IN THE SUPREME COURT OF FLORIDA

MONSANTO COMPANY, Appellant, v. MICHAEL McK. WILSON, et al., Appellees.	)	CASE NO. 73,689

ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

SUSAN F. CLARK
General Counsel

DAVID E. SMITH
Director, Division of Appeals

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

TABLE OF CONTENTS

TABLE OF CITATIONS

DESIGNATIONS AND ABBREVIATIONS

Appellee, Florida Public Service Commission, will be referred to in this brief as the "Commission".

Appellant, Monsanto Company, will be referred to in this brief as "Monsanto".

Appellee, Gulf Power Company, will be referred to in this brief as "Gulf".

The Southern Company, Gulf's parent corporation, will be referred to in this brief as "Southern".

Cites to the record on appeal are designated "R-___" except for the transcripts of hearing contained in Volumes III - V of the record. Cites to the transcript of the hearing are designated "Tr. ". Exhibits contained in Volume VI of the record are referenced "Exh. ___".

STATEMENT OF THE CASE AND FACTS

The Commission accepts Appellant's Statement of the Case and Facts as correct to the extent that they purport to describe the background of Gulf's Schedule R and the course of the proceedings in neutral terms. The Commission objects, however, to certain emotive characterizations of the facts as, for example, the statement at page 15 of Appellant's brief that the Commission "refused to require a refund." The Commission found, after careful consideration of all evidence, that Schedule R had not caused retail ratepayers to bear unreasonable fuel costs. Obviously, with that finding no refund was required. The Commission did not "refuse" to do anything.

Where appropriate, the Commission has incorporated additional relevant facts of record in the body of its hrief.

SUMMARY OF ARGUMENT

The Commission heard extensive testimony on Gulf's implementation of Schedule R and the operation of the Southern system. On the weight of that evidence, it properly concluded that Schedule R had not caused territorial ratepayers to bear unreasonable fuel costs. The evidence clearly establishes that under economic dispatch of the Southern system, the territorial ratepayers are assigned and billed for the most economical energy available at any given time.

Schedule R purchases necessarily had some effect on the pattern of economic dispatch of the Southern system, as would any large purchase of energy. The record showed that other factors, including the normal pattern of economic dispatch to serve the territorial load, could also produce such effects, specifically, bringing plant Daniel off minimal loading. It was thus unclear from the evidence before the Commission to what extent the apparent increase in plant Daniel usage was directly attributable to Schedule R or other factors. In the final analysis, there was no evidence in the record to show what the pattern of economic dispatch would have been had Schedule R not been implemented. Absent such a demonstration that territorial ratepayers would have had available and taken cheaper energy, the Commission had no basis to find that the energy they were assigned was unreasonably expensive. The Commission properly found that the cost of energy supplied, being the most economical available at any given time, was reasonable and that no fuel costs should be disallowed.

POINT I

THE COMMISSION'S FINDING THAT GULF'S SCHEDULE R DID NOT CAUSE RETAIL RATEPAYERS TO BEAR UNREASONABLE FUEL COSTS WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Standard of Review

This Court has stated many times that it will not reweigh or reevaluate the evidence presented to the Commission, nor overturn a Commission order, because it might have reached a different result, had it made the initial decision. The Court's role is to determine whether the Commission had before it competent substantial evidence to support its order. Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984); Citizens v. Public Service Commission, 464 So.2d 1194 (Fla. 1985). The Commission heard extensive testimony by Gulf's witnesses, Gilchrist and Howell, and Monsanto's witness, Pollock, on the issue of Schedule R's effect on the fuel costs borne by retail ratepayers. The Commission weighed that conflicting testimony and concluded that Schedule R did not cause retail ratepayers to bear unreasonable fuel costs. This Court should not disturb that finding.

Burden of Proof in PSC Proceedings

The plant Daniel fuel costs at issue in the proceedings below were initially reviewed by the Commission as part of its ongoing fuel adjustment proceedings. The burden of proof in the fuel adjustment proceedings is always on the utilities seeking to

demonstrate the reasonableness of the fuel costs they have incurred. Conversely, it is the Commission's regulatory duty to evaluate the evidence presented by the utilities in support of their fuel costs, and to allow them to pass on to retail ratepayers only those costs which were reasonably and prudently incurred. Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982).

