IN THE SUPREME COURT OF FLORIDA

CHOCTAWHATCHEE ELECTRIC
COOPERATIVE, INC.

and

FLORIDA ELECTRIC COOPERATIVES
ASSOCIATION, INC.

Appellants,

v.

ART GRAHAM, ETC., ET AL.

Appellees.

Consolidated Case Nos.:
SC11-1830 and SC11-1832
L.T. No.: 100304-EU

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

CONSOLIDATED ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION TO AMENDED INITIAL BRIEF OF CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC., AND INITIAL BRIEF OF FLORIDA ELECTRIC COOPERATIVES, INC.

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as "the Commission." Appellee, Gulf Power Company, is referred to as "Gulf." "Investor-owned utility" is referred to as an "IOU." Appellant, Choctawhatchee Electric Cooperative, Inc., is referred to as "CHELCO." Appellant, Florida Electric Cooperatives Association, Inc., is referred to as "FECA."

References to the record on appeal are designated (R. [Vol. #]:[Page #]). Hearing exhibits are designated (EX. [Exhibit #]). References to the transcript of the hearing are designated (T. [Vol. #]: [Page #]). References to CHELCO's Amended Initial Brief ("CHELCO's Initial Brief") are designated (CHELCO B. [Page #]). References to FECA's Initial Brief are designated (FECA B. [Page #]).

Final Order No. PSC-11-0340-FOF-EU, issued August 15, 2011, in Docket No. 100304-EU, entitled "Order Resolving a Territorial Dispute and Awarding Territory in Okaloosa County to Gulf Power Company" is referred to as "Final Order No. PSC-11-0340" or "Final Order."

All references to the Florida Statutes are the Florida Statutes (2011), unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

CHELCO and FECA appeal the Commission's Final Order resolving a territorial dispute between CHELCO and Gulf over a proposed new development known as Freedom Walk in favor of Gulf.

On May 24, 2010, CHELCO filed with the Commission a petition to resolve a territorial dispute between it and Gulf. (R. 1:9,10) FECA moved to intervene in the proceeding one day prior to the commencement of the administrative hearing, which was held on May 17, 2011. (R. 5:914; T. 1:1) FECA was granted intervenor status at the commencement of the hearing. (T. 1:17) Sixty-three exhibits and the testimony of nine witnesses were entered into the record of the hearing. (T. 1:50-175; T. 2:184-388; EX. 1-63)

In Final Order No. PSC-11-0340, issued on August 15, 2011, the Commission considered all factors in section 366.04(2)(e)[1] and (5),[2] Florida Statutes, and Rule

[1] Paragraph 366.04(2)(e), Florida Statutes, states:

> In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

[2] Section 366.04(5), Florida Statutes, states:

25-6.0441,[3] Florida Administrative Code, and found no substantive difference in CHELCO's and Gulf's total cost to serve the development, that the provision of service to Freedom Walk by either CHELCO and Gulf will not result in uneconomic duplication of any existing facilities, and that both CHELCO and Gulf are capable of providing service to Freedom Walk as that growth occurs. (R. 7:1216) Because all factors were substantially equal, the Commission awarded the territory to Gulf based on customer preference and the preference for service by IOUs established in *Tampa Electric Company v. Withlacoochee River Electric*

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

(emphasis added).

[3] Fla. Admin. Code R. 25-6.0441(2) provides that in resolving territorial disputes, the Commission may consider, but is not limited to consideration of:

(a) The capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed;
(b) The nature of the disputed area including population and the type of utilities seeking to serve it, and degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services;
(c) The cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and
(d) Customer preference if all other factors are substantially equal.

Cooperative, Inc., 122 So. 2d 471 (Fla. 1960), and *Escambia River Electric Cooperative, Inc., v. Florida Public Service Commission*, 421 So. 2d 1384 (Fla. 1982). (R. 1216) In reaching its decision, the Commission found the following relevant facts: (1) Freedom Walk would not meet the section 425.03(1), Florida Statutes, definition of "rural area" (R. 6:1177); (2) the nature of Freedom Walk is that it currently has urban characteristics, and urbanization would increase if the area is built out (R. 6:1190); (3) any upgrades necessary in order for CHELCO to extend service to the disputed area will not be considered in CHELCO's cost to serve Freedom Walk, because those upgrades were not directly triggered by providing service to Freedom Walk, and existing facilities together with the planned upgrades are adequate to serve the development (R. 6:1194-1195); (4) Gulf's cost to extend service to Freedom Walk is the $89,738 cost of the extension of Gulf's existing three-phase line along Old Bethel Road (R. 6:1198); (5) any other costs associated with Gulf's system upgrades impacting the facilities used to serve Freedom Walk will not be included in the cost to serve Freedom Walk because those projects were previously planned for and were not directly related to serving the load associated with the development (R. 6:1198); (6) there is nothing in the record definitively establishing when full build-out of Freedom Walk will occur, and all testimony suggests that it will occur later rather than sooner (R. 6:1198); (7) the $40,000 transformer replacement project is not a project that Gulf

intends to complete, but was identified in order to obtain a clear picture of Gulf's existing facilities and how its currently planned projects would impact its ability to serve the Freedom Walk development (R. 6:1198); (8) there is no substantive difference in CHELCO's and Gulf's ability or cost to serve Freedom Walk (R. 7:1215-1216); (9) while the provision of service to Freedom Walk could result in a further duplication of facilities, the provision of that service by either CHELCO or Gulf will not result in uneconomic duplication of any existing facilities (R. 7:1208, 1215-1216); (10) both utilities are capable of providing adequate and reliable electric service to the disputed territory (R. 7:1209, 1215); (11) Emerald Coast Partners, LLC, (Emerald Coast or developer), the developer of Freedom Walk, as a proxy for future customers, prefers to receive service from Gulf (R. 7:1216); and (12) CHELCO may continue to provide electric service to three out-parcels it currently serves adjacent to Freedom Walk. (R. 6:1166; 7:1216)

On November 13, 2011, CHELCO and FECA filed notices of appeal of the Final Order. (R. 7:1221, 1223) The Court consolidated the two appeals on November 23, 2011. On February 10, 2012, the Commission and Gulf filed an Amended Joint Motion to Dismiss Case No. SC11-1832, the appeal of FECA, because FECA lacks standing to appeal the Final Order.

