IN THE SUPREME COURT OF FLORIDA
Consolidated Case Nos.: SC11-1830 and SC11-1832
L.T. No.: 100304-EU

CHOCTAWHATCHEE ELECTRIC
COOPERATIVE, INC.

and

FLORIDA ELECTRIC COOPERATIVES
ASSOCIATION, INC.

Appellants,

vs.

ART GRAHAM, CHAIRMAN
EDUARDO E. BALBIS, RONALD A.
BRISÉ, JULIE I BROWN, and LISA
POLAK EDGAR, As and Constituting
THE FLORIDA PUBLIC SERVICE
COMMISSION,

Appellees.
__________________________________ /

REPLY BRIEF OF APPELLANT
CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.

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STATEMENT OF THE CASE AND FACTS

Appellees Gulf Power Company ("Gulf Power") and the Public Service Commission ("PSC" or "Commission") both chose to provide alternative Statements of the Case and Facts. Gulf Power rejected Choctawhatchee Electric Cooperative, Inc.'s ("CHELCO") Statement of the Case as incomplete and argumentative but offers no details and merely seeks to present a version more favorable to it. The Commission, however, has presented several pertinent facts in a manner which confuses the differences between the parties. Since the Commission presented these facts to support its erroneous decision, CHELCO responds as follows:

On page 7 of its Answer Brief, the Commission presents a comparison of the current facilities of the parties, stating that both have had customers in the area for more than 50 years, and that both have primary distribution facilities abutting the Freedom Walk property. CHELCO has served the area for over 60 years (TR 63). CHELCO has had lines to or on the Freedom Walk property since 1946. Although Gulf Power offered testimony that it has served the City of Crestview since 1928, such service is irrelevant with respect to the Freedom Walk property. Gulf Power does have residential service to a customer within 30 feet of the southeast corner of the property, but there is no evidence that Gulf Power has any service abutting the property.

The Commission next states that Gulf Power provides service within approximately one half of a mile of the property, and that CHELCO has customer accounts within approximately one mile of the property (PSC Brief, p. 7). However, the record below reflects that CHELCO has 139 accounts within a quarter of a mile of the boundary of Freedom Walk (TR 121; Ex. 8), and 810 accounts within a one mile radius (TR 63). Gulf Power, on the other hand, has only one residential account near the property and reference to the aerial view provided by Gulf Power (Gulf Power Appendix, p. 1) clearly shows all of the residential dwellings south of Freedom Walk served by Gulf Power are at least 1500 feet from the southern boundary of the property. The location of CHELCO accounts and relationship of facilities were part of the record below.

CHELCO's Appendix to this Reply Brief includes a copy of Exhibit 7, showing the location of lines, Ex. 8 which shows the location of CHELCO accounts relative to the Freedom Walk property. (Four of those accounts are on the same side of Old Bethel Road and abut Freedom Walk and are the "outparcels" referred to by the Commission). The Appendix also contains Exhibit 28 which are Gulf Power exhibits showing location of current 3 phase service on the extension required by Gulf Power. These exhibits demonstrate the distorted description offered by the Commission.

On pages 8-9 of its Answer Brief, the Commission addresses CHELCO's existing facilities and states that these facilities are sufficient to "*extend*" (italics in Answer Brief) service. CHELCO would not have to extend any facilities to Freedom Walk. (TR 127). There are planned upgrades to existing facilities, but the testimony before the Commission was that CHELCO would not have to expand existing facilities to serve the first customer now (TR 127-131).

While the Commission's Statement of the Facts is not incorrect, the picture which its descriptions depict are not a correct depiction of the current relationships between the two parties. For example, to say that Gulf Power has accounts within one half of a mile of the property and CHELCO within 1 mile is accurate, but leaves the impression that Gulf Power is serving accounts closer to the disputed area than CHELCO, which is not accurate.

ARGUMENT

I. The Commission's Order, which concludes that all issues are substantially equal, is not based on competent substantial evidence and constitutes a departure from the essential requirements of law.

The Commission and Gulf Power argue that the Order is based on competent substantial evidence, that CHELCO is merely rearguing its case, and that CHELCO is seeking to have this Court reweigh the evidence. Although this Court does not reweigh evidence, it shall review the record to determine if the Order appealed meets the essential requirements of law and is based on competent

substantial evidence. *See Lee County Electric Cooperative v. Marks,* 501 So. 2d 585 (Fla. 1987)*; Florida Power Corp. v. Public Service Comm.*, 487 So.2d 1061 (Fla. 1986); *Citizens of State v. Public Service Commission*, 464 So.2d 1194 (Fla. 1985) *Florida Bridge Co. v. Bevis,* 363 So. 2d 799 (Fla. 1978).

