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BEFORE THE ARIZONA CORPORATION COMMISSION

1  
2 WILLIAM MUNDELL  
3 Chairman  
4 JIM IRVIN  
5 Commissioner  
6 MARC SPITZER  
7 Commissioner

Arizona Corporation Commission AZ CORP COMMISSION  
DOCKETED DOCUMENT CONTROL

SEP 30 2002

DOCKETED BY *CM*

8 IN THE MATTER OF THE APPLICATION OF  
9 ARIZONA PUBLIC SERVICE COMPANY FOR AN  
10 ORDER OR ORDERS AUTHORIZING IT TO ISSUE,  
11 INCUR, OR ASSUME EVIDENCES OF LONG-  
12 TERM INDEBTEDNESS; TO ACQUIRE A  
13 FINANCIAL INTEREST OR INTERESTS IN AN  
14 AN AFFILIATE OR AFFILIATES; TO LEND  
15 MONEY TO AN AFFILIATE OR AFFILIATES;  
16 AND TO GUARANTEE THE OBLIGATIONS OF AN  
17 AFFILIATE OR AFFILIATES

DOCKET NO. E-01345A-02-0707

13 **RESPONSE OF ARIZONA PUBLIC SERVICE COMPANY TO MOTIONS**  
14 **TO INTERVENE BY PANDA GILA RIVER L.P., ET AL.**

15 Arizona Public Service Company ("APS" or "Company") hereby opposes the  
16 motions to intervene in the above-captioned matter by Panda Gila River L.P.  
17 ("Panda/TECO") and other similarly-situated merchant independent power plant owners  
18 ("Track B Merchant Intervenors").<sup>1</sup> APS further opposes the oral motion to intervene  
19 made by the Arizona Competitive Power Alliance ("Alliance") as well as the written  
20 motions to intervene by Tucson Electric Power Company ("TEP") and the Arizona Utility  
21 Investors Association ("Association").

22  
23 <sup>1</sup> As of 5:00 p.m. on September 27<sup>th</sup>, the date set by the Chief Administrative Law Judge ("ALJ")  
24 for intervention by the Track B Merchant Intervenors, APS had received additional motions to intervene  
25 from Harquahala Generating Company, L.L.C. ("PG&E") and Reliant Resources, Inc. ("Reliant"). It is the  
26 Company's understanding that additional motions to intervene were received today from Sempra Energy  
resources, PPL, and Southwestern Power, but counsel has not had the chance to review them and therefore  
would reserve the right to supplement this pleading either in writing or at the Procedural Conference on  
October 4<sup>th</sup>. For purposes of its Response, APS will refer to all such proposed intervenors as the Track B  
Merchant Intervenors.



1                   **NEITHER PANDA/TECO NOR THE OTHER TRACK B MERCHANT**  
2                   **INTERVENORS ARE DIRECTLY AND SUBSTANTIALLY**  
3                   **AFFECTED BY THE COMPANY'S APPLICATION**

4                   Having an opinion or even some expertise on a matter does not constitute a direct  
5                   and substantial interest. (PG&E Motion at 2.) Being incidentally or indirectly affected,  
6                   even if substantially, is not enough. Neither is being directly affected, but in a  
7                   comparatively insubstantial manner. Rather a proposed intervenor must meet both prongs  
8                   of Rule 105's "direct and substantial interest" test to justify their intervention in this  
9                   proceeding.

10                  Panda/TECO and the other Track B Merchant Intervenors clearly are not affected,  
11                  directly or indirectly, substantially or in-substantially, by the mere act of APS borrowing  
12                  money or providing a corporate guarantee. So in the most obvious sense, they have no  
13                  interest, direct or otherwise, in this proceeding. Rather, it is in the subsequent use of  
14                  proceeds or in the recipient of the Company's corporate guarantee that they claim such  
15                  interest. But such claims are both insufficient to support intervention and do not pass  
16                  either factual or legal scrutiny.

17                  Panda/TECO, et al., first try to support their assumed right to hamstring the  
18                  Company's affiliates at this and every other turn by claiming they have an interest in  
19                  making sure that this proceeding does not adversely "affect the amount, timing, and  
20                  manner of the competitive procurement process" [in Track B of the Generic Docket] as  
21                  directed in Decision No. 65154. (Panda/TECO Motion to Intervene at 2). Yet they can  
22                  point to nothing in the APS Application that seeks or could have this adverse affect.  
23                  Indeed, the Commission's directive in Decision No. 65154 was largely an admonition to  
24                  the parties as to their conduct and positions in Track B and not an invitation to  
25                  Panda/TECO and the other Track B Merchant Intervenors to hold this proceeding hostage  
26                  in the hope of wringing yet additional and unrelated Track B concessions out of APS.

