IN THE SUPREME COURT OF FLORIDA

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.

and

Consolidated Cases No.: SC11-1830 and SC11-1832
Lower Tribunal No.: 100304-EU

FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.,

Appellants,

vs.

ART GRAHAM, CHAIRMAN, ETC., ET AL.

Appellees.

ANSWER BRIEF OF APPELLEE GULF POWER COMPANY

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

References to the record on appeal shall be identified by "(R. [Vol. #]: [Page #])." References to the transcript of the May 17, 2011, evidentiary hearing before the Florida Public Service Commission shall be identified by "(Tr. [Vol. #]: [Page #])." References to hearing exhibits shall be identified by "(Ex. __ , p. __)." The Commission order which is the subject of the instant appeal, PSC-11-0340-FOF-EU issued August 15, 2011, will be referred to as the "Final Order." All references to the Florida Statutes and the Florida Administrative Code are to the 2011 versions.

Appellee Gulf Power Company shall be referred to in this brief as Gulf Power or Gulf. The Florida Public Service Commission shall be referred to as the Commission. Appellant Choctawhatchee Electric Cooperative, Inc. shall be referred to as CHELCO. Appellant Florida Electric Cooperatives Association, Inc. shall be referred to as FECA. References to CHELCO's amended initial brief shall be identified by "(CHELCO B. [Page #])." References to FECA's initial brief shall be identified by "(FECA B. [Page #])."

STATEMENT OF THE CASE AND FACTS

Appellee, Gulf Power Company, rejects the Statement of the Case and Facts of Appellants as incomplete and argumentative. In lieu thereof, Gulf Power submits the following:

(a) Nature of Case: This case involves an appeal from a Final Order entered in an administrative proceeding involving the Commission's exercise of its exclusive statutory jurisdiction over the electric grid in Florida and territorial matters involving electric utilities. The matter before the Commission involved a territorial dispute between CHELCO[1] and Gulf Power regarding new electric service to a planned 179 acre mixed-use development known as "Freedom Walk" within the City of Crestview in Okaloosa County, Florida.

(b) Course of Proceedings and Jurisdiction: CHELCO commenced the proceeding on May 24, 2010, by filing a petition to resolve a territorial dispute.

[1] While FECA is identified as an Appellant, FECA did not intervene in the proceeding before the Commission until the morning of the evidentiary hearing. FECA did not sponsor any evidence or testimony. (Tr. 1: 9-17) According to FECA, its sole purpose for intervening was to respond to a motion for summary final order (R. 5: 802 – 857) filed by Gulf Power which FECA viewed as raising statewide policy implications. (Tr. 1:14-15) The arguments raised by Gulf in its motion for summary final order were rejected by the Commission and are not a subject of this appeal. On February 9, 2012, the Commission and Gulf Power jointly moved to dismiss FECA's appeal for lack of standing. That motion is still pending. Consequently, Gulf Power addresses the arguments raised by FECA in this answer brief.

(R. 1: 8-34) Following nearly a year of discovery, including nine fact and expert depositions and the exchange nearly two hundred interrogatories and requests for production of documents, an evidentiary hearing regarding the dispute was held on Tuesday, May 17, 2011. On June 9, 2011, the parties submitted detailed post-hearing briefs. (R. 5-6: 968-1,083) On July 28, 2011, the Commission's professional legal and technical Staff filed a seventy page memorandum recommending that the Commission award Gulf Power the right to serve the Freedom Walk development. (R. 6: 1,084 – 1,154) Having considered all of the evidence and arguments of the parties, including direct testimony of eight witnesses (R. 2-3: 278 – 564) and rebuttal testimony of five witnesses (R. 4: 646 – 759) the Commission entered a unanimous fifty-six page Final Order awarding Gulf Power the right to serve the Freedom Walk development. (R. 6-7: 1,161 – 1,217) Appellants filed their notices of appeal to the Supreme Court of Florida on September 13, 2011. (R. 7: 1,221 – 1,281)

The Commission had proper jurisdiction to hear the dispute pursuant to the jurisdictional grant found in section 366.04(2)(e), Florida Statutes. This Court has jurisdiction to hear the appeal pursuant to section 3(b)(2), Article V, Florida Constitution, and section 366.10, Florida Statutes.

(c) Statement of Facts: Gulf Power Company is an investor-owned public utility with a statutory obligation to honor requests for electrical service

unless doing so would result in further uneconomic duplication of another utility's existing electrical facilities or otherwise violate Florida law. (Tr. 2: 227) Gulf Power is regulated by the Florida Public Service Commission pursuant to Chapter 366, Florida Statutes. (Tr. 2: 228) CHELCO is a rural electric cooperative organized pursuant to Chapter 425, Florida Statutes, for the purpose of supplying electric energy and promoting and extending the use thereof in "rural" areas. (Tr. 1: 56; § 425.02, Fla. Stat.) The City of Crestview, Florida is an incorporated municipality, having a population of 21,321 persons as of April 1, 2010. (Tr. 2: 309) The City of Crestview does not constitute a "rural area" as defined by section 425.03(1), Florida Statutes. (Tr. 2: 309) The Freedom Walk development will be located entirely within the municipal boundaries of the City of Crestview. (Tr. 2: 325, 350-352) Gulf Power has been providing continuous electrical service to customers within the City of Crestview since 1928 --nearly thirteen years before CHELCO's formation. (Tr. 2: 360)

In September 2007, Gulf Power received written correspondence from Emerald Coast Partners, L.L.C., the developer of Freedom Walk, requesting that Gulf Power provide electrical service to the development. (Tr. 2: 238; Ex. 27, p. 1)[2] In February 2011, the developer provided a follow-up letter reconfirming its

[2] The correspondence located on page 1 of Exhibit 27 is dated September 16, 2008. The reference to 2008 is a typo, as the letter was sent and received in September 2007.

choice of Gulf Power as the provider of electrical service for Freedom Walk. (Tr. 2: 238; Ex. 27, p. 2)

As detailed in the un-rebutted testimony of Gulf Power witness Johnson, Freedom Walk will be a substantial, urbanized mixed-use development. Among other things, Mr. Johnson explained that: the development will be located on approximately 179 acres within the City of Crestview; the development has been approved by the City of Crestview as a Community Development District pursuant to Chapter 190, Florida Statutes; and that the development will contain 489 single-family and 272 multi-family lots, a YMCA, commercial outlets, an upscale clubhouse, ponds, nature trails and various other urban characteristics such as sidewalks, underground utilities, phone, cable TV, water, sewer, garbage services and municipal police and fire protection. (Tr. 2: 233-237)

The boundaries of the Freedom Walk development are coincident with legal description included in the City of Crestview's Ordinance No. 1378 which created the Freedom Walk Community Development District. (Tr. 2: 325) This is the same area that is denoted with bold black lines on Exhibit "A" to CHELCO's petition to the Commission. (Id.) CHELCO does not provide service to anyone or anything within this area.[3] (Tr. 1: 96-97) Neither does Gulf Power. It is

[3] CHELCO states that it previously served a residence located within the boundary of the development, but that the "account is no longer active." (CHELCO B. 8) It should be noted that the distribution line referenced by CHELCO is not presently

undisputed, however, that Gulf Power has been serving a customer immediately adjacent to the development since 1955. (Tr. 2: 360-361; Ex. 35, p. 1) Similarly, Gulf Power serves a multitude of residences, schools, and mixed commercial enterprises to the south, east and west of the development, all of which are located within approximately one-half mile, or less, of the development. (Tr. 1: 154, 2: 361; Ex. 35, p. 1)

The projected electrical load of the Freedom Walk development upon full build-out is approximately 4,700 kilowatts. (Tr. 2: 239) Neither utility has constructed any facilities within the Freedom Walk boundaries in order to serve the development. (Tr. 1: 128-129) The parties stipulated for purposes of the proceeding that Gulf's cost to construct facilities within the development would be $1,152,515 and that CHELCO's cost to construct facilities within the development would be $1,052,598.[4] (R. 6: 1199) CHELCO and Gulf agree that the costs to build necessary facilities within Freedom Walk should be substantially the same for both utilities (T. 1:64, 148; 2: 255-256, 340-341, 376)

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operational (Ex. 49, p. 31), the residence served by the line was destroyed by fire some time ago (Ex. 50, p. 17) and that the line would not be used to provide permanent service to the Freedom Walk development even if CHELCO was awarded the right to serve the development. (Ex. 50, p. 18)

[4] The parties' stipulated costs to construct facilities within the development have no bearing on the issue of uneconomic duplication. Given that neither utility has constructed any facilities within the development, there is no prospect of any duplication of facilities within the development, uneconomic or otherwise.