This Court defined "competent substantial evidence" in *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) as follows:

> We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

(internal citations omitted).

When the Court reviews the record below and considers the evidence that was presented and the erroneous interpretation given that evidence by the Commission they will agree that the Order is not based on competent, substantial evidence as defined in *DeGroot.*

The record below reflects: (a) that the costs associated with serving the area by CHELCO are $0 and for Gulf Power at least $89,738; (R. 6: 1194, 1198; TR. 252) (b) that only one party—CHELCO—has adequate facilities now to serve Freedom Walk; (c) that Gulf Power will have to extend its existing line 2130 feet just to get to the same location as CHELCO, and that to do so, Gulf Power must

duplicate some of the existing facilities of CHELCO (R. 6: 1198; Ex. 23, p. 319); and (d) that CHELCO has had a long established presence in the territory.

Despite these significant differences, the Commission concluded that all factors were substantially equal and the Commission's Answer Brief continues these mistakes. At p. 27 of its Answer Brief, the Commission states it has "broad discretion in determining what *if any* (italics in original brief) weight to give . . ." The decision below gives essentially <u>no</u> weight to evidence supporting CHELCO even when that evidence was based on Gulf Power's testimony. Rather than give weight to CHELCO's supportive testimony, the Commission chose to ignore the accurate status of the parties.

Gulf Power argues that because the Commission determined that the area at issue has "urban" characteristics, the Commission's decision gives a "preference" to Gulf (Gulf Br. p. 38). Gulf Power also notes that it had raised the legal authority of CHELCO to serve the area under Chapter 425, Florida Statutes (Gulf Br. p. 37). The Commission found that Sections 425.02 and 425.04, Florida Statutes, do not preclude CHELCO from serving the area (R., 6: 1186), which Gulf Power has not cross-appealed. The Commission did not express a "preference" for Gulf Power because of the urban nature of the area – its decision was that <u>all</u> issues were substantially the same, and it based its decision on customer preference, despite the lack of any testimony from the developer.

A. Costs. The $89,738 cost is the number supplied by Gulf Power to extend its existing lines to the same location as CHELCO. There was no disagreement on the number and only by deeming this amount to be "not significant" could the Commission conclude that the costs were essentially the same. The Commission's decision that the $89,738 difference was "not significant" constitutes a failure to comprehend and apply numerous prior Commission orders where cost differentials less than $89,000 were considered to be relevant. The Commission argues that these prior orders have no bearing on this case because these orders have case-specific facts, *see* Comm'n Answer Br. p. 19, and that the orders are 20-25 years old. *See* Comm'n Answer Br. at p. 21.

The Commission's attempts to discredit and distinguish its prior orders are misplaced, as these are valid prior orders of the Commission whose underlying principles should provide *guidance to parties* in territorial disputes. Moreover, while there may have been other issues that were, as characterized by the Commission, "equally or more controlling[,]" *see* Comm'n Br. at 19, in each of the orders cited in CHELCO's Initial Brief, the Commission clearly considered costs as a factor some controlling. Notably, none of these orders support the conclusion that $89,738 is a "not significant" difference.

In *Gulf Coast Electric Cooperative Inc. v. Clark*, 674 So.2d 120 (Fla. 1996), this Court reversed the Commission's decision to award a territory to Gulf Power,

even though the $14,583 higher cost to Gulf Coast was characterized by the Commission as "relatively small." *Id.* at 122. The Commission's decision favored the party with the lowest cost; however, this Court reversed that decision and introduced the "de minimis" concept but offered no definition of "de minimis." *Id.* at 123. Gulf has made an argument that since the *Clark* decision the test is in part whether additional revenues exceed the costs (TR 342). In *Clark*, however this Court agreed with the Commission that other factors must be considered, See id. at 122, and the argument that *Clark* somehow revised issues to consider as far as disputes and the Grid Bill is incorrect.

In no Commission proceeding prior to the case at bar has the Commission considered a cost difference anywhere near $89,738 to be "not significant" or "de minimis." Further, in *In re Gulf Coast Electric Cooperative Inc. and Gulf Power Co.*, 01 FPSC 4:46 (2001) 2001 Fla. PUC Lexis 525, the Commission approved a territorial agreement which established $15,000 as the tipping point for a cost difference to be considered "de minimis." The Commission-approved agreement considered a cost difference below $15,000 to be de minimis, but customer choice prevails when other factors are equal if the cost exceeds $15,000. The Commission noted in this order that the agreement provides for the utilities to review load requirements, proximity to existing facilities of both utilities, capabilities of existing facilities and the costs to provide service. Had the

Commission impartially considered these elements in this proceeding, along with the precedent of its prior orders, it would not have concluded that the $89,738 difference was insignificant, let alone that all criteria were substantially the same.

