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COMMISSION
CLERK

August 9, 2001

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

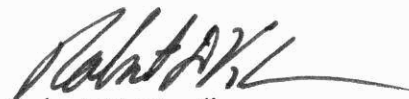
RE: Docket No. 010827-EI

Dear Ms. Bayó:

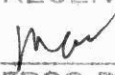
Enclosed are an original and fifteen copies of Office of Public Counsel's Motion to Compel Gulf Power Company to Respond to Discovery and Request for Expedited Motion Hearing for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Office of Public Counsel's Motion to Compel Gulf Power Company to Respond to Discovery and Request for Expedited Motion Hearing in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,


Robert D. Vandiver
Associate Public Counsel

- APP _____
- CAF _____
- CMP _____ RDV/dsb
- COM 5 Enclosures
- CTR _____
- ECR _____
- LEG I
- OPC _____
- PAI _____
- RGO _____
- SEC I
- SER _____
- OTH _____

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
09709 AUG-9 01
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Gulf Power Company's petition 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
FILED: August 9, 2001

OFFICE OF PUBLIC COUNSEL'S
MOTION TO COMPEL GULF POWER COMPANY
TO RESPOND TO DISCOVERY AND REQUEST FOR
EXPEDITED MOTION HEARING

The Office of Public Counsel ("OPC" or "Citizens"), pursuant to Rule 28-106.206, Florida Administrative Code, moves the Commission for entry of an order compelling Gulf Power Company ("Gulf Power" or the "Company") to fully respond to the discovery propounded to it by the Citizens and, as grounds therefor, states:

Background

1. On June 8, 2001, Gulf Power filed its petition in this docket seeking expedited treatment. Since that time, the Commission and all the parties have worked at a furious pace to accommodate Gulf Power. The extremely tight scheduling deadlines, the September 5, 2001, hearing date and all the other milestone dates in this docket have been set solely for the convenience of Gulf Power Company.

2. Intervenors such as the Florida Industrial Power Users Group (FIPUG) and the Citizens have expressed concern on the record that, in the rush to get this case heard, adequate time to prepare for the hearing may be lacking.

DOCUMENT NUMBER-DATE

09709 AUG-98

FPSC-COMMISSION CLERK

3. Citizens have attempted to prepare as fast as they can in this limited amount of time. Citizens have attended all issue identification conferences held by staff, all meetings with the prehearing officer and have served discovery on Gulf Power Company.

4. As relevant here, Citizen's Third Request for Production of Documents Number 7 read: "Please provide copies of all notes, minutes or any records of meetings at which the decision to seek approval of the purchased power agreement and/or sell Smith Unit 3 to Southern Power were discussed." Gulf Power provided no documents in response to this request.

5. Given that no notes exist of any meetings, Citizens sought to follow up for other documentation, reasoning that perhaps prudent a business person wrote down something before transferring/purchasing a \$225 million combined cycle electric plant. Citizens believe there to be a concerted plan of Southern Power to purchase combined cycle plants in the Southeastern United States.

6. Gulf Power is seeking expedited treatment here. Gulf Power is proposing to transfer a plant, originally sited to Gulf Power, to an affiliate. Gulf Power should not be permitted to transfer a \$225 million asset to a sister company, controlled by common parent and then blithely say Gulf Power doesn't have access to the sister company records. See Section 366.093(1), Florida Statutes.

7. Virtually every production response served contains the following: "Gulf does not possess or have access to any documents that would be responsive to this request." Discovery is not limited solely to documents in possession of a party. They can also be in the party's control. Parties thus can be requested to produce documents in the hands of their attorney, insurer, subsidiary, or another person outside the jurisdiction of the forum. Florida Civil Practice Before Trial, §16.56,

citing 8 Wright & Miller, Federal Practice and Procedure, §2210. The term “control” is not equated to “possession.” Trawick, Florida Practice and Procedure, §16-10 (1982).

8. In fact, Florida Rule of Civil Procedure 1.350(a) itself uses the terms “possession, custody or control.” There would be no need for the word “control” in addition to the word “possession” if it were not intended to reach documents that might not necessarily be in the actual possession of the other party, but subject to that party’s “control.”