There was significant disagreement between the parties concerning their respective costs to extend service to the development. CHELCO owns a three-phase distribution line which abuts a portion of the development. (Tr. 2: 248) This line originates at the Auburn substation, which would be used by CHELCO to serve the development. (Tr. 1: 120-121) The Auburn substation is located approximately 3.7 miles from the development. (R. 1: 39) At the evidentiary hearing, Gulf Power introduced evidence that CHELCO's distribution line and substation facilities would not be capable of serving Freedom Walk's full projected load without upgrades costing at least $377,000 and that such costs should be attributed to CHELCO's cost to serve the development. (Tr. 2: 261-265) The Commission determined that those costs should not be attributed CHELCO's cost to serve the development. (R. 6: 1194) Gulf Power has not challenged that determination in this appeal.

In order to provide adequate and reliable service to the development, Gulf Power will extend its existing three-phase distribution line 2,130 feet west along Old Bethel Road at a cost of $89,738. (Tr. 2: 252-253) Gulf Power will serve Freedom Walk using its Airport Road substation which is located approximately two miles from the development. (Id.) The Airport Road substation is not presently capable of handling the full projected load of the development. (Tr. 2: 286) However, as a result of a previously planned large-scale conversion project

involving five of the Company's substations in north Okaloosa County, the Airport Road substation will have adequate capacity to serve the development and other growth in the area if the conversion of the Airport Road substation occurs before Freedom Walk fully develops. (Ex. 13, pp. 1-4, Ex. 21, pp. 62-63) The conversion of the Airport Road substation is scheduled to occur between 2011 and 2015. (Tr. 2: 288, 290) The Freedom Walk area is presently wooded and no construction has begun. (Tr. 1: 78-79) There is nothing in the record pinpointing precisely when Freedom Walk will reach full build-out. According to CHELCO, "Freedom Walk will not develop to full build-out over night. In fact, it will most likely be years before the development is completed." (Tr. 1: 126) The Commission found that "all testimony suggests [build-out] will occur later rather than sooner." (R. 6: 1198) The large-scale conversion project is intended to maintain reliability and reduce maintenance costs on Gulf's system and is not related in any way to serving Freedom Walk. (Ex. 13, pp. 1-4) CHELCO took the position that the costs associated with Gulf's conversion of the Airport Road substation should be attributed to Gulf's cost to serve the development. After weighing competing testimony on the subject, the Commission rejected this argument, finding that "[w]e shall not include these costs when considering the cost for Gulf to serve the development because these upgrades were previously planned and not 'triggered' by service to Freedom Walk." (R. 6: 1198) Aside from its $89,738 cost to extend

its three-phase feeder 2,130 feet, Gulf will incur no other expenses to extend service to the development. (Tr. 2: 253)

SUMMARY OF ARGUMENT

Despite Appellants' best efforts to portray it as such, this case does not involve a foreign utility journeying into an area exclusively served by another utility and duplicating the existing utility's adequate facilities in order to capture a profitable customer. This is a case of an incumbent public utility honoring a customer's request for service in an area in which it, and a rural electric cooperative, each have a substantial historic presence and a substantially equal cost to serve.

The Appellants in the case at bar are asking this Court to step outside of its traditional role and to assume the role of the regulator. Appellants attempt to paint the Commission's Final Order as an unacceptable departure from prior precedent and as a shift in policy. This is not the case. A cursory review of the Commission's past exercise of its territorial jurisdiction reveals that territorial disputes are inherently fact specific and that Commission decisions resolving such disputes are frequently sui generis. Just as it has done in scores of territorial disputes to come before it in the past, the Commission in the instant case examined the facts, applied the law to those facts and drew reasoned and reasonable conclusions based on the facts, its technical expertise and the law. Appellants

disagree with some of those conclusions and are therefore requesting that this Court re-weigh the facts and substitute its judgment for that of the Commission. Gulf respectfully submits that the Court should not accept this invitation.

ARGUMENT

The Commission's decision to award Gulf Power the right to provide electrical service to the Freedom Walk development is supported by competent, substantial evidence contained in the record. The Commission's decision is consistent with the facts established in the record, Florida Statutes, the Commission's rules and established precedent. There is no lack of competent, substantial evidence, nor does the Commission's order fail to meet any of the essential requirements of law.

I. Appellants have asked this Court to go beyond the well defined limited standard of review and improperly re-evaluate the factual evidence presented to the Commission.

Parties challenging a Commission order on appeal bear an extraordinarily heavy burden. "Commission orders come to this Court clothed with the presumption that they are reasonable and just." West Florida Electric Cooperative Ass'n., Inc. v. Jacobs, 887 So.2d 1200, 1204 (Fla. 2004). Any party challenging such orders "bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law." Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259, 262 (Fla. 1999). As long as the

Commission's decisions are not clearly erroneous and are supported by competent substantial evidence, this Court should uphold the Commission's findings. Id. Moreover, "[w]hile there may be legitimate disagreements as to the weight and credibility of the evidence presented below, this Court's review is limited to a determination of whether evidence exists to support the Commission's findings." Crist v. Jaber, 908 So.2d 426, 432 (Fla. 2005). The task for this Court is not to re-weigh the evidence. Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983).

Furthermore, an agency's interpretation of a statute that it must enforce should be given great deference. Johnson, 727 So.2d at 262. Likewise, the same deference should be given to an agency's interpretation of longstanding administrative rules. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983). Such a deferential standard is appropriate given the Commission's "specialized knowledge and expertise" in the area of utility regulation. Johnson, 727 So.2d at 262.

While paying lip service to these long-established standards, Appellants repeatedly try to convince this Court to re-interpret statutes and rules over which the Commission has jurisdiction --matters relating to customer preference-- and to second-guess the Commission's rulings on purely factual matters such as the existence of uneconomic duplication, historical presence and the utilities'

respective costs and abilities to serve the development. This can only be because an application of the well established limited standard of review outlined above clearly supports the Commission's decision in favor of Gulf Power.

II. The Commission's determination regarding the parties' respective costs and abilities to serve the development is supported by competent and substantial evidence.

