



# Public Service Commission

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

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RECORDS AND REPORTING

**DATE:** APRIL 22, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF ELECTRIC AND GAS (HAFF) *msw JS NJ JDJ*  
DIVISION OF LEGAL SERVICES (C. KEATING) *RVE WCK*

**RE:** DOCKET NO. 990172-EI - PETITION BY GULF POWER COMPANY FOR WAIVER OF RULE 25-17.0832(4), F.A.C., WHICH SETS FORTH REQUIREMENTS FOR FILING OF A STANDARD OFFER CONTRACT

**AGENDA:** 05/04/99 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** MAY 13, 1999 - PETITION DEEMED APPROVED IF NOT GRANTED OR DENIED WITHIN 90 DAYS OF RECEIPT

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\EAG\WP\990172.RCM

### CASE BACKGROUND

On October 14, 1998, in Docket No. 981346-EQ, Gulf Power Company (Gulf) petitioned for Commission approval to establish a new standard offer contract for the purchase of firm capacity and energy from qualifying facilities as defined in Rule 25-17.0832(4)(a), Florida Administrative Code. For purposes of the proposed standard offer contract, Gulf chose as its avoided unit a 30 MW portion of a Southern Company combustion turbine (CT) unit with an in-service date of June 2006. However, Gulf's June 1998 Ten-Year Site Plan identified Gulf's next planned generating unit as a 532 MW combined cycle (CC) unit with an in-service date of June 2002.

In a memorandum dated November 5, 1999, staff recommended that the Commission deny Gulf's petition because the proposed standard

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offer contract was not based on Gulf's next identified generating unit and, thus, did not comply with the Commission's rules for establishing standard offer contracts. Staff noted three options available for Gulf to pursue: (1) petition for waiver of the Commission's standard offer contract rule; (2) petition for rulemaking to repeal the Commission's standard offer contract rule; and (3) file for approval of a standard offer contract based on Gulf's next planned generating unit addition. Gulf withdrew its petition prior to the Commission's vote, and Docket No. 981346-EQ was closed.

On February 12, 1999, Gulf filed a petition for waiver of the requirements of Rule 25-17.0832(4), Florida Administrative Code. In its petition, Gulf contends that none of its planned generation unit additions is suitable for designation as an avoided unit for purposes of a standard offer contract due to the timing of those planned additions. Therefore, Gulf argues, no reasonable standard offer contract can be established at this time without causing harm to Gulf and its ratepayers. This recommendation addresses Gulf's rule waiver petition.

Pursuant to Section 120.542(6), Florida Statutes, notice of Gulf's petition was submitted to the Secretary of State for publication in the March 5, 1999, Florida Administrative Weekly. On March 17, 1999, the Florida Industrial Cogeneration Association (FICA) filed preliminary comments in opposition to Gulf's petition. No other comments concerning the petition were filed within the 14-day comment period provided by Rule 28-104.003, Florida Administrative Code. In accordance with Section 120.542(8), Florida Statutes, the petition is deemed approved if the Commission does not grant or deny it by May 13, 1999.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Gulf Power Company's petition for waiver of Rule 25-17.0832(4), Florida Administrative Code?

**RECOMMENDATION:** No. The Commission should deny Gulf Power Company's petition for waiver of Rule 25-17.0832(4), Florida Administrative Code, because the petition does not satisfy the statutory criteria for a rule waiver. The Commission should require Gulf to submit a standard offer contract, consistent with Rule 25-17.0832, Florida Administrative Code, based on a 2002 combined cycle unit with an open solicitation period of two weeks. (HAFF, C. KEATING)

**STAFF ANALYSIS:**

**I. Standard for Granting Rule Waiver**

Section 120.542, Florida Statutes (1997), 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.

**II. Gulf's Arguments and FICA's Preliminary Comments**

Gulf argues that the purpose of the statute underlying Rule 25-17.0832(4), Florida Administrative Code, will be achieved if the petition is granted. Further, Gulf asserts that application of the rule would create a substantial hardship for Gulf and would violate principles of fairness. FICA disputes Gulf's arguments.

