

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 010827-EI
ORDER NO. PSC-01-1682-PCO-EI
ISSUED: August 20, 2001

ORDER DENYING MOTION TO STRIKE AND MOTION TO CONTINUE THE HEARING, REVISING ORDER ESTABLISHING PROCEDURE, AND REVISING TIME FRAMES FOR DISCOVERY AND MOTIONS

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

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). Gulf proposes to sell the Smith Unit 3 facility, currently under construction, to Southern Power and to obtain capacity and energy from the facility under the terms of the PPA. Gulf would recover the cost of the capacity and energy through the recovery clauses. Gulf obtained a certificate of need for the facility, and the ability to recover the cost of the facility through base rates, by Order No. PSC-99-1478-FOF-EI, issued in Docket No. 990325-EI on August 16, 1999. The matter is set for hearing. The Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) are intervenors.

On August 1, 2001, Gulf filed supplemental, direct testimony. On August 3, 2001, FIPUG filed a Motion to Strike Gulf Power Company's "Supplemental" Direct Testimony or in the Alternative, to Continue the Hearing and Extend the Date for Intervenor Testimony. On August 9, 2001, Gulf filed its Response.

DOCUMENT NUMBER-DATE

10239 AUG 20 01

FPSC-COMMISSION CLERK

I. FIPUG'S MOTION to STRIKE GULF POWER COMPANY'S "SUPPLEMENTAL" DIRECT TESTIMONY OR IN THE ALTERNATIVE, TO CONTINUE THE HEARING AND EXTEND THE DATE FOR INTERVENOR TESTIMONY

FIPUG's Position

FIPUG states that Gulf's Petition in this docket contains no quantitative comparison of the costs and benefits of the PPA as opposed to inclusion of Smith Unit 3 in rate base. FIPUG notes that an expedited schedule for this docket despite FIPUG's objections that the expedited schedule was an abuse of FIPUG's right to due process. FIPUG further notes that Gulf never sought or received permission to file supplemental testimony, such testimony is not included in the expedited schedule, and Gulf gave no reason for filing supplemental testimony.

FIPUG contends that the supplemental testimony includes documents which should have been part of the direct testimony Gulf initially filed on June 18, 2001. The supplemental testimony includes the agreement under which property will be transferred from Gulf to Southern Power, an interconnection agreement, and an operating agreement.

FIPUG argues that allowing the Supplemental Testimony to stand gives Gulf two opportunities to file its direct case, which is prejudicial to the intervenors and fundamentally unfair at any time but especially so under the expedited schedule. FIPUG claims that Gulf selected the date to file its direct testimony, and it was obligated to file its case on that date. Gulf is not now entitled to bolster its case, after hearing the objections and legal arguments of the parties as to the deficiencies of its direct testimony.

FIPUG states that the burden of filing intervenor testimony by August 17, 2001, is "almost impossible" to meet without having to address the supplemental testimony. FIPUG argues that to be required to respond to both the direct and supplemental, direct testimony without granting additional time "is at procedural odds with the rights of the parties."

For the reasons provided above, FIPUG asks that the supplemental testimony be stricken or that the hearing be continued.

Gulf's Position

Gulf responds by first listing all that it has done, under significant time constraints, to respond to the needs of Staff and interested parties. This includes several meetings with Staff and the parties, and responding to Staff's numerous discovery requests within 10 days. Gulf also notes that it was willing to shorten its time to respond to intervenor testimony so that the intervenors would have more time to prepare their testimony.

Gulf next explains that it proposed three issues for this docket, but after two issue identification meetings there were 19 issues. Gulf further explains that its supplemental testimony is an attempt to respond to the expanded list of issues. Gulf contends that the supplemental testimony will make its position on certain topics clear and facilitate stipulations.

Gulf seems to argue that its supplemental testimony has actually helped, not hindered, FIPUG in preparing its case. In support of its contention Gulf notes that FIPUG's consultants did not sign non-disclosure agreements until after the supplemental testimony was filed, and that FIPUG did not submit discovery requests until after the supplemental testimony was filed. Gulf states that FIPUG has more than two weeks to consider the 13 pages of supplemental testimony before intervenor testimony is due. Gulf has only four days to prepare its rebuttal to intervenor and Staff testimony. Gulf argues that it would be unreasonable to allow FIPUG's "unsubstantiated claims of prejudice to either result in probative evidence being excluded from consideration ... or to deprive the Commission of an opportunity to consider the [PPA] at all by delaying the hearing beyond September 5, 2001."

Gulf explains that FIPUG's Motion highlights a common misconception held by participants in this docket. The misconception, claims Gulf, is that Gulf is first seeking authority to transfer Smith Unit 3 to Southern Power and then seeks approval of its PPA. Gulf clarifies that it seeks approval of the PPA, and if the PPA is approved, the unit will be transferred.

