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PLEASE REPLY TO:
TALLAHASSEE

COGENERATION
ALTERNATIVE ENERGY
ENERGY REGULATORY LAW
PUBLIC UTILITY LAW
ADMINISTRATIVE LAW
APPELLATE LAW

April 14, 1992

**ORIGINAL
FILE COPY**

Mr. Steve Tribble
Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Re: Docket No. 920198-EQ - Petition of Monsanto Company for a declaratory statement concerning the provision of electric power to facilities at its Pensacola Chemical Complex.

Dear Mr. Tribble:

Enclosed for filing in the above Docket please find an original and twelve copies of the following documents:

03701-92

- ACK Response of Monsanto Company in Opposition to Gulf Power Company's Petition for Leave to Intervene
- AFA
- APP Response of Monsanto Company in Opposition to Gulf Power Company's Request for Hearing
- CAF
- CMU Request of Monsanto Company for Oral Argument
- CTR Enclosed also please find a 5-1/4 inch computer diskette formatted in WordPerfect 5.0.

03702-92

03703-92

- EAG
- LEG
- LIN
- OPS
- ROH
- SEC DS+12
- WAS
- OTH

Sincerely,

Paul Sexton

enclosures

cc: All parties

DOCUMENT NUMBER-DATE
03701 APR 14 1992
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition of Monsanto)
Company for a declaratory)
statement concerning the)
provision of electric power to)
facilities at its Pensacola)
Chemical Complex.)

Docket No. 920198-EQ
Filed: April 14, 1992

**RESPONSE OF MONSANTO COMPANY IN OPPOSITION
TO GULF POWER COMPANY'S PETITION FOR LEAVE TO INTERVENE**

Monsanto Company (Monsanto), by and through its undersigned attorneys, requests that the Commission deny Gulf Power Company's (Gulf) Petition for Leave to Intervene dated April 2, 1992, and its included request for hearing on the following grounds: 1) By the very nature of declaratory statements, only Monsanto will be substantially affected by the decision in this docket; 2) Gulf has failed to assert interests which are either relevant to the issues raised in Monsanto's declaratory statement or resolvable in the context of a declaratory statement proceeding; 3) Economic impact, by itself, does not constitute a substantial interest under Chapter 120; and 4) Gulf is improperly seeking to expand the scope of this proceeding. In support of these grounds Monsanto states as follows:

1. The standard to be applied here in determining whether Gulf should be granted intervention status is the "substantial interest" standard found in Section 120.52(12)(b), F.S., which states:

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or doubt" concerning their application. Rule 25-22.021¹, F.A.C. Declaratory statements are not rules, that is, "statements of general applicability that implements, interprets and prescribes law or policy." Section 120.52(14), F.S. See: Price Wise Buying Group v. Nuzum (Price Wise), 343 So.2d 115, 116 (Fla. 1st DCA 1977); Fletcher Properties v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978).

3. Based upon the legislature's actions in 1978 adding the language "as it applies to the petitioner in his particular set of circumstances only"² subsequent to the court's decision in Price Wise, it is obvious that the legislature intended to restrict declaratory statements exclusively to the party/parties requesting the statement under the specific factual scenario presented. Thus, declaratory statements are res judicata only to those parties under those specific facts. Sans Souci v. Division of Florida Land Sales, 448 So. 2d 1116, 1119 (Fla. 1st DCA 1984). With regards to all others, the decision has the same effect as any other final

¹ A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his or her particular circumstances only. The potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy, question or doubt.

² Chapter 78-425, Section 5, Florida Laws.

agency action order: stare decisis. Cenac v. Florida State Board of Accountancy, 399 So.2d 1013, 1018 (Fla. 1st DCA 1981). Accordingly, by their very nature, declaratory statements can only affect the prospective "substantial interests" of the declarant. In this case, the declaratory statement sought can only affect the substantial interests of Monsanto.

4. Notwithstanding the exclusive nature of declaratory statements, Gulf has failed to demonstrate any valid substantial interest in this proceeding. The Gulf's alleged "interests" can be categorized as: 1) Monsanto's current violation of its December 30, 1988 Contract for Electric Power [Petition at 3]; 2) Monsanto's current violation of Gulf's Rules and Regulations for Electric Service §§ 1.8, 4.1, and 4.2 [Petition at 3-5]; Monsanto's current violation of Gulf's PXT Rate Schedule and Tariff for Retail Electric Service [Petition at 3,5]; Monsanto's current violation of Section 366.03, F.S.'s, "resale of electricity" provision [Petition at 8]; Gulf's current loss of revenues due to all of the above [Petition at 9]; and "further interests" that Gulf will only know about when it has the ability to conduct discovery [Petition at 10]. None of the alleged "violations" or "interests" listed by Gulf have anything to do with the issues presented by Monsanto for resolution in this declaratory statement proceeding.

5. Monsanto has asked a specific three-part question: under the provisions of §366.02, would the future delivery of power and energy from the planned cogeneration expansion at Monsanto's Pensacola chemical complex to two specific facilities (Niject and Union Carbide) at that complex: a) result in or deemed to constitute a sale of electricity; b) cause Monsanto to be deemed a public utility as that term is defined under Florida law; and c) cause Monsanto to be subject to regulation by the Commission. In response, Gulf has raised issues regarding the present use of power delivered by Gulf by three facilities (Niject, Union Carbide and AES), alleging that such use is "violative" of Gulf's tariffs, rules, regulations and Monsanto's Power Purchase contract with Gulf. Gulf's issues are legally and factually irrelevant to the narrowly focussed questions presented in this petition: the application of §366.02 and the cases that construe its provisions to the future delivery of cogenerated power to two facilities.

