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COMMISSION  
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August 21, 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 the Prehearing Statement of the Office of Public Counsel for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Prehearing Statement of the Office of Public Counsel 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,

  
John Roger Howe  
Deputy Public Counsel

JRH/dsb  
Enclosures

- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM 5 \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- LEG 1 \_\_\_\_\_
- OPC \_\_\_\_\_
- PAI \_\_\_\_\_
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- SER \_\_\_\_\_
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DOCUMENT NUMBER-DATE

10333 AUG 21 01

FPSC-COMMISSION CLERK

**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  
Filed: August 21, 2001

**PREHEARING STATEMENT OF THE OFFICE OF PUBLIC COUNSEL**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. PSC-01-1532-PCO-EI, issued July 24, 2001, submit this Prehearing Statement.

**APPEARANCES**

JOHN ROGER HOWE, Esquire  
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ROBERT D. VANDIVER, Esquire  
Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, Florida 32399-1400  
On behalf of the Citizens of the State of Florida

**A. WITNESSES:**

None.

**B. EXHIBITS:**

None. Although exhibits may be introduced during the course of cross-examination.

**C. STATEMENT OF BASIC POSITION**

The parties in this docket are rushing toward an expedited hearing to satisfy Gulf Power's concerns and its own self-inflicted deadlines. Yet, as a matter of procedure, it is questionable whether the Commission has the authority to even consider having a hearing. Certainly, no one has formally asked for a hearing. Beyond question, the Commission's procedures are subject to the Uniform Rules of Procedure. Rule 28-106.201(1) defines a petition as a pleading which asks

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for a hearing and identifies disputed issues of fact. Gulf's "petition" does neither. Subsection (2) of the rule, although couched generally in terms applicable to a protest of a proposed agency action which will be heard by an Administrative Law Judge, requires citation to the statute or agency rule which entitles the petitioner to relief. But Gulf Power's has not invoked a statute administered by the Commission pursuant to which the Commission is being requested to act. Clearly, Gulf's petition is not in substantial compliance with Rule 28-106.201, and, pursuant to subsection (4), the Commission must dismiss it.

This case, at its core, asks the Commission to determine whether Gulf Power wants to transfer its Smith Unit 3 to a sister company because it would be good for Gulf Power's customers or because it would be good for the Southern Company. Gulf Power's position is that changes in the electric industry announced in the interim report of the Energy 2020 Study Commission indicate that the company's continued ownership of Smith Unit 3 is no longer a good idea. But other Southern Company subsidiaries such as Georgia Power and Alabama Power have also transferred projects under construction to Southern Power. Since it is doubtful these other companies were motivated to action by a study commission report in Florida, the pattern of generating asset transfers more likely represents the implementation of a system-wide strategy of the Southern Company to maximize its own profits. After all, if Gulf Power's ownership of Smith Unit 3 is now a really bad idea, and if Gulf Power is acting independently with its customers' interests at the forefront, one would expect Gulf Power would want to transfer the unit to the bidder offering the highest purchase price and the lowest purchased power agreement (PPA) costs. The last thing Gulf Power would want was to retain ownership. Yet, Gulf Power proposes to keep Smith Unit 3 in its rate base if the PPA with Southern Power is not approved for cost recovery -- without finding out what the least-cost alternative might be. Apparently, the study commission report is only an impetus for change if a sister company might benefit from such an interpretation.

At an even more fundamental level, the Commission has been asked to bless a PPA which may not be a valid, enforceable contract. Both Gulf and Southern Power lack the current ability to perform their respective obligations under the agreement. Gulf can't buy what it already owns, and Southern Power can't sell what it doesn't have. Admittedly, the PPA is contingent upon Gulf Power and Southern Power entering into a transfer agreement (and an operating agreement and an interconnection agreement), but neither Gulf nor Southern Power is legally bound, by contract or otherwise, to actually negotiate the transfer. Since either party can avoid its obligations under the PPA by not negotiating or by not agreeing to transfer terms, the PPA is probably not legally binding on either party. In other words, it is not a contract. The fact that neither Gulf Power nor Southern Power, as affiliated companies, is likely to raise this point, does nothing for the Commission's own obligation not to approve an "agreement" it reasonably believes is not valid.

