



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 8, 2001 **REVISED**

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (MCLEAN/STERN) *MKS*
DIVISION OF SAFETY & ELECTRIC RELIABILITY (HARLOW) *JOH JOT*

RE: DOCKET NO. 010827-EI - PETITION BY GULF POWER COMPANY FOR
APPROVAL OF PURCHASED POWER ARRANGEMENT REGARDING SMITH
UNIT 3 FOR COST RECOVERY THROUGH RECOVERY CLAUSES DEALING
WITH PURCHASED CAPACITY AND PURCHASED ENERGY.

AGENDA: 08/14/01 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\010827R3.RCM

CASE BACKGROUND

On June 8, 2001, Gulf Power Company (Gulf) filed a Petition for approval of a purchased power agreement (PPA) with Southern Power Company (Southern Power). The PPA anticipates the transfer of Smith Unit 3, a 575 MW combined cycle generating unit, to Southern Power by Gulf. According to Gulf, it will then have first call to purchase the full capacity and energy from Smith Unit 3 for 10 years. The contract also entitles Gulf to call upon the output of Smith Unit 3 for voltage support in the Panama City area for a 20-year term. The costs of the capacity and energy would be passed through the cost recovery clauses. In 1999 Gulf obtained a certificate of need for Smith Unit 3. See Order No. PSC-99-1478-FOF-EI, issued in Docket No. 990325-EI on August 16, 1999 (Need Determination Order). The matter is set for hearing. The Office of Public Counsel (OPC) and the Florida Industrial Power Users Group are intervenors.

DOCUMENT NUMBER-DATE

09637 AUG-8 01

J.PSC-COMMISSION CLERK

On June 28, 2001, the Office of Public Counsel filed a Motion to Dismiss in this docket. Gulf filed its response on July 5, 2001. Staff's recommendation on the Motion is addressed below.

The Commission is vested with jurisdiction over this subject matter through the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

ISSUE 1: Should OPC's Motion to Dismiss be granted.

RECOMMENDATION: No. OPC's Motion to Dismiss should be denied.

STAFF ANALYSIS:

OPC's Motion to Dismiss

OPC claims that Gulf's Petition for approval of the PPA offers the Commission no basis for finding that the PPA is better for the ratepayers than ownership of the plant by Gulf. OPC observes that the petition merely explains the terms of the PPA. OPC further observes that the Petition fails to allege the ultimate fact that the PPA is cost effective when compared to Gulf retaining ownership of Smith Unit 3. In short, OPC argues that the Petition simply asks for the PPA to be approved without providing the Commission a sound basis for granting the relief requested.

OPC claims that Gulf's prefiled, direct testimony also fails to demonstrate that the ratepayers benefit from the PPA. OPC states that Gulf's three witnesses filed a total of twenty-nine pages of testimony, and only a small portion of that testimony compares the PPA to plant ownership by Gulf. Furthermore, states OPC, that small portion speaks only to the risks of Gulf owning the plant and the benefits of Gulf having flexibility to explore other sources of energy after ten years. OPC claims that the testimony contains no affirmative assertion that the ratepayers are better off with the PPA than with Gulf retaining ownership of the plant.

OPC argues that Gulf has the burden of proof in this proceeding but has failed to provide a factual foundation for the

petition. Thus, OPC is in the position of shouldering Gulf's burden in that OPC must now provide the factual foundation for the petition through discovery. OPC argues that the purpose of discovery is to test the sufficiency of the opponent's claim, not to prove it. OPC further argues that the posture of the case allows Gulf to find out what the parties are interested in before Gulf plays its hand. OPC states that the Citizens are not prepared to engage in extensive discovery until Gulf first identifies the facts and law that Gulf believes support its Petition.

Finally, OPC argues that in the Need Determination Order the Commission found that Gulf's self-build option was the best alternative among several, and that Gulf cannot alter that Order without a showing of changed circumstances. See Austin Tupler Trucking v. Hawkins, 377 So. 2d 679, 681 (Fla. 1979); Gulf Coast Electric v. Johnson, 727 So. 2d 259, 265 (Fla. 1999). OPC claims that the Petition does not demonstrate any significant change in circumstances.

Gulf's Response to OPC's Motion to Dismiss

Gulf argues that its Petition does state a basis on which relief can be granted. Specifically, the Petition presents a proposed PPA for approval. Gulf argues that its Petition is no different from any other petition for approval of a PPA. Gulf also argues that there is no minimum filing requirement for such petitions or precedent for any specific allegations required to state a prima facie case for relief.

Gulf responds to OPC's argument that the testimony provides only descriptive detail of the PPA and little information on the benefits of the PPA to ratepayers by noting that OPC's argument goes to the weight of the evidence rather than the question of whether the Petition states a cause for relief. Gulf maintains that such argument is more appropriately considered as a form of closing argument after a hearing.

