

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Gulf)
Power Company) Docket No. 160186-EI
_____)

**RESPONSE OF GULF POWER COMPANY
IN OPPOSITION TO PETITION TO INTERVENE BY
SOUTHERN ALLIANCE FOR CLEAN ENERGY**

Gulf Power Company (“Gulf”), pursuant to Rule 28-106.205, Florida Administrative Code (hereinafter F.A.C.) files this response in opposition to the Petition To Intervene By Southern Alliance For Clean Energy (“SACE”) filed with the Florida Public Service Commission (“Commission”) on November 16, 2016 in Docket No. 160186-EI. In opposition to SACE’s Petition, Gulf states:

**I.
SUMMARY OF OPPOSITION**

Under both applicable rules governing intervention in this proceeding, Rule 25-22.039, F.A.C. and Rule 28-106.205, F.A.C., a person seeking to intervene must be able to show either that the person is entitled by right under the constitution, statute or rule to intervene or that their substantial interests will be affected by the determination in this proceeding. SACE has no right conveyed by the constitution, statute or Commission rule that entitles it to intervene in an electric utility base rate proceeding. Consequently, to have any opportunity to intervene in this electric utility base rate proceeding, SACE must allege and demonstrate that its substantial interests and the substantial interests of a substantial number of its members it purports to represent will be adversely affected by the determination in this proceeding. SACE must also allege and demonstrate that it meets the requirements for associational standing. SACE’s petition to intervene fails to demonstrate that its substantial interests and that the substantial interests of a

substantial number of its members will be adversely affected by the determination in this base rate proceeding. SACE lacks standing to participate in this or any other base rate proceeding given the interests it has alleged.

It is clear from SACE's petition to intervene (including its allegations of general and specific interests and proposed issues) that SACE is attempting to significantly and improperly expand the scope of this base rate proceeding beyond whether Gulf's proposed rates are just and reasonable. It appears SACE will use this proceeding as a platform upon which SACE can advocate "for energy plans, policies and systems that best serve the environment, public health and economic interests of communities in the Southeast." SACE Petition at 2. SACE seeks to make this base rate proceeding an opportunity to further its mission of evaluating "all opportunities for displacing non-renewable electricity generation with lower cost end-use energy efficiency measures and customer-sited renewable energy generation." *Id.* SACE further alleges as a substantial interest that, "SACE's members have an interest in ensuring that the Commission properly considers the true value of all conservation measures, including demand side renewable energy, as required by law." SACE Petition at 4.

As discussed below, none of these matters are properly at issue in an electric utility base rate proceeding. The interests alleged (but not yet proven) by SACE are properly considered by the Commission in a host of other proceedings that the Commission conducts under FEECA, including conservation potential evaluation proceedings, conservation goals proceedings and electric utility determination of need proceedings. SACE has been allowed to intervene in those proceedings where its interests have been affected. However, those types of issues are not part of a base rate proceeding in which the Commission is establishing just and reasonable rates all

customers should pay to cover reasonable expenses and provide a fair rate of return on the property that has been used by the Company to provide electric service.

In the FEECA proceedings in which it has been allowed to participate, SACE has not been particularly effective in convincing the Commission of the merit of its myriad positions. SACE was allowed to present evidence on those non-ratemaking issues, and it essentially lost. Having lost in the proceedings in which its concerns were properly addressed, it now seeks to convert this base rate proceeding into yet another proceeding for re-litigating issues it has already raised and lost. Such re-litigation would be highly inappropriate not only because it is outside the proper scope of an electric utility base rate proceeding, but also because it is a collateral attack on the various orders that have previously rejected SACE's arguments.

Given the interests alleged in SACE's petition, its intervention should be denied. If, however, the Commission were to decide to permit SACE's intervention, its intervention should be limited to issues properly within the scope of Gulf's base rate proceeding, and SACE should be required to affirmatively prove any allegations that the Commission concludes would warrant intervention. The Commission should not grant SACE's petition to intervene and thereby grossly expand the scope of this already broad and complex base rate proceeding with a host of FEECA issues that have already been addressed elsewhere.

II.
SACE HAS NO CONSTITUTIONAL OR
STATUTORY RIGHT TO PARTICIPATE

Rules 25-22.039 and 28-106.205 recognize that some persons are entitled by right to intervene by constitutional or statutory provisions. An example with which the Commission is familiar is the Office of Public Counsel's right to intervene. SACE has not alleged and cannot allege that it has a similar right to intervene in this proceeding.

**III.
SACE HAS NO COMMISSION RULE-
BASED RIGHT TO INTERVENE**

Similarly, there is no Commission rule that gives SACE the right to intervene in an electric utility base rate proceeding. SACE has not alleged such a right, because no such right exists.