#### D. STATEMENT OF LEGAL ISSUES AND POSITIONS:

ISSUE 1: Is the proposed transfer of ownership of Smith Unit 3 to Southern Power consistent with Commission Order No. PSC-99-1478-FOF-EI, issued August 2, 1999, in Docket No. 990325-EI, the determination of need for Smith Unit 3?

OPC: No. The State, through the power plant siting act, expressed an interest in knowing in advance who will own and operate power plants in Florida. The State's interest in such issues was not extinguished immediately after the Commission issued its need order. The order contemplated a jurisdictional utility owning the project for a thirty-year period. If the transfer is approved, a nonjurisdictional entity will own the unit. The pattern of generating asset transfers initiated by the Southern Company represents the implementation of a system-wide strategy by Southern to maximize its own profits, not to protect Gulf Power's customers.

ISSUE 2: Must the Commission make the specific findings required by the Energy Policy Act of 1992, 15 USCA § 79z-5a(c), before Smith Unit 3 can be transferred to Southern Power?

OPC: Yes. The transfer of Smith Unit 3 falls squarely within the criteria of the statute.

ISSUE 3: Will Gulf's proposed purchased power arrangement with Southern Power affect the Commission's ability to direct Gulf Power to make additions or extensions of facilities to the plant and equipment at the Smith site pursuant to Section 366.05, Florida Statutes?

OPC: Yes. The PPA is analogous to a territorial agreement entered into between Peoples Gas System and City Gas Company in 1960. At that time the Commission had no express authority to approve such agreements but "the commission asserted that such territorial service agreements would not be valid without its approval because they necessarily limited the commission's statutory authority to require additions and extensions to plant and equipment." City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 430 (Fla. 1965). The Commission clearly has the authority to order additions and extensions to any of Gulf Power's facilities. It would appear that this power might be severely limited if, after the PPA expires in 10 years, site specific limitations used up by Smith Unit 3 precluded the Commission from ordering additional facilities to be built there. In that the PPA will ultimately result in a nonjurisdictional entity owning Smith 3, the Commission's authority over the Smith site will be restricted and therefore the transfer cannot go forward without Commission approval. The "Smith site" is inherently ambiguous in that there are three generating units, Smith 1 (existing), Smith 2 (existing), and Smith 3 (under construction) located on the same contiguous geographic plot of land near Panama City. Gulf Power apparently

owns all the land and improvements. If the PPA were to be approved, Southern Power would own the Smith 3 site.

ISSUE 4: Must Gulf Power demonstrate changed circumstances since Order No. PSC-99-1478-FOF-EI was issued in order for Gulf's petition to be approved?

OPC: Yes. A fundamental principle of regulatory law is that previous orders will continue in full force and effect unless and until an appropriate party demonstrates a departure from a prior decision is warranted by changed circumstances. Gulf Power has made absolutely no showing in this case that changed circumstances justify a departure from the Commission's need determination order. Before construction of power plants above a certain size in Florida can begin, the state, through the power plant siting act, has expressed an interest in knowing: (1) the entity which will own and operate the plant; (2) whether the plant will be committed to serve identifiable retail load for a specific period of time; and (3) whether the proposed plant under the proposed form of ownership is the least-cost alternative to retail customers. These interests are not extinguished upon issuance of the Commission's need determination order. The Commission's determination of need is not transferable at Gulf Power's direction to an entity which never appeared before the Commission. Moreover, if Gulf Power had transferred Smith Unit 3 immediately after the need determination order, it is doubtful that Southern Power could have proceeded under that order to obtain the siting permit from DEP. Allowing the transfer to Southern Power would effectively circumvent Florida's statutory need determination process and grant Southern Power a permit it may not have been able to obtain on its own.

ISSUE 5: Will the Commission have the same authority, pursuant to Section 366.04(2)(c), Florida Statutes, over the disposition of power from Smith Unit 3 into the Florida grid: A) If Smith Unit 3 is in the rate base of a Florida utility? B) If Smith Unit 3 is owned by Southern Power Company?

OPC: No.

#### E. STATEMENT OF FACTUAL ISSUES AND POSITIONS:

ISSUE 6: What is the projected difference in costs to Gulf's retail customers, if any, between Gulf Power's proposed purchased power arrangement with Southern Power, including the transfer of Smith Unit 3, and rate base treatment of Smith Unit 3?

