

IN THE SUPREME COURT OF FLORIDA

MONSANTO COMPANY ,  
Appellant,  
v.  
MICHAEL McK. WILSON, et al.,  
Appellee.

CASE NO. 73,689

PSC DOCKET NO. 880001-EI

**FILED**  
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On Appeal from the Florida Public Service Commission

REPLY BRIEF OF APPELLANT  
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I  
ARGUMENT

THE FLORIDA PUBLIC SERVICE COMMISSION'S REFUSAL  
TO DISALLOW THE COST OF EXPENSIVE PLANT DANIEL  
ENERGY FROM RECOVERY IS NOT SUPPORTED BY  
COMPETENT SUBSTANTIAL EVIDENCE.

A. Standard of Review and Burden of Proof.

Monsanto agrees with the Commission's articulation of the standard of review and of the burden of proof in the Commission hearing. Monsanto developed a record--largely with data obtained from Gulf Power--which decisively carried Monsanto's burden of going forward with evidence.

Early in its brief the Commission correctly makes another significant point. The issue before the Commission was not one of prudence or imprudence. Monsanto has maintained throughout the case that the issue was instead one of an improper, cross-jurisdictional subsidy. The nature, mechanics and impact of the subsidy were demonstrated by evidence and cannot be refuted by references to "economic dispatch."

B. "Economic Dispatch" does not explain or justify the amount of Plant Daniel energy charged to retail ratepayers.

Gulf Power's brief acknowledges that the "economic dispatch" program commits units all over the system to meet overall needs.<sup>1/</sup>

The competent, substantial evidence establishes that the billing program is an after-the-fact tally. It does not take into account the Plant Daniel energy which the

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<sup>1/</sup> Gulf Power states in its brief that Monsanto witness, Mr. Pollock, conceded that "economic dispatch" resulted in territorial customers receiving the most economical energy available to them at the time. Gulf Power's Answer Brief, p. 5. Mr. Pollock made no such concession. In fact, during a lengthy explanation of economic dispatch in response to questions raised by Commissioner Herndon, Mr. Pollock explained the distinction between "economic dispatch" and Gulf Power's billing program. Tr-Vol. IV, p. 529.

UPS customers would have been obligated to schedule absent Schedule R. By describing the billing process as one which "backs down the stack" of units, Gulf Power attempts to convey the impression that the energy retained for territorial customers is necessarily that of the bottom (cheapest) units. This statement in Gulf Power's brief is at odds with the facts of record. The testimony clearly establishes that if the generation of an expensive unit such as Plant Daniel was not completely purchased by others, the residual of that expensive "top of the stack" unit would automatically be charged to ratepayers. It was Gulf Power, not Monsanto, who capsulized the process as follows:

$$\text{Retained Energy} = \text{Net Generation} - \text{All Energy Sold}$$

Gulf Power's claim that the energy received by retail customers was "the most economical available" assumes away the prior obligation of UPS customers to schedule greater deliveries of Plant Daniel's generation which would have reduced the retail portion of the after-the-fact tally--a classic case of "begging the question."

**C. UPS customers were contractually obligated to purchase Plant Daniel energy.**

Gulf Power argues that this case is about Monsanto's mistaken contention that UPS customers were obligated to purchase a minimum quantity of Plant Daniel energy. Gulf Power is wrong. The obligation is there; the clear language of the UPS contract establishes it, and the document which created Schedule R confirms it. This case is instead about Gulf Power's futile efforts to somehow avoid, deflect, or downplay the efficacy of the contractual obligation when gauging the impact of Schedule R. But consider, in addition to the contract itself:

(1) In a document entitled "Service Schedule R Summary," page 28 of Gulf Power witness Gilchrist's Exhibit 11, Gulf Power states:

Service Schedule R energy counts toward the UPS customers [sic] minimum annual obligation described in Section 3.5 of the UPS Agreement.

