowledges that CHELCO disputes that Bluewater Bay is a town and is a non-rural area. Gulf argues that CHELCO ignores the language of Section 425.03(1), F.S., which applies to "any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." (emphasis by Gulf) Gulf notes that "CHELCO further suggests that Bluewater Bay cannot constitute a non-rural area because the Florida Statutes do not provide any definition for an unincorporated city, town, village or borough." Citing Sanders v. State, 35 So. 3d 864, 871 (Fla. 2010), Gulf states that the general principle is that "[w]hen a word in a statute is not expressly defined, it is appropriate to refer to dictionary definitions . . . in order to ascertain the plain and ordinary meaning of the word." Gulf notes that Black's Law Dictionary defines a "town" as: "A center of population that is larger and more fully developed than a village, but that (traditionally speaking) is not incorporated as a city. BLACK'S LAW DICTIONARY 1498 (7th ed. 1999)." Similarly, Gulf notes that the definition of "town" found

[19] Both these cities have populations greater than 2,500, and would therefore not be considered a "rural area" as that term is defined in Section 425.03(1), F.S.

in www.merriam-webster.com/dictionary is: "1. a compactly settled area as distinguished from surrounding rural territory. 2. a compactly settled area usually larger than a village but smaller than a city. 3. a large densely populated urban area."

Based on the above, Gulf argues that Bluewater Bay qualifies as a "town." Further, as regards Bluewater Bay, Gulf notes that: (1) the approximate resident population of Bluewater Bay in 2010 was 10,487; (2) it is an "unincorporated residential and golf resort community located between Niceville and Destin in Okaloosa County, Florida;" (3) it "has substantial non-rural characteristics that include multiple golf courses, marina and other recreational facilities, underground utilities, water, sewer, private parks, along with fire and police services; and (4) "the voters in Bluewater Bay approved the establishment of a Municipal Services Benefit Unit ("MSBU") for their local area," with services including, but "not limited to, law enforcement, fire protection, recreation, garbage collection, sewage collection, indigent health care services, and mental health care services." Gulf argues that all the above support the conclusion that the Bluewater Bay community is not "rural" in nature.

Gulf also notes that its witnesses provided "data on the number of members and persons served by CHELCO in various other non-rural areas such as Greater Freeport, Greater Crestview and Greater DeFuniak Springs," which would make the exceedance even greater if these areas were considered. Because Gulf believes that CHELCO is already in excess of the ten percent limitation, Gulf alleges that this acts as a bar to CHELCO's serving Freedom Walk.

B. CHELCO's Argument

In addition to the nature of the area in dispute, CHELCO argues that the Commission must also consider other factors found in Section 366.04, F.S., such as uneconomic duplication, with none of the individual factors being controlling. Further, CHELCO notes that the term "rural" is not even found or used in Section 366.04, F.S., and that "as a matter of law, CHELCO is not prohibited from serving the Freedom Walk development by virtue of Section 425.02, F.S., or 425.04, F.S., nor does Chapter 425, F.S., prohibit cooperatives from serving areas that are not 'rural areas.'"

CHELCO notes that "[i]f the legislature had intended to apply the Chapter 425, F.S., 'rural area' definition to territorial disputes, it would have done so." Further, CHELCO believes the legislature's failure to use the word "rural" in Sections 366.04(2)(e) and (5), F.S., is significant. In its brief, CHELCO cites to Guckenberger v. Seminole County, 979 So. 2d 407, 409 (Fla 1st DCA 2008), and numerous other cases from other DCAs and the Florida Supreme Court.[20] In Guckenberger, the First DCA stated as follows:

> We have held that "[t]he legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended." *Beshore v. Dep't of Fin. Servs.*, 928 So. 2d 411, 413 (Fla. 1st DCA 2006). Thus, we reject appellant's public policy argument as one more appropriate for the

[20] CHELCO cited numerous Florida Supreme Court and District Court of Appeal decisions, and this one encapsulated the other decisions.

> legislature. *Cf. Thorkelson v. NY Pizza & Pasta Inc.*, 956 So. 2d 542, 544-45 (Fla. 1st DCA 2007) (noting that the "policy implications" of the Legislature's definition of misconduct in section 440.02(18), Florida Statutes, "are for the Legislature, not the courts.").

Guckenberger at 409.

In determining what is meant by "nature of the area" found in Section 366.04(2)(e), F.S., CHELCO turned to the dictionary. CHELCO states that Webster's Ninth New Collegiate Dictionary (1991) defines ''nature'' as "the inherent character or basic constitution of a person or thing: ESSENCE." As regards Freedom Walk, CHELCO argues that this is a factual matter, and that "the definition of a 'rural area' under Section 425.03, F.S., has little to do with the factual 'nature' of the area as urban or rural."

CHELCO states that if we determine we have jurisdiction, using our "authority under Chapter 366, F.S., - to interpret and apply Chapter 425, F.S.," then it points to Section 425.04(4), F.S., which states that cooperatives shall have power:

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

(emphasis added by CHELCO) CHELCO notes that we addressed this section in Order No. 15210,[21] PRECO Order, where we found that:

> Chapter 366, Florida Statutes, specifically gives the Commission jurisdiction over cooperatives for this purpose [territorial disputes]. 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.

(emphasis supplied by CHELCO) CHELCO also alludes to the 10-percent exception noted in the Alabama Electric Cooperative case, wherein the Court stated:

> 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. . . .

[21] Issued October 8, 1985, in Docket No. 840293-EU, In re: Petition of Peace River Electric Cooperative, Inc. against Florida Power & Light Co.

> Consequently, we hold that § 425.04(4) does permit service to some non-rural areas.

(Alabama Electric Cooperative, 684 F.2d at 791-792 -- emphasis by CHELCO)

In regards to the 10-percent exception, CHELCO notes that Gulf would have us "undertake a complete analysis of CHELCO's entire, multi-county service area to determine whether more than 10% of CHELCO's members are served in the boundaries of various political subdivisions, or their 'Greater Areas.'" CHELCO states that this has never been done, and would require this Commission to "consider areas far removed from the territory in dispute to determine the utility best situated to serve," and for which "the Commission has neither the jurisdiction nor the expertise to calculate percentages of cooperative members, to determine undefined and indefinite fringes of population around incorporated areas throughout their service areas, or interpret what, under Florida law, constitutes an 'unincorporated city, town, village or borough.'"

Further, CHELCO notes that it has only 8 members within the city limits of Crestview and 319 members within the city limits of DeFuniak Springs, and that Freeport is a city with a population of less than 2,500, and any members in that city would not count in the 10-percent exception. Therefore, based on total members of 34,727, and 327 (318 plus 8) members within city limits, CHELCO states that it is well below the 10-percent limit.

Also, CHELCO argues that Bluewater Bay is not within the limits of any political subdivision and by definition is a "rural area," and that our decision in Order No. 7516 was correct. Based on our decision in Order No. 7516, CHELCO states that it made a reasonable and good-faith investment to serve Bluewater Bay, but its ability to continue to serve would be jeopardized if we accept Gulf's argument.

In regards to Gulf's creation of something called the "Greater Crestview area" or "Greater DeFuniak Springs area," CHELCO argues that this is wholly arbitrary, subjective, and ignores the cities' own determination of their city limits. CHELCO believes that Gulf is relying on the language in Section 425.03, F.S., that refers to "unincorporated cities, towns, villages or boroughs," but that "Florida law does not define what constitutes an unincorporated city, town, village, or borough." Rather, CHELCO argues that Gulf "has fabricated those areas using its own definition, rather than any established by the legislature or the Commission." Further, CHELCO argues that "until the legislature decides to provide guidance as to the meaning of the term, it is not within the statutory duties of the Commission to create one."

CHELCO also argues that it would not be "compliant with the non-duplication of facilities of the grid bill," would make network planning impossible, and would not be in the best interests of the consumers of this state if we were to accept the arguments of Gulf. Further, CHELCO notes that in none of the cases cited by Gulf is the issue of urban versus rural the sole dispositive issue. Rather, all the criteria found in Sections 366.04(2)(e) and (5), F.S., and Rule 25-6.0441, F.A.C., have been considered. CHELCO argues that Section 366.04(5), F.S., the grid bill, is "the most recent expression of the will of the Legislature establishing the avoidance of uneconomic duplication of facilities as a basic goal of resolving territorial disputes." Noting that

"Gulf has admitted that its service to the disputed territory will result in duplication of CHELCO's existing facilities," CHELCO argues that awarding "the territory to Gulf will create a precedent of encouraging duplication," and that

> such a result is directly contrary to Lee County Electric Cooperative v. Marks, 501 So. 2d 585, 586 (Fla. 1987), in which the Supreme Court held 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 through Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."[22]

(emphasis by CHELCO)

CHELCO concludes that we "should accept a more reasoned application of the law" and allow it "to continue such service as allowed by Section 366.04, F.S. without punishment," and a cooperative "should not be displaced when that area experiences growth." Further, as already noted, "urbanization" is only one factor listed under Section 366.04, F.S., and it is not the only factor. Other factors, including the avoidance of uneconomic duplication of facilities, should be considered, such that a cooperative would be allowed "to use its existing facilities to serve new members in its historic service areas."

C. FECA's Argument

FECA primarily agrees with and reiterates some of the same arguments raised by CHELCO. However, "FECA asserts that Section 425.04 does not impose the ten percent limit that Gulf refers to, but even if it did, the percentage of CHELCO's members that are in non-rural areas is much less than ten percent." Citing an eminent domain case relied on by Gulf for its ten percent test, Alabama Electric Cooperative, 684 F 2d at 792, FECA notes that the "court held Section 425.04(4) 'does permit service to some non-rural areas.'"[23]

While FECA agrees that we have "historically considered Chapter 425 in the territorial disputes where the issue has been raised," it argues that we ultimately "relied on the Grid Bill to resolve the dispute." FECA notes that the "Grid Bill was enacted in 1974 to give us exclusive jurisdiction to resolve territorial disputes," and that it is clear "the Legislature wanted a coordinated grid and wanted to avoid further uneconomic duplication of facilities."

FECA argues that acceptance of Gulf's arguments would create "an absurd result that undermines Section 366.04(5)," and, among other things,

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[22] We had dismissed a complaint of Lee County Electric Cooperative (LCEC), where the customer, a mining company, had built its own lines across its property to receive service from FP&L when it had already been receiving service from LCEC.

[23] FECA states that the Court held only "that the statute allowed the cooperative to serve four municipalities," but "did not determine what the statute prohibits."

> would require other utilities to serve existing and prospective cooperative members by uneconomically duplicating the cooperative's facilities. Even Gulf's witness Mr. Spangenberg admits that this creates a "legal conundrum" that would have to be resolved.

Quoting Gulf witness Spangenberg, FECA notes "that '[a]reas can change in character over time and those that do typically change from rural to urban.'"

Taking the City of Freeport as an example of the "legal conundrum" that would be created by accepting Gulf's interpretation of Chapter 425 as it relates to the Grid Bill, FECA notes that Gulf's "closest facilities are somewhere between 8 and 25 miles away." However, Gulf asserts:

> that Freeport is not a rural area under Section 425.03 . . ., and that CHELCO would be prohibited from serving a new development like Freedom Walk if it were to be built in Freeport, even though no one else could readily provide service.

FECA notes that all across the state of Florida, cities are being created or cities are expanding and annexing additional territory where cooperatives are currently serving. Therefore, more and more customers of the cooperatives are located within the city limits. In some instances, FECA states that the cooperative was the only alternative and in many instances remains the only alternative, or that either a municipal utility or an investor owned utility would have to come from some distance at great cost. FECA states that this would uneconomically duplicate the Cooperative's facilities, and "be catastrophic for many of Florida's electric cooperatives, their members, and prospective members." FECA alleges that this "uneconomic duplication of facilities . . . would have to be paid for by the ratepayers of those utilities," and that this "is exactly what the Grid Bill was intended to prevent."

Citing Alvarez v. Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa, 580 So. 2d 151, 153 (Fla. 1991), FECA alleges that the "territorial provisions in Chapter 425 were repealed by implication with the enactment of the Grid Bill." In the Alvarez case the Florida Supreme Court explained that:

> a general law may be impliedly repealed in part or in whole by a subsequently enacted general law, where it appears that there is an irreconcilable conflict between the two or that the later enactment was clearly intended to prescribe the only rule that should govern the area to which it is applicable or that the later act revises the subject matter of the former.