Statement of the Facts

The Commission has jurisdiction to resolve territorial disputes pursuant to section 366.04(2)(e), Florida Statutes, and over the planning of the electric power grid throughout Florida pursuant to section 366.04(5), Florida Statutes. CHELCO is a rural electric cooperative pursuant to chapter 425, Florida Statutes, and an electric utility pursuant to section 366.02(2), Florida Statutes. (T. 1:56; R. 1:9) Gulf is a public utility and an investor-owned electric utility (IOU) pursuant to section 366.02, Florida Statutes. (T. 2:326) FECA is a not-for-profit trade association organized under chapter 617, Florida Statutes, and is the service organization for fifteen electric distribution cooperatives and two generation and transmission electric cooperatives. (R. 5:914)

Freedom Walk is a 179.06 acre community development district located entirely within the city limits of Crestview, a municipality with a population, as of April 1, 2010, of 21,321. (T. 2:325-326, 234-235, 309, 325, 329, 374; EX. 34) With the exception of the YMCA parcel, Emerald Coast is the owner/developer of 100 percent of the real property included in Freedom Walk. (T. 2:355; EX. 34) Freedom Walk is undeveloped property, with no roads (other than trails), no water or sewer service, and no electric utility service. (T. 1:62, 96-97; EX. 2) Emerald Coast has requested that Gulf provide electric service to Freedom Walk. (T. 2:226, 233, 238, 246-247, 326; EX. 27)

Both CHELCO and Gulf have provided electric service to customers in the area surrounding Freedom Walk for more than 50 years. (T. 1:63, 2:360-361; EX. 35) Both utilities have primary voltage distribution facilities abutting Freedom Walk: CHELCO's facilities are on the northern border of Freedom Walk, and Gulf's facilities are on the southeastern border. (T. 2:376; EX. 28; EX. 49, ATT. ONE (Ex. D))

Gulf provides service to property within approximately one-half mile or less of Freedom Walk, including all of the residential dwellings south of Freedom Walk, a middle school, a shopping center, a high school, the Crestview Post Office, several bank buildings, and a variety of other commercial enterprises. (T. 1:101; T. 2:360-361, 374; EX. 35) Gulf has a three-phase line located 2,130 feet east of Freedom Walk on Old Bethel Road and a single-phase line within 30 feet of the southeast corner of Freedom Walk. (T. 1:101; EX. 7; EX 12; EX 28; EX. 49, ATT. ONE (Ex. D))

CHELCO provides electric service to customer accounts within approximately one mile or less of Freedom Walk. (T. 1:63, 121; EX. 8) CHELCO has a three-phase line on Old Bethel Road at the northern boundary of Freedom Walk and a single-phase line adjacent to Freedom Walk's western boundary. (T. 1:61-62, 88-89, 120-121; EX. 7; EX 28; EX. 49, ATT. ONE (Ex. D))

The current development plan for Freedom Walk is a relatively dense residential area with a total expected population of 1,625 persons, resulting in an average density of one home for each 0.24 acres. (T. 2:237, 326) The development plan includes a YMCA, small commercial outlets, sidewalks, decorative street lighting and landscaping, underground electric utilities, phone, cable TV, water, sewer, garbage services, and municipal police and fire protection. (T. 2:234, 237, 355) Recent and near-term expectations for growth and development in the Crestview area are very strong, and include an influx of approximately 2,200 military personnel plus an additional 6,000 family members associated with the movement of two military commands to Eglin Air Force Base and an expected 4,200 jobs to be created at the Northwest Florida Regional Airport. (T. 2:235-236)

The Commission approved the stipulation of CHELCO and Gulf that the cost of necessary facilities to provide adequate and reliable service *within* Freedom Walk is $1,052,598.01 for CHELCO and $1,152,515.00 for Gulf. (R. 5:879-880; T. 1:28-29) 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)

CHELCO presented evidence that its existing facilities together with its planned upgrades, including the upgrade of a 1.3 mile conductor segment on the feeder that serves the Freedom Walk area and the capacitor and voltage regulator

projects, are sufficient to *extend* adequate and reliable service to Freedom Walk. (T. 1:73, 86, 92, 124-128, 131, 134-136, 139-141, 143-144, 150, 153-155, 175; T. 2:271-274) The evidence shows that CHELCO's plans include routine upgrades based on normal growth projections unrelated to Freedom Walk and that these facilities will continue to be used, expanded, and improved, regardless of Gulf providing service to Freedom Walk. (T. 1:73, 86, 91-92, 120-123, 127-128, 136-143, 151-152, 154-156, 158-159, 161, 175; T. 2:185-187, 206-207, 271-273, 275-276, 346-347; EX. 21, pp. 16-20; EX. 31; EX. 50, p. 34)

Gulf will need to extend its existing three-phase line 2,130 feet along Old Bethel Road at a cost of $89,738 to serve Freedom Walk. (T. 2:252-253; EX. 28, p. 2) This extension will not cross any of CHELCO's primary distribution lines. (T. 2:267) Gulf will serve Freedom Walk using its Airport Road substation. (T. 2:253, 284-285) Gulf presented evidence that projects related to the Airport Road substation are not attributable to Gulf's cost of providing service to Freedom Walk because those projects were previously planned for and were not directly related to serving the load associated with Freedom Walk. (T. 2:284-288; EX. 13, p.1; EX. 24 (Int. 39 and 41))

In February 2008, Gulf began the planning process for a large-scale 46 kV to 115 kV conversion project involving its Airport Road, South Crestview, Milligan, Baker and Laurel Hill substations in North Okaloosa County, Florida. (T. 2:300;

EX. 13) The line from the South Crestview substation to the Airport Road substation was built to 115 kV specifications in 1992 in anticipation of converting both substations to 115 kV at a future point in time. (EX. 13, p. 3) The 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, p. 1) Gulf presented testimony that elimination of the Baker substation was included in Gulf's 2011 budget forecast and was scheduled to be completed in 2011. (T. 2:290, 302) The Airport Road substation conversion will follow the Baker/Milligan conversion between 2011 and 2015 and will proceed regardless of whether Gulf serves Freedom Walk. (T. 2:288-290; EX. 13, p. 4; EX 21 pp. 61-65) As a consequence of this conversion project, the Airport Road substation will have adequate capacity to serve the full projected load of Freedom Walk and other growth in the area. (T. 2:301-302)

Based upon a common set of assumptions, Gulf and CHELCO agree that the estimated, full build-out load for Freedom Walk is approximately 4,700 kW. (T. 1:124, 2:239; EX. 60) Commission staff's interrogatory No. 1 asked Gulf to provide cost information for providing service to an *assumed* 4.7 MW of total load for Freedom Walk reaching build-out in December of 2014. (EX. 60) The evidence shows that *absent* the planned 46 kV to 115 kV conversion project, Gulf would need to replace certain transformers at the Airport Road substation at a cost

of approximately $40,000 in order to serve the estimated 4.7 MW load if build-out of Freedom Walk occurred by December, 2014. (EX. 13, p.1; EX. 60) However, Gulf has not planned such a $40,000 replacement project, and further, will not have to proceed with such a project if the Airport Road conversion project is completed before Freedom Walk is fully developed. (T. 2:301-302; EX. 13)

Although it is speculative as to when Freedom Walk build-out will occur, it is highly unlikely that build-out will occur in the next five years (EX. 49, pp. 71-72), the project could be delayed (T. 1:159-160), and it will most likely be years before the development is completed. (T. 1:126) The 4,700 kW anticipated load will not occur immediately, but will likely be phased in over several years. (T. 1:143)

Gulf provided testimony that its provision of electric service to Freedom Walk would not result in any uneconomic duplication of facilities. (T. 2:227, 344) Gulf witness Spangenberg testified that the $89,738 cost to extend facilities to Freedom Walk is de minimis compared to the total investment Gulf will make within the development. (T. 2:345-346) The evidence shows that the magnitude of Gulf's $89,738 extension cost compared to its $1,242,253 total cost investment to serve Freedom Walk is approximately 7.2 percent (T. 1:28-29, 2:342-343, 345-346; R. 5:879-880, 7:1203, 1208); that the $89,738 extension cost investment is only 18.5 percent of Gulf's $483,828 annual non-fuel revenue expected to be

received from Freedom Walk, which is slightly more than a two-month pay-back (T. 2:346); that Gulf's ratio of total investment to the annual non-fuel revenue to be received by Gulf is 1.9 (T. 2:346); and that any perceived duplication in Gulf extending the line along Old Bethel Road would only be temporary, and therefore not uneconomic (T. 2:346-347).

