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
EDUARDO E. BALBIS, RONALD A. BRISÉ,
JULIE I. BROWN, AND LISA POLAK EDGAR,
COMMISSIONERS AS AND CONSTITUTING
THE FLORIDA PUBLIC SERVICE COMMISSION

Appellees

AMENDED INITIAL BRIEF OF APPELLANT, CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.

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PREFACE

For purposes of this brief, Appellant, Choctawhatchee Electric Cooperative, Inc. will be referred to as "CHELCO." The Florida Electric Cooperatives Association, Inc., intervenor below and appellant in Case No. SC11-1832, will be referred to as "FECA."

Appellee, Florida Public Service Commission will be referred to as the "PSC" or "Commission" and Appellee, Gulf Power Company will be referred to as "Gulf Power"

The Commission's Order appealed, Order No. PSC-11-0340-FOF-EU issued August 15, 2011, will be referred to as the "Final Order."

References to the Record on Appeal are designated (R., vol.___, p.___).

References to the transcript of the hearing below, filed as separate attachment, will be designated as "TR" and page. References to the exhibits will be designated as "Ex____, p.____."

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

There are several opinions and PSC cases cited which involve the same parties. The opinions are easily cited, however, the PSC orders have lengthy case style and in an attempt to facilitate reference, the first cite to a PSC order references

the full title and shortened referenced and subsequent references are to the shortened cite with the PSC Reporter and LEXIS citations.

STATEMENT OF THE CASE

This is an appeal of Order No. PSC-11-0340-FOF-EU, a Final Order of the Public Service Commission, resolving a territorial dispute between CHELCO and Gulf Power, "electric utilities" as defined by Section 366.02(2), Florida Statutes. After a final hearing at which testimony and evidence was received, the Commission resolved the dispute in favor of Gulf Power and that decision is reflected in the Final Order.

CHELCO, a rural electric cooperative, initiated the proceeding before the Commission, by filing a Petition that sought resolution of a dispute as to which utility would have the right to serve a proposed development in Crestview, Florida. CHELCO filed its petition pursuant to Section 366.04(2)(e), Florida Statutes, which grants the Commission the power:

> [t]o resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including populations, 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.

The Commission has implemented the jurisdiction granted it in Section 366.04(2)(e) by adopting Rule 25-6.0441, Florida Administrative Code, which

provides, in part, that in resolving territorial disputes, the Commission may consider:

> (a) The capability of each utility to provide reliable 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.

Although not one of the considerations enumerated in Section 366.04(2)(e) F.S., or Rule 25-6.0441 F.A.C., the Commission also considers, when resolving territorial disputes, whether there will be an uneconomic duplication of facilities if either of the utilities serves the area in dispute. Section 366.04(5) F.S., known as the "Grid Bill," gives the Commission:

> 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.

The petition was assigned to a panel of three (3) commissioners, with one being assigned as the Prehearing Officer. In Order No. PSC-10-0615-PCO-EU, issued by the Prehearing Officer, October 13, 2010, the procedures for disposition of the case were established and the issues to be addressed and resolved through this process were identified. Although the Prehearing Order identified eight (8)

issues, for purposes of this appeal, CHELCO asserts that the issues on appeal that mandate reversal of the Final Order include: the necessary facilities and associated costs to extend adequate and reliable service; whether provision of service would result in uneconomic duplication; the capability of each utility to provide adequate and reliable service; and whether customer preference should be the deciding factor for resolving the instant dispute.

Prior to the final hearing, Gulf Power filed a Motion for Summary Final Order that the panel heard and denied. In addition, the Commission considered a Motion for Leave to Intervene filed by FECA, and without objection from any party, granted the Motion.

The Commission held a hearing after which all parties filed post hearing statements addressing the issues enumerated in the procedural order. The Commission Staff thereafter prepared a recommendation which was presented to the panel that heard the case. The Commission approved the Staff's recommendation unanimously, without any questions, discussion, or modification. In disposing of this petition, the Commission found, in part, that there is no substantial difference in CHELCO's and Gulf Power's total cost to serve, that the provision of service by either will not result in uneconomic duplication and that both are capable of providing service. The Commission then considered customer

preference, pursuant to Rule 25-6.0441(d), and based on the preference of the customer, awarded the territory to Gulf Power.

On September 13, 2011, CHELCO filed a Notice of Appeal (Case No. SC11-1830) as did FECA in Case No. SC11-1832. On November 7, 2011 the parties filed a Joint Motion for Extension of Time and a Joint Motion to Consolidate the cases. These motions were granted on November 23, 2011.

STATEMENT OF FACTS

On May 24, 2010, CHELCO filed a petition with the PSC to resolve a territorial dispute between CHELCO and Gulf Power. (R., vol. 1, pp. 8-34; Ex. 26). Both utilities provide electric service to consumers in the northwest area of Florida. The petition requested the Commission to determine whether CHELCO or Gulf Power would provide service to a currently undeveloped area planned to be developed as a residential area known as "Freedom Walk." (TR 233; R., vol. 6, p. 1164; Final Order, p. 4) The proposed development is located on the north side of Crestview, Florida and was annexed into the city limits of Crestview in 2008(TR 234; Ex. 26) over 60 years after CHELCO first had a presence in the area. The Commission concluded that the location of the property would not prevent CHELCO, a rural electrical cooperative, from providing service to the area. (Final Order, p. 26).

CHELCO defined the boundaries of the area in dispute to be Old Bethel Road on the North, Jones Road on the east, Normandy Road on the West and a surveyed line on the South (TR 60, Ex. 7; Ex. 9; Ex. 38, Interrog. 7). As described by CHELCO, the area would include three (3) parcels south of Old Bethel Road which currently receive service from CHELCO (TR 62, 120); however Gulf Power did not consider those parcels to be included in the description (Ex. 48, p. 20; TR 350- 352). The Commission concluded, however, that the area in dispute corresponded to the metes and bounds description contained in Ordinance No. 21378 enacted by the City of Crestview in 2007 which established the area as a Community Development District ("CDD"). (R., vol. 6, p. 1163; Final Order, p. 3). The effect is to exclude the parcels south of Old Bethel currently served by CHELCO. Except for these parcels, the area in dispute is as defined by CHELCO.

Although the Commission determined the area to have urban characteristics (R., vol. 6, p. 1190; Final Order, p. 30), the property currently is undeveloped, heavily wooded with no roads other than trails through the property and neither party disputes that the area is currently "dirt and trees." (TR 62, 78, 79, 120; Ex. 26).

Other than an active CHELCO owned single phase line on the property that was used to provide service to a member in the center of the property several years ago, there are no other utility services on the property as the disputed area is defined

by the Commission. (TR 120). When fully developed, Freedom Walk will have single-family residential lots, multi-family units and some small commercial outlets with an anticipated additional load of 4700 kW to be created by residents of Freedom Walk on full build out. For purposes of determining necessary facilities to serve the projected load and related costs and to insure the information from the parties was comparable, data provided to the Commission was based on the 4700 kW projection. (R., vol. 6, p. 1191; Final Order, p. 31). Both parties were requested by the Commission to provide costs and needed facilities assuming a full build out on December 31, 2014. (Ex. 57; Ex. 60, p. 40).

