

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for rate increase by Gulf ) DOCKET NO. 160186-EI  
Power Company )  
\_\_\_\_\_)

**SOUTHERN ALLIANCE FOR CLEAN ENERGY’S AND  
LEAGUE OF WOMEN VOTERS OF FLORIDA’S RESPONSE TO  
GULF POWER’S OBJECTION TO USE OF DEMONSTRATIVE EXHIBITS**

The Southern Alliance for Clean Energy (“SACE”) and League of Women Voters of Florida (“LWVF”), by and through its undersigned counsel, and pursuant to Order No. PSC-16-0473-PCO-EI, Order Establishing Procedure, hereby respond to Gulf Power Company’s (“Gulf’s”) Objection to the Use of Demonstrative Exhibits (“Objection”), filed March 14, 2017.

Gulf correctly points out that pursuant to the order establishing procedure, if “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 at 8 (emphasis added). To be clear, the order uses the word “identify,” not “provide” as Gulf would lead the Commission to believe. It is undisputed that at the March 6, 2017 Prehearing Conference, counsel for SACE and LWVF identified materials that they intended to use for demonstrative exhibits, including “pre-existing” items in the record, including “either exhibits submitted as part of prefiled testimony or docket entries or discovery responses.” Exhibit A to Gulf’s Objection. Immediately following, Commissioner Patronis asked if anybody else had anything to say, either in response or as to new topics, by stating “Okay. Anybody else?” Exhibit A to Gulf’s Objection. Gulf made no objection. If Gulf felt that SACE’s and LWVF’s identification was insufficient, the time to object and say so was at the Prehearing Conference. SACE and LWVF then would have been provided the opportunity to respond to the objection and cure any deficiency. However, Gulf waived any objection by not raising it at the pre-hearing

conference. For Gulf not to raise an objection for more than a week after the prehearing conference, and to wait until just days before the hearing, is extremely prejudicial to SACE and LWVF. If granted, Gulf's objection would make it impossible for SACE and LWVF to cure while still being in compliance with the Order Establishing Procedure.

Gulf further argues that SACE and LWVF had 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." Gulf Objection at 3. Nothing in the prehearing order, however, requires parties to provide intended cross-exhibits before the hearing. Gulf can point to no language in the pre-hearing order or other commission documents containing such a requirement. Gulf will have every opportunity to raise such objections at the hearing. Although Gulf may prefer to be able to examine all cross-documents, and perhaps opposing counsel's actual planned cross-examination, no commission order contains such a requirement. Part of a counsel's duty is to make objections at the hearing as matters occur. To require a party to make objections at a hearing is not prejudicial; it is a basic duty of counsel. If a proper objection is made at a hearing, the party being objected to has the opportunity to try to cure the objection. If the party is unable to cure the objection, the objected to material stays out of the record. If the party is able to cure the objection, the objected material is allowed into the record. By objecting now instead of at the Prehearing Conference, Gulf is depriving SACE and LWVF of any chance to cure the objection by more specifically identifying the demonstrative exhibits SACE and LWVF intend to use.<sup>1</sup>

Gulf identifies several ways in which it claims it will be prejudiced. First, Gulf argues that the demonstratives SACE and LWVF intend to present "may not appropriately be

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<sup>1</sup> To the extent the Commission finds Gulf's objection to be valid, in order for SACE and LWVF not to be prejudiced, SACE and LWVF should be allowed to provide a more definitive list of demonstratives.

presentable to the Commission or otherwise helpful to the presentation of evidence at the final hearing.” Gulf’s Objection at 4. If Gulf finds that material is not relevant or helpful to the presentation of evidence, it can certainly make that objection at the hearing, as it would with *any* exhibit used in cross-examination. There is absolutely no prejudice here that is distinct from not knowing the exact cross-examination questions and exhibits an opposing party will use on cross. Having to raise objections at the hearing is *not* prejudice, it is matter of course.

