



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

RECEIVED - EPSC
AUG 24 PM 1:28

RECORDS AND
REPORTING

ORIGINAL

August 24, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Petition by the Citizens of the State of Florida to Have the Florida Public Service Commission Conduct a Full Revenue Requirements Rate Case and Establish Reasonable Base Rates and Charges for Gulf Power Company; Docket No. 990947-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of Citizens' Response in Opposition to Gulf Power Company's Motion to Dismiss for filing in the above-referenced docket.

Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,


John Roger Howe
Deputy Public Counsel

Stenkiewicz
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG _____
MAS _____
OPC _____
PAI _____
SEC _____
WAW _____
OTH _____

JRH/dsb
Enclosures

RECEIVED & FILED

Howe
BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
10085 AUG 24 99
EPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for a full revenue
requirements rate case for
Gulf Power Company.

Docket No. 990947-EI
Filed: August 24, 1999

**CITIZENS' RESPONSE IN OPPOSITION
TO GULF POWER COMPANY'S
MOTION TO DISMISS**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 28-106.204(1), Florida Administrative Code, respond in opposition to Gulf Power Company's motion to dismiss, which should be denied for the following reasons:

1. The purpose of a motion to dismiss is to test the legal sufficiency of a pleading. To be successful, the motion must demonstrate that, taking all well-founded allegations as true, the petition does not state a cause of action upon which relief can be granted. Gulf Power, however, has not even attempted to address the Citizens' petition from this perspective. Gulf Power's motion should be denied summarily.

2. Although Gulf Power wants all the rate case issues identified in the Citizens' petition to be dealt with in Docket No. 990250-EI, the company has failed to demonstrate how the mere existence of this earlier docket, regardless of its title, could obviate any need for the more expansive docket contemplated in the petition. Gulf Power simply says "[t]he issues Public Counsel has raised should be addressed in the context of [Docket No. 990250-EI] rather than opening a separate proceeding." Motion, at 2. But Gulf Power fails to appreciate that it has filed a motion to dismiss, not a motion to consolidate. Issues such as quality-of-service, once dismissed, could not be resurrected and incorporated in a docket addressing other matters in which the Citizens are not participants.

DOCUMENT NUMBER-DATE

10085 AUG 24 89

FPSC-RECORDS/REPORTING

3. Docket No. 990250-EI was initiated by the Commission Staff's recommendation to address specific issues for a limited period of time. Gulf tried to preempt Staff's initiative by filing its own plan (in Docket No. 990244-EI), also limited in both scope and duration. The Commission rejected both proposals and instead issued a proposed agency action in Order No. PSC-99-1047-PAA-EI on May 24, 1999, containing the Commissioners' own terms but similarly limited in scope and duration. The PAA evinced no intent by the Commission to arrive at a rate-case result by establishing rates or a rate of return for an indefinite future period.

4. Section 120.80(13)(b), Florida Statutes, which was apparently adopted at the Commission's insistence, provides that the hearing on a protested proposed agency action can only address matters in dispute. All other matters in the PAA order are "deemed stipulated." Pursuant to the Commission's interpretation of this statutory process in cases such as Mid-County Services, Inc., the final order in Docket No. 990250-EI will only resolve those portions of Order No. 99-1047 which were placed in dispute by the Coalition for Equitable Rates' protest.¹ As noted in Order No. PSC-99-1376-CO-EI, the consummating order in Docket No. 990244-EI, the Commission's rejection of all matters contained in Gulf Power's incentive revenue sharing proposal is final agency action. Gulf Power cannot even raise issues related to its own proposal at the hearing in Docket No. 990250-EI. Similarly, the Citizens, in Docket No. 990250-EI, if they were to intervene, could only address the

¹In the Matter of Application for rate increase in Pinellas County by Mid-County Services, Inc., Docket No. 971065-SU. The Commission made a bench decision after oral argument at the hearing on June 21, 1999, that only issues raised in the utility's protest of the PAA could be addressed pursuant to Section 120.80(13)(b).

issues identified by the Coalition. The Commission, if it is to follow precedent, does not consider any other matters to be in dispute. Indeed, no other matters may even be considered at the hearing.²

5. Gulf Power is apparently of the opinion the Commission has a choice whether to conduct a rate case when faced with well-founded allegations that the company's rates and rate of return are excessive. But Section 366.06(2) provides that where the Commission, upon its own motion or upon request, finds that rates yield excessive compensation for the services rendered, "the commission shall order and hold a public hearing . . . and shall thereafter determine just and reasonable rates to be thereafter charged." The Commission, in Order No. 99-1047, has already expressed its belief that Gulf Power's current rates yield excessive compensation. It sought to balance the interests of the company and customers in that order but recognized at the time that, if its proposal was unacceptable to all concerned, a rate case might ensue. Gulf Power has not challenged any of the issues or allegations in the Citizens' petition which, by their very nature and scope, require a traditional rate case to resolve. Similar allegations were made by the Company in 1989 in support of its last request for a full-blown rate case. The only difference today, ten years later, is that Gulf Power resists rate reductions when changed circumstances go the other way.

