Eric Fryson

From: Roberts, Brenda [ROBERTS.BRENDA@leg.state.fl.us]

Sent: Wednesday, April 25, 2012 4:03 PM

To: Filings@psc.state.fl.us

Cc: Mcglothlin, Joseph; Sayler, Erik; Kelly, JR; Rehwinkel, Charles; Caroline Klancke; Charles Guyton; Christopher C. Thompson; Jeffrey A. Stone; John Moyle; John T. LaVia (jlavia@gbwlegal.com); Keino Young; Martha Barrera; Richard Melson (rick@rmelsonlaw.com); Russell Badders; Schef Wright (schef@gbwlegal.com); Shari Cornelius; Steve Griffin; Susan D. Ritenour; Vickie Gordon Kaufman (vkaufman@kagmlaw.com); White, Karen

Subject: E-filing (Dkt. No. 110138-EI)

Attachments: 110138 Joint Response to Motion for Reconsideration.sversion.doc

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 110138-EI

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

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 11 pages.

e. The document attached for electronic filing is the Joint Response of OPC, FIPUG, FRF, and FEA in Opposition to Gulf Power's Motion for Reconsideration. (See attached file: 11013 Joint Response to Motion for Reconsideration.sversion.doc)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for increase in rates by Gulf Power Company.	)	Docket No.: 110138-EI
	)	Filed: April 25, 2012

JOINT RESPONSE OF OPC, FIPUG, FRF, and FEA IN OPPOSITION TO GULF POWER'S MOTION FOR RECONSIDERATION

The Office of Public Counsel ("OPC"), the Florida Industrial Power Users Group ("FIPUG"), the Florida Retail Federation ("FRF"), and the Federal Executive Agencies ("FEA"), collectively the "Joint Respondents," hereby respond in opposition to Gulf Power Company's ("Gulf" or "Gulf Power") Motion for Reconsideration ("Motion"), which Gulf Power filed in this docket on April 18, 2012. The Commission should deny the Motion. In its Motion, Gulf Power fails to demonstrate that the Commission overlooked or failed to consider the matters that are the subjects of its request, which is the standard that governs motions for reconsideration. The "mistake" to which Gulf points as the primary justification for a motion for reconsideration is not a "mistake" at all, but instead is a mischaracterization of Order No. PSC-12-0179-FOF-EI (hereinafter, "the Order") contrived by Gulf Power as a pretext for rearguing matters that were fully developed before, and considered by, the Commission. Contrary to the premise which appears to underlie one of Gulf's principal arguments, there is no requirement that the Commission mention each and every piece of evidence in its order. Prior precedents cited by Gulf do not support Gulf's motion, because in each instance the Commission applied a fact-specific standard that utilities met in past cases but that Gulf failed to satisfy in this one. Gulf's brief-like Motion for Reconsideration is a thinly disguised, legally impermissible effort to have the Commission reweigh the evidence of the case after the matter has been decided. Gulf's

overlong (twenty-nine pages) protestations may serve to give voice to Gulf's disagreement and/or displeasure regarding the Commission's decision on the North Escambia site, but they merely exacerbate Gulf's misuse of the procedural device that is the motion for reconsideration.

Standard governing the Motion for Reconsideration

The limited purpose of a motion for reconsideration is to bring to the attention of the court (or agency, in this case) a matter of fact or law that the decision maker overlooked or failed to consider in its decision. *See Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315 (Fla. 1974); *Diamond Cab v. King,* 146 So.2d 889 (Fla. 1962).[1] A motion for reconsideration cannot be used to reargue matters that the forum considered when entering its decision. *Sherwood v. State,* 111 So. 2d 96 (Fla. 3d DCA 1959), quoting *State ex rel. Jaytex Realty Co. v. Green,* 105 So.2d 817 (Fla. 1st DCA 1958).[2] As Joint Respondents will demonstrate, Gulf cites the reconsideration standard in its Motion, but brazenly disregards the standard when presenting its argument.

Gulf fails to identify a "mistake." In its motion, Gulf ostensibly complains that the Commission erred by requiring a determination of need as a prerequisite to including the North Escambia site in Property Held For Future Use. However, examine the instances in which the Commission referred to the requirement of a determination of need in conjunction with its decision on the North Escambia site (see Order at pages 3, 5, 23, and 26). In each, the

[1] In *Stewart Bonded Warehouse,* the Florida Supreme Court remanded a decision by the Commission because the Commission had purported to "reconsider" its first order but had merely reweighed the evidence: "The only basis for reconsideration noted in the instant cause was the reweighing of the evidence discussed above. This is not sufficient." *Stewart Bonded Warehouse,* at 317. The Court directed the Commission to reinstate its first decision. Thus, it is not only impermissible for a party to base a motion for reconsideration on the basis of a requested reweighing of evidence; an agency that changes its decision based on such a requested reweighing of the evidence commits reversible error.

