State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: April 14, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger)
Division of Economic Regulation (Rieger, Williams)

RE: Docket No. 100304-EU – Petition to resolve territorial dispute with Gulf Power Company in Okaloosa County by Choctawhatchee Electric Cooperative, Inc.

AGENDA: 04/26/11 – Regular Agenda – Motion for Summary Final Order – Participation at discretion of the Commission

COMMISSIONERS ASSIGNED: Graham, Edgar, Brisé

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100304.RCM.DOC

Case Background

On May 24, 2010, Choctawhatchee Electric Cooperative, Inc. (CHELCO) petitioned the Commission to resolve a territorial dispute between it and Gulf Power Company (Gulf) in Okaloosa County involving the Freedom Walk development (Freedom Walk). The matter is set for hearing on May 17 and 18, 2011.

From the issuance of Gulf's Second Set of Interrogatories on August 24, 2010, the parties have disputed the applicability of Chapter 425, Florida Statutes (F.S.), to this territorial dispute. Chapter 425, F.S., titled Rural Electric Cooperatives, governs the provision of electric service by cooperatives.

Ultimately, CHELCO objected to 16 different interrogatories, and Gulf filed two motions to compel discovery on those 16 interrogatories. On January 11, 2011, the Prehearing Officer issued two orders, Order Nos. PSC-11-0020-PCO-EU and PSC-11-0021-PCO-EU, granting the motions to compel on six interrogatories, but denying the motion to compel on ten interrogatories. Although both parties initially moved for reconsideration of those orders, they ultimately withdrew those motions.

However, on February 11, 2011, Gulf filed its Motion for Summary Final Order (Motion). Attached to that Motion was the affidavit of Theodore S. Spangenberg, Jr., Gulf's First Request for Admissions to CHELCO (Nos. 1-10), and CHELCO's response to the request for admissions. In the Motion, Gulf "requests that the Commission enter an order determining that CHELCO is prohibited, as a matter of law, from serving the Freedom Walk development." CHELCO timely filed its Response on February 28, 2011.

Moreover, the time for prefiling direct testimony was extended to March 3, 2011. Pursuant to this extension, all parties timely prefiled their direct testimony on March 3, 2011. Finally, the time for filing rebuttal testimony was extended to April 27, 2011.

This recommendation addresses Gulf's Motion for Summary Final Order (Motion) and CHELCO's Response (Response).[1] The Commission has jurisdiction pursuant to the provisions of Section 366.04(2)(e) and (5), F.S.

[1] Neither Gulf nor CHELCO requested oral argument on their respective Motion and Response. Pursuant to Rule 25-22.0022(2), F.A.C., the Commission has the discretion to request oral argument.

Discussion of Issues

Issue 1: Should the Commission grant Gulf's Motion for Summary Final Order?

Recommendation: No, Gulf has not satisfied the requirements for a Summary Final Order, and its Motion should be denied. (Jaeger)

Staff Analysis:

Standard of Review

Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits."

Parties Arguments

I. Gulf's Motion for Summary Final Order

A. Jurisdictional Question and Applicability of Chapter 425, F.S.

Gulf notes that in CHELCO's Response to Gulf Power's Motion for Reconsideration and Cross-Motion for Reconsideration,[2] CHELCO alleged that the Commission lacked jurisdiction to interpret and apply Chapter 425, F.S. in resolving this territorial dispute. Gulf argues that the provisions of Sections 366.04(2)(e) and 366.04(5), F.S., give the Commission jurisdiction over CHELCO. The provisions of 366.04, F.S., provide in pertinent part as follows:

> (2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
> * * *
> (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 . . . 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.
> * * *

[2] Gulf had originally petitioned for reconsideration of Order Nos. PSC-11-0020-PCO-EU and PSC-11-0021-PCO-EU, granting the motions to compel on six interrogatories, but denying the motion to compel on ten interrogatories and CHELCO had filed the above-noted Response and Cross-Motion. Ultimately, both Gulf and CHELCO withdrew their motions.