B. Adequacy of service. Both the Commission and Gulf Power address the argument advanced by CHELCO that $40,000 associated with a transformer should be included in the cost. *See* Comm'n Answer Br. at 22-24; Gulf Power Answer Br. pp. 12-17. In order to establish a comparable basis for evaluating the ability of each party to provide service and the costs associated to do so, the Commission established a future date for full build out and directed the parties to respond. CHELCO could meet the target date and meet the full build out load. (TR 150, 175, 274). Gulf Power could not serve the incremental load in the second year without upgrading a transformer in the substation. (TR 286). The Commission chose to disregard evidence favoring CHELCO by dismissing responses to their own request because the date of full build out was questionable. (R. 6: 198).

C. Historical presence. The Commission argues that CHELCO's historic presence argument was not compelling because Gulf has also provided reliable service in the area for decades, *see* Comm'n Answer Br. p. 32, *See* also Gulf Power Answer Br., pp. 41-44. This argument continues to demonstrate the

erroneous conclusions which the Commission reached because such an argument is premised on a misunderstanding of the facts.

CHELCO has been serving customers on and immediately adjacent to the Freedom Walk property for over 60 years, and has previously served customers within the Freedom Walk property. CHELCO has existing customers across the road from the Freedom Walk property on the north, four accounts on the same side of the road as the Freedom Walk development, and has a line on the Freedom Walk property now, although it is not in use. In contrast as previously cited, Gulf Power has service 2,130 feet to the east of the property, at least 1,500 feet to the south of the property and none to the west or north. Gulf Power's only claim to service is one residential, single phase line 30 feet from the southeastern corner and that it has served within the City of Crestview since 1928 (TR 360). Gulf Power presented no evidence that it has been any closer to the Freedom Walk property than it is currently. The record below clearly demonstrates that CHELCO's historical presence was a factor the Commission should have considered in CHELCO's favor in making its decision. *West Florida Electric Cooperative Association, Inc. v. Jacobs*, 887 So.2d. 1200 (Fla. 2004).

D. Customer preference. Because the Commission decided that all factors were substantially equal, it resorted to customer preferences and contrary to the well-established and commonly followed principle of *Storey v. Mayo*, 217 So.2d

304 (Fla. 1968), that a customer has no inherent or organic right to select their utility provider, it awarded the territory to Gulf Power. Despite no testimony, and on the basis of two letters, the Commission let the customer – who is not the customer at all but the developer – choose the provider of service. This decision is a departure from the essential requirements of law.

II. The Commission's decision that awarding the territory to Gulf Power would not result in "further uneconomic duplication of facilities" is not consistent with Section 364.04(5), Florida Statute.

The "Grid Bill" found in Section 364.04(5), Florida Statutes, gives the Commission exclusive 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 operation and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

In concluding that service by Gulf Power will not result in uneconomic duplication, the Commission has relied on inaccurate interpretations of the facts, misinterpreted the requirements of the Grid Bill and misconstrued the evidence presented by the parties. Moreover, rather than avoiding further uneconomic duplication, the Order permits and encourages further uneconomic duplication.

In fact, to use the words of this Court: the order of the Commission dangerously collides with the entire purpose of territorial agreements as well as the

PSC's duty to police the [grid bill]. *Lee County Electric Cooperative v. Marks*, 501 So.2d at 585.

Both the Commission, (*see* Comm'n Answer Br. pp. 26-27), and Gulf Power, (*see* Gulf Power Answer Br. pp. 21, 22), support the Commission's conclusion of no uneconomic duplication by reciting the points that were considered. Although CHELCO previously addressed several of these points in its Initial Brief, below is a point-by-point reply to the points listed by Gulf Power concerning uneconomic duplication (the Commission's points were substantially the same):

a) Both utilities have had lines close to the development for over 40 years. Reply: As previously notes, the record evidence below is that only CHELCO has had lines close to the development since 1946, and that Gulf Power has never had a line closer than 30 feet from the boundary (which it placed in 1955);

b) CHELCO presently maintains lines in the immediate vicinity of Gulf Power's lines, in some cases paralleling them. Reply: There are no Gulf Power lines in or around the Freedom Walk property, only CHELCO lines. CHELCO has members and lines north of the middle school served by Gulf Power, which is over 2100 feet to the east of the disputed area. This argument, which the Commission posits as well, is simply an attempt to force this case into a scenario similar to that in *Gulf Coast Electric Cooperative Inc. v. Johnson*, 727 So.2d 259 (Fla. 1999). In