6. Gulf Power has not told why it considers the existence of Docket No. 990250-EI to be of such significance as to override the Citizens' entitlement to a full rate case review of the company's operations. Is it because the Commission Staff made a unitateral recommendation before

² It has always been unclear how Docket No. 990250-EI was expected to proceed in the event a protest was filed. Unlike other PAA's, there is no underlying petition and no petitioner in Docket No. 990250-EI to bear the burden of proof at hearing. Gulf Power's own proposal has been rejected by final order. Certain substantive terms of the PAA, such as its applicability for the years 1999, 2000 and 2001, were not protested and must be deemed stipulated and not subject to modification in the final order. Docket No. 990250-EI is completely unsuitable to resolve rate case type issues or to consider whether environmental costs should be rolled into base rates.

the rate case petition was filed which Gulf believes altered the regulatory scheme in Florida, revoked the Citizens' due process rights, and precluded a rate case? The Commission denied its Staff's recommendation. In any event, Gulf has not identified any connection between the existence of such a recommendation, whether accepted or rejected, and the Citizens' legal rights. Similarly, Gulf has not identified any link between the proposal it filed in Docket No. 990244-EI, which the Commission has denied by final order, and the Citizens' entitlement to a rate case. The only act of even tangential significance left for Gulf to hang its hat on is the Commissioner's own proposal which became the proposed agency action actually promulgated in Order No. 99-1047. But, again, Gulf has drawn no link between the fact the Commission made a unilateral proposal in hopes of avoiding a rate case and the Citizens' entitlement to one upon their own motion.

7. Gulf Power alleges it is not earning above its last allowed ROE range because both its current and projected surveillance reports say so. The petition, however, said the 1999 forecasted surveillance report showed earnings calculated in a manner consistent with Gulf's last rate case will be above 13%. Gulf's surveillance reports include adjustments which are not consistent with the last rate case. Gulf's surveillance reports, for example, include an additional \$3 million for the property insurance reserve, an adjustment inconsistent with the last rate case. Section 366.071(5)(b)3 contains an explicit provision allowing for the use of an ROE range established after the last rate case to set interim rates. There is, however, no similar provision allowing for the inclusion of additional expenses authorized after the last rate case. As a matter of statutory construction, the specific reference to an ROE established after the last rate case for purposes of setting interim rates suggests the intentional

exclusion of other post-rate-case elements in determining whether a utility was overearning for interim-rate purposes.³

8. In Order No. 99-1047, at page 8, the Commission noted that, if the order became final without a protest being filed, rate reductions would be effective earlier:


We note that if the plan is not protested, these benefits will begin sooner, and without the expense of a full revenue requirements rate proceeding.

The Coalition's protest, however, stopped the rate reductions intended to start on July 1, 1999, from going into effect. The Commission apparently contemplated that, in such event, a full revenue requirements rate case, with its attendant expenses and voluminous MFR filings, would likely follow. The Citizens' petition giving rise to this docket simply offered an appropriate procedural vehicle for this process. Gulf Power's protestations that filing a full set of MFR's would be expensive and burdensome is, therefore, without merit.

³This statutory maxim is usually expressed as inclusio unius est exclusio alterius or expressio unius est exclusio alterius. The Florida Supreme Court, in Gay v. Singletary, 700 So. 2d 1220, 1221 (1997), said that "[u]nder this doctrine, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." The First District Court of Appeal, in Sun Coast International, Inc. v. Dept. of Business Reg., 596 So. 2d 1118, 1121 (1992), said that "[i]f a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily construed as excluding from its operation all those matters not expressly mentioned. [Citation omitted.] And, as more particularly applicable to the statute now under consideration, a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way." [Emphasis in original; citation omitted.]

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, respectfully urge the Florida Public Service Commission to deny Gulf Power Company's motion to dismiss.

Respectfully submitted,



John Roger Howe
Deputy Public Counsel
Florida Bar No. 0253911

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 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 above CITIZENS RESPONSE IN OPPOSITION TO GULF POWER COMPANY'S MOTION TO DISMISS has been furnished by U. S. mail or hand-delivery (*) to the following parties this 24th day of August, 1999:

Robert V. Elias, Esquire*
Legal Division
Florida Public Service Division
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Jeffrey A. Stone, Esquire
Russell A. Badders, Esquire
Beggs & Lane
3 West Garden Street, Suite 700
P. O. Box 12950
Pensacola, FL 32576-2950

Mr. Arlan E. Scarbrough
Vice-President, Finance
One Energy Place
Pensacola, FL 32520-0100

Ronald C. LaFace, Esquire
Seann M. Frazier, Esquire
Greenberg Traurig, P.A.
Post Office Drawer 1838
Tallahassee, FL 32302



John Roger Howe
Deputy Public Counsel