

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for rate increase by Gulf Power Company)	DOCKET NO. 160186-EI
)	
In Re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.)	DOCKET NO. 160170-EI
)	December 5, 2016
)	
)	
)	
)	
)	
)	
)	

OFFICE OF PUBLIC COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

The Citizens of the State of Florida, by and through the Office of Public Counsel ("OPC" or "Citizens"), pursuant to Rule 1.380, Fla. R. Civ. P., hereby moves this Honorable Commission for an Order compelling Gulf Power Company (Gulf) to produce documents in response to the Citizens' First Request for Production, and as grounds therefore states:

BACKGROUND

On October 12, 2016, Gulf filed a Petition for Base Rate Relief, in which it requested an increase of \$106,782,000 in its gross annual revenues and an 11% rate of return on common equity capital. (Petition, p. 1)

Gulf's requested rate increase would result in a \$14.90 hike in the average residential customer's monthly bills, or a 21.3% increase for residential customers. The request would amount to a 17.9% surge in Gulf's revenues.

Gulf claims its current rates are “inadequate to afford Gulf a reasonable opportunity to earn a fair and reasonable rate of return” for the foreseeable future. (Petition, p. 3). Gulf further alleges that “to continue to attract the capital required to provide ... service to customers, Gulf must also offer a fair and reasonable and fair return to shareholders.” (Petition, p.7)

Gulf has additionally tied its financial integrity and its ability to provide service to the confidence of its investors and access to both capital and debt markets. (Testimony of Xia Liu pp. 21-31)

Entire sections of Gulf’s pre-filed testimony are dedicated to discussion of the importance of Gulf’s credit quality, credit risk profile, and credit ratings to its ability to provide service, and to its purported need for a rate increase. (Testimony of Xia Liu pp. 27-31)

On October 14, 2016, OPC issued its First Request for Production of Documents to Gulf. Among other things, the requests sought documents about the returns on equity, investment reports, and credit ratings for Gulf and its subsidiaries, including its parent company, Southern Company. Gulf is a “wholly-owned subsidiary of the Southern Company.” (Petition, p. 2)

In its responses filed on or about November 14, 2016, Gulf objected to producing certain documents related to its subsidiaries, claiming alternately that the documents

are not within its “possession, custody or control” and that the documents requested are irrelevant, and not calculated to lead to the discovery of admissible evidence.

ARGUMENT

It is well-established that documents concerning a subsidiary’s parent company may in fact be considered to be within the control of the subsidiary for purposes of discovery. *E.g.*, Order No. PSC-01-1725—PCO-EI, *In re: Petition by Gulf Power Company for Approval of Purchased Power Arrangement, et al.*, Docket No. 010827-EI; *Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services*, 488 So. 2d 886 (Fla. 1st DCA 1986); Order No. PSC-93-0812-FOF-TL, *In re: Comprehensive Review of Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company*, Docket No. 920260-TL (“a party need not have actual possession of documents to be deemed in control of them”). Order No. 19389, *In re: Investigation into 1987 Earnings of Southern Bell Telephone and Telegraph Company*, Docket No. 871401-TL.

Gulf has placed its financial integrity at issue on the face of its Petition; therefore the documents requested are in fact relevant to the instant rate case. Additionally, the testimony filed in this docket has already established that Gulf’s finances are intertwined with that of its parent company, Southern Co., and its affiliates through numerous shared resources, services, allocations of funds, dividends, intercompany transfers, and joint tax returns.

In Gulf's pre-filed testimony, its own officers and the officers of its subsidiary testify at length about the complex web of intercompany arrangements and the purported benefits both Gulf and its ratepayers gain from Gulf's close working relationship with Southern. It is disingenuous for Gulf to use this relationship as a material argument in support of its requested rate increase, while at the same time claiming that documents related to its relationship with its affiliates, including Southern, are "not relevant" and that it cannot possibly access documents from the parent company with which its core business functions are so inextricably intertwined, and from which it derives so many benefits. Based on Gulf's own testimony, there is no dispute that services flow back and forth between Gulf, Southern, and Southern's numerous subsidiaries. This exact type of "back and forth" flow of resources was central to this Commission's ruling granting OPC's Motion to Compel in Order No. 22460 in *In re: Petition of the Citizens of Florida to Investigate Southern Bell's Cost Allocation Procedures*, Docket No. 890190-TL. Furthermore, the parent's decisions regarding capitalization of the operating subsidiaries was central to the Commission's decision in Order No. 19685, *In re: Petitions of Southern Bell Telephone and Telegraph Co. for Rate Stabilization and Implementation Orders and Other Relief*, Docket No. 880069-TL (stating the data would aid in the determination of whether cross-subsidization occurred). In this case, OPC is entitled to discovery of information reasonably calculated to lead to admissible evidence in the form of all equity and debt related transactions between Gulf and its parent. In fact, Gulf's own testimony shows that Gulf has received hundreds of millions of dollars in equity investments from Southern. (Testimony of Xia Liu, p. 41)

The Commission has repeatedly held that it is error for a subsidiary to refuse to produce relevant documents of a parent company in discovery. The Commission has previously found that it is untenable to argue that OPC cannot obtain “through discovery documents that this Commission and its staff can obtain by means of a mere informal data request,” pursuant to statute. Order No. PSC-93-0071-PCO-TL, *In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company*, Docket No. 920260-TL (stating “such a result clearly cannot be countenanced”).

