

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Gulf Power Company's petition for)
approval of purchased power arrangement) Docket No.: 010827-EI
regarding Smith Unit 3 for cost recovery) Date Filed: August 13, 2001
through recovery clauses dealing with)
purchased capacity and purchased energy.)
_____)

**GULF POWER COMPANY'S RESPONSE TO OPC'S
MOTION TO COMPEL RESPONSE TO DISCOVERY AND REQUEST FOR
EXPEDITED MOTION HEARING**

GULF POWER COMPANY ("Gulf Power", "Gulf", or the "Company"), by and through its undersigned attorneys, hereby responds to the motion filed by the Office of Public Counsel ("OPC") on August 9, 2001¹ and states:

1. OPC's motion paints an inaccurate and unfair characterization regarding the posture of this case. All parties, Gulf included, have worked hard to preserve the Commission's opportunity to consider the proposed purchased power arrangement as an alternative to rate basing Smith Unit 3 for the life of the unit. The scheduling deadlines, the September 5, 2001 hearing date and all the milestone dates in this docket have been set solely to preserve an opportunity for the Commission to consider the power purchase agreement ("PPA") option for Smith Unit 3. It is not a matter of convenience for Gulf Power that is driving this docket and the expedited time schedule. Rather, it is an effort to strike the proper balance between the interests of Gulf's customers and shareholders alike. Smith Unit 3 capacity is under construction to meet the needs of Gulf's customers. Timely cost recovery for the new unit, whether through

¹ The Florida Industrial Power Users Group ("FIPUG") filed a "Joinder in Support of the Office of Public Counsel's Motion to Compel" on August 10, 2001 which Gulf did not receive until August 13, 2001. References in this response to OPC's motion are intended to include both OPC's motion filed August 9, 2001 and FIPUG's joinder. With regard to FIPUG's discovery requests, Gulf is in the process of locating and copying the requested documents and intends to produce them to all parties as soon as the copying process has been completed. Due to an unanticipated absence of personnel originally charged with locating and copying the requested documents, Gulf has not been able to complete this process as soon as originally anticipated. The unanticipated absence has also prevented Gulf's counsel from being able to provide FIPUG's counsel with an estimate as to when the copying process will be complete. Gulf reserves the possibility that the responses to FIPUG's discovery requests may be subject to either a request for confidential treatment or a notice of intent to seek confidential treatment

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purchased capacity and purchased energy clause recovery of costs incurred through a PPA or through increased base rates to cover the new rate based investment, is required to meet the needs of shareholders. Rates for such recovery of costs, to be timely, must be in place by the in-service date of the new unit. The plant will be online to meet the needs of Gulf's customers by June 1, 2002. That reality must not be ignored by any of the procedural decisions related to this case.

2. Gulf's petition presents a proposed purchased power arrangement regarding Smith Unit 3 to the Commission for approval as to cost recovery through the Purchased Power Capacity Cost ("PPCC") and Fuel and Purchased Power (energy) cost recovery clauses. Smith Unit 3 will be transferred from Gulf to Southern Power Company if, and only if, the proposed purchased power arrangement is approved. This distinction is significant because the primary emphasis of Gulf's proposal is on the purchased power arrangement as a means of cost recovery for the costs of Smith Unit 3 and providing valuable flexibility for a changing marketplace. As discussed in Gulf's petition, the proposed purchased power arrangement positions Gulf and its customers to be able to take advantage of changes in the wholesale market that are anticipated to occur during the next ten years. There has not been a transfer of Smith Unit 3 to Southern Power; and unless the proposed purchase power arrangement between Gulf and Southern Power is approved as set forth in Gulf's petition there will not be a transfer to Southern Power.

3. The request for approval of the proposed purchased power arrangement and associated recovery of costs is no different than any power purchase contract subject to recovery through the respective cost recovery clauses dealing with capacity and energy purchases. The motivation and business plan of the buyer of capacity through a power purchase contract is not a matter of concern to the seller. By the same token, the motivation and business plan of the seller of capacity through a power purchase contract is not a matter of concern to the buyer. The proper question from the buyer's perspective is whether the price offered by the seller and other terms of the seller's proposal constitute a good deal to the buyer. If the answer is yes, a transaction occurs. If the answer is no, a transaction does not occur. Each side evaluates the suitability of the terms and conditions of a proposed transaction from its own perspective and determines

whether the deal is a good deal from its own individual perspective without any need for an understanding of the motivation behind the other side's proposal.

