

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION
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In re: Request for Rate Increase by
of Our Company

_____ /

Docket No.: 010949-EI

Federal Executive Agencies
Post Hearing Brief
And
Statement of Issues and Positions

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PRELIMINARY STATEMENT

The Federal Executive Agencies file this post hearing brief and post hearing statement of issues and positions, in accordance with the "Order in Establishing Procedure" filed in this proceeding on October 15, 2001.

The following abbreviations are used herein:

Commission	Florida Public Service Commission
FEA	Federal Executive Agencies
FIPUG	Florida Industrial Power Users Group
FCTA	Florida Cable Telecommunications Association
OPC	Office of Public Counsel
Gulf	Gulf Power Company
Staff	Staff of the Florida Public Service Commission

References to the transcript of hearing in this matter or as follows: (Tr. ____).

In section 1 of this filing, the FEA presents its argument. In section 2 of this filing, the FEA presents the summary of each position taken by the FEA, wherein each summary consists of no more than 50 words, set off with asterisks, as required by the "Order Establishing Procedure."

Section 1
ARGUMENT

The Commission should adopt and direct the use of the Minimum Distribution System Methodology (MDS) as the appropriate Cost of Service methodology for designing Gulf's rates.

The FEA submits the following points of argument in support of its position that the Commission should adopt and direct the use of the Minimum Distribution System Methodology (MDS) as the appropriate cost of service methodology for designing Gulf's rates.

Point 1: MDS is the only methodology supported by testimony in the record; it would violate due process and rulemaking requirements to prohibit use of the MDS methodology in this Docket.

If the Commission directs the use of any methodology other than MDS, the Commission will be directing the use of the methodology for which there is no supporting testimony in the record.

In its filing in this case, Gulf proposes the use of the MDS methodology. Gulf submitted into the record the prefiled testimony of its expert, O'Sheasy, in support of the use of the MDS methodology, and his prefiled testimony has been received into evidence in this proceeding. Gulf has summarized its position as follows:

ISSUE 89: What is the appropriate treatment of distribution costs within the cost of service study? (Wheeler)

Where possible, direct assignments are appropriate. An example is the direct assignment of customer substations. For demand related distribution cost, NCP is appropriate. An example is the demand-related portion of Account 368 - line transformers allocated upon NCP. For customer related cost, the customer allocator is appropriate. An example of this is the customer-related portion of Account 364 - Poles and Fixtures allocated

upon the average number of customers at levels 4 and 5. Note: **Where cost must be divided into demand and customer component, the Minimum Distribution System (MDS) is appropriate in order to adhere more closely with sound cost causative principles.** (O'Sheasy)

Statement of Gulf position in Prehearing Order filed every 22, 2002, at issue 89 (emphasis added).

No party, nor Staff, has provided any testimony in this docket attacking use of the MDS methodology or suggesting use of any alternative methodology.

In Gulf's last rate case before this Commission, docket No. 891345-El, Order number 23573, issued on October 3, 1990, 120 PUR4th 1, this Commission rejected the use of the MDS methodology. However, that rejection was apparently based on extensive testimony as to various cost of service methodologies. See Commission order 23573 at page 74 (emphasis added):

A. Cost of Service Methodology.

Several methodology's were put forth for consideration as follows:

Gulf Power -- 12 month Coincident Peak and 1/13 Energy Methodology; Public Counsel -- equivalent Peaker Cost Methodology; and Industrial Intervenors -- Near Peak Methodology. The equivalent peaker methodology implies a refined knowledge of cost which is misleading, particularly as to the allocation of plant costs two hours past the break even .. The near peak methods includes to narrow a spread of peak hours in our view. **We heard extensive testimony on each of these methodologies**

At page 79 of the 1990 order, this Commission stated as follows:

Our policy since the early 1980s has been to classify only the service drop and meter portion of the distribution system as customer related. The Industrial Intervenors (II) and the utility advocate classifying a significant portion of the remainder of the distribution system, including poles, conductors, and transformers, as customer related. This method is often referred to as the minimum distribution system concept. There is a fundamental flaw in this proposal in that only part of the distribution system is classified as customer related. None of the sub transmission and transmission system would be classified as customer related. Hence customers served at primary voltage

through dedicated substations, and customers served at higher voltages would not pay for any of this network path.

