BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Gulf Coast Electric Cooperative, Inc. against Gulf Power Company for violation of a territorial order.	Docket No: 20180125-EU Filed: June 13, 2018

GULF COAST ELECTRIC COOPERATIVE, INC.'S
RESPONSE IN OPPOSITION TO GULF POWER COMPANY'S
MOTIONS FOR SUMMARY FINAL ORDER AND FOR PROTECTIVE ORDER

Gulf Coast Electric Cooperative, Inc. ("GCEC"), pursuant to Rule 28-106.204, Florida Administrative Code, responds in opposition to the motions of Gulf Power Company ("Gulf Power") for final summary order and for protective order (collectively, the "Motions").

Introduction

GCEC's Complaint for Expedited Enforcement of Territorial Order (the "Complaint") was filed in strict accordance with section 366.095, Florida Statutes, and Rule 25-22.036, Florida Administrative Code. In it, GCEC alleges that Gulf Power willfully violated a territorial order by failing to give GCEC full and fair notice of a request for service by a customer that GCEC was entitled to serve under the territorial order, and then racing to serve that customer under the pretense that GCEC had waived its right to serve. Gulf Power has filed its Answer to GCEC's Complaint and therein disputes many of the facts alleged by GCEC. In order to prepare for hearing and protect its rights under the territorial order, GCEC has attempted to initiate discovery seeking information related to issues raised by its Complaint and disputed by Gulf Power's Answer. Gulf Power now has filed Motions designed to strip GCEC of its due process rights as a complainant and bar it and the Commission from being able to investigate the relevant facts that led to Gulf Power's alleged violation of the territorial order.

Gulf Power's motion for summary final order is premature and must be denied for three

fundamental reasons. First, it is axiomatic that a summary final order is only proper after the completion of discovery. Second, a quick review of GCEC's Complaint and Gulf Power's Answer shows there are numerous genuine issues of material fact which preclude the award of a summary final order in Gulf Power's favor, including but not limited to whether Gulf Power willfully violated the Commission's territorial order and whether GCEC knowingly and willingly waived its right to serve under the territorial order. Third, a summary final order is particularly inappropriate where, as here, there is pending discovery regarding the "single issue" Gulf Power believes is dispositive of this case: whether GCEC waived the right to contest Gulf Power providing service in violation of a territorial order.

Gulf Power's motion for protective order fails to affirmatively establish the good cause necessary to entitle Gulf Power to a protective order which would wholesale bar all discovery pending resolution of its motion for final summary order. Rather than identifying any actual basis for entering a protective order identified in Florida Rule of Civil Procedure 1.280(c), Gulf Power merely parrots its same mantra that, in its view, this case requires no additional fact-finding and thus discovery is unwarranted. But given the numerous genuine issues of disputed fact, it is clear that this case requires discovery to aid in the Commission's fact findings. Further, Gulf Power fails to establish good cause for limiting discovery to the parties' respective costs of serving the lift station at issue, particularly given that the central issue according to Gulf Power—whether GCEC waived its right to serve the lift station—is a separate factual issue requiring discovery.

Factual Background

As Gulf Power acknowledges, the parties are subject to a Territorial Agreement which was approved by the Commission in Docket No. 930885-EU by Order Nos. PSC-01-891-PAA-

EU and PSC-01-891A-PAA-EU (collectively, the "Territorial Order"). Gulf Power concedes that the Territorial Agreement became part of the Territorial Order. *See* Gulf Power's Answer ¶ 10. The Territorial Order and the Territorial Agreement are part of the record, attached as Composite A to the Complaint.

In relevant part, Section 2.3 of the Territorial Agreement provides as follows:

> In any instance where the Load and distance criteria of Section 2.2 are not met ***but the requested Utility believes that its Cost of Service would not be significantly more than that of the other Utility, the following procedure shall be used to determine if the requested Utility may agree to provide service***:
>
> (a) ***The requested Utility is to notify the other Utility of the Customer's request, providing all relevant information about the request***.
>
> (b) If the other Utility believes that its facilities would be uneconomically duplicated if the request is honored, it has five (5) working days ***from receipt of notice*** to request a meeting or other method to be conducted within ten (10) working days for the purpose of comparing each Utility's Cost of Service. Absent such a request or upon notification from the other Utility of no objection to the requested Utility's providing the service, the requested Utility may agree to provide service.

