

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

**In Re: Petition for rate increase by Gulf Power Company** ) **DOCKET NO. 160186-EI**  
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**In Re: Petition for approval of 2016 depreciation and dismantlement studies, approval of annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.** ) **DOCKET NO. 160170-EI**  
) **March 14, 2017**  
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**Gulf Power’s Objection to Use of Demonstrative Exhibits Not Identified in Compliance with the Order Establishing Procedure**

Gulf Power Company (“Gulf”), by and through its undersigned counsel, hereby objects, pursuant to Order No. PSC-16-0473-PCO-EI (the Order Establishing Procedure entered October 20, 2016), to the presentation of any demonstrative exhibits not identified by the time of the Prehearing Conference held on March 6, 2017. In support, Gulf states:

1. The Order Establishing Procedure for this case set forth the specific and clear requirement that “[i]f a party wishes to use a demonstrative exhibit or other demonstrative tools at hearing, such materials must be identified by the time of the Prehearing Conference.” Order No. PSC-16-0473-PCO-EI, Section VI, Subsection E, page 8.

2. Neither prior to nor during the March 6, 2017, Prehearing Conference did any party identify specific materials to be used as demonstrative exhibits at the hearing.

3. Pursuant to the plain language of the Order Establishing Procedure, all parties are therefore prohibited from using or presenting demonstrative exhibits for the hearing.

4. The cause for this objection is a comment made by counsel for Southern Alliance for Clean Energy (“SACE”) and League of Women Voters of Florida (“LWVF”) at the Prehearing Conference. Counsel’s comments (a) misstated the Order Establishing Procedure regarding demonstrative exhibits, and (b) purported to reserve, contrary to the Order Establishing Procedure, to SACE and LWVF the power to conceal their demonstrative exhibits until the moment of presentation at hearing, thus preventing the parties from reasonable review and analysis of the contents of the demonstrative exhibits prior to their use at the hearing.

5. SACE and LWVF misstated the Order Establishing Procedure at the Prehearing Conference when describing the requirements for the timely identification of demonstrative exhibits. Counsel for SACE and LWVF stated, “The order establishing procedure requires parties to identify *whether* they intend to use any demonstrative exhibits.” Prehearing Conference Transcript, page 96,

lines 4-6<sup>1</sup>. (emphasis added) To the contrary, the Order Establishing Procedure did not merely require a party to identify *whether* a demonstrative exhibit would be used; rather, the Order Establishing Procedure required that “such materials must be *identified* by the time of the Prehearing Conference.” Order No. PSC-16-0473-PCO-EI, Section VI, Subsection E, page 8. [emphasis added] SACE and LWVF’s misstatement of the Order Establishing Procedure implied that SACE and LWVF had complied (or would comply) with the Order by merely mentioning they would use demonstrative exhibits, but SACE and LWVF failed to comply with the Order by not specifically identifying their planned demonstrative exhibits in a timely manner.

6. The purpose for requiring parties to identify demonstrative exhibits by the time of the Prehearing Conference is to provide the other parties sufficient time to review the proposed exhibits for accuracy, foundation, undue prejudice, and other grounds for objection prior to the hearing. Had SACE and LWVF complied with the Order Establishing Procedure, the parties would have had sufficient time to review and analyze any exhibits, and the Prehearing Officer could have heard arguments on disputes regarding the substance of such contemplated exhibits at the Prehearing Conference. This process (if followed) would have enabled appropriate rulings on these exhibits prior to the final hearing. The Commission should uphold

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<sup>1</sup> Exhibit “A” hereto.

its Order Establishing Procedure and reject SACE and LWVF's stated intent to present for the first time at final hearing demonstrative exhibits that have not previously been revealed to Gulf.

7. If SACE and LWVF are allowed to violate the Order Establishing Procedure, Gulf would be unfairly prejudiced:

- First, counsel for SACE and LWVF vaguely described at the Prehearing Conference that their demonstrative exhibits will consist of “blow-ups of pre-existing things in the record or that are clearly *derived* from the record in this proceeding. By that, I mean either exhibits submitted as part of prefiled testimony or *docket entries or discovery responses.*” Prehearing Conference Transcript, page 96, lines 8-12. (emphases added) The stated intent to present exhibits that are *derivative* from “things” either in the docket or in a discovery response indicates that SACE and LWVF intend to present demonstrative exhibits consisting of “things” that may not appropriately be presentable to the Commission or otherwise helpful to the presentation of evidence at the final hearing. That SACE and LWVF failed to comply with the Order Establishing Procedure and, as of the date of this objection, still have not identified any such materials, clearly warrants this objection.
- Gulf is further prejudiced by SACE and LWVF's violation of the Order Establishing Procedure because it is their stated intent to present

