

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  
ORDER NO. PSC-01-1725-PCO-EI  
ISSUED: August 23, 2001

ORDER GRANTING IN PART MOTION TO COMPEL, REQUIRING IN CAMERA REVIEW, AND DENYING REQUEST FOR ORAL ARGUMENT

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

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). Southern Power and Gulf are wholly-owned subsidiaries of Southern Company. Gulf proposes to sell the Smith Unit 3 facility, currently under construction, to Southern Power and to obtain capacity and energy from the facility under the terms of the PPA. Gulf would recover the cost of the capacity and energy through the recovery clauses. Gulf obtained a determination of need for the facility, by Order No. PSC-99-1478-FOF-EI, issued in Docket No. 990325-EI on August 16, 1999. The matter is set for hearing. The Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) are intervenors.

On August 3, 2001, OPC served its Fifth Request for Production of Documents (Nos. 8-19). On August 8, 2001, Gulf filed objections to OPC's Fifth Request for Production. On August 9, 2001, OPC filed a Motion to Compel, which included a request for oral argument on the Motion. On August 10, 2001, FIPUG filed a Joinder in Support of the Office of Public Counsel's Motion to Compel. On August 13, 2001, Gulf filed its Response to OPC's Motion to Compel Response to Discovery and Request for Expedited Motion Hearing.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

1. OPC's Fifth Request for Production of Documents and Gulf's Objections

OPC's Fifth Request for Production of Documents, Nos. 8-19, ask Gulf to produce documents from Southern Power and Southern Company. OPC claims the questions are designed to test Mr. Labrato's testimony on the role that the 2020 Study Commission played in the decision to transfer Smith Unit 3, and the theory that the transfer is actually part of a business strategy that was not discussed in any of Gulf's testimony.

Gulf objects to POD Nos. 8-19 on one or more of the following grounds: 1) they are not relevant; 2) they are overly broad and are unduly burdensome; and, 3) Gulf does not have possession of or access to the documents. Gulf also claims some documents, that it does not possess or have access to, are subject to the attorney-client privilege or work product privilege because they are the subject of pending litigation.

In support of its objections Gulf argues that the "assumptions, strategy, and supporting documentation of the other party to the [PPA] are not at issue and fall beyond the scope of review afforded such contracts. The [PPA] is no different from any other purchased power arrangement in that the relevant issues pertain to the utility side of the contract and not the other party to the contract. Simply entering into a contract with a utility does not expose a business to the level of scrutiny sought through [OPC's requests]."

2. OPC's Motion to Compel

In its Motion to Compel, OPC explains that its fifth set of requests was prompted by Gulf's response to an earlier request. OPC earlier asked Gulf to produce "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 provided no documents in response to this request. OPC explains that it was surprised by Gulf's response because OPC expected that Gulf would have records pertaining to the transfer or sale of a \$225 million asset. OPC then served the discovery requests challenged here, which ask Gulf

to produce Southern Company's and Southern Power's documents on the transfer of Smith Unit 3, among other things.

OPC claims that discovery applies to documents in the "possession, custody or control" of a party. See Rule 1.350(a), Florida Rules of Civil Procedure. OPC argues that lack of possession or access alone does not exempt Gulf from producing the documents, because those documents could still be in Gulf's control. See Florida Practice and Procedure, Section 16-10(1982). Citing Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 377, 399 (Fla. 1994), OPC argues that the location of documents with a parent company does not place those documents out of Gulf's control. Under the same reasoning, claims OPC, parties can be requested to produce documents in the possession of their attorney, insurer, subsidiary, or another person outside the jurisdiction of the forum. See Florida Civil Practice Before Trial, Section 16.56 (citing 8 Wright & Miller, Federal Practice and Procedure, Section 2210).

3. FIPUG's Joinder in Support of OPC's Motion to Compel

FIPUG states that the information sought by OPC is needed to test Gulf's assertions on the reasons for the proposed transfer of Smith Unit 3 to Southern Power. FIPUG also joins with OPC in continuing to object to the procedural schedule set in this docket. FIPUG particularly objects to Gulf's refusal to respond to discovery requests when Gulf is the party that wants this proceeding expedited. FIPUG notes that Gulf even refused to let the parties know when it would provide responses to discovery.

