

Dorothy Menasco

From: Mary Davis [MD@beggslane.com]
Sent: Monday, November 28, 2011 12:40 PM
To: Filings@psc.state.fl.us
Cc: Caroline Klancke; cguyton@gunster.com; chris.thompson.2@tyndall.af.mil; sayler.erik@leg.state.fl.us; kelly.jr@leg.state.fl.us; Jeffrey Stone; jmoyle@kagmlaw.com; mcglothlin.joseph@leg.state.fl.us; Karen.white@tyndall.af.mil; Keino Young; Keith L. Harris (klharris@southern.com); Martha Barrera; rick@rmelsonlaw.com; schef@gbwlegal.com; Russell Badders; Steven R. Griffin; sdriteno@southernco.com; merchant.tricia@leg.state.fl.us; vkaufman@kagmlaw.com
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Attachments: Response to Motion to Strike the Storm Study V2.pdf

a. Person responsible for this electronic filing:

Steven R. Griffin
 Beggs & Lane
 P.O. Box 12950
 501 Commendencia Street
 Pensacola, FL 32576-2950
 (850)432-2451
srg@beggslane.com

b. Docket 110138-EI

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

c. Document being filed on behalf of Gulf Power Company

d. There are 8 pages to Gulf's Response

e. The document attached for electronic filing is Gulf's Response to Consumer Intervenors' Motion to Strike

Mary E. Davis

Legal Assistant to Jeffrey A. Stone,
 Russell A. Badders and Steven R. Griffin
 Beggs & Lane
 501 Commendencia Street
 Pensacola, FL 32502
 (850)432-2451
 Fax (850)469-3331
md@beggslane.com

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for the increase in rates
by Gulf Power Company

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Docket No.: 110138-EI
Filed: November 28, 2011

**GULF POWER COMPANY'S RESPONSE TO
CONSUMER INTERVENORS' MOTION TO STRIKE**

Gulf Power Company ("Gulf") hereby responds to the Motion to Strike filed on November 21, 2011 by the Florida Industrial Power Users Group, the Office of Public Counsel, the Federal Executive Agencies and the Florida Retail Federation (the "Consumer Intervenors").

1. In the Motion, the Movants seek to strike the *Transmission and Distribution Hurricane Loss and Reserve Performance Analyses*, which was submitted as Exhibit CJE-1, Schedule 5 and which they call the "Storm Study," and portions of the Direct and Rebuttal Testimony of Constance J. Erickson that relate to the Storm Study. The Motion raises two legal arguments as a basis to strike:

- a. The Storm Study is hearsay.
- b. The Storm Study has a disclaimer.

Given that Witness Erickson is an expert accounting witness whose accounting expertise is unchallenged and given that Witness Erickson relied upon the Storm Study in making an accounting determination, the amount of the annual property damage accrual, neither argument raised in the Motion to Strike makes the Storm Study inadmissible.

**THE ADMINISTRATIVE PROCEDURE ACT, NOT THE EVIDENCE CODE,
SETS FORTH THE APPLICABLE EVIDENTIARY STANDARD.**

2. The Motion to Strike suggests that Section 90.801(1)(c), Florida Statutes, which is the section of the Florida Evidence Code addressing hearsay, is the operative statute. Motion to Strike at ¶ 5. It is not.

3. Evidence admissible in administrative proceedings is specifically addressed in the Administrative Procedure Act (“APA”). The standard for admissible evidence set forth in the APA is found in Section 120.569(2)(g), Florida Statutes:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Moreover, the APA specifically addresses the use of hearsay evidence, stating that it “may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” § 120.57(1)(c), *Fla. Stat.* So, the Movants’ reliance upon the Evidence Code instead of the APA is misplaced.