(2) The Federal Energy Regulatory Commission ("FERC"), which has regulatory jurisdiction over the UPS contracts, approved an opinion in which an Administrative Law Judge referred to the annual energy obligation imposed on UPS customers as the "~~minimum take~~" requirements of the UPS contracts. Initial Opinion of ALJ, 39 FERC ¶ 63,026, p. 65,138; A., p. 31. The Initial Opinion was approved and adopted by the FERC in Opinion 300, issued in Docket Nos. EL86-53-001 and EL86-57-001 on April 1, 1988.<sup>2/</sup>

(3) Southern/Gulf Power implicitly espoused a consistent view in the same FERC case:

Southern notes that it has made prior concessions to GSU under Section 2.2.1, whereby the original 1,000-MW UPSA was modified to add Schedule E and to reduce UPS capacity at a cost to Southern of approximately \$350-400 million, and substantially more if fuel related costs are considered. Moreover, Southern states that in the summer of 1985, it unilaterally offered GSU the opportunity to purchase lower cost energy under Schedule R in substitution for higher cost energy under the UPSA. By asking the Commission to allow Schedule R to become effective retroactively, Southern secured a \$360,000 refund for GSU. Southern reports that Schedule R saved GSU approximately \$20 million from August 1985 to December 1986 and that GSU has continued its takes under Schedule R in 1987 at very high levels,<sup>3/</sup>

39 FERC ¶ 63,026, p. 65,158; A., p. 51. Emphasis provided. Obviously, Southern/Gulf Power could not have claimed that Schedule R saved money for GSU without first recognizing that the UPS contracts imposed an obligation for GSU to purchase more expensive UPS energy that was obviated only by the availability of Schedule R.

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<sup>2/</sup> The Florida Commission made this FERC opinion part of the record below through official notice. Order No. 20568; R-Vol. I, pp. 173-177.

<sup>3/</sup> Contrast this characterization of Schedule R by Southern/Gulf Power with Gulf Power's assertion in the instant case that Schedule R is "not a concession."

In view of the above, it is indeed awkward for Gulf Power to attempt to dilute the efficacy of the annual minimum energy obligation. It attempts to do so by speaking in terms of the "lack of economic incentive" for the UPS customers to abide by the obligation, due to the changed economics of coal and oil-fired generation. However, the change in relative economics which Gulf Power portrayed to the Commission as the reasons why Monsanto's premise was in error were precisely the matters which Southern/Gulf Power maintained should have no bearing on the validity of contractual obligations in the very FERC proceeding referred to above.

In the FERC case, Gulf States Utilities ("GSU") asked the FERC to determine that, in view of changed economic conditions, *it* should be obligated to buy UPS energy from Southern only when the cost of the energy was less than GSU's own avoided cost.<sup>4/</sup> Opinion 300, p. 5; A, p. 8. The changed circumstances included changes in the relative prices of coal-fired energy on the Southern system and GSU's own gas-fired generation. Southern/Gulf Power, on the other hand, asked the FERC to confirm the validity of the contracts. During the case, Southern responded to GSU's claim that "changed circumstances" should alter GSU's responsibilities:

Southern argues that questions concerning the economics or prudence of the transaction from the buyer's perspective are irrelevant to the determination of justness and reasonableness. Southern cites Southern Company Services, Inc., 26 FERC ¶ 61,360 (1984), where the Commission held that allegations that GSU could buy power from other less costly sources were "irrelevant to this case because the Commission is not empowered to disapprove or modify a power sales agreement on the grounds that the buyer may not be making the best possible deal."

39 FERC ¶ 63,026, p. 65,147; A, p. 40.

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<sup>4/</sup> GSU defaulted on its UPS obligations after Schedule R was implemented. Based on evidence, the FERC determined that problems with construction of a nuclear unit and the associated need for rate relief constituted the primary cause of GSU's financial difficulties. Opinion 300, p. 13; A, p. 16.

Further, the FERC agreed with Southern:

In alleging that the UPS agreement and Schedule E are not producing the benefits expected, or that the burdens and benefits are widely disparate, G SU has done no more than establish that the agreements with the Southern companies may be uneconomic to it at this time. This does not render them unjust and unreasonable or contrary to the public interest under the FPA.

Opinion 300, p. 11; A, p. 14. In Opinion 300, the FERC affirmed the validity of G SU's obligations under the UPS agreement.

In response to Monsanto's request that the Commission take official notice of FERC Opinion 300 (which request was made after the hearing below), Gulf Power stated:

The Southern companies and Gulf Power have consistently [sic] maintained before all forums, including this Commission, that the obligations under the UPS agreements are contractually valid despite changes in conditions subsequent to the signing of the agreements.

. . . .