When the effect of Schedule R on fuel costs borne by retail ratepayers was heard in the Commission's February 1988 fuel adjustment proceedings, the burden was on Gulf Power to demonstrate the reasonableness of those fuel costs in the light of any effects that Schedule R may have had. Put another way, Gulf's burden was to show by a preponderance of the evidence that Schedule R produced no effects which made the plant Daniel buy-out costs and other fuel costs passed through to retail ratepayers unreasonably high or imprudently incurred. The burden on Appellant, Monsanto, in those proceedings was to come forward with evidence showing that Gulf had failed to meet that burden. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

It must be noted that the issue as presented to the Commission did not directly challenge the wisdom of Gulf's decision to offer Schedule R to its Unit Power Sales (UPS) customers. Since the offering of Schedule R involved wholesale contracts regulated by the Federal Energy Regulatory Commission (FERC), the Commission had no jurisdiction to directly question the prudence of that

decision. Mississippi Power & Light Co. v. Mississippi ex rel. Moore, No. 86-1940, 108 S. Ct. 2428 (June 24, 1988).

The only issue before the Commission was whether the outcome of offering Schedule R resulted in the retail ratepayers bearing fuel costs which were unreasonable. Tr. 509. Monsanto contended that Schedule R caused an increase in plant Daniel fuel costs to be passed-through to retail ratepayers, that these costs were higher than might otherwise have been incurred and that the excess should be borne by Gulf shareholders. Gulf, on the other hand, contended that neither the amount nor the cost of plant Daniel energy billed to retail ratepayers were excessive and that they should, therefore, bear the fuel costs.

A. Schedule R Did Not Cause A Shift Of Unreasonable Fuel Costs To Retail Ratepayers.

The weight of the evidence presented to the Commission did not support Monsanto's contentions.

Gulf's **UPS** contracts, as originally negotiated, contained provisions for two minimum energy purchases. First, the contracting utilities were required to purchase a pro rata share of the **UPS** unit's output when the unit was minimally loaded. R-87-88. Minimal loading refers to the operating condition of a unit when it is being run basically to maintain it in a ready state to meet increased system demands if necessary. Tr. 450. The second energy obligation of the **UPS** customers was to use their best efforts to buy energy equal to 50 percent of the unit's

output factors. The UPS customers could satisfy these obligations by purchasing energy produced by plant Daniel, referred to as base energy, or by purchases of what was designated alternate or supplemental energy. R-88. Alternate energy is energy produced by other non-UPS units on the Southern system and it was made available when the UPS units, such as Daniel, did not produce enough energy to meet the UPS customers' demands or when the UPS unit was available but not being used for economic reasons. It was priced at a mark-up based on a split-the-savings difference between the cost of the UPS energy and the non-UPS energy. Supplemental energy was available when the UPS units were shut down on a forced or planned outage. It was available from non-UPS units and was priced at the greater of the normal energy rate of the UPS unit or the incremental energy cost of the non-UPS unit supplying the energy. R-88.

Schedule R allowed the UPS customers to purchase energy to satisfy their minimum 50 percent purchase obligation from any of the units on the Southern system. It could thus be used in addition to, or in lieu of, base or alternate energy purchases. R-88. Schedule R energy was not marked-up; it was priced based on the average incremental cost of generation on the Southern system. Tr. 347; 363.

The central issue on the effect of allowing Schedule R sales was whether those sales resulted in a change in the pattern of economic dispatch on the Southern system such that it caused Gulf's retail ratepayers to be billed for energy that contained

unreasonably high fuel costs. In its order on reconsideration, Order No. **20568,** the Commission stated its conclusion on the issue as follows:

> The issue to be considered in this docket is associated with the fact that the presence of the UPS contracts necessarily causes units to be brought on line in a different dispatch order than they would be if those sales were not made. Practically speaking, this translates into the fact that those contracts cause Southern's more expensive units (Daniel and Shearer) to be brought off minimal loading more of the time than they otherwise would be to serve Gulf's territorial load alone. After exhaustively looking at the record developed in this proceeding, we are still of the opinion that Southern's economic dispatch does result in Gulf's ratepayers getting the benefit of the cheapest power being dispatched at any time.

R-175.

The Commission's finding is supported by the record developed on the operation of Southern's billing system and the operation of its economic dispatch.

