

COPY

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN 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.

BEFORE: CHAIRMAN E. LEON JACOBS, JR.
COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 16A

DATE: Tuesday, August 14, 2001

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

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TALLAHASSEE, FLORIDA 32301
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PARTICIPANTS:

BOB ELIAS, on behalf of Commission Staff.
ROGER HOWE, Office of Public Counsel.
VICKI GORDON KAUFMAN, on behalf of FIPUG.
HAROLD MCLEAN, Counsel to the Commission.
MARLENE STERN, on behalf of Commission Staff.
JEFF STONE, on behalf of Gulf Power Company.

STAFF RECOMMENDATION

ISSUE 1: Should OPC's motion to dismiss be granted?
RECOMMENDATION: No. OPC's motion to dismiss should be denied.

ISSUE 2: Should this docket be closed?
RECOMMENDATION: No, this docket should not be closed.

1 CHAIRMAN JACOBS: Issue 16A.

2 MS. STERN: Item 16A is staff's --

3 CHAIRMAN JACOBS: Item. Thank you.

4 MS. STERN: Is staff's recommendation in
5 Docket 010827. The parties are here to speak.

6 CHAIRMAN JACOBS: Very well. Jeff, do you
7 want to go first?

8 MR. STONE: Commissioner, it's not my
9 motion to dismiss. I would defer to Mr. Howe.

10 CHAIRMAN JACOBS: That is true.

11 MR. HOWE: Chairman Jacobs and
12 Commissioners, I'm Roger Howe with the Public
13 Counsel's Office.

14 We agree with your staff's statement that
15 in evaluating our motion to dismiss, you should
16 look at the four corners of Gulf's petition, but
17 that's as far as our agreement goes.

18 Commissioners, Gulf's petition is fatally
19 defective in both form and substance. For a
20 moment I would like to address something that is
21 not covered in our motion to dismiss, but I
22 don't think it has to be. I found myself
23 thinking, we're dealing with a petition, but is
24 it actually a petition? Under the uniform
25 rules, specifically Rule 106.201, it states that

1 the term "petition" includes any document that
2 requests an evidentiary proceeding and asserts
3 the existence of disputed issues of material
4 fact. I don't think Gulf's petition does
5 either. If you'll note, in Gulf's petition you
6 will not find a citation to Chapter 120. You
7 will not find that they are citing to Chapter
8 366, and they are not citing to a rule or an
9 order of this Commission. Essentially, they
10 have not invoked the Commission's jurisdiction
11 to have a hearing.

12 Under Uniform Rule 106.201(4), it states
13 that a petition shall be dismissed if it is not
14 in substantial compliance with subsection (2) of
15 this rule or it has been untimely filed. Now,
16 it doesn't say it shall be dismissed if somebody
17 invokes this rule in a motion to dismiss. I
18 think it puts the burden on the Commission. If
19 they get a defective petition, they should act
20 on their own to dismiss such a petition.

21 Under Rule 106.201, the petitioning party
22 must ask for a hearing. The petitioning party
23 must identify all disputed issues of material
24 fact. If there are none, the petition must so
25 indicate. There must be a concise statement of

1 the ultimate facts alleged. I don't think
2 you'll find that in Gulf's petition either. And
3 there must be a statement of the specific rules
4 or statutes the petitioner contends require the
5 action requested.

6 So on its face, I think you have what
7 amounts to a non-petition. There is not
8 adequate recitation to the APA, the uniform
9 rules, the Commission statutes, the Commission
10 rules, or Commission orders. I think it is
11 fatally flawed in form.

12 In substance, Commissioners, what you have
13 is, Gulf has filed what they purport to be a
14 contract between Gulf Power Company and Southern
15 Power. Commissioners, in this purported
16 contract, Gulf is proposing to buy what it
17 already owns, and Southern Power is proposing to
18 sell what it has not got. It's clear on the
19 face of the petition, that is what they are
20 asking you to approve.

21 Now, true, the petition does state that the
22 parties intend at some date in the future not
23 specified to enter into a transfer agreement.
24 But, Commissioners, I think in the first
25 instance, it's an issue for the court, and in

1 this case for this Commission to determine
2 whether you're even presented with a contract,
3 because if either or both parties can avoid
4 their obligation under this purchased power
5 agreement by simply failing to negotiate a sale
6 or negotiating but failing to agree upon the
7 terms of a sale, then neither party is obligated
8 under the document the Commission has before it.