(Id. at 153) Because Gulf's interpretation "could cause large areas of Florida to have uneconomic duplication of facilities and stranded facilities, and more importantly could prevent some areas from having any electric provider," and noting that "repeal by implication is not favored by the courts," FECA nevertheless argues that based on this irreconcilable conflict, "the only resolution is that any alleged territorial provisions in Chapter 425 were repealed by the Grid Bill." FECA argues that this is consistent with the idea that "the Grid Bill was intended to be a

comprehensive territorial bill, making it the only rule that should govern electric utility service areas."

Citing Order No. 7516, FECA notes that we "rejected Gulf's argument that CHELCO will have to abandon service to the disputed area if the area ever loses its rural character." Further, FECA notes that in that Order, we stated that Section 425.02, F.S., was not "an obstacle to service in the area by CHELCO, where the criteria enumerated in Section 366.04(2), Florida Statutes, and other relevant considerations indicate that such should be the result." (Bluewater Bay Order, at pp. 8-9) Therefore, FECA argues that we have already "determined that the Grid Bill trumps Sections 425.02 and 425.04(4) for purposes of resolving territorial disputes."

In conclusion, FECA argues that "[r]epeal by implication also would be consistent with our numerous orders that award exclusive service territories to electric cooperatives within cities that do not fit within the definition of 'rural' under Chapter 425." Allowing Sections 425.02, 425.03, or 425.04 to control, FECA argues, would prevent us from coordinating the grid, and municipalities, through the simple act of annexation, "would be the ultimate decision maker as to where an electric cooperative can serve, and where another utility must serve regardless of the costs involved."

Based on all the above, FECA maintains that the legislature did not give this power to the municipalities, but to the Commission. Therefore, FECA states that we must resolve any territorial dispute pursuant to Sections 366.04(2)(e) and (5), F.S., and that Chapter 425, F.S., while it may be considered, should not be controlling.

D. Commission Analysis and Conclusion

In regards to Gulf's arguments about members in the "Greater Crestview Area," "Greater DeFuniak Springs Area," or "Greater Freeport Area," we agree with CHELCO that this designation by Gulf's witnesses is wholly arbitrary, subjective, and ignores the cities' own determination of their city limits. Further, in regards to Bluewater Bay, we have neither the expertise nor enough information on whether this area would be considered an "unincorporated city, town village, or borough." We note that Gulf raised similar arguments in the territorial dispute over Bluewater Bay, and that there were similar issues in the territorial dispute between Peace River Electric Cooperative, Inc. and Florida Power & Light Company (PRECO Order). In the Bluewater Bay case, we specifically rejected Gulf's arguments and noted that Section 425.02, F.S., was not "an obstacle to service in the area by Chelco, where the criteria enumerated in section 366.04(2), Florida Statutes, . . . indicate that such should be the result." See Bluewater Bay Order No. 7516, p. 9; and see also Order No. 15210, PRECO Order.

As in the Bluewater Bay and PRECO cases, we find that Section 425.02, F.S., is not an obstacle to CHELCO serving the current disputed area. Moreover, we find that Section 425.04, F.S., specifically provides for CHELCO or other cooperatives to serve non-rural areas. In Order No. 13668, we found that we should "look at the surrounding area" in resolving territorial disputes. This did not mean that we must in every territorial dispute look at the whole service area of a cooperative. Rather, we were modifying our previous practice of looking only at the immediate area, and would now be looking at the surrounding area to help us determine the

nature of the area and whether the area was likely to become urbanized. We agree with CHELCO that never before have we "been asked to undertake a comprehensive analysis of Chapter 425 service issues, and consider area far removed from the territory in dispute to determine the utility best situated to serve." This is a precedent that the we would not like to set.

FECA's primary argument appears to be that "any alleged territorial provisions in Chapter 425 were repealed by implication with the enactment of the Grid Bill." Because, as discussed above, we find that the provisions of Sections 425.02 and 425.04, F.S., do not preclude service by CHELCO, we find that we do not need to address that argument.

In conclusion, we find that nothing in Chapter 425, F.S., or Chapter 366, F.S., requires us to do this sort of analysis. In any event, the degree of urbanization is only one factor and no one factor is controlling. Based on all the above, we find that Sections 425.02 and 425.04, do not preclude CHELCO from serving the Freedom Walk development. Further, in resolving any territorial dispute, we shall consider the provisions of Sections 366.04(2)(e) and (5), F.S., which provisions are discussed in the following issues.

VII. Nature of the Freedom Walk Development

Section 366.04(2)(e), F.S., and Rule 25-6.0441, F.A.C., provide that in resolving territorial disputes, we may consider the nature of the area involved, including population, the degree of urbanization, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

A. CHELCO's Argument

CHELCO argues that the Freedom Walk development is rural in nature, consisting currently of approximately 171 wooded acres. Further, CHELCO argues that there has been no change "at all in the 5 years since Gulf became aware of the proposed Freedom Walk development." CHELCO maintains that the area surrounding the proposed development is primarily residential or agricultural and historically the area has been rural even though it is now within the city limits of Crestview. CHELCO witness Grantham testified that the Freedom Walk area is not an urban area, but is an undeveloped wooded tract with no roads other than trails on the property, no water or sewer services, and except for CHELCO's lines on the property (out-parcels) and the four services to the members it serves, there is no other electric utility service.

CHELCO states that it has served the area since 1946 and served one home in the interior of the property (service began in 1967, but the home burned down and though the single-phase line is still there, no service is provided to the interior). Further, CHELCO has served the out-parcels since sometime after 1965. Witness Avery testified that CHELCO currently serves members immediately adjacent to the north and west of the Freedom Walk development with 139 active accounts within ¼ mile of the boundary of Freedom Walk. Both CHELCO witnesses Grantham and Avery agree that the current development plan for the area in dispute is a relatively dense residential area which is proposed to include single family and multi-family homes, and an undetermined commercial use area with no final approved plat. The witnesses do

not believe the property is urban in nature, as that term is used pursuant to Section 366.04, F.S., or urban under the definitions expressed by Gulf witness Spangenberg.

In its brief CHELCO argues that, under no reasonable construction of the term, can the area in dispute and the area in proximity be currently regarded as urbanized. With a final development plan still open to speculation, and whether Freedom Walk comes to fruition or falls victim to common economic vagaries, CHELCO stands ready by means of existing facilities serving on and adjacent to the property to continue service to the geographic area. CHELCO argues that it would provide service regardless of whether one or eight hundred units are built on the property, as it has any member requesting service for decades.

B. Gulf's Argument

Gulf witness Johnson testifies that, when fully developed, Freedom Walk will be quite large and have a military theme. He states that the development is expected to contain 489 single-family lots and 272 multi-family units within 179 acres in the City of Crestview. He maintains that, in addition to a YMCA and small commercial outlets, there will be other urban characteristics including sidewalks, underground electric utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection. According to the witness, the development will also include an upscale clubhouse with a pool, sun deck and exercise equipment. The street lighting will be decorative and the landscaping will feature a variety of plants, trees and shrubs. The primary street arteries will be heavily landscaped for additional aesthetics. Witness Johnson characterizes Freedom Walk as an urban development as it is located within the municipal boundaries of the City of Crestview and has been approved as a CDD. According to witness Johnson, the CDD serves the function of the delivery of urban community development services pursuant to Chapter 190, F.S., including financing, construction, and maintenance of basic infrastructure to support community development.

Witness Johnson characterizes the recent and near-term expectations for growth and development in the Crestview area as "very strong." He points out that the Crestview area will experience an influx of new residents associated with the movement of two large military commands to nearby Eglin Air Force Base. This transition will involve approximately 2,200 military personnel plus an additional 6,000 family members. Additionally, Vision Airlines has recently opened hub operations at the Northwest Florida Regional Airport, located approximately 20 miles south of Crestview. It is expected that with 4,200 additional jobs, Vision will create further demands for residential accommodations in Crestview.

Gulf witness Spangenberg testifies that Freedom Walk has a total expected population of 1,625 persons, which yields an average density of 9.1 persons per acre and one home for each 0.24 acres. Thus, the witness maintains that Freedom Walk and the City of Crestview are urban in nature by any common application of that term, and even more specifically by definitions provided by the Florida legislature. In the context of territorial disputes, witness Spangenberg indicates that where one of the utilities seeking to serve a disputed area is a rural electric cooperative, the designation of "rural" or "not rural" takes on special significance because the term "rural area" is specifically defined in its applicability to rural cooperatives in Chapter 425,

F. S. Section 425.03(1), F.S., states that "rural area" means "any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons." Witness Spangenberg asserts that for an incorporated city, the "boundaries" are clearly defined by the incorporated governmental entity in the form of "city limits." He also notes that Freedom Walk will be within the boundaries of the City of Crestview.

Witness Spangenberg notes that the only specific metric referenced in the definition of "rural area" in Section 425.03, F.S., is the population within the boundaries. The U.S. Census Bureau determined that on April 1, 2000, the City of Crestview had a population of 14,766 persons. The U.S. Census Bureau projected in 2005 that the population had already increased to 17,707 persons. As indicated by Gulf witness Harper, in 2010 that population had increased to 21,321, making it one of the fastest growing cities in Florida. Witness Spangenberg notes that these populations are many times in excess of the definitive number of 2,500 utilized within Chapter 425, F.S.

Witness Spangenberg concludes that it is clear that the land area on which Freedom Walk will be located is not now and will not be "rural" in nature. He notes that CHELCO acknowledged that the Freedom Walk development will not be "rural" in nature in response to Gulf's request for admissions, and admitted that the development, or at least the vast majority that will lie within the city limits as they exist today, does not constitute a "rural area" as defined in Chapter 425, F.S. The witness states that we should give preference to service by Gulf versus a rural electric cooperative simply based on the non-rural nature of this area. Witness Spangenberg further states that we should be consistent with the long-standing purpose of rural electric cooperatives. He maintains that, according to Chapter 425, F.S., if an area is not "rural," a rural electric cooperative is not legally permitted to serve it.

Witness Spangenberg maintains that CHELCO's claim of an exclusive historical presence is the principal reason why CHELCO initiated this dispute. He argues that CHELCO witness Grantham erroneously implies that this presence is exclusive to CHELCO and does not include Gulf. According to the witness, Gulf has been providing continuous service in the city of Crestview since 1928 -- nearly thirteen years before CHELCO's formation. Moreover, Gulf has been serving customers situated immediately adjacent to the disputed development since 1955. Witness Spangenberg points out that Gulf has been serving all of the residential dwellings south of Freedom Walk, the Davidson Middle School, a major shopping center, Crestview High School, the Crestview Post Office, several bank buildings, and a variety of other commercial enterprises all located within approximately one-half mile or less of the boundary of the disputed development.

Further, witness Spangenberg asserts that a utility's mere presence in a general area in past years, even if it was exclusive, has been given little consideration in the resolution of territorial disputes. He maintains that simple presence does not speak to the nature of the area, the nature of the utilities seeking to serve the area, the adequacy or cost of the facilities necessary to provide the requested service, or customer preference, and, thus, is not contained in the elements for consideration in our rules with respect to resolving territorial disputes.

To support his assertions, witness Spangenberg refers to Order No. PSC-01-2499-FOF-EU (West Florida Order).[24] The witness argues that in this case all other factors were essentially equal with the exception of historical presence and customer preference. According to witness Spangenberg, in the West Florida Order, we awarded Gulf the service, giving no relevance to historical presence. Gulf argues the rural electric cooperative appealed the decision to the Florida Supreme Court with its principal claim on appeal being its exclusive historical presence in the area. In its decision, the Court rejected the cooperative's argument and upheld our earlier decision. Witness Spangenberg argues that this precedential case serves as a reminder that what should be dispositive in the resolution of disputes is what is to be served in the future, not what was served in the past. Witness Spangenberg concludes that to assert that CHELCO has an exclusive historical presence in this area, and to rely upon that assertion as the basis for filing a territorial dispute with this Commission in this instance is ill-founded and without merit.