CHELCO has provided service to members on and around the disputed property since 1946 (TR 120). At one time CHELCO served a member residence on the west side of the property over an easement that is still valid. More recently, CHELCO provided service to a member who resided in the center of the property and that line is still active although that account is no longer active. (TR 120, 128; Ex. 50, pp. 17, 18; Ex. 21, pp. 111, 112).

CHELCO currently has three phase service along Old Bethel Road, which forms the northern boundary of the property. CHELCO began single phase service along Old Bethel Road in 1946 and along Normandy Road, the western boundary in 1967 (TR 120). The service along Old Bethel Road was upgraded to three phase in 1983 (TR 121). CHELCO has approximately 139 active accounts within ¼ mile of

the property. (TR 121). The area immediately east and south of the property is vacant, undeveloped property.

Gulf Power has one residential customer near the southeast corner of the property receiving single phase service (Ex. 23, p. 320). The nearest Gulf Power three phase service, which would be the service needed to provide power to the projected load of the development, is 2,130 feet to the east of the proposed development (Ex. 23, p. 319; Ex. 55, p. 6). Gulf Power has acknowledged the existence of CHELCO's three phase service located at Freedom Walk, has also admitted that it would have to extend its three phase service to get to the same place at Freedom Walk and to do so would duplicate existing CHELCO facilities. (Ex. 6; Ex. 20, pp. 54, 55, 128; Ex. 23, p. 319). Gulf Power identified the cost to extend its three phase service to the same location as CHELCO to be $89,738 (TR 52, 253; Ex. 55, p. 6).

Both companies also presented testimony on the facilities needed to serve the projected load and the cost to provide those facilities. CHELCO presented testimony that it could serve the projected load without any substation additions and without any upgrades not already anticipated--and thus no costs to CHELCO--because of the Freedom Walk load. (TR 127, 128; 156). In 2010, CHELCO approved a Construction Work Plan ("CWP") for 2011-2014 that identified and addressed system-wide projects planned for that period (TR185; Ex. 15). One

project included in the CWP was an upgrade of a conductor segment on the feeder that serves the Freedom Walk area (TR 186, 187). However, the upgrade was planned to handle projected load growth without regard to the additional load associated with Freedom Walk (TR 136, 175, 186, 187). CHELCO provided an analysis, including the 4700 kW load of Freedom Walk, that demonstrated that CHELCO could provide the adequate reliable service to Freedom Walk without any unplanned upgrades. (TR 175; Ex. 17). The Commission agreed that the upgrades were previously planned for and not triggered by Freedom Walk, and that the costs associated with these upgrades were not attributable to Freedom Walk. (R., vol. 6, p. 1194; Final Order, p. 34)

Gulf Power did not initially identify any costs associated with providing service to Freedom Walk other than the cost associated with extending its three phase service to Freedom Walk, which it testified would amount to $89,738. (TR 25).

In discovery, Commission Staff of the PSC requested both parties to identify the facilities and related costs that would be required to serve Freedom Walk, assuming full build out on December 31, 2014. (Ex. 57; Ex. 60). CHELCO demonstrated that it could provide reliable service at that date without any changes to the 2011-2014 CWP and that, even if the load came earlier, it could be handled by moving planned upgrades to an earlier schedule. CHELCO acknowledged the

earlier date would increase the demand on switches, buswork and breakers, but that it would still operate the project within rated capacities. (TR141, 165; Ex. 51, pp. 13, 14, 19). The Commission agreed (R., vol. 6, p. 1195; Final Order p. 35).

Gulf Power identified a project to upgrade their substation and facilities, but took the position that these were unrelated to the Freedom Walk development. The Commission agreed with Gulf Power for essentially the same reasons as they did with respect to CHELCO (R., vol. 6, p. 1198; Final Order, p. 38), and concluded that both parties could handle the full load on December 31, 2014. However, Gulf Power acknowledged it would have to change out a transformer at a cost of $40,000, but since the full load would probably not occur at this time, it was a cost Gulf Power would not need to incur. The Commission agreed with Gulf Power (R., vol. 6, p. 1198; Final Order, p. 38).

CHELCO and Gulf Power also submitted evidence regarding the cost for each to provide service within the boundaries of the Freedom Walk development. To provide comparable costs, the parties agreed to a common set of assumptions and based their calculations on these assumptions. Based on these assumptions, CHELCO demonstrated that it would cost $1,052,598 to provide the necessary facilities within the Freedom Walk area, and Gulf Power demonstrated that its cost was $1,152,515, or $99,917 more than CHELCO. The parties stipulated to these

numbers and no further testimony or evidence was provided at the final hearing. (R., vol. 6, pp. 1198, 1199; Final Order, pp. 38, 39).

The Commission also gave consideration to whether service by either party would constitute an uneconomic duplication of facilities, as referenced in Section 366.04(5), Florida Statutes. CHELCO's position was that Gulf Power's proposed extension of lines would constitute uneconomic duplication (Ex. 26; Ex. 38, p. 8; Ex. 39, p. 11; Ex. 49, pp. 58-60) and Gulf Power, while acknowledging that there would be a duplication of lines if it served, asserted that such duplication would not be "uneconomic." (Ex.23, p. 319). The Commission found that even though Gulf Power's cost to serve Freedom Walk would be $89,738 more than CHELCO's cost to serve, this amount was "not significant" (R., vol. 7, p. 1207; Final Order, p. 47).

The Commission also analyzed the tests for uneconomic duplication offered by Gulf Power's witness (TR. 345-347), and while agreeing that they reflect incremental benefit to Gulf Power's investors and ratepayers (R., vol. 17, p. 1208; Final Order, p. 48), acknowledged that the same tests if applied to CHELCO, would result in a similar benefit for CHELCO's members (R., vol. 7, p. 1208; Final Order, p. 48; TR 206, 207).

Upon consideration of the capability of each utility to provide service, the extent of additional facilities needed, the nature of the area, the cost to provide service and whether there would be uneconomic duplication, the Commission

concluded that all governing factors were substantially equal. (R., vol. 7, p. 1215; Final Order, p. 55). Thus, as provided by Rule 25-6.0441(2)(d), the Commission determined that it would consider customer preference. (R., vol. 7, p. 1216; Final Order, p.56). Gulf Power submitted a letter from the developer of Freedom Walk expressing a preference for Gulf Power (Ex. 27), but CHELCO argued the developer was not the ultimate customer and the developer's preference was not relevant. The Commission, however, found all things to be substantially equal and based the decision to award the territory to Gulf Power on customer preference.

STANDARD OF REVIEW

CHELCO recognizes that the orders of the Commission come to this Court for review entitled to great deference. In reviewing the appeal of a Final Order, the burden of overcoming the presumption is on the party challenging the order; and to overcome these presumptions, the party must show there has been a departure from the essential requirements of law and that the order is not based on competent, substantial evidence. Crist v. Jaber, 908 So. 2d 426 (Fla. 2005); West Florida Electric Coop. Ass'n v. Jacobs, 887 So. 2d 1200 (Fla. 2004). However, the Court will examine the record to determine whether competent substantial evidence exists and whether the order complies with the essential requirements of law; and the Court will reverse when appropriate. Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978). Section 120.68(7)(d), F.S., requires the remand of an agency decision when the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. When the Court reviews the record in this case and the absence of evidence to support the Commission's conclusion and misconstruction of applicable law, it will be clear that the Commission erred and the order does not comport with the essential requirements of law and constitutes an abuse of discretion warranting reversal.