**IV.
SACE LACKS STANDING TO INTERVENE**

Therefore, under Rules 25-22.039 and 28-106.25, and under Section 120.69 and 120.70, Florida Statutes, if SACE is to be allowed to intervene, SACE must allege and prove that its substantial interests and the substantial interests of a substantial number of its members will be adversely affected by the Commission's decision in this proceeding.

There is a substantial body of case law that addresses intervention in administrative proceedings and what has to be alleged and proven to show that a substantial interest will be adversely affected. The first body of case law was initially developed in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981), *reh. denied*, 415 So.2d 1359 (Fla. 1982), and was summarized by the Florida Supreme Court in *Amersiteel Corp. v. Clark*, 691 So.2d 473 (Fla. 1997). The second applicable body of cases addresses association standing, where an association such as SACE is attempting to intervene on behalf of its members. This body of case law is perhaps best summarized in *Florida League of Cities, Inc. v. Dept. of Environmental Regulation*, 603 So.2d 1363, 1366 (Fla. 1st DCA 1992).

Under the *Agrico* standard, the putative intervenor must make not one, but two, necessary showings. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a 120.57 hearing, and 2) that his substantial injury is of a type or nature which the

proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.” *Agrico*, 406 So.2d at 482. SACE must meet this two-pronged test to establish standing for a right to intervene. While SACE’s petition acknowledges that this two-pronged test is part of the applicable legal standard, SACE fails to meet the standard. If standing is challenged, the burden is on the intervenor to prove its allegations of standing. *Agrico*, 406 So.2d at 482.

In addition to having to meet the *Agrico* standard, SACE must also meet the additional requirements for association standing. In *Florida League of Cities*, the court held that an association must allege and prove that, “a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule, that the subject matter of the rule is within the association’s general scope of interest and activity, and that the relief requested is of the type appropriate for a trade association to receive on behalf of its members.” 603 So.2d at 1366. While *Florida League of Cities* addressed a rule challenge, it has been extended to Section 120.570 cases. *Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So.2d 753 (Fla. 1st DCA 1982). SACE’s petition also fails to meet this three-pronged standard for association standing.

V.

SACE HAS FAILED TO ALLEGE OR PROVE STANDING

SACE has made a number of assertions of interests, most of which have nothing to do with an electric utility base rate proceeding under Section 366.04, Florida Statutes. While not every allegation warrants a response, Gulf will address those that are clearly outside the scope of this base rate proceeding and then address why SACE’s few allegations that actually address base rates are not properly considered in a base rate proceeding.

SACE provides a summary of its alleged substantial interests in paragraphs 5, 6 and 7 of its petition. Gulf will address individual statements alleging purported interests and address why they do not meet standing requirements. Let's look first at SACE's self-proclaimed mission:

SACE: "The mission of SACE, as reflected in its bylaws, [not provided] is to advocate for energy plans, policies, and systems that best serve the environmental, public health and economic interest of communities in the Southeast, including Gulf Power's service territory in Florida." Petition, ¶5.

Gulf response: This proceeding is solely about Gulf's base rates, *i.e.*, the charges Gulf is authorized to use to recover the costs of providing electricity to its customers. It is not about energy plans, which are addressed in separate planning proceedings outside of rate cases. This proceeding is not about energy policies, which, under the Administrative Procedure Act (APA), would need to be considered in a rulemaking proceeding rather than a Section 120.569 proceeding. It is not about energy systems. It is not about the environmental or public health of communities in the Southeast, as these matters are clearly outside of any grant of jurisdiction to the Commission. The case may indirectly impact the economic interests of certain communities, but once again the Commission's consideration of that is limited to whether the rates charged to those identifiable communities recover the costs associated with providing service.

SACE continues its allegation of purported interests with the following passage:

SACE: "As part of that mission, SACE's members place a priority on evaluating all opportunities for displacing non-renewable electricity generation with lower cost end-use energy efficiency measures and customer-sited renewable energy generation. These measures directly and cost-effectively reduce the amount of fossil fuel consumed by existing non-renewable energy generation facilities and displace the need for new power plants, thereby reducing the overall electric system costs for customers who ultimately bear the cost of fuel, new power plants and added infrastructure. Decreased fuel consumption also reduces the overall public health, environmental and economic costs associated with greenhouse gas emissions from non-renewable energy generation." Petition, ¶5.

