

Marguerite McLean

100304-EU

From: Ann Bassett [abassett@lawfla.com]
Sent: Friday, April 29, 2011 4:38 PM
To: Filings Electronic <Filings@PSC.STATE.FL.US>
Cc: Steven Griffin; Matthew Avery; Leigh Grantham; Martin Blake; Doc Horton; Nicole Sullivan; Ralph Jaeger; Susan Ritenor
Subject: Docket No. 100304-EU
Attachments: 2011-04-29, 100304, Chelco's Prehearing Statement.pdf; 2011-04-29, 100304, CHELCOs Final Prehearing Statement.doc

The person responsible for this electronic filing is:

Norman H. Horton, Jr.
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, FL 32317
(850) 222-0720
nhorton@lawfla.com

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.

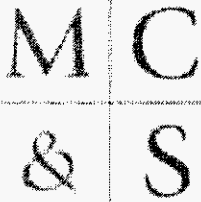
Prehearing Statement of Choctawhatchee Electric Cooperative, Inc.

The documents is attached in .pdf and MS Word format.

Total number of pages is 18

Ann Bassett
Messer, Caparello & Self, P.A.
2618 Centennial Place (32308)
P.O. Box 15579
Tallahassee, FL 32317
Direct Phone: 850-201-5225
Fax No. 850-224-4359
Email Address: <abassett@lawfla.com>
Web Address: <www.lawfla.com>

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MESSER CAPARELLO & SELF, P.A.

Attorneys At Law

www.lawfla.com

April 29, 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 the Prehearing Statement of Choctawhatchee Electric Cooperative, Inc. 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

DOCUMENT NUMBER 02975

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100304-EU
Filed: April 29 2011

**PREHEARING STATEMENT
OF
CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.**

Choctawhatchee Electric Cooperative, Inc. (hereinafter "CHELCO") pursuant to Order No. PSC-10-0615-PCO-EU, Order Establishing Procedure dated October 13, 2010, Order No. PSC-10-0708-PCO-EU, Order Granting Joint Motion for Change in Hearing Dates and Modifying Controlling Dates dated November 29, 2010, and Order No. PSC-11-0186-PCO-EU, Order Granting Agreed Motion to Modify Procedural Dates dated April 6, 2011 in Docket No. 100304-EU, submits the following Prehearing Statement in the above-captioned docket.

A. WITNESSES

<u>Witness</u>	<u>Subject Matter</u>	<u>Issues</u>
Leigh V. Grantham (Direct and Rebuttal)	Overview of dispute and operations, responds to Gulf Power.	All except legal argument
Jonathan Matthew Avery (Direct, Supplemental Direct and Rebuttal)	System requirements to serve Freedom Walk.	All except legal argument
Jacquelyn Nicole Sullivan (Direct and Supplemental Direct)	Studies performed for CHELCO and service to Freedom Walk area.	4, 5 and 7
Dr. Martin J. Blake (Rebuttal)	Rebuts Gulf Power witnesses on uneconomic duplication, ability to serve, policy and regulatory matters.	2, 3, 6, 8, and 9

B. EXHIBITS

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct Testimony</u>			
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-1	Plat Depicting Area in Dispute
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-2	Map showing active accounts
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-3	Map depicting CHELCO's 1PH Line
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-4	CHELCO'S Cost Estimate
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-5	CHELCO's Line Extension Policy
Jonathan Matthew Avery	CHELCO	<u> </u> JMA-6	Map of CHELCO and GULF existing lines
Leigh V. Grantham	CHELCO	<u> </u> LVG-1	Aerial map of area
Leigh V. Grantham	CHELCO	<u> </u> LVG-2	Aerial with overlay of planned development
Leigh V. Grantham	CHELCO	<u> </u> LVG-3	Franchise Agreement with City of Crestview
Leigh V. Grantham	CHELCO	<u> </u> LVG-4	Photos of property from the ground
Leigh V. Grantham	CHELCO	<u> </u> LVG-5	Gulf Power e-mail about service
Jacquelyn Nicole Sullivan	CHELCO	<u> </u> JNS-1	Resume

Jacquelyn Nicole Sullivan	CHELCO	<u>JNS-2</u>	Portions of Construction work plan
Jacquelyn Nicole Sullivan	CHELCO	<u>JNS-3</u>	July 7, 2010 Study (3700kW)
Jacquelyn Nicole Sullivan	CHELCO	<u>JNS-4</u>	February 1, 2011 Study (4700 kW)

Supplemental Direct Testimony

Jacquelyn Nicole Sullivan	CHELCO	<u>JNS-4</u> (Revised)	April 4, 2011 Study (25 MVA)
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Rebuttal Testimony

Jonathan Matthew Avery	CHELCO	<u>JMA-7</u>	Gulf Power Interrogatory Responses
Dr. Martin J. Blake	CHELCO	<u>MJB-1</u>	Prior testimony of Dr. Martin J. Blake

CHELCO may use other documents, including but not limited to discovery responses, deposition transcripts and exhibits listed by Gulf and the Commission as cross-examination exhibits.