C. FECA's Argument

FECA points out in its brief that CHELCO first historically served the property in 1967. It was rural by anyone's definition and annexation of the property has not changed its rural nature. FECA asserts that it is still just a "bunch of trees and dirt roads." CHELCO has historically served the area that includes the proposed Freedom Walk development. FECA notes that Gulf's witness Spangenberg attempts to minimize the importance of CHELCO's historic service in the disputed area, stating that historical presence "has been given little consideration in the resolution of territorial disputes." FECA notes that the only case witness Spangenberg cites for this proposition involved 230KV service to a new compressor station, where neither utility had 230KV facilities within six miles of the disputed area, and which happens to be the same decision the Supreme Court was reviewing in the above-cited West Florida case.[25] FECA further notes that the Supreme Court in West Florida Electric Cooperative Association, Inc. v. Jacobs, 887 So. 2d 1200 (Fla. 2004), stated "[t]he historical presence of one utility in an area thus may be relevant in determining whether uneconomic duplication would result from an award of service to another." FECA maintains if neither utility has historically provided the type of service in the disputed area that the customer requires, there is no historic service to consider and there is no reason for us to make it a factor in the case. However, FECA argues that in situations like the instant case where CHELCO has been serving the area for 60 years and can serve the customer with its existing facilities, and Gulf has neglected the area, we have always considered historic presence.[26]

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[24] Issued December 21, 2001, in Docket No. 010441-EU, In re: Petition to resolve territorial dispute with Gulf Power Company in Washington County by West Florida Electric Cooperative Association, Inc.

[25] Order No. PSC-01-2499-FOF-EU, issued December 21,2001, in Docket No. 010441-EU, In re: Petition to resolve territorial dispute with Gulf Power Company in Washington County by of West Florida Electric Cooperative Association. Inc., 01 F.P.S.C. 12:426. (West Florida Order)

[26] See. e.g., Order No. 19044, issued March 25, 1988, in Docket No. 870944-EU, In re: Petition of West Florida Electric Cooperative. Inc. to resolve a territorial dispute with Gulf Power Company in Holmes County; Order No. 15210, issued October 8, 1985, in Docket No. 840293-EU, In re: Petition of Peace River Electric Cooperative. Inc. against Florida Power and Light Company for resolution of a Territorial Dispute; Order No. 12324, issued August 4, 1983, in Docket No. 830271-EU, In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation; Order No. 7516, issued November 19, 1976, in Docket No. 74551-EU, In re: Choctawhatchee Electric Cooperative v. Gulf Power Company.

D. Commission Analysis and Conclusion

CHELCO admits that the part of Freedom Walk within the city limits of Crestview does not meet the definition of rural area found in Section 425.03(1), F.S. However, CHELCO and FECA argue that Freedom Walk development is currently rural in nature and, if built out, the area will be relatively dense residential, but not necessarily "urban" in nature. Gulf argues that the area is currently non-rural because it is within the Crestview city limits and, when built out, will have the characteristics of an urban development.

Pursuant to Section 366.04(2)(e), F.S., and Rule 25-6.0441, F.A.C., the current nature of the disputed area, the proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services may be considered. While CHELCO relies in part on its historical presence in the area to support its position with respect to the nature of the area, Gulf argues that CHELCO failed to provide evidence demonstrating how historical presence is relevant in determining the nature of the area. According to FECA, the Courts have found that the historical presence of one utility in an area may be relevant in determining whether uneconomic duplication would result from an award of service to another. Uneconomic duplication is discussed below.

Upon review of the testimony, exhibits, and case law, we are persuaded by Gulf's argument that the area in dispute currently has urban characteristics and urbanization would increase if the area is built out. The Freedom Walk development is a CDD within the Crestview city limits. The CDD will have urban characteristics including sidewalks, underground electric utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection. The area approximately 2,100 feet east of the development includes commercial development and there are residential areas to the north, west, and south of the development. Growth in the Crestview area appears to be moving in the general direction of the Freedom Walk property. Further, while CHELCO witnesses provided conflicting testimony as to the nature of the disputed area, in several instances CHELCO admits that a majority of the Freedom Walk development does not currently constitute a rural area as defined in Chapter 425, F.S., and will be an urban area if developed as planned. This is consistent with our decision in the Suwannee Valley I case, in which we found that the area in dispute was urban in nature because growth was moving in the general direction of the area.[27] We further found that "a subdivision located in the unincorporated area of an immediately adjacent urban area does not exist as a social, economic, or commercial unit separate and apart from the adjoining municipality," and therefore would not fall within the definition of "rural area" as defined in Section 425.03(1), F.S.

Based on the above, we find that the area in question is more like the area in Suwannee Valley I. Therefore, we conclude that the area in dispute currently has urban characteristics and urbanization would increase upon buildout.

[27] See Suwannee Valley I, p. 3.

VIII. Existing and Planned Load to Be Served in the Freedom Walk Development

Rule 25-6.0441(1), F.A.C., requires each utility party to provide a description of the existing and planned load to be served in the disputed area. As discussed above, there are differing views between the parties about the boundaries of the disputed area. CHELCO currently serves four active accounts located south of Old Bethel Road; however, these accounts are not directly associated with the Freedom Walk development. CHELCO asserts that the existing load associated with these accounts is 53 kW.

The parties agree that the planned load for Freedom Walk is approximately 4,700 kW. Both Gulf and CHELCO relied on this planned load and other design assumptions in order to provide information for the purposes of this dispute. However, both parties acknowledge that this anticipated full buildout load will not occur immediately, but will likely be phased in over several years.

Although there is an existing load associated with the four active accounts that CHELCO currently serves south of Old Bethel Road, CHELCO witness Avery acknowledges that these accounts are not a part of what will become the Freedom Walk development. Both parties have used information provided by the developer regarding the plans for residential and commercial services and established a set of agreed upon assumptions in order to establish the planned load for Freedom Walk at approximately 4,700 kW. Based on the above, we find there is no existing load for the Freedom Walk development and the planned load is approximately 4,700 kW.

IX. Necessary Facilities and Associated Costs for CHELCO to Extend Adequate and Reliable Service to the Freedom Walk Development

Rule 25-6.0441(2)(c), F.A.C., allows us, in resolving territorial disputes, to consider the cost for each utility to provide service to the disputed area. Witnesses for both CHELCO and Gulf provided testimony about each utility's existing facilities, currently planned upgrades, upgrades that may be required in order to provide service to Freedom Walk at full buildout, and the associated costs. Under this section, we are considering only those costs that CHELCO would incur to extend service to Freedom Walk.

A. CHELCO's Argument

CHELCO witness Avery states that CHELCO has lines and facilities in place at the property now that would be used to provide adequate and reliable service, without the need to extend any of its lines. CHELCO also states that it would be able to serve the projected load of 4,700 kW without any substation additions and without any upgrades that are not already anticipated and planned. Among several upgrade projects identified in CHELCO's current Construction Work Plan (CWP), there is one project that will upgrade a 1.3 mile conductor segment on the feeder that serves the Freedom Walk area at an estimated cost of $227,404. CHELCO states that those upgrades were planned to handle projected load growth in the area without consideration of any load for Freedom Walk.

Because the upgrades were planned and scheduled independent of the demand created by the proposed Freedom Walk development, CHELCO argues that the costs, including the $227,404 for the conductor segment project, cannot be attributed to CHELCO as costs to extend adequate and reliable service to the Freedom Walk development. CHELCO cites Order No. 18425,[28] where we only included the cost of upgrades that were "triggered" by providing service to the customer in the dispute. CHELCO also cites Order No. 18886,[29] in which we did not consider costs associated with upgrades and projects that were previously planned for or not directly caused by providing service to the disputed area.

CHELCO states that it planned the upgrade of the conductor segment in advance of, and completely independent of, any projected demand from the Freedom Walk territory that is in dispute. Given the expected Freedom Walk buildout schedule, CHELCO argues that it will be able to handle all projected load for Freedom Walk and its other forecasted load without any changes whatsoever to its 2011-2014 Construction Work Plan (CWP). CHELCO asserts that under directly analogous and applicable Commission precedent, costs of the conductor segment upgrade are not properly attributable to CHELCO's cost to serve the disputed territory.

In regards to other parts of its distribution system, CHELCO argues that all of its existing facilities are sufficient to provide adequate and reliable service. CHELCO asserts that electrical equipment can be operated safely at up to 100 percent of its rated capacity. CHELCO states that when the projected 4,700 kW load of Freedom Walk is added to all of the projected growth for the area served by the Auburn substation south circuit, the switches, buswork, and breakers serving that circuit will, at normal peak loads, operate at up to 93 percent to 97 percent of their rated capacities. CHELCO, however, also argues that those percentages are overstated because the Freedom Walk growth accounts for an indeterminate but significant portion of the load forecast by CHELCO. Thus, CHELCO argues that adding 100 percent of its forecasted growth to 100 percent of the Freedom Walk growth would overstate the actual potential growth; and the demand on the switches, buswork, and breakers will be less. Even though operating at 93 percent to 97 percent of capacity would approach the maximum rating, CHELCO asserts that there is nothing to indicate that the switches, buswork, and breakers can not be safely operated at those capacities. CHELCO states that because the maximum possible demand, after the Freedom Walk buildout and all other growth in the area are added, does not cause any of the substation equipment to exceed its rated capacity, there is no need to replace or upgrade that equipment. CHELCO acknowledges that the equipment would be monitored for potential upgrades consistent with its planning policy as expressed in its System Design and Operating Criteria (SDOC) as further growth occurs after 2014. CHELCO concludes that there is no competent, substantial evidence to support a finding that the addition of the Freedom Walk load will require CHELCO to incur any expense to upgrade its facilities to provide adequate and reliable service to the disputed territory and the other areas to which CHELCO provides service.

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[28] Issued November 16, 1987, in Docket No. 870096-EU, In re: Petition of Suwannee Valley Electric Cooperative, Inc. to resolve territorial dispute with Florida Power Corporation.

[29] Issued February 18, 1988, in Docket No. 870235-EU, In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc.

B. Gulf's Argument

Gulf argues that CHELCO cannot provide adequate and reliable service to the development without undertaking significant and costly upgrades to its existing system. Gulf asserts that the first necessary upgrade involves a 1.3 mile segment of conductor that CHELCO would use to serve the development. CHELCO has acknowledged that this conductor segment must be upgraded at a cost of $227,404. Gulf states that if it is awarded the right to serve Freedom Walk, a portion of the load growth projected for the Freedom Walk area in CHELCO's 2009 load forecast would not materialize. Gulf argues that CHELCO's contention that the upgrade will take place in 2014 regardless of whether CHELCO serves Freedom Walk is simply without merit and that consequently, CHELCO's cost of performing the upgrade must be included in CHELCO's cost to serve the development.

Gulf also states that the second category of necessary upgrades includes various critical substation components. CHELCO would provide service to Freedom Walk using PowerSouth's Auburn substation. Gulf brings up the fact that CHELCO's SDOC for substations provides that substation components, such as breakers, reclosers, busses, and bypass switches should not be operated in excess of 100 percent of their maximum operational ratings based on extreme load forecast. Gulf states that CHELCO acknowledged that the 93 and 97 percent figures were based on the normal load growth assumptions included in CHELCO's probable load forecast. Gulf argues that CHELCO's extreme load forecasts are higher than the probable load forecasts, and that consequently, using CHELCO's extreme load forecast, the above-referenced substation components would almost certainly be operated in excess of 100 percent of their maximum rated capacity. Gulf argues that this demonstrates that, contrary to CHELCO's testimony, substantial upgrades to the substation components are necessary. Gulf argues that CHELCO witness Avery's testimony that its existing facilities are sufficient is in direct conflict with testimony of CHELCO's engineering consultant, witness Sullivan. Witness Sullivan recognized that CHELCO would need to address these loading problems at the Auburn substation if it were to serve Freedom Walk and provided two alternatives. Gulf argues that either of witness Sullivan's alternatives comes with significant costs and should be included in CHELCO's cost to provide adequate and reliable service.