Moreover, Gulf has already produced selected Southern documents in response to discovery in this case. Gulf’s attempts to pick and choose which Southern documents it claims it “does not possess or control” is simply an attempt to improperly restrict the discovery process and evade investigation of the claims that Gulf itself has raised and placed at issue in its rate case. It is also inconsistent with the facts of Southern Company’s control of the Southern company’s operating subsidiaries.

Detailed discussion of the individual requests for production follows:

Request for Production #59. Investment Firm Reports. Please provide copies of any known reports by investment firms for Southern Company and Gulf Power Company from the major credit rating agencies published since January 1, 2015.

Gulf’s Response: No Investment Firm Reports have been issued for Gulf Power Company. Gulf objects to OPC’s Request Number 59 to the extent

that the request calls for Gulf to obtain documents from other parties (i.e., The Southern Company) that are not within Gulf Power's possession, custody or control. Additionally, as the request relates to entities other than Gulf, Gulf objects because the data requested is not relevant to this case, has no bearing on this proceeding, and is not reasonably calculated to lead to the discovery of admissible evidence.

The Citizens hold that these documents are relevant and reasonably calculated to lead to admissible evidence, in that the investment reports are necessary to assess how investment analysts look at Gulf - if there are no investment reports on Gulf, the only method for doing this is through Southern. It is also vital to understand how Gulf's credit worthiness is impacted by the operating results and management decisions of Southern and its other operating subsidiaries. This is critical to analyzing Gulf's claims in its rate case petition and testimony that it needs a rate increase to maintain its financial integrity, including maintaining access to credit on favorable terms. Gulf has explicitly tied the issue of its own financial integrity to the confidence of investors and the effect of same on its access to capital. (Testimony of Xia Liu pp. 21-31). The testimony filed in this docket has already established that Gulf's finances are intertwined with that of its parent company, Southern Co., and its affiliates through numerous shared resources, services, allocations of funds, dividends, intercompany transfers, and joint tax returns. The Citizens are obligated and entitled to investigate and test Gulf's claims regarding its investor profile and credit worthiness in order to protect the ratepayers of this state.

Moreover, the pre-filed testimony from Gulf's affiliate states on its face that Gulf is utterly reliant on Southern for creditworthiness and for the efficiency of its business operations:

Southern Company is Gulf's parent company and sole common equity investor. **Gulf is dependent on Southern Company's ability to access the capital markets for equity capital.** That access is extremely important to our customers who depend on Gulf to make the investments required to serve them safely and reliably ... [t]he Commission recognized the value of a goal based on Southern Company financials when the Commission approved the Southern Company financial goal ... in Gulf's 2012 test year rate case ...

(Testimony of James M. Garvie, Vice President of Southern Company Services, p. 24)(emphasis added). Gulf's pre-filed testimony is rife with references to Gulf's reliance on, and interconnectedness with, Southern:

- "Gulf's earnings per share goal focuses on running the Company efficiently, not only as a stand-alone utility but also as part of the Southern Company. This goal is a testament to the advantage of Gulf being a part of Southern Company. In the normal course of business, Gulf employees have access to specialized expertise and bulk purchasing leverages due to Gulf's relationship with Southern Company." (Testimony of James M. Garvie, p. 11)
- The goals for Gulf's compensation program are rooted in "Southern Company total shareholder return, Southern Company earnings per share, and Southern Company equity weighted return on equity." (Testimony of James M. Garvie, p. 12). As part of compensation program, Gulf "employees may receive actual shares of Southern Company common stock" (Testimony of James M. Garvie, p. 13)
- Regarding Gulf's **core business** of generating and transmitting power, Gulf participates in "the Southern Company electric system pooling of generation ... which allows Southern Company's electric system to **operate as a single integrated electric system or power pool** (the Pool)" whereby "generating resources of all member companies are economically dispatched at actual variable cost to serve the total system load requirements." (Testimony of Jeffrey A. Burleson, Vice President for Southern Company Services, p. 4)(emphasis added).