[2] A fuller reference to *Sherwood* is instructive: "Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation."

Commission was referring to Gulf's efforts to recover in base rates now the type of carrying costs that, under the provisions of Section 366.93, Florida Statutes ("F.S.") and Commission Rule 25-6.0423, Florida Administrative Code ("F.A.C.") can be recovered "in advance" of the in-service date of a nuclear unit through the alternative means created pursuant to those provisions only after the requesting utility has petitioned for and received a determination of need for the nuclear unit. The references to "determination of need" in the decision portion of the Order thus were specific to Gulf's premature efforts to collect site selection and related carrying costs of a nuclear unit, and were unrelated to any consideration of whether the site qualifies for inclusion within Plant Held For Future Use ("PHFFU") pursuant to "general ratemaking authority."[34] It is clear from the Order that the Commission was aware of the distinction.[5] It is equally clear that the Commission rejected Gulf's argument.[6] Aware that the legal standard governing a motion for reconsideration requires the movant to identify a mistake

---

[3] At page 2 of its Motion, Gulf seems to recognize the nature of the significance that the Commission attached to the requirement of a determination of need: "These accrued carrying costs were the subject of the legal issue raised and decided as Issue 1, which Gulf is not seeking to address through this motion. In resolving Issue 1, the Commission concluded that a determination of need is a condition precedent to the accrual of carrying costs under the Nuclear Cost Recovery Rule and its enabling statute, section 366.93, Florida Statutes."

[4] In OPC's Post-Hearing Brief, OPC began its argument on Issue 24 (the subject of Gulf's Motion) as follows: "The Commission should deny Gulf's request to place the property in rate base, because neither Gulf's premature effort to portray the North Escambia property as a potential nuclear site nor (given the availability of Crist, Smith, Scholz, Mossy Head, and Caryville for the purpose) the potential use of the property for conventional generation provides adequate justification to do so in this proceeding."

[5] "Witness McMillan argued that Section 366.93, F.S., provided authorization to record a deferred return on assets. He believed that there existed an apparent misunderstanding with the Intervenor witnesses about the role that Section 366.93, F.S., played for the inclusion of the Escambia Site costs. He argued that the Company was requesting to discontinue the deferral and move the dollars into rate base based on our general ratemaking authority. He further argued that the request was not based on specific provisions of Section 366.93, F.S." Order, at page 24.

[6] "We agree with OPC, FIPUG, FRF, and FEA that: (1) the Caryville site is available for any needed future generating plant(s); (2) Gulf may share the ownership of the Escambia Site with its sister companies; and (3) there was not an order granting a determination of need that would allow the Company to petition for and the Commission the opportunity to review the "nuclear option" and all the various corresponding costs. In light of our approval of Gulfs retention of the Caryville site and the other available sites already included in rate base, we believe that Gulf has sufficient options for its future generation needs. Moreover, we find that Gulf has failed to support the inclusion of the North Escambia County Nuclear plant site and associated cost in PHFU. Therefore, PHFU shall be reduced by $26,751,000 ($27,687,000 system). In addition, Gulf shall not be permitted to accrue AFUDC for this site. As discussed above, Gulf has neither obtained the requisite order granting a determination of need nor has it received the necessary authorization to accrue AFUDC on the site costs. Therefore, Gulf shall be required to adjust its books to remove the $2,977,838 in accrued carrying charges." Order, at page 26.

of fact or law, Gulf invented one for the occasion.[7] The Commission should see Gulf's contention for what it is: a mischaracterization of the Order that is, in effect, the creation of a "straw man."