Gulf argues that operating substation components under these planned loading conditions is highly irresponsible from an engineering and planning perspective because it fails to account for wide variations in actual loading that can be caused by weather extremes. Gulf also pointed out that during the winter of 2010, the load actually experienced at the Auburn substation exceeded CHELCO's 2009 probable load forecast for 2010 by nearly 15 percent. Gulf opines that while a 15-percent variation due to weather extremes may not be typical, variations of 10 percent on projected winter peak loads must be readily considered in projecting a need for facility upgrades, and that failing to upgrade these substation components could result in failure of the components or even the substation itself. If CHELCO is awarded the right to serve Freedom Walk, Gulf believes that these upgrades will be necessary to serve the development. Gulf witness Feazell prepared estimates for the cost of the substation upgrades, and testified that the cost associated with these upgrades, $70,781, must be included in CHELCO's cost to serve Freedom Walk.

Gulf states that the final category of necessary upgrades that CHELCO must make involves the addition of capacitors and voltage regulators on Auburn Circuit 03. These upgrades are identified by witnesses Avery and Sullivan in their supplemental direct testimony. Gulf witness Feazell testified that these upgrades were necessary and stated that their cost, $44,083 should also be included in CHELCO's cost to serve Freedom Walk. Gulf concludes that CHELCO's true cost to serve Freedom Walk is, at a minimum, $342,268, representing the 1.3 mile conductor upgrade, the replacement of Auburn substation components, and the addition of capacitors and voltage regulators for Auburn Circuit 03.

C. FECA's Argument

FECA agrees with CHELCO, in that CHELCO's existing facilities are adequate to serve the disputed area for the immediate future, and the 2014 CWP includes an upgrade project for the facilities that serve the disputed area. FECA argues that CHELCO is prepared to accelerate the completion of the CWP if necessary to accommodate Freedom Walk, but does not believe this will be necessary.

D. Commission Analysis and Conclusion

As noted previously, Rule 25-6.0441(2)(c), F.A.C., provides that we may consider the cost of each utility to provide service to the disputed area. As regards CHELCO's existing distribution system, while the majority of CHELCO's existing facilities are adequate to serve the Freedom Walk development, it is clear that some upgrades will take place. The major area of dispute in this issue relates to whether the costs for the planned upgrades to CHELCO's distribution system should be included when considering CHELCO's cost to serve Freedom Walk.

We agree with CHELCO in that, while there will be upgrades to its existing facilities, the costs of these upgrades cannot be attributed to CHELCO's cost to serve Freedom Walk. The issues related to cost to serve from our two orders cited by CHELCO are very similar to the circumstances in the instant case. While the upgrades previously discussed will be useful in providing service to Freedom Walk, these upgrades were previously planned for and were not directly triggered by planning to serve the Freedom Walk development. Similarly, the capacitor and voltage regulator projects that Gulf argues should also be included in CHELCO's cost to serve Freedom Walk were also planned as part of CHELCO's CWP. Consistent with our previous decisions, these upgrades should not be considered in CHELCO's cost to serve Freedom Walk, because they were not directly triggered by providing service to Freedom Walk.[30]

Gulf argues that because the Freedom Walk load accounts for some of the load forecast by CHELCO, the award of the disputed territory would eliminate the need for the upgrade, and the $227,404 cost should therefore be attributed to the cost of service to Freedom Walk. However, CHELCO witness Avery testified that CHELCO planned to upgrade the segment independent of Freedom Walk. We find that the evidence in the record demonstrates that there

[30] See also Order Nos. 18425 and 18886.

were other reasons CHELCO decided to perform the conductor segment upgrade unrelated to load considerations, including to reduce losses on the segment of conductor.

We also agree with CHELCO witness Avery, who testified that the switches, buswork and breakers that are part of the Auburn substation can be safely operated within their design capacity with the addition of 100 percent of CHELCO's forecast load and 100 percent of the projected Freedom Walk load. While these components may be upgraded in the future, those associated costs cannot be solely attributed to Freedom Walk as Gulf argues, but should be attributed to all of the load associated with the Auburn substation.

Based on the record testimony and our previous precedent, we find that CHELCO's existing facilities together with the planned upgrades are adequate to serve the Freedom Walk development, and that there are no associated additional costs attributable to CHELCO.

X. Necessary Facilities and Associated Costs for Gulf to Extend Adequate and Reliable Service to the Freedom Walk Development

Rule 25-6.0441(2)(c), F.A.C., allows us, in resolving territorial disputes, to consider the cost for each utility to provide service to the disputed area. Witnesses for both CHELCO and Gulf provided testimony about each utility's existing facilities, currently planned upgrades, upgrades that may be required in order to provide service to Freedom Walk at full buildout, and the associated costs. Under this section, we are considering only those costs that Gulf would incur to extend service to Freedom Walk. Because this section involves Gulf's facilities, we have placed Gulf's argument first.

A. Gulf's Argument

Gulf asserts that in order to provide adequate and reliable service to the Freedom Walk development, it will be required to extend its existing three-phase line 2,130 feet at a cost of $89,738. Gulf will serve Freedom Walk using its Airport Road substation, and asserts that there are no planned upgrades to the Airport Road substation specifically needed in order to serve the Freedom Walk development. Gulf states that in February 2008, it commenced the planning process for a large-scale conversion project involving its Airport Road, South Crestview, Milligan, Baker and Laurel Hill substations in North Okaloosa County, Florida. The project involves the conversion of Gulf's older 46 kV system in North Okaloosa County to Gulf's 115 kV standard voltage, which is also consistent with Southern Company's present standards. Gulf argues that the conversion project is intended to maintain reliability and reduce maintenance costs on Gulf's system and is not related in any way to serving Freedom Walk. Gulf testified that the first step of the project has already been completed and the second step of the project was included in Gulf's 2011 budget forecast and will be completed in 2011. Gulf states that the Airport Road substation conversion will follow the Baker/Milligan conversion between 2011 and 2015 and will proceed regardless of whether Gulf serves Freedom Walk. Gulf argues that as a consequence of this conversion project, the Airport Road substation will have adequate capacity to serve the full projected load of Freedom Walk and other growth in the area. Absent these planned upgrades, Gulf acknowledges that it would need to replace three single-phase substation transformers at the Airport Road substation at a cost of approximately $40,000 in order to serve

the full projected load for the development. The $40,000 cost figure represents the labor cost associated with transport and installation of three existing fully depreciated transformers which Gulf presently owns. Gulf asserts that it would not need to purchase any replacement transformers or substation equipment in order to serve Freedom Walk. Gulf also stresses that it would have no need to proceed with the $40,000 replacement project if the Airport Road conversion occurs before Freedom Walk fully develops.

Gulf argues that because the 46 kV to 115 kV conversion project is not related in any way to serving Freedom Walk, and because it will proceed regardless of whether Gulf serves Freedom Walk, it would be improper to attribute any of the project's cost to Gulf 's cost to serve the development. Gulf also argues that this project must be distinguished from CHELCO's $227,404 conductor upgrade project. Gulf states that CHELCO's conductor upgrade was included in the 2011-2014 CWP based on load projections that will not materialize if CHELCO does not serve Freedom Walk. Gulf believes that, unlike its Airport Road conversion project which is not load related, CHELCO's conductor upgrade will not be justified or needed at any point in the foreseeable future if CHELCO does not serve the development.

In summary, Gulf concludes that its true cost to serve the Freedom Walk development is $89,738. If Freedom Walk fully develops before the Airport Road substation conversion is completed, Gulf acknowledges that it would also incur an estimated cost of approximately $40,000 to install spare transformers at the Airport Road substation to accommodate load until the Airport Road conversion project is completed.

B. CHELCO's Argument

CHELCO argues that Gulf has no distribution facilities capable of providing adequate and reliable service to the disputed territory at or on the area that will become Freedom Walk. CHELCO asserts that Gulf will have to extend new lines 2,130 feet from their current line at a cost of $89,738, and that those lines will run parallel to and cross CHELCO's existing lines along Old Bethel Road.

CHELCO states that Gulf's Airport Road substation is inadequate to meet the projected load associated with the disputed territory. CHELCO argues that the current rating of the Airport Road substation is 10.5 MVA, and that it will exceed its rated capacity of 10.5 MVA by 2013 upon the addition of only 1880 kW of the 4,700 kW demand from Freedom Walk, when the load will be 11,430 kW or 11.43 MVA. CHELCO states that Gulf has no planned upgrades to the Airport Road substation in order to serve Freedom Walk because of Gulf testimony that the probability of Freedom Walk developing has not yet reached a threshold where Gulf would begin to include the anticipated load in its load studies.

CHELCO contends that because the Airport Road substation cannot meet the projected 14.7 MVA load demand for the disputed territory, Gulf has proposed a stopgap upgrade to replace the existing 10.5 MVA transformer bank with a fully depreciated, 45 year-old 12.5 MVA transformer at its Airport Road substation. Since the 12.5 MVA transformer will be expected to meet the 4,700 kW (14.7 MVA) projected load, it will be loaded to 120 percent of its nameplate rating. Considering the "operational issues" Gulf is experiencing with its 46 kV system, which

includes the Airport Road substation, because in part of its aging equipment, CHELCO questions Gulf's assertion that it will provide "adequate and reliable" service to Freedom Walk by replacing its aging and inadequate 10.5 MVA transformer with an aged and retired 12.5 MVA transformer that it has in inventory. CHELCO believes that such a proposal, which comes with no evidence of reliability, is nothing more than a transparent attempt to allow Gulf to argue that it will incur no costs to provide service from its inadequate substation facilities.

CHELCO notes that Gulf quotes a cost of $40,000 for the movement of the transformer or transformers to the Airport Road substation to serve Freedom Walk. CHELCO believes that this figure only includes labor, and points out that Gulf has not attributed any costs for installing the transformers, testing the transformers, connecting the transformers to the existing lines, performing any required maintenance or repairs to the 45 year-old transformers, or any other costs whatsoever that are necessary and reasonable to ensure that the transformer can be safely operated. CHELCO argues that we should not accept any implication through Gulf's omission that the costs of performing the substation upgrade are free or non-existent, and suggests that Gulf has intentionally ignored, obscured, and understated its cost to provide service to the disputed Freedom Walk area. CHELCO argues that it is improper for Gulf to use a 45 year-old transformer that it argues has no cost, while failing to include any of the costs of installing, testing, connecting, repairing, or maintaining the transformer, and running it at 120 percent of its nameplate capacity. CHELCO argues that the cost of providing service to the disputed Freedom Walk area necessarily includes those costs and that the admitted $139,738 cost of service is grossly understated by Gulf.

CHELCO also questioned Gulf's assertion that it will be performing a massive system-wide substation upgrade at some unspecified time in the next five years, at a cost of at least $1,600,000 for the Airport Road component. CHELCO argues that this project, which will be used in part to serve Freedom Walk, has no current timetable, no current planning document, no current land use approvals, and no current budget. CHELCO points out that when asked specifically, Gulf admitted that if anyone wanted to see the upgrade plan, they could not because it does not exist. CHELCO argues that jotting down a "plan" as the reply to a request for discovery in an adversarial proceeding does not, without some more definite and concrete evidence, create a basis upon which this Commission can make findings of fact. Thus, for purposes of this proceeding, CHELCO believes that there is no competent, substantial evidence of a current, planned project to perform a comprehensive upgrade of the Airport Road Substation.

C. FECA's Argument

FECA argues that at a minimum, Gulf would have to extend their existing lines 2,130 feet at a cost of at least $89,000.

D. Commission Analysis and Conclusion

As noted previously, Rule 25-6.0441(2)(c), F.A.C., provides that we may consider the cost of each utility to provide service to the disputed area. In this section, we address the costs to Gulf to extend service to Freedom Walk.

We agree with Gulf that the extension of Gulf's existing three-phase line along Old Bethel Road is the only true cost of service that is attributable to providing service to the Freedom Walk development. Similar to the discussion in the previous issue, our prior decisions[31] considered the cost of projects that were "triggered" by providing service to the disputed area, while not including the costs of projects that were previously planned for or undertaken independent of proving service to the development. Gulf's line extension project is specifically to provide service to Freedom Walk, and would otherwise not be completed.

