

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Gulf Power  
Company for waiver of portions  
of Rule 25-22.082(4)(a), F.A.C.,  
Selection of Generating  
Capacity.

DOCKET NO. 980783-EI  
ORDER NO. PSC-98-1202-FOF-EI  
ISSUED: September 9, 1998

The following Commissioners participated in the disposition of  
this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION  
ORDER DENYING PETITION FOR RULE WAIVER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service  
Commission that the action discussed herein is preliminary in  
nature and will become final unless a person whose interests are  
substantially affected files a petition for a formal proceeding,  
pursuant to Rule 25-22.029, Florida Administration Code.

On June 24, 1998, Gulf Power Company (Gulf) filed a petition  
for waiver of the requirements of Rule 25-22.082(4)(a), Florida  
Administrative Code. Pursuant to Section 120.542(6), Florida  
Statutes, notice of Gulf's petition was submitted to the Secretary  
of State for publication in the July 17, 1998, Florida  
Administrative Weekly. The Legal Environmental Assistance  
Foundation (LEAF) filed comments concerning the petition within the  
14-day comment period required by Rule 28-104.003, Florida  
Administrative Code. For the reasons stated below, Gulf's petition  
is denied.

Prior to filing a petition for determination of need for an  
electrical power plant, each investor-owned electric utility is  
required, pursuant to Rule 25-22.082(2), Florida Administrative  
Code, to evaluate supply-side alternatives to its next planned  
generating unit by issuing a Request for Proposals (RFP). Rule 25-  
22.082(4)(a), Florida Administrative Code, requires that each  
utility's RFP include:

DOCUMENT IDENTIFICATION

9801 SEP-98

a detailed technical description of the utility's next planned generating unit or units on which the RFP is based, as well as the financial assumptions and parameters associated with it, including, at a minimum, the following information:

1. a description of the utility's next planned generating unit(s) and its proposed location(s);
2. the MW size;
3. the estimated in-service date;
4. the primary and secondary fuel type;
5. an estimate of the total direct cost;
6. an estimate of the annual revenue requirements;
7. an estimate of the annual economic value of deferring construction;
8. an estimate of the fixed and variable operation and maintenance expense;
9. an estimate of the fuel cost;
10. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;
11. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;
12. a discussion of the actions necessary to comply with environmental requirements; and
13. a summary of all major assumptions used in developing the above estimates

Gulf seeks a waiver of this rule so that it may avoid including this information in an RFP it anticipates issuing in the near future.

Section 120.542, Florida Statutes, mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness.

For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Gulf argues that application of the rule creates a substantial hardship to Gulf. Gulf further argues that the purpose of the underlying statute will be achieved if Gulf's petition is granted.

In its petition, Gulf asserts that since January 20, 1994, when this Commission adopted Rule 25-22.082, Florida Administrative Code (the "RFP rule"), competition in the wholesale market has increased, due in large part to the Federal Energy Regulatory Commission's Order No. 888. Given this increase in competition, Gulf states that it is "not necessary nor is it in the best interest of Gulf's general body of retail ratepayers for the Commission to require that Gulf's RFP contain the detailed information set forth in subparagraph 4a of the RFP rule." Gulf asserts that the purpose of the statute underlying the RFP rule is to enable the Commission to determine, during the need determination process, whether the proposed plant is the most cost-effective alternative available. Gulf argues that if it is required to release information about its avoided cost in an RFP, the prices offered by bidders will tend to converge around its avoided cost. Therefore, Gulf contends, the RFP may not result in the lowest cost alternative, thus frustrating the purpose of the underlying statute and creating a substantial economic hardship for Gulf and its customers in the form of increased costs for generation capacity.

We note that the disclosure of utilities' avoided costs was discussed extensively at the September 29, 1993 hearing concerning the RFP rule. The utilities' primary objections to releasing this information dealt with the concern that utilities would be bound by these cost estimates and that bids would tend to converge around the utilities' avoided cost. The hearing transcript, however, indicates that the intent of the rule was not to hold utilities to the avoided cost estimates published in their RFPs, but rather to give this Commission information needed to continue to review

additional expenditures over the life of the plant. The utilities' avoided cost data would also provide some basic information to potential bidders and act as a cross reference when utilities file a need determination either alone or jointly with a non-utility generator. Further, it is necessary for utilities to publish avoided cost estimates to allow for the continuation of standard offer contracts with qualifying facilities. Disclosure of this information is also necessary for this Commission to evaluate the utilities' Ten-Year Site Plans and conservation programs. Finally, we note that a substantial portion of the data required by subsection 4a of the RFP rule was recently published by Gulf as part of its 1998 revised Ten-Year Site Plan.

