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In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

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b. This filing is made in Docket No. 110138-EI

c. The document is filed on behalf of the Consumer Intervenors.

d. The total pages in the document are 8 pages.

e. The attached document is CONSUMER INTERVENORS' MOTION TO STRIKE.

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DOCUMENT NUMBER-DATE

08516 NOV 21 =

11/21/2011

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in Rates by
Gulf Power Company

DOCKET NO.: 110138-EI
FILED: November 21, 2011

CONSUMER INTERVENORS' MOTION TO STRIKE

The Florida Industrial Power Users Group (FIPUG), the Office of Public Counsel (OPC), the Federal Executive Agencies (FEA), and the Florida Retail Federation (FRF), (collectively, Consumer Intervenors), pursuant to rule 28-106.204, Florida Administrative Code, and Order No. PSC-11-0307-PCI-EI, files this Motion to Strike portions of the direct testimony of Constance J. Erickson and Exhibit CJE-1, Schedule 5 (Storm Study). As grounds therefor, Consumer Intervenors state:

Introduction

1. On July 8, 2011, Gulf Power Company (Gulf) filed a request for a rate increase of over \$93 million; that amount has now increased to over \$101 million due to the inclusion of issues related to Gulf's turbine upgrade. As part of its request, Gulf seeks to nearly double its current storm damage accrual amount, which will result in an increase of \$3.3 million related to this item. (Erickson direct testimony at 28-29).

2. The purported basis for Gulf's accrual increase request is a Transmission and Distribution Hurricane Loss and Reserve Performance Analyses (Storm Study) performed by a consulting firm called EQECAT and attached as CJE-1, Schedule 5 to Ms. Erickson's direct testimony.

3. This Storm Study is uncorroborated hearsay which may not be relied upon by the Commission. Moreover, Ms. Erickson is not competent to sponsor this Study or to rely upon it in her testimony. Further, the Study itself is inherently unreliable based on the broad Disclaimer

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FPSC-COMMISSION CLERK

the author of the Study has included. Thus FIPUG moves to strike those portions of Ms. Erickson's testimony which rely upon the Storm Study¹ and the Storm Study itself.

The Storm Study is Hearsay

4. The Storm Study purports to be detailed analyses of Gulf's hurricane loss exposure determined through the use of an "advanced computer model simulation program WORLDCATenterprise USWIND developed by EQECAT, an ABS Group Company."²

5. The Evidence Code defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."³

6. There is no dispute that the Storm Study was prepared by EQECAT and EQECAT personnel, including a Mr. Harris, who is located in California.⁴ Nor is there any dispute that the Storm Study is being offered for the truth of the matters asserted – *i.e.*, to establish projected hurricane losses in an attempt to support Gulf's request for an increased storm accrual.

7. However, even though the Storm Study purports to be specific to Gulf's situation, Gulf has proffered no witness from EQECAT who can testify regarding the Study or the USWIND model used in the Study. Thus, the Storm Study is clearly hearsay. Ms. Erickson has attached it to her testimony and attempted to incorporate it as an exhibit. However, this end run deprives Consumer Intervenors of their due process right to test the contents of the report and the assumptions and model that support it by discussing it with the person who actually prepared it.

¹ See Exhibit A for the portions of Ms. Erickson's testimony that should be stricken.

² Storm Study at 7.

³ Section 90.801(1)(c), Florida Statutes.

⁴ Ms. Erickson's deposition was taken on November 14, 2011; however, it will not be available until November 21, 2011. Given the requirement of the Order Establishing Procedure that any Motion to Strike be filed prior to the Prehearing Conference, FIPUG is unable to provide deposition cites.

8. The only way in which Ms. Erickson could sponsor the Study would be if it met one of the exceptions to the hearsay rule. It does not.⁵

9. For example, section 90.704, Florida Statutes, provides that an expert may rely on facts or data relied on by other experts in the subject, even if such information is not itself admissible. Ms. Erickson is not an expert in hurricane loss prevention and admitted in her deposition that Gulf did not have the in-house expertise to perform the Study. Ms. Erickson further testified that she had never run the USWIND model or been involved with determining the synthetic hurricanes used in the Storm Study. As evidence of her lack of personal knowledge of the Storm Study, Ms. Erickson admitted that Mr. Harris at EQECAT developed the Storm Study for Gulf. So while Ms. Erickson may be an expert in regulatory accounting, she is clearly not an expert in the modeling and other areas the Storm Study covers and thus is not entitled to rely upon the Storm Study pursuant to this hearsay exception.

