BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Monsanto )

Company for a Declaratory )

Statement Concerning the ) Docket No. 920198-EQ

Provision of Electric Power to ) Date filed: 4/2/92

Facilities at its Pensacola )

Chemical Complex. )

)

GULF POWER COMPANY'S PETITION FOR LEAVE TO INTERVENE

Gulf Power Company ("Gulf Power", "Gulf", or "the Company"), by and through its undersigned attorneys, on behalf of itself and its general body of retail electric service customers, hereby petitions the Florida Public Service Commission ("Commission") pursuant to Rule 25-22.039, Florida Administrative Code and Section 120.57, Florida Statutes, for leave to intervene in the proceedings described in the caption above. In support of this petition, the Company states:

1. Notices and communications with respect to this petition and docket should be addressed to:

G. Edison Holland, Jr. Jack L. Haskins

Jeffrey A. Stone Mgr. Rates & Regulatory Mtrs.

Beggs and Lane Gulf Power Company

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2. Gulf Power Company is an electric utility providing retail electric service to customers within Northwest Florida and, pursuant to the provisions of Chapter 366 of the Florida Statutes, is subject to regulation by the Florida Public Service Commission. Monsanto Company (Monsanto), at its Pensacola chemical complex, is a retail electric service customer of Gulf Power.

3. The substantial interests of Gulf Power Company and its general body of retail electric service customers will be affected by the Commission's decision in this proceeding. As part of the declaration sought by Monsanto in this proceeding, the Commission must determine whether the present arrangements between Monsanto and Niject Services Company ("Niject"); Monsanto and Union Carbide Industrial Gases, Inc. ("Union Carbide"); and Monsanto and Advanced Elastomer Systems ("AES") constitute the unlawful resale or sharing of electric service provided to Monsanto at retail by Gulf Power pursuant to its Commission approved contract for electric power with Monsanto and the Company's Rules and Regulations for Electric Service and other provisions contained in the Company's Tariff for Retail Electric Service filed with and approved by the Florida Public Service Commission and by reference made a part of the approved contract for electric power between Gulf and Monsanto.

4. To the extent that the Monsanto/Niject, Monsanto/Union Carbide and Monsanto/AES arrangements constitute the unlawful resale or sharing of Gulf's retail electric service, the Company and ultimately its general body of retail electric service customers are deprived of certain revenues which the Company's rates were designed to produce in order to provide for the proper and non-discriminatory recovery of costs incurred by the Company to serve its general body of customers including the requirements placed on Gulf's system by Monsanto, Niject, Union Carbide and AES.

5. Monsanto is presently being provided retail electric service by Gulf Power Company pursuant to the Contract for Electric Power dated December 30, 1988 and the Company's Rate Schedule PXT. Article Seventh of the Contract for Electric Power states:

This contract contemplates that service hereunder shall be supplied only for the Customer's own use and particular establishment to which this contract refers and one customer. Service is hereby restricted to one person, firm, or corporation, and a single premise or establishment of the one person, firm, or corporation as a Customer.

Article Tenth of the Contract for Electric Power states:

The Customer hereby agrees to be bound by the service rules and regulations of the Company (when not in conflict with the terms of this contract) in effect during the period covered by this agreement.

The applicability section of Rate Schedule PXT in part states:

Service to two or more premises shall not be combined nor shall service furnished hereunder be shared with or resold to others. All service shall be taken at the same voltage and from a single delivery point, and shall be measured by a single meter.

6. Section 1.8 of the Company's Rules and Regulations for Electric Service in part states:

All service supplied by the Company is for the Customer's sole use within or upon his premises and for the purposes set forth by the applicable Rate Schedule. The Customer shall not supply electrical energy to anyone else or allow anyone to take same, nor shall he use or permit same to be used at any other premises (except as provided below) or for any other purposes (either directly of indirectly by transformation or regeneration) than those designated in the application.

Further on, Section 1.8 of the Company's Rules and Regulations

for Electric Service in Gulf's Tariff for Retail Electric Service

states:

No Customer shall extend electric lines or facilities across or under a street, avenue, alley, lane, court or other public way in order to make electric energy available through one meter to a structure of facility on an adjacent tract of land, except under the following conditions: (1) said structure or facility on adjacent land is at all times operated and utilized by the same Customer for the same business or enterprise; (2) electric service through such single meter is utilized solely by such Customer; (3) such single-meter electric service is otherwise permissible under applicable Company Rules and Regulations and applicable Rate Schedule; (4) Customer obtains written approval from the Company on plans, and any extension or revision thereof, for such single-meter service arrangement; (5) Customer obtains and keeps currently effective any and all required permits from required public authorities for crossing of public ways with Customer's electric facilities; and (6) Customer's electric facilities crossing public ways must comply with all applicable local and national codes. (See also, Rule 25-6.049(5)(a), F.A.C.)