9. Depositions are scheduled for August 15, 2001. A hearing is set for September 5, 2001. Time is of the essence. Citizens respectfully request immediate oral argument on this matter and expedited responses to discovery. Any delay here is truly justice denied.

Each Production Request is discussed separately below:

POD No. 8. Please provide the strategic plan and/or business plan for Southern Power.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

In Mr. Labrato’s direct prefiled testimony at page 3, he discusses how Gulf Power’s PPA is consistent with the findings of the Energy 2020 Study Commission formed by Governor Bush. The Citizens believe this “external factor” as a reason is an after-the-fact rationalization. To attempt to prove this fact, we need to first go to Staff’s First Set of Interrogatories, Number 14. (This answer appears as attachment I.) Briefly, this shows that Southern Power has recently purchased combined cycle units from Alabama Power Company and has entered into a Purchase Power Agreement (PPA) with Georgia Power on two combined cycle units. Alabama Power and Georgia Power are operating

companies of the Southern Company just like Gulf Power. Citizens believe there is a common plan for Southern Power to acquire various operating company plants and that this is the motivation for the PPA at issue here, not the findings of 2020 Study Commission . Citizens are certainly able to inquire into these matters to test the credibility of the 2020 assertions. Certainly these inquiries may lead to discoverable evidence.

Southern Power is seeking to own a \$225 million facility that is needed to serve Florida citizens, yet providing a copy of its business plan to Florida citizens is “irrelevant.” The citizens believe Southern Power should be made to produce this document immediately.

POD NO. 9. Please provide all Southern Power documents which discuss or analyze the acquisition of combined cycle units generally.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

Citizens will not reargue the points in Production of Documents Number 8, but the arguments apply with equal force here. Suffice it to say if the business plan or strategy does not discuss the activities discussed in Staff Interrogatory Number 14 and at issue here, this production request would capture those Southern Power Company documents responsive to the request. The documents are relevant for the same reason -- they cast doubt on the credibility of Gulf’s reasons for bringing this petition.

POD NO. 10. Please provide all Southern Power documents which discuss or analyze the acquisition of combined cycle units of the operating companies of the Southern Company.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

This POD puts a finer point on POD No. 9. and is directly related to Staff Interrogatory Number 14 in that it relates operating companies within the Southern Company. See attachment I and previous arguments.

POD NO. 11. Please provide all Southern Company documents which discuss or analyze the acquisition of combined cycle units by Southern Power.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

Citizens have no way of knowing whether the plan for Southern Power to acquire the various operating company plants was conceived at the Southern Power corporate level or higher up on the corporate food chain, e.g. the Southern Company. It is only by discovery of corporate parent

company documents that the citizens can know the answer to these questions. If the citizens cannot discover the records of corporate siblings and parents then any utility can simply evade the Commission's regulatory authority by forming a corporation relative and claiming we cannot ask Uncle Joe for the records. See Section 366.093(1), Florida Statutes; Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 377, 399 (Fla. 1994).

POD NO.12. Please provide all Southern Power documents which discuss, evaluate, or analyze the acquisition of any power plant situated in the State of Florida.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

To the extent that the documents in the possession of Southern Power fail to mention the terms "combined cycle" or the "operating units of the Southern Company" which were requested in Production of Documents 9, 10 and 11, Gulf Power would certainly be well within its rights to not produce the documents, even though the documents were part of a common plan. It is possible that documents exist referencing a plan of acquisition which do not contain those terms. This request seeks to close that gap and get a more complete picture of the Southern Power strategy. The Citizens have a right to bring this strategy before the Commission, particularly since Gulf Power has opened the door by raising other factors as reason for this docket.

POD NO. 13. Please provide all Southern Power documents which discuss, analyze or evaluate the regulation on regulatory scheme in any way in the State of Florida.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf power to attempt to produce the requested documents. Gulf Power also objects to Citizen's Request No. 13 to the extent it asks for privileged communications protected by the attorney-client privilege and/or are attorney work product. The request seeks documents prepared by Southern Power officers and employees at the request of counsel which relate to the pending litigation and are protected from disclosure by the attorney-client privilege. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

There is a typographical error in the POD. The word "on" should read "or." That having been said, if there is a scheme to take retail generating units and convert them into wholesale generators to enhance the profitability of the Southern Company. Citizens are entitled to ask if, in the evaluation of this docket, Southern Power evaluated the regulatory climate in Florida prior to Gulf Power filing this petition.