1 Panda/TECO also attempts to assume the unfamiliar role of consumer advocate by  
2 offering its speculation as to “what extent APS’ ratepayers may have to shoulder the  
3 financial burden of APS’ unregulated affiliates” and the supposed “effect” of this same  
4 hypothetical and unidentified “burden” on “Arizona’s wholesale market” (what “effect”  
5 Panda/TECO might be alluding to is never described or even identified by Panda/TECO  
6 in its Motion). (Panda/TECO Motion at 2; *see also* Reliant Motion at 2 and PG&E Motion  
7 at 2.) In fact, the Commission goes to great lengths to disavow any rate-making effect  
8 from a financing, going so far as to routinely include a provision that approval of the  
9 financing does not imply any specific rate-making treatment of either the financing itself  
10 or for the use of proceeds therefrom.<sup>4</sup> And as to vague and unspecified concerns about  
11 the Company’s internal finances affecting the viability of the entire “Arizona wholesale  
12 market,” which presumably is greater than just APS, Track B is the appropriate place to  
13 have those concerns vetted rather than in this proceeding.

14 During the Procedural Conference on September 24, 2002, Panda/TECO and some  
15 of the Track B Merchant Intervenors raised the new issue of whether the APS financing  
16 application could result in an “unfair competitive advantage” to the Company’s affiliates.  
17 This theme appears again in the PG&E and Reliant Motions. Although it may seem  
18 somehow “unfair” to Panda/TECO, et al., that these APS affiliates cannot be  
19 disadvantaged in every respect possible, in fact the intended reduction of the Bridge  
20 Financing used to construct Redhawk, West Phoenix and Saguaro will serve only to  
21 restore a small fraction of the wholesale competitiveness the Company’s affiliates enjoyed  
22 prior to the issuance of Decision No. 65154 (September 10, 2002). It was that decision  
23 that removed the ability of the Company’s affiliates to finance independently as

24 \_\_\_\_\_  
25 <sup>4</sup> APS will be fully compensated by its affiliates under either the loan or guarantee scenario.  
26 (Application at 12, ¶ 16 and 13, ¶ 19.) Thus, the Company’s affiliates will not impose a burden on APS,  
and therefore the issue of whether such non-existent burden will somehow be passed on by the  
Commission to APS retail customers at some future time is both hypothetical as well as premature.

1 investment-grade entities with some 6000 MW of fuel-diverse and operationally diverse  
2 generation rather than a handful of gas-fired units. The APS Application likewise furthers  
3 the Commission's stated objective in Decision No. 65154 of taking "action that is fair to  
4 all parties" (Decision No. 65154 at 22). To request the ability to provide what will at best  
5 be partial restitution of what had been previously promised by the Commission is not  
6 APS' idea of an "advantage." And receiving only part of what was originally promised is  
7 "unfair" only to APS and its affiliates—not the Track B Merchant Intervenors.

8 In one sense, Panda/TECO and the other Track B Merchant Intervenors do have a  
9 common commercial interest in having one fewer competitor. Failing that, they also have  
10 an interest in that one competitor being as non-competitive as possible. And during both  
11 the Track A and Track B proceedings, they have done everything within their power to  
12 eliminate or limit the ability of the Company's generation and power marketing affiliates  
13 to compete. But is that the sort of interest, one that is inimical to the interests of APS  
14 customers, which the Commission is obliged to protect? And does a generalized and  
15 indirect interest in the competitive welfare (or lack thereof) of the Company's affiliates  
16 make these entities "directly and substantially affected" by this APS proceeding? APS  
17 thinks not on both counts. Other public utility commissions have agreed.<sup>5</sup>

18 In *Re Ohio Power Company*, 148 PUR 4<sup>th</sup> 447 (1993), the Ohio Public Utilities  
19 Commission ("OPUC") denied intervention in a financing application by Ohio Power  
20 Company ("Ohio Power") to a group of large Ohio Power customers and the Sierra Club.  
21 The former was concerned not with the financing itself but the potential impact of such  
22 financing on Ohio Power's rates. The latter was likewise not affected by the financing *per*  
23 *se* but (like the Track B Merchant Intervenors) claimed an interest in Ohio Power's  
24 proposed use of proceeds—in this case the financing of scrubbers that would permit

25 \_\_\_\_\_  
26 <sup>5</sup> Copies of these administrative decisions are attached to the original written APS Response for the  
convenience of the ALJ and the Commission.