CHELCO provided testimony that applying these four tests to CHELCO would show that the resulting benefits would be equally applicable to CHELCO if it were to serve Freedom Walk. (T. 1:73; 2:206-207) There is no evidence that any of the existing investment of CHELCO would become stranded investment if Gulf provides service to Freedom Walk, only that CHELCO would not be able to maximize its current investment. (T. 1:57, 90)

Testimony and reliability statistics and indices, as well as outage reports from the past three years, indicate that both CHELCO and Gulf historically responded to outages in a reasonable time period. (T. 1:148-149; EX. 59; EX. 62) Gulf witnesses testified that, from a physical standpoint, each utility is capable of providing adequate and reliable electric service to Freedom Walk. (T. 2:256, 376)

SUMMARY OF THE ARGUMENT

Section 366.04, Florida Statutes, and Florida Administrative Code Rule 25-6.0441 set forth the Commission's jurisdiction and factors which the Commission may consider in resolving territorial disputes. The Commission heard evidence

and considered all relevant factors under section 366.04(2)(e), Florida Statutes, and Florida Administrative Code Rule 25-6.0441(2) and (3). Finding all factors substantially equal, the Commission relied on customer preference and preference for IOUs to serve in resolving the territorial dispute. The Commission's decision is based on competent, substantial record evidence.

The Commission was correct to find that Gulf's cost to extend service to Freedom Walk is insignificant. There was witness testimony to support this finding, and the finding is supported by case law and prior Commission orders.

The Commission considered CHELCO's historic presence in the area, but the record shows that historic presence should not be given much weight. Again, the Commission's finding on historic presence is supported by competent, substantial record evidence. Moreover, the Commission did not create a new definition of uneconomic duplication, and its finding that provision of service by Gulf would not result in uneconomic duplication of facilities is supported by competent substantial record evidence, and is consistent with Court and Commission precedent.

The Commission's Final Order should be affirmed because CHELCO and FECA have failed to overcome the presumption of correctness of the Final Order and have failed to show that the Final Order is not supported by competent, substantial evidence or that it contains clear error.

STANDARD OF REVIEW

Commission orders come to this Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *E.g., Gulf Coast Electric Cooperative, Inc., v. Johnson,* 727 So. 2d 259, 262 (Fla. 1999). The party challenging an order of the Commission bears the burden of overcoming these presumptions by showing a departure from the essential requirements of law. *Id.*

The standard of review for Points I, II and III is whether there is competent, substantial record evidence supporting the Commission's action. *See* section 120.68(7)(b), Florida Statutes. The Court, however, shall not substitute its judgment for that of the fact-finder as to the weight of the evidence on any disputed finding of fact. Sections 120.68(7)(b) and (10), Florida Statutes.

The standard of review for Point IV is whether the Commission's interpretation of the statutes it is charged with enforcing was clearly erroneous. Section 120.68(7)(d), Florida Statutes. The agency's interpretation of a statute it is charged with enforcing is entitled to great deference. *See Johnson*, 727 So. 2d at 262. Considering the Commission's specialized knowledge and expertise in resolving territorial disputes, this deferential standard of review is appropriate. *Id.*

ARGUMENT

As discussed above, both CHELCO and FECA appealed the Final Order. CHELCO and FECA filed separate Initial Briefs. This Consolidated Answer Brief addresses the arguments made by both CHELCO and FECA in their Initial Briefs. Points I through III of the Commission's Answer Brief responds to CHELCO's Initial Brief. Point IV of the Commission's Answer Brief responds to FECA's Initial Brief.

I. THE COMMISSION'S DETERMINATION THAT THE COSTS AND ABILITY TO SERVE FREEDOM WALK ARE SUBSTANTIALLY EQUAL IS BASED ON COMPETENT, SUBSTANTIAL RECORD EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

In Point I of its Initial Brief, CHELCO argues that the Commission's finding that the costs to extend service and capabilities of Gulf and CHELCO to serve Freedom Walk are substantially equal, is not based on competent, substantial evidence, and departs from the essential requirements of law. (CHELCO B. 17) This argument is meritless.

The Commission's finding that Gulf's cost to extend service to Freedom Walk is $89,738 is supported by competent, substantial record evidence. (T. 2:252-253; EX. 28, p. 2; R. 6:1198). The record shows that, other than the $89,738, neither Gulf (T. 2:284-288; EX. 13, p. 1; EX. 24 (Int. 39 and 41)) nor CHELCO need to make any other investments or upgrades to extend service to Freedom

Walk because existing facilities together with previously planned upgrades are adequate to extend service to Freedom Walk (R. 6:1194-1195, 1198; T. 1:73, 86, 92, 124-128, 131, 134-136, 139-141, 143-144, 150, 153-155, 175; T. 2:271-274).

Although there was an $89,738 cost differential, the record shows that this amount is insignificant. Gulf witness Spangenberg testified that the $89,738 cost for Gulf to extend facilities to Freedom Walk is de minimis compared to the $1,242,253 total cost investment Gulf will make to serve Freedom Walk. (T. 2:345-346) This comparison shows that the cost differential amounts to only 7.2 percent. (T. 1:28-29, 2:342-343, 345-346; R. 5:879-880, 7:1203, 1208)

Further, the record evidence shows that the $89,738 extension cost investment is only 18.5 percent of Gulf's $483,828 annual non-fuel revenue expected to be received from Freedom Walk, which is slightly more than a two-month pay-back. (T. 2:346) Also, the impact on ratepayers, using the Contribution in Aid of Construction calculation that the Commission has approved for analyzing the economy of extensions of facilities,[4] shows that Gulf's ratio of total investment, including the investment required for facilities within Freedom Walk, to the annual non-fuel revenue to be received by Gulf, is 1.9, which is less than half of the 4.0 level which would require a capital contribution by the customer. (T. 2:346)

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[4] Fla. Admin. Code R. 25-6.064, Contributions-in-Aid-of-Construction for Installation of New or Upgraded Facilities.

CHELCO urges this Court to compare the $89,738 cost differential in the case at hand with the $14,583 cost differential in *Gulf Coast Electric Cooperative, Inc., v. Clark*, 674 So. 2d 120 (Fla. 1997), to determine that the $89,738 is significant. (CHELCO B. 26) The Commission made this comparison and concluded, just like in *Clark*, that the cost to extend service is insignificant. (R. 7:1204, fn. 38) In this regard, the Commission found:

> It is important to note that the $14,583 figure in Clark was expended to serve a load with approximately 372 kW[5] 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. Consequently, Gulf's cost to serve the development would be considered "de minimis" in comparison to the development's projected load.

(R. 7:1204, fn. 38). Thus, based on the record evidence, and consistent with *Clark*, the Commission was correct to conclude that the difference in CHELCO's and Gulf's costs to extend service to Freedom Walk of $89,738 is not significant.

Instead of making a comparison of the $89,738 and $14,583 extension costs to any relevant factors concerning the project, as the Commission did in evaluating the evidence in this case, CHELCO simply points to the $14,583 cost differential from *Clark* and the $173,480 figure at issue in *Gulf Power Co. v. Public Service Commission*, 480 So. 2d 97, 98 (Fla. 1985), and asks this Court to substitute the

[5] *See In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc., by Gulf Power Company,* 95 F.P.S.C. 3:16 (1995), 1995 PUC LEXIS 286, *6.

