

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Gulf
Power Company.

DOCKET NO. 110138-EI
ORDER NO. PSC-11-0556-PCO-EI
ISSUED: December 7, 2011

ORDER DENYING CONSUMER INTERVENORS'
MOTION TO STRIKE

Consumer Intervenors' Motion to Strike

On November 21, 2011, 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) filed a motion to strike portions of the direct testimony of Gulf Power Company's (Gulf) witness, Constance J. Erickson, and Exhibit CJE-1, Schedule 5 (Storm Study). Specifically, Consumer Intervenors seek to strike page 29 lines 7-12, 19-23, page 31 lines 23-25, page 32 lines 1-25, and page 33 lines 1-3 and 5-12 of the witness's direct testimony. Consumer Intervenors also seek to strike the witness' rebuttal testimony contained on page 7 lines 15-25, page 8 lines 1-19, page 9 lines 15-23, page 13 lines 12-25, page 14 lines 1-4, page 18 lines 22-24, page 19 lines 1-9 and 21-25, page 20 lines 1-25, and page 21 lines 2-16.

Consumer Intervenors state that the basis for Gulf's request to increase its current storm damage accrual amount to \$3.3 million is exhibit CJE-1, Schedule 5, the Transmission and Distribution Hurricane Loss and Reserve Performance Analyses performed by a consulting firm called EQECAT. The Storm Study analyzes Gulf's hurricane loss exposure through the use of a computer model simulation program. Consumer Intervenors argue that the Storm Study is uncorroborated hearsay and that Ms. Erickson is not competent to sponsor the study or to rely upon it as she was not involved in its development. In support of their motion, Consumer Intervenors argue that the Storm Study meets the definition of hearsay in Section 90.801(1)(c), Florida Statutes, and that it does not fall within any hearsay exception. Consumer Intervenors further argue that the Storm Study is unreliable due to its disclaimer¹ and thus immaterial and irrelevant pursuant to Section 120.569(2)(g), Florida Statutes.

Gulf's Response to the Motion to Strike

On November 28, 2011, Gulf filed its response to the motion to strike. Gulf argues that pursuant to Section 120.569(2)(g), Florida Statutes, the Storm Study is admissible as evidence relied upon by reasonably prudent people in the conduct of their affairs. Gulf argues that the Storm Study was commissioned and filed with the Commission pursuant to Rule 25-6.0143,

¹ The disclaimer, quoted in toto in the Joint Motion, provides that the entity conducting the study believes the data and methodology to be accurate but that the study is provided with no warranties or guarantees as to the correctness of the analysis.

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FPSC-COMMISSION CLERK

Florida Administrative Code (F.A.C.). Gulf argues that Ms. Erickson is an expert in accounting who regularly relies upon expert third party analyses in making accounting determinations. Gulf states that Ms. Erickson relied upon the Storm Study in making an accounting determination on the amount of the annual property damage accrual. Gulf argues that the Storm Study is also admissible pursuant to Section 120.57(1)(c), Florida Statutes, as hearsay supplementing or explaining other evidence, in this case, Ms. Erickson's expert opinion as to the proper level of the accounting accrual.

Gulf further argues that the Storm Study is admissible under the Evidence Code, specifically Sections 90.702 and 90.704, Florida Statutes, dealing with the testimony of experts and the basis of an expert's opinion testimony because the Storm Study consists of data reasonably relied upon by experts, and Ms. Erickson relied upon it in forming her opinion.

Finally, Gulf argues that the Storm Study cannot be irrelevant or immaterial since it is required by Rule 25-6.0143(1)(l), F.A.C. Gulf also states that disclaimers such as the one contained in the Storm Study are typical of such studies that the Commission has accepted in the past.

Analysis

Consumer Intervenors correctly argue that the Storm Study as offered into evidence in this rate proceeding, is hearsay pursuant to Section 90.801(1)(c), Florida Statutes. However, in administrative proceedings, hearsay is admissible under Section 120.57(1)(c), Florida Statutes, which states:

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Section 120.569(2)(g), Florida Statutes, also governs these proceedings and states:

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

In this case, Gulf propounds the Storm Study as part of its Comptroller's direct and rebuttal testimony to explain how she arrived at the determination of the annual accrual amount and the expected average annual storm loss to be charged to the utility's reserve. Gulf's witness relied upon the Storm Study as an expert witness in accounting. Thus, I find the Storm Study admissible under Sections 120.57(1)(c) and 120.569, Florida Statutes.

Consumer Intervenors also argue that the Storm Study is immaterial and irrelevant due to its disclaimer. Gulf argues that the Storm Study is relevant and admissible evidence because

pursuant to Rule 25-6.0143(1)(I), F.A.C., the disclaimer is standard language and the study is required to be commissioned and filed by the utility. The Rule states:

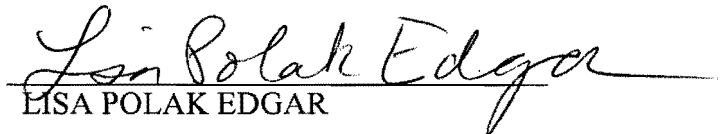
(I) Each utility shall file a Storm Damage Self-Insurance Reserve Study (Study) with the Commission Clerk by January 15, 2011 and at least once every 5 years thereafter from the submission date of the previously filed study. A Study shall be filed whenever the utility is seeking a change to either the target accumulated balance or the annual accrual amount for Account No. 228.1. At a minimum, the Study shall include data for determining a target balance for, and the annual accrual amount to, Account No. 228.1.

The rule required Gulf to file the Storm Study with the Commission by January 2011, and because Gulf, through these proceedings, seeks a change to the annual accrual amount for Account 228.1. Additionally, witness Erickson testified that she relied upon the Storm Study to determine the annual accrual amount that Gulf seeks to change. Thus, I find that the Storm Study, as required by the Commission pursuant to the Rule, is relevant evidence in these proceedings. The denial of the Motion to Strike does not remove from the Commission its authority to weigh the credibility of the Storm Study.

Based upon the foregoing, it is

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that the Motion to Strike filed by Florida Industrial Power Users Group, the Office of Public Counsel, the Federal Executive Agencies, and the Florida Retail Federation is hereby denied.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 7th day of December, 2011.


LISA POLAK EDGAR

Commissioner and Prehearing Officer

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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; or (2) 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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.