1 continued operation of the 2600 MW Gavin coal-fired power plant. The OPUC did so  
2 despite Ohio Power's concession that the financing would be a factor in that utility's next  
3 rate case (contrary to the instant situation) and the obvious environmental impacts of the  
4 Gavin plant. It noted the ability to raise these issues in future proceedings and in other  
5 forums and stated that "absent a compelling public interest to the contrary, protracted  
6 proceedings on a financing application are in nobody's interest." *Id.* at ¶ 17.

7 Similarly, the intervention by competitors of GTE Northwest incorporated ("GTE")  
8 in a proceeding requesting accelerated depreciation of GTE assets was denied by the  
9 Washington Utilities and Transportation Commission ("WUTC"). *In the Matter of the*  
10 *Petition of GTE Northwest Incorporated for Depreciation Accounting Changes, 1997*  
11 *WUTC LEXIS 25 (1997)*. These competitors had alleged that permitting GTE accelerated  
12 cost recovery of its assets would both give GTE a competitive advantage over them and  
13 increase the cost of wholesale telecommunications services purchased by them from GTE.  
14 The WUTC not only found such interests not to be direct or substantial but specifically  
15 expressed its concern over "the significant likelihood of a disproportionate increase in the  
16 length and complexity of the hearing and the volume of evidence" that would be  
17 occasioned by the utility's competitors' participation in such a proceeding. It further noted  
18 that the WTUC staff and that state's consumer advocate were fully capable of "assuring  
19 that the proceedings are lawfully conducted and effectively prosecuted."

20 Finally, from Florida comes the case of *In re: Petition of Monsanto Company for a*  
21 *Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, 1986*  
22 *Fla. PUC. LEXIS 351 (1986)*. The Florida Public Service Commission ("FPSC") denied  
23 intervention to Gulf Power Company ("Gulf Power") even though Gulf Power was the  
24 utility serving Monsanto. Although Gulf Power was not directly involved in the proposed  
25 lease financing of Monsanto's cogeneration equipment, Gulf Power was very much  
26 concerned about the potential loss of Monsanto as a customer should Monsanto's Petition

1 be granted. In its order denying intervention, the FPSC distinguished between Gulf  
2 Power's interest in the potential financial consequences of the lease transaction to Gulf  
3 Power and Gulf Power's lack of a legally protected interest in the lease transaction itself.  
4 Thus the FPSC held that "economic damages alone [do] not constitute 'substantial  
5 interest'."

6 **PANDA/TECO AND THE TRACK B MERCHANT INTERVENORS**  
7 **WILL DO LITTLE BUT BROADEN THE ISSUES HERETOFORE**  
8 **PRESENTED IN THIS PROCEEDING**

9 APS has already described how Panda/TECO and the other Track B Merchant  
10 Intervenor plan to drag unrelated Track B and retail ratemaking issues in this case.  
11 Indeed, it is these proposed intervenors that have now led to the defensive intervention  
12 requests by TEP and the Association, since one cannot know what issues the Track B  
13 Merchant Intervenor will come up with next. And yet if history is to be any guide, this is  
14 just the beginning of yet another war of attrition against the Company—one filled with  
15 countless new "issues" that will require delays in the resolution of this docket and one-  
16 sided discovery fishing expeditions into the finances and operations of APS and its  
17 affiliates. Such not only falls afoul of any reasonable interpretation of Rule 105, but it  
18 ignores what the Company believes was the clear direction from the bench on August 27<sup>th</sup>  
19 that this proceeding be treated as a financing application, plain and simple. The  
20 Commission need not and should not permit this to happen. Thus even if intervention is  
21 allowed the Track B Merchant Intervenor in contravention to Rule 105, the ALJ should  
22 expressly limit the issues such parties can raise to those potentially affecting the Company  
23 and its customers.