Gulf's arguments regarding the continuing economic viability of the contracts in light of the dramatic changes in the price of oil vis' a vis' the price of coal have been taken out of context. . . . The legal validity of contractual obligations alone is not sufficient to ensure compliance.<sup>5/</sup>

Gulf Power's Response to Request for Official Notice, September 19, 1988, at pp. 4-5.<sup>6/</sup> Yet, in its brief, Gulf Power appears to revert to an argument which questions--

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- ? Gulf Power makes no attempt to square this startling rationale with its own experience. In 1985, Plant Daniel energy was expensive--and UPS customers were unhappy--largely because Gulf Power was paying \$75 per ton of coal to the Plant Daniel suppliers. Alternatives later became available for roughly half the price. In the transaction which led to the request for approval of the buy-out costs and the discovery of retail/wholesale machinations, Gulf Power paid its supplier more than \$100 million to extricate itself from its expensive contract.

<sup>6/</sup> This pleading was inadvertently omitted from the record. The parties have filed a Joint Motion to Supplement the Record.

on behalf of the customer, of course--the efficacy of the contractual provision. Gulf Power's Answer Grief, pp. 33-34.

Monsanto is bemused by Gulf Power's attempts to negotiate the strange tightrope it has fashioned for itself on the subject of the minimum purchase obligation. Gulf Power meets itself coming and going. The contractual distinction it projects either to or on behalf of others is feeble; Gulf Power's protests notwithstanding, its argument conflicts with its stance elsewhere; and the "evidence" of risk it proffered is patently incompetent.

Opinion 300 is enlightening on this point. The very posture of the parties in the FERC proceeding belies Gulf Power's purported apprehension. GSU, confronted with a turnaround in energy prices which enabled it to generate gas-fired energy cheaper than the UPS energy it was obligated to buy, asked the FERC to use its powers under the Federal Power Act to modify the UPS contract so that GSU would be obligated to buy energy only when the cost did not exceed its own avoided cost:

GSU maintains that unforeseen changes in circumstances have transformed the UPSA and the Interchange Contract with Southern into unjust, unreasonable, unduly discriminatory or preferential contracts that are contrary to the public interest. GSU requests the Presiding Judge to find, pursuant to this Commission's authority under Section 206(a) of the Federal Power Act, that the UPSA and Schedule E of the Interchange Contract are no longer just, reasonable and in furtherance of the public interest. Should the Presiding Judge make this finding, GSU requests that the contracts be modified to provide that (1) GSU is required to purchase energy from Southern only when the price is at, or below, GSU's own avoided cost, and (2) Southern is allowed to recover capacity charges only to the extent that the total amount it is charging GSU for capacity and energy does not exceed GSU's avoided cost.

39 FERC ¶ 63,026, p. 65,139; A., p. 32. Emphasis provided.

The ability to generate at costs lower than the contract price is the same "economic incentive" which, according to Gulf Power, destroys Monsanto's premise. Yet, by asking that the contract be modified to make that result newly possible, GSU

acknowledged it had no such ability under the terms of the contract; and by asserting that the UPS contracts should not be modified as requested by GSU, Southern/Gulf Power agreed. Regardless of whether Southern/Gulf Power felt that the minimum obligation was vulnerable to "economic incentives" when it fashioned Schedule R, the positions of Southern/Gulf Power ~~and~~ of GSU in the FERC proceeding were that--absent a contractual modification--the changes in circumstances had no bearing on the buyer's energy obligations.<sup>7/</sup> Gulf Power's inconsistent position in this case reinforces the notion that Gulf Power would rather foist costs upon retail ratepayers than face the inconvenience of enforcing its contractual rights,<sup>8/</sup>

**D. Gulf Power has attempted to mask the impact of Schedule R.**

Monsanto witness Jeffrey Pollock demonstrated that the interplay between the concession of Schedule R--which enabled wholesale customers to avoid buying Plant Daniel energy--and Gulf Power's billing program, which assigned that unsold Plant Daniel energy to Gulf Power's retail customers--had the effect of severely tilting the allocations of expensive Plant Daniel energy to the territorial (95% of whom are retail) customers.

In its attempt to counter this point, Gulf Power presents a deceptively incomplete comparison. At page 30 of its brief, Gulf Power presents calculations (not offered by Gulf Power during the hearing) intended to show that the percentage of total Plant Daniel energy charged to retail ratepayers did not swing violently over selected time periods. Gulf Power conveniently ignores the fact **that** during those

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<sup>7/</sup> The FERC did not resolve GSU's claims based on state law and torts, which are still being litigated in federal court.

<sup>8/</sup> In any event, risk of ignored obligations ~~in no way~~ formed part of the basis for the Commission's determination that there should be no refund. As noted on pages 15-16, infra, the Commission's determination rested solely on "economic dispatch."

periods the capacity entitlement and the corresponding minimum energy obligation of the wholesale UPS customers increased dramatically.<sup>9/</sup> Without reference to the changing capacity entitlements or the corresponding UPS energy obligations, Gulf Power's comparisons of kilowatt hours are worse than meaningless; they are misleading.