- Southern Company Services (SCS) “is a subsidiary of Southern Company that provides various services to Gulf and the other subsidiaries of Southern Company.” These services include, but are not limited to professional, technical, and system operations for the generating fleet and transmission grid. SCS “facilitates the economic dispatch and sharing of generation resources ... centralized pool of professional talent ... negotiates system-wide purchase agreements ... manages the centralized filing of income tax returns.” Costs allocated among the subsidiaries. (Testimony of Janet J. Hodnett, Gulf’s Comptroller, p. 20-23)
- “D&O liability premiums are negotiated at a Southern Company level ... the premiums are then allocated to Southern Company and the subsidiary companies.” (Testimony of Janet J. Hodnett, p. 14)
- “The assumptions used in the [Gulf’s financial] forecast were provided by Southern Company Services ...” (Testimony of Susan D. Ritenour, Gulf’s Corporate Secretary, Treasurer and Corporate Planning Manager, p. 20)

The testimony cited above shows that Gulf relies heavily on the expertise and funding resources of Southern, but is improperly seeking the advantages of its reliance without assuming the responsibilities. This exact type of untenable position has been rejected by Florida’s appellate courts. *Medivision*, at 887, citing, *Alimenta (U.S.A), Inc. v. Anheuser-Busch Cos.*, 99 F.R.D. 309 (N.D. Ga. 1983). It is abundantly clear that Southern, SCS, Gulf and the other subsidiaries act as one sufficiently for the Commission to find that Gulf has control over, and access to, documents from its affiliates, including but not limited to Southern.

One of the key indicators the Commission has historically used to evaluate whether a company has control over documents of a parent or affiliate is whether an affiliate company filed testimony in the case. Order No. PSC-01-1725. The filing of testimony in a case makes it clear that the parent company is both involved in, and has

a significant stake in a matter. In the instant rate case, two officers of Southern Company Services have pre-filed testimony in this docket. As shown above in citations to testimony, SCS is the division of Southern which essentially controls and directs all of the intercompany functions which flow from Southern's control. Southern is basically the center of the wheel around which Gulf and all the subsidiaries turn.

Another aspect of acting as one is common governance. In this case, Gulf's VP and CFO is a member of a key management council at Southern – the Southern Company Accounting, Finance and Treasury Management Council, “which is comprised of CFOs from Southern Company and all sister operating companies.” (Testimony of Xia Liu, p. 1). Liu was also the Treasurer of Southern Company in 2015.

Nonetheless, the Citizens contend that it is not necessary to reach the question of whether the “acting as one” test outlined in *Medivision* applies here because it is so clear on the face of the Petition and testimony that the documents are relevant and squarely within the control of Gulf for discovery purposes, pursuant to Commission precedent and statute. Order No. 22460, *In re: Petition of the Citizens of Florida to Investigate Southern Bell's Cost Allocation Procedures*, Docket No. 890190-TL; Order No. PSC-95-1503-CF-WS, *In re: Application for Rate Increase and Increase in Service Availability Charges by Southern States Utilities, Inc., et al.*, Docket No. 950495-WS; Order No. PSC-93-0071-PCO-TL, *In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company*, Docket No. 920260-TL.

This Commission has also held production of documents is not limited solely to instances where corporations acted as one. The Commission found documents to be in control of an affiliate for discovery purposes where the affiliate has customary access to documents when the need arose in the ordinary course of business. Order No. PSC-93-0812-FOF-TL, *In re: Comprehensive Review of Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company*, Docket No. 920260-TL. The testimony cited above and the facts of the common operation of Gulf's core business show that Gulf has ready access to affiliate documents. Moreover, Gulf produced selected Southern documents in this case, so it is clear that control is not even a colorable objection in this matter.

Request for Production #62. Return on Equity. Please provide copies of the source documents, workpapers, and data in both hard copy and electronic (Microsoft Excel) formats, with all data and formulas intact used in calculating the earned return on common equity by state for the utility subsidiaries of Southern Company, including Gulf Power Company, including all adjustments to net income and common equity for each of the past five years (2011-2015).

Gulf's Response: Documents produced in response to this request contained extraneous information which is not responsive to the request. Such information has been removed or redacted. Gulf objects to OPC's Request Number 62 to the extent it calls for documents regarding utility

subsidiaries of Southern Company other than Gulf, except to the extent such documents are publicly available. Such non-publicly available documents, if they exist, are not in the possession, custody or control of Gulf and do not relate to transactions between Gulf and any of its affiliates. Further, the production of such documents, if they exist, is not reasonably calculated to lead to the discovery of admissible evidence.