9 Commissioners, what Gulf has offered is
10 analogous to me entering into a contract with
11 one of you to rent you your own house. It is
12 meaningless on its face. I can't rent you your
13 house because I don't own it. You can't rent it
14 from me because you do. It is completely
15 dependent upon a future event that neither party
16 is under an obligation to fulfill.

17 So, Commissioners, I think what you have
18 here is a facially deficient petition, and you
19 have a purported contract which is not binding
20 upon either party.

21 Thank you very much.

22 CHAIRMAN JACOBS: Ms. Kaufman?

23 MS. KAUFMAN: Thank you, Mr. Chairman. I'm
24 Vicki Gordon Kaufman of the McWhirter Reeves law
25 firm, and I'm here on behalf of the Florida

1 Industrial Power Users Group, who are
2 intervenors in this docket.

3 We agree with the Office of Public Counsel
4 that Gulf has not stated a claim in its petition
5 upon which relief can be granted. My arguments
6 are a little bit different than what Mr. Howe
7 has stated to you.

8 COMMISSIONER JABER: Ms. Kaufman, did you
9 file something?

10 MS. KAUFMAN: I did not, Commissioner
11 Jaber.

12 COMMISSIONER JABER: Okay.

13 MS. KAUFMAN: I'm here in support of
14 Mr. Howe's motion to dismiss.

15 COMMISSIONER JABER: So this would be
16 argument that the company has not had an
17 opportunity to address; right?

18 MS. KAUFMAN: I believe that they have
19 addressed it in their response.

20 COMMISSIONER JABER: But your arguments
21 specifically were not filed or served, so
22 therefore, they haven't had an opportunity to
23 file written responses to yours.

24 MS. KAUFMAN: That's correct.

25 COMMISSIONER JABER: Okay. Go ahead.

1 MS. KAUFMAN: What I was going to say,
2 Commissioners, is that every time Gulf files a
3 pleading in this case, and I believe they said
4 this in response to Mr. Howe's motion, they say
5 that this case is just like the approval of any
6 other purchased power agreement. And I beg to
7 differ with you.

8 This case is not like the approval of any
9 other purchased power agreement, number one, for
10 the reasons that Mr. Howe has already explained,
11 but also because what you have here is a case
12 where you all had a determination of need
13 docket, approved the Smith 3 plant, approved
14 Gulf to own it, and Gulf has proceeded on that
15 basis, and now comes in and says, "well, we
16 would like to sell this plant to our affiliate
17 and buy the power back." We suggest to you this
18 is a question of first impression that we're
19 aware of in Florida, and it is not the same as
20 coming in to you with an arm's length
21 transaction with an unaffiliated company.

22 That having been said, we think there are
23 certain allegations that must be included in
24 Gulf's complaint in order for the relief they
25 seek to be granted.

1 First of all, we think there has to be some
2 allegation that there are changed circumstances,
3 that something has happened since you granted
4 the need determination and entered your order in
5 that need determination docket, something has
6 happened that requires this different
7 transaction than the one that you approved.

8 Secondly, we think Gulf has to demonstrate
9 to you that this is the least cost option for
10 the ratepayers. And in that way, that is
11 similar to what you would look at when you
12 review a power purchase agreement. Not only
13 have they not made that allegation, but I
14 believe one of their witnesses in his prefiled
15 testimony says essentially this is a wash.

16 And thirdly, we think they would have to
17 allege to you in their petition that this
18 transaction is more cost-effective for the
19 ratepayers than the traditional rate-basing of
20 the unit, which I believe is what was
21 contemplated when you approved the determination
22 of need.

23 None of those allegations are present in
24 Gulf's petition, and therefore, we think they
25 clearly fail to state a claim upon which relief

1 can be granted and that the motion to dismiss
2 should be granted.

3 CHAIRMAN JACOBS: Thank you.

4 Would you like to respond, Mr. --

5 MR. STONE: Commissioner, if I may respond
6 briefly, both the Office of Public Counsel and
7 the Florida Industrial Power Users Group seem
8 bent upon preventing this Commission from
9 hearing the merits of this case. They have from
10 the very beginning. They've made numerous
11 attempts to throw this process off track, and
12 the arguments you've heard today are nothing
13 more than that.