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

Gulf notes that Section 366.04(2)(e), F.S., states that "the commission may consider, but not be limited to" the listed factors. Further, Gulf notes that the Commission has repeatedly and routinely interpreted and applied Chapter 425, F.S., in resolving territorial disputes.[3] Specifically, in Order No. 12324, issued August 4, 1983,[4] the Commission held that the "intent of Chapter 425, Florida Statutes, should be strongly considered in determining whether a cooperative should serve a particular area."

Based on the above, Gulf argues that it is clear that the Commission has jurisdiction pursuant to Sections 366.04(2)(e) and (5), F.S., over this territorial dispute. Also, Gulf argues that it has been past Commission practice to interpret and apply the provisions of Chapter 425, F.S., in resolving territorial disputes.

B. Facts Alleged by Gulf

As stated earlier, Gulf filed its Motion on February 11, 2011. In its Motion, Gulf states that the following are undisputed facts:

1. Gulf is an investor-owned electric utility subject to the jurisdiction of the Commission pursuant to Chapter 366, F.S.;[5]

2. CHELCO is a rural electric cooperative organized and existing under Chapter 425, F.S.;[6]

3. The Commission has jurisdiction over CHELCO pursuant to Section 366.04(5), F.S., for the planning, development, and maintenance of a coordinated electric power grid

[3] See Order No. 7961, issued September 16, 1977, in Docket No. 760510-EU, In re: Complaint of Suwanee Valley Electric Cooperative, Inc. against Florida Power & Light Company; Order No. 13668, issued September 10, 1994, in Docket No. 830484-EU, In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc.; Order No. 13926, issued December 21, 1984, in Docket No. 830428-EU, In re: Petition of Gulf Power Company involving complaint and territorial dispute with Alabama 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. 7516, issued November 19, 1976, in Docket No. 74551-EU, In re: Choctawhatchee Electric Cooperative v. Gulf Power Company; Order No. 7040, issued December 9, 1975, in Docket No. 74585-EU, In re: Complaint of Clay Electric Cooperative against Gainesville-Alachua County Regional Electric, Water and Sewer Utilities Board.

[4] Docket No. 830271-EU, In re: Petition of Suwanee Valley Electric Cooperative, Inc. for settlement of a territorial dispute with Florida Power Corporation, at page 4.

[5] CHELCO Petition at Paragraph No. 4.

[6] CHELCO Petition at Paragraph No. 2.

to avoid uneconomic duplication of distribution, transmission and generation facilities;[7]

4. The Commission possesses exclusive jurisdiction to resolve territorial disputes between rural electric cooperatives and investor-owned electric utilities;[8]

5. The territorial dispute involves the proposed Freedom Walk Development which is located entirely within the municipal boundaries of the City of Crestview, Florida (Crestview);[9]

6. Section 425.03(1), F.S., 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;"[10]

7. Crestview is an incorporated city with a population in excess of 2,500 persons;[11]

8. Gulf has provided continuous service to Crestview since 1928, and is currently serving approximately 9,965 customers within Crestview;

9. That in response to a request for admissions that the Freedom Walk Development does not constitute a "rural area" as defined by Section 425.03(1), F.S., CHELCO responded as follows:

> . . . CHELCO admits that a majority of the Freedom Walk Development (with the exception of a portion of the proposed Development bordering the south side of Old Bethel Road between Jones Road and Normandy Road) does not constitute a "rural area" as Gulf Power has defined that term in the Definitions section of its First Request for admissions.[12]