A. Purpose of the Underlying Statute Criterion

Gulf states that Rule 25-17.0832(4), Florida Administrative Code, was promulgated to implement Section 366.051, Florida Statutes. Gulf notes that this statute directs the Commission to establish guidelines and rates for the purchase of firm capacity and energy by electric utilities from cogenerators and small power producers. Gulf asserts that the purpose of this statute is to require purchases of capacity and energy by electric utilities from cogeneration and small power producers where such purchases would result in a benefit to the general body of ratepayers. Gulf further asserts that this statutory mandate would be frustrated where an electric utility is required to make purchases that would result in harm to the general body of ratepayers. Thus, Gulf contends that the underlying purpose of Section 366.051, Florida Statutes, as implemented by Rule 25-17.0832(4), F.A.C., is met through this waiver.

In its preliminary comments, FICA argues that Gulf has not demonstrated how the purpose of the underlying statute will be achieved if its waiver petition is granted. FICA asserts that the statutes underlying Rule 25-17.0832(4), Florida Administrative Code, are Sections 366.051 and 403.503, Florida Statutes. FICA notes that Section 366.051, Florida Statutes, is specifically designed to encourage cogeneration and small power production. FICA questions how that purpose can be achieved if Gulf does not file a standard offer based on its full avoided cost, i.e., the cost of its next planned generating unit. FICA also notes that Section 403.503, Florida Statutes, is part of the Florida Electric Power Plant Siting Act (PPSA) permitting process designed to balance the need for new power plants with environmental impacts. FICA points out that the Commission, in making a determination of need under the PPSA, must consider whether the proposed plant is the most cost-effective alternative available. FICA asserts that Gulf will be constrained in proving that its proposed power plant is the most cost-effective alternative if it does not file a standard offer based on its full avoided cost, i.e., the cost of the proposed power plant.

B. Substantial Hardship Criterion

Gulf's April 1998 Ten-Year Site Plan (TYSP) identified Gulf's next planned generating unit as a 100 MW CT unit with an in-service date of May 2003. Gulf amended its TYSP in June 1998 to reflect updated planning information. As stated above, the amended site plan identifies Gulf's next planned generating units as a 532 MW CC unit with an in-service date of June 2002 and a 30 MW portion of a

Southern Company CT unit with an in-service date of June 2006. Gulf argues that the type and timing of these two units make both unsuitable for designation as an avoided unit for purposes of a standard offer contract.

First, Gulf contends that its next planned generating unit, the 2002 CC unit, is unsuitable for designation as Gulf's avoided unit because the activities necessary to construct this unit have already begun. Gulf states that at the time this unit became a part of Gulf's generation resource plan, it was already too late to submit a standard offer contract for this unit. By that time, Gulf had to pursue the activities necessary to construct the unit, such as issuing a Request for Proposals (RFP), in order to meet the planned in-service date. Gulf is currently seeking a Determination of Need from the Commission for the 2002 CC unit. Gulf notes that Rule 25-17.0832(4)(e)(5), Florida Administrative Code, requires utilities to end the open solicitation period for standard offer contracts prior to the issuance of timely notice of a Request for Proposals. Gulf asserts that if the Commission requires it to establish a standard offer contract based on the 2002 CC unit, a delay in construction of the unit would result and, consequently, its ratepayers' need for capacity and energy would not be met. Gulf argues that this would impose a substantial hardship on Gulf and its ratepayers while providing no tangible benefits.

Second, Gulf contends that the next unit in its generation resource plan, the 30 MW portion of a Southern system CT unit, is unsuitable for designation as Gulf's avoided unit because such a designation would be premature. Gulf points out that units too far out on the planning horizon may or may not be built depending on load growth, the effect of demand-side management measures, and technology changes. Gulf asserts if the Commission requires it to establish a standard offer contract at this time based on the 2006 CT unit, there would be significant potential for Gulf's ratepayers to be burdened with costly capacity and energy that is not needed. Gulf argues that this would result in substantial hardship to Gulf and its ratepayers. Gulf states that the Commission, in Order No. PSC-94-1008-FOF-EQ, issued August 22, 1994, in Docket No. 940094-EQ, recognized that designating a unit prematurely as a basis for a standard offer contract is not in the ratepayers' best interest.