Gulf impermissibly asks the Commission to reweigh the evidence. Having first built and then swung at its "straw man," in its Motion Gulf quickly segues into a lengthy complaint about the Commission's decision to deny its request to place the North Escambia site in Property Held For Future Use. It is fundamental that a motion for reconsideration cannot be used for the purpose of asking the decision maker to reweigh the evidence because the losing party disagrees with the decision. *Diamond Cab*, *supra,* at 891. Yet, in support of its Motion, Gulf seeks to place before the Commission, for its reassessment, hearing transcript pages 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2218, 2221, 2223, 2224, 2225, 2228, 2230, 2231, 2232, 2233, 2234, 2244, 755, 756, 757, 758, 759,1079, several schedules within Exhibit 163, and pages 35, 37, and 38 of Exhibit 147! (Motion, at pages 16-19.) Even more remarkable, given the legal prohibition against reweighing the evidence and the admonition of the courts to identify matters that the forum overlooked or failed to consider, is the following passage at page 17 of the Motion: ". . .some of this evidence was addressed in Staff's recommendation and mentioned in the Commission's order. . ."[8] This statement is tantamount to a confession that through its Motion Gulf seeks a reweighing of the evidence.

At page 15 (footnote 9), Gulf quotes Commissioner Graham as expressing support for "strategic planning." The footnote is a Gulf misstep for two reasons. First, the proper purpose of

[7] At page 6 of the Motion, Gulf states, "Staff's recommendation concerning Issue 24 and the Commission's decision approving that recommendation at the special agenda conference on February 27, 2012, were premised primarily on the fact that Gulf Power had not sought or received a determination of need for a nuclear generation facility on the North Escambia site." However, despite the central role of this claim in Gulf's Motion, Gulf makes almost no effort to support its assertion.

[8] Gulf refers in its Motion to the Commission's "incomplete and inadequate consideration" of evidence." Motion, at page 3. As though the point was not already conspicuous, this language is further proof that Gulf wants the Commission to reweigh evidence it has already considered.

a motion for reconsideration is to point out something that the decision maker overlooked or failed to consider. Gulf's quotation from the transcript of the decision conference is proof that the Commissioners explicitly considered the matter about which Gulf complains. More inappropriately, Gulf's quotation is selective and misleading. When Commissioner Graham's comments are read in fuller context, the overall statements constitute "*proof positive*" that the Commission considered the competing considerations relative to Gulf's request to include the North Escambia site in Plant Held For Future Use, then resolved the matter against Gulf:

> COMMISSIONER GRAHAM: "I mean, I can tell you, and I've already decided where I was going to go on this thing, but I understand where they're coming from. I understand what the Chairman is saying about a fairness issue.
>
> If not, if not for the Caryville site that had been sitting there forever, it may be a different story. But, you know, the fact that I think they purchased it back in '72, and then it went 80% into rate base in 1980, I mean, so for the past 32 years it's been in rate base. And I get the fact that that can, that can handle all their other needs they could possibly want except for the nuclear site. So that kind of puts them in a – it doesn't give them a whole lot of ground to stand on. And so I don't have anything else to add to this."

Transcript, special agenda conference of February 27, 2012, at page 14

In essence, Gulf's Motion is "practically a joinder of issue with the court [here, the agency] as to the correctness of its conclusions" and Gulf is "arguing or quarreling with the court [agency] over correctness of its conclusions on the points it has considered and decided," in contravention of the purpose and scope of a motion for reconsideration. *Sherwood, supra,* at 98, quoting from *Atlantic Coast Line R. Co. v. City of Lakeland,* 94 Fla. 347, 115 So. 669, 679-680 (Fla. 1927).

Gulf wrongly asserts the Commission necessarily "failed to consider" any evidence to which it did not refer explicitly in the Order. Gulf proceeds to state that the Commission did not

refer in the Order to certain of the evidence that it cited in its Motion.[9] In doing so, Gulf makes another glaring error. It is axiomatic that the decision maker has no obligation to refer to each and every bit of record evidence in its decision. As the First District stated in *Jaytex Realty*:

> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has 'overlooked and failed to consider' from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.
>
> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.
>
> It may be that some petitions for rehearing stem from an erroneous conception of the purpose of an opinion prepared by the court. The only justification for inflicting upon the bar the duty of reading the great mass of opinions prepared by appellate courts is that an opinion is necessary for the guidance of the trial court and the litigants in the subsequent stages of the same litigation, or that a question of law is of such importance that its discussion and decision will be of assistance to the bar and other courts in ascertaining the rights of persons and the proper decision of other cases. An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. *For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.*
>
> *Jaytex Realty, supra,* at 818-819 (emphasis provided)

In its Order, the Commission fully complied with the requirements of law. By pointing to pieces of evidence that were not treated explicitly in the Order, Gulf has not demonstrated grounds for reconsideration. In fact, to accede to Gulf's apparent demand that the Commission refer explicitly in its decision to each and every shred of evidence would set a dangerous precedent—one that would invite other disappointed parties to seek reconsideration on the grounds that certain evidence was not specifically mentioned in an order. Gulf has failed to demonstrate a basis on which the Commission could reconsider its Order.