We also agree with Gulf that the other projects related to the Airport Road substation are not attributable to Gulf's cost of providing service to the development. Consistent with the our findings related to CHELCO's planned upgrades in the previous issue, we find that Gulf planned to upgrade its Airport Road substation independent of specifically providing service to the Freedom Walk development. Although the project would indirectly increase capacity and allow Gulf to provide adequate and reliable service to Freedom Walk, based on our prior decisions, we shall not include these costs when considering the cost for Gulf to serve the development because these upgrades were previously planned and not "triggered" by service to Freedom Walk.

Regarding Gulf's plan to replace the substation transformers absent the large upgrade of the Airport Road substation, we find that these costs should not be included in Gulf's cost to serve the development. Gulf testified that this project would only be completed if Freedom Walk reached full buildout before the larger planned substation upgrades are completed. There is nothing in the record that suggests when full buildout will occur, and all testimony suggests that it will occur later rather than sooner. We believe that the transformer replacement project is not a project that Gulf intends to complete, but was identified for the purposes of this docket in order to obtain a clear picture of Gulf's existing facilities and how their currently planned projects would impact their ability to serve the Freedom Walk development.

Based on the record testimony and previous precedent, we find that Gulf would need to extend its existing three-phase line 2,130 feet along Old Bethel Road at a cost of $89,738. While there are other upgrades that Gulf plans to complete that would impact the facilities used to serve Freedom Walk, the associated costs shall not be included in the cost to serve the Freedom Walk development because those projects were previously planned for and were not directly related to serving the load associated with the development.

XI. Necessary Facilities and Associated Costs for CHELCO and Gulf to Provide Adequate and Reliable Service Within the Freedom Walk Development

Rule 25-6.0441(2)(c), F.A.C., allows us to consider the cost of each utility to provide service to the disputed area. In order to develop the costs associated with providing service

[31] See Order No. 18425, issued November 16, 1987, in Docket No. 870096-EU, In re: Petition of Suwannee Valley Electric Cooperative, Inc. to resolve territorial dispute with Florida Power Corporation; and Order No. 18886, issued February 18, 1988, in Docket No. 870235-EU, In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, Inc.

within the Freedom Walk development, both parties agreed upon a common set of assumptions and design parameters for construction of underground services.

Based upon those assumptions, we approved the parties stipulation that the total cost estimate for CHELCO to provide adequate and reliable underground service within the development is $1,052,598. According to CHELCO, the developer (or contractor/builder) would be responsible for contributions in aid of construction (CIAC) of $632,052 associated with the cost of installing the underground facilities. Based on CHELCO's approved Line Extension Policy, CHELCO could waive the CIAC for the commercial load ($50,256). In addition, if the Freedom Walk development is built out within five years, the developer would receive $385,219 in refundable advances. The end-use customer (member) within the development would not be required to make any payments to CHELCO.

Based upon the above-noted assumptions, we also approved the parties stipulation that the total cost estimate for Gulf to provide adequate and reliable underground service within the development is $1,152,515, which is approximately $99,917 greater than CHELCO's costs. According to Gulf, the developer would be responsible for contributions in aid of construction (CIAC) of $82,595, which represents the Commission-approved Underground Residential Distribution (URD) differential for underground facilities within the proposed development. The end-use customer, or homeowners, within the development would not be required to make any payments to Gulf. None of the URD differential would be refundable to the developer.

XII. Uneconomic Duplication of Existing Facilities

Pursuant to Section 366.04(5), F.S., we "have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid . . ., and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities." Because Gulf would need to extend its existing three-phase line 2,130 feet along Old Bethel Road, both CHELCO and FECA argue that such extension of service to Freedom Walk by Gulf would constitute an uneconomic duplication of CHELCO's existing facilities. Gulf asserts that the testimony it provides in this case conclusively demonstrates that there will be no uneconomic duplication of CHELCO's facilities under the law as it exists in Florida.

A. CHELCO's Argument

Both CHELCO witnesses' Grantham and Avery testified that CHELCO has made an investment to serve current and future members in this area, and has included projects as part of its normal planning schedule to handle anticipated growth. The area has low customer density, yet CHELCO provided service when no other electric provider showed interest. Witness Grantham points out that once a high density, high-revenue development is proposed, Gulf claims the right to displace CHELCO as the electric provider in the area. Witness Grantham argues that not only will CHELCO not be able to maximize the investment in its current facilities, it will be precluded from taking advantage of the higher customer density and higher revenue per capital investment return that developments like Freedom Walk produce. According to CHELCO, if Gulf continues to claim the right to serve future high density areas because they

are urban, then CHELCO's traditional customers are relegated to always have a higher cost of service.

Witness Avery testified that CHELCO currently serves members who reside on property shown to be part of the Freedom Walk development. If the development is constructed as depicted on the plat as reflected on Exhibit 7, and the right to serve in CHELCO's existing service area is given over to Gulf, CHELCO argues that it would be forced to remove its facilities and have members taken away. CHELCO argues that it has existing single and three-phase lines on and around the Freedom Walk development, and has provided service to members on and adjacent to the property for 60 years. Witness Avery testified that since 1946, CHELCO had a single-phase line along Old Bethel Road, and that the single-phase line was extended along a 1967 easement to serve a customer located in the middle of the Freedom Walk property. Also, by 1967, CHELCO had run a single-phase line along Normandy Road to the west of the Freedom Walk development. By 1983, CHELCO completed a planned upgrade and extension of a three-phase line to the area along Old Bethel Road in front of the Freedom Walk development.

In its brief, CHELCO noted that, in response to discovery, Gulf did not dispute that it must extend its existing three-phase feeder 2,130 feet in order to serve the Freedom Walk development, nor does Gulf dispute that this extension will result in duplication of some CHELCO facilities which are presently in place. However, in direct contrast to this admission by Gulf, witness Spangenberg testifies that Gulf's provision of service to Freedom Walk would not result in any duplication of facilities, whether uneconomic or not.

According to CHELCO, Gulf argues that the decision of whether there is uneconomic duplication should be made from the perspective of the utility making the investment. Witness Spangenberg offered four tests similar to those put forth by Gulf in prior territorial disputes, which can be used to determine if an incremental benefit to Gulf investors and ratepayers would result from an investment to serve Freedom Walk.

In analyzing witness Spangenberg's four tests, CHELCO witness Blake, former Commissioner and Chair of the New Mexico Public Service Commission, testified that because of the relatively high density load, neither CHELCO nor Gulf would have uneconomic duplication of facilities using these tests. However, he noted that the analysis performed by Gulf disregards the fact that allowing Gulf to serve the area ignores existing lines, facilities and investment of CHELCO, and gives no consideration to whether the duplication of CHELCO's lines by Gulf would be uneconomic duplication from CHELCO's perspective. Witness Blake testified that it would be improper to consider the question of uneconomic duplication only from the financial interest of Gulf, and that a more objective analysis would be to consider whether the existing facilities a utility has constructed in good faith to serve consumers are duplicated in any manner. CHELCO argues that this view is entirely consistent with Gulf Coast v. Clark, 674 So. 2d 120, 123 (Fla. 1996), which held that:

> In its argument before the Court, the Commission asserts that the actual cost is only one factor to be considered in determining uneconomic duplication. The Commission states that lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has

been a "race to serve," and other concerns must be considered in evaluating whether an uneconomic duplication has occurred. We do not disagree that these factors must be considered.

CHELCO notes that Gulf cites to the Gulf Coast case for the proposition that the costs to be incurred by Gulf in the instant case are "de minimis" and thus there is no uneconomic duplication. In Gulf Coast, the cost to upgrade was $14,583, an amount we said was "relatively small" and the Court said was "de minimis." According to CHELCO, the cost for Gulf to duplicate CHELCO's existing lines is approximately $90,000, which does not include the additional costs for transformers and other upgrades CHELCO thought were needed, and which CHELCO considers beyond "de minimis."

CHELCO concludes that it has an established presence in the area, and has made an investment to provide service to members in the area. CHELCO argues that to allow Gulf to serve this area would be an uneconomical duplication of facilities and an economic waste and inefficient extension which should be avoided.

B. Gulf's Argument

Gulf witness Spangenberg testified that Section 366.04(5), F.S., gives us jurisdiction over a coordinated grid and the "avoidance of further uneconomic duplication." He notes that to implement this statute, our rules provide that, in resolving territorial disputes, we may consider the costs incurred by each utility to extend service to the disputed area as well as the cost to provide service within the area in dispute.[32] With regard to service within the disputed territory in this case, witness Spangenberg notes that neither party has adequate facilities within the area, and both would have to build extensive facilities to provide adequate and reliable service within Freedom Walk. Therefore, he concludes, no duplication of facilities would occur within the area in dispute, regardless of which utility was awarded the right to serve.

Concerning the costs of both CHELCO and Gulf to extend service, witness Spangenberg asserts that there is no need for us to undertake that consideration given that Freedom Walk is not "rural" in nature. The witness opines that service must be awarded to Gulf given the decision by the Eleventh Circuit Court[33] with respect to the ten percent limit on non-rural customers for rural electric cooperatives, and the number of non-rural customers that CHELCO is currently serving, which Gulf claims is greater than ten percent. Witness Spangenberg notes that that there could be instances where the facilities of one utility are duplicated in order to provide service to a customer in an instance where the other utility is not legally permitted to serve the customer.

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[32] See Rules 25-6.0441(2)(a) and (2)(c), F.A.C., which provide:

(2) In resolving territorial disputes, the Commission may consider, but not be limited to consideration of:

(a) The capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;

. . .

(c) The cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future.

[33] See Alabama Electric Cooperative, 684 F.2d at 792.

In this scenario, while the physical capabilities of the other utility may have been duplicated - uneconomically or not - it could not be legally "avoided."

Witness Spangenberg argues that even if we decide to consider the utilities' respective costs to extend service to Freedom Walk, we should look at any difference in those costs as just one element in reaching a finding with respect to economic duplication. The witness asserts that the whole concept of duplication of facilities arises from the recognition that there are occasions when one utility builds facilities that would not have to be built, or not as much in terms of invested capital, had a different utility served the customer. However, because existing facilities may have capacity or voltage limitations or because some expansion of facilities may have been needed regardless of which utility is providing service, this is often not a simple determination. Hence, the witness maintains that traditionally "duplication" had been measured by us as any greater amount of costs, as measured by the first cost of the installation of the minimum facilities required, that one utility would have to invest to reach the disputed area over the costs of another utility.

Further, according to witness Spangenberg, until 1996, we interpreted that any amount of duplication under this comparative analysis would be "uneconomic." In 1996, the Florida Supreme Court concluded that there were some amounts of duplication that could be considered "not uneconomic."[34] He notes that the specific conclusion at that time was that there were some amounts that could readily be considered as "de minimis." Gulf argues that in a follow-up to the Supreme Court's determination, we issued our final order in which we agreed with evidence presented by Gulf that "defines uneconomic duplication in terms of the costs and benefits accruing solely to Gulf Power from serving or not serving a given area, load or customer such as the incremental cost to serve, expected revenues, or other exclusive benefits. Benefits are defined as additional revenues in excess of the cost of building facilities to reach the customer."[35]

Witness Spangenberg testified that Gulf's cost to extend adequate facilities to Freedom Walk would be $89,738, and for CHELCO this cost would be at least $227,404. He notes that this cost for CHELCO does not include the significant costs to make the substation improvements that would also be required. The witness maintains that if CHELCO were to be allowed to provide service to Freedom Walk, Gulf's facilities would, in fact, be duplicated by CHELCO. To support this statement, witness Spangenberg asserts that CHELCO would duplicate the existing capacity in Gulf's feeder up to the point where Gulf provides service to Davidson Middle School on Old Bethel Road. Witness Spangenberg maintains that any notion that CHELCO will have to upgrade its feeder even absent service to Freedom Walk or anticipated load growth in any nearby rural area is speculative at best. He opines that, in fact, if Gulf were allowed to serve Freedom Walk, there would be no need for CHELCO to upgrade its feeder now or in the reasonably foreseeable future, which, in his opinion, could save CHELCO and its member-owners well in excess of $227,404 in otherwise needed investment.

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[34] See Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120, 123 (Fla. 1996).
[35] See Order No. 98-0174-FOF-EU, issued January 28, 1998, in Docket No. 930885-EU, In re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, p. 3.

However, witness Spangenberg opines that should we determine that Gulf is duplicating the facilities of CHELCO, the question for further consideration should be whether there is sufficient incremental benefit to Gulf's investors and ratepayers to warrant the investment. The witness explained that there are four tests which he applied to determine whether the investment results in sufficient benefit. According to the witness, Gulf passes all four of the tests.

The first test suggested by witness Spangenberg is to consider the magnitude of the cost to extend facilities to the development in contrast to the total investment to serve Freedom Walk. According to witness Spangenberg, the cost of extending facilities to the development is $89,738, and the amount of investment within the development is $844,935, for a total investment of $934,673.[36] Thus, the cost to extend service to the development is 9.6 percent of the total investment that would need to be made by Gulf. The witness opines that this amount is clearly "de minimis" and, therefore, "not uneconomic."

For the second test, witness Spangenberg determines the $89,738 investment to extend service to Freedom Walk as a percentage of the estimated annual non-fuel revenue Gulf expects to gain from serving the development, which is $438,828. He notes that this investment is only 18.5 percent of the annual non-fuel revenue. Stated another way, witness Spangenberg maintains that the investment of $89,738 is just slightly more than a two-month payback on that portion of the investment. He asserts that a pay-back that rapid would certainly not be considered "uneconomic."

Witness Spangenberg suggests that a third assessment that could be made is the ratio of total investment, including the investment required for facilities within the disputed area, to Gulf's estimated annual non-fuel revenue from Freedom Walk. According to the witness, this is the classic Contribution in Aid of Construction (CIAC) calculation that we have approved for analyzing the economy of extensions of facilities. He notes that this ratio is 1.9, which is less than half of the 4.0 level which would require a capital contribution by the customer. Witness Spangenberg concludes that this assessment would also show that this perceived duplication should not be considered "uneconomic."

Finally, witness Spangenberg offers a fourth assessment, which would consider whether the facilities that might initially be perceived as duplicative would have a reasonable prospect for future use in addition to just serving the area in dispute. Witness Spangenberg states that in this instance, there are undeveloped or underdeveloped parcels along the 2,130 feet of Old Bethel Road on which Gulf will construct its feeder extension for reaching Freedom Walk. According to the witness, these parcels total many tens of acres of property that will likely be developed as part of the natural progression of community development that is also giving rise to Freedom Walk. He notes that most of this acreage is also already within the city limits of Crestview. The witness suggests that the feeder extension for service to Freedom Walk could also provide adequate and reliable electric service to these parcels in the future. Witness Spangenberg concludes that any perceived duplication would only be temporary and is, therefore, not

[36] These figures come from Gulf witness Spangenberg's testimony. The figure ultimately stipulated to by the parties was $1,152,515 for costs to Gulf within the development– so the percentage figure quoted by witness Spangenberg of 9.6 percent would appear to be too high.

"uneconomic." The witness further concludes that, while there might be other tests that could be used to determine that any perceived duplication is not "uneconomic," there is no need in this case since in every one of the four tests he suggests, the perceived duplication would not be "uneconomic."

Gulf notes that CHELCO witness Blake is highly critical of witness Spangenberg's analysis. Gulf asserts that, according to witness Blake, a determination of uneconomic duplication should be based solely on "whether existing and adequate facilities are paralleled, crossed, or otherwise duplicated." Gulf notes that during deposition, witness Blake testified that, prior to the instant dispute, he had never testified in any territorial dispute in any state. He was retained by CHELCO approximately one month prior to his deposition, and had not previously reviewed Chapters 366 or 425, F.S., before being retained in the instant dispute. Gulf notes that the witness further acknowledged that he had not reviewed any Commission or Florida Supreme Court orders in reaching his conclusion that Gulf's definition of uneconomic duplication was erroneous, nor had he reviewed any Florida precedent addressing cooperatives' legal authority to serve non-rural areas. Gulf argues that based on this testimony in deposition (entire deposition was made Hearing Exhibit 54), we should give no weight to witness Blake's opinions on what he believes to be the law in Florida. Gulf maintains that witness Blake's testimony should be contrasted with testimony of witness Spangenberg who has over thirty years of first-hand experience as a witness and advisor for Gulf in a wide variety of territorial matters.

Witness Spangenberg testified that because Section 366.04(5), F.S., gives us jurisdiction over a coordinated grid and the avoidance of further uneconomic duplication of facilities, the statute, on its face, recognizes that some amount of duplication is permissible, so long as it is not "uneconomic." In its brief, Gulf notes that CHELCO's position is that any amount of duplication by Gulf of CHELCO's facilities, no matter how small, is "uneconomic." Gulf argues that this position is in direct conflict with existing Florida Supreme Court precedent. In Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996) (Gulf Coast Electric Cooperative), the Florida Supreme Court overturned a Commission order awarding Gulf the right to serve a prison in rural Washington County, Florida. Gulf owned an existing line directly abutting the proposed prison, which was capable of serving the full requirements of the new prison without any additional cost or modifications.[37] In contrast, the cooperative had to upgrade and relocate an existing line in order to serve the prison at a cost of $14,583.[38] The cooperative's new line was constructed directly across the road from Gulf's existing line. We ruled in Gulf's favor, finding that the cooperative had uneconomically duplicated Gulf's existing line and engaged in a "race to serve."[39] With respect to uneconomic duplication, Gulf argues that we took the position that actual cost is only one factor to be considered in determining uneconomic duplication, with other factors including "lost revenues for the non-serving utility, aesthetic and

[37] Id. at 121.
[38] It is important to note that the $14,583 figure in Clark was expended to serve a load with approximately 372 kW diversified demand as compared to Gulf's cost of $89,738 in the instant case to serve a load with an expected diversified demand of 4,700 kW. In other words, the expected Freedom Walk load is more than twelve times larger than the load at issue in Clark. Consequently, Gulf's cost to serve the development would be considered "de minimis" in comparison to the development's projected load.
[39] Id. at 122.

safety problems, proximity of lines, adequacy of existing lines, [and] whether there has been a 'race to serve.'" The Court did not disagree with these factors, but ultimately held that any duplication by the cooperative of Gulf's existing facilities was not "uneconomic" because the cost differential was "de minimis." The Florida Supreme Court reversed our order and determined that the cooperative should serve the prison based on the issue of customer preference.[40]

Gulf notes that in 1998, we issued a subsequent order, Order No. PSC-98-0174-FOF-EU, in this same case, which provided further guidance for determining the existence of uneconomic duplication.[41] In this order, we addressed a previous order wherein Gulf and Gulf Coast Electric Cooperative were directed to negotiate in good faith to develop a territorial agreement to resolve uneconomic duplication of facilities and establish a territorial boundary in south Washington and Bay Counties. Despite the passage of two years, the parties were unable to negotiate an agreement. We rejected the cooperative's request to establish defined territorial boundaries and, instead, ordered the parties to develop detailed procedures and guidelines for addressing new service requests in the area. In doing so, Gulf notes that we observed as follows:

> Gulf Power's Witness Holland argues that the amount of duplication that rises to the level of uneconomic duplication is best determined on a case-by-case basis. When asked to evaluate their service area in south Washington and Bay Counties, Gulf Power responded that there will be no areas where further uneconomic duplication of electric facilities is likely to occur as long as fixed boundaries are not established and their proposed territorial policy is adopted. Gulf Power's conclusion is based on its definition of "uneconomic duplication." Gulf Power defines "uneconomic duplication" in terms of the costs and benefits accruing solely to Gulf Power from serving or not serving a given area, load or customer such as the incremental cost to serve, expected revenues, or other exclusive benefits. . . . [W]e agree with the evidence presented by Gulf Power.

(Id. at 649-50 -- emphasis added by Gulf)

As noted in Gulf's brief, following this order, Gulf and Gulf Coast Electric Cooperative presented us with detailed procedures governing new requests for electric service in south Washington and Bay Counties. We approved the procedures, finding that they would avoid future uneconomic duplication.[42] In our order approving the procedures, we observed the following with respect to uneconomic duplication:

> ...[T]he Supreme Court's opinion does not require that the *de minimis* standard be the only criterion for evaluating uneconomic duplication.

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[40] Id. at 123.
[41] See Order No. PSC-98-0174-FOF-EU, issued January 28, 1998, in Docket No. 930885-EU, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company.
[42] See Order No. PSC-01-0891-PAA-EU, issued April 9, 2001, in Docket No. 930995-EU, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company.

> If the foregoing *de minimis* test is exceeded, the agreement provides an alternative comparison of the companies' respective costs of service. If the differential is not more than 25%, the utility with the higher cost of service may provide service according to the agreement, if chosen by the customer. This provision provides a reasonable means for establishing the limit of economic duplication. In the context of a project where there is a significant load associated with the new service, the level of investment necessary by either party would be substantial, as would be the revenues provided by that customer. In such a case, a differential of $15,000 would likely not be a meaningful measure. Instead, the 25% threshold provides a reasonable measure of the outer limit of economic duplication and therefore the trigger for uneconomic duplication.

Order No. PSC-01-0891-PAA-EU, p. 3.

In its brief, Gulf concludes it is clear from the precedent outlined above that determining the existence of uneconomic duplication is not, as CHELCO suggests, simply a matter of asking whether one utility will duplicate another utility's existing facilities. Gulf witness Spangenberg states that CHELCO's costs to serve the development are significantly higher than Gulf's, and, therefore, Gulf's provision of electric service would not result in any duplication of CHELCO's facilities, let alone uneconomic duplication. Further, Gulf maintains that even if we were to set aside all of CHELCO's costs to make necessary facility upgrades, Gulf's cost to serve the development would still not result in uneconomic duplication.

C. FECA's Argument

FECA states that CHELCO has existing single- and three-phase lines on and around the Freedom Walk development, and has provided service to members on and adjacent to the property for 60 years. Moreover, Gulf would have to extend and upgrade its existing lines at a cost of $89,000 to duplicate CHELCO's facilities. FECA concludes its argument by noting that CHELCO made the prudent business decision to invest in infrastructure to serve current and future members in this area, while Gulf has never provided service to any portion of the Freedom Walk property.

D. Commission Analysis and Conclusion

CHELCO's arguments appear to be founded in part on the premise that it has had a historical presence in the disputed area with single-phase lines in and around the disputed area, and a three-phase line on the northern boundary. Further, CHELCO argues that it is serving members on property shown as part of the Freedom Walk development. CHELCO is concerned that, if they are precluded from serving the Freedom Walk development, they will not be able to take advantage of the higher customer density and higher revenue per capital investment. If Gulf continues to claim the right to serve future high density areas because they are urban, then CHELCO's traditional customers are relegated to always have a higher cost of service. FECA supports CHELCO's position and points out that CHELCO has served the area for 60 years.

Gulf argues that we should not consider the costs of CHELCO and Gulf because the Freedom Walk area is not rural and, therefore, CHELCO should not be allowed to serve the disputed area as a matter of law. However, should we decide to consider the utilities' respective costs to extend service to Freedom Walk, Gulf argues that we should look at any difference in those costs as just one element of reaching any finding with respect to uneconomic duplication. Gulf points out that the Courts have found that in some instances, duplication of facilities does not mean that there is uneconomic duplication. Both this Commission and the Courts have agreed that there are a number of factors that may be considered in determining whether there is uneconomic duplication. Gulf argues that duplication has been defined as any greater amount of costs, as measured by the first cost of the installation of the minimum facilities required, that one utility would have to invest to reach the disputed area over the cost of another utility. Gulf further argues that, prior to 1996, we interpreted that any amount of duplication under this comparative analysis would be uneconomic, while in subsequent cases other considerations were included, such as whether the investment in duplicative facilities was de minimis. Gulf's arguments rely on these various considerations to show that there will be no uneconomic duplication if the Freedom Walk development is served by Gulf.