FIPUG states that the procedural order in this docket does not set a response time for discovery. Gulf, in its petition, pledged to respond to discovery on an expedited basis. FIPUG has served discovery on Gulf and despite a letter and e-mail asking Gulf when it would respond, Gulf has not replied to FIPUG's inquiries.

4. Gulf's Response to OPC's Motion to Compel and Request for Expedited Motion Hearing

Gulf's Response pertains to POD Nos. 8, 9, 10, 11, 12, 13, 14, 17, 18 and 19. Gulf asserts that this PPA is no different than any other. Gulf further asserts that the motivation and business plan

of the buyer of capacity is not a matter of concern to the seller, and vice versa. Gulf explains that each signatory to the PPA evaluates the transaction from its own perspective. If the signatory finds the terms to be favorable, then the signatory agrees to the contract. Gulf further explains that the buyer's question is whether the price and other terms offered by the seller constitute a good deal to the buyer. Gulf contends that in this docket, the Commission is being asked to examine the transaction from the buyer's perspective. Gulf states that the Commission is being asked to decide whether the PPA is a reasonable response to the uncertainty of the future regarding wholesale electric power supplies. Regardless of the Commission's final determination, the Commission need only evaluate the question from the buyer's perspective.

Gulf also points out that Southern Power, a non-jurisdictional entity, is not obligated to offer to sell capacity to Gulf. Gulf notes that the fact that Southern Power has made such an offer does not make Southern Power subject to OPC's "invasive inquiry." Gulf adds that non-jurisdictional entities such as Southern Power do not assume that their entire business plan or other proprietary information will be subject to discovery as part of the process of approving the PPA. Gulf states that entities such as Southern Power expect to hold such information confidential in order to protect their ability to compete in the marketplace. Gulf asserts that granting OPC's Motion "will have a chilling effect on the willingness of non-jurisdictional entities to make power supply proposals to Florida utilities in the future."

Gulf claims that OPC's discovery requests and Motion "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." Gulf further claims that OPC "seems intent on forcing Southern Power to withdraw from the [PPA] 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."

Gulf asserts that it does not have possession, custody or control of the documents OPC requests. Gulf contends that Section 366.093(1), Florida Statutes, is inapplicable because the requests

are made to gather facts for litigation. See Southern Bell at 1389. Gulf also asserts that OPC's theory of the case "has nothing to do with the case before the Commission."

5. Applicable Law

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter not privileged that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will not be admissible at the trial if the information is reasonably calculated to lead to admissible evidence." A mere possibility that the information might lead to admissible evidence is insufficient. See Florida Practice and Procedure, Sec. 16-3 (Henry P. Trawick 1998). If a request is found to be within the scope of discovery, then it is not overly broad or unduly burdensome. See e.g. Order No. PSC-01-1444-PCO-EI issued on July 5, 2001, in Docket No. 010001-EI.

Rule 1.280(b)(5), Florida Rules of Civil Procedure, provides that when a party responds to a discovery request with a claim of privilege, the party "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

When a party claims an attorney-client privilege, that party carries the burden of proof to demonstrate that the documents meet the criteria for the privilege. See Southern Bell Telephone and Telegraph Co. v. Deason, '632 So. 2d 1377, 1384 (Fla. 1994). Claims of this privilege in the corporate context are subject to a heightened level of scrutiny. See id at 1384.

Rule 1.280(b)(3), Florida Rules of Civil Procedure, provides, with respect to work product, that a party may obtain work product documents "only upon a showing that 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 materials by other means."

Rule 1.350, Florida Rules of Civil Procedure, provides that a party need only respond to POD requests with documents that are in its "possession, custody or control." Rule 1.351, Florida Rules of Civil Procedure, provides that a party may request documents from a non-party by issuing a subpoena. If a party does so, it must notice its intent to issue a subpoena at least 10 days before actual issuance if the subpoena will be served by hand, and 15 days before if service is by mail.