CHELCO posits that the Commission "ignored" evidence concerning Gulf Power's true cost to serve the Freedom Walk development. (CHELCO B.18-20) Specifically, CHELCO contends that Gulf's true cost to serve the development is at least $129,738, as opposed to the Commission's finding that Gulf's true cost to serve the development is $89,738. (CHELCO B. 20) This argument is centered upon Gulf Power's Airport Road substation which will be used to serve the development. At the time of the evidentiary hearing, Gulf Power's Airport Road substation did not possess enough excess capacity to serve the full projected load of the development. Nevertheless, Gulf Power introduced evidence demonstrating the existence of a previously planned large-scale conversion project involving upgrades to multiple aging substations in north Okaloosa County --including the Airport Road substation-- that would enable the substation to easily serve the load associated with the development and other normal load growth upon completion of the project. After receiving competing testimony on the issue, the Commission determined that the conversion project would be completed prior to full build-out

of the development and that the costs associated with the conversion project should not be included in Gulf Power's cost to serve the development because the conversion plan was not necessitated or "triggered" by the Freedom Walk development. (R. 6: 1198)

As detailed below, CHELCO's disagreement with these findings amounts to a classic case of asking this Court to re-weigh the evidence. In its Final Order the Commission clearly acknowledged that "[w]itnesses for both CHELCO and Gulf provided testimony about each utility's existing facilities, currently planned upgrades, upgrades that may be required in order to provide service to Freedom Walk, and the associated costs." (R. 6: 1195) The Commission did not "ignore" any evidence concerning Gulf's costs to upgrade the Airport Road substation. The Commission simply disagreed with CHELCO's arguments relating to the same.

In support of its argument on appeal, CHELCO relies heavily on Gulf Power's response to a single interrogatory propounded by the Commission Staff which has been identified as Exhibit 60. (CHELCO B. 18-20) This response demonstrated that, based on facilities in existence on January 1, 2010, Gulf's Airport Road substation would not be capable of serving the full projected 4,700 kW load of Freedom Walk if the development reached full build-out in December 2014. (Ex. 60, p. 41) In order to serve the load under Staff's hypothetical scenario, Gulf explained that it would be required to expend $40,000 to replace the

existing transformers at the substation on a temporary basis pending completion of the large-scale conversion project (the "Transformer Replacement Project"). Based on this interrogatory response, CHELCO argues that Gulf's true cost to serve the development is at least $129,738 ($89,738 plus $40,000).

After considering the evidence, the Commission determined that "the transformer replacement project is not a project that Gulf intends to complete, but was identified for the purposes of this docket in order to obtain a clear picture of Gulf's existing facilities and how their currently planned projects would impact their ability to serve the Freedom Walk development." (R. 6: 1198) (emphasis supplied) The Commission further determined that the Transformer Replacement Project would not be needed given the likely build-out schedule for the development and Gulf's previous plans to upgrade the Airport Road substation as part of its large-scale conversion project involving north Okaloosa County. (Id.)

The Commission was entirely correct in this determination. While CHELCO attempts to ascribe great importance to Exhibit 60, it is clear that this interrogatory, and an identical Staff interrogatory to CHELCO identified as Exhibit 57, were simply Staff's attempt to gain a clearer picture of the parties' abilities to serve the full requirements of the development using their existing facilities at a given point in time, December 2014. Commission Staff's choice of December 2014 as the date for purposes of comparison was nothing more than that --an

arbitrary point in time.[5] It was not an indication that the development would, in fact, reach full build-out in December 2014. Nor did it amount to an official "parameter" for purposes of determining the parties' respective costs to serve the development. As the Commission made clear in its Final Order, there is no record evidence as to when Freedom Walk will fully develop. (R. 6: 1198) The Commission correctly recognized that developments as extensive as Freedom Walk do not develop overnight. Freedom Walk is presently nothing more than "dirt and trees" (CHELCO B. 7) and all indications are that "buildout will occur later rather than sooner." (R. 6: 1198) Indeed, CHELCO's own witnesses testified that: (a) what Freedom Walk may become in the future is "speculative" (Tr. 1: 79); (b) there was not a high probability that Freedom Walk would be fully developed by 2014 (Ex. 49, p. 61); (c) "there is still a lot of work to be done by the developer before anyone can move into a house in Freedom Walk" (Tr. 1: 120); and (c) "Freedom Walk will not develop to full build-out over night. In fact, it will most likely be years before the development is completed." (Tr. 1: 126) Gulf Power testified that Gulf would have no need to proceed with the $40,000 Transformer Replacement Project if the Airport Road conversion project was completed before Freedom Walk fully develops and that the conversion was

[5] Gulf recognized the hypothetical nature of the interrogatory at the time it was propounded and included cautionary language in a footnote to its response indicating that Gulf and CHELCO had agreed to a common set of assumptions "for the exclusive purpose of responding to this interrogatory." (Ex. 60, p. 41)

scheduled to be completed between 2011 and 2015. (Tr. 2: 288, 301-302) In light of the record evidence, the Commission concluded that the Transformer Replacement Project would not be needed and that Gulf Power would be capable of adequately and reliably serving the development through previously planned upgrades to the Airport Road substation scheduled to occur between 2011 and 2015. The Commission's decision in this regard is based on competent, substantial evidence and should not be overturned on appeal.

In addition to suggesting that the Commission improperly ignored Gulf's response to Staff's interrogatory, CHELCO also attacks the Commission's finding that Gulf had previously planned to upgrade its Airport Road substation independent of providing service to Freedom Walk. This too amounts to nothing more than a request that this Court second-guess the Commission's factual determinations based on its review of the record evidence. Gulf provided detailed evidence to the Commission and CHELCO concerning a previously planned system-wide upgrade project involving no less than five substations in north Okaloosa County, Florida, including the Airport Road substation. (Ex. 13, pp. 1-4) Gulf explained that the project was not tied in any way to serving Freedom Walk and that the project would proceed regardless of whether Gulf served the development. (Tr. 2: 284; Ex. 13, p. 1; Ex. 21, pp. 61-62) Rather, the project is intended to replace Gulf's aging 1950's era 46 kV system in that area with the

Company's present 115 kV standard system. (Ex. 13, p. 1; Ex. 21, pp. 61-62) Gulf witness Feazell explained that the first portion of the project --conversion of a 46 kV line from the South Crestview substation to the Airport Road substation to a 115 kV line-- had already been completed, and that the second step of the project -- elimination of the Baker substation and transferring that load to the Milligan substation-- had been budgeted and scheduled for completion in September 2011. (Tr. 2: 302; Ex. 21, pp. 75-79) He further explained that the remaining steps in the project --including the conversion of the Airport Road substation-- would be completed sequentially. (Ex. 21, pp. 78-80) CHELCO makes much of the fact that, at the time of the hearing, there were no comprehensive planning documents addressing the remaining steps. (CHELCO B. 19-20) However, as witness Feazell explained, it would not have made operational sense to have drawn up detailed planning documents at that time due to the complex and sequential nature of the project. (Ex. 21, pp. 73-77)

In short, the Commission's determination that Gulf Power's true cost to serve the Freedom Walk development is $89,783 is supported by competent substantial evidence and should not be overturned by this Court. See, Florida Bridge Co. v. Bevis, 363 So.2d 799, 801 (Fla. 1978) ("It is within the Commission's authority to evaluate conflicting testimony and accord to each opinion whatever weight it deems appropriate.") Gulf notes that it introduced

evidence demonstrating that CHELCO's cost to serve the development was understated by at least $377,000 and that such cost should be attributed to CHELCO's cost to serve the development. (Tr. 2: 261-265) After weighing the evidence, the Commission determined that those costs should not be attributed CHELCO's cost to serve the development. (R. 6: 1194) Aware of the Commission's substantial discretion in resolving such matters, Gulf chose not to appeal the Commission's determination. In apparent recognition of infirmities of its primary position, CHELCO resorts to a secondary argument assailing the Commission's determination that, under the circumstances of the instant case, a cost differential of $89,738 is "not significant." This argument is intertwined with Appellants' contentions regarding "uneconomic duplication." As such, it will be addressed in the following section of the brief.

III. The Commission's determination that Gulf Power's provision of service to Freedom Walk will not constitute "uneconomic duplication" is supported by competent and substantial evidence and is not a departure from the essential requirements of the law.