Gulf concludes by noting that unless this case is expedited, Gulf will be compelled to pursue rate base treatment of Smith Unit 3. Gulf claims that "FIPUG and others have attempted to deprive the Commission of an opportunity to consider evidence in this case, either through opposition to an expedited hearing, a motion to dismiss or now a motion to strike testimony." Gulf states that granting the Motion to Strike would deprive the Commission of evidence intended to respond to the issues in this case. Granting FIPUG's alternative Motion for a continuance "would, in essence, be a denial of the request for an expedited decision in this case which is tantamount to a denial of a hearing.

Decision

Gulf's efforts to meet with and respond to the discovery requests of Staff and the Intervenors are duly noted. However, it is incumbent upon Gulf to do all it has done, and to continue such efforts because Gulf requested expedited treatment of this docket.

The issue raised by FIPUG's Motion is one of fundamental fairness. Gulf contends that two weeks is sufficient time for FIPUG to respond to 13 pages of supplemental testimony. However, the 13 pages of testimony was accompanied by the following six exhibits: a quantitative analysis comparing the cost effectiveness of the PPA and rate base treatment of Smith Unit 3; the Asset Purchase and Sale Agreement; the Assignment and Assumption Agreement; the Bill of Sale; the Interconnection Agreement; and, the Operating Agreement.

The supplemental testimony is lengthy and significant to the proceeding. Of the six exhibits, FIPUG, OPC and Staff have only seen the analysis of cost effectiveness because it was generated in response to a discovery request by Staff. Furthermore, until it was filed as supplemental testimony, the parties could not have planned to treat it as testimony. Equally important is that the supplemental testimony introduces evidence that broadens the case. It is not evidence which merely adds detail to the original prefiled testimony. Under the circumstances of this case, I find that two weeks is not sufficient time for FIPUG or OPC and Staff to respond to this new information, and it is fundamentally unfair to require FIPUG or OPC and Staff to do so.

That being said, every effort should be made to determine if the PPA is in the best interest of Gulf's ratepayers. Gulf's supplemental testimony provides needed information to evaluate the PPA. In addition, as Gulf notes, if we do not expedite this proceeding it will withdraw the PPA.

A number of interests must be balanced in deciding on this Motion. Those interests include, the intervenor's due process rights, the interests of Gulf's general body of ratepayers in having the the lowest cost option, and the interest of the Commission in getting the facts on the table in order to make an informed decision. Granting FIPUG's Motions will not provide balanced treatment and for that reason the Motions are denied.

For the reasons provided above, the hearing will not be continued and the supplemental testimony will not be stricken. In addition, the date for filing intervenor testimony will be pushed back from August 17, 2001, to August 27, 2001, and Gulf will not have the opportunity to file rebuttal testimony.

II. OTHER PROCEDURAL MATTERS

In addition to the revised dates for filing of testimony, addressed in Part I of this Order, filing times for responses to motions and discovery shall be changed as follows: 1) responses to discovery requests shall be filed within 5 days of the date of service by hand and within 7 days of the date of service by mail; 2) responses to motions shall be within 3 business days of the date of service by hand, and within 5 days of the date of service by mail. Gulf shall provide the information, for which it has stated no objection, requested by all outstanding discovery requests within three business days of the issuance of this Order.

At the status conferences held on July 13, 2001, and August 1, 2001, OPC raised the question of whether the Commission can make a bench decision in this docket. Because this is a critical issue, the parties shall file briefs on the following question:

Can the Commission take final agency action in a formal hearing by making a decision from the bench over the objection of a party?

The briefs shall be filed no later than August 31, 2001.

Based on the foregoing, it is

ORDERED by the Commissioner Braulio L. Baez, as Prehearing Officer, that the Motion to Strike Gulf Power Company's "Supplemental" Direct Testimony or in the Alternative, to Continue the Hearing and Extend the Date for Intervenor Testimony filed by the Florida Industrial Power Users Group is denied. It is further

ORDERED that the deadline for filing intervenor testimony is August 27, 2001. It is further

ORDERED that the deadline for filing staff testimony is August 29, 2001. It is further

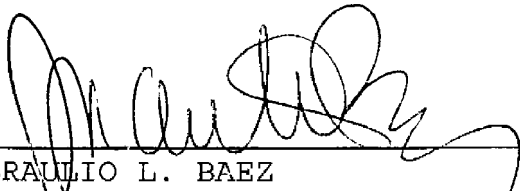
ORDERED that responses to discovery requests shall be filed within 5 days of the date of service by hand and within 7 days of the date of service by mail. Gulf Power Company shall provide the documents requested by and any objections to FIPUG's First Request for Production of Documents within 3 business days of the issuance of this Order. It is further

ORDERED that responses to motions shall be within 3 business days of the date of service by hand, and within 5 days of the date of service by mail. It is further

ORDERED that the parties shall provide briefs on the issue of a bench decision no later than August 31, 2001.

ORDER NO. PSC-01-1682-PCO-EI
DOCKET NO. 010827-EI
PAGE 7

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 20th Day of August, 2001.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

MKS

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 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling

ORDER NO. PSC-01-1682-PCO-EI

DOCKET NO. 010827-EI

PAGE 8

or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.