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FILE COPY

BEGGS & LANE

ATTORNEYS AND COUNSELLORS AT LAW

SEVENTH FLOOR BLOUNT BUILDING

3 WEST GARDEN STREET

PENSACOLA, FLORIDA 32501

POST OFFICE BOX 12950
PENSACOLA, FLORIDA 32576-2950
TELEPHONE (904) 432-2451
TELECOPIER (904) 438-6139

ROBERT P. GAINES
WILLIAM GUY DAVIS, JR.
W. SPENCER MITCHEM
JAMES M. WEBER
ROBERT L. CRONGEYER
JOHN F. WINDHAM
J. NIXON DANIEL, III
G. EDISON HOLLAND, JR.
RALPH A. PETERSON
RONALD L. NELSON
GARY B. LEUCHTMAN
THOMAS R. JENKINS
JOHN P. DANIEL
JEFFREY A. STONE
JAMES S. CAMPBELL
LARRY A. MATTHEWS
TERESA E. LILES
T. RHETT SMITH
CRYSTAL COLLINS

October 18, 1990

E. DIXIE BEGGS
Retired
BERT H. LANE
1917-1981

Mr. Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0870

Dear Mr. Tribble:

~~Re: Docket Number 891345-EI~~

Enclosed are an original and fifteen copies of: Gulf Power Company's Motion for Reconsideration of Decision Requiring Partial Refund of Interim Rates; Motion to Sever as to Issue 111, or, in the Alternative, Request for Expedited Consideration of Motion for Reconsideration; Motion to Stay as to Issue 38, and Request for Oral Argument or, in the Alternative, to Participate at Agenda Conference on Motion for Reconsideration, to be filed in the above docket.

ACK _____ Please acknowledge receipt and filing of the enclosed
AFA 3 material by stamping the duplicate copy of this letter and
APP _____ returning same to the attention of the undersigned.

CAF _____ Thank you for your assistance in this matter.

CMU _____

CTR _____

FAG _____

LEG 1 w/m

LIN 6

OPC GEHjr/tel

RCH cc: Jack L. Haskins

SEC 1

WAS _____

OTH _____

Yours very truly,

G. Edison Holland, Jr.
For the Firm

DOCUMENT TO STAY #538
DOCUMENT TO SEVER
REQUEST TO BE HEARD
09342 OCT 18 1990
09343 OCT 18 1990
PSC RECORDS/REPORTING

RECEIVED & FILED

Motion to Sever III
DOCUMENT NUMBER-DATE

09341 OCT 18 1990

PSC-RECORDS/REPORTING

Motion for Rec
DOCUMENT NUMBER-DATE

09340 OCT 18 1990

PSC-RECORDS/REPORTING

FPSC-BUREAU OF RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Gulf Power)
Company for an increase in its) Docket No.: 891345-EI
rates and charges) Date filed: 10/18/90

MOTION FOR RECONSIDERATION OF DECISION
REQUIRING PARTIAL REFUND OF INTERIM RATES

Gulf Power Company ("Gulf Power", "Gulf", or "the Company"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby petitions the Florida Public Service Commission ("FPSC", or "the Commission") to reconsider that portion of its decision announced in Order No. 23573, issued October 3, 1990, ("the Order", or "Final Order") directing the Company to refund a portion of the interim increase in rates reflected in billings rendered for meter readings taken from March 10, 1990 through September 12, 1990, pursuant to the authority granted in Order No. 22681, issued on March 13, 1990 ("the Interim Order"). In support of the relief requested by this motion, the Company states:

1. At pages 44-45 of the Order, the Commission addresses the issue of a refund of a portion of the interim increase in rates collected during the pendency of the proceedings in this docket. It is only this aspect of the Order for which the Company seeks reconsideration by the Commission. By separate motion filed contemporaneously herewith, the Company seeks to have this aspect of the Order severed for purposes of reconsideration from the remaining aspects of the Order which would then be rendered final

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for purposes of appeal. Gulf's separate motion, in the alternative, seeks expedited treatment of this request for reconsideration so that the Company's rights to appellate review of the other aspects of the Order, which are more prospective in application and effect than the interim rate refund question, will not be rendered effectively moot by the passage of time.