---

[9] Given the elaborate treatment of Gulf's testimony at pages 23-26 of the Order, which includes, among other things, the claim that including the property in PHFFU would have a small impact on bills that Gulf repeats in its Motion, the Commission should summarily reject this argument.

Past decisions in other utilities' cases do not require the Commission to grant Gulf's motion for reconsideration in this docket. In its motion, Gulf attempts to invoke the doctrine of *stare decisis.*[10] The doctrine, to the extent it may be applicable to administrative proceedings, means simply that cases that have similar facts should be decided similarly, absent an articulated policy reason for departing from prior practice. Unfortunately for Gulf, in decisions relating to PHFFU, the Commission conducts an analysis that is fact specific. It requires, among other things, a showing that the utility will use the property for utility service-related purposes within a reasonable period of time. Order No. 5278 (Tampa Electric Company), issued in Docket No. 70532-EU on November 30, 1971;[11] Order No. 5471 (Gulf Power's Caryville site), issued in Docket No. 71342-EU on June 30, 1972. In this case, Gulf failed to meet the factual standard—partly, but not solely, because the Caryville site that was the subject of a similar request in 1972 remains unused and fully available for generation expansion. As OPC pointed out at page 21 of its post-hearing brief, Gulf has such an abundance of property available for the expansion of its generation system that the Caryville site, consisting of 2200 acres capable of supporting 3,000 megawatts of fossil-fueled capacity, did not even make the "top four" most likely sites for Gulf's

---

[10] Gulf cites the case of *Geller v. Department of Business and Professional Regulation,* 627 Sl. 2d 501 (4th DCA, 1993) in support of its argument that the Commission is bound by the principle of *stare decisis.* The Court's decision in *Geller* deals with an agency's failure to follow its clear statutory mandate, not *stare decisis.* In *Geller,* the appellant complained that the agency failed to make available all prior orders or compile a subject matter index of its orders, thereby preventing the appellant from comparing the agency's decision with prior orders. *Geller, supra,* at 503-504. The Court concluded that ". . . persons have the right to examine agency precedents and the right to know the factual basis of and policy reasons for agency action." *Geller, supra,* at 503-504. In dicta, which Gulf quoted in its Motion, the Court discussed the concept of *stare decisis* and its impact on agency decisions. Here, Gulf obviously had access to the Commission's orders, but the arguments Gulf drew from them do not support its position. In the Order, the Commission set forth the "factual basis and policy reasons" for its decision to deny Gulf's request to place the North Escambia site in PHFFU. As developed above, the Commission did not depart from prior Commission orders or precedents when reaching its decision. Now, Gulf simply disagrees with the Commission. That disagreement is no basis for reconsideration by the Commission.

[11] Order No. 5278, which Gulf also cited, involved Tampa Electric Company's Beacon Key site. In Order 5278, the Commission emphasized the test that ". . .it appears that it will be used for utility purposes in the reasonably near future in the light of prevailing conditions. . ." Gulf made no effort to meet this test in its case.

next generating unit in Gulf's Ten Year Site Plan (Gulf identified Big Bend, Scholz, Mossy Head, and Smith, but did not even mention the Caryville site). *See* Exhibit 190. During the evidentiary proceeding that culminated in the Order, the fact that Caryville was purchased in 1963 explicitly for the purpose of generation expansion, has been in PHFFU since 1972, has not become part of the generation system during the forty years during which it has been part of PHFFU, and does not today make the "top four" sites for generation expansion listed in Gulf's Ten Year Site Plan constituted graphic proof that Gulf does not need the North Escambia site in the foreseeable future, if ever. This plain fact sets Gulf's situation apart from other instances in which the Commission has ruled on requests to place property in Property Held For Future Use. Gulf's inability to make the required showing distinguishes Gulf's situation from the decisions to which it refers in its motion. The fact that utilities met the standard in past cases does not enable Gulf to ride their coattails in a case in which the facts are insufficient to support its request.

The Commission did not mistakenly regard the Caryville site to be available for nuclear generation. This argument appears at page 20 of the Motion. However, it is clear that the Commission understood that the Caryville property is not a potential nuclear site. For instance, at page 24 of the Order, the Commission said:

> Witness Burroughs testified that it was his understanding that the Caryville site is certified for two 500 megawatt coal units. He further stated that the Caryville site also could support combined cycle units, combustion turbines, and other options except for the nuclear option.