4. Under the APA evidence standard, the Storm Study and Witness Erickson’s testimony addressing the Storm Study is clearly admissible. It is evidence of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.

a. The Storm Study was commissioned by Gulf in order to fulfill its obligations under mandate of the Florida Public Service Commission. It was performed pursuant to Commission Rule 25-6.0143, Florida Administrative Code.

b. The Storm Study was filed with the Commission, pursuant to Rule 25-6.0143(1)(l), Florida Administrative Code on January 15, 2011, prior to Gulf’s filing for a base rate increase.

c. The Commission’s Rule requires the filing of a storm study not only every five years, but also when a utility seeks to change its annual accrual. Thus, the Commission considers such a study necessary to its consideration and deliberation. Given the

Commission's determination that such a study is necessary, it constitutes "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

5. Even if the Commission's mandated filing of such studies for its consideration is disregarded, the study still meets the APA standard. Witness Erickson is the Comptroller of Gulf Power Company, the Company's Chief Accounting Officer. She is an unchallenged expert in accounting. She regularly relies upon expert third party analyses in making accounting determinations. In this instance she used the Commission-required Storm Study to make an accounting judgment as to the appropriate amount of the annual accrual to the property reserve fund. She uses similar studies in making other accounting judgments, including in this case alone:

1. A study by McGriff, Seibels, & Williams for the estimation of Workers Compensation retained liabilities;
2. A study by American Appraisal Associates, Inc. used to develop depreciation rates and the Advanced Meter Infrastructure average service life in this case;
3. Studies by Aon Hewitt that are actuarial reports on qualified and nonqualified pension plans; and
4. A study by Ernst & Young addressing the valuation of a spare refurbished General Electric 7FA turbine rotor.

These third party studies performed by recognized experts are commonly used by accounting experts such as Witness Erickson to make accounting judgments in the conduct of their affairs. So, even if the Movants contest whether the Commission is comprised of reasonably prudent persons who would rely on the Storm Study in the conduct of their affairs, the evidence in this case shows that Witness Erickson is an unchallenged accounting expert who regularly relies upon such studies in the conduct of her affairs. Thus, this study passes the evidentiary standard set forth in the APA.

6. Witness Erickson's testimony and Storm Study exhibit are also admissible under the section of the APA addressing hearsay. The primary basis for Gulf's increased annual property damage accrual is Witness Erickson's expert opinion as to what the proper level of the accounting accrual should be. The Storm Study corroborates that expert opinion. Thus, Gulf is using the Storm Study "for the purpose of supplementing or explaining other evidence," as contemplated and permitted under Section 120.57(1)(c), Florida Statutes.

**EVEN UNDER THE EVIDENCE CODE THE STORM STUDY
AND RELATED TESTIMONY WOULD BE ADMISSIBLE.**

7. Although the Evidence Code is clearly subordinate to the APA in an administrative proceeding, under the Evidence Code the expert opinion of Witness Erickson as to the proper amount of the annual property damage accrual and her discussion of the matters she relied upon in reaching her expert opinion are admissible under the Florida Evidence Code. Once again, the Movants have cited the wrong statutory provision. The applicable provisions of the Evidence Code in this instance would be Sections 90.702 and 90.704, Florida Statutes, which provide:

90.702 Testimony by experts – if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

90.704 Basis of opinion testimony by experts. The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

8. Witness Erickson is an expert accounting witness qualified by knowledge, skill, training and education and experience in the area of accounting. She is Gulf's chief accounting officer. As an expert on accounting, she may give an opinion as to the proper level of an

accounting accrual, which is exactly what she has done in regard to Gulf's requested annual property damage accrual. This is entirely consistent with Section 90.702, Florida Statutes. Moreover, in giving her opinion she has relied upon data reasonably relied upon by experts; indeed, she relied upon no less an authority than the Commission has required to be filed for its deliberations – a Storm Study. Consequently, under Section 90.704, Florida Statutes, it would not matter even if the Storm Study was inadmissible in evidence.

9. Finally, it should be noted that the Storm Study would probably be admissible under at least two recognized exceptions to the hearsay rule: Section 90.803(6), RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY or 90.803(8) PUBLIC RECORDS AND REPORTS, Florida Statutes. However, further development of these arguments is unnecessary given the language of Section 90.704, Florida Statutes.