Gulf response: Setting aside that these issues have been unsuccessfully litigated by SACE in a number of DSM and need determination proceedings, these are not interests at issue in rate cases, and they are certainly not interests that rate cases are designed to protect. These "interests" meet neither of the *Agrico* standards. Evaluations of energy end-use efficiency and customer-sited renewable energy generation are considered in other Commission proceedings (where SACE has repeatedly been unable to convince the Commission of the merit of its positions). These issues are better considered in DSM and need cases. That is the statutory

intent under Chapter 366, and it has been the appropriate historical practice of the Commission not to address such issues in rate cases.

SACE then continues its paragraph 5 with the following irrelevant observation:

SACE: “SACE’s members have made investments in energy efficiency and conservation measures, and support policies promoting demand-side renewable energy, such as rooftop solar.” Petition, ¶5.

Gulf’s Response: This is not a matter within the scope of Gulf’s base rate proceeding. This is not a policy proceeding regarding energy efficiency or demand-side renewable energy, such as rooftop solar. These types of issues may be appropriate for conservation potential or conservation goals proceedings. There is no injury to these interests alleged or shown, and, more importantly, this base rate case is not the type of case designed to protect such issues.

Finally, after almost an entire page of irrelevant verbiage, SACE mentions that its members are ratepayers, but then once again addresses policies that are not at issue in this or any other electric utility base rate proceeding:

SACE: “As ratepayers, they are adversely affected by policies that make it harder to lower their power use by reducing their consumption, such as the rate restructure proposed by Gulf Power in this proceeding.” Petition, ¶5.

Gulf Response: Gulf’s “rate restructure” in this proceeding is not a policy designed to “make it harder to lower [customer] power use by reducing their consumption.” Gulf’s customers, including SACE members, regardless of the rate structure chosen by the Commission, retain the exclusive right to lower their power use and reduce their consumption. The purpose of Gulf’s proposed restructuring of rates is simply and solely meant to better recover costs through rate elements that track cost-causation. SACE has misrepresented Gulf’s proposal and consequently, the purported interests of SACE’s members.

In paragraph 6 of its petition to intervene, SACE attempts a fleeting effort to comply with one of the three prongs of the association standing cases, alleging that it has a “substantial number” of members residing in Gulf’s service territory. This is an incomplete effort to address only the first of three prongs required to meet the standard for association standing. To address this first prong of association standing, SACE has to allege and prove not only that it has a substantial number of its members in Gulf’s service area—a factual assertion Gulf disputes and

demands strict proof of--but also that its members in Gulf's service area are substantially adversely affected by a matter properly at issue in the proceeding. There is no attempt to make that latter showing here. Otherwise, paragraph 6 completely ignores the other two prongs required to show association standing.

SACE closes its general allegation of its substantial interest by listing proceedings in which SACE has been granted intervention, as if this has some precedential value. Conspicuously absent from this list of prior interventions is any electric utility base rate proceeding such as the case in which SACE now seeks to intervene. Actually, SACE's intervention in DSM and need cases demonstrates Gulf's earlier point that the types of issues SACE seeks to raise in this proceeding are not base rate case issues but issues more appropriately considered in DSM and need cases.

SACE then moves to Section V of its petition, paragraphs 8 through 13, to buttress its statement of affected interests. While some of this verbiage is simply a restatement of earlier, clearly infirm allegations, there are a few additional allegations that warrant a response.

Paragraph 8 does actually mention Gulf's requested base rate relief and its rate restructuring proposal, noting it will result in "substantial bill increases to SACE's members." However, the interest SACE apparently seeks to protect is that Gulf's rate request purportedly "raises the rates most on the consumers that have saved the most energy, and thus would negatively impact SACE's members in Gulf's service territory." SACE has not shown that either of these assertions is in fact true. More importantly, this issue is not appropriate for a base rate proceeding. The issue in a base rate proceeding is whether the proposed rate design properly recovers costs from cost causers. Whether SACE's members are among the customers who historically have saved the most energy and whether it would raise their rates more is irrelevant

in this proceeding. Whether SACE's members have invested in energy efficiency devices and other measures to lower their energy use may be true and would be commendable, but it is not relevant to their standing in a base rate proceeding. In this proceeding the issue is whether the new rate structure more appropriately tracks cost causation than the existing rate structure. It does track cost causation better than existing rates regardless of whether customers have reduced their consumption through energy efficiency or other measures. SACE's members have no right to preserve their existing rate structure, including its higher energy charge, if the Commission decides a new rate structure is more appropriate to recover costs, regardless of whether SACE members have installed energy efficiency measures.