Pursuant to section 366.04(5), Florida Statutes, (the "Grid Bill") the Commission has exclusive jurisdiction "[o]ver 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 for avoidance of further uneconomic duplication of generation, transmission and distribution facilities." § 366.04(5), Fla. Stat. (emphasis

supplied) Based on the record evidence, the Commission determined that allowing Gulf Power to serve Freedom Walk will not result in uneconomic duplication of CHELCO's existing facilities. (R. 7: 1206-1208) As detailed below, the Commission's decision in this regard was the product of careful evaluation of an array of facts and factors. It was not, as FECA suggests, a matter of erroneous statutory interpretation subject to de novo review. (FECA B. 9) See, Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120, 122 (Fla. 1996) (recognizing that determination of uneconomic duplication is factual in nature and subject to a competent and substantial evidence standard); Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259, 264 (Fla. 1999) (same).

The Grid Bill does not define "uneconomic duplication." However, it is clear from the plain language of the statute that duplication is permissible when it is deemed to be something other than "uneconomic." Historically, the Commission has considered whether uneconomic duplication will exist in resolving territorial disputes. In the instant case, the Commission reviewed the issue in great detail.

While Appellants quarrel with the Commission's conclusion that no uneconomic duplication of CHELCO's facilities will result from Gulf's serving the development, neither of them attempts to offer a definition of their own. Instead, they appear to take the position that, absent extraordinary circumstances, any

duplication or crossing[6] of one utility's existing facilities by another utility is per se "uneconomic." This is consistent with CHELCO's position in the hearing below. (Ex. 39, (CHELCO response to Interrogatory 49); Ex. 49, p. 59) While simplistic in its appeal, this cannot be what the legislature intended. It must be presumed that, in enacting the Grid Bill, the legislature recognized the Commission's specialized expertise and knowledge relative to utility planning and coordination and the attendant need to provide the Commission with discretion in the application of that expertise on a case-by-case basis.[7] That is precisely what the Commission has done in the past and what the Commission did in the instant case.

Appellants cite to a litany of prior Commission orders addressing uneconomic duplication and comparing costs of service which Appellants contend were ignored or misinterpreted by the Commission. A review of these orders

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[6] CHELCO asserts that Gulf "admitted" that Gulf would have to "cross" existing CHELCO lines in order to serve the development. (CHELCO B. 29) This is simply not the case. Gulf testified that extension of its three-phase line to serve the development would not cross any of CHELCO's distribution facilities. (Tr. 2: 267) Moreover, no such finding appears in the Commission's Final Order.

[7] If the legislature had intended to avoid all future duplication of existing facilities, it could have enacted legislation requiring prescribed retail service areas similar to legislation in Alabama and other jurisdictions across the country. Indeed, such legislation has been proposed and rejected in Florida on several occasions. See, Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 FLA. ST. U. L. REV. 407, 420-427 (1991).

serves as a vivid reminder that territorial disputes are intensely fact specific. What constitutes uneconomic duplication or "comparable cost" in one case may differ in another case depending on other factors. See, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 98 F.P.S.C. 1:647 (1998), 1998 WL 101844 at *2-3 (Fla. P.S.C. Jan. 28, 1998) (concurring with the proposition that "[t]he amount of duplication that rises to the level of uneconomic duplication is best determined on a case-by-case basis."); Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So. 2d 1092, 1094 (Fla. 1985) (observing that the determination of estimated costs in a territorial dispute is "one which may be so dependent on the individual facts of each case that the only way it may be considered is on a case-by-case basis.") Any attempt to divine a bright line rule from such rulings would improperly constrain the Commission in the exercise of its duties.[8] Each case stands on its own facts. It is for this very reason that the Commission must be, and has been, afforded discretion in the interpretation and application of the statutes over which it is charged with implementing. See, Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259, 262 (Fla. 1999).

[8] Gulf notes that the bulk of the Commission orders cited by Appellants were rendered long before this Court's decision in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996) holding that some amounts of duplication are not "uneconomic."

With respect to the facts of the instant case, the Commission appropriately considered a host of factors in reaching its conclusion that no uneconomic duplication would result from Gulf Power's serving the development. Appellants mischaracterize the Commission's decision regarding uneconomic duplication as being based on two single factors: (1) an erroneous conclusion that the differential in the utilities' cost to extend service to the development was "not significant" or "de minimis," and (2) profitability for the utility seeking to serve the load. (FECA B.13-14) The Commission's own order plainly demonstrates that this is not the case. In rendering its decision, the Commission recognized that "there are a number of factors that may be considered in determining whether there is uneconomic duplication." (R. 7: 1207) In determining that Gulf Power's serving the development would not constitute uneconomic duplication, the Commission correctly found, among other things, that: (a) both utilities have had lines close to the development for over 40 years; (b) CHELCO presently maintains lines in the immediate vicinity of Gulf Power's lines, in some cases paralleling them; (c) provision of service to the development by either utility could result in further duplication of facilities; (d) the difference in the parties' respective costs to extend service to the development is not significant; (e) serving the development would be profitable for either utility; (f) both utilities' facilities in the area will continue be used, expanded and improved regardless of which party serves the development;

(g) neither party's investment would become stranded if it is not awarded the right to serve the development; and (h) CHELCO's stated desire to "maximize its investment" in its existing facilities was misplaced. (R. 7: 1207-1208)

Appellants' choice to ignore all but two of the foregoing considerations is telling in and of itself. When viewed as a whole, the Commission's findings clearly support its conclusion and refute Appellants' assertions that the Final Order runs counter to the policy considerations underlying the Grid Bill. Given the long history of service of both utilities in the immediate vicinity of the development, the historical and expected growth patterns of both utilities, the close proximity of the utilities' lines and the insignificant differential in the parties' respective costs to serve, it is clear that the Final Order will not serve as an open invitation to utilities across the state to engage in uneconomic duplication. Indeed, the instant case is not unlike the case of In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, wherein the Commission declined to impose territorial boundaries in south Washington and Bay counties on the ground that service by either utility in areas where facilities were in close proximity would not result in further uneconomic duplication. 98 F.P.S.C. 1:647 (1998), 1998 WL 101844 (Fla. F.P.S.C. Jan. 28, 1998), aff'd on appeal, Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So.2d 259 (Fla. 1999).

A. The Commission's reliance on Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996) and related Commission orders was appropriate.

FECA submits that the Commission improperly relied on Gulf Coast Electric Cooperative, Inc. v. Clark and subsequent orders in the same case after remand to justify a "new interpretation of the statutory term 'uneconomic' as permitting the unnecessary duplication of utility facilities if financially beneficial to the duplicating utility, without regard to the public interest or other utility's investment in its existing facilities." (FECA B. 18) (emphasis supplied) Foremost, the Commission adopted no such interpretation. As detailed above, financial benefit was only one factor among many that the Commission considered in reaching its determination. It was not the determinative factor, as Appellants have suggested. Moreover, in the instant case, the Commission concluded that service to Freedom Walk would be financially beneficial to both utilities, not just Gulf Power. (R. 7: 1207-1208) Certainly, the cost effectiveness of an investment in facilities to serve a load is one proper consideration in determining whether the investment is "uneconomic." And, to be sure, this is not the first time the Commission has considered financial benefits in assessing uneconomic duplication. See, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 98 F.P.S.C. 1:647 (1998),

1998 WL 101844 (Fla. P.S.C. Jan. 28, 1998); Re: Gulf Coast Electric Cooperative, Inc., 01 F.P.S.C. 4:46 (2001), 2001 WL 468913 (Fla. P.S.C. April 9, 2001).