Based on the reference to "extensive testimony on each of these methodologies," *supra*, presumably there was testimony in the record in the 1990 proceeding, supporting the Commission ruling that the MDS system was flawed. There is no testimony in the current proceeding as to any flaws or deficiencies in the MDS methodology. To the contrary, the uncontradicted testimony in this case is that the MDS methodology is the best methodology (Tr. 689-90), and that MDS adheres most closely with sound principles for identifying cost causation. Moreover, the testimony in the current proceeding is that conditions have changed since 1990, and that the use of the MDS methodology is currently appropriate (testimony of O'Sheasy, Tr. 688).

Alternatively, in the 1990 Order the Commission may have been implementing nonrule policy. This may have been proper in 1990; see Florida Public Service Com'n v. Central Corp., 551 So.2d 568 (Fla 1st DCA 1989) at 570 ("We are not unmindful of the principle that rulemaking cannot be forced upon an agency and that policy may be developed through the adjudication of individual cases. *See McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977) (while the Florida Administrative Procedure Act requires rulemaking for policy statements of general applicability, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases).").

However, the law concerning rulemaking has changed substantially since 1990,¹ and what may have been proper in 1990 is not proper under current law. Under current

¹ See Florida Administrative Practice, Florida Bar, 5th edition 1999, at chapter 3, "Rule Adoption and Review," section 3.1 and 3.2: "The 1996 Florida Legislature substantially revised the Administrative

law, this Commission is generally prohibited from enforcing a rule that has not been properly promulgated.² Clearly the Commission position stated in its 1990 order, that "Our policy since the early 1980s has been to classify only the service drop and meter portion of the distribution system as customer related," was a statement of general applicability, and would be a rule as defined at section 120.52(15), Florida Statutes (2001), if applied in the current case.

This Commission currently has no rule promulgated in accordance with chapter 120, Florida Statutes (2001), prohibiting the use of the MDS methodology, or directing use of some other alternative methodology.

The Commission has no exemption regarding compliance with the requirements of Chapter 120, Florida Statutes; see Southern States Utilities v. Florida Public Service Com'n, 714 So.2d 1046 (Fla. 1st DCA1998)("As regards used and useful calculations, our concern thus far has been only that the PSC comply with the procedural requirements of the Administrative Procedure Act, chapter 120, Florida Statutes (1997), in making changes in policies governing these calculations. **The PSC is, after all, subject to the Act.**") (emphasis added). The Commission is properly subject to challenge where its policies constitute unpromulgated rules; see Aloha Utilities, Inc. v. Public Service Com'n, 723 So.2d 919 (Fla 1st DCA 1999); Florida Public Service Com'n v. Central Corp., 551 So.2d 568 (Fla 1st DCA 1989).

Procedure Act Many of the substantive changes to the APA were in the areas of agency rulemaking, administrative determinations of invalidity, and legislative oversight of rulemaking."

² See section 120.54(1)(a), Florida Statutes (2001): "Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." See also section 120.56(4)(d): "When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement for any substantially similar statement as a basis for agency action." Only if this Commission issues an order in this case, relying on a

There being no properly promulgated rule rejecting the MDS methodology as a matter of Commission policy, the Commission must be constrained by the evidence of record in the current proceeding, and failure to be so constrained results in a deprivation of due process. See e.g., General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978) at 409 (emphasis added):

The Commission selected a ratio which nowhere appears in the record, apparently fabricating one for the company based on information it has compiled for water companies generally. **The arbitrary selection of this ratio as a "fact" comes from outside the record of the proceeding and plainly violates the notions of agency due process** which are embodied in the administrative procedure act. See Section 120.59(2), Florida Statutes (1975), which directs that findings of fact shall be explained by reference to "facts of record"; Section 120.57(1)(b)7, which states that findings of fact "shall be based exclusively on the evidence of record and on matters officially recognized"; and Section 120.61, which contemplates notice of matters to be officially recognized and the opportunity to contest them.