OPC relies on Southern Bell as authority for the notion that a subsidiary or other type of affiliate has possession, custody or control over documents of its parent or other type of affiliate. Southern Bell, while informative, is not entirely applicable in this circumstance. Southern Bell required that an affiliate of a party provide documents to the PSC and an audit team from the National Association of Regulatory Utility Commissioners. The ruling was based on a statute<sup>1</sup> and was expressly not based on the requirements of Rule 1.350, Florida Rules of Civil Procedure. See Southern Bell at 1388. In this Order the issue is governed by Rule 1.350, although statutory authority similar to that cited in Southern Bell does have some relevance<sup>2</sup>.

The federal counterpart to Rule 1.350 is Rule 34(A), Federal Rules of Civil Procedure. In applying Rule 1.350, Florida Courts follow the reasoning of federal courts in applying Rule 34(A). See American Honda Motor Company, In. V. Votour, 435 So. 2d 368 (Fla. 4<sup>th</sup> DCA 1983); Medivision of East Broward County v. Dep't of Health and Rehabilitative Services, 488 So. 2d 886, 887-88 (Fla. 1<sup>st</sup> DCA 1986).

Whether a subsidiary may be compelled to obtain documents from a parent company or affiliate for discovery depends on consideration of three factors: 1) the corporate structure; 2) the non-party's connection to the transaction at issue; and, 3) the

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<sup>1</sup> The statute was Section 364.183, Florida Statutes, which provides the PSC access to the records of companies it regulates and access to the affiliates, including parents, of companies it regulates, to ensure that ratepayers do not subsidize the company's unregulated activities.

<sup>2</sup>Section 366.093(1), Florida Statutes, provides the PSC access to records of public utilities and their affiliates, including parent companies, to ensure that ratepayers do not subsidize non-utility activities.

degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. See Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986). With respect to the first factor, "[w]hether a subsidiary is wholly or partially owned by the parent, the overlap of directors, officers, and employees, or the financial relationship between the corporations all aid in the analysis of control." Afros at 131. With respect to the second factor, courts focus on the degree to which the non-party participated in the transaction at issue, and how relevant the requested documents are to the litigation. See id. at 131-2. With respect to the third factor, if the non-party will receive a benefit from the litigation, that fact must be weighed along with others in determining control. See id. at 132.

#### 6. Decision

The threshold issue in ruling on OPC's Motion is whether Gulf has possession, custody or control over the documents requested. If Gulf does not have possession, custody or control, then it cannot be compelled to produce the documents regardless of their relevance, their breadth, or applicability of a privilege.

##### (1) Possession, Custody or Control

Upon consideration, I find that Gulf has possession, custody or control of the documents requested that pertain to Southern Power. With respect to Southern Power, the overriding consideration is its connection to the transaction at issue, the PPA. Southern Power has a direct and significant connection to the PPA because it is a signatory to the PPA.

I also find that Gulf has possession, custody or control of the documents requested that pertain to Southern Company. Based on the response to Staff's Interrogatory No. 14, Southern Power purchased construction work in progress for 2 combined cycle units from Alabama Power, a subsidiary of Southern Company. Alabama Power has an agreement to buy capacity and energy from one of the units and Georgia Power has an agreement to buy energy and capacity from the other. Georgia Power is also a subsidiary of Southern Company. In addition, Southern Power has approval from the Securities and Exchange Commission to purchase an 810 MW combustion turbine facility from Georgia Power. The actual purchase will

occur later this year. Finally, a representative of Southern Company Services, a subsidiary of Southern Company, filed testimony in this docket.

It is unlikely that three subsidiaries are transferring assets to Southern Power independently of the parent company. That two subsidiaries of the parent have filed testimony in this docket also points to involvement of Southern Company in the transaction.

Gulf had no documents to provide in response to a POD asking for "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's lack of meeting records and notes on the transfer of a large asset tends to indicate that other entities, such as Southern Power and Southern Company, were involved and that it was those entities that attended meetings and have records.

Finally, I note that once Gulf objected to the production of documents, OPC did not have to compel production from Gulf but could have subpoenaed the documents directly from Southern Power and Southern Company. See Rule 1.351, Florida Rules of Civil Procedure. Had OPC done so, there likely would have been a 15 day notice period before the non-party could even be served. If the companies exercised their right to object, it would lead to further delay. Gulf's actions appear contrary to its stated desire for an expedited proceeding.