SUMMARY OF ARGUMENT

The Commission decided this dispute by finding that all factors considered by the Commission pursuant to Rule 25-6.0441 F.A.C., are substantially equal and, therefore, the customers' preference in favor of Gulf Power tips the scales and ultimately results in the award of the disputed territory to Gulf Power. (Final Order, p. 56). To reach this conclusion, the Commission had to find, among other considerations, that CHELCO's and Gulf Power's costs and facilities required to provide service to Freedom Walk were essentially the same, that both CHELCO and Gulf Power had the same ability to serve the present and future load, that there would be no uneconomic duplication if Gulf Power serves the Freedom Walk development and the ultimate customer or customers had expressed a preference to be served by Gulf Power.

CHELCO agrees with the Commission's conclusion that nothing prohibits CHELCO from serving the disputed area. However, the Commission's conclusions that all other factors are substantially equal are contrary to acknowledged, unrefuted facts and not consistent with precedent established by the Commission and this Court in resolving previous disputes.

This dispute is the first to go to hearing at the Commission in several years. However, there are a number of Commission decisions and Court opinions from the earlier years which established principles, criteria and precedent for reviewing and

resolving disputes and the Commission failed to property consider or apply those precedents. Had the Commission reviewed the evidence and properly applied their analysis of the evidence with their prior decisions, they could only conclude that several factors to be considered per statutes and rules favor CHELCO and not Gulf Power. Instead, the Commission's conclusions and decision give credence to the only factor which potentially favors Gulf Power while ignoring the numerous factors favoring CHELCO. Awarding the area to Gulf Power ignores the role CHELCO has had in developing service to members in the area of the disputed property and inappropriately rewards Gulf Power by allowing them to "cherry pick" another revenue-producing development.

I

The Commission's conclusion that the costs to serve the disputed area are substantially equal and both utilities are equally capable of providing service is not based on competent substantial evidence and departs from the essential requirements of law.

Among the criteria listed in Rule 25-6.0441, F.A.C., that the Commission may consider in resolving territorial disputes, is the "cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future" and the capability of each to provide reliable service. Even before the adoption of this rule in 1990, the Commission had considered the costs of the respective utilities to a dispute as one of the evaluated criteria, and in virtually every proceeding before the Commission since the specific statutory jurisdiction to resolve disputes became part of Chapter 366 F.S., in 1976, costs have been a factor considered. The Commission found there was no substantive difference in the costs to provide service (R., vol. 7, p. 1216; Final Order, p. 56) even though Gulf Power admitted that it will have to extend existing lines just to get to the same location at Freedom Walk as CHELCO at a cost of $89,783 (TR 252) and CHELCO has existing three phase service along the entire northern edge of the disputed area, a fact admitted by Gulf Power (Ex. 23, p. 319). The Commission concluded that both were capable of providing the projected load even though Gulf Power's own responses reflect this to not be the case.

Both parties offered testimony that it would cost the other party more to provide facilities and reliable service. As recited in the Statement of Facts, the Commission concluded that the difference in costs is the $89,738 line extension costs. Since that was a number admitted by Gulf Power, it would be difficult for the Commission to ignore it as they did with other evidence that demonstrates it will cost Gulf Power more than that to provide reliable service.

The Commission Staff requested both parties to identify the facilities and costs to provide service assuming full build out of Freedom Walk as of December 31, 2014. CHELCO demonstrated that it could provide adequate and reliable service as of that date without any unplanned upgrades but acknowledged that the additional load would increase the demand on the system components. Even with the increased load the equipment would still be operated within the rated capacities of the various components of the distribution and transmission facilities and the Commission agreed with CHELCO's position. (R., vol. 6, p. 1195; Final Order, p. 35).

On the other hand, Gulf Power's response to this request from Staff, their responses to discovery from CHELCO, and testimony revealed that Gulf Power would not be able to provide the service for the full load on December 31, 2014. Rather Gulf Power acknowledged they would exceed the rated capacity of the substation serving Freedom Walk in 2013 when only 1880 kW of the total 4700 kW

demand associated with Freedom Walk is included in its capacity and that they would have to change out the current transformers at the substation serving the development at a cost of $40,000. (TR 281, 285-286; Ex. 21, pp. 192, 193, 222; Ex. 24, pp. 383, 388). In response to a question as to whether Gulf Power could handle the full 4700kW load, the witness at least twice acknowledged they could not (TR 286; Ex. 21, pp. 192-222). Gulf Power did offer testimony that it had a system-wide substation upgrade planned which would address the deficiency, but there is no document reflecting any definitive plan, time line, or budget in place for the upgrades. (TR 287). Without these upgrades, and if full build out occurred on December 31, 2014, Gulf Power would be unable to provide service without replacing substation transformers at a cost of $40,000, which is only the costs associated with installing used, fully depreciated transformers on a temporary basis. (TR 282). In its Final Order, the Commission did not consider the additional $40,000 costs or acknowledge there would be other expenses as part of the costs to Gulf Power because it is not a project Gulf Power would complete unless full build out occurred, and since full build out will probably not occur at or before December 31, 2014, the Commission concluded those costs should not be included. (Final Order, p. 38).

The Commission, in effect, eliminated the cost to serve full build out by ignoring the comparison of costs as of December 31, 2014 that the Commission

requested. The Commission offers as partial justification for ignoring Gulf Power's costs that full build out of Freedom Walk will occur later rather than sooner (R., vol. 6, p. 1198; Order p. 38), however, even if that occurs, CHELCO established that it has existing, approved upgrades scheduled, while Gulf Power failed to establish anything definitive to support their position that system-wide upgrades are planned. What is known is that Gulf Power, by their own admission, cannot handle the full load of Freedom Walk as of December 31, 2014 without at least $40,000 more in costs than the $89,738.

More disturbing is that Gulf Power cannot provide service for the full load within the comparison parameters set by the Commission. Gulf Power's inability to provide the projected load, by their own admission, is in stark contrast to CHELCO's present ability to serve. In order for Gulf Power to be able to serve the load at Freedom Walk at the same time that CHELCO can, it would cost Gulf Power at least $89,738 to extend lines and $40,000 for used fully depreciated transformers. All of these costs are directly attributable to demands placed by Freedom Walk on Gulf Power's system. The true comparison of costs is nothing for CHELCO and at least $129,738 for Gulf Power. The Commission clearly erred in not recognizing these costs.

