BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor.	DOCKET NO. 890001-EI ORDER NO. 20568 ISSUED: 1-9-89

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER
JOHN T. HERNDON
MICHAEL McK. WILSON

ORDER GRANTING REQUEST FOR OFFICIAL NOTICE
AND
DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

The primary issue raised by the Industrial Intervenors at the February, 1988 fuel adjustment hearing was one which had been deferred from the August, 1987 fuel hearings. That issue was: Does Gulf Power Company's (Gulf) Schedule R sales to Unit Power Sales (UPS) customers cause retail ratepayers to bear inappropriate fuel charges? At the conclusion of the February fuel hearings this Commission decided that no adjustment should be made to the fuel charges passed on to Gulf's general body of ratepayers because of the offering of Schedule R energy to Gulf's UPS customers. On April 8, 1988, the Industrial Intervenors filed a Motion for Reconsideration of this decision. Gulf filed its response to the motion on April 15, 1988. Oral argument was held on the motion on August 1, 1988. On September 8, 1988, the Industrial Intervenors filed a request for judicial notice of Federal Energy Regulatory Commission (FERC) Opinion No. 300, issued on April 1, 1988, in Dockets Nos. EL86-53-001 and EL86-57-001. Gulf filed its response to this request for judicial notice on September 19, 1988, arguing that this request should be denied.

JUDICIAL NOTICE

There are several statutes which control the judicial notice of materials in evidentiary proceedings conducted pursuant to the Florida Administrative Procedures Act, Chapter 120, Florida Statutes. Section 120.61, Florida Statutes, requires that when official recognition is requested, the parties must be notified and given an opportunity to examine and contest the material. Intervenors have complied with Section 120.61's requirements by their September 8, 1988 filing requesting judicial notice of FERC's April 1 decision.

Materials which may be judicially noticed are defined in Sections 201 through 207 of the Florida Evidence Code, Chapter 90, Florida Statutes. FERC decisions are official actions of a federal executive agency and therefore are covered under the provisions of Section 90.202(5), Florida Statutes. Materials listed in Section 90.202 are admissible at the discretion of the court. Once a party has requested that materials listed in Section 202 be officially recognized, however, the court must recognize those materials if each adverse party has had timely

written notice of the request, proof of which is filed with the court, and the requesting party furnishes enough information to the court to enable it to make a ruling on whether the materials are properly classified as information subject to judicial notice. Section 90.203, Florida Statutes.

The general standard applied to materials listed in Section 202 to determine whether they are properly judicially noticed is twofold: relevancy and exemption from a claim of privilege. Relevant evidence is evidence tending to prove or disprove a fact. Section 90.401, Florida Statutes. All relevant evidence is admissible unless its use is restricted by law or its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the trier of fact, or being needlessly redundant. Sections 90.402-3, Florida Statutes.

Essentially, Gulf has argued that Opinion 300 and the associated May 12, 1987 Administrative Law Judge's (ALJ) decision, Gulf States Utilities Company v. Southern Company Services, Inc., 39 FERC ¶ 63,026 (1987), should not be officially recognized because it is irrelevant. Gulf's position is that this material does not address the issue currently before this Commission, i.e., whether a motion for reconsideration should be granted. Further, Gulf states that the FERC's decision involved interpretation of Section 2.2.1 of the UPS agreements, not Section 3.5, the section discussed in this docket. Finally, Gulf argues that this material should not be officially recognized because it was submitted in an untimely fashion, i.e., seven months after the February hearing in this docket, sixteen months after the ALJ's decision and five months after the decision by FERC.