C. Gulf's Legal Argument

Gulf argues that its Motion "hinges solely on a basic question of statutory interpretation, and is therefore particularly appropriate for summary resolution." Gulf argues that Chapter 425, F.S., governs rural electric cooperatives and that pursuant to Section 425.02, F.S., the purpose of electric cooperatives is to supply electric energy and promote and extend the use thereof in rural areas. Further, it reiterates that Section 425.03(1), F.S., defines "rural area" as "[a]ny area not included within the boundaries of any incorporated or unincorporated city . . . having a population in excess of 2,500 persons." Moreover, Gulf notes that pursuant to Section

[7] CHELCO Petition at Paragraph No. 5.
[8] CHELCO Petition at Paragraph No. 5.
[9] CHELCO Petition at Paragraph No. 6, and Exhibit "A" thereto.
[10] Section 425.03(1), F.S. (2010).
[11] Affidavit of Theodore S. Spangenberg, Jr., at Paragraph No. 4.
[12] The definition was taken from Section 425.03(1), F.S., and Gulf states that the area cited by CHELCO in its exception above is not in the City, is not a part of Freedom Walk, and is not reflected as part of the disputed area in this proceeding. See Exhibit "A" to CHELCO's Petition and affidavit of Theodore S. Spangenberg, Jr.

425.04(4), F.S., a cooperative shall have power 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, . . . and to other persons not in excess of 10 percent of the number of its members." (Emphasis supplied by Gulf)

Citing 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, an area located in Lafayette County, at page 4,[13] Gulf quotes the Commission as saying the "case law is clear that the intent of Chapter 425, Florida Statutes, should be strongly considered in determining whether a cooperative should serve a particular area." (Emphasis supplied by Gulf). Further, Gulf cites Tampa Electric Company v. Withlacoochee River Electric Cooperative, Inc., a 1960 Florida Supreme Court decision,[14] in which the Supreme Court stated as follows:

> . . . 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.

(Emphasis supplied by Gulf)

Also, in a Commission order[15] issued in 1984, Gulf notes that the Commission 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 precluded from serving the area.
> * * *
> Evidence was presented at the hearing that the disputed area is a "rural area." (TR 247). As such, Chapter 425 would permit Gulf Coast to serve the disputed area.

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[13] See 83 F.P.S.C. 90, at page 4.

[14] See Tampa Electric Company v. Withlacoochee River Electric Cooperative, Inc., 122 So. 2d 471, 473 n. 6 (Fla. 1960). See also Escambia River Electric Cooperative, Inc. v. F.P.S.C., 421 So. 2d 1384 (Fla. 1982), and Order No. 7961, issued September 16, 1977, in Docket No. 760510-EU, In re: Complaint of Suwanee Valley Electric Cooperative, Inc. against Florida Power & Light Company.

[15] See Order No. 13668, issued September 10, 1994, in Docket No. 830484-EU, In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, Inc., at pages 2 and 7. See also Orders Nos. 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; and 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 (Area lacked sufficient urban characteristics which would exclude electric service by the cooperative), at page 2; 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 (The 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), at page 4.

(Emphasis supplied by Gulf)

Based on all the above quoted statutes, cases, and orders, Gulf asserts that CHELCO lacks statutory authority under Florida law to prospectively serve non-rural areas. Based on the definition of "rural area" as defined by Section 425.03(1), F.S., Gulf further asserts that Freedom Walk is plainly not rural, and as a matter of law, CHELCO is prohibited from serving it. Gulf acknowledges that Section 425.04(4), F.S., "has been interpreted to allow cooperatives to continue to serve a number of persons in non-rural areas which does not exceed 10 percent of the cooperative's total membership." Gulf says it is not seeking a determination that CHELCO must relinquish service to non-rural areas which it presently serves, but is seeking a summary final order determining that, based on the undisputed facts of this case, CHELCO is prohibited, as a matter of law, from serving Freedom Walk.