Territorial Agreement § 2.3 (emphasis added). Importantly: (1) the utility receiving the customer request must "believe that its Cost of Service would not be significantly more than that of the other Utility" in order to invoke the notice procedure specified in Section 2.3; and (2) the utility's notice to the other utility must "provid[e] all relevant information about the request." If the notice does not "provid[e] all relevant information about the request," the requirement to respond within five working days of "receipt of notice" is not triggered.

Gulf Power claims to have received a request for electrical service from the St. Joe Company for a lift station located in Bay County (the "Lift Station"). Apparently, after cavalierly concluding that "its Cost of Service would not be significantly more than" that of GCEC, Joshua Rogers of Gulf Power drafted a short email which he sent to C. Peyton Gleaton,

Jr. of GCEC on October 20, 2017. The email bears the subject line "Electrical Service Request," and reads in its entirety, save the greetings line and signature block, as follows:

> Pursuant to section 2.3(a) of the agreement between Gulf Power and GCEC, I am notifying GCEC of a customer's request for electrical service from Gulf Power for a new lift station on parcel 26597-000-000. Construction would not result in any duplication of facilities.

Exhibit B to Motions. Gulf Power acknowledges that Mr. Rogers had never communicated with Mr. Gleaton prior to sending the short email on October 20, 2017. Gulf Power's Answer ¶ 28. As explained below, GCEC disputes that this short email provides "notice" as required by the Territorial Order issued in Docket No. 930885-EU.

GCEC vigorously disputes that Mr. Gleaton was ever designated or authorized to receive notice on behalf of GCEC. The Territorial Agreement was approved by the Commission in Docket No. 930885-EU, wherein Gulf Power was expressly instructed that all "[n]otices and communications with respect to this docket" are to be addressed to GCEC's counsel of record and GCEC's General Manager. *See* GCEC's Answer to Gulf Power's Petition in Docket No. 930885-EU. Gulf Power never notified GCEC's counsel of record or its General Manager of the request to serve the Lift Station. Furthermore, neither the Commission nor GCEC ever instructed Gulf Power to send notices and communications to Mr. Gleaton.

GCEC also disputes that Gulf Power's notice was effectuated properly by email under the terms of the Territorial Order. GCEC expressly instructed that "[n]otices and communications" should be "addressed to" the physical mailing addresses of GCEC's counsel of record and GCEC's General Manager. *See* GCEC's Answer to Gulf Power's Petition in Docket No. 930885-EU. GCEC never indicated or agreed that "[n]otices and communications" should be sent by email.

Furthermore, the short email sent to Mr. Gleaton on October 20, 2017, does not provide

"all relevant information about the request" as required by the Territorial Order. The Territorial Order is designed to eliminate and avoid uneconomic duplication, the existence of which depends on whether there is a significant difference in the cost of service for each of the utilities, which "is primarily a function of the size of the Load, and the difference in distance between the Point of Delivery and the Existing Facilities of each Utility." Territorial Agreement § 2.1. Thus, to achieve the purpose of the Territorial Order, the utility receiving a request for service must, at a minimum, provide the other utility with notice of the size of the load to be served, the precise location of the point of delivery, and the precise location of the requested utility's existing facilities. All of that information is vitally important for determining whether there is uneconomic duplication of facilities under the Territorial Order. The email that Mr. Rogers sent to Mr. Gleaton is devoid of that relevant information.

