

2



JACK SHREVE  
PUBLIC COUNSEL

**STATE OF FLORIDA**  
**OFFICE OF THE PUBLIC COUNSEL**

c/o The Florida Legislature  
111 West Madison Street  
Room 801  
Tallahassee, Florida 32399-1400  
904-488-9330

**ORIGINAL  
FILE COPY**

October 25, 1990

Mr. Steve Tribble, Director  
Records and Reporting  
Florida Public Service Commission  
101 E. Gaines Street  
Tallahassee, FL 32399-0863

RE: Docket No. 891345-EI

Dear Mr. Tribble:

Enclosed please find the original and twelve copies each of Public Counsel's Response to Motion for Reconsideration and Public Counsel's Response to Motion for Stay in the above-referenced docket.

Please indicate receipt of the documents by date-stamping the attached copy of this letter and returning it to this office. Thank you for your consideration of this matter.

Sincerely,

  
John Roger Howe  
Assistant Public Counsel

- ACK
- AFA
- APP
- CAF
- CMU
- CTR  JRH/ch
- EAG Enclosures
- LEG
- LIN
- OPC
- RCH
- SEC
- WAS
- OT

<i>Res Tomation for Stay</i>	<i>Res Tomation for Rec</i>
DOCUMENT NUMBER-DATE	DOCUMENT NUMBER-DATE
09631 OCT 25 1990	09630 OCT 25 1990
FPSC-RECORDS/REPORTING	FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Gulf Power Company )  
for an Increase in its Rates and ) Docket No. 891345-EI  
Charges. ) Filed: October 25, 1990  
\_\_\_\_\_ )

**PUBLIC COUNSEL'S RESPONSE TO  
MOTION FOR RECONSIDERATION**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.060(1)(b), Florida Administrative Code, respond in opposition to the motion for reconsideration filed by Gulf Power Company, which should be denied for the following reasons:

1. The Commission originally set Gulf Power's interim rates in Order No. 22681 pursuant to Section 366.071, Florida Statutes (1989). Consistent with the statutory scheme, interim rates were set initially based on the last allowed return on equity (which, for purposes of this case, was the 13% Gulf employed in its filing). The interim award was to be evaluated at the end of the case using the return established on a going-forward basis. Under this procedure, Gulf should be placed in the same position for interim purposes as it would have been had the Commission known in advance, and used, the 8.10% overall return set at the end of the case. Section 366.071(4) reads, in pertinent part:

Any 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 which is found fair and reasonable on a prospective basis ....

Gulf has actually been treated preferentially because the return on equity found to be reasonable on a going-forward basis in Order No. 23573 was 12.05%, not the 12.55% used to derive the overall cost of capital used to test the interim award.

2. If a weighted average cost of capital of 8.10% had been used to set interim rates initially, Gulf would have been awarded \$3,699,000 (on an annual basis). In that event, no refunds would have been ordered at the conclusion of the rate case. Gulf is placed in precisely this posture by Order No. 23573. The utility has been ordered to return the difference between the \$5,751,000 granted subject to refund in Order No. 22681 and the \$3,699,000 that would have been awarded on an interim basis if the final return had been known in advance.

3. The statute clearly calls for a rate-of-return test, not the total-revenue comparison Gulf advocates. The Commission is not free to consider operating expenses and rate base found prudent for permanent rates (using a different test year) in an interim statute expressly limited to rate-of-return comparisons. Logic also dictates that, when investor returns have declined since the last rate case, there should be a refund of interim rates set initially under the make-whole standard of Section 366.071.

4. The interim statute simply does not provide the protection for utilities that Gulf reads into it. A statute that permits interim rates based on an old rate of return during the pendency of a case designed to set a new return will give varying results depending on trends in capital costs. Two utilities will be

treated differently based solely on the timing of their former rate cases. On occasion, Section 366.071 will not even protect against regulatory lag. For example, if Gulf's last rate of return had been substantially lower, instead of higher, it would not have been entitled to interim rates at all. Yet the effects of regulatory lag may have been more pronounced because earnings would have been eroding because of the very factors that drove the request for a rate increase in the first place.

5. In such a case, Gulf could not successfully argue for interim rates after the permanent case concluded, nor could it ask for higher permanent rates because interim rates were unavailable. Similarly, Gulf cannot suffer harm because it has to refund excessive interim rates after being awarded a larger permanent increase. The only reason Gulf is moving for reconsideration is because it does not want to relinquish funds in its possession. And the only reason Gulf is in possession of the money in the first place is because its previously allowed return was set at a time of higher capital costs. Contrary to Gulf's position, under these circumstances, returning funds collected on such a conditional basis could not possibly cause "further deterioration of its financial condition." Motion, at 3.