Section 4.1 of the Company's Rules and Regulations for Electric Service in part states:

The Rate Schedules of the Company contemplate the service will be supplied to each separate premise as one Customer. Where a customer, for any reason, requires the installation of more than one meter by the Company each meter will be billed as a separate Customer. The electricity used by the same person, firm or corporation at different premises will not be combined and billed as one Customer.

Section 4.2 of the Company's Rules and Regulations for Electric Service states:

No individual or person is authorized to receive service through the meter installed for a Customer on a neighboring premise, and the connection of one premise with another for the purpose of obtaining service through one meter is an unauthorized practice and shall be deemed as receiving service without full compensation to the Company therefore. The Company reserves the right to discontinue service to any Customer who violates this rule.

The Company's Tariff for Retail Electric Service provides the following definitions:

CUSTOMER A Customer is an individual, firm or organization who purchases service or is interconnected at one location under one rate classification, contract or schedule.

PREMISES Defined as a contiguous area, building or group of buildings, or portion of a building, joined together electrically as may be permitted by the applicable rules and regulations of the Company, occupied by one Customer and served through one meter.

7. The foregoing terms and conditions, rules and regulations clearly demonstrate that the present arrangements between Monsanto and two of its suppliers of raw materials, Niject and Union Carbide, as alleged in Monsanto's Petition for Declaratory Statement, violate the Contract for Electric Power between Monsanto and Gulf as well as Gulf's Tariff for Retail Electric Service and constitute the unlawful resale of electricity provided thereunder by Gulf Power. Although Monsanto alleges that it provides electric service to Niject and Union Carbide at no cost and disingenuously argues that it therefore is not "selling" electric service, the relationship between Monsanto and its suppliers clearly involves the purchase and sale of raw materials (compressed air and nitrogen) for which electricity is required as an integral part of the production process. The agreement of Monsanto to provide electricity at no cost was clearly part of the consideration for the contract price of the raw materials produced by Niject and Union Carbide. Gulf is uncertain of the arrangements between Monsanto and AES, however it is clear that it involves, at a minimum, the unlawful sharing of electric service purchased from Gulf.

8. Monsanto has not properly disclosed to Gulf Power the existence of the tenant arrangements Monsanto has with two of its suppliers of raw materials, Niject and Union Carbide, or its tenant and electric service arrangements with AES. As a result of this failure to disclose the true nature of the electric loads on its Pensacola chemical complex, Monsanto has been able to improperly aggregate the four electric services to avoid charges called for under the applicable provisions of Gulf's Tariff for Retail Electric Service. Further, Monsanto has improperly avoided billing under Gulf's Rate Schedule SS governing standby electric service. Service under Rate Schedule SS (or the optional Rate Schedule ISS for interruptible standby electric service) is mandatory if the customer's total generating capacity exceeds 100 kilowatts, supplies at least 20% of his total electrical load and is operated for other than emergency and test purposes. Separation of the Niject, Union Carbide and AES loads causes Monsanto to fall within the foregoing provisions in that its total generating capacity exceeds 20% of its owned electrical load and the other two conditions are present.

9. As stated above, it is clear that the present arrangements between Monsanto and at least two of its raw material suppliers, as described in Monsanto's Petition, as well as the arrangement between Monsanto and AES referred to in Monsanto's Clarification, are all in violation of the Commission's policy as it is embodied in Gulf's Commission regulated and approved Tariff for Retail Electric Service and in Rule 25-6.049(5)(a) of the Florida Administrative Code. Furthermore, to the extent that Monsanto is presently supplying electric service from its existing on-site generating capability to any of the other three entities operating their own facilities on the grounds of the Pensacola chemical complex (Niject, Union Carbide and AES), such service clearly constitutes the supplying of electricity to members of the public[[1]](#footnote-1) and therefore, as the term "public utility" is defined under Florida law[[2]](#footnote-2), would properly subject Monsanto to the regulatory jurisdiction exerted by the Florida Public Service Commission over public utilities.[[3]](#footnote-3) 10. The present and anticipated arrangements between Monsanto and at least these two suppliers of raw materials (Niject and Union Carbide) as well as that between Monsanto and AES, both now and after installation of the combustion turbine described in Monsanto's Petition for Declaratory Statement, clearly constitute the supplying of electricity to members of the public. As a consequence, the provision of standby electric service by Gulf Power to Monsanto cannot and could not be required since such service would constitute a sale for resale.[[4]](#footnote-4) Not only does the arrangement described in Monsanto's Petition constitute a retail sale, if Monsanto should seek standby service from Gulf Power as suggested in Monsanto's Petition, the arrangements with Niject and Union Carbide and presumably AES would constitute a violation of the provisions in Gulf's Tariff for Retail Electric Service governing standby service. The Company's Rate Schedule SS (and its optional counterpart, Rate Schedule ISS) in part states:

Resale of service not permitted hereunder. Service under this rate is subject to the Company's currently effective and filed "General Rules and Regulations for Electric Service".

