

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 10, 2001

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

FROM: DIVISION OF LEGAL SERVICES (STERN) *MKS RVE*
DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW) *goh JDJ*

RE: DOCKET NO. 010827-EI - PETITION BY GULF POWER COMPANY FOR
APPROVAL OF PURCHASED POWER ARRANGEMENT REGARDING SMITH
UNIT 3 FOR COST RECOVERY THROUGH RECOVERY CLAUSES DEALING
WITH PURCHASED CAPACITY AND PURCHASED ENERGY.

AGENDA: 9/18/01 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\010827R4.RCM

CASE BACKGROUND

On June 8, 2001, Gulf Power Company (Gulf) filed a Petition for approval of a purchased power agreement (PPA) with Southern Power Company (Southern Power). The PPA anticipates the transfer of Smith Unit 3, a 575 MW combined cycle generating unit, to Southern Power by Gulf. According to Gulf, it will then have first call to purchase the full capacity and energy from Smith Unit 3 for 10 years. The contract also entitles Gulf to call upon the output of Smith Unit 3 for voltage support in the Panama City area for a 20-year term. The costs of the capacity and energy would be passed through the cost recovery clauses. In 1999 Gulf obtained a certificate of need for Smith Unit 3. See Order No. PSC-99-1478-FOF-EI, issued in Docket No. 990325-EI on August 16, 1999 (Need Determination Order). The Office of Public Counsel (OPC) and the Florida Industrial Power Users Group are intervenors.

DOCUMENT NUMBER-DATE

11264 SEP 10 2001

FPSC-COMMISSION CLERK

DOCKET NO. 010827-EI
DATE: December 6, 2001

On June 28, 2001, the Office of Public Counsel filed a Motion to Dismiss in this docket. Gulf filed its response on July 5, 2001. At the Agenda Conference on August 14, 2001, the Commission voted to deny the Motion.

On August 27, 2001, Gulf filed a Notice of Voluntary Dismissal and/or Withdrawal of Petition and requested an order acknowledging its voluntary dismissal. At the same time, Gulf filed a Request for Immediate Return of Confidential Information Provided Pursuant to Discovery. This recommendation addresses Gulf's August 27, 2001, filing, and the Commission's decision to deny OPC's Motion to Dismiss in light of the withdrawal of the Petition. The Commission is vested with jurisdiction over this subject matter through the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

ISSUE 1: Should the Commission acknowledge Gulf's Notice of Voluntary Dismissal and/or Withdrawal of Petition?

RECOMMENDATION: Yes.

STAFF ANALYSIS: The Commission has previously considered the issue of whether an entity initiating a proceeding can subsequently voluntarily dismiss its petition, and has decided it can. See Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, in Docket 920977-EQ; Order No. PSC-01-0082-FOF-EI, issued January 9, 2001, in Docket No. 000442-EI. But for the fact that the Commission has taken official action in this docket, it would be appropriate to handle this matter administratively. Therefore, Gulf's Notice of Voluntary Dismissal and/or Withdrawal of Petition should be acknowledged.

ISSUE 2: Should the Commission, on its own motion, vacate its August 14, 2001, decision on OPC's Motion to Dismiss?

RECOMMENDATION: Yes. Gulf's withdrawal of its Petition renders the decision on OPC's Motion to Dismiss unnecessary, and the Commission has previously vacated decisions under such circumstances.

STAFF ANALYSIS: As stated in the Case Background, OPC's Motion to Dismiss was denied at the August 14, 2001, Agenda Conference. An order on that decision was not yet issued when, on August 27, 2001, Gulf filed its Notice of Voluntary Dismissal.