6. The case of Southern Bell v. Bevis, 279 So.2d 285 (Fla. 1973), cited by Gulf at page 2 of its motion does not support the company's position. That case was decided before file-and-suspend procedures and Section 366.071 were enacted. Furthermore, that appeal concerned a purely make-whole case in which Southern Bell

sought a rate increase so it could earn the rate of return previously allowed. The Court directed the Commission to grant the utility an increase up to the previous return. However, the Commission could impose a refund condition and retroactively adjust rates based on the outcome of the full proceedings:

[T]he Commission is fully empowered to make the rate increase contingent upon the outcome of the full hearing, and to require the company to repay any part of the interim increase to its customers which the Commission may, at a later date, determine was improper. . . . [W]e have never held the Commission powerless to make interim increases contingent on the outcome of a full hearing, and thus refundable if the full hearing discloses the interim increase was improvidently granted.

279 So.2d at 286-87.

7. Later cases concluded that, under file-and-suspend procedures, the final decision could not retroactively justify the interim award. In Citizens v. Mayo, 333 So.2d 1, 6 n.12 (Fla. 1976), an appeal of a Gulf Power rate order, the Court rejected the procedural aspects of Southern Bell and concluded that "Southern Bell . . . is not applicable to proceedings under subsection 366.06(4) [the file-and-suspend law]." However, in Maule Industries v. Mayo, 342 So.2d 63, 68 (Fla. 1976), the Court did agree that Southern Bell's make-whole standard was a proper substantive basis on which to set interim rates initially under Section 366.06(4).

8. Significantly, in Maule, the Court reaffirmed its conclusion in Citizens v. Mayo that the result of the hearings on the full case could not provide retroactive justification for the amount of the interim award:

'[W]e reject the suggestion that full public hearings . . . could breathe life into the prior proceedings. If the full rate proceeding could provide retroactive justification for an interim award there would have been no need for the Commission to be given preliminary review and suspension authority.' 333 So.2d at 8.

342 So.2d at 66, n.6.

9. Clearly, the interim rates granted to Gulf in Order No. 22681 were contingent only on the outcome of the rate of return decision to be reached in the full case, not the total revenue requirements ultimately awarded. Moreover, the Commission's decision in Gulf's case is completely consistent with the recent Florida Public Utilities (Fernandina Beach Division) case. Interim rates of \$456,195 had been granted pursuant to Section 366.071 using an overall return of 9.63%. Order No. 21211. FPUC was eventually awarded a permanent increase of \$579,872 using a return of 9.01%. Since the return for permanent rates was lower, FPUC was ordered to refund \$67,725, even though its permanent revenue award exceeded the interim award. Order No. 22224, at 45. Refunds were also properly ordered for Gulf Power Company.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny Gulf Power Company's motion for reconsideration of Order No. 23573.

Respectfully submitted,

Jack Shreve  
Public Counsel

  
John Roger Howe  
Assistant Public Counsel

c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-1400

(904) 488-9330

Attorneys for the Citizens  
of the State of Florida

CERTIFICATE OF SERVICE  
DOCKET NO. 891345-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S RESPONSE TO MOTION FOR RECONSIDERATION has been furnished by U.S. Mail or by \*hand-delivery to the following parties on this 25th day of October, 1990.

G. EDISON HOLLAND, JR., ESQUIRE  
JEFFREY A. STONE, ESQUIRE  
Beggs & Lane  
Post Office Box 12950  
Pensacola, FL 32576-2950

\*MIKE PALECKI, ESQUIRE  
Division of Legal Services  
Florida Public Service  
Commission  
101 E. Gaines Street  
Tallahassee, FL 32399-0872

JOSEPH A. MCGLOTHLIN, ESQUIRE  
Lawson, McWhirter, Grandoff  
& Reeves  
522 E. Park Avenue, Suite 200  
Tallahassee, FL 32301

MR. JACK HASKINS  
Gulf Power Company  
Corporate Headquarters  
500 Bayfront Parkway  
Pensacola, FL 32501

MAJOR GARY A. ENDERS, ESQUIRE  
HQ USAF/ULT  
Stop 21  
Tyndall AFB, FL 32403-6081

RONALD C. LAFACE, ESQUIRE  
Roberts, Baggett, LaFace  
& Richard  
Post Office Drawer 1838  
Tallahassee, FL 32302

  
John Roger Howe