Gulf then argues it is prejudiced because SACE and LWVF may “present exhibits *derived* from unidentified portions of this universe of information.” Gulf’s Objection at 5. Again, this is no different than an objection would be to any non-demonstrative exhibit. In fact, Gulf no longer even uses the word “demonstrative” to frame its objection in this sentence, instead arguing that it may be surprised at hearing with something from the record or clearly derived from the record. To the extent Gulf claims it is prejudiced because it is unfamiliar with the record in this case, that is not SACE’s and LWVF’s fault. If, at the hearing, SACE and LWVF were to introduce a cross-exhibit which Gulf does not believe is authentic or accurate, Gulf can certainly make such an objection at the hearing. It is incumbent upon attorneys to make such objections on behalf of their clients at evidentiary hearings. There is no prejudice in not giving Gulf a copy of all cross-exhibits and cross-examination questions beforehand. If Gulf is not prepared for such questions or exhibits, that does not mean Gulf is *prejudiced* by such questions or exhibits.

Gulf then continues to argue that SACE and LWVF are attempting a “trial by ambush,” and that if there are exhibits Gulf has not seen before, Gulf may need to “ascertain the accuracy and foundation of such exhibits in the midst of the final hearing.” Gulf’s Objection at 5-6. Once again, this objection would apply equally to any cross-exhibit or cross-question not given to Gulf

before the hearing. If SACE and LWVF proffer an exhibit for admission, it is incumbent on SACE and LWVF to lay the foundation and authenticity of any such exhibit. If Gulf feels SACE and LWVF have not laid sufficient foundation, Gulf is free to object at the hearing. To require Gulf to object to lack of foundation at the hearing is not prejudice. It is a standard objection available for use at all evidentiary hearings. Again, Gulf's desire to know exactly what exhibits and questions will be used on cross-examination is not reflected in the Order Establishing Procedure, in any Commission rule or order, and is certainly not in the Florida Rules of Evidence. Although Gulf repeatedly cites the purported prejudice from the potential surprise it may experience at the hearing, it is telling that Gulf can cite no rule, order, or case stating that parties have the right to know exactly what other parties will use in a case. Given that SACE and LWVF explicitly limited any demonstratives to those derived from the record or discovery, there should be no surprise to parties in the use of such demonstratives, as opposed to the potential universe of cross-examination exhibits which could be used from outside the record.

Gulf also argues that SACE and LWVF had time to identify materials used for demonstrative exhibits. Gulf Objection at 6. SACE and LWVF made such identification. As was made clear by the transcript from the prehearing conference, Gulf had time to make an objection at the prehearing conference to the identification. Gulf chose not to do so, and by not doing so, waived any objection as to the sufficiency of the identification. Under Gulf's theory that objections need not be timely raised, Gulf could come back at any time to challenge the sufficiency of the identification or, for that matter, any other issue. If the objection had been made at the Prehearing Conference, and the Prehearing Officer found that the objection was well-founded, SACE and LWVF could have attempted to cure the objection. Gulf, by waiting for over a week to state its objection, has deprived SACE and LWVF of that opportunity, to the

extreme prejudice of SACE and LWVF. It would be as if during the briefing period after the hearing next week, SACE and LWVF were to make an objection regarding questions asked during the prior week. Such objections would be untimely because there would be no way to cure such objections, even if such objections were otherwise valid. The same is true of Gulf's objection here.

Gulf cites no order, rule, or case that would allow its objection filed over a week after the Prehearing Conference, to be considered timely, and cites no provision of the Order Establishing Procedure allowing Gulf to do so. Part of the purpose of the Prehearing Conference is to resolve such disputes. To allow such an objection now, over a week after the Prehearing Conference, the purpose of which is to facilitate a just and orderly final hearing, would run counter to the spirit and intent of the Prehearing Conference.

Respectfully submitted this 14th day of March, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served on this 14th day of March, 2017, via electronic mail on:

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