Commission's finding of fact with a determination that $89,738 is closer in value to $173,480[6] and, thus, this Court should deem it "significant." (CHELCO B. 26) Such action by the Court, however, is not authorized. *See* section 120.68(10), Florida Statutes (stating that, when the administrative order depends on any fact found by the agency, the court shall not substitute its judgment for the judgment of the fact-finder as to the weight of the evidence on any disputed finding of fact).

CHELCO's request for the Court to compare the numbers is also contrary to the Court's prior review of the Commission's determinations of the significance of costs. In both *Clark* and *Gulf Power Company*, the Court relied upon the Commission's factual findings as to whether a cost differential was "small" (*Clark*, 674 So. 2d at 122-123) or "large." (*Gulf Power Company*, 480 So. 2d at 98) These cases show that the Court will not reweigh the evidence or factors considered by the Commission in determining whether a cost differential is significant or not in reviewing a territorial dispute final order. *See Clark*, 674 So. 2d at 122 (stating that the Court's decision was "[b]ased upon the unrefuted facts and the Commission's own findings"); *see also Gulf Power Company*, 480 So. 2d at 98-99 (declining the "invitation to recalculate and reweigh the evidence properly presented to the PSC").

[6] It should be noted that $89,738 is actually closer to $14,538 than to $173,480.

CHELCO's reasoning, that the smaller cost differential in *Clark* corresponded to a smaller projected load, can also be distinguished from the prior Commission orders cited by CHELCO for the proposition that the cost differentials which were found to be insignificant in those orders were not "anywhere near $89,738." (CHELCO B. 21-22)[7] More importantly, the prior Commission orders cited by CHELCO offer no support for CHELCO's argument that the $89,738 cost differential is significant because it is larger than the cost differentials found in those orders. (CHELCO B. 22-23) The prior orders have no bearing on the instant case because factors other than the cost differential were equally or more controlling, and the case-specific facts are not similar to those of the instant case. *See In re: Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Company*, 86 F.P.S.C. 5:132 (1986), 1986 Fla. PUC LEXIS 760 (customer preference resolved dispute where all other factors equal; the cost differential to provide service was $6,000 involving 24-30 customers over five years); *In re: Territorial Dispute between Suwannee Valley Electric Cooperative, Inc., and Florida Power Corporation*, 87 F.P.S.C. 11:213 (1987),

[7] The exception is *In re: Petition of Peace River Electric Cooperative, Inc*. against *Florida Power and Light Company*, 85 F.P.S.C. 10:120 (1985), 1985 Fla. PUC LEXIS 227 ("*In re: PRECO v. FPL*"), wherein the cost differential to serve was $9,206 and the two utilities' costs were determined to be approximately the same, with the projected peak load was 15.8 MW. However, this order provides no support for CHELCO's premise that the Commission erred in finding the $89,738 cost differential insignificant based on the record and unique facts of this case.

1987 Fla. LEXIS 201 (FPL was awarded the disputed territory on the basis of customer preference and because it could provide the most economical service to the projected 380 kW correctional institution, even though the $8,373 cost differential was found to be "not great"); *In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative,* 88 F.P.S.C. 2:184, 1988 Fla. PUC LEXIS 367 (territory awarded to Gulf based on the cooperative's significant duplication of existing facilities; $1,300 cost difference to serve a new high school with an estimated peak demand of 650 kW); *In re: Petition of Suwannee Valley Electric Cooperative, Inc., to resolve a territorial dispute with Florida Power and Light Company*, 92 F.P.S.C. 7:170 (1992), 1992 Fla. PUC LEXIS 1029 (Commission found that the factors were not substantially equal and that permitting FPL to serve a Best Western Inn would allow uneconomical duplication of Suwannee Valley's facilities because FPL would have to cross Suwannee Valley's lines to serve; $4,723 cost differential was not discussed); and *In re: Petition of Gulf Coast Cooperative, Inc., against Gulf Power Company*, 86 F.P.S.C. 5:138 (1986), 1986 Fla. PUC LEXIS 761 (Commission found that Gulf's $10,000 estimated cost for three-phase service was unjustifiably excessive to serve the projected load consisting of one 10 hp water pump at a cemetery, compared to the $1,580 cost for Gulf Coast, and that service by Gulf represented an uneconomic duplication of facilities).

These orders do not support CHELCO's argument that the Commission erred in finding the $89,738 cost differential to be insignificant. That the Commission 20 to 25 years ago may have considered cost differentials of less than $89,738 to be significant under the unique facts of other cases does not mean that the Commission erred in finding the $89,738 cost differential insignificant based on the evidence and unique facts of this case.

CHELCO further asserts that Gulf's cost to extend service to Freedom Walk should include an additional $40,000, for a total of $129,738. (CHELCO B. 20) CHELCO's argument is without merit and mischaracterizes the December 2014 date contained in the record.

Gulf will serve Freedom Walk using its Airport Road substation. (T. 2:253, 284-285) As previously stated, Gulf presented evidence that *existing* projects related to the Airport Road substation are not attributable to Gulf's cost of providing service to Freedom Walk because those projects were previously planned for and were not directly related to serving the load associated with Freedom Walk. (T. 2:284-288; EX. 13, p.1; EX. 24 (Int. 39 and 41))

Record evidence shows that Gulf commenced a large-scale 46 kV to 115 kV conversion project[8] in February 2008, not related in any way to serving Freedom

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[8] CHELCO acknowledges that Gulf offered testimony that it has a system-wide substation upgrade planned which would allow it to provide reliable service to Freedom Walk. (CHELCO B. 19)

Walk, that involves five substations in North Okaloosa County, including the Airport Road substation. (T. 2:284-290, 300-302; EX. 13; EX. 24 (Int. 39 and 41)) The line from the South Crestview substation to the Airport Road substation was built to 115 kV specifications in 1992 in anticipation of converting both substations to 115 kV at a future point in time. (EX. 13, p. 3) The conversion project is intended to maintain reliability and reduce maintenance costs on Gulf's system. (EX. 13, p. 1) The evidence shows that elimination of the Baker substation as part of this project was included in Gulf's 2011 budget forecast and was scheduled to be completed in 2011, that the Airport Road substation conversion will follow the Baker/Milligan conversion between 2011 and 2015, and that it will proceed regardless of whether Gulf serves Freedom Walk. (T. 2:288-290, 302; EX. 13, p. 4; EX 21 pp. 61-65) Gulf provided testimony that as a consequence of this conversion project, the Airport Road substation will have adequate capacity to serve the 4.7 kW full projected load of Freedom Walk and other growth in the area. (T. 2:301-302)

CHELCO's argument to include an additional $40,000 to Gulf's cost of extending service to Freedom Walk should be rejected because it is based on a hypothetical question as framed in a staff interrogatory during discovery. (EX. 60) There is no planned $40,000 transformer replacement project for the Airport Road substation . (EX. 13, p.1) The record evidence shows that it is only if Gulf's 46

kV to 115 kV conversion project is not completed before an assumed December 2014 build-out date, corresponding to a 4.7 MW total load, that Gulf would need to replace the Airport Road transformers at a cost of $40,000. (EX. 13, p. 1; EX. 60) The interrogatory was based upon a hypothetical December 2014 build-out date, and the response was based upon that assumption. (EX. 60)