See also, e.g., North Florida Water Co. v. City of Marianna, 235 So.2d 487 (Fla. 1970) at 488, 489 (emphasis added):

In the instant case, petitioner submitted to the respondents accounting figures which indicated that the rate of return it was receiving was unreasonable. The Commission did not choose to rebut these figures with evidence of its own or from any other source, but nonetheless it denied the rate increase request.

Governmental bodies authorized by law to pass upon utility rates must base their decisions upon evidence and not upon some undisclosed factor or factors. **A reviewing body's mere opinion as to what is a proper rate of return is not a valid substitute for evidence.**

In the absence of a properly promulgated rule against use of the MDS methodology, and given that the MDS methodology is the only methodology supported by testimony of record in this proceeding, it would be a violation of the FEA's due

unpromulgated rule policy against use of the MDS methodology, would the matter be ripe for the FEA or

process rights, as well as a violation of Florida rulemaking statutes, for the Commission to rule against use of the MDS methodology in the present case.

Point 2: No party opposes use of MDS methodology; a majority of the parties support use of MDS.

There are only five parties to this proceeding: Gulf, OPC, FEA, FIPUG, and FCTA. No party to the proceeding has opposed the use of the MDS methodology. As of the date of the Prehearing Order in this matter filed on February 22, 2002, Gulf, FEA and FIPUG are all on record as supporting the use of the MDS methodology; OPC and FCTA take no position concerning use of the MDS methodology. See Prehearing Order, at issues 88 and 89. (As Staff has pointed out to FEA during preliminary proceedings in this docket, Staff is not a party to the proceeding.)

Although the FEA cannot, as of when it files this brief, know for certain whether any party will change its position concerning use of MDS methodology, upon information and belief the FEA submits to the Commission that the final filings of the parties will continue to indicate that no party opposes use of MDS, and that a majority of the parties support use of MDS.

Point 3: MDS is the only methodology suggested by NARUC in its Electric Utility Cost Allocation Manual; MDS is a longstanding, mainstream methodology.

Exhibit 23 in this proceeding is an excerpt from the Electric Utility Cost Allocation Manual, January 1992 edition, published by the "*National Association of Regulatory Utility Commissioners*." Exhibit 23 was duly admitted into the record in this proceeding (Tr. 36). As suggested by Comm. Deason at the hearing in this matter (Tr.

other aggrieved parties to initiate challenge under 120.56(4)(d), Florida Statutes.

35-36), the purpose of the NARUC manual is to basically be a resource document to indicate what methodologies are out there and what are the pros and cons of each.

As noted on pages ii and iii of Exhibit 23, staff of the Florida Public Service Commission were involved in the writing of the NARUC Electric Utility Cost Allocation Manual.

The MDS methodology is the only relevant cost of service methodology set forth in the NARUC Manual. See testimony of O'Sheasy (Tr. 688):

Q: Okay. Now, does the NARUC manual propound any other cost-of-service methodology besides MDS?

A: Not in terms of the splitting of demand and customer related costs in the distribution system, no.

Q: There's not a non-MDS methodology in the manual?

A: Correct.

A review of reported cases reveals that MDS was mentioned and described in reported cases as early as 1982, and indicate that MDS is a long-established, mainstream methodology. Review of the cases does not reveal any cases where the MDS methodology has been found to be fundamentally flawed. See, e.g.:

American Can Co. v. Lobdell, 638 P.2d 1152 (Or.App., 1982) at 1157 (emphasis added):

To determine how much each customer class had contributed to LRIC [long run incremental cost], the Commissioner in these cases broke down total system LRIC to three basic components: "demand" or "capacity" costs, "energy" costs, and "joint and customer" costs. Both demand and energy LRIC may be generally described as costs of supplying peak capacity and energy in excess of a minimum system; joint and customer costs are costs of connection to a **minimum distribution system** (with sufficient poles, lines and transformation equipment to deliver one kilowatt hour of energy to each customer) and costs of meter reading, accounting and billing, i.e. customer service costs. Most joint and customer costs are incurred in serving residential and some commercial customers; few, if any,

are attributable to large industrial customers, as the table in the margin demonstrates

Bryant v. Arkansas Public Service Com'n, 907 S.W.2d 140 (Ark.App.,1995) at 150 (emphasis added):

The Attorney General also argues that the Commission erred in accepting ALG's [Arkansas Louisiana Gas Company] allocation of the cost of distribution mains because the Commission arbitrarily accepted an allocation methodology that the Commission had already recognized as being incorrect.