## (2) Privilege

A party claiming attorney-client privilege has the burden of establishing that the privilege is applicable. See Southern Bell at 1383. Gulf is subject to a heightened level of scrutiny because its claim is made in the corporate context. See id. It was Gulf's responsibility to demonstrate its entitlement to the privilege in its Response to OPC's Motion to Compel, yet Gulf made no attempt at carrying its burden.

For each document that is deemed relevant and for which Gulf claims the attorney-client privilege, Gulf shall: 1) provide the document to the Commission for an *in camera* review; 2) explain why the privilege applies; and 3) file a description of the document



that allows the parties to assess the applicability of the privilege claimed, in accordance with Rule 1.280(b)(3), Florida Rules of Civil Procedure. In providing its justifications for the privilege, Gulf shall address the criteria for applicability of the privilege listed in Southern Bell at page 1383. Gulf shall provide this information to the Commission and all parties within 5 business days of the issuance of this Order.

Gulf claims that the work product doctrine applies to all those documents for which it claims the attorney-client privilege. OPC claims it cannot obtain the documents by other means. OPC has explained that it needs the documents to pursue its theory of the case. I find that OPC cannot in fact obtain the documents by other means, unless it subpoenas the documents directly from Southern Power and Southern Company. Following that course of action would conflict with Gulf's goal of expediting this proceeding. OPC is entitled to prepare its case in accordance with its theory and it needs the requested information to do so. OPC has therefore met its burden under Rule 1.280(b)(3), Florida Rules of Civil Procedure. I find that Gulf cannot withhold the documents on grounds that they are work product.

### (3) Relevance and related claims

OPC's theory that the transfer of Smith Unit 3 is part of a business plan that incidentally accords with preliminary findings of the 2020 Study Commission, is reasonable and pertains to the subject matter of the case. OPC explains that it arrived at this theory based on Gulf's responses to discovery requests. First, Southern Power has purchased units from Alabama Power and Georgia Power. The purchases from affiliates could tend to indicate that Southern Power may be following a plan. Second, Gulf provided no documents in response to OPC's POD asking for "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's lack of meeting records and notes on the transfer of a large asset could indicate that other entities, such as Southern Power and Southern Company, were involved and that those entities attended meetings and have records. Accordingly, I find that POD Nos. 8-19 are relevant to OPC's theory of the case and are within the scope of Rule 1.280(b)(1), Florida Rules of Civil Procedure.

Claims that discovery requests are overly broad and unduly burdensome are actually variants of the claim that they are not reasonably calculated to lead to admissible evidence. See e.g. Order No. PSC-01-1444-PCO-EI issued on July 5, 2001, in Docket No. 010001-EI. Because POD Nos. 8-19 are reasonably calculated to lead to admissible evidence, they are not overly broad or unduly burdensome.

(4) Request for Oral Argument

Oral argument is appropriate to enable the Prehearing Officer to fully understand the parties' arguments. The pleadings summarized above were sufficiently clear, and given that the proceeding is being expedited, oral argument is not appropriate or time efficient.

Each of OPC's production requests are provided below and are followed by a summary of Gulf's objections, a summary of OPC's argument as to why production should be compelled, and directions consistent with the analysis above.

**8. Please provide the strategic plan and/or business plan for Southern Power.**

Gulf claims the request is not relevant and that it does not possess or have access to the documents.

OPC claims that this request is aimed at testing the credibility of Mr. Labrato's testimony. Mr. Labrato indicates that Gulf's PPA is consistent with the findings of the Energy 2020 Study Commission. Gulf's responses to one of Staff's Interrogatory 14 indicate Southern Power has purchased units from Alabama Power Company and Georgia Power, both operating companies of Southern Company. OPC expects the information to show whether Mr. Labrato's testimony is true or whether Gulf's PPA is actually part of an ongoing business plan developed independently of the Study Commission findings. OPC also maintains that a business plan associated with the transfer of ownership of a \$225 million facility that is needed to serve Florida's citizens is relevant to Florida's citizens.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission and all parties within five days of the issuance of this Order.

**9. Please provide all Southern Power documents which discuss or analyze the acquisition of combined cycle units generally.**

Gulf claims that the request is not relevant, is overly broad, is unduly burdensome, and that it does not possess or have access to the documents.