Even if the Court agrees with the Commission that the costs (other than those associated with the line extension) should not be included, it will still cost Gulf

Power $89,738 just to get to the Freedom Walk property. The Commission concluded that the $89,738 difference " . . . is not significant." (R., vol. 7, p. 1207; Order p. 47). This is not the first case in which the Commission has considered the difference in costs to be substantially the same, but in none of the prior cases was the difference anywhere near $89,738. For example, In Petition of Peace River Electric Cooperative, Inc. against Florida Power and Light, ("PRECO v. FPL"), 85 FPSC 120 (1985), 1985 Fla. PUC LEXIS 227, the Commission determined the cost to serve an area of $70,794 for Florida Power & Light ("FPL") as compared to $84,000 for Peace River Electric Cooperative, Inc. to be approximately the same (page 6 of the order). In Petition of Gulf Coast Electric Cooperative to resolve territorial dispute with Gulf Power Co., ("Gulf Coast v. Gulf Power"), 86 FPSC 1321 (1986), 1986 Fla. PUC LEXIS 761. The Commission considered the costs of the utilities to serve a disputed area of $33,600 for Gulf Coast and $39,791 for Gulf Power to be "comparable." In re: Territorial Dispute between Suwannee Valley Electric Cooperative, Inc. and Florida Power Corp., ("SVEC v. FPC"), 87-11 FPSC 213 (1987), 1987 Fla. PUC LEXIS 201, the Commission awarded the area to Florida Power Corp. because Florida Power Corp. had provided service to customers for many years and the cost to serve for Florida Power Corp. ("FPC") of $31,779 as compared to $40,152 for Suwanee Valley Electric Cooperative ("SVEC"), even though the difference between the two was not great. And In re:

Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, ("Gulf Power v. WFEC"), 88 FPSC 2-184 (1988), 1988 Fla. PUC LEXIS 367, the Commission found that Gulf Power's distribution costs of $17,600 compared to $18,900 for West Florida Electric Cooperative ". . . are not substantially different."

In these cases in which the Commission said the costs were "comparable" or essentially the same, the biggest difference is $13,206, which is far less than the minimum $89,738 difference determined by the Commission in this case. Had the Commission properly considered the precedent in prior cases they would not have concluded the difference between CHELCO and Gulf Power to be not significant

The Commission has awarded areas to utilities with lower costs, even when the difference would seem to be "not significant." For example, In re: Petition of Gulf Coast Cooperative, Inc. v. Gulf Power Co., ("Gulf Coast v. Gulf Power"), 86 FPSC 5:138 (1986), 1986 Fla. PUC LEXIS 761, the Commission determined the cost to Gulf Coast to provide service to be $1,580 and for Gulf Power $11,000, and awarded the area to Gulf Coast in part on the basis of the difference in costs. In re: Petition of Suwannee Valley Electric Cooperative to resolve a territorial dispute with Florida Power & Light, ("SVEC v. FPC"), 92 FPSC 7:170 (1992), 1992 Fla. PUC LEXIS 1029, the Commission considered Florida Power & Light's cost to

provide service of $7,877 compared to $3,154 for Suwannee Valley Electric Cooperative in awarding the area to Suwannee Valley Electric Cooperative.

The difference in costs to the utilities in these cases would place them within the "comparable" cost range of the previously cited cases and, like others, the Commission awarded the area to the utility with the lowest costs. Here, the Commission said the costs were substantially the same and awarded the territory to the utility whose costs are at least $89,738 greater than the other. In none of the cases cited was the difference as great as in this case. In fact, the Commission awarded territory to one utility when the difference was only approximately $4,500. See SVEC v. FPL, 1992 Fla. PUC LEXIS 1029 at *4.

In its case before the Commission below, Gulf Power argued that the difference in cost was "de minimis," a term which the Commission did not use in the body of the order but which can be traced to this Court's decision in Gulf Coast Electric Cooperative v. Clark, 674, So.2d 120 (Fla. 1996).

In that case, this Court reviewed and reversed an order of the Commission awarding a service area to Gulf Power (In re: Petition to resolve territorial dispute with Gulf Coast Electric Cooperative by Gulf Power Company, ("Gulf Power v. Gulf Coast"), 95 FPSC 3:16 (1995), 1995 Fla. PUC LEXIS 286), which involved service to a planned new prison to be constructed in Washington County. When Gulf Coast learned of the plan for the new prison, it made a proposal to Washington

County to assist in obtaining a grant and assistance in getting a loan to acquire property for the prison. Gulf Power made no similar proposal or any effort on behalf of the county. After the loan and grant were obtained, Washington County selected Gulf Coast to provide service. The Commission determined the cost which should be attributed to Gulf Coast to serve the prison was $14,583, which was the cost to upgrade to three phase service. The PSC found both utilities had been serving the area, and both had adequate facilities, but considered Gulf Coast's cost of $14,583 to upgrade the singe phase service to three phase service to be the cost differential between the two utilities. The Commission also found Gulf Coast's duplication of Gulf Power's lines to be significant. The Commission recognized the cost to Gulf Coast to serve to be "relatively small" but nevertheless, based on that cost and the duplication of lines, awarded the area to Gulf Power. See Gulf Power v. Gulf Coast, 1995 Fla. PUC LEXIS 286 at *10.

On appeal this Court reversed, recognizing the role Gulf Coast had taken in obtaining the funds on behalf of the County for the purchase of the property, and that Gulf Coast had been the historic provider of service since the early 1950's. The Court viewed the cost differential between the two utilities of $14,583 to be "de minimis" as compared to the cost differential in Gulf Power Co. v. Florida Public Service Commission, 480 So. 2d 97 (Fla. 1985), (Gulf Coast $27,000 vs. Gulf Power $200,480), and concluded that all factors were equal and customer

preference should have been considered. The Court reversed the Commission and awarded the area to Gulf Coast. Gulf Coast v. Clark, 674 So. 2d at 123. However, the Gulf Coast v. Clark Court left open the question now of what is a "de minimis" cost difference.

In the Gulf Power v. Public Service Commission opinion cited above, which is referenced in the Gulf Coast v. Clark case, this Court reviewed an order of the Commission resolving another dispute between these same parties involving service to a new subdivision. See In re: Territorial dispute between Gulf Power Company and Gulf Coast Electric Cooperative, ("Gulf Coast v. Gulf Power"), 84 FPSC 121 (1984), 1984 Fla. PUC Lexis 271. After Gulf Coast filed a petition with the PSC to resolve the dispute, Gulf Power proceeded to spend approximately $200,480 to extend lines and build a substation to serve the area. The PSC found it would cost Gulf Coast approximately $27,000 to provide service and that, prior to the construction by Gulf Power, Gulf Coast had lines within 100 feet and 250 feet of the new subdivision. The Commission held in favor of Gulf Coast, finding this expenditure by Gulf Power to be inappropriate and an uneconomic duplication by Gulf Power and this Court agreed, noting the "considerable" cost different between the two utilities to serve the new development. Gulf Power v. Public Service Commission, 480 So.2d at 98.

In Gulf Coast v. Clark, this Court did not establish any precise parameters as to what amount would be considered to be "de minimis." However, it appears that $14,583 would be considered "de minimis," even though the Commission had considered this amount to be "relatively small" and insufficient to tip the scales in favor of Gulf Power.[1] It would also be reasonable to conclude that a difference of approximately $170,000 that existed in Gulf Power v. Florida Public Service Commission, 480 So.2d at 97, would not be "de minimis" given the Court's characterization of that number as "considerable."

The question then is whether the cost difference in this case of at least $89,738 is "de minimis." According to the prior decisions of the Commission and their analysis of what constitutes comparable costs and opinions of this Court, the proper conclusion is that it is not. The facts are that the difference is at least $89,738 much closer to being "considerable" as referenced in the Gulf Power v. PSC case, 480 So. 2d 90, than the $14,583 which was considered "de minimis." It is important to consider in conjunction with the cost difference that Gulf Power does not have the capability to provide the projected load at the same time and cost as CHELCO.

The Commission chose to ignore the very information they requested from the parties that enabled a reasonable comparison and of the costs and capabilities

[1] In those cases previously cited wherein the Commission considered the costs to be substantially the same, the differences were much smaller.