C. BASIC POSITION

This docket was initiated by CHELCO because Gulf Power Company (“Gulf Power”) has expressed its intent to provide electric service to a development, known as Freedom Walk, to be built on a parcel of property which CHELCO has historically served, and because CHELCO has existing lines and facilities directly adjacent to Freedom Walk that are adequate to provide service to the area now and with previously planned upgrades, upon full build out of the Freedom Walk development. The area at issue is heavily wooded, undeveloped and surrounded by undeveloped or minimally developed property. It is by no means urbanized and is not in

direct proximity to other urban areas. CHELCO has the ability to provide service to Freedom Walk through its own existing capabilities. CHELCO has a line extending into the property and lines on two sides of the property, including a three phase line along the northern boundary of the disputed territory. CHELCO would serve this area and the development from the Auburn substation, which is capable of providing adequate and reliable service now and at full build out. In order to address projected growth in the general area of the development, CHELCO has planned upgrades on a portion of the lines from the Auburn substation in its current Construction Work Plan that were developed independent of the projected development. These upgrades will be implemented to serve all anticipated growth in demand in the area, and are sufficient to meet the projected Freedom Walk load plus the previously anticipated additional load growth. Thus, CHELCO would have no additional costs to serve this area and the development. CHELCO has provided service in this general area for nearly 60 years and, in fact, has had, and currently has, members receiving service within the platted boundary of the development.

In contrast to CHELCO, Gulf Power will have to extend lines just to get to where CHELCO has an existing line, at a cost of at least \$89,000. Furthermore, Gulf does not have the capacity at its Airport Road substation necessary to serve Freedom Walk. Without an upgrade, the substation will exceed its rated capacity by 2013 with the addition of only 1880kW of Freedom Walk's total 4700 kW load. Gulf has admitted that there are no planned upgrades to the Airport Road substation in order to serve Freedom Walk and that it has not even begun to include the anticipated Freedom Walk load in its load studies. Although Gulf has asserted that it will be performing a massive upgrade of the Airport Road substation at some unspecified time in the next 5 years, at a cost of at least \$1,600,000, it has no current timetable, no current planning document, no current land use approvals, and no current budget. Gulf has now proposed

replacing the existing “fully depreciated” 10.5 MVA transformer bank with a “fully depreciated” 12.5 MVA transformer bank at its Airport Road substation to allow it to serve Freedom Walk, at an alleged cost of \$40,000. This would also suggest the transformer banks are 25-35 years old if they are “fully depreciated.” Even with that upgrade, the demand in December 2014, with the full 4700 kW Freedom Walk load, will exceed the total rated load capacity. In short, despite Gulf’s acknowledged “existing reliability risks” and operational and maintenance issues, Gulf has no present and identifiable plan that would allow it to perform the upgrades required to serve the full projected load as quickly as CHELCO could. Gulf Power has never provided service to the property, and prior to the Freedom Walk proposal becoming known, had no plan to extend their service to the area at issue. Gulf Power’s costs to provide service to the area would be significantly greater than CHELCO’s, and any service by Gulf Power to the area of the Freedom Walk development would be an uneconomic duplication of service.

D. ISSUES

Issue 1: What are the boundaries of the area that is the subject of this territorial dispute known as Freedom Walk Development?

CHELCO’s Position: The boundaries of the area subject to this dispute are Old Bethel Road on the north, Normandy Road on the west, Jones Road on the east and a metes and bounds description on the south. The area is the development plat which is shown as an overlay on the exhibits attached to the petition and testimony and as has been described repeatedly by CHELCO in discovery.

Issue 2(a): Does the Commission have jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, in the context of the instant territorial dispute?

CHELCO's Position: No. The Commission was created by the legislature to exercise regulatory jurisdiction over electric utilities to the extent established in Chapter 366, Florida Statutes, and specifically for this matter, Section 366.04, Florida Statutes. As an administrative agency, the Commission is a creature of statute and has only those powers conferred upon it by the legislature. The powers of the Commission are measured and limited by the statute in which such powers are expressly granted or implicitly conferred. In that regard, Section 120.52(8), Florida Statutes provides that "[s]tatutory language . . . generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute." The Commission has no power to act in a manner that enlarges, modifies, or contravenes the authority that the legislature has delegated to it.