**THE STUDY'S DISCLAIMER DOES NOT AFFECT ADMISSIBILITY;
AT MOST IT GOES TO THE WEIGHT TO BE GIVEN TO THE EVIDENCE.**

10. Interestingly, in this part of the Motion to Strike, the Movants acknowledge the applicability of Section 120.569, Florida Statutes and make no reference to the Evidence Code. This reinforces the accuracy of Gulf's argument above. However, the Movants make a huge leap from the language of the disclaimer to the unsupported conclusion that the Storm Study is "irrelevant and immaterial." Their leap falls short of the mark.

11. It is difficult for Gulf to understand how a Study required by the Commission any time the Commission is to consider a change to an annual accrual to a property damage reserve can be characterized as either "irrelevant" or "immaterial." Quite frankly, the Commission has already rejected such an argument when it adopted Rule 25-6.0143, Florida Administrative Code. Any other conclusion assumes that in adopting the rule the Commission was intentionally

requiring utilities to file immaterial and irrelevant material. The existence of Rule 25-6.0143, particularly subsection (1)(l), effectively rebuts the Movants' argument.

12. It should also be noted that disclaimers such as the one contained in the Storm Study are typical of such studies that the Commission has considered in the past without striking the studies. A similar disclaimer appeared in the storm study submitted by Gulf in 2006 as well as in the storm studies most recently submitted by TECO and Progress Energy Florida. Such a disclaimer of an implied warranty should not be surprising given the statistical nature of the studies. Absent such a disclaimer, the cost of such studies would be much higher to cover the higher risk the analysts would be assuming. Requiring a higher cost for essentially the same work product would benefit neither the customers nor the Company.

For the foregoing reasons, the Consumer Intervenors' Motion to Strike filed on November 21, 2011 should be denied.

Respectfully submitted this 28th day of November, 2011.

JEFFREY A. STONE
Florida Bar No. 325953
RUSSELL A. BADDERS
Florida Bar No. 007455
STEVEN R. GRIFFIN
Florida Bar No. 627569
Beggs & Lane
P. O. Box 12950
501 Commendencia Street
Pensacola, FL 32576-2950
(850) 432-2451

CHARLES A. GUYTON
Florida Bar No. 398039
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 618
Tallahassee, FL 32301
(850) 521-1980

RICHARD D. MELSON
Florida Bar No. 201243
705 Piedmont Drive
Tallahassee, FL 32312
(850) 894-1351
Attorneys for Gulf Power Company

BY: s/ Charles A. Guyton
Charles A. Guyton
Fla. Bar No. 398039

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and via U.S. Mail this 28th day of November, 2011 to all counsel of record as indicated below:

Office of Public Counsel
J. R. Kelly/Joseph A.
McGlothlin/Erik
c/o The Florida Legislature
111 W. Madison Street,
Room 812
Tallahassee, FL 32393-1400
Kelly.jr@leg.state.fl.us
mcglothlin.joseph@leg.state.fl.us
Sayler.erik@leg.state.fl.us
Merchant.tricia@leg.state.fl.us

Caroline Klancke
Keino Young
Martha Barrera
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850
mbarrera@psc.state.fl.us
cklancke@psc.state.fl.us
kyoung@psc.state.fl.us

Robert Scheffel Wright/John T. La
Via,
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com

Gunster Law Firm
Charles A. Guyton
215 S. Monroe St.,
Suite 618
Tallahassee, FL 32301
cguyton@gunster.com

Richard Melson
705 Piedmont Drive
Tallahassee, FL 32312
rick@rmelsonlaw.com

Florida Retail
Federation
227 South Adams
Street
Tallahassee, FL 32301

Florida Industrial Power
Users Group
Vicki G. Kaufman/Jon C.
Moyle, Jr.
c/o Keefe Law Firm
118 North Gadsden Street
Tallahassee, FL 32301
vkaufman@kagmlaw.com
jmoyle@kagmlaw.com

Federal Executive Agencies
c/o Major Christopher C.
Thompson
Ms. Karen White
AFLOA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall Air Force Base,
Florida 32403
chris.thompson.2@tyndall.af.mil
karen.white@tyndall.af.mil

BY: s/ Steven R. Griffin
Steven R. Griffin
Fla. Bar No. 627569