14 Gulf has presented to the Commission an
15 alternative to a life-of-plant commitment to
16 Smith Unit 3. This is not a case where there
17 needs to be a demonstration of changed
18 circumstances. This is not a case where the
19 question of a least cost option is the
20 determinative factor.

21 what we've outlined in our petition is that
22 there are other factors that need to be
23 considered by this Commission in determining
24 whether the purchased power arrangement is the
25 preferred alternative to the rate-based

1 arrangement, and that's what we've tried to get
2 before this Commission since we filed our
3 petition on June 8th.

4 The arguments that Public Counsel makes
5 about the rule, there are many things in that
6 rule that simply do not apply to a case that is
7 not a petition after a proposed agency action
8 that a party disagrees with. It is difficult to
9 imagine a petition -- I go back to the analogy
10 that Ms. Kaufman says I've made in virtually
11 every pleading that we've filed, and I'll make
12 that analogy again today. But it is difficult
13 to imagine that we would file a petition for
14 approval of a purchased power agreement with any
15 entity other than an affiliate that could meet
16 the test that Mr. Howe has articulated is a
17 requirement in the rule that we have to meet.
18 You just simply cannot do that on a normal,
19 routine purchased power agreement.

20 This notion that we have to demonstrate
21 changed circumstances is addressed well by your
22 staff in the recommendation. We've not alleged
23 that we're changing the need determination
24 order, nor are we seeking a change in the need
25 determination order. The need determination

1 order did not speak to the manner of cost
2 recovery. It identified the most cost-effective
3 resource, Smith Unit 3. That resource which
4 Gulf demonstrated the need for is still the
5 resource Gulf's customers will benefit from if
6 this purchased power agreement is approved.

7 All we're doing is changing it from the
8 concept of -- the implied concept of a
9 life-of-plant commitment, a life-of-plant
10 obligation, and potentially a life-of-plant
11 burden, to an opportunity to be committed for
12 ten years and then take a look and see have the
13 changes in the wholesale market that everyone is
14 expecting to occur over the next ten years, does
15 that present a better opportunity. And we're
16 submitting to you that the benefits of this
17 arrangement are that the customers of Gulf Power
18 Company, the customers that these two agencies
19 contend they represent, ought to have that
20 opportunity and that pause, because things are
21 happening today and over the next several years
22 that we cannot know the outcome today. But if
23 we were to make a commitment today for 30 years,
24 a life-of-plant, then we may be foreclosing that
25 opportunity ten years hence.

1 And that's the opportunity we're trying to
2 present to the Commission. And you will have an
3 opportunity if you deny the motion to dismiss to
4 hear that case in three weeks. And if you agree
5 with Gulf, you can approve the arrangement, and
6 everything else will fall into place. If you
7 don't agree with Gulf, then you deny Gulf's
8 petition and we move the other direction. In
9 either case, Smith Unit 3 will be serving Gulf's
10 customers consistent with the need determination
11 order you made two years ago.

12 This is not a case that needs to be thrown
13 off track by a stubborn insistence on
14 technicalities in the rule. As your staff has
15 recommended in its -- as staff has noted in the
16 recommendation before you, we have stated that
17 we believe there are benefits from this
18 arrangement that warrant its adoption. If you
19 agree with that, you have the basic notice
20 pleading before you. Everyone knows what this
21 case is about, and they're ignoring what's there
22 in order to try and present to you a technical
23 basis for throwing this case off track.

24 I urge you to deny the motion to dismiss
25 and allow us to proceed to a hearing on the

1 merits.

2 CHAIRMAN JACOBS: Commissioners, questions?

3 How would you respond to the point raised
4 by Mr. Howe that to genuinely consider approval
5 of the agreement, there has to be quid pro quo
6 in that agreement, and that quid pro quo is
7 absent in the proposal, i.e., that there is no
8 capacity from Smith that's available to Southern
9 to commit to that contract at this moment?

10 MR. STONE: Commissioners, it's a chicken
11 or egg controversy. We obviously can't sell the
12 unit to Southern Power without knowing you're
13 going to approve the purchased power
14 arrangement, because then we would have to buy
15 it back if you did not approve it.

16 Mr. Howe knows that the commitment is that
17 the unit will be sold as long as the conditions
18 precedent are satisfied. Those conditions
19 precedent are the approval of this Commission
20 and the approval of the Federal Energy
21 Regulatory Commission.