It is the Citizens' position that these documents are relevant and reasonably calculated to lead to admissible evidence because the data on ROEs for other Southern subsidiaries provide a comparison of Gulf's performance relative to others in the Southeast owned by Southern. See, Order No. 19389, *In re: Investigation into 1987 Earnings of Southern Bell Telephone and Telegraph Company*, Docket No. 871401-TL (finding documents related to the parent's operation in other states may lead to the discovery of admissible evidence). The documents requested in this instance are important for OPC's investigation of the claims raised by Gulf regarding its need for a rate increase and an increase to its return on equity. The documents are also necessary for Citizens to test Gulf's claims about its performance. OPC incorporates herein the citations to testimony and authority cited above regarding Request for Production #59.

Additionally, it is improper for a party to "remove or redact" material that is neither privileged, nor covered by the work product privilege. See, Order No. PSC-93-0071-

PCO-TL, *In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company*, Docket No. 920260-TL. As such, Gulf must produce complete and un-redacted copies of the requested material, especially when the information can be protected if it is confidential.

Request for Production #71. Credit Ratings. For the past ten years, please list the credit ratings for Southern Company and Gulf Power by S&P and Moody's. For each time a credit rating was changed either up or down by any of the three rating agencies, please provide a copy of the related credit rating report.

Gulf's Response: Gulf objects to Citizens' Request to Produce Item No. 71 to the extent that it directs Gulf to "list the credit ratings for Southern Company and Gulf Power by S&P and Moody's." This directive is in the nature of an interrogatory and exceeds Gulf's obligation under Rule 1.350 to produce responsive documents. Gulf further objects to this request to the extent it calls for Gulf to obtain information and/or documents from other parties (i.e., The Southern Company) that are not within Gulf Power's possession, custody or control. Additionally, as the requests relate to entities other than Gulf, Gulf objects because the data requested is not relevant to this case, has no bearing on this proceeding, and is not reasonably calculated to lead to the discovery of admissible evidence

The Citizens' Motion relates only to the portion of Gulf's response to producing documents; Citizens have already addressed the allegation that a portion of the request should have been phrased as an interrogatory. Citizens assert that these documents are relevant and reasonably calculated to lead to admissible evidence in that they are necessary for the evaluation of whether there are issues with Southern or its other subsidiaries that are impacting the credit ratings of Gulf. This is critical to analyzing Gulf's claims in its rate case petition and testimony that it needs a rate increase to maintain its financial integrity, including maintaining access to credit on favorable terms. Gulf's ratepayers should not have to subsidize or otherwise pay extra for credit issues caused by Southern or any of Gulf's other affiliates. OPC incorporates herein the citations to testimony and authority cited above regarding Request for Production #59.

SUMMARY

Commission precedent and case law authority fully support the Citizens' right to the documents requested in order to investigate the claims raised by Gulf in its Petition and in its pre-filed testimony. The documents requested by the Citizens relate squarely to Gulf's claims both about its own financial integrity, and about the manner in which Gulf's finances and business functions are dependent on, and intertwined with, those of its parent and subsidiaries. As such, the documents requested are within Gulf's control for purposes of document production; moreover, they are highly relevant to Gulf's claims in this case, and reasonably calculated to lead to the discovery of admissible evidence.

The Citizens request that the Commission order Gulf to produce the requested documents in an expedited manner, due to the compressed timeline within which discovery and the hearing are scheduled to be completed. Additionally, Citizens ask the Commission to provide an extension of the intervenor testimony filing deadline and discovery periods for the delays caused by Gulf's willful failure to comply with its discovery obligations.

OPC hereby certifies that, pursuant to Fla. R. Civ. P. 1.380(a)(2), the Citizens in good faith conferred or attempted to confer with Gulf in an effort to secure the information or material without court action.

J. R. Kelly
Public Counsel



Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Office of Public Counsel's Motion to Compel Production of Documents has been furnished by electronic mail to the following parties on this 5th day of December, 2016:

Bianca Lherisson
blheriss@psc.state.fl.us
Kelley Corbari
kcorbari@psc.state.fl.us
Stephanie Cuello
scuello@psc.state.fl.us
Theresa Tan
ltan@psc.state.fl.us
Florida Public Service Commission
2540 Shumard Oak Blvd., Room 110
Tallahassee, FL 32399-0850

Thomas A. Jernigan
Thomas.Jernigan.3@us.af.mil
Federal Executive Agencies
AFCEC/JA-LFSC
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403

Jeffrey A. Stone, Esquire
jas@beggslane.com
Russell A. Badders, Esquire
rab@beggslane.com
Steven R. Griffin, Esquire
srg@beggslane.com
Beggs & Lane
P. O. Box 12950
Pensacola, FL 32576-2950

Mr. Robert L. McGee, Jr.
rlmcgee@southernco.com
Gulf Power Company
One Energy Place
Pensacola FL32520-0780



Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713