Paragraph 9 for the most part rehashes the general interests SACE pled earlier. Accordingly, those redundant allegations will not be addressed. However, there is another passage that warrants a response:

SACE: "Thus, the substantial interest of members of SACE are affected in this cases [sic] because the Commission's order will determine the rates SACE's members pay in GPC's service territory, and whether such rates discourage the use of energy-efficiency measures and demand-side renewable energy, and whether SACE's members will be financially penalized by GPC via high fixed charges for having invested in energy-efficiency measures and demand side renewable energy or be prevented from reducing their bill by reductions in energy consumption."

Gulf Response: This passage is somewhat tortured in its "logic," but let's start with the alleged injury to SACE's members, *i.e.*, that SACE's members are supposedly "financially penalized by GPC via high fixed charges for having invested in energy-efficiency measures and demand side renewable energy or be prevented from reducing their bill by reductions in energy consumption." The most obvious response is that the rate restructure proposal does not prevent SACE members or any other customer from reducing their bill by reducing their consumption. Under the new rate structure, there will still be an energy charge. A reduction in consumption will still have the effect of reducing the bill. It may not reduce the bill as much as it would have under the existing rate structure, but no customer is being prevented from reducing consumption or reducing his or her bill. The same twisted logic utilized by SACE here would argue that the Commission should not reduce fuel clause rates because that action would

“discourage conservation” and adversely affect the pecuniary interests of customers who have made conservation investments. Gulf has no way of knowing whether SACE members have installed energy efficiency or renewable energy measures, but more importantly, the new rate structure is not being proposed to penalize SACE members or any other customers. It is being proposed merely because it is a superior means of addressing cost recovery and cost causation for all customers. Furthermore, the proposed optional demand rates allow any customer to avoid the higher fixed charge while managing their bill through their consumption of both energy and demand. The primary purpose of the rate case is to establish just and reasonable rates designed to recover costs for providing electrical service. While the Commission can consider the impact of rates on energy conservation in a rate case, SACE’s unproved suggestion that the new rate structure will discourage conservation is at odds with Gulf evidence already presented in this case that the new rate structure will make more energy conservation programs cost-effective, a benefit for all of Gulf’s customers. In addition, some of the allegations in this paragraph are just plain wrong; therefore, Gulf demands strict proof of all the allegations therein for SACE to be able to demonstrate standing.

Paragraph 10 of SACE’s petition is easily addressed. SACE and its members should rely upon their rights, if any, in different types of proceedings, not Gulf’s base rate case, to present “expert testimony and opinion about the full technical, economic and achievable potential for cost-effective energy efficiency and the value of demand side renewables.” That is the clear purpose and intent of proceedings designed to implement FEECA and establish conservation goals. SACE’s proposed expert evidence has no bearing on the matters to be addressed in this base rate proceeding, and SACE should not be permitted to hijack this matter, particularly when it has been so unsuccessful in presenting such testimony in more proper proceedings.

Paragraph 11 is wrong as a matter of law and fact. This proceeding is not designed to protect the interests SACE has alleged. There are other proceedings, in which SACE has repeatedly participated, that are designed to address the interests that SACE has pled in its petition to intervene. Those interests are not at issue in this base rate proceeding, and a base rate proceeding is not designed to address, much less protect, such interests.

Paragraph 12 is merely a rehash of earlier statements of SACE's general interests. Gulf notes that, to the extent SACE's members are affected by the proposed base rate increase, they are already represented by the Office of Public Counsel. Indulging SACE's broad scope of issues in this case would clearly introduce unnecessary and irrelevant complexity into an already multi-faceted proceeding. The proposed injection of these issues into this matter would serve no legitimate purpose.

SACE has failed to meet both the *Agrico* and the *Florida Cities* standards for administrative standing. Its petition should be denied. In the alternative, its intervention should be strictly limited to appropriate rate case issues. That said, SACE's members are already represented on those issues and have no unique interests that justify SACE's intervention in this case.

**VI.
SACE SEEKS TO ADDRESS MATTERS
NOT AT ISSUE IN THIS PROCEEDING**

A review of the multiple issues raised by SACE further demonstrates how SACE is attempting to hijack this statutory revenue requirement proceeding into an energy efficiency and renewable generation proceeding. A sampling of those issues readily makes this point.

First, SACE is clearly attempting to change the nature of this proceeding. Notably, paragraph 28 of SACE's petition asserts that it is disputed whether "the proposed changes to GPC's goals under the Florida Energy Efficiency Conservation Act are appropriate." This issue incorrectly assumes Gulf is requesting such relief in this proceeding. This assumption is wholly off-the-mark. In fact, Gulf has not made such a request in this matter. Gulf is not seeking to change its FEECA goals in this proceeding. If Gulf does seek to change its goals, it will not file a base rate proceeding to do so. It will file a proceeding under FEECA, as it has done

previously. This is not a DSM goals case, and SACE should not be allowed to commandeer it into such a case.