Gulf Power benefits from that action. The Commission cannot ignore the $89,738 although they make every effort to do so. In a footnote in the Order (R., vol. 7, p. 1204(footnote 38)) the Commission compares the projected load and cost in the Clark case ($14,583 and 372kW) to the instant case ($89,738 and 4700kW) and concludes that the amount is "de minimis" in comparison to the projected load. Gulf Power cannot provide the projected load at a cost of $89,738; that is only the start for Gulf. A better question is whether the $89,738 needs to be spent in order for Freedom Walk to receive reliable service and clearly the answer is "no." This is not a cost the customers have to support and it is not insignificant.

II

The conclusion of the Commission that service to the disputed territory by Gulf Power would not result in uneconomic duplication of facilities is contrary to the evidence and a departure from the essential requirements of law.

Uneconomic duplication is not one of the criteria enumerated in Section 366.04(2) or Rule 25-6.0441, but Section 366.04(5), Florida Statutes, vests the Commission with jurisdiction over the planning, development and maintenance of the power grid to assure adequate and reliable sources of energy and to avoid further uneconomic duplication of facilities. This Court has acknowledged the applicability of the consideration of uneconomic duplication by the Commission in resolving territorial disputes. See West Florida Electric Cooperative Ass'n Inc. v. Jacobs, 887 So. 2d 1200 (Fla. 2004); Gulf Coast Electric Cooperative Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999); Lee County Electric Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987); Utilities Comm'n of the City of New Smyrna Beach v. Florida Public Service Comm'n, 469 So. 2d 731 (Fla. 1985).

The Commission thus appropriately considered whether there would be uneconomic duplication of facilities, but its reasoning and conclusion that there will be no uneconomic duplication if Gulf Power is allowed to serve the Freedom Walk area (R., vol. 7, pp. 1206-1208; Final Order, pps. 46-48) overlooks or fails to consider the evidence and the precedents of this Court and the Commission. In

spite of the evidence of duplication, presence, ability to serve and inappropriateness of the tests offered by Gulf Power, the Commission failed to comprehend the relationship of the evidence and decisions precedential to disposition of this issue.

A. Gulf Power Will Have to Extend Lines and Duplicate CHELCO Facilities.

In the Final Order, the Commission concluded that service by either utility could (emphasis supplied) result in a duplication of facilities (R., vol. 7, p. 1208; Order p. 48) but the fact is that service by Gulf Power will (e.s.) result in a duplication of facilities. Gulf Power admitted that it would have to extend its three phase lines and cross existing CHELCO lines and that they will duplicate some CHELCO facilities currently in place (Ex. 23, p. 319). Moreover, Gulf Power was aware of CHELCO's presence and facilities since their initial contact regarding service to the area in 2006 (Ex. 6; Ex. 20, pp. 55, 128). Based on prior decisions of the Commission, those admitted facts alone would suffice to support a determination of uneconomic duplication by Gulf Power. See In re: Gulf Coast Electric Cooperative against Gulf Power Co., ("Gulf Coast v. Gulf Power"), 86 FPSC 138, 1986 Fla. PUC LEXIS 761 (concluding that extension of lines into an area known to be served by Gulf Coast and crossing of Gulf Coast facilities by Gulf Power was uneconomic duplication); In re: Petition of Clay Electric Cooperative to resolve territorial dispute with Florida Power & Light, ("Clay v. FPL"), 88 FPSC 85 (1988), 1988 Fla. PUC LEXIS 122 (Clay had adequate facilities and extension

of like facilities by FPL would be unnecessary and economically wasteful and uneconomic duplication); Gulf Power v. WFEC, 88 FPSC 2-184 (1988); 1988 Fla. PUC LEXIS 367 (Gulf Power had lines closer to disputed area at time of dispute and extension by WFEC was a duplication); In re: Territorial dispute between Withlacoochee River Electric Cooperative and Florida Power Corporation, ("Withlacoochee v. FPC"), 88-6 FPSC 477 (1988), 1988 Fla. PUC LEXIS 866 (FPC crossing Withlacoochee line twice was uneconomic duplication); and In re: Petition of Suwannee Valley Electric Cooperative to resolve a territorial dispute with Florida Power & Light Co., ("SVEC v. FPL"), 92 FPSC 7:170 (1992), 1992 Fla. PUC LEXIS 1029 (SVEC distribution lines had been in place since 1950 and FPL would have to cross those lines at approximately $4,000 more in cost was uneconomic duplication). There may be instances when some duplication may be necessary for purposes of safety, reliability or similar service related circumstances but that is not the situation here; the only reason to duplicate CHELCO facilities is so Gulf Power can serve the Freedom Walk development and enjoy the additional revenue derived from their duplication of facilities.

The Commission also concluded, incorrectly, that service by CHELCO could result in a further duplication of facilities by CHELCO because of the proximity of lines (R., vol. 7, p. 1207; Final Order, p. 47). That conclusion is based on the fact that CHELCO currently serves members to the north of Old Bethel Road in the

vicinity of the schools currently being served by Gulf Power. (R., vol. 7, p. 1207; Final Order, p. 47). While that is correct, that area is not close to the area in dispute and should have no relevance to the issue of duplication of facilities to serve Freedom Walk. CHELCO does not have to extend any lines, cross any existing Gulf Power lines or in any way duplicate any facilities of Gulf Power to serve Freedom Walk. There is absolutely no evidence that supports a conclusion that CHELCO would duplicate facilities of Gulf Power in order to provide the service.

The Commission noted in the Final Order that this Court has said there may be instances where a duplication of facilities may exist without the duplication being uneconomic; the "de minimis" concept discussed previously. Gulf Coast v. Clark, 674 So.2d at 123. However, the Commission mischaracterized its own findings in the Gulf Coast case when it was before the Commission to support its conclusion in the instant matter. The Commission's Order states, ". . . in the Gulf Coast Electric Cooperative case, we [the Commission] (e.s.) found that, while there was duplication of facilities, that duplication was not uneconomic because the difference in the costs . . . was considered "de minimis." (R., vol. 7, p. 1207; Order p. 47.) That is not correct. In Gulf Power v. Gulf Coast , 95 FPSC 3:16 (1995), 1995 Fla. PUC LEXIS 286, the Commission recognized the difference in costs was relatively small but awarded the area to Gulf Power, holding "[o]ur primary reason . . . is that Gulf Coast duplicated Gulf Power's existing facilities . . ." The Court

reversed the Commission, recognizing the historic presence of Gulf Coast and the "de minimis" nature of the cost difference, Gulf Coast v. Clark, 674 So.2d at 122. The Commission in the Gulf Coast case actually followed precedent and decided that case in favor of the utility with the lower costs; even though they characterize the difference as relatively small. It was this Court that presented the "de minimis" basis for reversal.

B. The Commission Failed to Consider all Elements Necessary to Determine Whether the Duplication of Facilities is Uneconomic.