The Commission did not rely upon the hypothetical December 2014 Freedom Walk build-out date. Evidence at hearing showed that although it is speculative as to when build-out will occur, it is highly unlikely that build-out will occur in the next five years (EX. 49, pp. 71-72) (and thus not by December 2014), that the project could be delayed (T. 1:159-160), and that it will most likely be years before the development is completed. (T. 1:126) The 4,700 kW anticipated load will not occur immediately, but will likely be phased in over several years. (T. 1:143)

No party argued at hearing that December 2014 was the build-out date for Freedom Walk. CHELCO does not assert in its Initial Brief that this is the date of full build-out, and there is no record evidence which would support such a claim. Thus, the Commission correctly found that there was nothing in the record that suggests when full build-out will occur, and the Commission did not include the hypothetical $40,000 replacement project cost in Gulf's cost of extending service to Freedom Walk. (R. 6:1198)

The Commission's finding of fact that both utilities are capable of providing adequate and reliable electric service to Freedom Walk (R. 7:1209-1210) is supported by competent, substantial record evidence. Testimony and reliability statistics and indices, as well as outage reports from the past three years indicate that both utilities have historically responded to outages in a reasonable time period. (T. 1:149; EX. 59; EX. 62) The record shows that both Gulf and CHELCO are stable, well-run, and physically capable of providing adequate and reliable electric service to Freedom Walk. (T. 2:256, 376).

CHELCO has failed to meet its burden of showing that the Commission's findings of fact are unsupported by competent, substantial evidence or are clearly erroneous.

II. THE COMMISSION'S FINDING THAT SERVICE TO FREEDOM WALK BY GULF WILL NOT RESULT IN UNECONOMIC DUPLICATION OF FACILITIES IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

In Point II of its Initial Brief, CHELCO argues that the Commission's finding of fact that there will be no uneconomic duplication if Gulf serves Freedom Walk "overlooks or fails to consider the evidence and the precedents of this Court and the Commission." (CHELCO B. 28) CHELCO's argument is baseless and, again, is just an attempt to get this Court to reevaluate and reweigh the evidence and factors considered by the Commission.

A. The extension of Gulf's lines to serve Freedom Walk will not result in uneconomic duplication of facilities.

CHELCO argues that Gulf's extension of lines to Freedom Walk will duplicate CHELCO's facilities. (CHELCO B. 29) The factor relevant to resolution of a territorial dispute, however, is not whether further duplication could occur, but whether any such duplication of facilities is considered "uneconomic duplication" under section 366.04(5), Florida Statutes. *See Johnson*, 727 So. 2d at 264 (finding that "if there is a comingling of facilities in a disputed territory, it does not necessarily follow that this duplication is "further *uneconomic* duplication" within the meaning of subsection 366.04(5)(emphasis supplied)"). Duplication will not be considered uneconomic if the cost differential is relatively small or de minimis. *See Clark*, 674 So. 2d at 123 (finding no uneconomic

duplication because Commission had found the $14,583 cost differential was "relatively small").

B. The finding that no uneconomic duplication of facilities will occur if Gulf provides service is supported by competent, substantial record evidence and is consistent with Commission and Court precedent.

CHELCO argues that the Commission failed to consider all elements necessary to determine whether the duplication of facilities is uneconomic (CHELCO 32) and that the Commission's consideration was limited to whether there is sufficient incremental benefit to Gulf (CHELCO B. 33-35). This argument is without merit.

The Commission evaluated and weighed conflicting evidence concerning numerous factors in reaching its decision. The Final Order contains a full comprehensive discussion of all factors the Commission considered in making its determination (R. 6:1199-7:1208), including: The historic presence of both utilities in the area (T. 6:1199-1200; 7:1206-1207)[9]; the location of the utilities' existing lines and facilities (T. 6:1200; 7:1206, 1207); the proximity of lines (T. 6:1200; 7:1207); the cost to extend service to Freedom Walk (T. 6:1202; 7:1207); the magnitude of the cost to extend facilities compared to the total investment (T. 7:1203, 1207-1208); the investment compared to estimated non-fuel revenue (T. 7:1203, 1207-1208); the ratio of the total investment to annual non-fuel revenue

[9] *See* Point II. C., herein, concerning the Commission's consideration of historic presence.

(T. 7:1203, 1207-1208[10]); consideration of whether the facilities would have a reasonable prospect of future use if not used to serve Freedom Walk (T. 7:1203-1204, 1207-1208); the ability to serve Freedom Walk with existing facilities (T. 7:1201, 1208); comparison of the cost to extend service to the total projected 4,700 kW load (T. 7:1204); both companies' plans for routine upgrades based on normal growth projections unrelated to Freedom Walk (T. 6:1199; 7:1208); and whether CHELCO's existing investment would become stranded if it was not awarded the Freedom Walk territory (T. 7:1206, 1208). Thus, contrary to CHELCO's argument, the Commission's finding that service by Gulf will not result in further uneconomic duplication was based upon consideration of numerous factors, including factors identified in *Clark*, that is, the proximity of lines, adequacy of existing lines, and cost.

The Commission has broad discretion in determining what, *if any*, weight to give to any particular factor which the Commission may consider in exercising its authority to resolve territorial disputes pursuant to section 366.04, Florida Statutes. *West Florida Electric Cooperative, Inc., v. Jacobs*, 887 So. 2d 1200, 1206 (Fla. 2004). The Commission in the instant case properly considered all relevant factors

[10] The "four tests" factors concerning costs and benefits resulting from serving or not serving a disputed area, such as incremental cost to serve and expected revenues, were previously considered by the Commission in its analysis of uneconomic duplication in a territorial dispute in *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc., by Gulf Power Company,* 98 F.P.S.C. 1:167 (1998), 1998 Fla. PUC LEXIS 169.

in finding no uneconomic duplication will result from Gulf extending service to Freedom Walk.

The Commission's findings on the factors listed above are supported by the record. The evidence shows that both CHELCO and Gulf have had lines close to Freedom Walk for more than 50 years. (T. 1:61-63, 88-89, 101, 120-121; 150-154; T. 2:357, 360-361, 376; EX. 7; EX. 8, EX. 12; EX. 28; EX. 35; EX 49, ATT. ONE (Ex. C, D, and E)) Based on record evidence, the Commission found that Gulf's existing lines are in the immediate vicinity of CHELCO's existing lines and that, because of the close proximity of the lines, the provision of service to the development by either CHELCO or Gulf could result in a further duplication of facilities. (R. 7:1208)

As set forth in Point I above, the evidence shows that, except for facilities already planned and budgeted, CHELCO would incur no additional cost to extend service to the development**,** and Gulf would incur $89,738 to extend service to the development. The record supports the Commission's finding that the $89,738 difference in CHELCO's and Gulf's costs to extend service to Freedom Walk is not significant.[11] The record evidence also supports the Commission's finding that there is sufficient incremental benefit to Gulf's investors and ratepayers to allow

[11] *See* Point I., herein, concerning the evidence supporting the Commission's decision that the $89,738 cost differential is not significant.