SACE proposes two issues about the rate restructuring that are not appropriate for a base rate proceeding by asking whether the restructuring will “discourage energy efficiency” and “demand side renewable generation.” SACE Petition, ¶¶ 14, 15. The proper issue in a base rate case is whether the restructured rates better recover the cost of providing service to customers. This case is not about encouraging or discouraging energy efficiency or renewable generation. The primary purpose of this proceeding is recovery of revenue requirements associated with providing electric service through just and reasonable rates. The Commission may consider the impact of rates on energy conservation, but the overall purpose of this case is not to encourage energy conservation or demand-side renewable projects.

Similarly, whether customers who invest in energy efficiency and demand side renewable generation are subsidized by other customers (SACE Petition, ¶¶ 16, 17) is regularly considered in addressing cost-effectiveness in conservation proceedings. It is the classic RIM/TRC debate. It does not need to be injected into this proceeding, which serves an entirely different purpose.

The issue in paragraph 19 is proper only if it were stated more broadly. In this case the Commission should address whether all customers pay an equitable share of fixed costs. That is what is properly at issue in a base rate proceeding.

The issue in paragraph 20 is also an inappropriate issue because it assumes as true facts that would be contested, but even if it was objectively reworded, it is a far more appropriate issue for a DSM or need proceeding. It serves no legitimate purpose in a base rate proceeding.

None of the statutes and rules cited by SACE in paragraph 30 entitle SACE to intervene. It has no statutory or rule right to intervene. It must show it meets the two applicable standing tests, and it has failed to do so.

**VII.
SACE'S PETITION IS A COLLATERAL ATTACK
ON PRIOR COMMISSION DETERMINATIONS**

It is clear from the purported interests pled in SACE's petition, as well as the issues SACE alleges are at issue in this proceeding, that SACE is attempting to employ this base rate proceeding to circumvent the Commission's prior determinations in DSM proceedings. SACE has been unsuccessful in a host of DSM proceedings. Therefore, it now seeks to have the Commission review the same tired arguments once again in a proceeding that has nothing to do with DSM. Such an approach is nothing less than a collateral attack on the Commission's prior determinations in the recent DSM potential, goals and plan proceedings. SACE was unsuccessful there, and instead of initiating a new goals proceeding (which it could petition to do), it wants to retry some of the same issues in a revenue requirements proceeding. This is nothing more than a collateral attack on prior Commission decisions in which SACE had a full opportunity to participate and be heard. The Commission should not indulge this unwarranted collateral attack on its prior decisions.

Wherefore, Gulf is opposed to SACE's intervention in this proceeding. Gulf asks that SACE's intervention be denied. In the alternative, if SACE is granted intervention, Gulf respectfully requests that SACE's intervention be limited to matters at issue in a statutory base rate proceeding and that SACE not be allowed to introduce issues more appropriately considered or previously considered in DSM and need cases. If SACE is granted intervention, Gulf contests

SACE's standing and insists upon proof of its allegations in its petition and reserves its ability to contest those assertions.

Respectfully submitted,



JEFFREY A. STONE

Florida Bar No. 325953

RUSSELL A. BADDERS

Florida Bar No. 007455

STEVEN R. GRIFFIN

Florida Bar No. 0627569

Beggs & Lane, R.L.L.P.

P. O. Box 12950

Pensacola, FL 32591

(850) 432-2451

Attorneys for Gulf Power Company

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Increase in Rates)
By Gulf Power Company)
)

Docket No.: 160186-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail this 23rd day of November, 2016 to the following:

Office of Public Counsel
J. R. Kelly/Stephanie A. Morse
Public Counsel
c/o The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400
kelly.jr@leg.state.fl.us
morse.stephanie@leg.state.fl.us

Office of the General Counsel
Theresa Tan
Kelley Corbari
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850
ltan@psc.state.fl.us
kcorbari@psc.state.fl.us
blheriss@psc.state.fl.us
scuello@psc.state.fl.us
kyoung@psc.state.fl.us

Bradley Marshall
Alisa Coe
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
bmarshall@earthjustice.org
acoe@earthjustice.org



JEFFREY A. STONE
Florida Bar No. 325953
jas@beggslane.com
RUSSELL A. BADDERS
Florida Bar No. 007455
rab@beggslane.com
STEVEN R. GRIFFIN
Florida Bar No. 0627569
srg@beggslane.com
BEGGS & LANE
P. O. Box 12950
Pensacola FL 32591-2950
(850) 432-2451
Attorneys for Gulf Power