4. In this docket, the examination the Commission is being asked to perform is from the buyer's perspective. Commission review of the PPA from the buyer's perspective is appropriate, both as part of the Commission's regulatory authority over Gulf Power, the actual purchaser of capacity if the proposed arrangement with Southern Power is approved, and as part of the Commission's role to protect Gulf's customers, on whose behalf Gulf would be purchasing the Smith Unit 3 capacity under the PPA. The ultimate issue in this case is whether the Commission wishes to commit Gulf's customers to paying the carrying costs of Smith Unit 3 over the entire life of the unit or, given the alternative available through the PPA, whether the Commission would prefer to secure the benefits of Smith Unit 3 over a reasonable planning horizon and preserve an option for Gulf's customers to be able to take advantage of other opportunities that may appear at the end of ten years (with regard to committed capacity) and twenty years (with regard to commitment to operate for voltage support). The Commission is being asked to decide whether the option presented by Gulf through the proposed purchased power arrangement is a reasonable response to the uncertainty the future holds with regards to wholesale electric power supplies. If the Commission decides that such flexibility is prudent in these uncertain times, then it should approve the proposed purchased power arrangement for cost recovery as requested in Gulf's June 8, 2001 petition. If the Commission decides that such flexibility is not desirable, then it should deny the petition, in which case the Company will proceed with the more traditional rate base treatment of this capacity as a Gulf-owned resource with the associated customer commitment to recovery of costs associated with the unit through base rates over the life of the asset. In either case, such decision need only be made from the buyer's perspective.

5. As a non-jurisdictional entity, Southern Power is under no obligation from the Commission to offer to sell capacity to Gulf Power. The fact that it has agreed to sell such capacity to Gulf under certain terms and conditions does not subject that entity to the type of invasive inquiry advocated by OPC in its motion. As noted above, it is not the seller's side of this transaction that is subject to the regulatory scrutiny of the Florida Public Service Commission, but rather that of the buyer. It is neither necessary, nor appropriate, for the Commission or any party to question the motivation of the seller in this proposed transaction through attempts to review the strategic plans, business plans, or other internal documents of Southern Power, an entity not subject to the jurisdiction of the Commission. Non-jurisdictional entities operating in a competitive marketplace, such as Southern Power, that endeavor to sell capacity to regulated entities, such as Gulf Power, do not assume that their entire business plan and strategy or other proprietary internal business documents will be subject to discovery and review in a proceeding such as this one. Such entities expect and intend to hold such proprietary business information confidential in order to protect their opportunities to succeed in the competitive marketplace. Allowing inquiry into proprietary internal business documents such as those sought by OPC in its motion to compel responses to OPC's production of document ("POD") requests 8, 9, 10, 11, 12, 13, 14, 17, 18 and 19² is simply unreasonable given the nature of the inquiry before the Commission in this proceeding. Moreover, permitting such an inquiry would undoubtedly have a chilling effect on the willingness of non-jurisdictional entities to make power supply proposals to Florida utilities in the future.

² OPC's POD request no. 15 seeks a copy of an order issued by the Georgia Public Service Commission. As noted in Gulf's previous response, the Company does not presently have a copy of the requested order but is in the process of obtaining this document and will provide a copy to OPC as soon as the document is received. Unlike the other requests referred to in OPC's motion, OPC's POD request no. 16 seeks Gulf Power documents. The Company is in the process of reviewing its files in an effort to locate any non-privileged documents that would be responsive to OPC's request. As indicated in Gulf's previous response, the Company intends to make such documents available to OPC. Gulf cannot provide any documents until it locates such documents. Gulf's efforts at expediting discovery in this docket have been hindered by having to devote attention to such motions as OPC's motion to dismiss, FIPUG's motion to strike and OPC's motion to compel