OPC's claim that it is entitled to this information is based on the same reasoning applied to POD No. 8.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission and all parties within five days of the issuance of this Order.

**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.**

Gulf's objections are the same as for POD No. 9.

OPC's claim that it is entitled to this information is based on the same reasoning applied to POD No. 8.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission and all parties within five days of the issuance of this Order.

**11. Please provide all Southern Company documents which discuss or analyze the acquisition of combined cycle units by Southern Power.**

Gulf's objections are the same as for POD No. 9.

OPC claims that this request tests the same testimony as POD Nos. 8-10, but asks for Southern Company's documents instead of Southern Power's. OPC explains that it is trying to determine

whether the plan, if one exists, to acquire the plants of various operating companies was developed by Southern Power or Southern Company. OPC claims Gulf has control over these documents under authority of Section 366.093, Florida Statutes and Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377, 1399 (Fla. 1994).

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the commission and all parties within five days of the issuance of this Order.

**12. Please provide all Southern Power documents which discuss, evaluate, or analyze the acquisition of any power plant situated in the state of Florida.**

Gulf's objections are the same as for POD No. 9.

OPC claims these documents are needed to test Mr. Labrato's testimony. While PODs 9-11 ask about combined cycle units, POD No. 12 asks about power plants. The type of documents sought could use either term.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the commission and all parties within five days of the issuance of this Order.

**13. Please provide all Southern Power documents which discuss, analyze or evaluate the regulation or regulatory scheme in any way in the State of Florida.**

Gulf's objections are the same as for POD No. 9. In addition, Gulf claims the documents are subject to the attorney-client privilege, the attorney work product privilege, or both. In support of these claims of privilege, Gulf states that the requests seek documents, related to the pending litigation, prepared by Southern Power officers and employees at the request of counsel.

OPC claims that if there is a plan to convert retail units to wholesale units, then OPC is entitled to ask about whether Southern Power or Southern Company evaluated Florida's regulatory regime.

Relying on Southern Bell, OPC claims that it is Gulf's burden to demonstrate the documents are privileged, and that to meet its burden Gulf must produce the documents for an *in camera* inspection by the Prehearing Officer. OPC also questions how Gulf can claim that it cannot obtain the documents yet assert Southern Power's rights to a privilege.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. It should be noted that Gulf cannot legitimately claim that it lacks access to the documents and, at the same time assert that the documents are privileged. However, I have found that Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission for *in camera* review within 5 days of the issuance of this Order.

In addition, in accordance with Rule 1.280(b)(5), Florida Rules of Civil Procedure, for each responsive document for which Gulf claims the privilege, it shall provide the following information: 1) a title for the document which will allow the parties to assess the subject matter of the document without revealing privileged information; 2) the type of document (e.g. letter, memo, meeting notes, etc.); 3) the name and affiliation of the individual(s) who were responsible for generating the subject matter of the document; 4) the name and affiliation of each individual for whom the document was prepared; and, 5) the date of the document. The list shall be provided to the Commission and all parties within five days of this Order.

**14. Please provide any Southern Company documents which compare the regulatory regimes of Florida, Georgia and Alabama.**

Gulf's objections are the same as for POD No. 13.

OPC states that the arguments made with respect to POD No. 13 apply here. In addition, OPC states that Gulf's response to Staff's Interrogatory No. 14 shows that the regulatory Commissions in Alabama and Georgia have been involved in similar decisions. OPC explains that its theory of the case is that a common plan exists to acquire generating units, and in light of this theory, the documents are highly relevant.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission for *in camera* review by the Prehearing Officer within five days of the issuance of this Order.

In addition, in accordance with Rule 1.280(b)(5), Florida Rules of Civil Procedure, for each responsive document for which Gulf claims the privilege, it shall provide the following information: 1) a title for the document which will allow the parties to assess the subject matter of the document without revealing privileged information; 2) the type of document (e.g. letter, memo, meeting notes, etc.); 3) the name and affiliation of the individual(s) who were responsible for generating the subject matter of the document; 4) the name and affiliation of each individual for whom the document was prepared; and, 5) the date of the document. The list shall be provided to the Commission and all parties within five days of the issuance of this Order.

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

Gulf states that this document is in the public domain and that it will attempt to provide a copy within the time period allowed for this response.