FECA goes to great lengths to limit the Clark decision and the Commission's subsequent orders in the same case following remand to their specific facts. (FECA B. 18-28) It should come as no surprise that the factual underpinnings of those decisions are not the same as the factual underpinnings as the instant case.[9] It does not follow, however, that the holdings in those decisions were not relevant considerations for the Commission in resolving the instant dispute. In Clark, this Court clearly held that Gulf Coast Electric Cooperative's duplication of Gulf Power's existing line was not "uneconomic" based, in part, on the Commission's conclusion that a cost differential of $15,000 was "relatively small" or "de minimis." Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120, 123 (Fla. 1996). The Commission has recognized that the Clark decision did not establish a bright line test. Re: Gulf Coast Electric Cooperative, Inc., 01 F.P.S.C. 4:46 (2001), 2001 WL 468913 at *2 (Fla. P.S.C. April 9, 2001) ("[T]he Supreme Court's opinion does not require that the de minimis standard be the only

[9] To be clear, while the facts in Clark do differ from the instant case, they are not as disparate as Appellants portray them to be. In distinguishing Clark, Appellants focus on the efforts undertaken by the cooperative utility to bring the prison to the area. (CHELCO B. 24, FECA B. 18-19) Yet, it is clear in this case that Gulf Power had been coordinating and working with the developer of Freedom Walk since the conceptual stages of the development. (Tr. 2: 233) There is no evidence that any such assistance was offered or provided by CHELCO.

criterion for evaluating uneconomic duplication.") ; Re: Gulf Power Company, 96 F.P.S.C. 11:172 11:174 (1996), 1996 WL 678447 at *3 (Nov. 18, 1996) ("[T]he Court did not establish this amount [$15,000] as a standard to evaluate all territorial dispute cases."). It is therefore not surprising that it was not used as a bright line test in the instant case. It was simply one among many considerations. It is also not surprising that the Commission concluded that the cost differential of $89,738 in the instant case was "not significant." FECA notes that the cost differential in the instant case is "over 600% of the amount characterized as 'relatively small' in Clark." (FECA B. 20) CHELCO submits that the cost differential in the instant case is much closer to being "considerable" than the $14,583 which was considered "de minimis" in Clark. (CHELCO B. 26) Aside from the fact that they are asking this Court to re-evaluate a factual decision that was clearly within the Commission's discretion to make, the inherent and fatal flaw with both Appellants' conclusions is that they ignore the size of the load to be served at Freedom Walk as compared to the size of the prison load to be served in Clark. Appellants' observations result in an "apples to oranges" comparison. The Commission stated in its Final Order that,

> It is important to note that the $14,583 figure in Clark was expended to serve a load with approximately 372 kW diversified demand as compared to Gulf's cost of $89,738 in the instant case to serve a load with an expected diversified demand of 4,700 kW. In other words, the expected Freedom Walk load is more than twelve times larger than the load at issue in Clark.

(R. 7: 1204, n. 38) (emphasis supplied)

The fact that the Freedom Walk load is more than twelve times larger than the load at issue in Clark is of critical important. When relative loads are considered, the $89,738 differential in the instant case equates to approximately $7,105 – less than half of the $14,583 differential that was found to be "de minimis" in Clark.[10] When the relative sizes of the loads are considered, it is clear how the Commission reached its conclusion that the cost differential was "relatively small." In fact, the Commission has previously recognized that "[i]n the context of a project where there is a significant load associated with the new service, the level of investment necessary by either party would be substantial, as would be the revenues provided by that customer. In such a case, a differential of $15,000 would likely not be a meaningful measure." Re: Gulf Coast Electric Cooperative, Inc., 01 F.P.S.C. 4:46 (2001), 2001 WL 468913 at *2 (Fla. P.S.C. April 9, 2001). Appellants' challenge of Commission's findings regarding the cost differential in the instant case is plainly an attempt to have this Court substitute its judgment for the Commission's on purely factual matters. The Commission's decision is supported by competent, substantial evidence and should not be revisited by this Court.

[10] The $7,105 figure is derived by dividing $89,738 by 12.63.

B. The Commission's decision actually dissuades future uneconomic expansion, consistent with the policies underlying the Grid Bill.

While Appellants devote much of their effort to challenging the Commission's findings regarding uneconomic duplication, it is noteworthy that no mention is made of the economics of CHELCO's investment in the three-phase line along Old Bethel Road which Appellants claim Gulf Power would uneconomically duplicate. According to CHELCO, that line was upgraded and extended in 1983. (Tr. 1: 121) The costs associated with this line constitute a significant portion of the "investment" that CHELCO claims it will be precluded from "maximizing" if Gulf Power is permitted to serve Freedom Walk. (Tr. 1: 93) If CHELCO is correct in its position that this line can accommodate the substantial load associated with the Freedom Walk development in addition to other normal load growth in the area, it is clear that CHELCO made this "investment" many years before it was actually needed. (Tr. 2: 356) Indeed, CHELCO has acknowledged that "[w]e built to that area when it was uneconomic to do so, and our members were willing to make that investment at that time." (Exhibit 49, p. 6) (emphasis supplied) This could easily be construed as an attempt to "stake out territory," recognizing that Gulf Power has long been serving customers in the area. (Tr. 2: 356) Allowing utilities to lay claim to service territory through premature and uneconomic investment in facilities runs counter to the purpose of the Grid Bill. The Commission addressed this issue in In Re: Complaint of Florida

Power & Light Company Against the Utilities Commission of the City of New Smyrna Beach, Florida, 81 F.P.S.C. 227, 1981 WL 634484 (Fla. P.S.C. Sept. 18, 1981) wherein the Commission held as follows:

> We should also note here that our engineering staff recommendation to award much of the territory to NSB was based primarily on the location of existing distribution facilities located within the disputed area. We do not think this is a persuasive reason for allocating service areas in a territorial dispute. If we were to rely exclusively upon such data in these controversies, we would encourage and foster the uneconomic expansion of facilities in all areas in order to stake out a claim to the territory.

Id. at *3. (emphasis supplied)

At best, CHELCO's "investment" amounts to an uneconomic business judgment, the effects of which should have no bearing on the instant dispute.[11] The Commission has no obligation to protect a rural electric cooperative, or any other utility, from the consequences of investments that are speculative, uneconomic at the outset, or the result of efforts to "stake out territory." (Tr. 2: 356-357) Indeed, the Commission has cautioned against such practices in the past. "If a utility we regulate engages in uneconomic expansion, it does so at its own

[11] CHELCO has acknowledged these business risks. (Ex. 49, pp. 10-11, Q: "When CHELCO made the uneconomic investment in the three-phase feeder at that time, do you agree that CHELCO took on a certain amount of business risk if that access [sic] capacity would not be maximized?" A: "Certainly." Q: "And you know, as CEO of CHELCO, you know that CHELCO and other utilities make business judgments every day?" A: "Certainly." Q: "And so there's no guarantee [sic], when you build that investment and construct those facilities, that you are going to be able to use them to their fullest extent?" A: "That's correct.")

risk. This Commission has disallowed investments made by Gulf Power in the past. To the extent that [a rural electric cooperative] engages in such activity, it must answer to its member owners if the rates increase to unacceptable levels." In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 98 F.P.S.C. 1:647, 1998 WL 101844 at *3 (Fla. P.S.C. Jan. 28, 1998). The Final Order serves as yet another warning to all electric utilities in the state against premature and uneconomic expansion of their facilities.

Despite the fact that the Commission has no obligation to protect utilities from the consequences of uneconomic expansion, it is noteworthy that the Commission did find that its decision in the instant case will not result in "stranding" of CHELCO's investment. (R. 7: 1208) While CHELCO may not be able to "maximize" its investment in a way that CHELCO had presumptively hoped, it is undisputed that the investment will continue to serve CHELCO's existing customers and future customers in areas where it is providing service.[12] This service will presumably continue to generate revenues in a range that CHELCO expected when it made its past investments.