OPC: The PPA is more expensive. It is particularly noteworthy that Gulf Power has not even alleged that the PPA with Southern Power would be less costly to Gulf's customers than if Gulf rate-based the unit. It appears that the Georgia commission

did not approve a similar transfer until the PPA was changed to be lower priced than rate-basing. Gulf Power has not demonstrated any least-cost alternative nor has it presented any evidence related to other scenarios. The comparison of the two alternatives presented by the company shows a wash between the rate base scenario and the affiliate PPA scenario at a 13% return on equity. However, the rate impact on customers for the PPA is much greater because, considering the overearnings posture the company will be in when Smith 3 comes on line, Gulf Power could absorb the rate base treatment of the unit with a much smaller rate increase, or perhaps no rate increase at all or even a decrease.

ISSUE 7: What is the projected difference in fuel costs to Gulf's retail customers, if any, between Gulf Power's proposed purchased power arrangement with Southern Power, including the transfer of Smith Unit 3, and rate base treatment of Smith Unit 3?

OPC: There is no basis upon which to assume at the present time that fuel costs under a "market based" PPA will be the same as cost based recovery under the clauses.

ISSUE 8: What risks and benefits to retail ratepayers should the Commission consider in deciding whether to grant Gulf's request for approval of the proposed purchased power arrangement with Southern Power regarding Smith Unit 3?

OPC: Gulf Power is not alleging the PPA will be less costly than rate base treatment of Smith 3. The Commission must therefore consider the risk of imposing higher costs on Gulf's retail customers today in return for a potentially ill-advised "opportunity" to test the market in eight years. Moreover, Gulf has said that, if the electricity is not available at that time, it will build its own generating unit. Customers will then be at risk that the new unit will be far more costly than the one Gulf is trying to take away from them now. The Commission must also consider the risk associated with neither the Commission nor Gulf's customers knowing whether a lower cost alternative to the PPA could have been identified through an efficient RFP process in today's market.

ISSUE 9: What is the difference, if any, in the impact of wholesale sales on Gulf's retail customers between Gulf Power's proposed purchased power arrangement with Southern Power, including the transfer of Smith 3, and rate base treatment of Smith 3?

OPC: Gulf Power's retail customers will receive fewer benefits from wholesale sales if the PPA is approved.

ISSUE 10: Based on the RFP process reviewed and approved by the Commission in Docket No. 990325-EI wherein the selection of Smith Unit 3 was recognized as the more

cost-effective alternative to purchases from non-affiliated third parties, is the price to be paid by Gulf Power under the proposed purchased power arrangement with Southern Power no higher than the price Gulf would have paid to purchase power from a non-affiliate?

OPC: The mathematical truism Gulf Power wants the Commission to confirm is meaningless within the context of the dynamic market affecting electric generation costs. Gulf Power has failed to demonstrate: (1) that a reasonable comparison can be made between the 2001 PPA and RFP responses which are 3 years old -- especially where the PPA entails ownership at Plant Smith but the RFP only contemplated remotely sited units; or (2) that such a comparison is relevant when the real issue is whether the self-build option is less expensive than the PPA.

ISSUE 11: Is it necessary that Gulf Power demonstrate its proposed purchased power arrangement with Southern Power regarding Smith Unit 3 would be the least cost alternative for its retail customers? If so, has Gulf made such a demonstration?

OPC: Least cost alternatives are invariably required in utility cases for sound policy reasons. It is only with such a showing that regulators can be assured that monopoly providers supply electricity in the most cost efficient manner possible. This concern is especially acute where, as here, there are affiliated companies involved. Gulf Power has not demonstrated any least-cost alternative nor has it presented any evidence related to other scenarios. The comparison of the two alternatives presented by the company show a wash between the rate base scenario and the affiliate PPA scenario at a 13% return on equity. However, the rate impact on customers for the PPA is much greater because, in its current overearnings posture, Gulf Power could absorb the rate base treatment of the unit with a much smaller rate increase, or perhaps no rate increase at all.

ISSUE 12: If Gulf's proposed purchased power arrangement (PPA) with Southern Power is approved for cost recovery, should the Florida Public Service Commission condition its approval upon there being no modifications to the PPA without the prior consent of the Florida Public Service Commission?

OPC: Yes. Any change to the PPA should be brought to the Commission for approval.

ISSUE 13: If Gulf's proposed purchased power arrangement (PPA) with Southern Power is approved, should Gulf file any price changes permitted under the PPA with the Florida Public Service Commission for prior review as to compliance with the agreement and that the costs are prudently incurred?

OPC: Yes.