The Commission also considered the tests offered by Gulf Power to determine whether the duplication of facilities would be uneconomic or not. These tests were first offered by Gulf Power in Petition to resolve territorial dispute with Gulf Coast Cooperative, Inc. by Gulf Power Co., ("Gulf Power v. Gulf Coast"), 98 FPSC 1:647 (1998), 1988 Fla. PUC LEXIS 169. The tests included the magnitude of the cost to extend facilities in contrast to the total investment; a comparison of the investment to estimated non-fuel revenue; ratio of the total investment to annual non-fuel revenue, and finally consideration of whether the facilities would have a reasonable prospect of future use. Applying these tests, Gulf Power determined that there would be sufficient incremental benefit to Gulf Power's investors and ratepayers to allow Gulf Power to serve the area in spite of uneconomic duplication (R., vol. 7, p. 1207; Order p. 47). Gulf Power will benefit financially if it can serve this load, but so will CHELCO. By allowing Gulf Power to step in and provide

service to an area traditionally served by CHELCO once it becomes profitable tends to condemn CHELCO's remaining customers to higher electric rates. CHELCO should be allowed to continue to serve the areas it has traditionally served once they become economic in order to reduce the average cost of service to all its customers.

The Commission agreed that Gulf Power's analysis reflected that there would be sufficient incremental benefit to justify the duplication of facilities, but noted that the same tests as applied to CHELCO would produce the same result to CHELCO's members. (R., vol. 7, p. 1208; Final Order, p. 48). The tests offered by Gulf Power are nothing more than a financial analysis, that when read with Gulf Power's position that with the application of their line extension policy there could be no prospective customers who could not be economically served (Ex. 214, p. 376) lead to the conclusion that Gulf Power has effectively rejected the Grid Bill. If their position is accepted there can be no uneconomic duplication and the Commission's reliance on these tests completely ignores the real issues that it should have considered to determine whether there will be uneconomic duplication. The tests give no consideration whatsoever to anything other than whether the provision of service would be financially beneficial to the serving utility. There is no consideration of the effect on the other utility, to the effect on the reliability of the system, nor is there any recognition given to the presence of existing lines, facilities or investment. (TR 206). This is not a situation where there is no service

to an area and two utilities want to provide service to the area; CHELCO has lines at the property now and there is no need for Gulf Power to extend lines to serve the area. In Gulf Coast v. Clark, the Court noted,

> In its argument before the Court, the Commission asserts that the actual cost is only one factor to be considered in determining uneconomic duplication. The Commission states that lost revenues for the non-serving utility, aesthetic and safety problems, proximity of lines, adequacy of existing lines, whether there has been a "race to serve," and other concerns must be considered in evaluating whether an uneconomic duplication has occurred. We do not disagree that these factors must be considered. (Emphasis supplied). 674 So.2d at 123.

Reliance on the tests offered by Gulf Power ignores the very factors that the Commission argued must be considered and with which this Court agreed.

The Commission did state in its Order that ". . . neither party offered testimony that any of its existing investment would become stranded investment if it is not awarded the Freedom Walk territory." (R., vol. 7, pl. 1208; Order p. 48). Gulf Power has no facilities in the area so it would not have any stranded investment. While CHELCO may not have used the term "stranded investment," there was testimony at the hearing that allowing Gulf Power to serve Freedom Walk would harm CHELCO's members because of the investment CHELCO had already made to serve the Freedom Walk area, the upgrades CHELCO made to the facilities over the years and the loss of the additional revenue that will flow from Freedom Walk upon build out. (TR 57, Ex. 49, pp. 6, 7)

Unless the Commission gives consideration to the factors which it argued in Gulf Coast v. Clark, it will be encouraging utilities to duplicate facilities and will establish a policy which dangerously collides with " . . . the PSC's duty to police the planning development and maintenance of a coordinated electric power grid throughout Florida . . ." Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987). The message sent with this decision is that it is acceptable to duplicate existing facilities of another utility as long as it is financially beneficial to do so and that defies the purpose of the Grid Bill. In fact, in In re: Petition of Gulf Power Company to resolve a territorial dispute with West Florida Electric Cooperative, ("Gulf Power v. WFEC"), 88 FPSC 2-184 (1988), 1988 Fla. PUC LEXIS 367, the Commission in rejecting to consider customer preference said:

> In a dispute such as this, where there has been a significant duplication of existing facilities by the customers chosen utility, it would be contrary to the intent of Section 366.04(3),[2]F.S., to allow the offending utility to serve.
>
> 1988 PUC LEXIS 367 at *12.

In 1988 the Commission recognized the conflict with their responsibilities under the grid bill in rewarding territory to the utility that has duplicated existing facilities of another. In contrast to that decision, the present Commission would ignore this precedent and reward Gulf Power for duplicating CHELCO's facilities.

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[2] Sec. 366.04(3) was subsequently renumbered to 366.04(5).

The conclusion of the Commission with respect to the boundaries of the disputed area further demonstrates the conflict with the Grid Bill. As noted, CHELCO currently serves members south of Old Bethel Road but these parcels were not included within the area because they were not part of the CDD. The Commission order allows CHELCO to continue to serve these members even though they are surrounded by the area in dispute. CHELCO serves these members from the very lines that would be used to serve Freedom Walk but the Commission would allow Gulf Power to duplicate facilities to serve. Allowing CHELCO to continue existing service is correct but the Commission's decision is clearly one which increases and encourages uneconomic duplication and not one that discourages it.

C. CHELCO's Historical Presence is Relevant to Determining Uneconomic Duplication and Should be Considered.

In its Order, the Commission states that CHELCO's arguments with respect to the issue of uneconomic duplication appear to be founded in part on the "premise" that CHELCO has had a presence in the disputed area (R., vol. 46, p. 1206; Order, p. 46). That is not a "premise" but rather a fact; CHELCO has been serving the area for over sixty (60) years and in fact served members on the very property in dispute. CHELCO currently serves three (3) members in the area carved out of the description of the disputed area and Gulf Power knew of the historic and current service by CHELCO. As noted in prior argument, Gulf Power

knew CHELCO had service to the area. Prior to learning of the Freedom Walk development, the closest Gulf Power had ever been to the area in dispute was single phase service to a residence near the southeast corner of the disputed territory. 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.

Under the circumstances it would be proper to consider the historical presence and existence of facilities, and the failure of the Commission to do so reveals further errors and flaws in its decision.

The historical presence of a utility is not a specifically enumerated factor but the Commission has the ability to consider not just the specifically enumerated factors but others, as well including historic presence. In fact, the Commission has considered, and has decided some cases on the basis of, historic presence. Clay v. FPL, 88 FPSC 85 (1988), 1988 Fla. PUC LEXIS 122; In re: Territorial Dispute Between Suwannee Valley Electric Cooperative and Florida Power Corp., ("SVEC v. FPC"), 87 FPSC 11:213 (1987), 1987 Fla. PUC LEXIS 201; In re: Petition of Gulf Coast Electric Cooperative Inc. Against Gulf Power Co., ("Gulf Coast v. Gulf Power"), 86 FPSC 5:138 (1986), 1986 Fla. PUC LEXIS 761, In re: Petition of Suwannee Valley Electric Cooperative, Inc. for Settlement of a Territorial Dispute

with Florida Power Corp., ("SVEC v. FPC"), 83 FPSC 90 (1983), 1983 Fla. PUC LEXIS 439.