[12] Mere inability to maximize investment does not equate to uneconomic duplication. CHELCO's facilities would not be subject to "waste" (FECA B. 16) or go unused.

C. Appellants' policy arguments demonstrate a fundamental misunderstanding of the Commission's ruling.

CHELCO boldly proclaims that the Commission's ruling in the instant case amounts to a declaration that duplication of another utility's existing facilities is acceptable (i.e., not "uneconomic") so long as it is financially beneficial for the duplicating utility. (CHELCO B. 34-35) FECA similarly contends that the Commission has improperly adopted a "new definition" of uneconomic duplication which permits unnecessary duplication of utility facilities so long as such duplication is "financially beneficial" to the duplicating utility. (FECA B. 18, 28) In order to reach these erroneous conclusions, both parties grossly distort the Commission's ruling. Specifically, they focus exclusively on the Commission's consideration of the four economic tests offered by Gulf Power witness Spangenberg and inaccurately portray the Commission's ruling as hinging on those tests. (CHELCO B. 32-35; FECA B. 14-15) The Commission did consider the four tests and concluded that service to Freedom Walk would be financially beneficial to <u>both</u> utilities, not just Gulf Power. (R. 7: 1207-1208) As the Commission has made clear in the past, it will consider a number of factors in determining the existence of uneconomic duplication; and the cost effectiveness of an investment in facilities to serve a load is certainly <u>one</u> proper consideration in determining whether the investment is "uneconomic." If profitability was the <u>only</u> consideration, as Appellants incorrectly suggest occurred in this case, their

concerns regarding the erosion of the policies underlying the Grid Bill might possess more merit. To be sure, however, profitability was not the only factor considered by the Commission below. A cursory review of the Final Order demonstrates that, in considering uneconomic duplication, the Commission found that (a) both utilities have had lines close to the development for over 40 years; (b) CHELCO presently maintains lines in the immediate vicinity of Gulf Power's lines, in some cases paralleling them; (c) provision of service to the development by either utility could result in further duplication of facilities; (d) the difference in the parties' respective costs to extend service to the development is not significant; (e) serving the development would be profitable for either utility; (f) both utilities' facilities in the area will continue be used, expanded and improved regardless of which party serves the development; (g) neither party's investment would become stranded if it is not awarded the right to serve the development; and (h) CHELCO's stated desire to "maximize its investment" in its existing facilities was misplaced. (R. 7: 1207-1208)[13] Indeed, given the depth of the record below, there may well

[13] While Appellants fail to mention all of the factors considered by the Commission, the clear effect of their argument would be to require this Court to step into the shoes of the Commission and prescribe the factors which the Commission must and must not consider in assessing uneconomic duplication in each case. As the Commission has previously recognized, "[t]he amount of duplication that rises to the level of uneconomic duplication is best determined on a case-by-case basis." See, In Re: Petition to Resolve Territorial Dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company, 98 F.P.S.C. 1:647 (1998), 1998 WL 101844 at *2-3 (Fla. P.S.C. Jan. 28, 1998). Gulf Power

have been other additional factors that informed the Commission's judgment that were not expressly articulated in the Final Order. It remains clear, however, that Appellants' characterization of the Commission's ruling is, at best, misguided. Despite Appellants' best efforts to portray it as such, this case does not involve a foreign utility journeying into an area exclusively served by another utility and duplicating the existing utility's adequate facilities in order to capture a profitable customer. Moreover, any suggestion that the Commission's ruling would encourage such activity or that the Commission would approve of such activity in the future borders on the absurd. This is a case of an incumbent public utility honoring a customer's request for service in an area in which it, and a rural electric cooperative, each have a substantial historic presence and a substantially equal cost to serve.

IV. The Commission's consideration of customer preference and the urban characteristics of the development and the surrounding area was entirely appropriate.

Pursuant to Rule 25-6.0441(2)(d) F.A.C., the Commission considered customer preference and found that "the record is clear…that the developer of Freedom Walk, as a proxy for future customers, prefers to receive service from Gulf." (R. 7: 1216) The Commission also concluded that a preference should be given to Gulf Power based on its finding that the area in dispute possessed "urban

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respectfully submits that this is a task which is appropriately left to the reasoned and informed judgment of the Commission.

characteristics" and established Florida Supreme Court precedent recognizing that, all else being equal, rural electric cooperatives are not intended to serve as competitors in areas where electricity is available by application to an existing public utility. (R. 7: 1216)

CHELCO first contends that the Commission's reliance on customer preference was improper because all factors in the rule were not substantially equal. (CHELCO B. 42-43) This again amounts to a request that the Court re-evaluate the evidence and supplant the Commission's judgment with the Court's. For the reasons articulated above and in the Final Order, this argument should be rejected.

CHELCO further contends that the Commission's reliance on Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960); Escambia River Electric Cooperative, Inc. v. Florida Public Service Comm'n., 421 So.2d 1384 (Fla. 1982); and In re: Petition of Suwannee Valley Electric Cooperative for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90, 1983 WL 820025 (Fla. P.S.C. Aug. 4, 1983) (identified in the Final Order as Withlacoochee, Escambia River and Suwannee Valley II, respectively) was in error. (CHELCO B. 45)

In Tampa Electric Co. v. Withlacoochee River Coop., this Court held that

> [i]t is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to

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

122 So.2d 471, 473 n.6 (Fla. 1960) (emphasis supplied)

This Court re-affirmed the principles articulated in Withlacoochee in Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982). Escambia River involved a territorial dispute between Gulf Power and Escambia River Electric Cooperative over provision of electrical service to the Exxon Blackjack Creek Miscible Gas Displacement Project in Escambia County, Florida. The Commission awarded service to Gulf Power. In its order, the Commission expressly relied on Withlacoochee, and the "plain language and spirit" of Chapter 425 Florida Statutes:

> The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes the dispute must be resolved in favor of Gulf Power….[W]hile we recognize the valuable service performed by the cooperatives, we believe that this case too presents an example of the type of electrical requirements that is beyond the basic intent and purpose of cooperatives, especially when a privately owned utility can reasonably meet those requirements.

Id. at 1384-85. (emphasis supplied)

The purposes underlying the creation of rural electric cooperatives --to serve rural areas not otherwise capable of being served by public utilities-- have not changed since these decisions were made. In fact, given the increasingly urban characteristics of much of the state, it would appear that the principles articulated above are even more relevant today than in the past. Despite the fact that neither decision has been overruled, CHELCO speculates that the Withlacoochee and Escambia River decisions must no longer be viable because Rule 25-6.0440, F.A.C. --which was enacted following these decisions-- does not expressly provide that an investor-owned utility must be given preference over a rural electric cooperative if there is no factual distinction between the utilities' ability to serve. (CHELCO B. 45) CHELCO's conclusion completely ignores the fact that the factors set forth in the Commission's rule (and the statute which the rule implements) are not exclusive. Section 366.04(2)(e), Florida Statutes, sets forth a number of factors, including the "nature of the area involved," which the Commission may consider in resolving territorial disputes. Moreover, the plain language of the statute appropriately recognizes that the Commission is not limited to consideration of the factors listed in the statute in resolving territorial disputes. See, West Florida Electric Cooperative Ass'n., Inc. v. Jacobs, 887 So.2d 1200, 1203, 1205 (Fla. 2004) ("The statute also outlines certain factors that the commission 'may consider, but not be limited to consideration of,' in resolving a

territorial dispute…[B]ecause the listed factors are not exclusive, the commission is free to consider other factors…."); In Re: Petition of Peace River Electric Cooperative, Inc. to Settle Territorial Dispute with Florida Power and Light Company, 85 F.P.S.C. 12:202, 1985 WL 1090310 (Fla. P.S.C. Dec. 18, 1985) ("[T]he Commission has the discretion to choose which criteria it will consider in territorial dispute cases."). The same is equally true of Rule 25-6.0441, Florida Administrative Code, which expressly provides that the Commission "may consider, but not be limited to consideration of" the factors identified in the rule. Given the discretion afforded to the Commission under the statute and the rule, the cited precedent was certainly an appropriate consideration in this case.