Importantly, Mr. Rogers' email does not identify the Lift Station at issue. Providing solely the parcel number for a property is meaningless without identification of the county in which the parcel is located. Gulf Power suggests reference to the parcel number as opposed to the physical address was more precise "because an internet search of the physical address depicts the location of the subject property as being more than four driving miles and three aerial miles away from its actual location." Motions at 9 n.3; *see also* Gulf Power's Answer Ex. G. But what Gulf Power ignores is that an internet search of the parcel number—the ***only*** "relevant information" Gulf Power provided in its notice—turns up absolutely nothing. Further, even if Gulf Power had disclosed the county along with the parcel number—which it did not do—the physical address would still have been more precise, as the parcel number only identifies a large block of land measuring approximately one mile long and one mile wide. It does not come close to identifying the actual location of the Lift Station.

As illustrated by other correspondence and in pleadings before the Commission, Gulf Power has gone to great lengths to precisely identify the Lift Station as either being located at: (1) 1900 Highway 388 West in Bay County, Florida, *see* Gulf Power's Answer Exs. C and D (identifying the requested service location as "1900 Hwy 388 West"); or (2) Parcel ID 26597-000-000 "in unincorporated Bay County," *see* Gulf Power's Answer ¶ 2 ("Gulf Power received an inquiry from the St. Joe Company ('St. Joe') concerning the provision of electric service to a 112 kVA sewage lift station located on parcel ID 26597-000-000 in unincorporated Bay County"); Motions at 3 ¶ 2 & 11 (same). Indeed, Mr. Rogers subsequently indicated that "1900 Hwy 388 W" was the actual "specified location" of the request for service he referenced in his October 2017 email. *See* Gulf Power's Answer Ex. I. This is an implicit acknowledgement that the parcel number divorced from identification of the county in which the parcel is located is useless for identifying the Lift Station at issue.

Mr. Rogers' short email also completely fails to identify the location of Gulf Power's existing facilities that are closest to the Lift Station, and says nothing about the size of the load. Again, GCEC strongly disputes that Mr. Rogers' email provided "all relevant information" about the service request.

In addition to disputing the adequacy of Gulf Power's "notice," GCEC also disputes that Gulf Power could reasonably believe that its cost of service would not be significantly more than GCEC's to serve the Lift Station, a necessary predicate for Gulf Power to invoke the notice procedure of Section 2.3.

On December 14, 2017, GCEC received a request from Bay County to serve the Lift Station at 1900 Highway 388 West in Bay County, and was also advised that Bay County intended to request that Gulf Power serve ***another*** lift station located at 3815 Highway 388 West,

just east of the Northwest Florida Beaches International Airport, which was much closer to Gulf Power's facilities than to GCEC's facilities. After learning that the customer intended to request Gulf Power to serve another lift station located at 3815 Highway 388 West, as a courtesy, GCEC sent an email to Gulf Power advising that the same customer had requested GCEC to serve the Lift Station at 1900 Highway 388 West on January 8, 2018, since it was much closer to GCEC than to Gulf Power.

Gulf Power responded to that courtesy correspondence four days later, on January 12, 2018, claiming that GCEC had "waived any right to serve the subject location" of 1900 Highway 388 West by virtue of not responding to Gulf Power's "notice" sent in October 2017. Gulf Power's Answer Ex. I. In addition to disputing the adequacy of the notice, GCEC also ardently disputes that it ever "knowingly and willingly waived or relinquished its right to serve the Lift Station under the Territorial Order" by virtue of the inadequate notice. Compl. ¶ 23. Attached is the affidavit of Mr. Gleaton, who avers that: (i) he was never authorized or designated by GCEC to receive any type of notice on behalf of GCEC; (ii) he was completely unaware that any territorial agreement existed between GCEC and Gulf Power until January 2018; (iii) he had never communicated with Mr. Rogers prior to receiving the email in October 2017; (iv) he did not knowingly or intentionally waive any right of GCEC to serve the Lift Station; and (v) he received a request to serve the Lift Station from Bay County on December 14, 2017.

A Summary Final Order Is Premature

To be entitled to a summary final order, Gulf Power must demonstrate that, based on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order." § 120.57(1)(h), Fla. Stat.