Gulf to make this investment in spite of any determined duplication.[12] The determination of incremental benefit involved evaluation of the magnitude of the cost to extend facilities compared to the total investment; the investment compared to estimated non-fuel revenue; the ratio of the total investment to annual non-fuel revenue; and consideration of whether the facilities would have a reasonable prospect of future use. (T. 2:345-347)

There is no evidence that CHELCO's existing investment would become stranded investment if Gulf provides service to Freedom Walk. Instead, CHELCO stated that it would not be able to "maximize its investment" if it is not allowed to serve Freedom Walk. (T. 1:57, 90) The inability to maximize investment is not uneconomic duplication. Uneconomic duplication refers to facilities which go unused, or are otherwise wasted due to construction of duplicate facilities. *E.g. Gulf Power Company*, 480 So. 2d at 98 (affirming Commission order that the actual construction of new facilities was a wasteful duplication, and a reckless, irresponsible and uneconomic duplication of existing electrical facilities).

The record shows that CHELCO's plans include routine upgrades to its facilities based on normal growth projections unrelated to the Freedom Walk development and that these facilities will continue to be used, expanded, and improved, regardless of Gulf providing service to Freedom Walk. (T. 1:73, 86, 91-

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[12] *See* Point I., herein, concerning the evidence supporting this finding.

92, 120-123, 127-128, 136-143, 151-152, 154-156, 158-159, 161, 175; T. 2:185-187, 206-207, 271-273, 275-276, 346-347; EX. 21, pp. 16-20; EX. 31; EX. 50, p. 34) Thus, the evidence shows there would be no economic waste with regard to CHELCO's existing facilities if Gulf provides service to Freedom Walk, because those facilities will by design be efficiently used for future growth, notwithstanding Gulf's providing service to Freedom Walk, consistent with the intent of section 366.04(5), Florida Statutes.

A closer look at CHELCO's arguments show that it is actually asking this Court to reevaluate and reweigh the evidence and factors considered by the Commission. However, this is something the Court has repeatedly rejected. *See Jacobs*, 887 So. 2d at 1206 (stating that at its heart, West Florida's claim was that the Commission should have assigned dispositive weight to its historic presence, but the Court will not reweigh the evidence and factors considered, and the Commission was well within its discretion to consider only the factors listed in its rule); *see also Gulf Power Company*, 480 So. 2d at 98 (rejecting Gulf Power's argument that the Commission erred in focusing on certain factors and failed to properly apply statutory criteria of section 366.04(2)(e) in resolving the territorial dispute, stating that it represented a thinly veiled attempt to have the Court reweigh and revaluate the evidence). Additionally, this Court has stated that the determination of estimated costs in a territorial dispute resolution case 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." *Gulf Coast Electric Cooperative, Inc., v. Florida Public Service Commission*, 462 So. 2d 1092, 1094 (Fla. 1985).

The Commission's interpretation of what constitutes "uneconomic duplication" under section 366.04(5), Florida Statutes, should be given great deference. *See Johnson*, 727 So. 2d at 262 (in affirming the Commission's resolution of a territorial dispute pursuant to section 366.04(2)(e) and (5), the court stated that Commission's interpretation of a statute is entitled to great deference, and, considering the Commission's specialized knowledge and expertise in this area, this deferential standard of review is appropriate). CHELCO has failed to show that the Commission's findings are unsupported by competent, substantial evidence.

C. The Commission considered CHELCO's historic presence in finding that no uneconomic duplication will occur if Gulf provides service to Freedom Walk.

CHELCO's argument that the Commission failed to consider CHELCO's historic presence in determining that there will be no uneconomic duplication if Gulf provides service to Freedom Walk (CHELCO B. 37) is meritless. The Final Order specifically states that, with regard to the issue of uneconomic duplication, the historic presence of both Gulf and CHELCO was considered, including evaluation of CHELCO's evidence and argument concerning its investment and

historic presence. (R. 6:1199-7:1201, 1206-1207)[13] In weighing the evidence, the Commission found that CHELCO's historic presence argument was not compelling because Gulf has also provided reliable service in the area for decades. (R. 7:1210; T. 2:360-361; EX 35)

Just like the appellant in *Jacobs*, 887 So. 2d 1200, a closer look at CHELCO's argument shows that CHELCO is actually asking the Court to reweigh the evidence on historic presence. And just like in *Jacobs*, this Court should decline to do so. *Id.* at 1206.

In support of its argument, CHELCO quotes portions of Justice Lewis' dissent in *Jacobs*. (CHELCO B. 39-40) Justice Lewis was concerned that the Commission's final order considered only the four factors detailed in Rule 25-4.0441(2), Florida Administrative Code, and that the Commission should not have decided the case based on customer preference, but instead on the basis of West Florida's historic record of service to the area. *Id*. at 1207-1208.

The facts in *Jacobs* are quite different than those of the instant case. In *Jacobs*, the cooperative had been serving a 35 acre rural area for more than 50 years, and the disputed territory which was awarded to Gulf consisted of the

[13] CHELCO's historic presence was also considered with respect to chapter 425, Florida Statutes, considerations (R. 6:1183), the nature of the Freedom Walk development (R: 1186, 1188-1190), and the capability of each utility to provide adequate and reliable service to Freedom Walk (R. 7:1209). The Commission considered in detail CHELCO's historic presence argument in making its ultimate determination to award the right to serve Freedom Walk to Gulf. (R. 7:1213-1215)

footprint of two 15,000-horsepower electric motors located in that 35 acre tract. Further, Gulf's nearest customer was over four miles away. *Id.* at 1202, 1209. In the instant case, both Gulf and CHELCO have been serving customers near the 179 acre disputed territory for more than 50 years, and neither are serving any customers in the territory at issue. (T. 1:63, 101, 121, 2:360-364; EX. 8; EX. 35)

CHELCO also argues that the Commission failed to apply the precedent of *In re: Petition of Gulf Power Company involving territorial dispute with Gulf Coast Electric Cooperative*, 84 F.P.S.C. 146 (1984), 1984 Fla. PUC LEXIS 960 ("*In re: Gulf Power v. Gulf Coast*") (CHELCO B. 40), wherein the Commission, almost 30 years ago, found that Gulf Coast's construction of 3,450 feet of line was an uneconomic duplication of facilities. In *In re: Gulf Power v. Gulf Coast*, the Commission found that the utilities engaged in a "race to serve" a 143 acre subdivision; two residences were receiving service from Gulf Power; one residence was receiving service from Gulf Coast; the lower cost for Gulf Power to provide service was considered a compelling factor; and Gulf Power's rates would be lower. This is not the case in this instance. On appeal in *In re: Gulf Power v. Gulf Coast*, the Court recognized that the Commission's determination of estimated cost was "so dependent on the individual facts of each case that the only way it may be considered is on a case-by-case basis." *Gulf Coast Electric Cooperative, Inc., v. Florida Public Service Commission*, 462 So. 2d at 1095. Likewise, consideration

of the issue of uneconomic duplication should be considered on a case-by-case basis. The facts of the case at hand show no uneconomic duplication.

In making its finding of fact, the Commission acted within its authority, consistent with the essential requirements of law, to evaluate conflicting testimony and accord to it the weight the Commission deemed appropriate. *Florida Bridge Company v. Bevis*, 363 So. 2d 799, 801 (Fla. 1978). CHELCO has failed to show that the Commission's finding of fact is unsupported by competent, substantial record evidence or is clearly erroneous.

III. THE COMMISSION'S RELIANCE ON CUSTOMER PREFERENCE AND PREFERENCE FOR GULF AS AN INVESTOR-OWNED UTILITY IS BASED ON COMPETENT, SUBSTANTIAL RECORD EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

In Point III of its Initial Brief, CHELCO argues the customer's preference for Gulf and the preference given to Gulf as an IOU should not have been considered by the Commission. (CHELCO B. 42-49) CHELCO's argument is without merit.