OPC states that it would be more expeditious for Gulf to get the requested order from a sister company than to object to the discovery request because the document is in the public domain.

Gulf provided this document on August 15, 2001.

**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.**

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

OPC's arguments on attorney-client privilege and work product privilege apply here. In addition, OPC notes that Gulf's offer to provide non-privileged documents within the time allowed for discovery responses (30 days) means OPC won't get the documents until after the hearing.

Gulf shall provide any documents for which it does not claim the attorney-client privilege to the Commission and all parties within business days of the issuance of this Order. Gulf shall provide the rest of the documents to the Commission for *in camera* review by the Prehearing Officer within five days of the issuance of this Order.

In addition, in accordance with Rule 1.280(b)(5), Florida Rules of Civil Procedure, for each responsive document for which Gulf claims the privilege, it shall provide the following information: 1) a title for the document which will allow the parties to assess the subject matter of the document without revealing privileged information; 2) the type of document (e.g. letter, memo, meeting notes, etc.); 3) the name and affiliation of the individual(s) who were responsible for generating the subject matter of the document; 4) the name and affiliation of each individual for whom the document was prepared; and, 5) the date of the document. The list shall be provided to the Commission and all parties within five days of the issuance of this Order.

**17. Please provide all Southern Company documents which discuss the possible transfer of Smith Unit 3 to Southern Power between January 1, 2001, and May 31, 2001.**

Gulf objects on grounds that the requested information is not relevant, and that the request is overly broad and unduly burdensome. Gulf states it does not possess or have access to the information.

OPC claims that the information requested is relevant to determining whether Gulf's PPA is part of a corporate strategy. OPC's argument that Gulf does in fact have control over the documents, described under POD No. 11, is applicable here.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the

documents. Gulf shall produce the documents to the commission and all parties within five days of the issuance of this Order.

**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.**

Gulf objects for the same reasons stated under POD No. 17.

OPC's response is the same as provided under POD No. 17.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission and all parties within five days of the issuance of this Order.

**19. Please provide all Southern Company documents which reference an acquisition strategy of merchant plants by a corporate subsidiary generally.**

Gulf objects for the same reasons stated under POD No. 17.

OPC's response is the same as provided under POD No. 17.

The request is reasonably calculated to lead to admissible evidence, and Gulf has possession, custody or control of the documents. Gulf shall produce the documents to the Commission and all parties within five days of the issuance of this Order.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Motion to Compel filed by the Office of Public Counsel is granted for Production of Documents requests Nos. 8-19, except for documents for which Gulf Power Company claims the attorney-client privilege applies. A ruling on the discoverability of allegedly privileged documents shall not be made until an *in camera* review of those documents is conducted by the Prehearing Officer. All responsive documents for which the privilege is not claimed shall be provided to the Commission and all parties within five days of the issuance date of this Order. It is further



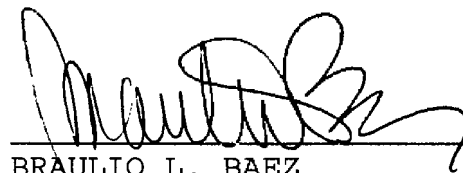
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ORDERED that Gulf Power Company shall provide, for *in camera* review by the Prehearing Officer, those documents for which it claims the attorney-client privilege in its Objections to OPC's Fifth Request for Production of Documents (Nos. 8-19). Those documents shall be provided to the Commission within five days of the issuance date of this Order. It is further

ORDERED that for those documents submitted for *in camera* review, Gulf shall provide the following information: 1) a title for the document which will allow the parties to assess the subject matter of the document without revealing privileged information; 2) the type of document (e.g. letter, memo, meeting notes, etc.); 3) the name and affiliation of the individual(s) who were responsible for generating the subject matter of the document; 4) the name and affiliation of each individual for whom the document was prepared; and, 5) the date of the document. The list shall be provided to the Commission and all parties within five days of the issuance date of this Order. It is further

ORDERED that the requests of the Office of Public Counsel and Gulf Power Company for oral argument are denied.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 23rd day of August, 2001.



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BRAULIO L. BAEZ  
Commissioner and Prehearing Officer

( S E A L )

MKS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.