The Storm Study is Inherently Unreliable, Immaterial and Irrelevant

10. In addition to the hearsay objection discussed above, the Storm Study itself is inherently unreliable and should be stricken on that basis alone.

11. Page 4 of the Storm Study (attached hereto as Exhibit B) includes a Disclaimer, included by the Storm Study's author. In essence, the Disclaimer provides that EQECAT does not stand behind the Storm Study or warrant it in any way or for any purpose. That is, the author himself does not stand behind the accuracy of the Storm Study.

12. The Disclaimer states in part:

...the analyses and services provided herein are provided "*as is*" *without any warranty or guaranty of any kind*. Neither EQECAT nor any of its officers, directors, agents, subsidiaries or affiliates guarantees or warrants the correctness, completeness, correctness,

⁵ When Staff inquired as to why an EQECAT witness was not provided, Gulf responded that Ms. Erickson oversaw the retention of EQECAT and commissioned and received the Study. This does not overcome the hearsay problem. (Gulf response to Staff interrogatory no. 228).

merchantability or *fitness for a particular purpose* of the analysis provided hereunder.⁶

13. If the Storm Study was reliable, then why have the very authors of the Study included such an extensive Disclaimer? EQECAT states that it provides no warranty or guaranty regarding the Storm Study *or its use for any purpose*. Thus, the Storm Study is inherently unreliable – based on the authors’ own Disclaimer – and should not be considered by the Commission at all for any purpose.⁷ The Storm Study, and all references to the Storm Study in Gulf witnesses’ testimony, exhibits, and MFRs, should be stricken pursuant to section 120.569(2)(g), Florida Statutes. This section requires the exclusion of irrelevant and immaterial evidence.

14. Gulf may attempt to argue that the Storm Study is admissible pursuant to section 120.569(2)(g), Florida Statutes, which provides that evidence of the type commonly relied upon in the conduct of affairs is admissible. However, this general provision cannot overcome the hearsay and unreliability flaws discussed above. No ordinary person, faced with making a multi-million dollar decision in the conduct of his or her affairs, would rely on a Study that, by its own terms, is not warranted or guaranteed as to its accuracy or fitness for any purpose whatsoever. Indeed, it is shocking that Gulf would even attempt to induce the Commission to rely on such a document to force its customers to pay over \$3 million a year in additional rates based on this unwarranted, unguaranteed, and unfit document.

15. Gulf may also attempt to argue that the Storm Study is a document used in the regular course of business and is routinely relied upon by Gulf for such matters. However, the Storm Study is not a business record created by Gulf; nor is Gulf relying upon the Storm Study to make a business decision for its own affairs or for a company expenditure for which it intends

⁶ Exhibit CJE-1, Schedule 5, p. 4, emphasis supplied.

⁷ To the extent that Gulf or Ms. Erickson attempt to “explain” the meaning of the Disclaimer, which is clear on its face, such “explanation” should be disregarded as hearsay also.

to bear any risk whatsoever. Gulf instead is asking the Commission to rely upon the Storm Study -- which is tantamount to asking the Commission to rely solely on hearsay -- to increase Gulf's storm damage accrual at the sole expense and risk of its customers. Sole reliance upon hearsay is prohibited by Chapter 120, Florida Statutes.

16. The Storm Study is clearly hearsay within the meaning of the Florida Evidence Code. Gulf commissioned this Storm Study, proffered no witnesses with direct knowledge of the Storm Study, and is now trying to use this rank hearsay -- the Storm Study -- to support its request to double its storm damage accrual. In addition, the very author of the Study has explicitly refused to warrant it for any purpose, rendering it inherently unreliable.

WHEREFORE, Consumer Intervenors request that the Commission strike those portions of Ms. Erickson's testimony listed in Exhibit A, Exhibit CJE-1, Schedule 5 and all other references to or reliance upon the Study in Gulf's case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Consumer Intervenor's Motion to Strike was served via Electronic Mail and First Class United States Mail this 21st day of November, 2011 to the following:

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Exhibit A
Portions of Constance J. Erickson's Testimony to Be Stricken

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Exhibit B

DISCLAIMER

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