The focus of Gulf's argument is that, given the increase in wholesale competition, bids will tend to converge around Gulf's avoided cost if this information is published in its RFP. In support of this position, Gulf supplied the affidavits of M. W. Howell, Transmission and System Control Manager for Gulf; John F. Young, Vice President of Southern Wholesale Energy; and Hugh A. Gower, a Certified Public Accountant. We note that this argument was raised and considered at our September 29, 1993 rulemaking hearing, yet we found that avoided cost data should be included in RFPs. Further, we find that the possibility that bids will converge around the utility's avoided cost is less likely today than when the RFP rule was implemented.

We agree with Gulf's statement that competition in the wholesale market has increased since the RFP rule was implemented in 1994. However, we believe that this increase in competition will lessen the possibility that potential bidders will not present their lowest price. Pursuant to the RFP rule, utilities may select finalists from the list of bidders and negotiate a final price. Even if a utility publishes its avoided cost estimates, potential bidders will compete with each other to make it to the negotiating table. The increased number of potential bidders in today's market thus provides more incentive for bidders to present their lowest price to make it to final negotiations. Further, the utility may reject all of the bids if it believes, and can show, that another option is the most cost-effective. Thus, we find that Gulf has not shown that a waiver of the requirements of subparagraph 4a of the RFP rule will more likely result in a lower cost supply of electricity to Gulf and its general body of ratepayers. Accordingly, we find that Gulf has not demonstrated that application of the RFP rule will create a substantial hardship on

Gulf or its customers or that the purpose of the underlying statute will be achieved if the waiver is granted.

In its comments, LEAF notes that while Gulf's apparent concern is with the financial information required by the RFP rule, Gulf has asked for a waiver from all the information requirements of the rule. LEAF argues that it is not necessarily harmful to Gulf to release these financial assumptions. We agree. As stated above, a substantial portion of this information is already publicly available through Gulf's 1998 revised Ten-Year Site Plan and, as we found above, its release will not likely result in a higher cost supply of power.

LEAF also notes that Gulf will be the first utility to issue an RFP under the requirements of the RFP rule. Thus, LEAF expressed concern that waiver of the RFP rule in this case will set a precedent that may "carve out" the use of the rule in the future. We share this concern. If we granted such a broad waiver, a precedent would be set that would require persons to look not only to the RFP rule but also to the waiver in order to determine the state of the law on RFPs.

In conclusion, we deny Gulf's request for a waiver of the requirements of Rule 25-22.082(4)(a), Florida Administrative Code. Given the increase in wholesale competition, the possibility that bids will converge around the utility's avoided cost if this data is disclosed in the RFP is less likely today than when the RFP rule was implemented. Further, a substantial portion of the data required by subsection 4a of the RFP rule was recently published by Gulf in its 1998 revised Ten-Year Site Plan. Therefore, Gulf has not demonstrated that application of the RFP rule will create a substantial hardship on Gulf or its customers. In addition, it is not clear whether the purpose of the underlying statute will be achieved by the means suggested by Gulf.

Based on the foregoing, it is

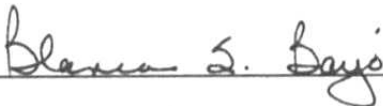
ORDERED by the Florida Public Service Commission that Gulf Power Company's petition for waiver of the requirements of Rule 25-22.082(4)(a), Florida Administrative Code, is denied. It is further

ORDER NO. PSC-98-1202-FOF-EI  
DOCKET NO. 980783-EI  
PAGE 6

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 9th day of September, 1998.

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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

WCK

DISSENT

Commissioner Deason dissents from the Commission's opinion.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as

ORDER NO. PSC-98-1202-FOF-EI  
DOCKET NO. 980783-EI  
PAGE 7

well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 30, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.