

Dorothy Menasco

From: Ann Bassett [abassett@lawfla.com]
Sent: Monday, May 16, 2011 1:37 PM
To: Filings Electronic <Filings@PSC.STATE.FL.US>
Cc: Steven Griffin; Matthew Avery; Leigh Grantham; Doc Horton; Ralph Jaeger; Susan Ritenor
Subject: Docket No. 100304-EU
Attachments: 2011-05-16,100304, CHELCO's Response to Gulf's Motion to Strike.pdf

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The Docket No. is 100304-EU Territorial Dispute between Choctawhatchee Electric Cooperative, Inc. and Gulf Power Company

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

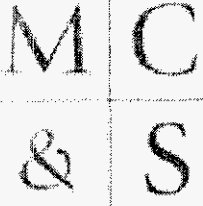
Choctawhatchee Electric Cooperative, Inc.'s Response to Gulf Power Company's Motion to Strike

Total number of pages is 10

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May 16, 2011

BY ELECTRONIC FILING

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


Re: Docket No. 100304-EU

Dear Ms. Cole:

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

Thank you for your assistance.

Sincerely,



Norman H. Horton, Jr.

NHH/amb

Enclosure

cc: Ms. Leigh V. Grantham
Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100304-EU

Filed: May 16, 2011

**CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.'S RESPONSE TO
GULF POWER COMPANY'S MOTION TO STRIKE**

Choctawhatchee Electric Cooperative, Inc. (hereinafter "CHELCO"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby responds to Gulf Power Company's Motion to Strike, and states:

1. On May 9, 2011, Gulf filed its Motion to Strike asking that the Commission strike all portions of the testimony filed by CHELCO in this case "which [accurately and correctly] characterize the area in dispute as non-urban, rural or otherwise use the terms "Freedom Walk," "disputed area" or "area in dispute" in a context that infers a reference to anything other than "Freedom Walk as fully developed." In so doing, Gulf seeks to limit the scope of this territorial dispute from that established in Section 366.04(2)(e), that allows consideration of "the nature of the area in dispute" and from that alleged in the "pleadings" filed not only by CHELCO, but by Gulf.

2. Gulf is apparently baffled by one of the descriptions of the area in dispute in which, at paragraph 6 of the Petition, CHELCO states that "[t]he disputed territory is a proposed new development known as Freedom Walk, which is within CHELCO's historic service area." That language is quite clear that the dispute is territory proposed to be a new development. CHELCO believed it to be appropriate and required by Commission Rule 25-6.0441 F.A.C., to describe what was expected to be built on the disputed territory, since it was that development

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that provided the incentive for Gulf to cross CHELCO's existing lines, duplicate CHELCO's existing facilities at substantial expense and without existing substation capacity to do so, and encroach into a service area that CHELCO has served for decades when Gulf would not. Gulf is at an apparent loss as to how it is to interpret the plain meaning of other portions of paragraph 6 which describe the disputed territory – the “development” if you will – as “approximately 171 acres is currently wooded area but upon buildout will contain both residential and commercial customers. The area immediately 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 the City of Crestview.” Furthermore, paragraph 7 of the Petition provides that “CHELCO has openly served the disputed area since the 1940s.” In addition, at paragraphs 13 and 14, the Petition states that “Gulf Power continues to assert its intent to extend service into CHELCO's historic service area,” and that “CHELCO has historically and exclusively served the area to be developed as Freedom Walk and has the ability, capability, experience and willingness to provide reliable electric service to this property.” (Affidavit of Leigh Grantham at ¶4)

3. What is even more interesting than CHELCO's allegations in the Petition, is Gulf's answer thereto. Regarding paragraph 6, in which the undeveloped nature of the area in dispute and the surrounding area is described, Gulf answered that “Gulf does not contest Chelco's general description of the physical environment and community surrounding the Customer except that Gulf objects to and denies Chelco's suggestion that the Customer is located within Chelco's ‘historic service area.’” Even more telling is Gulf's statements in paragraph 7 of its answer. In that paragraph, Gulf stakes out the argument it advances in its Motion to Strike by stating that “Gulf Power denies that an ‘area’ is even in dispute – there is no ‘disputed area.’ The only ‘dispute’ at issue in this proceeding involves the right to serve an electric customer – the

Freedom Walk Development.” Gulf’s argument is directly contrary to Commission Rule 25-6.0439(2), F.A.C., which provides that “[t]erritorial dispute’ means a disagreement over which utility has the right and the obligation to serve a particular geographical area.” Gulf’s argument and the cited rule could not be at further odds with one another. However, since the rule does not advance Gulf’s argument, it is ignored. Finally, in a statement that reveals the misleading purpose of the Motion to Strike, Gulf “admits” that “[a]s Chelco clearly recognizes in paragraph 6 of its petition, the Freedom Walk Development location is currently wooded and no build-out has occurred.”

4. Gulf’s “pleadings” conclusively demonstrate that Gulf has known from Day 1 that CHELCO believes the nature of the area to be undeveloped, non-urban, and rural “in nature.” There is also no reasonable dispute that CHELCO acknowledges that the development, if ultimately built-out as planned, will be that as depicted in the plats of the development that were provided as exhibits to the Petition. Gulf was not confused or misled as to CHELCO’s case then, and is not confused or misled as to CHELCO’s case now. The only purpose of the instant motion is to further argue Gulf’s position stated in paragraph 7 of their answer as referenced in paragraph 3 above.