In responses to POD's 13, 14 and 16, Gulf Power raises two closely related issues: attorney-client privilege and/or attorney work product. The leading case here is Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 377 (Fla. 1999). As to the attorney-client privilege, the burden rests on the party claiming it. Id. at 1383. Citizens challenge the right of Gulf Power to assert the right of Southern Power in the first instance. (If they cannot even obtain Southern Power

documents, are they in any position to assert Southern Power's rights?) The Court set forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 1383.

Here we only have Gulf Power's statement of privilege. To meet its burden of proof, Gulf Power should be required to produce the records and an in camera inspection by the Prehearing Officer be held on each document claimed to be privileged. Absent such a process, the Commission and parties have simply abdicated the process to Gulf Power. Whatever Gulf Power says is privileged is not necessarily privileged.

In terms of work product, the Supreme Court of Florida has spoken on this issue: "Florida Rule of Civil Procedure 1.280(b)(3) permits disclosure of work product if the party seeking discovery 'has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the material by other means.'" 632 So.2d at 1385.

This answers itself for the materials at issue. Citizens seek Gulf Power, Southern Power and Southern Company materials that are available nowhere else. Our case cannot be adequately prepared without them. The materials should be produced at once.

POD NO.14. Please provide any Southern Company documents which compare the regulatory regimes of Florida, Georgia and Alabama.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf Power also objects to Citizen's Request No. 14 to the extent it asks for privileged communications protected by the attorney-client privilege and/or are attorney work product. The request seeks documents prepared by Southern Power officers and employees at the request of counsel which relate to the pending litigation and are protected from disclosure by the attorney-client privilege. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

The arguments made with respect to POD NO. 13. apply with equal force here. Because Staff Interrogatory No. 14 clearly shows that the regulatory commission's in Alabama and Georgia have been involved in similar decisions, it is logical and appropriate for Citizens to inquire into these matter. Moreover, given Citizens' theory of the case that a common plan exists to acquire these generating units it is highly relevant to this docket.

POD NO. 15. Please provide the Georgia Commission Order for Plant Goat Rock referenced in Staff's First Set of Interrogatories No. 14.

Answer: This document is available in the public domain, accessible by the requesting party. Although Gulf does not presently have a copy in its possession, Gulf will attempt to provide a copy of the document within the time period allowed for response to this request.

Analysis

Citizens thought we were to expedite this case, yet Gulf Power apparently cannot pick up the telephone and have a sister company fax them an order.

POD NO.16. Please provide all Gulf Power Company documents which discuss the possibility of transferring Smith Unit 3 to Southern Power which were prepared between January 1, 2001 and May 31, 2001.

Answer: Gulf Power objects to this request to the extent that it asks for privileged communications protected by the attorney-client privilege and/or are attorney work product. Gulf Power will provide any non-privileged documents within the time period allowed for response to this request.

Analysis

The “time allowed for response to this request” is just past the hearing date. Citizens realize the points made in POD 13 we would only add that a very small number of the universe of documents would be expected to fall within the privilege. In any case, the process demands a complete accounting here. These are the utility documents. There can be no questions as to corporate shell games here. Privilege claims should be strictly construed.

POD NO. 17. Please provide all Southern Company documents which discuss the possible transfer of Smith Unit 3 to Southern Power prepared between January 1, 2001 and May 31, 2001.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

This again relates to Citizens' theory of the case. At this stage of the process, we cannot know if this transaction may involve ratepayers subsidizing nonutility activities. For this reason, the Commission has access to Southern Company and Southern Power records. Section 366.039, Florida Statutes (2000) See Southern Bell, 632 So.2d 1377, 1388.