2. The purpose of interim rate relief during the pendency of the full case on permanent rates is to reduce or remove the effects of regulatory lag on a utility's earnings. Regulatory lag is the inherent result of the delay between the time a utility identifies a revenue deficiency that must be addressed with rate relief and the conclusion of a rate case with an order approving new permanent rates. Without interim rates during this period, a utility suffering from inadequate earnings at the time it files for rate relief would be forced to continue to suffer the ill effects of inadequate rates for many months until completion of the full case. Interim rates are collected "subject to refund" pending completion of the full case and "[t]hus, the company can be allowed to enjoy the rate of return authorized by the Florida Public Service Commission while full rate hearings progress without endangering the consumers of the utility's services." Southern Bell v. Bevis 279 So.2d 285, 287 (Fla. 1973).

3. Gulf's most recent surveillance report filed with this Commission, dated October 15, 1990, provides the Commission with calculations of the retail jurisdictional return from actual data for the twelve month period ending August, 1990.¹ The report shows that the Company has achieved an actual rate of return (ROR) for the period of 7.09% and a return on common equity (ROE) of 9.10% based on that portion of the interim rates the Company would be allowed to retain under the dictates of the Order. As shown in Attachment A to this motion, the rate of return and return on equity during the twelve months ended August, 1990 would have been only 7.17% and 9.36% respectively even if the Company were allowed to retain the full amount of the interim rates previously awarded. These figures are significantly below the ROR and ROE figures found and determined by the Commission to be fair and reasonable in the Order, 8.10% and 12.55% respectively.² It is clearly inconsistent with the policy and intent behind the concept of interim rates to direct a utility already suffering with inadequate earnings to suffer further deterioration of its financial condition by having to refund a portion of its interim rate relief when that portion which is ordered refunded does not cause the utility's earnings to exceed a reasonable return.

¹This period includes all but the last 12 days during which interim rates were in effect, which of course fall in September, 1990. The earnings shown in the surveillance report reflect the effects of the interim rate refund that was decided by the Commission on August 14, 1990.

²Although the surveillance report still reflects certain investments and expenses which were not allowed in the Final Order, including 63 MW of Plant Scherer, the revenue effect of these adjustments would not be sufficient to cause the Company to earn at, let alone exceed, the approved rate of return.

4. Unlike the situation addressed by the Florida Supreme Court in Maule Industries v. Mayo 342 So.2d 63 (Fla. 1977), this is not a case where the Commission made an error in the initial grant of interim rates which must be addressed through a refund. In the present case, unlike Maule, the interim award was requested and made under the Interim Rate statute, section 366.071 of the Florida Statutes. The refund ordered herein is not for the purpose of correcting an error made by the Commission in making the earlier interim award (no such error has ever been alleged in this case); rather, the purported purpose of the refund is to comply with the Interim Rate statute. In this sense, a fundamental misapplication of the language of section 366.071(4) has occurred.

5. In the Interim Order, the Commission granted a \$5,751,000 interim increase pursuant to Section 366.071 of the Florida Statutes, the "Interim Rate" statute. The Commission's decision, as announced in the Final Order, requires Gulf to refund \$2,052,000 of the interim rate increase. The stated basis in the Order for this refund is ". . . to reduce the utility's rate of return during the pendency of the rate case proceedings to the level of the newly authorized rate of return which is found fair and reasonable on a prospective basis." Order No. 23573 at p. 45. The Order states that such action is necessary in order to comply with the Interim Rate statute, Section 366.071, Florida Statutes (1989). The amount of the refund was determined by inserting the newly approved rate of return into the calculation initially used to determine the amount of the interim increase, and comparing the

two figures. This calculation utilized an historical test period for interim purposes of the twelve months ending September, 1989.

6. The Commission's decision to require a partial refund of interim rates results from a misapplication of the Interim Rate statute which states, in pertinent part, that "[a]ny refund ordered by the commission shall be calculated to reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return of return which is found fair and reasonable on a prospective basis . . ." § 366.071(4), Fla. Stat. (1989) (emphasis added). In Gulf's case, the interim rates were in effect during a period that lies wholly within the test period used to calculate permanent rates, calendar year 1990. Therefore, the use of the historical test period of twelve months ending September 30, 1989 as the basis for calculating the amount of the refund is clearly contrary to the express dictates of the Interim Rate statute.