Florida Administrative Code Rule 25-6.0441(2)(d) states that if all other factors are equal, customer preference may be considered in resolving a territorial dispute. Pursuant to this rule, the Commission found that, all other factors being equal, Emerald Coast, the developer of Freedom Walk, as a proxy for future customers, prefers to receive service from Gulf. (R. 7:1213, 1216) The developer

is the logical proxy for the ultimate customers and the only entity that can practically make decisions about such critical elements as infrastructure for a development. (T. 2:226, 237-238, 363, 378-379) CHELCO agreed that the developer is acting as an agent on behalf of the ultimate end-users. (T. 1:103) The evidence shows that, by letter of November 15, 2010, CHELCO provided Emerald Coast with a cost estimate for providing electric service to Freedom Walk. (EX. 44) The evidence also shows that Emerald Coast requested Gulf as its electric utility provider, stating, in part: "We are aware of Gulf Power's approved rate distribution and we believe the consumers will benefit from Gulf Power's services." (T. 2:238, 326; EX. 27)

CHELCO recognizes that, pursuant to Florida Administrative Code Rule 25-6.0441(2)(d), the Commission may consider customer preference if all other factors are substantially equal (T. 1:90, 108), but argues that Emerald Coast's preference for Gulf should not have been considered because several factors favor CHELCO. (CHELCO B. 42-43) Points I and II of this Brief show that the Commission was correct to find all other factors were equal and the Commission's findings are based on competent, substantial record evidence. When all other factors are equal, case law is clear that the Commission may rely on customer preference to determine which entity should serve the disputed territory. *Clark*, 674 So. 2d at 123 (holding that customer preference should be considered a

significant factor where the other factors in Florida Administrative Code Rule 25-6.0441(2) are substantially equal). *Accord Jacobs*, 887 So. 2d at 1204.

CHELCO acknowledges that the evidence shows customer preference for Gulf, but again, asks this Court to reweigh the evidence by arguing that the developer, Emerald Coast, did not give "sufficient justification" for its preference. (CHELCO B. 47-49) As discussed in Points I and II of this Brief, the Court will not reevaluate and reweigh the evidence considered by the Commission in resolving territorial disputes. *Jacobs*, 887 So. 2d at 1206.

In addition, CHELCO's argument has no basis in the law, and the prior Commission orders cited by CHELCO (CHELCO B. 47-49) do not support its position. Final Order PSC-11-0340 is consistent with *In re: PRECO v. FPL,* 1985 Fla. PUC LEXIS 227. In that case, the Commission, in recognizing the developer's strong preference for FPL, stated that customer preference must be based on established facts in the record. As previously shown, the Commission in the instant case relied upon evidence in the record showing customer preference for Gulf. The remaining orders cited by CHELCO (CHELCO B. 48) likewise do not support its position because none of the orders rejected customer preference for "insufficient justification." Instead, customer preference was not a deciding factor because all other factors were not substantially equal, and other factors weighed in favor of one utility over the other.

Likewise, CHELCO's argument that the Commission may not consider and give weight to customer preference because the customer is a developer (CHELCO B. 46) has no basis in the law, and the prior Commission orders cited by CHELCO do not stand for that proposition. Moreover, *In re: PRECO v. FPL, 1985 Fla. PUC LEXIS 227,* is directly contrary to CHELCO's position that the Commission has never awarded disputed territory to a utility based on customer preference of the developer alone, when all other things are equal. (CHELCO B. 48)

In citing to *In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative*, *Inc*., 84 F.P.S.C. 9:121(1984), 1984 Fla. PUC LEXIS 271, CHELCO failed to include the concluding sentence concerning customer preference in its quotation from the order (CHELCO B. 47): "Therefore, customer preference shall be given little weight, *in light of the other facts brought out in the record.*" (emphasis added) *Id*. at *14. The Commission gave little weight to customer preference, and the chapter 425, Florida Statutes, preference for IOUs was not considered, because all other factors were not equal, not because the customer was a developer. Id. at *18-19.

In *In re: Petition of West Florida Electric Cooperative Association, Inc., to resolve a territorial dispute with Gulf Power Company*, 85 F.P.S.C. 11:12 (1985), 1985 Fla. PUC LEXIS 154, customer preference of the developer and three lot owners was the determining factor because all other factors were equal between

the utilities. The Commission gave no indication that the customer preference of the developer should not be considered or that it was accorded any less weight than that of end-use customers.

As reflected in the Final Order, customer preference is only to be considered if other factors do not weigh in favor of one of the utilities, and an end-user's preference carries weight over that of the developer. (R. 7:1212) In the instant case where all other factors are equal and the only customer is the developer, the Commission correctly considered the customer's preference for Gulf.

Also without merit is CHELCO's argument that an IOU should not be given preference when all factors are equal because there is no mention of this preference in Florida Administrative Code Rule 25-6.0441. (CHELCO B. 45) The Final Order found that the IOU, Gulf, should be given preference to serve Freedom Walk because all other factors are equal. (R. 6:1174; 7:1216). Case law is clear that when no factual or equitable distinction exists in favor of either utility, the territorial dispute is properly resolved in favor of the IOU. *Gulf Power Co.*, 480 So. 2d at 99 (stating that *Escambia River* held that when no factual or equitable distinction exists in favor of either utility, the territorial dispute is properly resolved in favor of the IOU); *Escambia River*, 421 So. 2d at 1385; *Withlacoochee*, 122 So. 2d at 473. The Commission's reliance on *Escambia River* and *Withlacoochee* is further supported by the record evidence showing that the nature

of Freedom Walk is urban and likely to become more urbanized, and that Freedom Walk does not meet the section 425.03(1), Florida Statutes, definition of "rural area." (T. 2:234-237, 309, 325-329, 374; EX. 34; Ex. 48 (Req. #4); EX. 50, pp. 83, 98) In addition, case law establishes that the factors listed in section 366.04, Florida Statutes, and Florida Administrative Code Rule 25-6.0441 are not exclusive and the Commission may consider other factors. *Jacobs*, 887 So. 2d at 1205.

CHELCO asserts that the IOU preference established by *Withlacoochee* and *Escambia River* is no longer valid and cites to *Clark,* 674 So. 2d at 123, as the Court overturning these decisions (CHELCO B. 45). However, *Clark* does not even mention *Withlacoochee* and *Escambia River*, let alone overturn the Court's decisions in these cases.

Further, CHELCO's contention that Gulf should get no preference as an IOU because all factors are not equal (CHELCO B. 45) is without merit because, as shown in Points I and II above, the Commission's finding that all other factors are equal is supported by the evidence and is not clearly erroneous.

IV. THE COMMISSION CORRECTLY INTERPRETED SECTION 366.04(5), FLORIDA STATUTES.

Point IV answers the Initial Brief of FECA. To the extent that FECA's arguments are addressed in Points I through III of the Commission's Answer Brief, the Commission will not repeat its answers in Point IV. Instead, reference is made to the appropriate points above which answer FECA's arguments.