In allocating this cost, ALG applied the **minimum size distribution** theory, which recognizes that a minimum size main is necessary in any distribution system, regardless of peak demands or annual throughput. ALG used a main two inches or less in diameter, and the associated facilities, as the minimum size and allocated that plant among customer classes on customer number. The remaining cost of mains was allocated among customer classes on the basis of peak demand. AGC [Arkansas Gas Consumers] supported ALG's proposed cost allocation method. The Attorney General contended, however, that ALG's methodology allocated too much of the cost to residential and small business customers. He advocated allocating 50% of the costs on annual throughput and 50% on demand to recognize that a distribution system is designed to provide both commodity and demand. Staff proposed allocating mains on a density of customer factor and an average and peak cost allocation factor. The parties presented considerable evidence through witnesses and studies in regard to this issue.

David Sullins, vice president of rates for ALG, responded that Copeland's approach ignored the realities of the system; first, that smaller consumption classes like the residential class use and are responsible for far more of the distribution grid than larger customers, and second, that ALG serves a considerable number of residential customers in rural areas, which results in a high ratio of pipe investment per customer. Sullins admitted that ALG's method was not perfect but argued that at least it recognized some measure of this cost differential and thus is more precise than demand or volume methods.

In its order, the Commission rejected Staff's approach, finding that further study was necessary before customer density factors could be properly developed. In discussing the Attorney General's approach, the Commission stated: "[T]he AG's approach ignores reality by dismissing the customer related costs of distribution mains. While the Commission does not necessarily disagree with the Attorney General that some smaller size distribution main may be more appropriate in determining the **minimum distribution system**, no party has adequately justified such a proposal." The Commission adopted ALG's allocation for purposes of this docket only.

Point 4: The use of the MDS method has been approved by utility regulators in other states for use by Gulf's affiliated utilities in the Southern Group.

The use of the MDS methodology by Gulf's affiliated utilities, has been approved by utility regulators, and is in actual use. See testimony of O'Sheasy (Tr. 686):

A: Gulf -- in addition to what we've proposed with Gulf, Georgia Power uses it. Mississippi uses it. Savannah Electric in their current filing is using it.

Q: Now, specifically, do you know what happened in December of 2001 in the Mississippi rate case and the Georgia rate case?

A: Well, in both cases, the regulatory Commissions approved the filed cost-of-service study by those two operating companies, and those filed cost-of-service studies included the Minimum Distribution System.

Point 6: MDS is the best method for identifying cross subsidy of one rate class of customer by another rate class of customer.

See testimony of O'Sheasy (Tr. 689-90):

Q: Now, you believe that MDS is the best methodology for identifying rate class cross-subsidization; correct?

A: I do, and that would be true for any utility, not just Gulf Power Company.

There is no contradictory testimony in the record in this proceeding.

CONCLUSION

Based upon the above stated argument, the FEA urges that the Commission adopt and direct the use of the Minimum Distribution System Methodology (MDS) as the appropriate cost of service methodology for designing Gulf's rates.

Section 2
ISSUES AND POSITIONS

ISSUE 15: Has the Company removed all non-utility activities from rate base?
(Meeks, L. Romig)

FEA position: *FEA adopts the position of OPC.*

ISSUE 24: Should any adjustments be made to Gulf's fuel inventories?
(Bohrmann, Matlock)

FEA position: *FEA adopts the position of OPC.*

ISSUE 35: What is the appropriate return on equity (ROE) to use in
establishing Gulf's revenue requirement? (Lester)

FEA position: *In light of recent actual and projected inflation
experience, returns currently paid on long term debt instruments,
the relatively risk-free regulatory environment in which GP
operates, as well as rates of return authorized by other state
regulatory Commissions in recent months, GP's requested return
on equity request is unreasonably high.*