CHELCO further surmises that the Withlacoochee and Escambia River decisions cannot be reconciled with the holding in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996). (CHELCO B. 45) However, a review of the Commission order that was the subject of appeal in Clark reveals that Withlacoochee and Escambia River were not factors which the Commission considered or relied upon in reaching its decision in that case. See, Re: Gulf Coast Electric Cooperative, Inc., 95 F.P.S.C. 3:16 (1995), 1995 WL 116791 (Fla. P.S.C. Mar. 1, 1995). Consequently, in Clark, this Court would have had no reason to invoke either decision. If the Commission had given weight to these decisions --as it would have been entitled to do under section 366.04(2)(e),

Florida Statutes, and Rule 25-6.0441, Florida Administrative Code-- it is possible that the outcome in Clark may have been different.

CHELCO is also critical of the Commission's reliance on the Suwannee Valley II order and submits that the order actually supports CHELCO's position.[14] (CHELCO B. 45) CHELCO apparently miscomprehends the Commission's purpose for citing Suwannee Valley II. The Commission cited the Suwannee Valley II order in recognition of the fact "[t]hat the intent of Chapter 425, Florida Statutes, should be strongly considered in determining whether a cooperative should serve a particular area." (R. 7: 1216 and In Re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute with Florida Power Corporation, 83 F.P.S.C. 90 (1983), 1983 WL 820025 (Fla. P.S.C. Aug. 4, 1983) (emphasis supplied)).

In the proceeding before the Commission, Gulf Power contended that CHELCO lacked any legal authority to serve Freedom Walk under Chapter 425, Florida Statutes, because the development area is not "rural" as defined in section 425.03(1), Florida Statutes, and will be quite urban as that term is used in section

[14] Even the most cursory review of the facts in Suwannee Valley II demonstrates that they are distinguishable from the instant dispute. Among other things: (1) the investor-owned utility's nearest distribution lines were nine miles away from the disputed area while the cooperative owned an energized line on the site; and (2) the investor-owned utility's cost to serve was six times greater than the cooperative utility's. In Re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a territorial dispute with Florida Power Corp., 83 F.P.S.C. 90 (1983), 1983 WL 820025 at *2-3 (Fla. P.S.C. Aug. 4, 1983).

366.04(2)(e), Florida Statutes. (Tr. 2: 329-331) Gulf noted that section 425.02, Florida Statutes, titled "Purpose" provides that rural electric cooperatives such as CHELCO are organized for the sole purpose "[o]f supplying electric energy and promoting and extending the use thereof in rural areas." § 425.02, Fla. Stat. (emphasis supplied) The Commission concluded that it did not possess authority to enforce or apply provisions of Chapter 425, Florida Statutes. (R. 6: 1176) Nevertheless, the Commission found that it would continue to consider the provisions of Chapter 425, Florida Statutes, in carrying out its duties under sections 366.04(2)(e) and (5), Florida Statutes. (Id.) Having found that the Freedom Walk area was not "rural" as defined in section 425.03(1), Florida Statutes, and that the area possessed "urban characteristics," it was entirely within the Commission's discretion under Chapter 366, Florida Statutes, to ascribe significance to the nature of the area involved and the nature of the utilities seeking to serve it. In fact, Rule 25-6.0441(2)(b) specifically identifies the nature of the disputed area, including population, degree of urbanization and proximity to other urban areas as an item for consideration in resolution of territorial disputes. In short, the Commission's decision to give a "preference" to Gulf because of the urban nature of the area was equivalent to a finding that section 2(b) of the rule weighed in Gulf Power's favor. Given the Commission's finding, the assertion that all factors other than customer preference were substantially equal would

appear to be an overstatement. The Commission clearly determined that the nature of the area also weighed in favor of Gulf Power's serving the development. Thus, even if customer preference was not considered, the Commission would have been correct in awarding service to Gulf Power.

Lastly, CHELCO disagrees with the Commission's decision to consider customer preference because the developer is "not the consumer of electricity and the one responsible for the bills." (CHELCO B. 46) This position not only ignores the Commission's discretion in interpreting its own rule, but also overlooks the fact that the developer is the only reasonable proxy for the future residents of the development. (Tr. 2: 226) The Commission has previously acknowledged that it is "acceptable to consider the preference of the developer." (R. 7: 1212) CHELCO acknowledges that the developer is acting as an "agent" on behalf of the future residents. (Tr. 1: 103) The developer oversees and orchestrates all aspects of the property development, from property purchase, obtaining permits for vegetation removal, obtaining development permits to initiating and overseeing installation of water, sewer, power and all other utilities. (Tr. 2: 237-238) Under CHELCO's view, at the time the development might be subject to a dispute over an infrastructure provider, there could be no "customer" to express a preference. (Tr. 2: 363) CHELCO further cites to lack of testimony from the developer concerning the rationale for its preference and insinuates that the developer's expressed

preference for service from Gulf Power "might" have been financially motivated and at odds with interests of the development's future residents. (CHELCO B. 49) There is no evidence whatsoever that this is the case. Indeed, in its February 2011 correspondence reiterating its preference that Gulf serve the development, the developer noted that it was aware of Gulf's approved rate distribution and believed that "the consumers will benefit from Gulf Power's services." (Ex. 27, p. 2) (emphasis supplied) CHELCO's own correspondence sheds further light on the developer's motivations. Exhibit 36 consists of a March 2008 email from CHELCO's Vice President of Engineering to the developer's representative. In that email, Mr. Avery states, in part, as follows:

> I wanted to touch base with you in regards to Freedom Walk and CHELCO's intent to serve all your electrical needs for this development. After speaking with Mike Kapotsy, I understand that CHELCO did not leave the best taste in your mouth from your past experience with The Preserve at Campton. I was also very frustrated with the duration of that project and I apologize for not being more personally involved from the very beginning. It is our goal to stay one step ahead of you in Freedom Walk to prevent any delays over which we have control.

(Ex. 36, p. 1) (emphasis supplied)

Thus, the record evidence strongly indicates that the developer's preference for Gulf Power was a product of its belief that the ultimate consumers would benefit from Gulf Power's services and previous negative experiences with CHELCO. CHELCO did not raise the lack of testimony from the developer as a

reason to disregard customer preference in the proceeding before the Commission and should not be heard to do so for the first time on appeal. (R. 6: 1040-1043) CHELCO certainly had the opportunity to depose the developer's representative or call him as a witness. It did not and should not be permitted now to question the lack of testimony in the record. Gulf Power submitted two letters from the developer clearly expressing a desire to receive service from Gulf Power --one predating CHELCO's petition and one dated nearly a year after the commencement of the territorial dispute. (Ex. 27, pp. 1-2) The Commission was free to disagree with CHELCO's arguments and to ascribe weight to the developer's preference. The Commission's decision in this regard was reasonable and should be afforded great deference. See, Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983) (recognizing that great deference should be afforded to an agency's interpretation and application of its own rules).

V. The Commission appropriately considered the historical service of both utilities in and around the Freedom Walk development.