11. Monsanto's argument in its Petition that there is no "cream skimming" under the circumstances it has outlined, has misapplied the opinion of the Florida Supreme Court upholding this Commission's determination that the circumstances presented in the PW Ventures case would subject the entity supplying electricity to regulation as a public utility. Monsanto, through its barter arrangement to exchange electric service for raw materials, has improperly diverted revenue to unregulated producers that would otherwise have gone to Gulf Power, the regulated utility which serves the affected area. PW Ventures v. Nichols, 533 So.2d 281, 283 (Fla. 1988). The Supreme Court's analysis of the situation created by PW Ventures' interpretation of the statutory definition of public utility and its conflict with the legislative scheme for the regulation of the production and sale of electricity[[5]](#footnote-5), did not limit the concept Monsanto describes as "cream skimming" to the enticement away of "existing" customers of the utility.[[6]](#footnote-6) The Supreme Court's concern about the ". . . [drastic] change to the regulatory scheme of this state . . ." created by the interpretation of the statute preferred by PW Ventures (and presumably Monsanto) is equally applicable to the enticement away of "potential" high-use industrial complexes on a one-to-one contractual basis. It is precisely the type of harm against the general body of Gulf's retail electric service customers that the Supreme Court, in its opinion in PW Ventures, predicted would occur if it had reversed the determination of this Commission in that case that Monsanto has now created through its contractual arrangements with Niject and Union Carbide, and seeks to perpetuate through the declaratory opinion sought by its Petition for Declaratory Statement.

12. Gulf and its general body of retail electric service customers may have further interests in this case that the Company will be able to assert and protect only if it is granted intervenor status and is allowed to conduct discovery. Among the areas of inquiry for discovery are the nature of the relationship between Monsanto, Niject, Union Carbide and AES, and the nature of the electric service requirements of these various entities as they are operating or intend to operate their own facilities at Monsanto's Pensacola chemical complex. Gulf and its general body of electric service customers have not as yet been allowed to review the contractual materials evidently filed with the Commission under a separate request for confidential treatment or other documents that are relevant to the question for which Monsanto seeks a declaratory opinion of the Commission. In order to ensure that the rights and best interests of Gulf's general body of electric service customers are adequately protected, Gulf requests that this case be scheduled for an evidentiary hearing to be conducted after the parties have been given the full and fair opportunity to conduct discovery in this matter.

WHEREFORE, Gulf Power Company having demonstrated that it and its general body of retail electric service customers have substantial interests that will be affected by the decision to be made by the Commission in this proceeding, the Company respectfully requests that the Florida Public Service Commission enter its order granting the Gulf Power Company leave to intervene in these proceedings in order that it may participate and adequately protect the substantial interests of the Company and its general body of retail electric service customers.

Respectfully submitted this 2nd day of April, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 2nd day of April, 1992 by U. S. Mail to the following:

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1. See, PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988). [↑](#footnote-ref-1)
2. Section 366.02 of the Florida Statutes defines Public Utility as:. . . every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . .[references to gas omitted] . . . to or for the public within this state . . .

   The foregoing definition does not provide that the entity supplying the electricity must do so as part of cash sale in order to be classified as a public utility. Rather, it is the supplying of electricity, as opposed to its sale, that characterizes the entity as a public utility. [↑](#footnote-ref-2)
3. Section 366.01 of the Florida Statutes states:

   The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to

   (Note 3 Continued)

   be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose. [↑](#footnote-ref-3)
4. Section 366.03 of the Florida Statutes provides that "No public utility shall be required to furnish electricity . . . for resale . . ." [references to gas omitted] [↑](#footnote-ref-4)
5. "The regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest." PW Ventures, Inc. v. Nichols, 533 So.2d at 283. [↑](#footnote-ref-5)
6. Of course, in this instance, the loads of Niject, Union Carbide and AES would constitute existing customers of Gulf Power but for Monsanto's improper arrangement to resell or share the electric service provided by Gulf. Thus, when the added cogeneration capacity described by Monsanto is brought on-line, Monsanto's supply of its generated power to these three entities in lieu of Gulf would be an enticement away of existing load being served by the regulated utility. [↑](#footnote-ref-6)