"The standard for granting a summary final order is very high." *In re: Petition for approval of Special Gas Transp. Serv. agreement with Fla. City Gas by Miami-Dade Cnty. through Miami-Dade Water & Sewer Dep't* ("*Special Gas Transportation Service*"), Docket No. 090539-GU, Order No. PSC-11-0244-FOF-GU, at 4 (Fla. PSC June 2, 2011). As this Commission has stated in describing the standard applicable to deciding a motion for summary final order:

> Under Florida law, "the party moving for summary judgment is required to ***conclusively demonstrate*** the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." *Green v. CSX Transportation, Inc.*, 626 So. 2d 974 (Fla. 1st DCA 1993) (citing *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977)). Furthermore, "***A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law***." *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985).

In re: Application for increase in water rates in Orange Cnty. by Wedgefield Utils., Inc., Docket No. 991437-WU, Order No. PSC-00-2388-AS-WU, 00 FPSC 12:177, at *6-7 (Fla. PSC Dec. 13, 2000) (emphasis added); *see also Special Gas Transportation Service*, Order No. PSC-11-0244-FOF-GU, at 3-4 n.6 (terms summary final order and summary judgment may be used interchangeably). "If the record reflects the existence of any issue of material fact, possibility of an issue, or raises even the slightest doubt that an issue might exist, summary judgment is improper." *Special Gas Transportation Service*, Order No. PSC-11-0244-FOF-GU, at 4.

This Commission has also consistently held that "[t]he appropriate time to seek summary final order is after testimony has been filed and discovery has ended." *In re: Complaint of Quest Commc'ns Co., LLC against MCIMetro Access Transmission Servs., et al.*, Docket No. 090538-TP, Order No. PSC-10-0296-FOF-TP, at 7-8 (Fla. PSC May 7, 2010); *Complaint of Fla. Competitive Carriers Ass'n against BellSouth Telecommc'ns, Inc. regarding BellSouth's practice of refusing to provide Fast Access Internet Service to customers who receive voice*

service from a competitive voice provider, and request for expedited relief, Docket No. 020507-TL, Order No. PSC-02-1464-FOF-TL, at 8 (Fla. PSC Oct. 23, 2002) ("We believe that the suitable time to seek summary final order, if otherwise appropriate, is after testimony has been filed and discovery has ceased."); *In re: Complaints by Ocean Props., Ltd., J.C. Penney Corp. Target Stores, Inc. & Dillard's Dep't Stores, Inc. against Fla. Power & Light Co. concerning thermal demand meter error*, Docket No. 030623-EI, Order No. PSC-04-0992-PCO-EI, at 9 (Fla. PSC Oct. 11, 2004) ("[A] summary final order should not be entered . . . because good faith discovery on the issue was still pending at the time of the vote."); *In re: Application for increase in water rates in Orange Cnty. by Wedgefield Utils., Inc.*, Order No. PSC-00-2388-AS-WU, at *10-11 (observing that "Section 120.57(1), Florida Statutes, contemplates that responses to discovery be considered in ruling on a motion for summary final order," and given that discovery requests on issue were pending, the Commission concluded that it was "premature to decide whether a genuine issue of material fact exists when [the nonmovant] has not had the opportunity to complete discovery and file testimony").

Here, Gulf Power has not conclusively demonstrated the nonexistence of an issue of material fact. Rather, the face of GCEC's Complaint and Gulf Power's Answer clearly show there are numerous genuine issues of material disputed fact that include but are not limited to:

- Whether Gulf Power willfully violated the Territorial Order;[1]
- Whether Mr. Gleaton was authorized by GCEC to receive notice under the Territorial Order;
- Whether Gulf Power failed to give notice to GCEC's counsel of record in Docket No.

[1] When addressing whether one willfully violated a Commission order, "willfulness is a question of fact." *In re: Initiation of show cause proceedings against Kincaid Hills Water Co.*, Docket No. 20170200-WU, Order No. PSC-2017-0470-PCO-WU, at 7 (Fla. PSC Dec. 15, 2017); *In re: Initiation of show cause proceedings against Country Club Utils., Inc.*, Docket No. 140031-WS, Order No. PSC-14-0131-WCO, at 8 (Fla. PSC Mar. 17, 2014).