The limitation on the exercise of jurisdiction by the Commission is best expressed in the case of *Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493 (Fla. 1973), in which the Florida Supreme Court held that:

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

conferred upon the Commission the authority to administer such plan. (Emphasis in original)(Citations omitted)

Id. at 495-496; *see also, Lee County Elec. Coop. v. Jacobs*, 820 So. 2d 297, 300 (Fla. 2002). The Court in *Lee County Elec. Coop.* was clear in its ruling that the Commission's general jurisdiction established in Section 366.04(2)(b), Florida Statutes to "prescribe a rate structure for all electric utilities" did not extend to the rate structures of rural electric cooperatives under Chapter 425. The limitations expressed in that opinion apply with equal force to the Commission's authority to construe, interpret, and apply Chapter 425 terms and conditions in the context of a territorial dispute, where the Commission's jurisdiction is one of determining "the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services." While the Commission is not necessarily limited to those precise items, it is limited to areas of inquiry established, and over which jurisdiction has been conferred, by Chapter 366, Florida Statutes. Thus, the Commission does not have jurisdiction to engage in statutory construction regarding the overall scope of the rights, powers, and duties of rural electric cooperatives, or to enforce or apply provisions of Chapter 425, Florida Statutes, in the context of the instant territorial dispute.

Issue 2(b): If the Commission determines that it has jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, is the Freedom Walk Development a "rural area" as defined in section 425.03(1), Florida Statutes?

CHELCO's Position: A significant portion of the proposed Freedom Walk development is within the area annexed by the City of Crestview in conjunction with the establishment of a

community development district. That portion of the property does not meet the legal definition of “rural area” in Section 425.03(1), Florida Statutes. The remainder of the area within the proposed development plan is not within the area annexed, and thus meets the legal definition of “rural area” in Section 425.03(1), Florida Statutes.

Issue 2(c): If the Commission determines that it has jurisdiction to enforce or apply provisions of Chapter 425, Florida Statutes, and if the Freedom Walk Development is not found to be “rural” in nature, is CHELCO prohibited from serving the Freedom Walk Development by virtue of section 425.02 or 425.04, Florida Statutes?

CHELCO’s Position: No. CHELCO is not prohibited from serving the Freedom Walk development by virtue of Section 425.02 or 425.04, Florida Statutes, nor does Chapter 425 prohibit cooperatives from serving areas that are not “rural areas.” The problem inherent in this issue is that it mixes and confuses terms applicable to territorial disputes. In that context, it must be kept in mind that Section 366.04(3)(b) provides that a territorial dispute may include consideration of, among other things, “the degree of urbanization of the area, [and] its proximity to other urban areas.” The term “rural” is not used in Section 366.04(3)(b). If the legislature had intended to apply the Chapter 425 “rural area” definition - or any other definition of “rural” - to territorial disputes, it could have and would have done so. It did not.

In addition, whether the Freedom Walk development property meets the legal definition of a “rural area” under Section 425.03 has little to do with the factual “nature” of the area as urban or rural. The “nature” of Freedom Walk is far from “urban,” and would meet any reasonable person’s idea of being rural “in nature.” Freedom Walk is agricultural and silvicultural property, surrounded by more of the same, interspersed with rural residential

properties and sand mine. It has been relatively unchanged since CHELCO began serving it over 60 years ago. It is difficult to imagine a more rural setting. Thus, from a factual perspective, Freedom Walk is not “urbanized,” nor is it located in proximity to other urban areas. Thus, to the extent “rural” is to be used as a synonym of “not urban” when determining the “nature” of the property under Section 366.04, Freedom Walk is “rural” in nature. However, as to the legal question of whether CHELCO is limited by Chapter 425 in its ability to serve outside of “rural areas,” and if so, the scope of any such limitation, the construction, interpretation, and application of that somewhat ambiguous statute is outside of the Commission’s regulatory jurisdiction.

Issue 3: What is the nature of the Freedom Walk Development with respect to its population, the type of utilities seeking to serve it, degree of urbanization, proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services?

CHELCO’s Position: The area which will be the location of the Freedom Walk development is currently heavily wooded with no roads other than those on the boundaries and no other utilities other than those serving the three residents on the north part of the property and an existing line of CHELCO’s which runs to the center of the property. Although the area north and west of Old Bethel Road, which is served by CHELCO, has low-density residential development, the adjacent land south and east is vacant. The property on which Freedom Walk will be located and that in close proximity to the disputed area is not urbanized. Reasonably foreseeable future requirements of the area for service will be provided by CHELCO, since the existing residential areas to the west and north of Freedom Walk are already served by CHELCO, and will continue to be served as those areas grow. The only foreseeable future

requirement for other utility services is water service to the development, which is to be provided by Auburn Water System, a water provider that shares space with CHELCO at its Auburn service center.