7. In this case, there are two legally defensible options available to the Commission for calculating the amount of any refund of interim rates in accordance with Section 366.071(4). The first would be to examine actual data from the period interim rates were in effect (in this case billings rendered on meter readings taken on or after March 10, 1990 through and including September 12, 1990). The Commission has historically rejected this method

for sound policy reasons, including the fact that the data is not readily available to the Commission or its staff and that the amount of data generated during an electric utility rate case is already staggering to the utility as well as the Commission and its staff. As noted by FPSC Deputy Executive Director William Talbott, it would not be cost effective to accumulate and evaluate the data required to make this "third calculation." See Agenda Transcript at page 395. The second legally defensible option would be to use the test period used by the Commission to set permanent rates. This option is available to the Commission in this case because the period during which interim rates were effective lies wholly within the test period on which permanent rates have been determined. Again, Mr. Talbott set forth very strong reasons why the Commission, as a matter of policy, should always use this particular option when it is legally available.³ ". . . [T]he test period that is used in the full case [is the one] that gets all the scrutiny, and it's the one with cross examination, and depositions and so forth and so on." Id. Use of the test period on which permanent rates were set as a proxy for the period interim

³This option may not be legally available if the period during which the interim rates were in effect was outside of the test period for the permanent rates. For example, if a rate case were pending during 1990, and interim rates were in effect from March through August, 1990 but the test period on which the permanent rates were set was projected data for the twelve month period of September 1990 through August 1991, then use of the permanent case test period for determining whether a refund of interim rates is appropriate would not be consistent with the dictates of Section 366.071(4). However, this hypothetical differs markedly from Gulf's case which is presently before the Commission because, as noted in the text of this motion, the period during which Gulf's interim rates were in effect lies wholly within the test period used to calculate permanent rates.

rates were in effect is a cost effective mechanism for the Commission to use in determining whether a refund of interim rates is required in order to ". . . reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return of return which is found fair and reasonable on a prospective basis . . .". If this second option had been used in this case, there would be no refund of any of the interim rate increase.

8. In the Commission's own analysis, the revenue deficiency during the 1990 test period would have been \$14,131,000.⁴ This deficiency is nearly two and one half times the annual interim increase of \$5,751,000 which was only in effect during a portion of 1990. The permanent increase approved by this Commission is the result of this Commission's determination that existing rates (without interim) were inadequate to meet Gulf Power's revenue requirements as determined by the Commission. Since the permanent increase was greater than the amount of interim relief previously granted, the Commission's decision as to the amount of the permanent rate increase is the conclusive determination that the revenue deficiency during calendar year 1990 was greater than the amount of interim relief granted. In other

⁴This figure is based on the Commission's adjustments to rate base and operating expenses and a required rate of return of 8.10% which incorporates a return on equity of 12.55%. Even after applying the fifty basis point penalty to equity, the annual revenue deficiency identified by the Commission for calendar year 1990 was \$11,838,000. This amount more than doubles the annual interim increase of \$5,751,000 which was only in effect during a portion of 1990.

words, even if the interim rates had been in effect throughout 1990, the revenues collected would not have been sufficient to have allowed the Company to achieve the "fair rate of return" determined by the Commission. Therefore, any refund of the interim increase which on its own would not have allowed the Company to achieve a fair rate of return, would compel the Company to earn an inadequate and confiscatory return during 1990. Such a result is clearly contrary to the law and should be corrected by the Commission on reconsideration.

9. The Commission did not choose either of the legally defensible options discussed above. Instead, the Commission chose a third option of adjusting the interim test period to reflect the newly approved rate of return. In Gulf's case, this "option" is contrary to Section 366.071(4) since the interim test period was an historical period totally different from the period interim rates were in effect. There is no case law from the Florida Supreme Court interpreting the statutory language of Section 366.071(4) in a fashion that would allow the Commission to act as it has done in this case. Given the ordinary meaning of the words in the statute, the only proper interpretation is that this third "option" cannot legally be applied in this case and to do so was error, and was contrary to the clear weight of Commission precedent as to