In its preliminary comments, FICA challenges Gulf's assertion that there was insufficient time in its planning schedule to issue both a standard offer and an RFP for the 2002 CC unit. FICA asserts that there was a two-month period between the filing of Gulf's amended 1998 TYSP and the issuance of Gulf's RFP during which a solicitation period for standard offer contracts could have

been opened. FICA also suggests that Rule 25-17.0832(4), Florida Administrative Code, may not prohibit an open solicitation period upon conclusion of the RFP process.

In addition, FICA argues that Gulf's description of its planning process is inconsistent with Gulf's argument that Gulf should be excused from complying with the standard offer rule because timing is so critical. Citing the affidavit attached to Gulf's petition, FICA notes Gulf's statement that its planning process utilizes an annual cycle coinciding with the calendar year. FICA observes that Gulf's amended 1998 TYSP does not appear to coincide with either a calendar year or a TYSP filing cycle. Again citing the affidavit, FICA notes Gulf's statement that the 2002 CC unit was the result of extensive evaluations, supplemental to the normal planning process, that had been conducted during the eight months prior to the April 1998 TYSP. FICA suggests that Gulf's planning process, by its own description, is flexible enough to accommodate a modest time period for standard offer solicitations based on the 2002 CC unit.

FICA also expresses concern that Gulf appears to be engaged in an ongoing effort to avoid purchasing firm capacity from small qualifying facilities under the standard offer rules and from other suppliers under the bidding rules. As the basis for this concern, FICA cites the timing of Gulf's generation planning activities, its TYSP filings, its petition for waiver of portions of the Commission's RFP rules, and its petition for approval of a standard offer contract based on a 2006 avoided unit.

### C. Principles of Fairness Criterion

Gulf asserts that if the Commission requires it to establish a standard offer contract at this time based on the 30 MW portion of Southern's CT unit planned for 2006, such treatment would violate principles of fairness. Citing Order No. PSC-94-1008-FOF-EQ and Order No. 25550, Gulf states that the Commission has previously refused to require similarly situated utilities, i.e., investor-owned utilities subject to Rule 25-17.0832(4), Florida Administrative Code, to designate a unit seven or more years out on the planning horizon as an avoided unit. Gulf argues that it should be afforded the same treatment and not be required to designate the 2006 CT unit as its avoided unit.

In its comments, FICA argues that Gulf has not demonstrated that application of the rule affects Gulf in a manner significantly different from the way it affects other similarly situated persons who are also subject to the rule. FICA asserts that if Gulf's

petition is granted, any utility subject to the rule could obtain a waiver by simply alleging that time constraints prevented it from publishing a standard offer contract. FICA states that such a precedent would render the standard offer rules meaningless.

### III. Staff Analysis

Gulf's argument against choosing the 2002 CC unit is based on timing. This concern could have been avoided had Gulf filed its petition for rule waiver shortly after deciding it needed to construct the 2002 CC unit. Regardless of the timing concern, Gulf's petition should still be denied.

In June 1998, eight months prior to filing this petition, Gulf filed an amended Ten-Year Site Plan which identified its next planned generating unit as a 538 MW CC unit with a June 2002 in-service date. At that time, a brief solicitation period for standard offer contracts based on this unit was still feasible. However, Gulf did not seek approval of a standard offer contract based on the new avoided unit and did not request a waiver of Rule 25-17.0832(4), Florida Administrative Code, at that time. Instead, four months later, in October 1998, Gulf sought approval for a standard offer contract based on a 30 MW portion of a Southern Company 2006 CT unit rather than Gulf's next avoided unit (Docket No. 981346-EQ). Thus, staff agrees with both Gulf and FICA that the 2006 CT unit is not an appropriate basis for Gulf's standard offer contract. After staff filed a recommendation that Gulf's petition to approve the 2006 CT unit be denied, Gulf withdrew its petition in November. Three months later, Gulf filed this rule waiver petition.