The Billing System

The amount of energy allocated to Gulf's retail customers is calculated by a billing program which analyzes the various types of retail and wholesale sales on the Southern system and assigns the charges accordingly. That is, after the sales have taken place, Southern reviews its logs of schedules placed by companies, line readings, and other calculations and reconstructs the billing to determine who bought the power. Tr. **368.** The billing program

is such that it assigns Gulf's retail customers the energy that is left over after all other types of transactions have been accounted for. Tr. 368. The billing program is embodied in the formula: "Retained energy = Net generation - All energy sold." Exh. 15, Item 52(b). Fuel costs passed on to the retail ratepayers are calculated based on the energy assigned by this formula.

Economic Dispatch

The Southern system is a coordinated generating system which brings units on line to serve its customers in order of the increasing cost of generation from those units. Tr. 368. The units are dispatched on an incremental generating cost basis with the lowest incremental cost going first to serve territorial customers and then to meet other system needs. Tr. 531-532; Exh. 11, Sec. 2, p. 22. This is referred to as "economic dispatch". Because the Southern System units operate in economic dispatch, the energy that is assigned the retail customers in any given hour is the most economical available to them at that time. Tr. 368; 451.

When plant Daniel comes off minimal loading, thereby relieving UPS customers of their minimum purchase obligation, it is utilized in economic dispatch and the energy available from it is the most economical available to all customers then being served, whether they are off-system, wholesale, or territorial customers. This was established by the testimony of Gulf witness Gilchrist and was

conceded to by Monsanto's own witness Pollock. Tr. 451; 526. The retail customers are thus billed for energy which is the most economical that they could obtain under the operation of the system in economic dispatch at any given time. Tr. 451. As Mr. Pollock conceded, the energy from plant Daniel did not become less economical by virtue of it being the left-over energy assigned to the territorial ratepayers under the billing program. Tr. 528.

The record did not conclusively establish how much of the increased use of plant Daniel power to serve the retail load was directly attributable to Schedule R. The evidence showed that plant Daniel might come off minimal loading and be committed in economic dispatch to serve the system demand for a variety of reasons. Gulf's witness Gilchrist testified that one reason was that Daniel could be brought on line for normal economic dispatch of the system. Tr. 451. Under those circumstances, Daniel would be dispatched as the most economical unit available to meet the incremental demand on the system. Mr. Gilchrist testified that such a demand for Daniel energy in any particular hour might be created by the territorial customers and that under such circumstances, the amount of energy retained under the billing program for territorial customers would not necessarily be a function of what is sold to other customers. Tr. 370.

Monsanto's witness Pollock conceded that plant Daniel or any unit in economic dispatch, might come off minimal loading for a variety of reasons other than the alleged impact of Schedule R. Tr. 541-542. Mr. Pollock further agreed that it was conceivable

that even the UPS customers would continue to schedule energy out of plant Daniel when it was off minimum operating levels because it might be the most economical energy available. Tr. 541.

The assumptions of Monsanto's witness on how much Daniel energy was used before Schedule R were likewise questionable. Mr. Pollock stated that in making his calculation comparing the amount of energy that the territorial customers would have retained out of plant Daniel absent Schedule R, he had assumed that the territorial customers would take energy out of plant Daniel at a percentage equal to the percentage of capacity retained in plant Daniel. Tr. 521. However, Mr. Pollock acknowledged that in 1983, before the implementation of Schedule R in 1985, there were times when the energy retained by territorial customers did exceed the capacity retained. Tr. 524. Gulf's witness, Mr. Howell, also criticized Mr. Pollock's theory as incorrectly assuming that UPS customers would be allocated energy out of Daniel in proportion to their capacity entitlement. Mr. Howell stated that this was incorrect and that there was no allocation of energy in direct relationship to capacity purchased and that none was ever intended. Tr. 623.

The Commission did not casually reach its conclusion in Order No. 19042 that Monsanto had failed to support its claim that Schedule R had caused retail ratepayers to bear inappropriate fuel costs. Based on the evidence before it, the Commission could not agree that the territorial ratepayers were being charged unreasonably high fuel costs because of Schedule R's effect on

economic dispatch. The Commission had no evidence before it showing what the pattern of economic dispatch would have been had the UPS customers not been offered the option of Schedule R energy from 1985-1987. There was thus no evidence showing what energy the territorial ratepayers would have been allocated under the operation of economic dispatch without Schedule R. The Commission, therefore, could not make a finding that Schedule R resulted in the retail customers paying unreasonable fuel costs for energy used to serve Gulf's territorial load. The Commission could and did find that under the Southern system's economic dispatch and the billing program it uses, the retail customers paid the fuel costs associated with the power they were assigned and that that power was the most economical available to them at any given time.