The record is clear that both CHELCO and Gulf have had lines close to the Freedom Walk development for more than 40 years. CHELCO's three-phase line is on Old Bethel Road at the northern boundary of the development. In addition, CHELCO has a single-phase service line, with a 1967 easement, that previously served a residence within the Freedom Walk property, but unrelated to the development. Gulf's three-phase line is 2,130 from the Freedom Walk development; however, Gulf has had a single-phase line within 30 feet of the eastern boundary of the development since 1955. Further, CHELCO's single-phase line running along Old Bethel Road appears to run parallel with Gulf's three-phase line which serves the schools. Based on these facts, it appears that Gulf's existing lines are in the immediate vicinity of CHELCO's existing lines. Further, because of the close proximity of the lines, the provision of service to the development by either CHELCO or Gulf could result in a further duplication of facilities.

We agree with Gulf that the Courts have found that there may be instances where duplication of facilities exists without that duplication being uneconomic. We also agree with Gulf that the Courts have found that there are other factors that should be considered in determining whether uneconomic duplication exists. For example, in the Gulf Coast Electric Cooperative case, we found that, while there was duplication of facilities, that duplication was not uneconomic because the difference in the costs between the two utilities was considered "de minimis." Gulf Coast Electric Cooperative, 674 So. 2d at 123. In the instant case, as described above, CHELCO would incur no additional cost to extend service to the development, and Gulf would incur $89,738 to extend service to the development. We find that the difference in CHELCO's and Gulf's costs to extend service to the Freedom Walk development of $89,738 is not significant.

In addition, we agree with Gulf's analysis that the "four tests" show that there is sufficient incremental benefit to Gulf's investors and ratepayers for us to allow Gulf to make this investment in spite of any determined duplication. According to witness Spangenberg, Gulf's

cost of extending service to the development is 9.6 percent of the total investment that would need to be made by Gulf.[43] However, we also note that those same tests would result in a similar conclusion for CHELCO.

Both CHELCO and Gulf provided testimony that either would be able to serve the Freedom Walk development with existing facilities (other than Gulf extending its 3-phase line), depending on when the development builds out. Further, it appears that these facilities will continue to be used, expanded, and improved, regardless of which party is approved to provide service to Freedom Walk. Both CHELCO and Gulf provided testimony that both companies' plans include routine upgrades based on normal growth projections unrelated to the Freedom Walk development. In addition, neither party offered testimony that any of its existing investment would become stranded investment if it is not awarded the Freedom Walk territory. Instead, Witness Grantham testified that CHELCO would not be able to "maximize its investment" if it is not allowed to serve Freedom Walk.

In conclusion, based on the record evidence, we find that while the provision of service to Freedom Walk could result in a further duplication of facilities, the provision of that service by either CHELCO or Gulf will not result in uneconomic duplication of any existing facilities.

XIII. Capability of Each Utility to Provide Adequate and Reliable Electric Service to the Freedom Walk Development

Rule 25-6.0441(2)(a), F.A.C., allows us to consider the capability of each utility to provide reliable electric service within the disputed area when resolving territorial disputes. This includes consideration of each utility's existing facilities, the extent to which additional facilities are needed, and each utility's history of providing adequate and reliable service.

A. CHELCO'S Argument

In its brief, CHELCO asserts that as a member of PowerSouth, it has access to sufficient power to supply the requirements of its members with this additional load and acknowledges that Gulf has the generating capacity to do the same. Responding to Gulf's assertion that it could provide more reliable service because its operations center is closer to Freedom Walk, CHELCO witness Avery states that CHELCO is equally capable of responding to the needs of members in the area. CHELCO states that it has been serving the area in dispute for over 60 years and has a long history of service to members in and around the area, while Gulf does not.

B. Gulf's Argument

Gulf acknowledges that each utility is physically capable of providing adequate and reliable service to the Freedom Walk development. However, Gulf argues that CHELCO's cost of doing so will exceed Gulf's cost. Gulf states that, while CHELCO owns distribution facilities

[43] We note that, as described in Section XI, Gulf revised its cost to serve the Freedom Walk development to reflect a total cost of $1,242,253 ($89,738 +$1,152,515). Therefore, the revised percentage of Gulf's cost to extend service to freedom Walk verses the total cost to serve would be approximately 7.2 percent.

which abut portions of the development, the record evidence conclusively demonstrates that CHELCO cannot provide adequate and reliable service to the development using those facilities without undertaking significant and costly upgrades as discussed earlier in this Order. Gulf argues that its necessary facility upgrades and associated costs, as previously discussed, demonstrate that Gulf would be able to provide adequate and reliable service at a lower cost.

C. FECA's Argument

FECA's position supports CHELCO's ability to provide adequate and reliable service to the development. FECA argues that, although both utilities have the means to capably provide adequate and reliable electric service to Freedom Walk, only CHELCO can provide this service with existing facilities.

D. Commission Analysis and Conclusion

This issue addresses each utility's overall ability to provide adequate and reliable service to the Freedom Walk development. Both CHELCO and Gulf provided testimony and reliability statistics and indices, as well as outage reports from the past three years, which indicate that both utilities have historically responded to outages in a reasonable time period. In addition, Gulf argues that it can provide reliable service at a lower cost than CHELCO. CHELCO argues that its historical presence should be considered, and FECA argues that CHELCO is the only provider that can provide service with existing facilities.

CHELCO witness Avery discusses the configuration of CHELCO's distribution system and states that its looped circuit would allow CHELCO to provide greater reliability to the Freedom Walk area. While the Auburn Circuit 03 is a partially looped circuit, both CHELCO and Gulf witnesses testified that it is not a fully looped circuit. We agree with Gulf witness Feazell that the configuration of CHELCO's looped circuit alone does not necessarily ensure any significant degree of reliability greater than Gulf's radial circuit.

While addressing both utilities' ability to respond to outages and emergencies, witness Feazell testified that Gulf would have an advantage over CHELCO in responding to outages because of the closeness of Gulf's service headquarters to the Freedom Walk development. However, we agree with CHELCO witness Avery who testified that neither utility has any substantial advantage, and that although Gulf's service headquarters is closer to Freedom Walk than CHELCO's headquarters, both utilities are able to respond to emergency situations.

We agree with Gulf witness Feazell who testified that, from a physical standpoint, each utility is capable of providing adequate and reliable electric service to the Freedom Walk development. When considering only each utility's intrinsic ability to provide adequate and reliable electric service to the Freedom Walk development, the record evidence clearly shows that both utilities are in a position to do so. The evidence shows that both CHELCO and Gulf have been providing reasonably adequate and reliable electric service to customers in both the immediate area of Freedom Walk and the northwest panhandle of Florida for decades. All relevant reliability indices from the past three years suggest that both utilities are able to timely respond to outage events.

We do not believe that CHELCO's argument with respect to historical presence is compelling because, as discussed previously in this Order, both Gulf and CHELCO have provided service in the area for decades and as described above, both have provided reliable service. In addition, we believe that Gulf's argument regarding the cost to provide reliable service is not relevant in determining whether each utility is capable of providing adequate and reliable electric service; rather, this issue addresses only performance criteria. Based on the testimony, we find that both CHELCO and Gulf are capable of providing adequate and reliable electric service to the Freedom Walk development.

XIV. Customer Preference

Rule 25-6.0441(2)(d), F.A.C., provides that, in resolving territorial disputes, we may consider customer preference if all other factors are substantially equal. In this case, the parties argue that not all other items of consideration are equal, and, therefore, there is no need to address customer preference. Nevertheless, Gulf maintains it has demonstrated that the developer of Freedom Walk has shown a clear preference for service from Gulf. CHELCO argues that the developer is not an appropriate proxy for the future customers, and its preference for service by Gulf should be given little weight in the Commission's ultimate decision. FECA did not discuss this issue in its brief, simply stating that the issue is moot since the facts heavily favor CHELCO.

A. CHELCO's Argument

CHELCO notes that customer preference has been considered by us only when all other issues are equal, which is in accord with several Supreme Court decisions. However, CHELCO asserts that, in this case, issues of existing service capabilities, cost of providing service, uneconomic duplication of facilities, and the non-urban nature of the disputed area demonstrate that all issues in this docket are not equal and, in fact, favor CHELCO. Therefore, CHELCO concludes that customer preference should not be given any consideration.

In its brief, CHELCO asserts that Gulf provided letters from Emerald Coast Partners, LLC, the developer of Freedom Walk, that they have treated as a request for service from Gulf. CHELCO states that, according to Gulf, the letters constitute the customer's "choice", and under the "applicable law" it is the customer who should make the initial choice of electric supplier. CHELCO argues that Gulf's position that customer choice should be a guiding concern ignores a fundamental principle of utility regulation in Florida that a customer has no organic economic or political right to service by a particular utility merely because he deems it advantageous to himself. In support of this argument, CHELCO cites to three court cases that it maintains support the proposition that a consumer has no right to select their provider of utility service.[44]

Additionally, CHELCO argues that we should give lesser weight to customer preference if, as in this docket, it is the developer and not the end-use customers who express a preference. CHELCO maintains that the interests of developers do not necessarily coincide with those of

[44] Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); Lee County Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987); and West Florida Electric Cooperative Inc. v. Jacobs, 887 So. 2d 1200, 1204 (Fla. 2004).

customers, and, therefore, the developer is not acting as an agent or surrogate for the future end-use customer. CHELCO notes that Gulf witness Jacob admitted that the developer may not reside at Freedom Walk, and that the developer does not know what future consumers may want. Moreover, CHELCO suggests it is possible that the developer would prefer Gulf in this case given the initial economic benefit if Gulf were the electric provider. CHELCO maintains it would require the developer to pay a line-extension charge up front and refund portions back to the developer as the development builds out, which serves to protect its members from losing their investment if the development does not buildout as projected. According to CHELCO, Gulf, on the other hand, would require no contributions in aid of construction (CIAC) and would let their ratepayers bear the risk. CHELCO argues that its approach is far more prudent on behalf of its members. CHELCO concludes that the law is clear that consumers have no organic right to choose their provider of utility service, and we should give little weight to the developer's "preference" or "choice" in this case since his decision was very likely influenced by his own economic interests.

B. Gulf's Argument

Gulf acknowledges that we may consider customer preference if all other factors in Rule 25-6.0441, F.A.C., are substantially equal. Gulf maintains that, with the exception of the parties' relative costs to serve within the development -- which costs are substantially equal -- the record evidence demonstrates that Gulf prevails on each of the factors addressed in the rule, including customer preference. As evidence of customer preference, Gulf offered two items of correspondence from the developer of Freedom Walk, Emerald Coast Partners, LLC, which indicate its preference that Gulf serve the development.

In its brief, Gulf notes that CHELCO witness Grantham testified that the developer is not the "customer" in this case and suggests that we should give the developer's preference no weight. Gulf argues that witness Grantham's contention ignores the fact that, in this case, the developer is the only reasonable proxy for the future residents of the development. In fact, Gulf notes that CHELCO witness Grantham acknowledged that the developer is acting as an "agent" on behalf of the future residents. Gulf asserts that we have recognized that it is appropriate to give weight to a developer's preference in territorial disputes.[45] Gulf also argues that there is no evidence to support CHELCO's suggestion that the developer's preference in this case may be financially motivated. Therefore, Gulf concludes that it is appropriate for us to consider the developer as the "customer" in this dispute and to afford the developer's preference significant weight in determining which utility should serve the development.

C. FECA's Argument

FECA argues that this issue is moot, because customer preference is considered only if all other items of consideration are equal, and, in this case, they are not.

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[45] See Order No. 16246, issued June 17, 1986, in Docket No. 850048-EU, In re: Petition of West Florida Electric Cooperative Ass'n. to Resolve a Territorial Dispute with Gulf Power Company in Washington County, Florida, (recognizing that it is "[a]cceptable to consider the preference of the developer, who in many cases pays for the CIAC for installed services before his lots are placed for sale....")

D. Commission Analysis and Conclusion

As noted previously, we may consider customer preference only if all other factors in the rule are substantially equal. Whether or not all other factors are substantially equal in this case is discussed in the other sections within this Order. Therefore, whether or not customer preference should enter into our ultimate decision in this case is discussed in the next section, in which we will decide which utility should be awarded the right to serve the Freedom Walk development.

To answer the question in this issue, Gulf offered two items of correspondence from the developer of Freedom Walk, Emerald Coast Partners, LLC, which clearly indicate its preference that Gulf serve the development. The first letter from the developer is dated September 16, 2008, and expresses the developer's preference that Gulf provide electric service for the Freedom Walk development. The second letter is dated February 10, 2011, and reiterates the developer's preference despite the pendency of the territorial dispute. No other evidence of customer preference was provided in the record of this case.