POD NO. 18. Please provide all Southern Power documents which discuss or analyze the possible transfer of Smith Unit 3 to Southern Power prepared between January 1, 2001 and May 31, 2001.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

This again relates to Citizens' theory of the case. At this stage of the process, we cannot know if this transaction may involve ratepayers subsidizing nonutility activities. For this reason, the

Commission has access to Southern Company and Southern Power records. Section 366.039, Florida Statutes (2000) See Southern Bell, 632 So.2d 1377, 1388.

POD NO. 19. Please provide all Southern Company documents which reference an acquisition strategy of merchant plants by a corporate subsidiary generally.

Answer: Gulf Power objects to this request on the basis that it seeks information that is irrelevant and not likely to lead to relevant evidence. In addition, Gulf Power objects to this request in that it is overly broad and it would be unduly burdensome to Gulf Power to attempt to produce the requested documents. Gulf does not possess or have access to any documents that would be responsive to this request.

Analysis

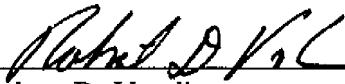
This again relates to Citizens' theory of the case. At this stage of the process, we cannot know if this transaction may involve ratepayers subsidizing nonutility activities. For this reason, the Commission has access to Southern Company and Southern Power records. Section 366.039, Florida Statutes (2000) See Southern Bell, 632 So.2d 1377, 1388.

CONCLUSION

Gulf Power speaks of how "burdensome" this all is to the company. All the burdens are of Gulf Power's own making. Citizens received Gulf Power's objections on August 8, 2001. Citizens are working to file this motion no later than August 9, 2001. All of these efforts are an attempt to get information to prepare for hearing.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, demand an immediate hearing and production of the documents critical for trial preparation.

Respectfully submitted,



Robert D. Vandiver
Associate Public Counsel

Office Of Public Counsel
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorney for the Citizens
of the State of Florida

Staff's First Set of Interrogatories
Docket No. 010827-EI
GULF POWER COMPANY
July 19, 2001
Item No. 14
Page 1 of 1

14. Please describe the physical generation assets and other wholesale commitments of Southern Power.

Answer:

In June 2001, Southern Power Company purchased the construction work in progress (CWIP) for Plant Autaugaville combined cycle units 1 and 2 from Alabama Power Company. Both Autaugaville 1 and Autaugaville 2 began construction June 2001 and both have an expected commercial operation date of June 2003.

Alabama Power has agreed to acquire energy and capacity equivalent to the output of the first unit pursuant to a purchased power agreement to meet retail needs beginning June 1, 2003 and ending May 31, 2010, pursuant to an RFP process approved by the Alabama Public Service Commission. Georgia Power has agreed to acquire energy and capacity equivalent to the output of the second unit pursuant to an RFP process in Georgia to meet retail needs that is subject to final approval of the Georgia Public Service Commission. The Company expects the Georgia Public Service Commission and the FERC to approve this contract.

Southern Power has received approval from the Securities and Exchange Commission to purchase Plant Dahlberg from Georgia Power. The Plant Dahlberg Combustion Turbine Project is an 810 MW facility consisting of ten G.E. gas turbines, all of which are in commercial operation. Southern Power plans to purchase these units from Georgia Power Company later this year.

Georgia Power has recently received approval from the Georgia Public Service Commission for Purchase Power Agreements (PPA's) with Southern Power on two combined cycle units at Plant Goat Rock. Southern Power plans to purchase the CWIP for these units from Georgia Power as a result of the approval of these PPA's.

Southern Power, through its EWG subsidiary Southern Company-Florida LLC, has agreements with Orlando Utilities Commission, Kissimmee Utility Authority and Florida Municipal Power Agency to build, operate and own (65%) a combined cycle unit to be located at the Stanton Energy Center in Orlando, Florida. Construction is planned to begin later this year.

CERTIFICATE OF SERVICE
010827-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing OFFICE OF PUBLIC COUNSEL'S MOTION TO COMPEL GULF POWER COMPANY TO RESPOND TO DISCOVERY AND REQUEST FOR EXPEDITED MOTION HEARING has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 9th day of August, 2001.

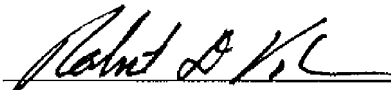
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