5. One can parse words and remove things from any rational context to justify any position, as Gulf has done here. However, this case has been docketed for almost a year. The pleadings, discovery and testimony are replete with statements, descriptions, documents and photographs that establish without any question whatsoever that the area in dispute is currently not urbanized, and is surrounded by property that is equally “rural in nature.” (Affidavit of Leigh Grantham at ¶¶4 and 8) No one, not even Gulf, can realistically and with a straight face argue that there is any misunderstanding as to the nature of the issues in this proceeding, or to the

nature of the area in dispute. Both the area in dispute at present, and the area in dispute at build-out have been accurately described by CHELCO throughout this proceeding. There is no basis for granting the Motion to Strike the accurate and correct description of the area in dispute as consisting of nothing but undeveloped, non-urban, rural land.

6. The cases Gulf cites provide that statements in “pleadings” are akin to admissions and require no further proof. Gulf first incorrectly assumes that the Petition is the only “pleading” in this case, and second, even though every statement in the Petition is true, cherry-picks statements to support its contrived argument. A review of the “pleadings” in this case in their entirety reveals that from the beginning, the present nature of the property has been accurately described and placed at issue. Every pleading filed subsequent thereto has repeated that description. The discovery responses and testimony have consistently identified the present nature of the area, and its complete lack of any urban characteristics, as an issue in this proceeding. Gulf’s cited cases must be read in the context of those cases that hold that “charges in administrative proceedings need not be set forth with the technical nicety or formal exactness required of pleadings in court...” *Jacker v. School Board of Dade County*, 426 So. 2d 1149, 1150 (Fla. 3rd DCA 1983). Furthermore, it is well-recognized that,

Although technical and formal rules of procedure which govern trials before courts of law are not applicable to administrative proceedings, the pleadings must be such as to reasonably inform the affected party of the nature and purpose of the hearing to be held and the relief sought by the initiating party. (e.s.)

Deel Motors, Inc. v. Department of Commerce, 252 So. 2d 389, 394 (Fla. 1st DCA 1971). In addition,

The requirement for pleading specific issues is necessary because "parties to civil and criminal proceedings, whether judicial or administrative, are entitled to notice of the issues, as a matter of due process." ... The rules of pleading are not applied in

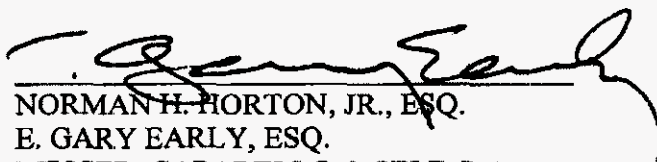
administrative proceedings as strictly as they are in court proceedings, however. (e.s.)(citations omitted)

University Community Hospital v. Department of Health & Rehabilitative Services, 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992). In this case, Gulf was on notice of the issue of the present nature of the area in dispute then, has been on notice of the issue of the present nature of the area in dispute throughout this proceeding, and is on notice of the issue of the present nature of the area in dispute now. Thus, all rules of pleading necessary to preserve the issue of the present nature of the area in dispute have been met, and the Motion to Strike must be denied.

7. For Gulf to come in at the very last possible minute allowed by the Procedural Order, and argue that statements from the Petition filed a year earlier, and read by Gulf in an apparent vacuum, serve to limit the statutory criteria for the Commission's consideration is little more than an effort to divert counsel from their preparation for hearing in the final critical days. The motion does nothing but argue a position that Gulf takes and which it has had and will have ample opportunity to advance in its post-hearing submissions and arguments.

WHEREFORE, for the reasons set forth herein, Choctawhatchee Electric Cooperative, Inc. requests that Gulf Power Company's Motion to Strike be denied.

RESPECTFULLY SUBMITTED this 16th day of May, 2011.


NORMAN H. HORTON, JR., ESQ.
E. GARY EARLY, ESQ.
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2618 Centennial Place
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Attorneys for Choctawhatchee Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

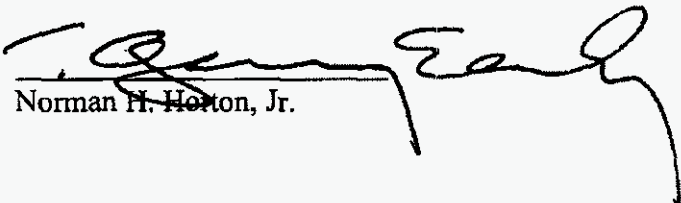
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 16th day of May, 2011.

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Choctawhatchee Electric Cooperative, Inc.
P.O. Box 512
Defuniak Springs, FL 32435-0512

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


Norman H. Horton, Jr.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100304-EU
Date: May 16, 2011

AFFIDAVIT OF LEIGH V. GRANTHAM

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

1. I am competent to testify, and have personal knowledge of the facts herein.
2. I am the Chief Executive Officer of Choctawhatchee Electric Cooperative, Inc. My business address is 1350 W. Baldwin Avenue, DeFuniak Springs, Florida 32435.
3. As Chief Executive Officer of Choctawhatchee Electric Cooperative, Inc., I have been closely involved with the instant territorial dispute, and was directly involved in the preparation of the *Petition to Resolve Territorial Dispute* filed on CHELCO's behalf.
4. It was CHELCO's specific intent to include all of the areas identified by the developer as being within Freedom Walk for which it would require service, as depicted in the plat provided by Moore-Bass Engineers, in the *Petition* for consideration by the Commission in this territorial dispute. For that reason, the entire platted area, including streets and lot lines, was overlaid on the *Petition* exhibits. For that reason the area was accurately described as "west of Highway 85N and south of Old Bethel Road as depicted on Exhibit "A" hereto." To the extent there is any misunderstanding as to CHELCO's intent in this matter, its intent was to include all of the area south of Old Bethel Road within the recognized and accepted plat of Freedom Walk within the area subject to this territorial dispute.

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NOT:


LEIGH V. GRANTHAM

STATE OF FLORIDA

COUNTY OF LEON

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



Notary Public, State of Florida

My Commission Expires 3/29/13

(SEAL)