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- Whether Gulf Power failed to give notice to GCEC's General Manager;
- Whether Gulf Power's email can effectuate notice under the Territorial Order;
- On what basis did Gulf Power believe its Cost of Service as defined by the Territorial Order is not significantly more than GCEC's Cost of Service, in order to even invoke the notice procedure in Section 2.3;
- Whether Gulf Power's "notice" provided "all relevant information about the request" as required by the Territorial Order; and
- Whether GCEC knowingly and willingly waived its right to serve the Lift Station under the Territorial Order.

Indeed, the "single issue" that Gulf Power contends is key to resolving this dispute is a factual question: whether GCEC waived its right to serve the Lift Station by virtue of the notice Gulf Power provided. Waiver is the "intentional relinquishment or abandonment of a known right or privilege, or conduct that warrants an inference of the intentional relinquishment of a known right." *Hale v. Dep't of Revenue*, 973 So. 2d 518, 522 (Fla. 1st DCA 2007) (internal quotation marks omitted); *see also Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2d DCA 2007) ("The elements that must be established to prove waiver are the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage."). A question of waiver inherently involves factual issues that are ***not*** appropriate for decision by summary final order. *See Hale*, 973 So. 2d at 523; *Schiebe v. Bank of Am., N.A.*, 822 So. 2d 575, 575 (Fla. 5th DCA 2002); *Dusich v. Horley*, 535 So. 2d 507, 509 (Fla. 2d DCA 1988); *Parker v. Dinsmore Co.*, 443 So. 2d 356, 358 (Fla. 1st DCA 1983). Thus, the issue of waiver cannot be decided at this juncture in a

final summary order without the benefit of discovery. GCEC vigorously disputes that it intentionally and knowingly waived any right to serve the Lift Station. Indeed, GCEC's preparations to serve the Lift Station in January 2018 bely any contention that GCEC's earlier conduct was consistent with waiver and shows that GCEC was actually prejudiced by Gulf Power's failure to provide adequate notice. It is incumbent upon Gulf Power, as the party "rel[ying] upon the other party's conduct to imply a waiver," to show that the conduct relied upon to do so makes out "a ***clear*** case of waiver." *Hale*, 973 So. 2d at 522 (internal quotation marks omitted) (emphasis added). Based on the record at present, as well as the affidavit of Mr. Gleaton, whether GCEC waived its right under the Territorial Order to serve the Lift Station is a genuine issue of material fact that cannot be decided without additional discovery and is not ripe for decision through a final summary order. And of course, the issue whether Gulf Power "willfully" violated the Territorial Order is always a question of fact. *See In re: Initiation of show cause proceedings against Kincaid Hills Water Co.*, Order No. PSC-2017-0470-PCO-WU, at 7; *In re: Initiation of show cause proceedings against Country Club Utils., Inc.*, Order No. PSC-14-0131-WCO, at 8.

There are also disputed issues of fact regarding the "notice" Gulf Power did provide. Although courts should "give effect to the plain meaning of [a contract's] terms," *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 132 (Fla. 2000), the requirement of "notice" in this case cannot be determined without reference to the docket in which the Territorial Order and Territorial Agreement were entered. While the Territorial Agreement itself does not specify the manner or method by which notice must be given, the docket in which the Territorial Agreement was considered and approved by the Commission does. The Territorial Agreement was approved by the Commission and became part of the Commission's Territorial

Order in Docket No. 930885-EU. At the outset of that proceeding, GCEC gave Gulf Power written instructions that all "[n]otices and communications ***with respect to this docket*** should be addressed to" GCEC's counsel of record and GCEC's General Manager. *See* GCEC's Answer to Gulf Power's Petition in Docket No. 930885-EU (emphasis added). Quite obviously, Mr. Gleaton is not named as a person authorized to receive notice, nor is his title, Vice President of Engineering for GCEC, one of a person authorized to receive notice. It is equally obvious that GCEC expressly instructed Gulf Power that "[n]otices and communications" should be "addressed to" the physical mailing addresses of GCEC's counsel of record and GCEC's General Manager. *See* GCEC's Answer to Gulf Power's Petition in Docket No. 930885-EU. GCEC never indicated or agreed that "[n]otices and communications" should be sent to GCEC's counsel of record or GCEC's General Manager by email.