Gulf should have properly addressed the standard offer contract issue when it arose in June 1998, thus allowing the Commission to make a timely and effective decision. Gulf did not petition for approval of a standard offer contract or for a rule waiver prior to issuing an RFP and now suggests that the Commission has no remedy but to grant a rule waiver. Staff disagrees and recommends that the Commission deny Gulf's petition. As discussed below, Gulf has not demonstrated that the purpose of the underlying statute will be achieved if the waiver is granted and has not demonstrated that application of the rule will create a substantial hardship or violates principles of fairness. Staff recommends that Gulf be required to submit for Commission review a standard offer contract based on the 2002 CC unit with an open solicitation period of two weeks. It is recognized that any firm capacity payments made by Gulf to a qualifying facility pursuant to this standard offer contract could be a subsidy to the qualifying facility.

cannot know whether purchases from cogenerators or small power producers would have resulted in benefit to its ratepayers.

Staff recognizes that requiring Gulf to issue a standard offer contract at this time based on the 2002 CC unit most likely will not result in a benefit to Gulf's ratepayers. It is further recognized that any capacity purchased by Gulf pursuant to this standard offer contract will not likely defer or avoid the 2002 CC unit. If any qualifying facility signs Gulf's standard offer contract, Gulf will essentially pay twice for firm capacity. In effect, Gulf's capacity payments to the qualifying facility could amount to a subsidy. Staff notes, however, that the potential subsidy could be mitigated, as Gulf may have opportunities to sell any surplus capacity to other Southern Company member utilities or to the wholesale market.

Staff believes that the only manner in which the purpose of the statute can be achieved in this case is to require Gulf to seek Commission approval of a standard offer contract based on the 2002 CC unit. The standard offer contract should provide for a two-week open solicitation period to allow potential parties sufficient time to sign the contract. Staff does not anticipate much, if any, response to this standard offer. Thus, staff believes that Gulf's ratepayers will not be "materially burdened" with costs that could result from any standard offer contracts signed during the two-week open solicitation period.

This approach is consistent with the approach recently taken by Tampa Electric Company (TECO) in Docket No. 981893-EQ. In that case, TECO's planning process indicated that its next planned generating unit would need to be built sooner than expected. While TECO was not required to issue an RFP for the unit, there was no time to issue a standard offer contract that could effectively defer the necessity to construct the unit. In order to comply with the rule, however, TECO petitioned for approval of a standard offer contract based on that unit. The contract called for a brief open solicitation period of two weeks. By Order No. PSC-99-0748-FOF-EQ, the Commission approved TECO's petition.

#### B. Substantial Hardship / Principles of Fairness Criteria

Gulf asserts that if the Commission requires it to establish a standard offer contract based on the 2002 CC unit, a delay in construction of the unit would result and, consequently, its ratepayers' need for capacity and energy would not be met. Gulf argues that this would impose a substantial hardship on Gulf and its ratepayers while providing no tangible benefits. Staff



believes, however, that the hardship alleged by Gulf is not created by application of the rule, but by actions entirely within Gulf's control. Gulf is well aware of its own planning processes and should be well aware of the Commission's rules, including the standard offer rule, related to that process. If Gulf had issued a standard offer contract or sought waiver of the rule in a timely manner, Gulf would have been able to mitigate any potential hardship caused by a delay in construction of its next planned generating unit. In any event, staff believes that if the Commission adopts staff's recommendation to require Gulf to seek approval of a standard offer contract based on the 2002 CC unit with a two-week open solicitation period, neither Gulf nor its ratepayers will face a substantial hardship. The course of action recommended by staff will not cause Gulf to delay construction of its next unit.

C. Conclusion

In summary, staff recommends that the Commission deny Gulf's petition for waiver of Rule 25-17.0832(4), Florida Administrative Code. Gulf has not demonstrated that the purpose of the underlying statute will be achieved if the waiver is granted and has not demonstrated that application of the rule will create a substantial hardship or violate principles of fairness. Gulf should be required to submit for Commission review a standard offer contract and tariff based on the 2002 CC unit and allow for an open solicitation period of two weeks.

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** A consummating order should be issued, and this docket should be closed if no person whose substantial interests are affected by the proposed action files a protest within the 21-day protest period. (C. KEATING)

**STAFF ANALYSIS:** At the conclusion of the protest period, if no protest is filed, a consummating order should be issued and this docket should be closed.