ISSUE 13a: If Gulf's proposed purchased power arrangement (PPA) with Southern Power is approved, should the Florida Public Service Commission condition its approval upon there being no price changes permitted under the PPA without the prior consent of the Florida Public Service Commission?

OPC: Yes.

ISSUE 14: Did Gulf seek competitive bids for the purchase of power and voltage regulation [support?] before entering into the contract with Southern Power? If not, should it have?

OPC: No. Bids should have been sought to gauge today's market. The bid process engaged in over three years ago is not an adequate surrogate for an RFP today.

ISSUE 14a: Was it necessary that Gulf seek competitive bids for the purchase of power and voltage regulation [support?] before entering into the contract with Southern Power? If so, did Gulf comply with such bidding requirement?

OPC: Yes. Gulf Power could not otherwise satisfy its responsibility as a well-run utility to engage in least-cost planning for its ratepayers' benefit.

ISSUE 15: If Gulf's proposed purchase power arrangement with Southern Power is approved and Smith 3 is transferred, what assets will be transferred and what will be the transfer price?

OPC: No one, not even Gulf Power, can know what assets will be transferred until the appropriate agreements are fully negotiated and executed. Everything is dependent upon the explicit terms which may eventually be incorporated in the transfer agreement, the operating agreement, and the interconnection agreement. However, if transferred to an affiliate, the transfer amounts should be established by the market, based on an open competitive bidding process.

ISSUE 16: Have Gulf Power's retail customers been charged to date with any costs associated with Smith 3? If so, how will Gulf's customers be compensated for these prior costs if the proposed purchased power arrangement is approved and Smith Unit 3 is transferred to Southern Power?

OPC: Yes. The burden is on Gulf Power to demonstrate that costs associated with Smith 3 are not currently being borne by its customers. Gulf has not yet identified the manner in which customers might be reimbursed for such costs.

ISSUE 17: As a matter of public policy, should a Florida regulated utility be allowed to construct a power plant for the benefit of a non-regulated affiliate when



independent power producers cannot construct merchant plants in Florida, except under limited circumstances?

OPC: No. The need determination statute is subject to gaming by regulated entities if the arrangement here is approved.

ISSUE 18: If Gulf's petition is granted, what conditions, if any, should be imposed on Gulf due to the affiliate relationship between Gulf and Southern Power?

OPC: The Commission should assure itself that no advantage to the non-regulated affiliate is enjoyed by reason of this transaction.

ISSUE 19: Should the Commission approve the proposed purchased power arrangement regarding Smith 3 for cost recovery through the cost recovery clauses designated for addressing the recovery of costs associated with purchased capacity and purchased energy?

OPC: No. It has not been shown to either be in the public interest or to be the least-cost alternative.

NEW ISSUE: Is the PPA between Gulf Power and Southern Power a binding contract between the parties?

OPC: No. Whether a contract exists is a decision to be made in the first instance by the trial court or, in this case, by the Commission as a matter of law. Where either or both parties can avoid any obligations by refusing to negotiate the conditions precedent or by failing to reach final agreement on the transfer, the parties are not really bound, and the PPA is illusory.

NEW ISSUE: Can Gulf Power transfer Smith Unit 3 to Southern Power without the Commission's prior approval?

OPC: No. Since any transfer would affect the Commission's statutory authority under Section 366.05, Florida Statutes, in the same manner as the territorial agreement at issue in City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 430 (Fla. 1965), the transfer would not be valid without prior Commission approval.

F. STATEMENT OF POLICY ISSUES AND POSITIONS:

None.

G. STIPULATED ISSUES:

None.

H. PENDING MOTIONS:

Public Counsel's motion to compel discovery is pending.

I. PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY:

None.

J. STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE:

There are no provisions of the order establishing procedure with which the Office of Public Counsel cannot comply.

Respectfully submitted,

JACK SHREVE  
Public Counsel



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Attorneys for the Citizens  
of the State of Florida

**CERTIFICATE OF SERVICE  
DOCKET NO. 010827-EI**

I HEREBY certify that a copy of the foregoing PREHEARING STATEMENT OF THE OFFICE OF PUBLIC COUNSEL has been served by \*hand delivery or U.S. Mail to the following parties of record on this 21st day of August, 2001.

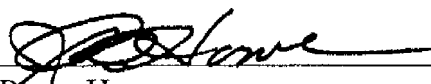
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