State of Florida

ORIGINAL

Public Service Commission

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

02 APR 23 PM 12:08

COMMISSION CLERK

RECEIVED FPSC

DATE: April 17, 2002
TO: Dr. Mary Bane, Executive Director
FROM: Office of the General Counsel (Stern) MKS
Division of Economic Regulation (Romig) DM
RE: Revision to the Post-hearing Recommendation for the Gulf Rate Case, Docket No. 010949-EI

The post-hearing recommendation for the Gulf Rate Case was filed on April 15, 2002, for a Special Agenda on April 26, 2002. Staff requests permission to revise Issue 125 of the recommendation because it does not include reference to filings made by Gulf and the Florida Industrial Power Users Group (FIPUG). The revisions will not affect the published Agenda or the vote sheet. The recommendation can not be deferred because the Commission must make its decision on whether to grant Gulf rate relief by May 10, 2002, a statutory deadline.

As you know, the decision on rate relief requires two steps. First the revenue requirement must be set and then any increase in revenue must be allocated to the customer classes. The revenue requirement will be addressed at the April 26, 2002 Special Agenda, and the allocation will be addressed at a Special Agenda set for May 8, 2002. The Special Agenda for April 26, 2002, can not be deferred because staff needs the time between the two agenda conferences to determine the proper allocation of the revenue requirement. In addition, no other agenda conference is scheduled between April 26, 2002, and May 8, 2002.

Issue 125 of the recommendation filed for the April 26, 2002 Agenda Conference addresses Gulf's proposal for a revenue sharing plan. The proposal was filed after the hearing as a late-filed exhibit. The parties were given the opportunity to file objections to the late-filed exhibit. The recommendation states that only the Office of Public Counsel filed an objection, but FIPUG also filed an objection. The recommendation must be revised to acknowledge FIPUG's objection and to summarize its content.

OK
MMB
4/22/02

APR 22 2002

DOCUMENT NUMBER-DATE
04480 APR 23 02
FPSC-COMMISSION CLERK

ISSUE 125: Should Gulf's proposed Incentive Earnings Sharing Plan be approved? (Stern)

RECOMMENDATION: No. Gulf's proposed Incentive Earnings Sharing Plan should not be approved because it is not supported by the hearing record. Instead, Gulf's plan should be addressed in a separate evidentiary proceeding. (Stern)

STAFF ANALYSIS: At the hearing the Commission asked Gulf to file a late-filed exhibit describing an earnings sharing plan proposed by Mr. Bowden during his live testimony. The exhibit, identified at the hearing as Late-filed Exhibit 25, was also to include citations to the hearing record to show that the plan had evidentiary support. (TR 103-109) The parties' responses to the exhibit were to be filed two weeks after the exhibit. (TR 109)

Gulf filed the exhibit on March 14, 2002. ~~, and~~ FIPUG filed its response on March 20, 2002, and OPC filed its response on March 28, 2002. With its response OPC also filed a Request for Oral Argument. Gulf filed a response to OPC's response, and Request for Oral Argument on April 5, 2002. No other parties filed a response to Gulf's exhibit.

OPC's Request for Oral Argument

OPC argues that oral argument should be allowed because Gulf cites to numerous areas of prefiled testimony in Late-filed exhibit 25 and the parties had no way of knowing, at the hearing, how Gulf would attempt to support its proposal.

Gulf's position is that there should be no oral argument. Gulf contends that OPC's Request for Oral Argument is an attempt to expand the time frame OPC has to respond to the Late-filed exhibit. Gulf also believes that OPC should not be given the opportunity to address whether the Late-filed exhibit is admissible.

Staff recommends the Request be granted. Neither the parties nor the Commission had the opportunity to evaluate the evidentiary support for the proposal at the hearing, because no one knew what it would contain. Oral argument would better inform the Commissioners as to the record support for Late-Filed Exhibit 25. Therefore, staff recommends that Oral argument be allowed in order to address whether Late-Filed Exhibit 25 be admitted into the record. Staff suggests that each party be allowed ten minutes to make their arguments.