We find these arguments to be meritless. FERC's interpretation of the Gulf States' UPS contracts, contracts which are directly involved in this proceeding and the subject of the Intervenor's motion for reconsideration, are relevant. Although it is true that the ALJ and FERC decisions discuss Section 2.2.1 of the UPS agreement, these decisions also discuss at length the changed industry and regulatory circumstances which gave rise to Gulf States' assertion that its UPS agreements with the Southern company should no longer be enforceable. These are the same circumstances which Gulf contends justify its offer of Schedule R to its UPS customers. This Commission should have the benefit of FERC's thinking on these circumstances in order to make an informed decision on the Schedule R issue raised in this proceeding. As to the timeliness issue, Gulf has been given an adequate opportunity to make a response to Intervenor's request prior to a ruling on the request. Neither the law, nor fairness require more. For these reasons, we find that Opinion 300 of FERC issued on April 1, 1988, in Dockets Nos. EL86-53-001 and EL86-57-001 and the associated ALJ order be and hereby is judicially noticed in this docket.

RECONSIDERATION

Intervenors have argued that the Commission's rationale for denying recovery of the contested fuel expenditures is premised on two faulty interpretations of the evidence

presented in the February hearings. These are stated in Order No. 19042 as: that "economic dispatch" cures the problem which the Intervenors have raised and that Schedule R sales made additional fuel savings for all of Gulf's customers possible during the time period in dispute.

This Commission has traditionally examined and accounted for the impacts of UPS agreements when setting rates for Gulf's general body of ratepayers. In Gulf's last rate case, this Commission retained for Gulf's ratepayers all of the profits associated with the sale of alternate and supplemental energy under the UPS agreements. This amounted to an increase in Gulf's revenues of $161,000. Order No. 14030 at 19-20.

Thus in Gulf's last rate case, the Commission looked closely at the terms of the UPS contracts and made regulatory adjustments based on them. More importantly, the Commission's action retained 100% of the "profits" of the alternate and supplemental sales for the ratepayer. Both supplemental and alternate energy are "marked up", i.e., they are not priced solely on an incremental, break-even level, as is Schedule R energy, but are priced on a "split-the-savings" formula.

By offering Schedule R energy to UPS customers, the amount of revenues associated with alternate energy and supplemental energy imputed to Gulf's ratepayers has necessarily decreased. The formula applied to the computation of fuel costs (Retained energy = Net generation - UPS energy sold) does not include the markup for alternate and supplemental energy, but only the incremental fuel costs. Therefore, the decrease in alternate and supplemental energy sales does not directly affect the amount of fuel cost passed on to the ratepayer through the fuel adjustment clause.

We recognize that this decrease in revenues associated with decreased supplemental and alternate energy sales for the period in question lowers the total revenues used to compute Gulf's earnings. For this reason, there is a foregone revenue issue associated with the offering of Schedule R sales which we will address in Gulf's pending rate case docket. Since the markup was never passed through the fuel adjustment clause, however, there is no issue associated with decreased supplemental and alternate sales in this docket.

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.

The Industrial Intervenors have pointed to no new evidence or misinterpretation of the evidence produced at trial that

counters the rationale that economic dispatch does credit the ratepayer with the appropriate amount of fuel costs even though those costs may have been higher in the questioned period. The second misinterpretation of the evidence complained of by the Industrial Intervenors concerned the finding that the offering of Schedule R actually lowered fuel costs due to increased MW sales. Upon a more detailed review of the record, we are now convinced that the evidence presented at the hearing is simply incapable of supporting that factual finding. However, we do not believe that the failure of the record to support that factual finding nullifies our decision in this case.

Therefore, for the reasons stated above, it is

ORDERED by the Florida Public Service Commission that judicial notice in this docket is hereby taken of FERC Opinion No. 300, issued on April 1, 1988, in Dockets Nos. EL86-53-001 and EL86-57-001 as well as of the associated Administrative Law Judge's decision discussed in the body of this order. It is further

ORDERED that the motion of the Industrial Intervenors for reconsideration of Order No. 19042, issued on March 25, 1988, is hereby denied as discussed in the body of this order.

By ORDER of the Florida Public Service Commission, this 9th day of JANUARY, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

SBr

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial

review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.