Johnson, the Commission concluded, and the Court agreed, that there was such a comingling of the parties' facilities that the incremental cost of adding additional customers would not be uneconomic duplication. There are significant differences in this case: the territory at issue in *Johnson* was developed, while the area in dispute in the instant case is undeveloped; and there was a considerable amount of comingling of lines in *Johnson* which does not exist here;

c) Provision by either utility could result in further duplication of facilities. Reply: That is not correct; CHELCO does not have to extend any facilities and there was no evidence presented below of any need for duplication of Gulf Power facilities by CHELCO. The only evidence of duplication was Gulf Power's admission that it would duplicate some of CHELCO's facilities to serve the Freedom Walk property;

d) The difference in the respective costs is not significant. Reply: Although previously addressed, there is a difference of $89,738 (at least) associated with Gulf Power having to extend its lines, and there is no precedent or policy that reflects this amount to be within the range of values considered "small" by the Commission historically;

e) Serving the area would be profitable for either utility. Reply: CHELCO concedes this point and notes that the Commission's Answer Brief addressed the different calculations performed by Gulf Power but in its Order the Commission

acknowledged that it would also be profitable for CHELCO to serve using Gulf Power's calculations. (R. 7:1208). However, the proper analysis is not whether serving an area would be profitable. As Gulf notes in responses to discovery (Ex. 24 p. 376) that it could always economically serve an area given their Line Extension policy. If profitability is the guide the Grid Bill has no meaning. Under the grid bill, the more important question is whether it is necessary to duplicate facilities in order to get service to customers, and whether that duplication is in the best interest of all the customers. In fact, in *In re Clay Electric Cooperative Inc. and Florida Power & Light*, 98 FPSC 1:671 (1998); 1998 Fla. PUC Lexis 173; *13, 14, the Commission considered whether there would be future <u>unnecessary</u> and uneconomic duplication using that term frequently in one of the few decisions after the *Clark* case. Had the Commission followed that consideration here, as they should have, they could only have concluded that the duplication was unnecessary since CHELCO has adequate existing facilities in place now;

f) Both utilities' facilities in the area will continue to be used and expanded. Reply: CHELCO testified that it made an investment and plans to serve members in the area, and that if Gulf Power serves the area, those plans would have to be readdressed. Certainly CHELCO has no intention of abandoning any existing service, but allowing the intrusion by Gulf Power will affect the growth potential for CHELCO and adversely affect the members of CHELCO;

g) Neither party's investment would become stranded if it is not awarded the right to serve; and h) CHELCO's stated desire to maximize investment was misplaced will be addressed separately and summarily below.

If the Commission's Order stands, it will encourage further uneconomic duplication, precisely what the Grid Bill seeks to prevent. Gulf Power argues that the Order actually dissuades future uneconomic expansion and that CHELCO's investment and expansion could be viewed as an attempt to "stake out the area." CHELCO began serving the area in 1946, actually set a meter for a member on what is part of the Freedom Walk property in 1965 and completed the upgrade of their existing lines along Old Bethel in 1983 from single phase to three phase, more than 20 years before any development was contemplated and long before Gulf Power had any service anywhere near the property, other than the single residential service previously acknowledged. There is no evidence of any "staking out" by CHELCO and this argument should be disregarded.

Similar to the "staking out" theory, Gulf Power argues that CHELCO made a bad business decision and is attempting to maximize its investment. *See* Gulf Power Answer Br. p. 28. CHELCO was founded as an electric cooperative under the Rural Electrification Administration and thus was formed to provide electric service to rural areas which were not being served by privately owned companies such as Gulf Power. (TR 99). *See Tampa Electric Co. v. Withlacoochee River*

Cooperative, 122 So. 2d 471 (Fla. 1960). Electric Cooperatives were originally created to serve low density rural areas, which have a higher cost to serve. What Gulf Power would characterize as a "bad business decision" was, in fact, the type of decision for which cooperatives were formed. Even today the density for CHELCO compared to Gulf Power is low. In 2010, Gulf Power had about 57 customers per mile of distribution line and CHELCO about 12 members (TR 213). Serving the low density rural areas was not a bad investment or bad business decision by CHELCO; it was their purpose. It is a good and proper decision to now want to use that investment to benefit all members by increasing the density of members per line mile.

CONCLUSION

The Commission failed to correctly comprehend the evidence presented in this case and departed from established precedent in resolving this dispute in favor of Gulf Power. Similarly, the Commission erroneously interpreted their responsibility under the Grid Bill and their decision will result in unnecessary and uneconomic duplication of facilities by Gulf Power. The Court should reverse the clearly erroneous order of the Commission.

Respectfully submitted,

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