In short, the present record reflects numerous issues of disputed material fact. And if the record reflects even "the possibility of an issue, or raises ***even the slightest doubt that an issue might exist***," a summary final order in Gulf Power's favor is improper. *See Special Gas Transportation Service*, Order No. PSC-11-0244-FOF-GU, at 4 (emphasis added). The Commission has been quick to reject similar requests for summary disposition of other complaint proceedings. *See, e.g., In re: Complaint by Allied Universal Corp. & Chem. Formulators, Inc. Against Tampa Elec. Co. for violation of Sections 366.03, 366.06(2) and 366.07, F.S.*, Docket No. 000061-EI, Order No. PSC-00-0908-FOF-EI (Fla. PSC May 8, 2000).

Gulf Power Is Not Entitled to Either a Stay of All Discovery or to Limited Discovery

Pursuant to Florida Rule of Civil Procedure 1.280(c), a protective order may issue upon a showing of good cause "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" as justice may require. *Bush v. Schiavo*, 866 So. 2d

136, 138 (Fla. 2d DCA 2004). The burden of making an affirmative showing of good cause lies with the party seeking the protective order. *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1025 (Fla. 1st DCA 1998). If the Commission denies a protective order, it may, "on such terms and conditions as are just, order that any party or person provide or permit discovery." Fla. R. Civ. P. 1.280(c). The rule also states that the "provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion." In turn, rule 1.380(a)(4) states, in pertinent part, "[i]f the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees." Fla. R. Civ. P. 1.380(a)(4).

Gulf Power has failed to meet its burden of demonstrating good cause for entry of a protective order. Gulf Power does not invoke any particular ground set forth in Rule 1.280(c) for barring all discovery, other than its view that the Commission can simply decide the case based on the current documents in the record. But as described above, there are numerous disputed issues of material fact that preclude entry of a summary final order and demand further discovery.

There is no merit to Gulf Power's suggestion that discovery has no place in Commission proceedings absent a petition that specifically invokes section 120.57(1), Florida Statutes. The order Gulf Power cites for the proposition, *In re: Petition for declaratory statement regarding discovery in dockets or proceedings affecting rates or cost of service processed with the Commission's proposed agency action procedure* ("*In re: Petition for declaratory statement*"), Docket No. 140107-PU, Order No. PSC-15-0381-DS-PU (Fla. PSC Sept. 14, 2015), is inapposite. That proceeding concerned a very specific situation, in which the Office of Public

Counsel "sought a declaratory statement as to Public Counsel's right, if any, to conduct discovery in rate cases pending before the PSC under the proposed agency action (PAA) procedure, before proposed agency action is decided upon." *See Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 164 So. 3d 58, 59 (Fla. 1st DCA 2015). After reviewing other decisions in which the Office of Public Counsel was or was not permitted to engage in discovery as an intervenor in a PAA proceeding, the Commission ultimately concluded that Public Counsel ***could*** engage in discovery, and confined the reach of its declaratory statement "solely to OPC and not to any other parties or entities." *In re: Petition for declaratory statement*, Order No. PSC-15-0381-DS-PU, at 9. In passing, the Commission observed that "although Rule 28-106.206, F.A.C., addresses discovery, that rule applies to hearings involving disputed issues of material fact pursuant to Section 120.57(1), F.S., and not to PAA actions." *Id.* at 8-9. The order does not stand for the proposition that absent the specific invocation of section 120.57(1), Florida Statutes, discovery is foreclosed in a proceeding requiring the Commission's fact-finding and involving clear and disputed factual issues.