22 We came to this Commission first because
23 the merits of this case affect the retail
24 customers. That's the jurisdiction that you're
25 operating in, and that's the jurisdiction we

1 came to for prior approval.

2 This notion that we could avoid the
3 contract, we have no intention of avoiding the
4 contract if we secure the proper regulatory
5 approvals.

6 CHAIRMAN JACOBS: Staff -- you had a
7 comment, Mr. McLean?

8 MR. MCLEAN: Yes, sir. It's not directly
9 responsive to what you just asked, but let me
10 give you what I think the big picture is. I
11 think that Gulf has brought before you a plan
12 which, according to Gulf, will put the
13 ratepayers in a better position, or at the
14 least, as well as they are now, with a different
15 plan. I think that it would serve this agency
16 well to give that plan a fair airing before
17 you.

18 I believe that Mr. Howe's interpretation of
19 the rule is hypertechnical, and I don't think
20 you should permit a hypertechnical
21 interpretation of that rule to prevent a fair
22 airing, airing with an "a", a fair airing of
23 this issue before you. It's an important issue
24 to the Commission, and it will have implications
25 perhaps as many as 30 years down the road.

1 I can tell you that it would have been nice
2 if the case had been better pled, but I do think
3 it's adequately pled. And what is before you
4 today is the facial validity of that petition
5 and nothing more. If you would like me to get
6 into why I think it's hypertechnical, I would be
7 happy to do so, but it is my view that it's a
8 very hypertechnical interpretation upon which
9 the motion to dismiss is based.

10 COMMISSIONER JABER: Mr. McLean, let's come
11 back to the standard. What's the standard for a
12 motion to dismiss?

13 MR. MCLEAN: I think whether it fairly --
14 whether it states what it wants -- I'm sorry.
15 Speaking of the petition, whether it states what
16 it seeks, why the petitioner is entitled to the
17 relief it seeks and the factual basis upon which
18 it bases that entitlement. And one need not
19 look, and in fact, one cannot look to the
20 renting the house analogy that Mr. Howe brought
21 to your attention or to the witness's testimony
22 that Ms. Kaufman brought to your attention. You
23 must look to the four corners of the document.
24 Now, that it itself --

25 COMMISSIONER JABER: In fact, you should

1 assume -- does the Barnes (phonetic) case stand
2 for the principle that you should assume for
3 purposes of considering a motion to dismiss that
4 what is in the petition, the allegations in the
5 petition are true?

6 MR. MCLEAN: For purposes of the motion to
7 dismiss, you must take those as true, yes,
8 ma'am.

9 COMMISSIONER JABER: Okay. Now, what's the
10 difference between a motion to dismiss and a
11 motion for a summary judgment?

12 MR. MCLEAN: A summary judgment, or in this
13 context, a motion for summary final order, takes
14 you to a fair consideration of the adequacy and
15 weight of the evidence tendered by the parties,
16 as well as discovery which may have taken place.

17 COMMISSIONER JABER: So unlike a motion to
18 dismiss, a motion for summary judgment would
19 have us looking at the sufficiency of the
20 testimony, and therefore the merits.

21 MR. MCLEAN: That's correct, Commissioner.
22 And I believe a motion for summary order is --
23 it can be made at any time, but its most
24 appropriate time is when the case is ripe to go
25 to hearing, when the case is fairly laid out, at

1 least in terms of tendered evidence, discovery,
2 and pleadings.

3 This motion today takes you solely to the
4 facial sufficiency of the pleading which is
5 filed. And I believe, again, without a
6 hypertechnical application of a rule which in my
7 mind has a very questionable application to this
8 situation, the case is adequately pled.

9 COMMISSIONER JABER: And there are cases,
10 which, of course, Barnes cites, where an agency
11 or a court was overturned because they made the
12 error of looking at the sufficiency of the
13 testimony in considering a motion to dismiss.

14 MR. MCLEAN: That's correct, Commissioner.
15 As Mr. Pruitt told us on many occasions, it's a
16 lot easier to get reversed on granting a motion
17 to dismiss than it is on denying one.