CHELCO argues that the developer is not a good proxy for the end-use customer because its interest may be divergent from those of the future customers. However, Gulf asserts that the developer is the only reasonable proxy for future residents of the development. In fact, as noted by Gulf, the developer oversees all aspects of the property development, such as property purchase, obtaining permits for vegetation removal, obtaining development permits, and initiating and overseeing installation of water, wastewater, power and all other utilities. We note that in Order No. 13668,[46] we addressed the situation of where the customer was the developer. In that Order, we stated:

> This case is even more compelling in favor of giving little weight to customer preference because here we are dealing with the developer and not the purchaser or ultimate user of electricity. Moreover, customer preference should only be considered as a guiding factor if the facts do not weigh heavily in favor of one utility.

See also Order No. 12858.[47]

Also, in Order No. 16246 cited by Gulf in its argument, we note that in addition to the developer stating a preference, the first three customers of the development expressed the same preference. Still, we acknowledged that it was "acceptable to consider the preference of the developer."[48] Similarly, in Order No. 16105,[49] we considered the request of the developer and

[46] Issued September 10, 1984, in Docket No. 803484-EU, In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc.
[47] Issued January 10, 1984, in Docket No. 830154-EU, In re: Petition of Gulf Power Company involving a territorial dispute with Gulf Coast Electric Cooperative.
[48] See Order No. 16246, issued June 17, 1986, in Docket No. 850048-EU, In re: Petition of West Florida Electric Cooperative Ass'n. to Resolve a Territorial Dispute with Gulf Power Company in Washington County, Florida, p. 2.
[49] Issued May 13, 1986, in Docket No. 850247-EU, In re: Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Company in Washington County.

five customers in awarding service to Gulf, all other things being equal. Therefore, while we do not like to rely on customer preference, especially when it is the developer, but all other things being equal, we find that the developer preference becomes a valid consideration. Therefore, we agree with Gulf that in the past we have recognized that it is appropriate to give weight to a developer's preference in territorial disputes.

Based on the above, we find that the developer of Freedom Walk, as the only reasonable proxy for future residents of the development, has indicated a preference that Gulf serve the development.

XV. Awarding of the Right to Serve the Freedom Walk Development

This dispute involves the right to serve a planned, 170-plus acre mixed use development in the City of Crestview, Florida, known as Freedom Walk, which will be developed by Emerald Coast Partners, LLC. Having considered all the above, we must ultimately decide who should be allowed to serve the disputed area (Freedom Walk development).

A. CHELCO's Argument

CHELCO argues in its brief that it has the ability, resources and capacity to provide service to the area currently and upon full buildout of the Freedom Walk development. In addition, CHELCO has a historic presence on the property. CHELCO asserts that Gulf witness Spangenberg counters by saying that Gulf has been serving the City of Crestview since 1928 and areas south of the property since 1955. CHELCO argues that Gulf may have been serving customers in Crestview before CHELCO, but they certainly were nowhere near the area in dispute when CHELCO began serving members there. CHELCO maintains that it satisfies all the criteria outlined in Chapter 366, F.S., and Rule 25-6.0441, F.A.C., to be considered in resolving the dispute and Gulf does not.

According to CHELCO, Gulf argues that it should prevail because customers of Gulf will enjoy the benefits provided by regulation and oversight by the Commission. However, CHELCO asserts that in Escambia River Cooperative, Inc. v. FPSC, 421 So. 2d 1384 (Fla. 1982), the Florida Supreme Court rejected that argument and held instead:

> We disagree, however, with the Commission's alternative finding that its more extensive jurisdiction over privately owned utilities is an additional consideration supportive of a policy decision in favor of Gulf Power. We disapprove the jurisdictional distinction as a valid reason to support a ruling for a privately owned utility and against a rural electric cooperative in a territorial dispute.

CHELCO maintains that there is no reason to depart from that decision. According to CHELCO, its members have the benefits and protections afforded by a Board of Trustees whom they elect and whom they can replace. Customers of Gulf have no similar recourse. CHELCO concludes that no basis has been offered as to why the holding of the Court should be ignored and we should decline to do so.

According to CHELCO, Gulf has also argued that it should prevail because it has an "obligation to serve" a customer as a public utility, whereas CHELCO, as a cooperative, does not. CHELCO maintains that this too has been presented and thoroughly addressed by us in Order No. 15210, issued October 8, 1985, in Docket No. 840293-EU, In re: Peace River Electric Cooperative Inc. [PRECO] against Florida Power and Light Company for resolution of a Territorial Dispute (PRECO Order). In that docket, Florida Power and Light Company (FPL) argued, in part, that we did not have jurisdiction over PRECO, and, thus, could not award the area in dispute to PRECO because we could not compel PRECO to serve anyone in the area requesting service. We rejected this position, concluding that even though a cooperative has no statutory duty to serve any customer anywhere in the state, when it comes within our jurisdiction to resolve disputes pursuant to Section 366.04(2)(e), F.S., the cooperative cannot refuse to provide service to anyone requesting service within the disputed area. We reasoned that the ability to award an area to a cooperative carries with it the ability to enforce that award. At no time has CHELCO advocated a position inconsistent with our decision in the PRECO Order.

In addition to the above, CHELCO concludes its argument by stating:

1. Gulf cannot provide substation and distribution facilities to the area without expending a minimum of $139,738;
2. Gulf's construction of the three-phase extension will duplicate CHELCO's existing facilities;
3. The disputed area is currently not urbanized, and buildout remains speculative, and, if it occurs, will result in a relatively high density and primarily residential area, but not necessarily urban area;
4. CHELCO has historically served the area and is currently serving members in the disputed area;
5. Gulf has never served the area;
6. Although the majority of the area is within the annexed city limits of Crestview, this does not preclude CHELCO from serving the area;
7. Less than one percent of CHELCO's members reside within municipal boundaries; and
8. Because all factors are not equal, customer/developer preference is not relevant.

B. Gulf's Argument

In its brief, Gulf argues that CHELCO is seeking to provide service in a non-rural area where it is not legally entitled to serve under Chapter 425, F.S. Gulf further argues that Freedom Walk will be highly urbanized in nature as contemplated in Section 366.04(2)(e), F.S., and Rule 25-6.0441, F.A.C., and will lie in close proximity to other urban neighborhoods located within the municipal boundaries of Crestview. Consequently, according to Gulf, CHELCO lacks authority to serve the development under Chapters 366 and 425, F.S.

Additionally, Gulf maintains that it should be awarded the right to serve the development based on application of all factors contained in Section 366.04, F.S., and Rule 25-6.0441(2), F.A.C. Gulf asserts that it is capable of extending adequate and reliable service to the development at a cost substantially below that of CHELCO. Further, Gulf argues that if it serves

the disputed territory, it would not result in the uneconomic duplication of CHELCO's existing facilities.

Finally, according to Gulf, the customer has unequivocally indicated its preference that Gulf serve the development. Gulf maintains that, as a public utility providing electric service in Okaloosa County, Gulf has a statutory obligation to honor the customer's request for service unless doing so would result in further uneconomic duplication of CHELCO's existing facilities or otherwise violate Florida law. Gulf concludes its argument by stating that the record evidence conclusively demonstrates that there is no basis for Gulf's refusing to honor the customer's request in this case, and that Gulf prevails under each of the disputed elements contained in Rule 25-6.0441, F.A.C.

C. FECA's Argument

In its brief, FECA maintains that CHELCO has provided service in this general area for nearly 60 years and currently serves members within the platted boundary of the development. In contrast, Gulf has never provided service to the property. FECA argues that Gulf's costs to provide service to the area would be $89,000 more than CHELCO's cost, and would result in an uneconomic duplication of CHELCO's facilities. FECA asserts that the area at issue is heavily wooded, undeveloped and surrounded by undeveloped or minimally developed property. The area is not urbanized and is not in direct proximity to other urban areas. Further, FECA argues that CHELCO has a line extending into the Freedom Walk property, a single-phase line on one side of the property and a three-phase line along the northern boundary of the disputed area. FECA concludes that CHELCO is capable of providing adequate and reliable service now and at full buildout of the development; and therefore, the disputed area must be awarded to CHELCO.

D. Commission Analysis and Conclusion

As stated repeatedly, this proceeding is governed by Sections 366.04(2)(e) and (5), F.S., and Rule 25-6.0441, F.A.C. In resolving territorial disputes, we may consider, but are not limited to: (1) the capability of each utility to provide service (See Section XIII); the extent to which additional facilities are needed (See Sections IX, X, and XI); the nature of the disputed area (See Section VII); the cost of each utility to provide service to the disputed area (See Sections IX, X, and XI); whether the provision of service will result in uneconomic duplication of existing facilities (See Section XII); and customer preference (See Section XIV). The weight that each of these factors should be given is not specifically prescribed in either the statute or the rule; although, case law provides some guidance in cases where "all else is equal" with respect to the cost and ability of the utilities to extend service to the disputed area.

As discussed in Section XIII, both utilities are capable of providing adequate and reliable electric service to the disputed territory. The parties agree that the planned load for Freedom Walk is approximately 4,700 kW. In Section VII, we found that the area in dispute currently has urban characteristics and urbanization would increase if the development is built out.

In Sections IX, X, and XI, we address the cost of CHELCO and Gulf to provide service to the development, and Section XII addresses whether the provision of service by either party to

Freedom Walk could result in a further duplication of facilities. In Section XII, we determined that the provision of service to Freedom Walk by either CHELCO or Gulf will not result in uneconomic duplication of any existing facilities.

Pursuant to Rule 25-6.0441(2)(d), F.A.C., we may only consider customer preference in resolving territorial disputes if all other factors are substantially equal. In this case, we have found that there is no substantive difference in CHELCO's and Gulf's ability or cost to serve the development. In addition, there will be no uneconomic duplication if either Utility serves the development. Therefore, we find it appropriate to consider the developer's preference in deciding which Utility should be awarded the territory. The record is clear, as described in Section XIV, that the developer of Freedom Walk, as a proxy for future customers, prefers to receive service from Gulf.

Further, CHELCO is a rural electric coop, formed and providing service pursuant to Section 425, F.S. While we have been given no jurisdiction with respect to Chapter 425, F.S., to enforce the provisions of Section 425, F.S., we note that in the Withlacoochee case, the Florida Supreme Court found that "it was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and servicing electricity in a described territory." In the Escambia River case, the Court agreed with our finding that no factual or equitable distinction existed in favor of either utility and thus resolved the dispute in favor of the privately owned utility over the cooperative. Also, in the Suwannee Valley II case, we found that the provisions of Chapter 425, F.S., should be strongly considered. As previously discussed, we found that the area in dispute has urban characteristics. Therefore, considering the case law and all the above, we find that a preference shall be given to Gulf.

In summary, we find there is no substantive difference in CHELCO's and Gulf's total cost to serve the development, the provision of service to Freedom Walk by either CHELCO or Gulf will not result in uneconomic duplication of any existing facilities, and both CHELCO and Gulf are capable of providing service to the Freedom Walk development as that growth occurs. Based on these conclusions, we find that all other factors are substantially equal, and, pursuant to Rule 25-6.0441(2)(d), F.A.C. customer preference shall be considered. Further, pursuant to the Withlacoochee and Escambia River cases cited above, the investor-owned utility, i.e., Gulf, should be given a preference, all else being equal. Therefore, based on the record evidence and the criteria described above, Gulf shall be awarded the right to serve the Freedom Walk development. As described in Section III, this decision will have no impact on CHELCO's continued provision of service to existing customers in the out-parcels adjacent to the Freedom Walk development.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company shall be awarded the right to serve and shall serve the Freedom Walk development. It is further

ORDERED that the Freedom Walk boundaries shall be the metes and bounds description found in the Freedom Walk Community Development District as shown in Choctawhatchee Electric Cooperative, Inc.'s petition – Hearing Exhibit 26. It is further

ORDERED that if there is no timely appeal or petition for reconsideration, this docket shall be closed within 35 days from the issuance of this Order.

By ORDER of the Florida Public Service Commission this 15th day of August, 2011.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.