II. CHELCO's Response to Gulf's Motion for Summary Final Order

A. Jurisdictional Question and Applicability of Chapter 425, F.S.

CHELCO states that Gulf overstates CHELCO's position on the jurisdiction of the Commission. CHELCO admits that the Commission has jurisdiction over this proceeding pursuant to the provisions of Sections 366.04(2)(e) and (5), F.S. However, as regards Chapter 425, F.S., asserts that "the Commission's jurisdiction under Chapter 366 is limited to those elements of Chapter 425 necessary to determine the characteristics of the area in dispute, and the capability of the cooperative to serve that area."[16]

B. Facts Alleged by CHELCO

CHELCO disagrees with Gulf's assertion that all of Freedom Walk lies within the city limits of Crestview, i.e., the parties do not agree on the boundary of the area in dispute. CHELCO also asserts that it has been serving the area in dispute for over 40 years.[17] CHELCO also states that "there are other disputed issues of fact including the nature of the area [rural or urban], the planned load, whether there will be duplication of facilities, and historic and current service to the area, among others."

C. CHELCO's Legal Argument

Quoting Commission Order No. PSC-10-0296-FOF-TP, issued May 7, 2010,[18] CHELCO notes that the applicable standard for granting a summary final order is as follows:

> The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts.

[16] See page 7 of CHELCO's Response.
[17] In its testimony filed on March 3, 2011, CHELCO asserts that it is currently serving "three members which represent four active residential accounts within the developer's designated boundary of Freedom Walk." See testimony of Jonathan Matthew Avery, page 2.
[18] In Docket No. 090538-TP, In re: Qwest Communications Co., LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et al., pages 7-8.

> There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.
>
> Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." . . . The burden is on the movant to demonstrate that the opposing party cannot prevail. . . . "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." . . . "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." . . . If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.
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> * * *
>
> The appropriate time to seek summary final order is after testimony has been filed and discovery has ended. . . . However, once a movant has tendered competent evidence through discovery to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. . . . Until the parties have had the opportunity to proceed with discovery and file testimony, it is premature to decide whether a genuine issue of material fact exists.

(extensive citations omitted by CHELCO)

CHELCO alleges that "virtually every issue remains in dispute," which includes the most fundamental issue, i.e. the area in dispute. Further, CHELCO states that the pleadings in this docket show that, in addition to the area in dispute, there are other disputed issues of fact including but not limited to the nature of the area, the planned load, whether there will be duplication of facilities, and historic and current service to the area.

As stated in Section 366.11, F.S., CHELCO argues that the Commission only has jurisdiction over cooperatives as specifically noted in Chapter 366, F.S. Chelco states that pursuant to Sections 366.04(2)(e) and (5), F.S., the Commission "has been granted limited jurisdiction over cooperatives for purposes of resolving territorial disputes and for implementation of the 'grid bill,'" respectively. Further, for purposes of resolving territorial disputes, CHELCO argues that "the relevant statutory requirements are found in Chapter 366," and not in Chapter 425, F.S.

Citing six Florida Supreme Court decisions,[19] CHELCO argues that the courts "have confirmed that Section 366.04(2)(e) provides the basis for jurisdiction and criteria for

[19] See, Gainesville-Alachua County Regional Electric Water & Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So. 2d 1159 (Fla. 1976); Gulf Coast Electric Cooperative Inc. v. Fla. Public Service Commission, 426 So. 2d 1092 (Fla. 1985); Gulf Power Co. v. Public Service

consideration," and that the criteria found in that section "have been incorporated into Rule 25-6.0441," F.A.C., titled *Territorial Disputes for Electric Utilities.* CHELCO further argues that nowhere in Chapter 366, F.S., or Rule 25-6.0441, F.A.C., "is there any suggestion that the Commission has regulatory or interpretive authority over Chapter 425," and also that nowhere in Chapter 425 is there "even a hint of any Commission jurisdiction or authority to interpret, construe, or enforce the provisions of that chapter."