Gulf Power's transgression can be illustrated by a simple analogy. Assume that Gulf Power operates a 100 acre farm, on which it can grow 1000 melons per acre. Assume that in year one it sells 50,000 melons to wholesale customers and 50,000 melons to retail customers; in year two it sells 45,000 melons to wholesale customers and 55,000 melons to retail customers. On the surface this limited information might imply no radical change in circumstances. However, if one adds to the information that in year one wholesale customers contracted to buy the output of 50 acres and in year two the wholesale contractual responsibility increased to 85 acres, the comparison changes markedly; it would mean that in year two retail customers were receiving 40,000 melons more than could even be grown from the acreage retained for their needs.

The illustration shows why the contractual capacity entitlement is an essential part of the measurement of Schedule R's impact. Also, the illustration fits the facts: Mr. Pollock demonstrated that at times Gulf Power charged retail customers for far more of the expensive Plant Daniel energy than could physically be generated for them with the share of Plant Daniel capacity not contractually dedicated to the UPS buyers. At the same time, UPS wholesale customers were gorging on cheaper Schedule R energy and making scant use of their contracted Plant Daniel capacity. Mr. Pollock conveyed these relationships by reference to the

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<sup>9/</sup> The concept of uncontracted Plant Daniel capacity remaining to serve retail customers was recognized by this Court in Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 801 (Fla. 1984).

territorial/ UPS capacity factors<sup>10/</sup> of Plant Daniel. Mr. Pollock "divided" the capacity between that dedicated contractually to UPS customers (which increased over time) and that which remained to serve territorial customers.

In 1983 territorial ratepayers received 57% of total Plant Daniel generation, and in 1986 the figure was almost unchanged at 56%. ~~In the~~ meantime, however, UPS customers had contracted to increase their capacity entitlements from 47% to 83% ,leaving far less Plant Daniel capacity (17%)dedicated to the territorial needs. Most significantly, as the UPS capacity entitlement increased, so did the UPS minimum energy purchase obligation.

Thus, in 1983 territorial customers received 57% of Plant Daniel energy and Plant Daniel's territorial capacity factor was 46%. In 1986, the percentage of overall generation retained for territorial customers had not changed much (56%), but in view of the small remaining amount of capacity not devoted to the UPS contracts the implicit retail capacity factor had risen to an impossible 141%. R-Vol. VI, Exh. 21, Schedules 1-3. Stated another way: as the UPS capacity entitlement increased, the minimum energy purchase requirement correspondingly increased; but following the advent of Schedule R, the energy was not purchased by UPS customers. It instead was "retained." The impact of Schedule R is seen in the way the amount of retained energy overwhelmed the relationship between remaining capacity and the amount of expensive energy received by retail customers.

**E. Gulf Power overlays speculation on top of speculation.**

Ultimately, Gulf Power resorts to the argument that, had the wholesale customers breached their obligations to make capacity payments, Gulf Power would have been "forced" to impose those costs on retail ratepayers. Gulf Power first

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<sup>10/</sup> The "capacity factor" relates the energy actually generated by a unit to the maximum of which it is capable.

speculatively assumes its inability to enforce its contracts. The premise that the cost of a breach would fall on retail customers incorporates another speculative assumption. The test of what can be reflected in retail rates is not what cannot be sold off-system. The test of what can be recovered from retail customers' rates is the cost of plant and expenses needed to reasonably, prudently and timely provide service to them.

Gulf Power has no basis on which to speculate about the outcome of possible proceedings involving this question. The point is most easily made by reference to the three most recent Gulf Power retail base rate cases (to which Gulf Power refers in its brief). In Docket No. 810136-EU, Gulf Power felt "forced" to ask the Commission for a retail increase of \$38.6 million; in Order Nos. 10557 and 10963 (cited by Gulf Power), the Commission awarded a total of \$6.9 million. In Docket No. 820150-EU, Gulf Power was "compelled" by circumstances to seek a retail increase of \$36.9 million; in Order No. 11498 (cited by Gulf Power), the Commission awarded \$3.4 million. In Docket No. 840086-EU, Gulf Power was "forced" to return with a request for \$18.7 million; in Order No. 14030 (cited by Gulf Power), the Commission authorized an increase of only \$4.6 million.<sup>11/</sup>