Based on its conclusions, the Commission did not find it necessary to engage in speculation about what Gulf's management might have done differently to respond to the pressures from UPS customers that led to Schedule R's implementation. However, it is worth noting in the face of Appellant's arguments in its brief that there was ample evidence presented by Gulf's witness Gilchrist which indicates that the alternatives suggested by Appellant of lower capacity charges, elimination of the mark-up on alternate energy would have been ineffective or would have resulted in only a short term pass-through of costs to stockholders before the company might have been forced to ask for rate relief. Tr. 399-409. The Commission previously found in

Order No. 11498 that, if properly managed, the UPS contracts could have a salutary effect for Gulf's retail ratepayers. It had no reason to retreat from that finding or conclude that Gulf's management decisions were imprudent in this case.

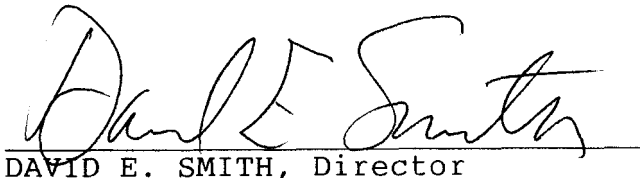
Finally, it should be observed that the Commission did recognize that there might be an issue as to whether Gulf, by offering Schedule R, had foregone revenues from the mark-up on supplemental and alternate energy sales under the UPS agreement. The Commission recognized in its order on reconsideration, Order No. 20568, however, that this issue was one which should be properly considered in Gulf's then pending rate case. The Commission had previously ruled in Order No. 14030 that the mark-up on supplemental and alternate energy should be counted in the utility's jurisdictional revenues and accrue to the benefit of the retail ratepayers. That issue, however, is separate and distinct from any issue of the alleged negative impacts of Schedule R which the Commission has addressed in this fuel adjustment proceeding.

CONCLUSION

This Court should not reweigh the evidence presented to the Commission. The FPSC's finding that Schedule R did not cause Gulf's retail ratepayers to bear unreasonable fuel costs was based on competent substantial evidence and should be affirmed.

Respectfully submitted,

SUSAN F. CLARK
General Counsel



DAVID E. SMITH, Director
Division of Appeals
Florida Bar No. 309011

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

2634G

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission, has been furnished by U.S. Mail this 13th day of June, 1989 to the following:

G. Edison Holland, Esquire
Jeffrey A. Stone, Esquire
Beggs & Lane
Post Office Box 12950
Pensacola, FL 32576

Robert S. Goldman, Esquire
Messer, Vickers, Caparello,
French & Madsen
Post Office Drawer 1876
Tallahassee, FL 32302-1876

Robert R. Morrow, Esquire
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404

Gail P. Fels, Esquire
Assistant County Attorney
Metro-Dade Center
111 N.W. First Street
Suite 2810
Miami, FL 33128-1993

Matthew M. Childs, Esquire
Steel, Hector & Davis
310 West College Avenue
Tallahassee, FL 32301-1406

Jack Shreve, Public Counsel
Stephen C. Reilly
Office of the Public Counsel
c/o Florida House of
Representatives
The Capitol
Tallahassee, FL 32399

Lee L. Willis, Esquire
James D. Beasley, Esquire
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302

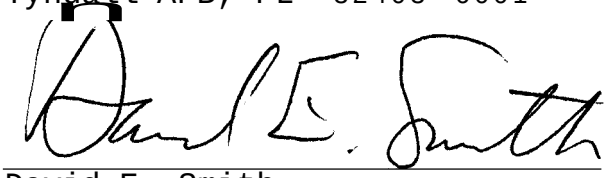
James A. McGee, Esquire
Florida Power Corporation
Post Office Box 14042
St. Petersburg, FL 33733

H.G. Wells
Coalition of Local Governments
Post Office Box 4748
Clearwater, FL 33518

Zori G. Ferkin, Esquire
Judith A. Center, Esquire
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Suite 100
Washington, D.C. 20004-2404

Lee G. Schmudde
Reedy Creek Utilities, Inc.
Post Office Box 40
Lake Buena Vista, FL 32830

Major Gary A. Enders, USAF
Hurbert Field
Pensacola Naval Air Station
& Naval Coastal Systems Center
HQ USA/ULT, STOP 21
Tyndall AFB, FL 32403-6001



David E. Smith