CHELCO asserts that even pursuant to the provisions of Section 425.04(4), F.S., Gulf admits "that CHELCO may serve within the city limits, subject to Gulf's understanding of the statutory "limitation" regarding the nature of CHELCO's membership in its entire, multi-county service area. Section 425.04(4), F.S., grants, in pertinent part, the following legislative authority to rural electric cooperatives:

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

In addition, CHELCO notes that pursuant to the above-noted section, and Section 425.03(1), F.S., definition of rural area,[20] Gulf argues:

> [T]he Commission must undertake a complete analysis of CHELCO's multi-county service area in order to determine the ability of CHELCO to serve Freedom Walk, and in so doing interpret and construe Chapter 425, determine how many members CHELCO serves in what it characterizes as "non-rural areas," and determine what percentage of CHELCO's members are served in and out of the boundaries of various political subdivisions throughout the CHELCO service area.

CHELCO maintains "that the Commission has neither the jurisdiction nor the expertise to decide percentages of cooperative members, whether the cooperatives are, throughout their entire service areas, operating in 'rural areas,' or even such fundamental issues as what, under Florida law, constitutes an 'unincorporated city, town, village or borough.'"

CHELCO notes that Gulf cites Order No. 15210 (PRECO Order)[21] as being instructive. However, CHELCO argues that Gulf has misconstrued and left out important portions of the PRECO Order, as regards the Commission's jurisdiction over cooperatives. In the PRECO Order, FPL argued that because the Commission did not have regulatory authority to compel

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Comm., 480 So. 2d 97 (Fla. 1985); Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996); Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999); West Florida Electric Cooperative Association Inc. v. Jacobs, 887 So. 2d 1200 (Fla. 2004).

[20] Section 425.03(1), F.S., 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."
[21] Issued October 8, 1985, in Docket No. 840293-EU, In re: Petition of Peace River Electric Cooperative Inc. against Florida Power & Light Co.

PRECO to serve all customers in a disputed area, it could not resolve the dispute in favor of the unregulated PRECO. CHELCO notes that Gulf included a portion of the PRECO Order, but omitted the following:

> FPL maintains that the Commission could not compel PRECO to serve an application for service because the Commission does not have regulatory jurisdiction over cooperatives. This proposition is erroneous. FPL is ignoring the Legislature's grant to the Commission of jurisdiction over rural electric cooperatives expressly for the purpose of resolving territorial disputes. This grant of jurisdiction carries with it the implied power to enforce any such decision pursuant to that jurisdiction. Any other interpretation of the law would render the Commission's jurisdiction over cooperatives, for the purpose of resolving territorial disputes, meaningless.
>
> Additionally, FPL is ignoring the fact that PRECO is permitted, by Florida Statutes, to serve customers who are not members of the cooperative. Although this permission is limited by the statute, the fact remains that the ability to do so does exist. This is not to say that the Commission can, in any circumstance, require PRECO to serve any customer within the state who may request service or that PRECO has an absolute duty to serve anyone requesting service. Although this issue was raised in this proceeding, the issue is truly irrelevant to any present determination by the Commission because the Commission is attempting to only deal with the disputed area. Therefore, we find that although a cooperative comes within the Commission's jurisdiction to resolve territorial disputes pursuant to Section 366.04(2)(e), Florida Statutes, by either petitioning for relief or responding to a petition filed by another utility and acknowledging that a dispute exists, then the cooperative cannot refuse to serve a customer located in that disputed area resolved by the Commission. Chapter 366, Florida Statutes, specifically gives the Commission jurisdiction over cooperatives for this purpose. The Commission's jurisdiction is not inconsistent with Chapter 425, Florida Statutes, which does not prohibit cooperatives from serving non-members and in fact, actually provides for it. Sections 425.04(4) and 425.09(1), Florida Statutes.

(emphasis supplied by CHELCO).