demonstrative exhibits *derived* from a discovery response. “Derived” is an unreasonably ambiguous characterization that will undoubtedly contribute to confusion and delay in the midst of the final hearing. Furthermore, demonstrative exhibits “derived” from discovery responses renders it unnecessarily difficult for other parties to verify the source(s) of the derivative exhibit and the accuracy of the information in the *derived* demonstrative exhibit. There were well over 1,000 discovery requests served on Gulf in this case, consisting of many hundreds of interrogatories and thousands of pages of document production. There are also over 2,000 docket entries in this case. SACE and LWVF’s indication that they intend to present exhibits *derived* from unidentified portions of this universe of information, but without revealing those exhibits until the final hearing, is unduly prejudicial to Gulf.

8. SACE and LWVF’s violation of the Order Establishing Procedure indicates an attempt to conduct a “trial by ambush.” According to the comment from SACE and LWVF’s counsel at the Prehearing Conference, SACE and LWVF plan multiple demonstrative exhibits that consist of blow-ups from unidentified portions of the docket and unidentified discovery responses, as well as demonstrative exhibits that are *derived* from unidentified information found in discovery responses and the docket. By not providing the proposed exhibits by the

time of the Prehearing Conference in violation of the Order Establishing Procedure, SACE and LWVF apparently envision a final hearing littered with attempted presentations of never-before-seen demonstrative exhibits, presumably to send Gulf scrambling to ascertain the accuracy and foundation of such exhibits in the midst of the final hearing. Their tactics are substantially likely to create undue prejudice and unnecessary delay by presenting incorrect, misleading, inadmissible, or out-of-context information. No justifiable reason exists to allow SACE and LWVF to violate the Order Establishing Procedure in this manner.

9. The Order Establishing Procedure was issued on October 20, 2016. SACE and LWVF had sufficient time to comply with the Order's requirement to identify the materials for any proposed demonstrative exhibit prior to the Prehearing Conference. If SACE and LWVF's violation of the Order Establishing Procedure is allowed to stand, their violation will prejudice not only Gulf, but the Commission, the other parties, and, indeed, Gulf's customers, by unnecessarily diverting hearing time needed for the presentation of those witnesses and any exhibits that *were* identified in compliance with the Order Establishing Procedure.

10. In summary, SACE and LWVF's plan to present at the final hearing an unknown number of previously-undisclosed demonstrative exhibits derived from unspecified sources found somewhere within hundreds of interrogatory responses, thousands upon thousands of discovery documents, and over two

thousand docket entries, should be rejected by the Commission. The Order Establishing Procedure set forth a reasonable timeline for the pre-hearing identification and disclosure of demonstrative exhibits. The Order Establishing Procedure was designed and entered for the purpose of facilitating a just and orderly final hearing, and SACE and LWVF's stated intentions run counter to the spirit, intent and letter of the Order. If SACE and LWVF's planned violation of the order is allowed by the Commission, such a "trial by ambush" with never-before-seen exhibits would unduly prejudice Gulf and unnecessarily interrupt and delay the proceedings of the final hearing.

WHEREFORE, Gulf objects to the use of any demonstrative exhibits that were not appropriately identified by the time of the Prehearing Conference.

Respectfully submitted this 14th day of March, 2017.

s/Charles Wiggins

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1 and I just wanted to put it out there.

2 **COMMISSIONER PATRONIS:** Right. All right.  
3 Any other matters? SACE?

4 **MR. MARSHALL:** Yes, thank you. The order  
5 establishing procedure requires parties to identify  
6 whether they intend to use any demonstrative exhibits.  
7 At this time, we would like to state that we do intend  
8 to use demonstrative exhibits; namely, blowups of  
9 pre-existing things in the record or that are clearly  
10 derived from the record in this proceeding. By that, I  
11 mean either exhibits submitted as part of prefiled  
12 testimony or docket entries or discovery responses.

13 **COMMISSIONER PATRONIS:** Okay. Anybody else?  
14 Any other matters to come before this prehearing?

15 All right. We stand adjourned. Thank you.

16 (Proceeding adjourned at 4:03 p.m.)  
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23 **Exhibit A**  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Increase in Rates )  
By Gulf Power Company )  
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Docket No.: 160186-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail this 14th day of March, 2017 to the following:

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