In Point I of its Brief, FECA argues that the Commission erroneously interprets the section 366.04(5), Florida Statutes,[14] mandate to avoid uneconomic duplication because the Final Order defines uneconomic duplication in a manner which considers financial benefits to Gulf only, without considering CHELCO's existing facilities or the public interest. (FECA B. 11, 14-16, 18, 20-22, 28, 29, 31) FECA's argument should be rejected because it mischaracterizes the Final Order. As discussed in Points II. B. and C, above, the plain language of the Final Order considered, evaluated and weighed relevant evidence on numerous factors applied to both Gulf and CHELCO.

A. The Commission's finding that service by Gulf will not result in uneconomic duplication pursuant to section 366.04(5), Florida Statutes, comports with case law and prior Commission orders.

FECA cites to various cases, most not involving electric utility territorial disputes, for the proposition that economic waste is bad. (FECA B. 16-18) The Commission does not disagree with these cases. Indeed, avoiding economic waste

[14] Referred to by FECA sometimes as "the Grid Bill."

is a goal of the Commission in determining territorial disputes. *E.g. Lee County Electric Cooperative v. Marks*, 501 So. 2d 585, 587 (Fla. 1987)(stating that the Court has repeatedly approved the Commission's efforts to end the economic waste and inefficiency resulting from utilities "racing to serve").

To the extent FECA argues that Gulf's and CHELCO's stipulated costs to provide service *within* Freedom Walk are relevant to the issue of uneconomic duplication (FECA B. 6,13), the argument is without merit. CHELCO and Gulf agreed that the costs to provide service within Freedom Walk should be substantially the same for both utilities. (T. 1:64, 148; T. 2:255-256). This case does not involve a "race to serve." Neither utility has constructed facilities within Freedom Walk. Individual customer distribution facilities will need to be constructed regardless of which utility provides service. (T. 1:129) Since neither utility has constructed or incurred any expense for facilities within Freedom Walk, there can be no "further unnecessary duplication" or economic waste within the development, and therefore the estimated costs to provide service within Freedom Walk are not relevant to the issue of uneconomic duplication.

FECA's discussion of *Clark*, 674 So. 2d 120, and Commission orders in Docket No. 930885-EU (FECA B. 18-27) has no apparent bearing on the Commission's finding in the instant case that extension of service by Gulf will not result in further uneconomic duplication of facilities. As explained in Point I

above, the Commission considered numerous factors in making this finding. It is up to the Commission to determine what factors to consider in exercising its authority to resolve territorial disputes. *Jacobs,* 887 So. 2d at 1206. While the Commission concluded that the testimony shows that there is sufficient incremental benefit to *either utility* and its customers to allow either utility to make the investment in spite of any determined duplication,[15] the Final Order is based on all factors considered by the Commission on the issue of further uneconomic duplication, and does not define "uneconomic" to mean "not profitable for Gulf Power," as FECA purports.

B. The Commission's finding that service by Gulf will not result in uneconomic duplication correctly interprets section 366.04(5), Florida Statutes.

FECA argues that any duplication of facilities must be considered "uneconomic duplication" under section 366.04(5), Florida Statutes. (FECA B. 30-34) This argument is completely contrary to this Court's rulings in *Johnson*, 727 So. 2d at 264 (Fla. 1999), and in *Clark*, 674 So. 2d at 123 (wherein the Court overturned the Commission's decision finding that any duplication of facilities is uneconomic, even if that duplication is insignificant or de minimis). As

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[15] As noted in Point I above, these factors were previously used by the Commission in its analysis of further uneconomic duplication in *In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative, Inc., by Gulf Power Company, 98 F.P.S.C. 1:167 (1998), 1998 Fla. PUC LEXIS 169.*

demonstrated in Points I through III above, the Commission was correct to conclude that, while the provision of service to Freedom Walk could result in a further duplication of facilities, the provision of that service by either utility will not result in uneconomic duplication of any existing facilities.

Likewise, the three Commission orders approving territorial agreements cited by FECA (FECA B. 30) fail to show Commission error in finding that no uneconomic duplication will occur in the instant case. In *In re: Joint petition for approval of territorial agreement in Orange County by Orlando Utilities Commission and Progress Energy Florida, Inc.,* 07 F.P.S.C. 7:2 (2007), 2007 Fla. PUC LEXIS 342, Docket No. 070137-EU, Order No. PSC-07-0562-PAA-EU, issued July 5, 2007**,** the Commission found that the territorial agreement eliminated existing or potential uneconomic duplication of facilities and was in the public interest. In *In Re: Joint petition for approval of territorial agreement in Leon and Wakulla Counties by Talquin Electric Cooperative, Inc. and Progress Energy Florida, Inc.,* 4 F.P.S.C. 11:124 (2004), 2004 Fla. PUC LEXIS 1050 at *9, the Commission found that the territorial agreement appeared to eliminate or minimize existing or potential uneconomic duplication of facilities. In *In Re: Joint petition for approval of territorial agreement between Sumter Electric Cooperative, Inc., and Central Florida Electric Cooperative, Inc.,* 96 F.P.S.C. 7:323 (1996), 1996 Fla. PUC LEXIS 1068 at *1, 4-5, the approved territorial agreement states in a

"whereas clause" that the Commission has recognized that duplication of service facilities *may* result in needless and wasteful expenditures detrimental to the public interest, but the Commission stated that the purpose of the territorial agreement is to, in part, prevent the potential *uneconomic duplication* of electric facilities. A determination that duplication of facilities could occur does not require a conclusion that the duplication is uneconomic. *Johnson*, 727 So. 2d at 264.

The remainder of FECA's brief reargues testimony of CHELCO witnesses for the proposition that awarding service of the disputed territory to Gulf creates a negative economic impact on CHELCO. (FECA B. 31-33). Like CHELCO, FECA is asking the Court to reweigh the evidence and factors considered by the Commission in resolving this territorial dispute. As discussed in Points I through III above, this is something the Court has repeatedly stated it will not do. *E.g., Jacobs*, 887 So. 2d at 1206.

Moreover, FECA's reliance on *PW Ventures, Inc., v. Nichols*, 533 So. 2d 281 (Fla. 1988), is misplaced. (FECA B. 34) There, the Court affirmed the Commission's declaratory statement that, pursuant to chapter 366, Florida Statutes, PW Ventures would become a regulated public utility if it sold electricity to only one customer, stating, in part, that the decision was consistent with the Commission's power to avoid uneconomic duplication. *Id.* at 284. The Court expressed concern that a contrary decision could result in entities unregulated by

the Commission entering into contracts with high use industrial complexes, diverting revenues to unregulated electric producers, and drastically changing the regulatory scheme in Florida. *Id*. The Court in *PW Ventures* was addressing a very different fact pattern than that of the territorial dispute in the instant case which involves two utilities subject to the Commission's jurisdiction as set forth in chapter 366, Florida Statutes. (T. 1:56; T. 2:326; R. 1:9)

The Commission's interpretation of section 366.04(5), Florida Statutes, is entitled to great deference. *Johnson*, 727 So. 2d at 262. FECA has failed to carry its burden of showing that the Commission erroneously interpreted section 366.04(5), Florida Statutes.

CONCLUSION

CHELCO and FECA have failed to meet their heavy burden of overcoming the presumption of correctness that attaches to Commission orders. *Johnson,* 727 So. 2d at 262. They have failed to show that the Commission's findings and conclusions are not based on competent substantial evidence or that they contain clear error. *Id.* The Commission's Final Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 19th day of March, 2012, to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font type used in this brief is Times New Roman 14-point, which is in compliance with the requirements of Fla. R. App. P. 9.210.

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