REVISED 04/23/02

Gulf's Response to OPC's Response

Gulf's Response to OPC's Response ~~April 5, 2002 filing~~ should not be considered in deciding this issue. First, the Commission did not grant the parties leave to file responses to responses. Second, such a filing is not contemplated by the Commission's rules or the Florida Rules of Civil Procedure.

Gulf's Proposal

Gulf titles its proposal "Incentive Earnings Sharing Plan." The plan is contained in Attachment 7 to this recommendation. Gulf proposes that its earnings be shared between customers and shareholders when those earnings lie between the top of its authorized range on ROE (the sharing point) and a higher point (the maximum sharing point) to be designated in the future. Earnings exceeding the maximum sharing point would be under the Commission's jurisdiction, and the disposition of those earnings would also be determined in the future.

The proposal identifies three measures that will be used to assess Gulf's performance: 1) price - the overall retail cents per kwh in the lowest quartile as compared to an appropriate peer group; 2) reliability - a fixed value on the System Average Interruption Duration Index (SAIDI) and the System Average Interruption Frequency Index (SAIFI); and, 3) customer satisfaction/value - the upper quartile among a peer group based on a customer value survey. The quantitative scores Gulf must receive on the reliability indices, number 2 above, will be set in the future.

The three performance measures will be used to develop an annual performance rating for Gulf. A Level 3 performance rating will be achieved if Gulf meets or exceeds all three performance measures. A Level 2 performance rating will be achieved if Gulf meets or exceeds two of the performance measures. A Level 1 performance rating will be achieved if Gulf meets or exceeds one of the performance measures. If Gulf does not meet any of its performance measures, the Commission will have jurisdiction over the earnings above the sharing point, and the disposition of those earnings will be determined in the future.

The division of earnings between the customers and shareholders for a year is based on the performance level Gulf achieves in that year. If Gulf achieves a Level 3 rating than the customers get 1/3 of the shared earnings and the shareholders get

2/3. If Gulf achieves a Level 2 rating than the customers get 1/2 of the shared earnings and the shareholders get 1/2. If Gulf achieves a Level 1 rating than the customers get 2/3 of the shared earnings and the shareholders get 1/3. If Gulf performs below a Level 1 rating than the sharable earnings will be under the jurisdiction of the Commission, and their disposition will be determined in the future.

Gulf proposes that the Incentive Earnings Sharing Plan be implemented in 2002 through 2005. The amount of earnings to be shared will be based on Gulf's surveillance reports. The proposal includes a schedule for determining the amount of earnings to be shared and distributing those earnings.

Finally, "to implement the proposed incentive plan in a timely manner that also recognizes the due process rights of the intervening parties, Gulf proposes the following procedure:

> "Simultaneous with the Commission's final vote on Gulf Power's request for rate relief, the Commission should vote to (1) approve the incentive plan concept as presented in th[e] Late-filed Exhibit (2) direct Gulf to file within thirty days after the Commission's vote proposed specific details for implementation and operation of the plan, and (3) schedule a 1 day hearing to allow parties to respond to the proposed plan."

Gulf suggests that the 1 day hearing be handled as a "second phase" proceeding in Docket No. 010949-EI.

OPC objects to the admission of Late-filed Exhibit 25 into the evidentiary record for three reasons. First, the Commission's jurisdiction to order refunds of historical overearnings is unclear and a decision cannot be made on Gulf's proposal until the legal issue is squarely addressed. Second, the procedural means by which the exhibit was introduced does not satisfy the requirements of due process. Finally, there is not evidentiary support for the proposal in the record.

OPC points out that Gulf's proposal assumes that the Commission has authority to order refunds of overearnings from a previous period whether or not there is a rate case. OPC notes that Mr. Bowden conceded the point during his live testimony.