6. It appears to Gulf that OPC has concluded that it wishes to block Commission consideration of Gulf's proposed purchased power arrangement for Smith Unit 3 without regard to whether that arrangement offers valuable flexibility and other benefits to Gulf's customers. The unreasonable and invasive nature of the discovery requests at issue in OPC's motion, just like OPC's motion to dismiss, appear to be motivated by a desire to impose transaction costs and other burdens through the regulatory process that are high enough to force either Gulf or Southern Power to withdraw the proposal from further consideration. In the case of OPC's motion to dismiss, OPC seems intent on delaying the hearing in this case long enough that Gulf has no reasonable alternative but to withdraw its proposal from further consideration and proceed with a rate case filing designed to obtain needed rate relief in time to match the in-service date of Smith Unit 3. In the case of OPC's motion to compel, OPC seems intent on forcing Southern Power to withdraw from the proposed purchased power arrangement for Smith Unit 3 in order to protect its proprietary internal business documents from disclosure and thereby avoid the resulting harm to its ability to compete in the wholesale markets. In either case, the Commission would be prevented from considering the merits of Gulf's proposal. Given the efforts that have been expended thus far to preserve the Commission's opportunity to consider Gulf's proposal, it would be a shame to allow OPC to preempt the case at this late date by asserting unreasonable and unnecessary requests for discovery.

7. Gulf acknowledges that discovery in this proceeding is governed in part by the Florida Rules of Civil Procedure. Gulf does not dispute that OPC is entitled to request the Company to produce documents within the scope of the rules and that are in the "possession, custody, or control of" Gulf Power. As indicated in its previous response to OPC's requests, Gulf does not possess or have access to any documents that would be responsive to OPC's POD requests 8, 9, 10, 11, 12, 13, 14, 17, 18 and 19. In other words, Gulf does not have "possession, custody, or control of" such documents. Section 366.093(1) of the Florida Statutes is not

applicable to OPC's requests since they are "... sought in order to gather facts for litigation." See, Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377, 1389 (Fla. 1994).³

8. OPC's "theory of the case" has nothing to do with the case before the Commission. Under the proposed purchased power arrangement before the Commission, Gulf's customers will be obligated to pay approximately the same for Smith Unit 3 capacity over the ten years covered by the PPA as they would otherwise be obligated to pay under base rates if ownership of Smith Unit 3 is retained by Gulf and the unit is placed in the Company's retail rate base. The advantage of the purchased power proposal is that it avoids obligating Gulf's customers to pay for Smith Unit 3 during the entire life of the unit. No matter what the plans of Southern Power may be with regard to other generating assets in Florida or elsewhere, such plans do not take away any of the benefits to Gulf's customers from the proposed purchased power arrangement which Gulf has placed before the Commission in this docket. In fact, without Southern Power's participation, Gulf would not be able to secure such benefits for its customers. Smith Unit 3, whether as a rate based asset owned by Gulf or as a Southern Power asset supporting the proposed PPA, beat out all other proposals submitted in response to Gulf's Request for Proposals. Once again, inquiry into the motivation of Southern Power is neither necessary nor appropriate to determine whether there are benefits to Gulf's customers from the proposed purchased power arrangement for Smith Unit 3.

³ The Florida Supreme Court stated in Southern Bell (at page 1389):

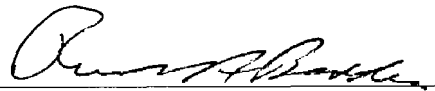
... the documents at issue in case number 81,296 were not sought in order to gather facts for litigation. Rather, the mission of the audit team was designated by NARUC and is consistent with the PSC's regulatory power to ensure against cross-subsidization. The audit team is not involved in legal proceedings before the PSC or before this Court. Thus, because NARUC's request for the affiliates' documents was not sought in furtherance of a legal discovery effort, the documents are subject to the statute governing the regulation of telephone companies and not to the rules of discovery.

The converse is true in this case. The documents sought by OPC are part of a discovery effort. It therefore stands to reason under the holding in Southern Bell that OPC's request is subject to the rules of discovery and not to the statute governing regulation of electric companies.

9. Gulf agrees that time is of the essence in this case and requests a prompt motion hearing before the Prehearing Officer on this matter. Gulf needs to know as soon as possible whether OPC's motion to compel as to OPC's POD requests 8, 9, 10, 11, 12, 13, 14, 17, 18 and 19 will be denied so that Gulf can continue its efforts to bring its proposal to the Commission for a fair hearing regarding the merits.

WHEREFORE, Gulf Power Company respectfully requests that the Commission uphold Gulf's objections to OPC's production of documents requests and deny OPC's motion to compel so that this docket may proceed to hearing on September 5, 2001 as contemplated by the decision of the Prehearing Officer at the status conference on August 1, 2001 without the disclosure of any documents requested through OPC's production of document requests 8, 9, 10, 11, 12, 13, 14, 17, 18 and 19.

Respectfully submitted this 13th day of August 2001,



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Certificate of Service

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