The Commission did not specifically reject historical presence, but did not list that as one of the factors it considered in its Final Order (R., vol. 7, p. 1215; Order, p. 55). In the Commission proceeding, Gulf Power argued that historical presence has been given little consideration in the past and is less relevant now given the decision of this Court in West Florida Cooperative Ass'n, Inc. v. Jacobs, 887 So.2d 1200 (Fla. 2004). In In re: Petition to Resolve Territorial Dispute with Gulf Power by West Florida Electric Cooperative Association Inc., 01 FPSC 12:46 (2001), 2001 Fla. PUC LEXIS 1414, the Commission gave little weight to West Florida's historical presence in an area awarded to Gulf Power. This was a central issue on appeal. In upholding the Commission's order, this Court concluded that the Commission was not required to consider historical presence but stated "the historical presence of one utility in an area thus, may be relevant in determining whether uneconomic duplication would result from an award of service to another." West Florida v. Jacobs, 887 So. 2d at 1205.

A significant difference between the West Florida v. Jacobs case and this case is that in West Florida v. Jacobs, the parties stipulated that the construction of facilities needed to provide service would not cause uneconomic duplication. The

Court noted that stipulation and said that because of the stipulation, historical presence had little or no relevance. 887 So. 2d 1205.

There is no such stipulation in this case and in fact, the issue of uneconomic duplication is a central issue. West Florida v. Jacobs does not stand for the proposition that historic presence is not relevant at any time as some may argue; just that it was not in that case.

The question of the relevance of historical presence in the West Florida case was not resolved by unanimous agreement. The Commission's decision in West Florida was a 2-1 vote and affirmance of their order by this Court was on a 4-2 vote. Justice Lewis dissented and portions of his dissent are particularly germane to this case:

. . .

> In what must have been a concerted effort to ignore West Florida's longstanding service to FGT and the surrounding rural area, the Public Service Commission ("PSC") analyzed the instant territorial dispute through considering only the four factors detailed in rule *25-6.0441(2) of the Florida Administrative Code* as though this property and customer had never before received electric service.
>
> . . .
>
> In turn, the majority of this Court now approves the action taken by the PSC, inflexibly refusing to recognize any consideration outside of those detailed with particularity in the Code.
>
> As concluded by Justice Quince and Commissioner Palecki, I am convinced that the Public Service Commission should not have considered customer preference, the fourth factor listed in *rule 25-6.0441(2)*. The PSC has long considered an electric power utility's historical record of service to a territorial area when resolving disputes,

> and in the instant case, this well-settled [*1208] additional factor most certainly weighs heavily in West Florida's favor but has been ignored by the commission and the majority here. Thus, the balance of factors to be considered when resolving territorial disputes is not "substantially equal," and reference to consumer preference, factor (d) of rule 25-6.0441(2), was unnecessary.
>
> . . .
>
> Despite the compelling facts of the instant case, and the PSC's obvious disregard for West Florida's history of service to the geographical customer area at issue, the Court today simply duplicates the error perpetrated [**19] by the Public Service Commission.
>
> . . .
>
> Further, I fear that today's decision is a significant step towards unmeasured competition and large commercial customer poaching in the electric power provision industry. Because I am convinced that the Legislature never intended to facilitate this sort of economic contention, and , in fact, intended to discourage and prohibit it, I dissent.
>
> . . ."

West Florida 887 So. 2d at 1207.

Given the facts in this case, the dissent of Justice Lewis, is an accurate description and summary of this case and an insightful prediction for the Court to consider. It is an important distinction worth repeating that in West Florida the issue of uneconomic duplication was stipulated and here it was not.

Finally, in 1984 this Commission said:

> We find that Gulf Coast's construction of 3,450 feet of line just to reach the edge of the subdivision when Gulf Power had an existing line immediately adjacent to the entrance of the subdivision amounted to an uneconomic duplication of facilities. In re: Petition of Gulf Power Company involving a territorial dispute with Gulf Coast Electric Cooperative, ("Gulf Power v. Gulf Coast"), 84 FPSC 146 (1984), 1984 Fla. PUC LEXIS 960 at #5, 6.

That is the same that Gulf Power is trying to do in this case and the Commission erred when they did not recognize and apply this precedent.

III

There are substantial differences between the parties as to the criteria in Rule 25-6.-0441, FAC, and reliance on customer preference was not necessary, is not based on the evidence and is a departure from the essential elements of law.

Customer preference is not one of the criteria described in Section 366.04(2)(e) F.S., but it is identified in Rule 25-6.0441(d) F.A.C., which identifies it as a consideration when it has been determined that all other criteria is substantially equal between the parties in a dispute. Customer preference is not mentioned in the statute, possibly because of the long standing state of the law in this state that no customer has an organic or economic right to service by a particular utility. Storey v. Mayo, 217 So.2d 304 (Fla. 1968); Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987). Prior to adoption of Rule 25-6.0441(d) the Commission had considered customer preference when resolving disputes but with recognition of Storey v. Mayo and only when the factors did not weigh in favor of one utility.

In this case some factors are substantially equal; either utility could serve the area at issue; neither is precluded from serving the area; neither is precluded from serving the area because of the nature of the area; and both have adequate capacity available and ability to provide reliable service.

However, as CHELCO has argued previously, there are substantial differences in the costs to serve, the capability to provide service, the facilities

necessary to provide service and the uneconomic duplication that will occur. It is not just one factor that favors CHELCO in this proceeding. There are several and there are sufficient differences to justify disregarding customer preference; especially considering the decisions of the Commission and the precedent that customer preference should not be considered if there is any fact weighing in favor of one of the utilities. As the Commission said in Gulf Power v. Gulf Coast, 84 FPSC 146 (1984), 1984 Fla. PUC LEXIS 960 *:

> "[C]ustomer preference should not be relevant to our decision in a case such as this, where the facts are so heavily weighted in favor of one utility."

See also In re: Choctawhatchee Electric Cooperative v. Gulf Power Co., 1976 Fla. PUC Lexis 51 and Gulf Power v. Gulf Coast, case 84 FPSC 121 (1984).

Given the significant factors favoring CHELCO, customer preference should not have been a factor considered in this case and certainly not the deciding factor.

In its order, the Commission cites 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 Corp., 83 FPSC 90 (1983), 1983 Fla. PUC LEXIS 439, (the cases were referenced in the Commission order as Withlacoochee,

Escambia River, and Suwannee Valley II respectively) to bolster its reliance on customer preference and the award of the area to Gulf Power. That reliance is misplaced in each case.

The Withlacoochee and Escambia River cases have been cited for the proposition that an investor owned utility ("IOU"), such as Gulf Power, should prevail in a dispute when all else is equal. Unless all else is equal, the IOU gets no preference under either of these cases and that is clearly enunciated in Gulf Power v. Florida Public Service Comm'n, 480 So.2d 97 (Fla. 1985), wherein the Court rejected Gulf Power's appeal of an order of the PSC awarding Gulf Coast the territory. Before the Commission, Gulf Power had argued that Gulf Coast was prohibited by law from serving the disputed area because of the Withlacoochee and Escambia River cases, but in that case the Commission rejected that argument recognizing that Withlacoochee and Escambia River only apply to give a preference to the IOU when there is no factual distinction between the two utilities. See Gulf Power v. Gulf Coast, 84 FPSC 271. On appeal, Gulf Power contended, in part, that the Escambia River case mandated a different result; but that position was rejected. See Gulf Power v. Gulf Coast, 480 So.2d at 99. In the opinion the Court said:

> Escambia River merely held that when no "factual or equitable distinction exists in favor of either utility . . . the territorial dispute is properly resolved in favor of the privately owned utility. Escambia River, 421 So.2d at 1385.