ISSUE 36: What is the appropriate weighted average cost of capital including
the proper components, amounts and cost rates associated with the
capital structure? (Lester)

FEA position: *FEA adopts the position of OPC.*

ISSUE 41: Is Gulf's requested level of O&M Expense in the amount of
\$182,419,000 (\$186,354,000 system) for the May 2003 projected
test year appropriate? (L. Romig)

FEA position: *FEA adopts the position of OPC.*

ISSUE 42: Should wholesale energy costs to Gulf Power be Adjusted?
(Wheeler)

FEA position: *FEA adopts the position of OPC.*

ISSUE 48: Should an adjustment be made to advertising expenses for the May
2003 projected test year? (Kaproth, L. Romig)

FEA position: *FEA adopts the position of OPC.*

ISSUE 51: Should an adjustment be made to Gulf's requested level of Salaries and Employee Benefits for the May 2003 projected test year? (Kaproth, L. Romig)

FEA: *Yes.*

ISSUE 53: Should an adjustment be made to Pension Expense for the May 2003 projected test year? (Kyle, L. Romig)

FEA position: *Yes.*

ISSUE 61: What is the appropriate amount of expense to include for special projects? (Haff, Merta)

FEA position: *FEA adopts the position of OPC.*

ISSUE 62: Should an adjustment be made to Production Expenses for the May 2003 projected test year? (Haff, Merta)

FEA: *FEA adopts the position of OPC.*

ISSUE 64: Should an adjustment be made to cable inspection expense? (Matlock, D. Lee, Merta)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 65: Should an adjustment be made to substation maintenance expense? (Matlock, D. Lee, Merta)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 66: Should adjustments be made to tree trimming expense? (Matlock, D. Lee, Merta)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 67: Should an adjustment be made to pole line inspection expense? (Matlock, D. Lee, Merta)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 68: Should an adjustment be made to street and outdoor light maintenance expense? (Matlock, D. Lee, Merta)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 69: Should an adjustment be made to Distribution Expenses for the May 2003 projected test year? (Mattock, D. Lee, Marta)

FEA position: *Yes.*

ISSUE 71: Should an adjustment be made to Customer Accounts Expense for the May 2003 projected test year? (L. Romig, Kaproth)

FEA position: *Yes.*

ISSUE 73: What adjustments, if any, should be made to the depreciation expense and the fossil dismantlement accrual to reflect the Commission's decision in Docket No. 010789-EI? (Meeks)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 74: What is the appropriate depreciation rate and dismantlement provision for Smith Unit 3? (Meeks)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 75: Should an adjustment be made to Depreciation Expense for the May 2003 projected test year? (Meeks)

FEA position: *FEA Adopts the position of OPC.*

ISSUE 88: What is the appropriate cost of service methodology to be used in designing Gulf's rates? (Wheeler)

FEA position: *Minimum Distribution System Methodology (MDS) is the appropriate Cost of Service methodology for designing Gulf's rates. This is the only methodology sponsored by any witnesses on the record.*

ISSUE 89:

What is the appropriate treatment of distribution costs within the cost of service study? (Wheeler)

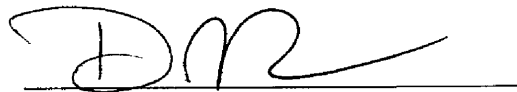
FEA position: *The recommended MDS methodology classifies distribution costs as demand related, customer related or a combination of as stated by the National Association of Regulatory Utility Commissioners advocate in its official guide book Electric Utility Cost Allocation Manual, January 1992, page 89.*

ISSUE 90:

If a revenue increase is granted, how should it be allocated among the customer classes? (Wheeler)

FEA position: *If a revenue increase is granted, it should be allocated based on the Company's MSD Methodology Cost of Service Study Results using the approach set forth by GP Rate Design witness James I. Thompson at Page 16, Lines 9-20.*

Respectfully submitted this 20 day of March, 2002.



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CERTIFICATE OF SERVICE

I hereby certify that copy of this post hearing brief and statement of positions, has been served by Federal Express this March 20, 2002 to the following:

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