Issue 4: What is the existing and planned load to be served in the Freedom Walk Development?

CHELCO's Position: The existing load to members residing on the property is approximately 53kW. For purposes of responding to staff discovery, both parties have used 4700 kW as the load at full build out. Although both parties acknowledge that load will not occur for several years, CHELCO has provided evidence of its current ability to provide such 4700 kW service within its own capabilities. CHELCO initially projected 3700 kW as the expected load on full build out, which excluded some commercial load, but has since incorporated the full 4700 kW in its load planning and projections presented in this proceeding. It is conceivable that the final load could be less than 4700 kW if the entire planned load does not happen, though that is not reflected in the record.

Issue 5(a): What are the necessary facilities and associated costs for CHELCO to extend adequate and reliable service to the Freedom Walk Development?

CHELCO's Position: CHELCO has lines and facilities in place at the property now that would be used to provide adequate and reliable service without the need to extend any of its lines. CHELCO would be able to serve the projected load of 4700kW without any substation additions or additions that are not already anticipated and planned. CHELCO does have in its Construction Work Plan ("CWP") a project that would upgrade the line serving the Freedom Walk area and development, however, the upgrades were planned to handle projected load

growth in the area and planned without consideration of any load for Freedom Walk. Although the Freedom Walk load is not specifically identified in the CWP, the upgrade will have the capacity to allow CHELCO to handle Freedom Walk and other anticipated growth in the area for some time to come. The existing facilities are adequate to serve Freedom Walk if the 4700 kW demand at full build out occurred next week with only an acceleration of the previously planned improvements and no costs over what has been planned for with the future upgrades. If Freedom Walk is built in phases as expected, the existing facilities and normal planned upgrades would be more than adequate to handle the projected load with no changes to the CWP and no additional costs to members as a result of the Freedom Walk load.

Issue 5(b): What are the necessary facilities and associated costs for Gulf to extend adequate and reliable service to the Freedom Walk Development?

CHELCO's Position: Gulf Power has no presence at or on the area that will become Freedom Walk and at a minimum would have to extend their existing lines 2130 feet from their current line. The cost for this would be at least \$89,000 according to Gulf Power. In addition, according to projections provided by Gulf Power, the Airport Road substation will exceed its rated capacity of 10.5 MVA by 2013 upon the addition of only 1880 kW of demand from Freedom Walk when the load will be 11,430 kW (11.43 MVA). Gulf has admitted that there are no planned upgrades to the Airport Road substation in order to serve Freedom Walk and that it has not even begun to include the anticipated Freedom Walk load in its load studies. Although Gulf has asserted that it will be performing a massive upgrade of the Airport Road substation at some unspecified time in the next 5 years, at a cost of at least \$1,600,000 for that element, it has

no current timetable, no current planning document, no current land use approvals, and no current budget.

Despite its earlier admission that it had no plans to upgrade the Airport Road Substation to serve Freedom Walk, Gulf has now proposed a stopgap upgrade to replace the existing 10.5 MVA transformer bank with a 12.5 MVA transformer bank at its Airport Road substation to allow it to serve Freedom Walk, at an alleged cost of \$40,000, a figure that CHELCO believes to be artificially low and based upon the accounting maneuver of reporting the cost of both the existing and replacement transformers at their “fully depreciated” value. Even with that upgrade, the demand in December 2014, with the full 4700 kW Freedom Walk load will be at least 14,690 kW (14.7MVA) far exceeding the “bank rating” that Gulf has equated to the total load capacity (See Gulf’s Response to CHELCO Interrogatory 38). In short, Gulf has no present and identifiable plan that would allow it perform the upgrades required to serve the full projected load. Gulf will not be able to serve the full projected load of Freedom Walk without costly substation upgrades to their facilities.

Issue 5(c): What are the necessary facilities and associated costs for CHELCO to provide adequate and reliable service within the Freedom Walk Development?

CHELCO’s Position: Based on parameters agreed to by Gulf Power and CHELCO, the total cost for CHELCO to serve all residential and commercial loads within the Freedom Walk development is \$1,052,598.01.

Issue 5(d): What are the necessary facilities and associated costs for Gulf to provide adequate and reliable service within the Freedom Walk Development?