As explained above, there are numerous disputed issues of material fact apparent from the face of the pleadings that warrant discovery. Moreover, Gulf Power overlooks that this is a formal complaint proceeding initiated under the letter of section 366.095, Florida Statutes, and its correlative regulation, Rule 25-22.036, Florida Administrative Code, to address a serious violation of a Commission order. There is no precedent for denying discovery in this type of complaint proceeding. Indeed, Gulf Power ignores the fact that the Commission has allowed broad-ranging discovery by parties in similar complaint proceedings. *See, e.g., In re: Complaint of Allied Universal Corp. & Chem. Formulators, Inc.* Order No. PSC-00-0392-PCO-EI (establishing broad discovery procedure); *In Re: Emergency complaint by Peoples Gas Sys., Inc.*

against Tampa Elec. Co. for providing unauthorized incentives for electric water heating appliances, Docket No. 941165-PU, Order No. PSC-95-1418-S-PU, at 10 (Fla. PSC Nov. 21, 1995) (in stipulation, noting that parties had engaged in "considerable discovery"); *In re: Complaint of Builders Ass'n of S. Fla. v. Fla. Power & Light Co.*, Docket No. 760545-EU, Order No. 8130, at 1 (Fla. PSC Jan. 9, 1978).

Gulf Power has failed to otherwise show that proceeding with discovery will cause annoyance, embarrassment, oppression, or undue burden or expense; all that Gulf Power suggests is that additional discovery is irrelevant in its view of the case. But the concept of relevancy for discovery purposes is broader than Gulf Power is willing to concede, *see Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995), and under the rules, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action" and it is no "ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1).

Gulf Power also makes no affirmative showing of good cause to limit any discovery to matters concerning the parties' respective costs of service. GCEC is not embarking on a fishing expedition, but rather seeks only basic information reasonably related to fundamental issues, including the notice that was purportedly sent by Gulf Power in October 2017 under Section 2.3 of the Territorial Agreement—"notice" that Gulf Power claims forecloses GCEC's entire case.

Moreover, granting a stay of discovery would unfairly prejudice GCEC and cause substantial harm. GCEC has sought expedited treatment of this case because Gulf Power is unabashedly moving forward with extending its services to serve a location reserved for GCEC under the Territorial Order. Compl. ¶ 38. The limited discovery requests that are currently

pending—a request to depose one Gulf Power employee that sent emails to GCEC which Gulf Power claims are dispositive "notice" in the case and short written discovery regarding both Gulf Power's purported notice and cost of service—are designed to prepare this case for decision by the Commission and to ensure a speedy resolution of this action. By further delaying this action through staying discovery based on Gulf Power's faulty view of the case, GCEC's ability to receive a quick resolution of this matter will be threatened.

When a party seeks a protective order, and the court denies the motion, the court "shall require the moving party to pay" the reasonable expenses incurred in opposing the motion, including attorney's fees, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Fla. R. Civ. P. 1.280(c) (citing Fla. R. Civ. P. 1.380(a)(4)). GCEC submits that Gulf Power was not substantially justified in seeking an unprecedented protective order completely barring discovery at this juncture of the case, and an award of GCEC's expenses incurred in responding to the motion for protective order would be just.

Conclusion

For these reasons, GCEC asks the Commission to deny Gulf Power's Motion for Final Summary Order and Motion for Protective Order, and after hearing, to award GCEC its expenses, including attorney's fees, incurred in responding to the Motion for Protective Order.

Respectfully submitted on June 13, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by E-Mail this 13th day of June, 2018 to: Jeffrey A. Stone (jastone@southernco.com), Gulf Power Company, General Counsel, Sandy Sims (SFSims@southernco.com), Eastern District General Manager, Gulf Power Company, and Rhonda J. Alexander (rjalexad@southernco.com), One Energy Place, Pensacola, Florida 32520-0780, and Russell A. Badders (rab@beggslane.com) and Steve Griffin (srg@beggslane.com), Beggs & Lane, P.O. Box 12950, Pensacola, Florida 32591-2950, Mary Anne Helton (mhelton@psc.state.fl.us), Deputy General Counsel, and Jennifer Crawford (jcrawfor@psc.state.fl.us) and Kurt Schrader (kschrade@psc.state.fl.us), Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399.