18 COMMISSIONER PALECKI: I believe --

19 CHAIRMAN JACOBS: What do --

20 COMMISSIONER PALECKI: Go ahead.

21 CHAIRMAN JACOBS: What do we normally get
22 when we get a proposal to approve a PPA? What
23 we basing our analysis on here?

24 MR. MCLEAN: Commissioner Jacobs, would you
25 repeat your question? I'm just getting over a

1 cold, and I'm deaf as a post.

2 CHAIRMAN JACOBS: That's okay. When we get
3 a proposal to approve a purchased power
4 agreement, what are the four corners of that?

5 MR. MCLEAN: Let me defer that one to the
6 folks who know more about it than I do.

7 MS. STERN: They explain what the agreement
8 is and ask for approval.

9 MR. ELIAS: There are no specific
10 requirements in our rules that I'm aware of that
11 specify the form and content of the initial
12 application for the approval of a purchased
13 power agreement. What is typical is the
14 agreement, an analysis that shows why this
15 agreement is in the best interests of the
16 general body of ratepayers, and testimony that
17 supports those findings, either filed with the
18 petition in some instances, or upon the
19 establishment of a schedule for hearing if
20 that's the procedural posture the case takes.

21 CHAIRMAN JACOBS: All right. I'm sorry,
22 Commissioner Palecki. I interrupted you.

23 COMMISSIONER PALECKI: I agree with staff's
24 recommendation. I believe that we have a fair
25 question before this Commission, and that is

1 whether this purchased power agreement is the
2 best deal for the ratepayers, both in terms of
3 cost-effectiveness and also in terms of risk. I
4 look forward to hearing the evidence on this
5 fair question. And I think that Gulf has a
6 tough burden in front of it, but I think the
7 question needs to be resolved through the
8 evidence.

9 COMMISSIONER DEASON: If that's a motion, I
10 will second it.

11 COMMISSIONER PALECKI: Yes, it is a motion.

12 CHAIRMAN JACOBS: It has been moved and
13 seconded.

14 Before I call for a vote, let me say this.
15 I believe that probably the critical issue that
16 I think we have before us is what was just
17 said. We don't have very clear standards about
18 what a pleading for approval of a PPA should be,
19 and so for us now to come in and impose such a
20 standard would in my mind probably not be
21 reasonable.

22 But it does concern me that we want to
23 proceed without -- a motion to dismiss has to do
24 with the sufficiency of a pleading, and that's
25 what was argued here, that this pleading was

1 insufficient. The problem is we don't have a
2 standard by which to judge it, and I suggest
3 that maybe we want to look at that standard, we
4 want to maybe think about what that standard
5 should be if we don't have one. But because we
6 don't have an adequate standard by which to
7 judge the sufficiency of this pleading, then I
8 think probably the motion should fail.

9 And with that, all in favor, aye.

10 COMMISSIONER DEASON: Aye.

11 COMMISSIONER JABER: Aye.

12 CHAIRMAN JACOBS: Aye.

13 COMMISSIONER DEASON: Aye.

14 COMMISSIONER PALECKI: Aye.

15 CHAIRMAN JACOBS: Opposed? Show it
16 approved. Thank you.

17 MR. HOWE: Chairman Jacobs, could I just
18 ask that the Commission order reflecting your
19 vote, that in that order the Commission
20 explicitly state that compliance with Rule
21 106.201 was not necessary in this case so that
22 we can preserve it for appeal?

23 COMMISSIONER DEASON: I don't think that
24 was the vote, Mr. Howe.

25 MR. MCLEAN: No, sir.

1 COMMISSIONER JABER: Exactly.

2 COMMISSIONER DEASON: That was not the
3 vote.

4 COMMISSIONER JABER: No.

5 And, Mr. Chairman, I didn't want to say
6 anything while you were giving your comments. I
7 understood the motion to be in recognition that
8 the motion to dismiss calls for us to make a
9 finding based on the sufficiency of the
10 testimony, and I disagree that that's the
11 standard associated with a motion to dismiss.
12 And like Commissioner Palecki, I agree we should
13 hear this case and base our decision on the
14 merits of this case, and that's the purpose of
15 my supporting the vote. It had nothing to do
16 with whether the rule was applicable or anything
17 like that.

18 CHAIRMAN JACOBS: Very well. It sounds
19 like that's the answer, Mr. Howe.

20 (Conclusion of consideration of Item 16A.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 22 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 21st day of August, 2001.


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