the methods actually applied by the Commission to ascertain the appropriateness of such a refund. See, e.g. Order No. 15451, Docket Nos. 850050-E1 and 850246-E1 (December 13, 1985, TECO); Order No. 12663, Docket No. 830012-EU (November 7, 1983, TECO); Order No. 11628, Docket No. 820100-EU (February 17, 1983, FPC); Order No. 11437, Docket No. 820097-EU (December 22, 1982, FP&L); Order No. 6681, Docket No. 74597-EU (May 21, 1975, TECO) (aff'd, Citizens v. Mayo, 335 So.2d 809 (Fla. 1976)); Order No. 12221, Docket No. 820294-TP (July 13, 1983, Southern Bell); Order No. 7018, Docket No. 74805-TP (CR)(December 4, 1975, Southern Bell). See also Agenda Tr. at 391-393.

WHEREFORE, Gulf Power Company, having demonstrated that the Florida Public Service Commission's decision to require a partial refund of the interim rates previously awarded was founded in a misapplication of the law set forth in Section 366.071(4) of the Florida Statutes, and having further demonstrated sound policy reasons why the calculation of any refund due under the Interim Rate statute should have been based on the test period used in setting permanent rates, respectfully requests that the Commission reconsider its decision requiring a partial refund of interim rates and enter its order confirming the interim rate award

in its entirety and removing from said interim rate increase the requirement that it be held subject to refund by the Company upon a corporate undertaking.

Respectfully submitted this 18th day of October, 1990.



G. EDISON HOLLAND, JR.
Florida Bar No. 261599
JEFFREY A. STONE
Florida Bar No. 325953
Beggs & Lane
P. O. Box 12950
Pensacola, Florida 32576
904/432-2451
Attorneys for Gulf Power Co.

Attachment A

GULF POWER COMPANY
 CALCULATION OF AUGUST 1990 ROR & ROE(1)
 BASED ON RETAIL 13 MONTH AVERAGE
 (\$000)

		With Interim Less Refund (per filing)	With Total Interim	Without Interim
NOI	Per filing Sch. 1	\$ 63,880,109	\$ 63,880,109	\$ 63,880,109
	Add back refund (\$1,082,068 x .6237)		674,886	
	Subtract Interim in filing (\$1,950,633 x .6237)			<u>(1,216,610)</u>
NOI		\$ 63,880,109	\$ 64,554,995	\$ 62,663,499
Rate Base		\$900,831,747	\$900,831,747	\$900,831,747
Jurisdictional Rate of Return		7.09%	7.17%	6.96%
Less Retail Weighted Fixed Costs (Schedule 5)		<u>(4.33)</u>	<u>(4.33)</u>	<u>(4.33)</u>
NET		2.76%	2.84%	2.63%
Divided by Common Equity Ratio (Schedule 5)		30.34%	30.34%	30.34%
Jurisdictional Return on Common Equity		9.10%	9.36%	8.67%

(1) In this document, the term "filing" refers to the Company's surveillance report filed within the Commission dated 10/15/90. References to schedules are to schedules within that surveillance report.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Gulf Power)
Company for an increase in its)
rates and charges)

Docket No.: 891345-EI
Date filed: 10/18/90

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 18th day of October, 1990 by hand delivery or U.S. Mail to the following:

Jack Shreve, Esquire (by hand)
Public Counsel
Florida House of Representatives
The Capitol
Tallahassee, FL 32399-1300

John W. McWhirter, Jr., Esquire
Lawson, McWhirter, Grandoff &
Reeves
P.O. Box 3350
Tampa, FL 33601

Robert Vandiver, Esquire
Michael Palecki, Esquire
Marsha Rule, Esquire
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Joseph A. McGlothlin, Esquire
Lawson, McWhirter, Grandoff &
Reeves
522 E. Park Avenue, Suite 200
Tallahassee, FL 32301

Major Gary A. Enders
HQ USAF/ULT
Stop 21
Tyndall AFB, FL 32403-6001

Richard Chais
ORI, Inc.
1375 Piccard Drive
Rockville, MD 20850



G. EDISON HOLLAND, JR.
Florida Bar No. 261599
JEFFREY A. STONE
Florida Bar No. 325953
TERESA E. LILES
Florida Bar No. 510998
Beggs & Lane
P.O. Box 12950
Pensacola, FL 32576
(904) 432-2451
Attorneys for Gulf Power Company