Appellants both contend that the Commission improperly ignored CHELCO's "historic" presence on and around the Freedom Walk development. (CHELCO B. 37; FECA B. 9) In fact, FECA goes so far as to claim that the Commission ignored CHELCO's "exclusive decades-long service to consumers on and around the disputed territory." (FECA B. 9) (emphasis supplied) These arguments are in direct contradiction to the facts. It is true that CHELCO has

served customers in the area for many years. However, any suggestion that such service has been "exclusive" ignores reality. The record evidence plainly demonstrates that Gulf Power has had a very substantial presence in the area for many years as well. As described by Gulf Power witness Spangenberg, Gulf Power has been serving customers within the City of Crestview since 1928 --nearly thirteen years before CHELCO's formation. (Tr. 2: 360) In fact, Gulf Power has been serving a customer situated immediately adjacent to the disputed development since 1955. (Id.) Using an aerial photograph (Ex. 35), Mr. Spangenberg identified a great number of other commercial and residential customers which Gulf serves just to the south and east of the development. (Tr. 2: 360-361) Mr. Avery testified that Gulf Power also serves a number of residences just to the west of the development. (Tr. 1: 153-154) CHELCO's repeated attempts to depict Gulf Power as a load-poaching newcomer to the area are, at best, distasteful and certainly without merit.

Moreover, while CHELCO portrays the Freedom Walk development as its historic service area, the evidence confirms that CHELCO serves absolutely nothing within the area in dispute. (Tr. 1: 96-97) CHELCO makes much of the fact that, in the past, CHELCO served a single residence located within the area

planned for the development.[15] (Tr. 1: 120-121, 128) However, past provision of single-phase service to a single residence located within a 170-plus acre parcel of property does not amount to historical service to the Freedom Walk development area, nor does it establish an intrinsic right in CHELCO to serve the development itself. See, In Re: Petition of Peace River Electric Cooperative, Inc. v. Florida Power and Light Company for Resolution of a Territorial Dispute, 85 F.P.S.C. 10:120 (1985), 1985 WL 1090384 (Fla. P.S.C. Oct. 8, 1985) (finding that a cooperative's previous service to a single account within the area proposed for a large, mixed-use development did not establish a "historic claim to service" in the area in dispute).

Historic presence is mentioned nowhere in the Commission's territorial dispute rule or section 366.04, Florida Statutes. While the Commission does have the discretion to consider historic presence, it is certainly not required to do so. See, West Florida Electric Cooperative Ass'n., Inc. v. Jacobs, 887 So.2d 1200, 1205 (Fla. 2004) (finding that "neither [section 366.04, Florida Statutes, nor Rule 25-6.0441, Florida Administrative Code] requires the Commission to consider a utility's historical presence in an area.")

[15] This single phase line does not presently serve any CHELCO customers. (Ex. 50, p. 17) The line would not be used to provide permanent service to the development. (Id. at p. 18)

In the instant case, it is clear that the Commission did consider both utilities' past and present service in and around the area. In its Final Order the Commission specifically found that "we do not believe that CHELCO's argument with respect to historical presence is compelling because, as discussed previously in this Order, both Gulf and CHELCO have provided service in the area for decades, and as described above, both have provided reliable service." (R. 7: 1210) Among other things, the Commission concluded that both utilities have had lines close to the development for over 40 years and that CHELCO presently maintains lines in the immediate vicinity of Gulf Power's lines, in some cases paralleling them. (R. 7: 1207) Given the undisputed record evidence, it is no wonder that the Commission elected not to grant CHELCO a preference on the grounds of historical presence.

CHELCO cites extensively to West Florida Electric Cooperative Ass'n., Inc. v. Jacobs, 887 So.2d 1200 (Fla. 2004) in support of its historical presence argument and even goes so far as to suggest that the dissenting opinion of Justice Lewis in that case is "an accurate description and summary of this case." (CHELCO B. 40) In Jacobs, this Court upheld a Commission order (2-1 Commission vote) awarding Gulf Power the right to serve a new natural gas compression station in the Hinson's Crossroads area of Washington County, Florida. West Florida Electric Cooperative had a long and undisputed history of exclusive service to residents and businesses in the Hinson's Crossroads area,

including existing 120/240 volt service to a building owned by Florida Gas Transmission in which the new compression station was to be located. Id. at 1203, 1207-08. In contrast, Gulf Power's nearest customer was over four miles away from the territory to be served. Id. at 1209. On appeal, West Florida claimed that the Commission ignored its exclusive historical presence in the area in awarding Gulf Power the right to serve the compression station. Id. at 1205. The majority of this Court disagreed, noting that neither utility had facilities in place which were adequate to serve the increased load requirements of the compression station and that neither the Commission rules, nor section 366.04, Florida Statutes, required consideration of historic presence. Id. at 1205-06. In separate dissenting opinions, Justices Lewis and Quince articulated concerns similar to those voiced by Commissioner Palecki in his dissent from the Commission's order and in the Commission Staff's recommendation that service be awarded to the cooperative. Id. at 1207-09. Chief among those concerns was the concern that awarding service to a "previously entirely foreign Gulf Power" ignored West Florida's undisputed historical service to the area. Id. at 1208.

The facts relating to historical presence in Jacobs differ substantially from those at issue in the instant case. In Jacobs, it was undisputed that Gulf Power had no history of service within four miles of the compression station and that West Florida was presently providing 120/240 volt service to a controls building which

would house the new compression station. As noted above, Gulf Power has a long history of service in the immediate vicinity of Freedom Walk, including more than five decades of service to a customer on the southeastern border of the development and a great number of residences, schools and commercial facilities within a half mile or less to the south, east and west of the development. Additionally, CHELCO does not serve anyone or anything within the boundaries of the development. Notwithstanding Appellants' arguments to the contrary, this is not a case of Gulf Power swooping into an area that CHELCO has historically served in order to "poach" a profitable customer.[16] (Tr. 1:70)

The Commission did consider both parties' presence in the area and ultimately chose not to award CHELCO a preference on that basis. The Commission's decision in that regard is supported by competent and substantial evidence and should not be overturned on appeal.

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[16] CHELCO tells this Court that "Gulf Power had no plans to serve the area until they saw an opportunity for financial gain; otherwise Gulf Power would have been satisfied to let CHELCO serve the area." (CHELCO B. 37) This is not the case. In its Second Interrogatories to Gulf, CHELCO did ask whether Gulf had any plans to extend its three-phase line on Old Bethel Road prior to learning of the Freedom Walk development. (Ex. 24, p. 394) Gulf responded that there were no specific plans or projections, but that it always stood "ready to meet its obligation to provide service, particularly with respect to those non-rural areas including the municipal limits of Crestview." (Id.) While Gulf always stood ready to provide service in the area, Gulf obviously would have had no reason to extend its three-phase line in the absence of a need for service –from Freedom Walk, or otherwise. This would amount to the same type of premature and uneconomic expansion that the Commission has cautioned against in the past.

CONCLUSION

The Commission's decision to award Gulf Power Company the right to provide electrical service to the Freedom Walk development is the product of thorough and reasoned analysis. It is supported by extensive record evidence. It is wholly consistent with Chapter 366, Florida Statutes, Chapter 425, Florida Statutes, the Commission's territorial dispute rule, and Commission and Florida Supreme Court precedent. Recognizing their heavy burden on appeal, Appellants go to great lengths to portray the Commission's decision as an unprecedented and unwarranted shift in policy. This is not the case. Territorial disputes are often fact-intensive. The instant case is no different. At their core, Appellants' arguments are simply an invitation to this Court to take over as the trier of fact and re-weigh the evidence. Gulf Power respectfully requests that the Court decline this invitation and affirm the Final Order.

Respectfully submitted this 16th day of March, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States mail on this the 16th day of March, 2012, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been produced in compliance with the requirements of Rule 9.210(a)(2), Fla. R. App. P., in 14 pt. Times New Roman Font.

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