



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: JULY 26, 2001

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

FROM: DIVISION OF LEGAL SERVICES (STERN, ELIAS) MKS
DIVISION OF SAFETY & ELECTRIC RELIABILITY (HARLOW,
WOODALL) *qH/or qL*

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: 08/07/01 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\010827R2.RCM

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31 JUL 27 PM 2:00
COMMISSION CLERK
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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) is an intervenor.

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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 the Motion to Dismiss be granted?

RECOMMENDATION: The Motion should be granted in part and denied in part, and Gulf should be granted leave to amend its Petition. The amended petition should be filed no later than three days after the date of the vote on this issue.

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

A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

Gulf argues that there is no minimum filing requirement when a utility requests approval of a purchased power agreement. However, pursuant to Rule 28-106.201(2), Florida Administrative Code, Gulf's petition must fulfill six specific requirements. Of those six, Gulf's Petition has not fulfilled the following two requirements:

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(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate,

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

Gulf's Petition is ambiguous as to what, if any, disputed facts exist, and what it believes the ultimate facts are. Gulf, however, does state a claim for which relief can be granted. Specifically, Gulf asks for approval of the PPA and recovery of costs through the appropriate cost recovery clauses. The Commission has jurisdiction over such a petition under its ratemaking authority found in the provisions of Chapter 366, Florida Statutes.

Section 120.569(c), Florida Statutes, and Rule 28-106.201(4), Florida Administrative Code, allow that a petition not in substantial compliance with Rule 28-106.201(2) may be amended at least once unless "it conclusively appears from the face of the petition that the defect cannot be cured."

Staff recommends that Gulf be granted leave to file an amended petition because the defects in the filed Petition can be cured. By amending the Petition, Gulf will clarify its position. The amended petition should provide the information required by Rules 28-106.201(2)(d) and (e), Florida Administrative Code. Because this proceeding is being expedited at Gulf's request, the amended petition should be filed no later than three days after the date of the Commission's vote on this recommendation.

OPC's argument that the Need Determination Order cannot be altered unless Gulf shows that circumstances have changed is not properly addressed in a motion to dismiss for failure to state a claim. OPC's argument goes to the merits of the claim, not the facial sufficiency of the claim.

Similarly, OPC's arguments that Gulf's prefiled, direct testimony is insufficient and that Gulf has not carried its burden of proof exceed the scope of a motion to dismiss. These arguments go to the merits of the claim and the weighing of evidence.

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For the reasons stated above, Staff recommends that Gulf be granted leave to amend its Petition to comply with Rules 28-106.201(2)(d) and (e), and that the amended petition be filed within three days of the Commission's vote on this recommendation. Accordingly, OPC's Motion to Dismiss should be granted in part and denied in part.

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.