OPC argues that if the Commission does in fact have continuing jurisdiction to order refunds of subsequent overearnings then the

Commission should require Gulf to refund, at the close of each fiscal year, all earnings above the top of the range on ROE or whatever the Commission deems excessive. If the Commission does not have such jurisdiction, then it has no authority to approve Late-Filed Exhibit 25. OPC's position is that a decision on whether to approve the proposal cannot be made until this legal issue has been addressed, and Gulf has not addressed it.

OPC next argues that the proposal was not offered in a manner that satisfies the requirements of due process. Specifically, the proposal was not identified during the prehearing process so the parties had no opportunity for discovery. Because the proposal was filed late there was no opportunity for cross-examination or testimony to refute the proposal.

OPC argues that the evidentiary record does not provide support for the proposal. OPC notes that Mr. Bowden testified at the hearing that the concept was something he had thought about but not written down. OPC does not believe that the citations Gulf makes to the record support the proposal.

FIPUG strenuously objects to the admission of the Late-filed exhibit into evidence. FIPUG notes that Witness Bowden introduced the incentive plan while summarizing his prefiled testimony from the stand. Because his prefiled testimony did not include any such plan, he went beyond the scope of his prefiled testimony.

FIPUG contends that Gulf failed to comply with the Commission's instruction because it did not provide a reference to prefiled testimony for each item in the Late-filed exhibit. FIPUG argues that because no issue in the case addresses the performance plan, the parties were not on notice that such a plan would be considered. FIPUG claims that as a result, the parties had no opportunity to conduct discovery on Gulf's proposal, to file testimony on the proposal, or to cross-examine Witness Bowden about the proposal because it was filed after the hearing.

Given the above, FIPUG claims that implementing any sort of plan based on Gulf's proposal deprives the Intervenors of their due process rights. FIPUG notes that Gulf recognizes the due process flaws because it suggests that a second hearing be conducted in this docket in order to approve the proposal. FIPUG's position is that Gulf's proposal is not properly before the Commission.

Staff does not agree with certain concepts put forth in the proposal, but more importantly believes the proposal is not supported by the record. The direction to Gulf was to prepare an exhibit that compiles, in one place, testimony from the record. (TR 105, 109) Approving Gulf's proposal would violate the parties' rights to due process because the proposal introduces concepts and criteria which are addressed no where in the record.

In its attempt to show that the evidentiary record supports the proposal, Gulf relies on the following: 1) Mr. Labrato's criticism of Mr. Breman's testimony; 2) Mr. Labrato's testimony that Gulf has low rates; 3)Mr. Bowden's testimony that Gulf has become more efficient and reduced its workforce through implementing new programs; 4) Mr. Fisher's testimony on Gulf's quality of service and customer satisfaction; 5) Mr. Fisher's testimony on Gulf's use of SAIDI; 6) Mr. Howell's testimony on the use of Integrated Resource Planning for transmission reliability; 7) Mr. Kilgore's testimony explaining that weather conditions during the past two years caused an increase in the number of consumer complaints to the Commission against Gulf; 8) Mr. Moore's testimony on programs that increase the system reliability and the efficiency of Gulf's generating units.

The record does not contain any reference to key elements of Gulf's proposal, including but not limited to: 1) the sharing point and maximum sharing point; 2) the combined use of the proposed performance measures to assess future performance; 3) the performance ratings; 4) the Commission's jurisdiction over earnings above the maximum sharing point; 5)the Commission's jurisdiction over earnings when Gulf fails to achieve a Level 1 performance or higher; and, 6) the percentages of earnings that would go to shareholders and customers. As OPC explains, there has been no opportunity to conduct discovery, file testimony, or conduct cross-examination on these and other components of Gulf's proposal. The lack of opportunity violates the parties' right to due process. For this reason staff recommends that Late-filed Exhibit 25 not be admitted into the evidentiary record.

Staff recommends that Gulf's proposal be addressed in a separate hearing. The hearing can be conducted as a "second phase" of this rate case, as Gulf proposed. If Gulf wishes to pursue its proposal, it should file a petition.