The Commission's reliance on these cases is misplaced given the significant differences in the factors. In fact, it appears that the I.O.U. preference established by the Withlacoochee and Escambia River cases is no longer valid. The Commission rule does not give preference to one utility over the other; it simply refers to customer preference and presumably this means a cooperative or other non-I.O.U. would prevail when all factors are equal and the customer favors the non-I.O.U. However, if Withlacoochee and Escambia River are still valid, a non-I.O.U. would never prevail in a territorial dispute where all factors are substantially equal even if the customer expressed a preference for the non-IOU. Further support for the proposition that Withlacoochee and Escambia River are no longer viable can be found in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So. 2d 120 (Fla. 1996), which was decided after the Withlacoochee and Escambia River decisions. In Clark, this Court reviewed an order of the Commission and concluded that the correct decision of the Commission should have been that all factors were substantially equal and customer preference should have been considered Clark, 674 So.2d at123. In that case the customer preferred the cooperative and the area was awarded to the cooperative. If Withlacoochee and Escambia River were still viable, that conclusion could not have been reached.

The Suwannee Valley II case cited by the Commission, 83 FPSC 90, 1983 Fla. PUC LEXIS 439, actually supports the position of CHELCO. In that case the

Commission awarded disputed territory to Suwannee Valley Electric Cooperative, finding that FPC had attempted to knowingly intrude into an area served by SVEC for 30 years and that SVEC was capable of providing the needed service. The Commission rejected the application of Withlacoochee and Escambia River stating:

> In this case, a strong factual distinction exists in favor of SVEC. Aside from the fact the area in dispute clearly falls within SVEC's service area, the much greater costs on behalf of FPC and the fact that service by FPC would result in a duplication of services leads us to the conclusion that SVEC should serve the disputed area. 1983 Fla. PUC LEXIS 439 at *10.

In the Suwannee Valley II case the Commission made note of the presence of Suwannee River Electric Cooperative in the area and their capability to serve the area; similar to CHELCO's situation in the present case.

Also weighing against considering customer preference was that the customer was the developer and not a customer in the sense of the ultimate consumer of electricity and the one responsible for the bills. The only indication of customer preference was a letter from the developer requesting that Gulf Power provide service. There was no testimony from any customer – developer or consumer – as to the preference for Gulf Power or the reasons for the preference and there are no customers residing on the property as defined by the Commission.

The Commission has considered matters where it was the developer who expressed a preference for the provider of service, but there has been less

inclination by the Commission to embrace preferences of developers than the ultimate consumer.

That was stated in Gulf Power v. Gulf Coast, 84 FPSC 121, where the Commission said:

> Regardless of the desires of the subdivision developer, we conclude, as we have done in previous cases, that customer preference should not be decisive in the resolution of this dispute. This case is even more compelling in favor of giving little weight to customer preference because here we are dealing with the developer and not the purchaser or ultimate user of electricity. Moreover, customer preference should only be considered as a guiding factor if the facts do not weigh heavily in favor of one utility. 1984 Fla. PUC LEXIS 271 at *13, 14.

In Petition of Peace River Cooperative Inc. against Florida Power and Light Company, ("PRECO v. FPL"), 85 FPSC 10 120 (1985), 1985 Fla. PUC LEXIS 227, the Commission notes the staff position that ". . . the developer is so far removed from the ultimate consumer that his preference should not be given much weight." 85 FPSC 10:126. The Commission did give some consideration to preference in that case when the County became a party.

The problem which the Commission encounters when evaluating customer preference is to determine what motivates the expressed preferences; and that is the case whether it be a developer or consumer. In PRECO v. FPL, the Commission said that customer preference must be based on established facts in the record and not purely emotional arguments. (85 FPSC 10:126). In that vein, the Commission has rejected expressed preferences when a customer supported one utility over

another for beneficial or convenience reasons. See In re: Petition of Gulf Power Company involving a territorial dispute with Gulf Coast Electric Cooperative, 84 FPSC 146 (1984), 1984 Fla. PUC LEXIS 960 (developers preference based on use of utility right-of-way); SVEC v. FPC, 83 FPSC 90 (1983), 1983 Fla. PUC LEXIS 761 (preference based on lowest rates); Gulf Power v. Gulf Coast, 84 FPSC 121 (1984), 1984 Fla. PUC LEXIS 271 (preference based on fact utility was willing to waive charges for underground facilities); In re: Territorial dispute between Suwannee Valley Electric Cooperative and Florida Power Corporation, 87 FPSC 11:213 (1987); 1987 Fla. PUC LEXIS 201) (preferred one utility because they could meet construction deadlines).

In none of the cases before the Commission wherein the developer was the party expressing the preference, did the Commission consider customer preference of the developer alone. In each one there were requests from consumers making a request as well. In an order denying reconsideration of its decision in Petition of West Florida Electric Cooperative to resolve dispute with Gulf Power, ("WFEC v. Gulf Power"), 85 FPSC 12 (1985), 1985 Fla. PUC LEXIS 154, WFEC challenged the Commission's decision to base customer preference on the developer's preference but the Commission said it was appropriate to do so because the developer pays the Contributions in Aid of Construction ("CIAC"). However, the Commission also noted there were preferences from residents. WFEC v. Gulf

Power, Order denying Reconsideration, 86 FPSC 270, 1986 Fla. PUC LEXIS 651 *12.

In PRECO v. FPL, 85 FPSC 120 (1985), 1985 Fla. PUC LEXIS 227, the Commission expressed that customer preference based on reliability, quality of service, public benefit, adequacy of service would be considered but in this case there is no testimony from the developer as to a preference because of quality of service, reliability, capability or any basis. CHELCO offered testimony that the developer wanted the best arrangement it could receive and that the developer might consider Gulf Power because of the difference in CIAC policies. CHELCO requires deposits from developers up front in order to protect its members from investing in infrastructure which may become stranded with refunds to the developer over a period of time as houses become occupied – Gulf Power does not. (TR 220-222, Ex. 48, pp. 41-44). The initial cost to the developer for service from CHELCO would be greater than from Gulf Power. Gulf Power suggests that the reasons the developer may prefer Gulf Power is a previous experience with CHELCO (Ex. 50, pp. 74-78). The Commission did not address either of these suggestions and there is no evidence as to why the developer prefers one or the other but there are differences in the interests of developers and the final customer (TR 1220) and the Commission should not have given any weight to the developers preference; let alone even consider customer preference under the facts in this case.

CONCLUSION

The decision of the Commission to award the territory that is at dispute to Gulf Power on the basis of customer preference in spite of the overwhelming evidence that favors CHELCO is unsupported and contrary to well established principles found in Commission decisions and opinions of this Court.

The result of the Commission misapprehension and misapplication of policies and principles developed over years of Commission decisions and opinions of the Court is to award the disputed territory to the utility that has the greatest cost to serve, the one that has to extend facilities and uneconomically duplicate facilities to serve, and the one that can't provide service without upgrades.

Despite the evidence and despite the precedents, the Commission resolved all factors but one to be substantially equal and decided this dispute on the only factor that could be said to favor Gulf Power and that one – customer preference – is the least preferred factor of all those in the rules.

The Commission decision is arbitrary and a departure from the essential requirements of law and the decision of the Commission should be reversed upon review and remanded to the Commission.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U. S. Mail on this 23rd day of January, 2012.

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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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