CHELCO argues that the Commission merely recognized that if it resolved a territorial dispute in favor of the cooperative, it had the authority and jurisdiction to make sure that the cooperative provide adequate and reliable service to the area granted. However, in resolving a territorial dispute, CHELCO states that it "is not, as Gulf urges, a broad grant of jurisdiction to determine the appropriate scope and limitations regarding the cooperative's system-wide service area." CHELCO argues that any decision by the Commission "must be limited to the nature of and the service to the affected area, and not be based on issues that are far removed – physically, legally, and jurisdictionally – from the disputed area."

As its final point, CHELCO points to Section 366.045(5), F.S., the grid bill, as appropriate for consideration in resolving territorial disputes and whether allowing Gulf to serve

would result in uneconomic duplication of service. CHELCO argues that it is already in the area and that Gulf's lines are over 2,100 feet away.

CHELCO cites Lee County Electric Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987), as being informative. In that case, CHELCO notes that a customer within the territory of the Lee County Electric Cooperative (LCEC) had extended its lines approximately two miles to a power delivery point within Florida Power & Light's (FPL's) territory in order to receive service from FPL. CHELCO states that LCEC filed a petition with the Commission contesting this action, but its petition was dismissed by the Commission. The Florida Supreme Court reversed the Commission's dismissal of the petition filed by LCEC, and CHELCO quotes the following language from that decision:

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

(Lee County Electric Cooperative, at 586 -- Emphasis supplied by CHELCO)

In conclusion, CHELCO states that it is clear that there is no strict legal requirement under either Section 366.04 or Chapter 425, F.S., that compels the award of the disputed territory to Gulf, or that prevents CHELCO from serving the area, even if it is within the city limits of Crestview. CHELCO argues that "Gulf admits by way of its discovery responses that there is no legal authority preventing CHELCO, or any other rural electric cooperative, from serving a disputed area solely by virtue of its being within the limits of a political subdivision."[22]

Based on the foregoing, CHELCO states:

> [T]here are disputes of fact and law that prevent the entry of a Summary Final Order. In that regard, the Commission should review the facts, and in so doing consider the lack of any urbanized characteristics of the disputed area; the fact that CHELCO is not "initiating" service to the area at issue but currently has lines on, at, and around the property; that Gulf's nearest 3 phase lines are over 2,000 feet from the property, and would have to cross over CHELCO's lines to access the disputed area; that the award of the disputed territory to Gulf will result in uneconomic duplication of facilities under Section 366.04(5); that such duplication materially and adversely affects CHELCO's existing and planned investment in the disputed area; that CHELCO has been serving the area for over 40 years; and that the area was in the past and is now "rural" in its nature and characteristics.

[22] CHELCO asserts that it is entitled, as a matter of law, to serve Freedom Walk, so long as the Commission determines that, as a matter of fact, CHELCO has the capability to do so, and the disputed area does not exhibit characteristics of urbanization under the standards established in Section 366.04(2)(e), F.S.

CHELCO acknowledges that Gulf disputes some or all of CHELCO's factual allegations, and that this is why the scheduled evidentiary hearings should move forward expeditiously. For the reasons set forth above, CHELCO argues that there are genuine disputed issues of law and material fact, and that Gulf has failed to demonstrate that a Summary Final Order is appropriate. Moreover, CHELCO notes that discovery has not been completed in this docket,[23] and that Florida case law holds that final summary judgment, equivalent to a Chapter 120 proceeding, requires the opportunity to conduct discovery. See Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932 (Fla. 2d DCA 1995) (grant of summary judgment reversed where plaintiff had not yet deposed any representative of the corporate defendant); Singer v. Star, 510 So. 2d 637, 639 (Fla. 4th DCA 1987) (summary judgment should not be granted until facts have been developed sufficiently for court to be reasonably certain no issue of material fact exists). CHELCO contends that the Commission has consistently held that discovery should be finished before filing of a Motion for Summary Final Order. CHELCO also asserts that while Gulf maintains that there are no disputed issues of material fact, CHELCO does not agree and has provided testimony. CHELCO states that they have only done one round of discovery and that there have been no depositions. CHELCO further contends that the relief requested is inappropriate.