6. Gulf should not be allowed to turn Monsanto's request for an agency opinion on prospective action into a complaint proceeding based on allegations regarding current practice. Current practice is simply irrelevant to this request for a declaratory statement. Gulf has appropriate means of addressing these alleged "violations" but this proceeding is not one of them. In short, the "violation" issues identified by Gulf do not constitute a substantial interest

in this proceeding.

7. Gulf eventually attempts to create an illusion of interest based on the fact that Monsanto has "improperly diverted revenue to unregulated producers that would otherwise have gone to Gulf Power, the regulated utility which serves the affected area." [Petition at 9]. Ignoring for the moment that Gulf is still talking about current practice, economic damage, by itself, does not constitute a substantial interest. Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478 (Fla. 1st DCA 1981). Thus, the economic impact of Monsanto's future removal of its load from Gulf's system does not give Gulf a "right" to intervene. Nor does Gulf have the right to intervene because the resolution of this declaratory statement has precedential value which would subsequently adversely affect the utility. See: State of Florida Department of Health and Rehabilitative Services v. Barr, 359 So.2d 503 (Fla. 1st DCA 1978).

8. Gulf's economic assertions here are precisely the same as those rejected by the Commission in Docket No. 860725-EU³ when Gulf sought intervention in that declaratory statement proceeding. In denying Gulf's intervention, the Commission held:

³ In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.

Gulf currently provides all of Monsanto's electric power needs. Its assertion of "substantial interest" is based on the economic consequences of Monsanto's proposed cogeneration facility's output on Gulf's load. Economic damage alone does not constitute "substantial interest." Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 1st DCA 1981). We find, therefore, that Gulf does not have a "substantial interest" in this proceeding and in accord with Rule 25-6.039, Florida Administrative Code, deny Gulf's request for intervention.

Order No. 16581, issued on September 11, 1986, at page 2. Nothing has changed since 1986: the Commission should follow this established, clearly applicable precedent and find that Gulf's allegation of economic impact alone is insufficient to establish substantial interest in a declaratory statement proceeding.

9. Gulf has also raised "unknown" interests capable of discernment only after discovery. [Petition at 10] Section 120.57, F.S., hearings which concern "disputed issues of material fact" are the type of proceedings in which discovery is appropriate. Discovery is not appropriate in declaratory statement proceedings where the facts are accepted as presented and the agency applies rules, statutes or orders to those facts. Facts cannot be in dispute in a declaratory statement proceeding. A declaratory statement is only as useful to the declarant as the accuracy of its facts since it is res judicata only with regard to

"his or her particular circumstances only." There is no reason for a declarant to "misrepresent" the facts. To the contrary, there is every reason to strive to be as accurate and specific as possible. How can hypothetical facts be misrepresented and therefore how can they be in dispute? If not in dispute, how can discovery be appropriate?

10. Gulf's intervention is particularly inappropriate in that Gulf is actually seeking to initiate a wide-ranging investigation which would substantially and unnecessarily delay a Commission ruling on Monsanto's plain and simple request. It is clear from Gulf's petition that Gulf does not have standing to intervene and Gulf states that it is not certain what, if any, issues it wishes to raise. By its own admission, Gulf is seeking permission to "rummage around" in this narrowly focussed proceeding. Monsanto would suggest Gulf's purpose: raising additional irrelevant issues in the hope of maximizing confusion and delay. However, whatever Gulf's goals are and whatever problems it has with Monsanto, they are not properly pursued in this proceeding.

11. In addition to its complaints regarding Monsanto's current practices, (which are really challenges to Monsanto's "financing" choices regarding equipment integrated into its chemical complex), Gulf also has attempted to improperly expand the

scope of this declaratory statement by adding its own issues: the provision of standby service to Monsanto and the AES facility. First, Gulf argues that it will "unlawfully" be required to provide standby service to Monsanto should it construct the proposed cogeneration unit. However, the provision of standby service is controlled by federal law as implemented by FERC rules and codified in state law and Commission rule. There is therefore no "controversy or doubt" with regard to the provision of standby electric service as previously found by the Commission in analogous circumstances in Order No. 17009⁴. Nothing has changed in applicable state or federal law since Order No. 17009 was issued; it should be followed here. Second, Gulf has interjected the provision of electric service to Advanced Elastomer Systems (AES) as an issue in this docket. Monsanto filed a clarification of its Petition for Declaratory Statement on March 20, 1992 which specifically excluded the AES facility from this petition. Further, Monsanto stated in its clarification that it would either seek a separate declaratory statement concerning the AES facility at a later date or, that AES would become a direct service customer of Gulf. Subsequent to the filing of Monsanto's clarification, Gulf filed its intervention on April 2, 1992. Whether or not Gulf

⁴ Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility, Docket No. 860725-EU, issued on December 22, 1986, at 5.

was aware of Monsanto's clarification, Monsanto has not raised the AES issue for resolution in this declaratory statement and Gulf should not be allowed to interject it via its petition for intervention.

WHEREFORE due to the nature of declaratory statements and the failure of Gulf to raise any substantial interest which would be affected by a Commission decision in this case, Monsanto Company respectfully requests entry of an order denying Gulf's Petition for Leave to Intervene.

Respectfully submitted this 14th day of April, 1992, by



Richard A. Zambo, Esquire
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Attorneys for Monsanto Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been provided to the following persons by U.S. Mail or Hand-delivery (*), this 14th day of April, 1992.

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