In light of the voluntary dismissal of the petition, the Commission does not need to make a decision on OPC's Motion. The Commission has previously vacated its decision after a change in circumstances has warranted such action. See Docket No. 000499-TI, Order No. PSC-00-1606-PAA-TI (rescinding a decision to grant a certificate); see also, Docket No. 970381-SU, Order No. PSC-98-1248-FOF-SU (granting motion to rescind previous order); Docket No. 992029, Order No. PSC-00-1214-FOF-TI (rescinding its previous order); Docket No. 000442-EI, Order No. PSC-01-0082-FOF-EI (vacating previous decision). If the Commission issues an order reflecting the August 14, 2001, decision, it may be appealed or it may lead to confusion since there will be no final decision in the docket.

Based on the discussion of the merits provided above, and in an effort to promote administrative efficiency, Staff recommends that the decision denying OPC's Motion to Dismiss be vacated.

ISSUE 3: Should the Commission approve Gulf's Request for Immediate Return of Confidential Information Provided Pursuant to Discovery?

RECOMMENDATION: Gulf's Request should be granted to the extent that it asks for OPC and FIPUG to return discovery responses subject to a request for confidential classification. Gulf's Request should be denied in all other respects.

STAFF ANALYSIS: In its Request, Gulf asks the Commission to:

direct the parties receiving confidential information during the course of discovery in this proceeding to immediately return all copies of such information to Gulf Power's attorneys; to destroy all materials derived from the confidential information..., such derivative material to include, without limitation, any notes, testimony or exhibits (including drafts), and any other derivative material of any description developed from the confidential information supplied by Gulf...and to certify that no copies of the confidential information or derivative material, electronic or otherwise, have been retained.

Gulf requested confidential classification of much of the information it provided to Staff and the parties in response to discovery requests. Gulf entered into a non-disclosure agreement with FIPUG. On August 30, 2001, the Division of the Commission Clerk and Administrative Services (CCA) returned to Gulf all documents in the possession of Commission Staff for which Gulf requested confidential classification. OPC and FIPUG informally told Staff that they have not yet returned any discovery responses to Gulf.

Section 366.093(4), Florida Statutes, states:

The commission shall order the return of records containing proprietary, confidential business information when such records are no longer necessary for the commission to conduct its business. At that time, the commission shall order any other person holding such records to provide them to the person providing the records.

Rule 25-22.006(6)(c), Florida Administrative Code, addresses the return of discovery information, subject to a request for confidential classification, that has been provided to Public Counsel, and states:

If the information is not to be used in a proceeding before the Commission, then Public Counsel shall return the information to the utility in accordance with the record retention requirements of the Department of State.

The Order Establishing Procedure, Order No. PSC-01-1532-PCO-EI, issued July 24, 2001 (Order), also addresses the return of discovery information, subject to a request for confidential classification and states:

If no determination of confidentiality has been made and the information has not been made part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information.

The Order is not explicit with respect to whether only the Commission must return the documents, or whether all the parties must return the documents. However, the Order should not be interpreted in a way that conflicts with the Florida Statutes or the Florida Administrative Code.

In light of the above provisions of law and the Order, Staff recommends that the Commission order FIPUG and OPC to return to Gulf discovery responses that are subject to a Request for Confidential Classification filed by Gulf.

With respect to "derivative" materials, Gulf's request should be denied. Gulf cites no authority for its request. Chapter 366, Florida Statutes, does not authorize the Commission to order parties to destroy "derivative" material. Rule 25-22.006, Florida Administrative Code, and the Order do not address "derivative" materials.

Gulf's definition of "derivative" is extremely broad and includes information which would not meet the confidentiality criteria in Chapter 366, as well as information that could be subject to the work product doctrine or the attorney-client privilege. Even if some authority existed somewhere, which is highly doubtful, it is even more doubtful that such authority would

allow the Commission to order destruction of documents on such a broad scale and without prior inspection of any sort.

For the reasons provided above, Staff recommends that Gulf's Request be granted to the extent that it asks for OPC and FIPUG to return discovery responses subject to a request for confidential classification, and that Gulf's Request be denied in all other respects.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: This docket should be closed 32 days after the issuance of the order to allow the time for filing an appeal to run.

STAFF ANALYSIS: This docket should be closed 32 days after the issuance of the order to allow the time for filing an appeal to run.