Analysis

The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." 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)). The burden is on the movant to demonstrate that the opposing party cannot prevail. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996). "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); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 2d 1123 (5th DCA 2000). If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996). "Even where the facts are uncontroverted, the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts." Albelo, at 1129.

Staff believes that Gulf hinges most of its argument on the fact that Freedom Walk is entirely within the city limits of Crestview,[24] and that the definition of "rural area" found in Section 425.03(1), F.S., states as follows: "'Rural area' means any area not included within the

[23] See Order No. PSC-10-0708-PCO-EU, issued November 29, 2010, in this docket which establishes the deadline for concluding discovery as May 10, 2011.
[24] CHELCO disputes this allegation and argues that there are small areas in dispute outside the city limits.

boundaries of any incorporated or unincorporated city, town . . . having a population in excess of 2,500 persons." Therefore, by definition, Freedom Walk is not defined as rural.

Staff believes that an order cited by Gulf is informative. In Order No. 7961, the Commission was addressing Suwannee Valley's complaint against FPL in a territorial dispute. Though the area in dispute was just outside the city limits of Live Oak, the Commission considered: (1) that the area abutted for a distance of more than 2,000 feet a paved street of the City of Live Oak, (2) that the area was within the unincorporated suburban territory of the City of Live Oak; and (3) the area west of the city of Live Oak was growing at a steady rate. Based on these considerations, and others, the Commission found that 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." Staff believes the Suwannee Valley case was decided on the specific facts of that case. Similarly, staff notes that, among other things, CHELCO maintains that Freedom Walk is rural in nature, despite it being within the city limits of Crestview. Therefore, staff believes there are disputed issues of material fact.

Based on the above, staff does not believe that Gulf has shown that it is entitled to judgment as a matter of law on the undisputed facts. At this stage of the proceeding, the direct testimony has been filed and rebuttal evidence is scheduled to be filed on April 27, 2011. Also, discovery will close as of May 10, 2011. Thus, staff believes the Commission must draw factual inferences in favor of CHELCO.

The Commission has determined that the appropriate time to seek summary final order is after testimony has been filed and discovery has ended. See Order No. PSC-02-1464-FOF-TL issued October 23, 2002), in Docket No. 020507-TL, In re: Complaint of Florida Competitive Carriers Association v. against BellSouth Telecommunications, Inc. regarding BellSouth's practice of refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider, and request for expedited relief; See also, Order No. PSC-00-2388-AS-WU, issued December 13, 2000, in Docket No. 991437-WU, In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc., However, once a movant has tendered competent evidence through discovery to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. See Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985). Until the parties have had the opportunity to proceed with discovery and file rebuttal testimony,[25] staff recommends that it is premature to decide whether a general issue of material fact exists.

Staff believes Gulf has failed to meet the requirements of Section 120.57(1)(h), F.S., for the granting of a Motion for Summary Final Order. Specifically, Gulf has not made a conclusive showing that there is no genuine issue of material fact in dispute and that it is entitled to judgment as a matter of law. Staff believes that CHELCO has shown that Gulf failed both prongs of the test for summary final order set out in Section 120.57(1)(h), F.S., i.e., that there are both issues of material fact and that Gulf is not entitled to judgment as a matter of law. Therefore, staff recommends that Gulf's Motion for Summary Final Order be denied, and the

[25] Rebuttal testimony is now scheduled to be filed on April 27, 2011.

Commission continue the hearing process set out in the orders establishing procedure and setting controlling dates issued in this docket.[26]

[26] See Orders Nos. PSC-10-0615-PCO-EU; PSC-10-0708-PCO-EU; and PSC-11-0126-PCO-EU.

Issue 2: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendation in Issue 1, the docket should remain open until the territorial dispute is resolved. (Jaeger)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the docket should remain open until the territorial dispute is resolved.