/s/D. Bruce May, Jr.
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Gulf Coast Electric Cooperative, Inc. against Gulf Power Company for violation of a territorial order.	Docket No: 20180125-EU Filed: June 13, 2018

AFFIDAVIT OF C. PEYTON GLEATON, JR.

Before me, the undersigned authority, personally appeared C. Peyton Gleaton, Jr., who after being sworn, deposes and says as follows:

1. My name is C. Peyton Gleaton, Jr. I am over 18 years of age and in all other respects competent to testify. My statements are based on personal knowledge.

2. Since 2012, I have been employed by Gulf Coast Electric Cooperative, Inc. ("GCEC") as Vice President of Engineering.

3. During the entire time that I have been employed by GCEC, I have never been designated, authorized, or appointed by GCEC to receive notice for any territorial agreement or any other legal or contractual matter on behalf of GCEC.

4. I have never had any communication with, to, or from Joshua Rogers of Gulf Power Company ("Gulf Power") until I discovered an email from him on October 20, 2017, that Gulf Power attaches to its answer.

5. At the time I discovered the email from Mr. Rogers, I was unaware that any territorial agreement or any other agreement existed between GCEC and Gulf Power.

6. Nothing in Mr. Rogers' email in any way informed me that I was expected to respond to Mr. Rogers or Gulf Power within 5 days.

7. By not responding to Mr. Rogers' email, it was never my intent to waive or relinquish GCEC's right to serve the lift station. I certainly have no authority to waive or relinquish any right belonging to GCEC.

8. Prior to January 2018, I was unaware of any territorial agreement between GCEC and Gulf Power.

9. On December 14, 2017, I received a request from Don Hamm of Bay County, Florida (the customer), for GCEC to serve a lift station identified as being located at 1900 Highway 388 West in Bay County, Florida. During my conversations with Mr. Hamm, I also learned that Bay County intended to request that Gulf Power serve another lift station located at 3815 Highway 388 West, just east of the Northwest Florida Beaches International Airport, which was much closer to Gulf Power's facilities than to GCEC's facilities.

10. Upon receipt of the request from the customer for service to the lift station identified as being located at 1900 Highway 388 West, I promptly calculated the distance of the lift station to be located at 1900 Highway 388 West from GCEC's facilities and from Gulf Power's facilities, and concluded that GCEC's facilities were much closer to the lift station than those of Gulf Power and that it was therefore reasonable to expect that GCEC would serve this lift station. I also began working up all of the information and agreements required to serve the lift station. On December 15, 2017, I advised the customer that GCEC would serve this lift station as requested.

11. The customer request I received on December 14, 2017, for a lift station referenced at 1900 Highway 388 West was the first knowledge I had regarding service being requested or needed at that address.

12. After learning on December 14, 2017, that the customer intended to request Gulf Power to serve another lift station located at 3815 Highway 388 West, as a courtesy, I sent an email to Gulf Power on January 8, 2018, regarding the customer's request for GCEC to serve the lift station at 1900 Highway 388 West.

13. On January 12, 2018, I was advised by Gulf Power that Gulf Power had been requested to serve the lift station identified as being located at 1900 Highway 388 West. Prior to that time, I had no knowledge or information that a request had been made of Gulf Power to serve the lift station identified as being located at 1900 Highway 388 West.

FURTHER AFFIANT SAYETH NOT.

By: _____
C. PEYTON GLEATON, JR.

STATE OF Fl
COUNTY OF Bay

Sworn and subscribed before me, at the time of notarization, by C. Peyton Gleaton, Jr., who is ✓ personally known to me or _____ produced a valid form of identification, this 13th day of June, 2018.

SHANNON L. NEWSOME
Commission # GG 137026
Expires December 13, 2020
Bonded Thru Troy Fain Insurance 800-385-7019

_____
NOTARY PUBLIC

Shannon L Newsome
[Print Name]

My Commission Expires: December 13 2020