This statement in Gulf Power's brief is revealing: "GSU's actions prove that breach of the UPS contracts was an option to customers." Gulf Power's Answer Brief, p. 19. First of all, GSU--which is mired in a unique set of nuclear-related financial \does--defaulted after Schedule R became effective. Secondly, a breach of

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<sup>11/</sup> Complicating any Gulf Power request to impose these costs on retail ratepayers would have been its own acknowledgement that the capacity will not be needed by retail customers until the late 1980s or 1990s (Gulf Power's Answer Brief, p. 19) and the fact that, while UPS capacity payments covered 85% of Plant Daniel, 50% of the plant was already embedded in base rates. To the extent Gulf Power's rate of return had been affected by other factors and expenses since 50% of Plant Daniel was reflected in base rates, those factors would also have been the subject of a prudence and reasonableness review.

a legal obligation--the validity of which is implicitly recognized again in Gulf Power's statement, quoted above--is not an "option" that leaves the other contracting party without recourse. (As Gulf Power acknowledges, it has sued GSU over the breach.) What Gulf Power's statement really says again is that Gulf Power was willing to saddle retail ratepayers with the cost of enhancing its relationship with its wholesale customers, so that it would have less risk of facing the necessity of enforcing its contractual rights.

**F. The Commission concedes that Schedule R impacted retail customers' fuel costs.**

At page 9 of its brief, the Commission states: "The record did not conclusively establish how much of the increased use of Plant Daniel power to serve the retail load was directly attributable to Schedule R." The Commission observed that ~~at times~~ Plant Daniel may be the most economical for territorial customers (which is consistent with the carefully hedged testimony of Gulf Power's witness); and added that the Commission "had no evidence before it showing what the "economic dispatch" would have been had the UPS customers not been offered the option of Schedule R energy from 1985-1987," Commission's Answer Brief, p. 11. Thus, in its brief the Commission appears to say--not that the entire burden of fuel costs imposed by Schedule R was justified by "economic dispatch"--but that the amount of Plant Daniel generation attributable to the concession (as opposed to the amount which was economical) was not quantified with absolute, hour-by-hour precision.

The Commission's argument is a far cry from the "blanket justification" which Gulf Power attempted to accomplish with its contrived "economic dispatch" rationale. The Commission overlooks the fact that the principal impact of the minimum obligation--unmodified by Schedule R--would have been a requirement that the UPS customers schedule additional deliveries of Plant Daniel energy over time. Under the contract they would have had discretion over the timing, but not the

amount. The recognition of their responsibility For additional quantities of Plant Daniel energy for billing purposes, which Mr. Pollock captured, is the pertinent and material consideration in fashioning an adjustment.

The Commission also misses another important aspect of Mr. Pollock's analysis. Mr. Pollock did not recommend that all Plant Daniel energy be removed from the fuel clause; he testified only that the relationships between UPS and territorial usage which existed prior to Schedule R--which he precisely measured--should be restored for the purpose of calculating an adjustment to fuel expense. To the extent Plant Daniel energy is at times the most economical for territorial customers, that was true before Schedule R as well as afterwards. Mr. Pollock's restoration of the original relationship would incorporate that consideration.


Mr. Pollock's analysis of the relationships and usage was based on actual data obtained from Gulf Power; with the use of actual information, reasonable proxies and known reference points, he gave the Commission the ratemaking tools it needed to reasonably quantify and remove the wholesale subsidy from the retail fuel clause. Jacksonville Suburban Utilities Corporation v. Hawkins, 380 So.2d 425 (Fla. 1980).

## CONCLUSION

Section 120.68(10) directs the Court to set aside agency action (or remand the case to the agency) if the agency action depends on a finding of fact not supported by competent substantial evidence in the record. Clearly, the Commission's "economic dispatch" finding is not supported by competent substantial evidence of record and must be set aside. The Court should conclude that, by flowing through the retail fuel cost recovery clause the cost of a concession to UPS wholesale customers, Gulf Power has required retail customers to bear the cost of an impermissible cross-jurisdictional subsidy, causing retail fuel expense to be unreasonably and inappropriately high.

Further, the record contains ample evidence to enable the Commission to determine the appropriate refund amount. See Monsanto's Initial Brief, pp. 46-49. Therefore, this Court should direct the Commission to determine the overcharge of fuel and buy-out costs based on the evidence of record and order Gulf Power to return those monies to the customers who bore the cost of the concession during 1985-1987.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant, Monsanto Company, has been furnished either by U.S. Mail or by hand delivery\* to the following parties of records, this 10th day of July, 1989.

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