With respect to OPC's argument on absence of changed circumstances, Gulf responds that it does not ask the Commission to change its determination of need for Smith Unit 3. Gulf states that the PPA secures the plant's capacity for Gulf's customers for the first 10 years it is in service, and that the 10 year term is consistent with the Ten Year Site Plan filing requirements associated with the Florida Electrical Power Plant Siting Act

(PPSA) under which the certificate of need was issued. Furthermore, notes Gulf, the PPA secures the benefits of the new capacity for voltage support for 20 years from the plant's in-service date. Consequently, Gulf concludes that the PPA contractually commits Smith Unit 3 to Gulf's customers in a manner that is consistent with the Need Determination Order.

Gulf argues that OPC's focus on whether the PPA will cost the ratepayers less than continued ownership of the plant by Gulf is misplaced. Gulf states that the primary issue in this case is whether Gulf's customers should be obligated to pay the carrying costs of Smith Unit 3 for the life of the plant, or whether the benefits of the plant should be secured over a reasonable planning horizon with the flexibility to take advantage of other options.

Gulf argues that the PPSA does not require "a life of plant commitment to any capacity certified under the statute." Gulf also argues that Rule 62-17.211(3), Florida Administrative Code, contemplates that power plants certified under the PPSA may be transferred to other parties. Furthermore, Gulf states that no statute or rule obligates a certificate holder to modify a need determination prior to a transfer of the plant.

Staff's Analysis

It is well-settled law that a motion to dismiss ought to be resolved solely by reference to the four corners of the complaint, petition, or application, as appropriate. See e.g. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Nonetheless, OPC's motion to dismiss invites commission attention to the weight and indeed, number of pages filed by Gulf to support its petition. Staff believes that it is the petition which is the subject of a motion to dismiss, not the supporting evidence, or the perceived lack of such evidence. Staff notes that the Commission is constrained to a consideration of the legal sufficiency of the petition and thus to its four corners. It ought omit any consideration of the sufficiency of tendered evidence, at least for the purpose of considering the Motion to Dismiss.

OPC urges that in the petition "scant attention is given to any benefits the PPA may provide Gulf Power's customers." Yet Gulf's petition, in paragraph 16, notes: ". . . approval of this proposed purchased power arrangement is an attempt to reduce the risk to Gulf's customers that the benefits of wholesale electric

competition will not be available for that portion of Gulf's capacity needs represented by Smith Unit 3 until the end of the useful life of the unit."

Gulf further alleges that "rates under the proposed purchased power arrangement between Southern Power and its affiliate, Gulf Power, are no higher than the price Gulf Power would have paid to purchase power from a non-affiliate under the RFP process reviewed and approved by the Commission in Docket No. 990325-EI, and that such process resulted in the selection of Smith Unit 3 as a more cost effective alternative to purchases from non-affiliated third parties." (Gulf petition, closing paragraph)

Thus Gulf's petition seeks approval of its PPA and alleges that the PPA will occasion a lessening of risk to customers with no increase in rates, all else held equal. Such an allegation, if proven up, clearly serves the public interest. Staff believes that Gulf's case is adequately pled and that OPC's Motion to Dismiss should be denied.

OPC's motion advances several other matters which staff believes warrant comment. OPC correctly observes that the burden to sustain any petition or application filed before the Commission is that of the petitioner or applicant. Then OPC offers: "But the Citizens, for one, are not prepared to engage in extensive discovery until Gulf Power first identifies the facts and law the company believes support the relief sought." Staff believes that neither the staff nor the Citizens are in any way under an obligation to bolster, by discovery or by any other means, the evidence upon which Gulf intends to rely to make out its case. Simply put, staff believes that it is Gulf's burden to put on competent and substantial evidence which supports its petition. The risk of failure in this endeavor lies with Gulf, not with the intervenors.

Moreover, as implied in OPC's motion, it is Gulf's burden to present its evidence in such timely fashion as to permit affected parties - including OPC - sufficient opportunity to test that evidence, Gulf's desire for expedited treatment notwithstanding. If Gulf is committed to expeditious consideration of its Petition, then staff urges that it is incumbent upon Gulf to present its direct case fully and promptly - promptly implying that affected parties can exercise discovery and where intervenor discretion dictates, offer controverting testimony.

If any intevenor is persuaded that Gulf has not met its burden, based on its prefiled testimony, each has at its disposal other pre-hearing motions which, unlike a motion to dismiss, address the weight of the evidence tendered by a petitioner or applicant in a pre-hearing context.

Lastly, OPC argues that Gulf's petition lacks any demonstration that the need determination order should be altered. Staff notes that no such allegation is present in Gulf's petition, and that such an allegation is not a demonstrated prerequisite to the relief that Gulf seeks.

For the reasons provided above, Staff recommends that OPC's Motion to Dismiss be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should not be closed.

STAFF ANALYSIS: This docket should remain open to process this case.