Gulf cannot ask the Commission to "reconsider" a finding of fact that the Commission did not make. Gulf claims the Commission "mistakenly" assumed the site will be available in the future, after its decision denying Gulf's request to include it in PHFFU. A review of the Order demonstrates that the Commission made no such finding and expressed no

such assumption. Accordingly, the possibility that Gulf may sell some or all of the property presents no basis for reconsidering the decision.

Gulf tosses the kitchen sink (regulatory compact) into its Motion. In the Motion, Gulf invokes, among other things, the "regulatory compact." The term of course does not refer to an actual contract, as the words would imply. Instead, "regulatory compact" is a metaphor that sometimes is used to describe the interplay between the protection from competition that the utility receives, on the one hand, and the imposition of regulatory requirements and constraints placed on the utility in view of the absence of competition, on the other. In this instance, Gulf uses the term in its effort to create, with respect to its acquisition of the North Escambia site, an aura of utility entitlement (and a corresponding obligation of the Commission to approve the utility's action). However, central to the theme of regulation that is part and parcel of the so-called "regulatory compact" is the proposition that the regulator will protect customers by limiting the costs they bear in rates to those expenditures that are necessary in nature and reasonable in amount. The Commission's action to deny PHFFU treatment, in recognition of the remote and speculative nature of Gulf's nuclear ambition, the surfeit of property that is already in rate base and is available to meet other generation needs, the lack of any plan to use the North Escambia property for utility purposes within a reasonable time frame, as required by established policy, and the resulting unnecessary and unreasonable nature of the cost of the North Escambia property is perfectly consistent with applicable regulatory principles to which utilities refer as the 'regulatory compact."

CONCLUSION

Gulf cites the appropriate standard that applies to motions for reconsideration, but its Motion is instead an impermissible request to reweigh the evidence. Gulf has shown no legitimate basis for reconsidering Order No. PSC-12-0174-FOF-EI. The Commission should deny the Motion.

Dated this 25th day of April, 2012.

Respectfully submitted,

J.R. KELLY
PUBLIC COUNSEL

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel

Erik L. Sayler
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm. 812
Tallahassee, FL 32399-1400

Attorney for the Citizens
of the State of Florida

s/ Vicki Gordon Kaufman
Vicki Gordon Kaufman
Jon C. Moyle Jr.

Keefe, Anchors, Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, FL 32301

Attorneys for the Florida Industrial
Power Users Group

s/ Robert Scheffel Wright
Robert Scheffel Wright
John T. LaVia

c/o Gardner Law Firm
1300 Thomaswood Drive
Tallahassee, FL 32308

Attorneys for the Florida Retail Federation

s/ Karen S. White
Karen S. White, Staff Attorney

USAF Utility Law Field support Center
139 Barnes Drive
Tyndall AFB, FL 32403

Attorney for Federal Executive Agencies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **JOINT RESPONSE OF OPC, FIPUG, FRF, AND FEA IN OPPOSITION TO GULF POWER'S MOTION FOR RECONSIDERATION** has been furnished by electronic mail and U.S. Mail on this 25th day of April, 2012, to the following:

Caroline Klancke, Esquire
Keino Young, Esquire
Martha Barrera, Esquire
2540 Shumard Oaks Boulevard
Florida Public Service Commission
Tallahassee, FL 32399-0850

Jeffrey A. Stone, Esquire
Russell A. Badders, Esquire
Steven R. Griffin, Esquire
Beggs & Lane
P. O. Box 12950
Pensacola, FL 32576-2950

Susan Ritenour
Gulf Power Company
One Energy Place
Pensacola, FL 32520

Charles Guyton
Gunster, Yoakley, & Stewart, P.A.
215 S. Monroe Street, Suite 618
Tallahassee, FL 32301

Richard Melson
705 Piedmont Drive
Tallahassee, FL 32312

Robert Scheffel Wright/John T. LaVia
Gardner, Bist, Wiener, Wadsworth, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308

Federal Executive Agencies
Christopher Thompson/Karen White
c/o AFLOA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403

Florida Industrial Power Users Group
Vicki G. Kaufman/Jon C. Moyle, Jr.
Keefe Anchors Gordon & Moyle, P.A.
118 North Gadsden Street
Tallahassee, FL 32301

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel