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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 110041-EI

PETITION FOR APPROVAL OF AMENDMENT
NO. 1 TO GENERATION SERVICES
AGREEMENT WITH GULF POWER COMPANY,
BY FLORIDA PUBLIC UTILITIES
COMPANY.

PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 2

COMMISSIONERS
PARTICIPATING: CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER ART GRAHAM
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, January 24, 2012

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6734

DOCUMENT NUMBER-DATE
00558 JAN 27 2012

1 P R O C E E D I N G S

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3 CHAIRMAN BRISÉ: At this time, we're going to
4 move to Item 2, which is Docket Number 110041-EI. And
5 we're going to give everyone a few minutes -- or a few
6 seconds to get in place.

7 Okay. At this time, Ms. Robinson, if you
8 could begin.

9 MS. ROBINSON: Good morning, Commissioners.
10 Item number 2 addresses Florida Public Utilities
11 Company's motion to dismiss the City of Marianna's
12 petition for formal hearing. Both parties have
13 requested oral arguments, which is at the Commissioners'
14 discretion.

15 Staff believes that oral argument could be
16 beneficial to the Commission and recommends that, if
17 granted, oral arguments should be limited to five
18 minutes per side. However, Staff was informed yesterday
19 that the City of Marianna intends to request ten
20 minutes.

21 Staff also would like to make an oral
22 modification to the closing issue, which is Issue 3 of
23 the recommendation, which is on page 10.

24 CHAIRMAN BRISÉ: Sure. You can do that at
25 this time.

1 **MS. ROBINSON:** Thank you. And the
2 modification would be inserted after the full, first
3 full complete sentence on the recommendation after the
4 word "prejudice."

5 And the modification reads as follows: "The
6 City of Marianna should be allowed 21 days from issuance
7 of the Commission order to file an amended petition. If
8 the City of Marianna fails to timely file an amended
9 petition, then the docket should be closed."

10 **CHAIRMAN BRISÉ:** Thank you. I don't know if
11 everyone got that, if all the Commissioners got that.
12 Okay. Very good. Thank you very much.

13 So at this time I think we need to make a
14 decision with respect to the oral arguments.

15 **MS. ROBINSON:** Yes.

16 **CHAIRMAN BRISÉ:** I agree with Staff. Five
17 minutes should be sufficient per side. And after that,
18 obviously there will be opportunity for questions, and
19 whatever other issues that need to come out can come out
20 through there, through that process.

21 So is there a recommendation as to which party
22 should go first?

23 **MS. HELTON:** The moving party should go first.
24 I believe FPUC filed the motion to dismiss, so
25 Ms. Keating should go first.

1 **CHAIRMAN BRISÉ:** Thank you very much.

2 At this time we're going to ask Ms. Keating to
3 go forward and present the oral arguments.

4 **MS. KEATING:** Thank you. Good morning,
5 Commissioners. Beth Keating with the Gunster Law Firm
6 here today for FPUC. We appreciate the opportunity to
7 address you on our motion. With me here today is
8 Ms. Cheryl Martin and Mr. Buddy Shelley and Mr. Tom
9 Geoffroy for the company as well.

10 Commissioners, we agree with your Staff's
11 recommendation. As such, I'd like to just address a
12 couple of points, and then if I may reserve the
13 remainder of my time to respond to arguments made by the
14 City.

15 **CHAIRMAN BRISÉ:** Okay.

16 **MS. KEATING:** Commissioners, our motion is
17 based on the City's inability to demonstrate that it
18 will suffer any injury in fact, much less one of
19 sufficient immediacy to warrant a hearing in this
20 matter.

21 The basis for the City's protest is that
22 notwithstanding acknowledged savings through 2017, there
23 is a possibility that the costs in 2018 and 2019 will be
24 unreasonable. Simply put, the City would ask this
25 Commission to set a hearing to determine whether or not

1 this amendment will reduce reasonable fuel charges some
2 six years into the future. Not only would this require
3 the Commission to rely upon extended and probably
4 competing fuel projections for those years, but it would
5 also require the parties and the Commission to make
6 assumptions of the fuel costs for FPUC's wholesale
7 provider in those years. It would also require
8 speculation as to what FPUC may or may not have been
9 able to accomplish by issuing an RFP for wholesale power
10 in those years, an RFP that wouldn't even be issued
11 until early 2017. The entire proceeding would boil down
12 to speculation.

13 FPUC has entered into an amendment to its
14 existing approved contract with its wholesale provider
15 that reflects measurable identifiable savings over the
16 remaining life of the contract. The City would have you
17 scrap those savings and benefits based on speculative
18 and, we believe, unlikely concerns that wouldn't
19 actually come to fruition for six years, and even then
20 only exist for two years.

21 Frankly, were it not for ongoing matters in
22 the civil court, the City's position in this matter
23 would be unfathomable. As your Staff has recommended,
24 we believe the City's protest should be dismissed.

25 Commissioners, we would, however, ask that you

1 consider one modification. Staff has suggested that you
2 dismiss the City's protest but without prejudice,
3 allowing them opportunity to refile to cure the defect.
4 We'd submit that the City cannot cure the defect of this
5 petition. The only possible harm to the City arises in
6 the out years of 2018 and 2019. Under no circumstances
7 can the City definitively demonstrate that it will incur
8 harm in those years, nor can it show that such harm has
9 any immediacy whatsoever.

10 While Staff is correct that under 120.569 the
11 agency should typically dismiss an initial petition with
12 leave to refile, the statute further provides that
13 dismissal of an initial petition can be with prejudice
14 if it appears on the face of the petition that the
15 defect cannot be cured.

16 In this instance, we'd ask that you dismiss
17 the protest with prejudice because the defect can't be
18 cured. Revisiting this issue on a second protest and
19 the inevitable second motion to dismiss would be
20 administratively inefficient.

21 If you decide, however, to allow the City to
22 refile, we'd respectfully ask that you consider
23 shortening the time frame suggested by Staff by which
24 the City would need to refile. Since the PAA that would
25 be the order being protested was issued some seven

1 months ago, we'd suggest that the City be required to
2 file within 21 days of your decision today, or by
3 February 14th. Thank you, Commissioners.

4 **CHAIRMAN BRISÉ:** Thank you. You have a
5 balance of about a minute and 30 seconds.

6 Mr. Wright.

7 **MR. WRIGHT:** Thank you, Mr. Chairman. I had a
8 lot to cover, and I will cover as much as I can in five
9 minutes. Thank you.

10 **CHAIRMAN BRISÉ:** Thank you.

11 **MR. WRIGHT:** Perhaps obviously -- thank you
12 very much for the opportunity to address you. I'm Schef
13 Wright representing the City of Marianna, and with me is
14 Mr. Jim Dean, the City Manager of the City.

15 Obviously, the City of Marianna disagrees with
16 the Staff recommendation and respectfully requests that
17 you deny the recommendation, deny FPUC's motion to
18 dismiss, and set this matter for hearing on the numerous
19 disputed issues of material fact identified in our
20 petition.

21 In overview, we disagree with the Staff's
22 conclusion that the City lacks standing for the
23 following reasons: The City is a substantial customer
24 of FPUC, one of the largest in its northwest division.
25 Our substantial interests, the City's substantial

1 interests will be determined now, once and for all time,
2 and adversely affected by the proposed approval of the
3 PPA amendment because the rates that will result from
4 this action will be so high in the out years, 2018 and
5 2019, as to be unfair, unjust, and unreasonable.

6 The City has specifically alleged that FPUC's
7 current costs from which the future monthly capacity
8 charges will be escalated are already excessive, and
9 that upon such escalation provided for in the amendment
10 as well as incorporating what the City believes and has
11 alleged will be additional increases in the cost of
12 coal, which determines Gulf's energy prices, which
13 determines FPUC's energy payments, the charges that FPUC
14 will incur in 2018 and 2019 will be so excessive as to
15 greatly outweigh the cost savings to be realized by the
16 short-term reductions. We have put this in real dollar
17 terms.

18 The Staff's recommendations point out that
19 savings over the next six years are about \$5.9 million.
20 We believe that the amount at risk is at least
21 \$12 million a year in 2018 and 2019, or somewhere
22 between 24 and 28 million, quite possibly more depending
23 on the future of coal costs and environmental regulatory
24 costs applicable to Gulf's and Southern's coal system in
25 the out years. \$30 million, \$24 million in '18 and '19

1 is a fool's bargain versus \$6 million of savings over
2 the next six years.

3 FPUC has admitted that it has not even
4 evaluated the cost and benefits of approving the PPA
5 amendment considering the 2018 and 2019 costs; neither
6 has your Staff evaluated this. They've assumed that
7 it'll all be okay because it'll be some market value.
8 This is a real concern. We've got monthly capacity
9 charges that are known to be too high. We've got a
10 billing demand floor that's unique that is hurting the
11 City badly. We've got monthly energy charges that are
12 seriously at risk.

13 And your decision today, and this is the real
14 immediate injury of the proposed action here, your
15 decision, if you were to approve this PPA, will be the
16 only chance we will ever have or any other customer of
17 FPUC's northwest division will ever have to challenge
18 the reasonableness of those costs. That's the effect of
19 exactly what FPUC and Gulf have -- FPUC has asked for
20 with Gulf's agreement in joining in, and that is that
21 you approve it for cost recovery for the long-term.

22 This is exactly how it works with QF
23 contracts, and for good reason. The parties want
24 certainty. FPUC says, "We want certainty." But
25 affected customers, substantially affected customers are

1 entitled to a hearing. If you approve this, you will
2 lock us in and all of FPUC's northwest division
3 customers in for an extra two years at rates that we
4 alleged, as a disputed issue of material fact, will be
5 way too high.

6 **CHAIRMAN BRISÉ:** You have one minute.

7 **MR. WRIGHT:** Thank you, sir. And in that
8 time -- I had five more pages of stuff, but in that time
9 I'll respond briefly to some comments made by
10 Ms. Keating.

11 She said there's a possibility the rates will
12 be high, too high. We assert, we allege as a matter of
13 fact that it is likely that the rates will be too high
14 and we have alleged exactly why. The current demand
15 charges are too high, they'll be escalated from their
16 current rates, there's a billing demand floor, and the
17 energy charges are highly risky because of coal costs.

18 Furthermore, this is just -- the idea that
19 costs seven and eight years out are speculative isn't
20 relevant here. This is just like a need determination
21 in which you consider long-term costs 20, 30, 40 years,
22 sometimes more, out in making your decision. Clearly
23 customers have the standing to protest a need
24 determination when the cost benefits or cost impacts are
25 in the out years.

1 Finally -- and two more things. One,
2 certainly I believe that Chapter 120 provides for
3 dismissal the first time without prejudice as a matter
4 of right.

5 And finally, the -- Ms. Keating has once again
6 essentially accused us of trying to get a leg up in the
7 civil litigation. Today it was if it weren't for the
8 civil litigation, our positions would be unfathomable.
9 Here, Commissioners, we are trying to protect the City's
10 interests as one of the largest customers of FPUC's
11 northwest divisions and, though we don't formally
12 represent them, the interest of all customers. We're
13 looking at trying to avoid being stuck with 20, 25,
14 \$30 million worth of excess costs in two years in return
15 for savings of \$5.9 million over the next six years.

16 **CHAIRMAN BRISÉ:** Thank you.

17 **MR. WRIGHT:** Thank you, sir.

18 **CHAIRMAN BRISÉ:** Thank you.

19 Ms. Keating.

20 **MS. KEATING:** Commissioners, everything that
21 the City has said hangs on speculation. They are
22 talking about costs in 2018 and 2019, and they're
23 offering that the rates will be too high in those two
24 years. But compared to what? There's no -- there is no
25 contract without this amendment through those years.

1 There's no RFP for those years. What are they making
2 that comparison to? It is pure speculation. This isn't
3 a rate case. This is not a need determination. It
4 isn't even a proceeding in which the Commission will set
5 fuel charges through the fuel clause.

6 The only alternative available here is to
7 revert to the original underlying PPA pursuant to which
8 fuel charges will in fact be higher, as the City has
9 already acknowledged in its response to our motion to
10 dismiss. There is no third alternative. The City, it
11 would seem, is trying to insert itself in the
12 negotiation process for a wholesale contract, and
13 allowing such interference, second guessing and Monday
14 morning quarterbacking seems to me to be a proverbial
15 slippery slope that could have some serious implications
16 for the Commission's consideration of future wholesale
17 purchase power agreements. Thanks.

18 **CHAIRMAN BRISÉ:** Thank you very much. At this
19 time, Commissioners, if -- questions or comments?

20 Commissioner Brown.

21 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

22 I have a question for our Staff regarding what
23 Ms. Keating and Mr. Wright discussed regarding
24 addressing -- dismissing the petition with prejudice
25 under 120.569(2)(c). Can you address those comments

1 that FPUC -- the recommendation to dismiss it with
2 prejudice, Ms. Robinson?

3 **MS. ROBINSON:** I'm sorry. The Commission does
4 have the discretion, if the Commission determines that
5 the defect in the pleading cannot be cured, it does have
6 the discretion to dismiss with prejudice.

7 **COMMISSIONER BROWN:** Okay. That's all.

8 **CHAIRMAN BRISÉ:** Any further comments or
9 questions?

10 Commissioner Graham.

11 **COMMISSIONER GRAHAM:** I've got a question to,
12 to ask Staff. Why was it that the recommendation was to
13 go to do it without prejudice rather than with
14 prejudice? I know you said it's our discretion, but I
15 guess my question is why was it teed up this way and not
16 the other way?

17 **MS. ROBINSON:** The Commission practice has
18 been to permit petitioners an opportunity in accordance
19 with the statute to file an amended petition. At this
20 time we do not believe the pleading sufficiently
21 demonstrates that it cannot be cured. However, the
22 dismissal is based on the fact that the City lacks
23 standing for an immediate injury. So if the Commission
24 determines, the Commission does have the discretion.

25 **COMMISSIONER GRAHAM:** Does Staff think that

1 there's any cure to this?

2 **MS. ROBINSON:** At this time the pleadings are
3 inconclusive.

4 **COMMISSIONER GRAHAM:** Okay. Thank you.

5 **CHAIRMAN BRISÉ:** Any further comments or
6 questions by Commissioners?

7 Commissioner Graham. Oh, I'll go to
8 Commissioner Edgar first.

9 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.
10 I do not have a question. I was prepared to make a
11 motion, if we are in that posture. But if you would
12 like me to hold off --

13 **CHAIRMAN BRISÉ:** Hold off.

14 **COMMISSIONER EDGAR:** Okay.

15 **CHAIRMAN BRISÉ:** I don't know if Commissioner
16 Graham was going to ask another question or make a
17 comment or going to make a motion.

18 **COMMISSIONER GRAHAM:** Actually I was going to
19 amend the Staff recommendation to do it with prejudice.

20 **CHAIRMAN BRISÉ:** All right. Is that a motion?

21 **COMMISSIONER GRAHAM:** That was a motion.

22 **CHAIRMAN BRISÉ:** Is there a second to that
23 motion?

24 **COMMISSIONER EDGAR:** Then, Mr. Chairman, I
25 would second that, recognizing that to be a change in

1 the Staff recommendation for both Issues 2 and 3.

2 **CHAIRMAN BRISÉ:** Any discussion on the motion?

3 (No response.)

4 All right. Very good. All in favor, say aye.

5 (Affirmative response.)

6 Any opposed?

7 (No response.)

8 Very good. This item is carried with the

9 change as reflected in the motion.

10 (Agenda item concluded.)

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1 STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
2 COUNTY OF LEON)

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I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 27th day of January, 2012.

Linda Boles
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FPSC Official Commission Reporter
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