CHELCO's Position: Based on parameters agreed to by Gulf Power and CHELCO, the total cost for Gulf to serve all residential and commercial loads within the Freedom Walk development is \$1,152,515.00 .

Issue 6: Will the provision of service to the Freedom Walk Development by CHELCO or Gulf result in uneconomic duplication of any existing facilities?

CHELCO's Position: Yes. CHELCO has existing single phase and 3 phase lines on and around the area to become the Freedom Walk development and has provided service to members on and adjacent to the property for 60 years. CHELCO has made an investment to serve current and future members in this area, and to serve these members has included projects as part of its normal planning schedule to handle anticipated growth. Gulf Power has no facilities in the area which would be adequate to serve any load at the property and would have to extend its existing lines over 2000 feet just to get to CHELCO's existing point of presence. Gulf Power has never provided service to any portion of the parcel of property now known as Freedom Walk and had no plans to serve this property before Freedom Walk was proposed. To serve Freedom Walk, Gulf Power would have to construct lines that would run parallel to and cross existing 3 phase lines of CHELCO. A determination of whether an extension of facilities constitutes uneconomic duplication must be based on more than whether the party seeking to extend can profit from providing the service, but must take into account the impact to the existing service capabilities and reasonable expectations upon which investments have been made by the existing provider. As applied to this case, any extension of service to Freedom Walk by Gulf Power would constitute an uneconomic duplication of existing facilities.

Issue 7: Is each utility capable of providing adequate and reliable electric service to the Freedom Walk Development?

CHELCO's Position: As set forth above, CHELCO has existing distribution facilities with the current capacity and capability to provide adequate and reliable electric service to the Freedom Walk Development. CHELCO is a member of PowerSouth Energy Cooperative, a generating and transmission cooperative, and through this arrangement has access to sufficient power to adequately and reliably serve the Freedom Walk development.

As set forth in CHELCO's position to Issue 5(b), there is a significant question as to whether Gulf is currently capable of providing adequate and reliable electric service to the Freedom Walk Development, or has any present and identifiable plan for constructing the upgrades and improvements necessary to allow it to provide such service.

Issue 8: What utility does the customer prefer to serve the Freedom Walk Development?

CHELCO's Position: Gulf has provided letters from Emerald Coast Partners, LLC that requests service from Gulf Power. Those letters were presumably obtained in a manner consistent with Gulf's training policy to aggressively seek out such "choice" letters for use in a dispute. However, the law is clear that consumers have no organic right to choose their provider of utility service. Rather, customer preference is an issue considered by the Commission in a dispute only when all other items of consideration are equal, and it is the last criteria used; not the first as Gulf Power would argue. In this case, issues of existing service capabilities, cost of providing service, uneconomic duplication of facilities, and the non-urban nature of the disputed area demonstrate that all issues in this docket are not equal. Therefore, customer preference should not be given any consideration.

Further, the Commission should give lesser weight to the customer preference in this docket, as it is the developer and not the ultimate end user customers who would be expressing a preference. In such cases the developer is not an “agent” or surrogate for the customer, since the interests of the developer may be, and generally are, divergent from those of the end users. Gulf Power has offered an argument that customer choice should dictate which utility serves the area of Freedom Walk. However, the law is clear that consumers have no organic right to choose their provider of utility service.

Issue 9: Which utility should be awarded the right to serve the Freedom Walk Development?

CHELCO’s Position: CHELCO.

E. STIPULATED ISSUES

None at the present time.

F. PENDING MOTIONS

CHELCO is not aware of any pending motions.

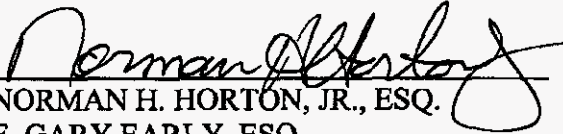
G. OTHER MATTERS

Dr. Martin J. Blake, rebuttal witness, is available on May 18, 2011, only due to previously scheduled commitments.

Nicole Sullivan is available May 17 and the morning of May 18, but has a previous scheduled conflict requiring travel the afternoon of the 18th.

CHELCO would like to use a short video as part of its opening.

RESPECTFULLY SUBMITTED this 29^h day of April, 2011.



NORMAN H. HORTON, JR., ESQ.
E. GARY EARLY, ESQ.
MESSER, CAPARELLO & SELF, P.A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720

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 29th day of April, 2011.

Ralph Jaeger, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Steven R. Griffin, Esq.
Beggs and Lane
P.O. Box 12950
Pensacola, FL 32951-2950

Leigh V. Grantham
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


E. Gary Early