24 Any legitimate issue that these various Track B Merchant Intervenor might pursue  
25 will more than adequately be addressed by Staff and RUCO, as well as the Commission  
26 itself. In the 1996 amendment to Rule 24 (a), Ariz.R.Civ.P., even intervention as of right  
can be denied if the proposed intervenor's interests are adequately protected by existing

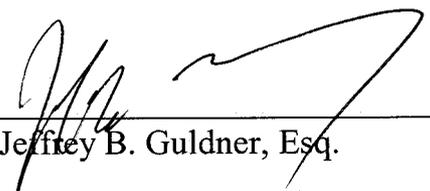
1 participants in the proceeding. Although Rule 105 itself has not been amended since 1975,  
2 it should be presumed that Commission rules of procedure are intended to be interpreted  
3 in a manner consistent with their civil rule counterparts. See A.A.C. R14-3-101(A).

4 **CONCLUSION**

5 The temptation to use one proceeding as leverage in another has existed since  
6 people first invented the concept of litigation. The higher the stakes, the greater the  
7 temptation. But understanding the actor's motivation and countenancing the act are quite  
8 different matters, and APS requests that the ALJ deny the interventions of Panda/TECO,  
9 the Track B Merchant Intervenors and the Alliance.<sup>6</sup>

10 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of September 2002.

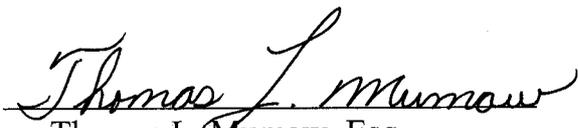
11 SNELL & WILMER

12  
13 By: 

14 Jeffrey B. Guldner, Esq.

15 and

16 PINNACLE WEST CAPITAL  
17 CORPORATION LAW DEPARTMENT

18  
19 By: 

20 Thomas L. Mumaw, Esq.

21 Attorneys for Arizona Public Service  
22 Company

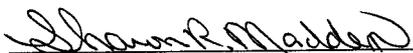
23  
24  
25 <sup>6</sup> The Company also asks that the requested intervention by TEP and the Association, although no  
26 doubt well-intentioned and likely benign, be denied as being neither authorized by statute nor meeting the  
requirements of Rule 105.

1 The original and 10 copies of the foregoing were  
2 filed this 30th day of September, 2002 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007.

7 Copies of the foregoing mailed, faxed or  
8 transmitted electronically this 30th  
9 day of September, 2002 to:

10 All parties of record.

11   
12 Sharon Madden

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In the Matter of The Application of OHIO POWER COMPANY,  
Pertaining to The Terms of a Lease Agreement With an  
Unaffiliated Owner-Lessor For Pollution Control Equipment  
Being Installed at The Gavin Generating Plant in The State  
of Ohio

Case No. 93-793-EL-AIS

PUBLIC UTILITIES COMMISSION OF OHIO

1993 Ohio PUC LEXIS 1073; 148 P.U.R.4th 447

December 9, 1993

[\*1]

Craig A. Glazer, Chairman; J. Michael Biddison; Jolynn Barry Butler; Richard M. Fanelly; David W. Johnson

OPINION: FINDING AND ORDER

The Commission finds:

(1) Applicant, Ohio Power Company, is an Ohio corporation and a public utility as defined in Section 4905.02, Revised Code, and is subject to the jurisdiction of this Commission.

(2) This Application complies with the provisions of Sections 4905.40 and 4905.41, Revised Code.

(3) By its Order dated November 25, 1992, in Case No. 92-790-EL-ECP, the Commission, pursuant to a stipulation entered into by Applicant, the Commission Staff, and the Office of the Consumers Counsel ("OCC"), approved Applicant's environmental compliance plan (the "Plan"), after determining that the Plan was reasonably designed to meet the acid rain requirements, and constituted a reasonable and least cost strategy. The Plan, among other things, provides for the construction and leasing of the flue gas desulfurization system (the "Scrubbers") at Applicant's Gavin Plant Power Plant Facility (the "Gavin Plant").

(4) By its Order in Applicant's fuel cases, issued the same day, in Case Nos. 92-01-EL-EFC and 92-101-EL-EFC, the Commission also adopted another stipulation [\*2] entered into by Applicant, the Commission Staff, and OCC. The stipulation, among other things, placed a cap on the recoverable costs for the construction of the Scrubbers at the Gavin Plant of \$ 815 million and provided for the Scrubbers to be financed by a non-affiliated third party, under a leasing arrangement.

(5) Applicant is now requesting Commission approval of the terms of a lease agreement (the "Lease") that Applicant entered into with JMG Funding, Limited Partnership (the "Lessor"), a non-affiliated, Delaware Partnership, pursuant to which the Lessor will construct the Scrubbers at Applicant's Gavin Plant and lease them to Applicant, as described in the Application and Exhibits.

(6) Under the terms of the Lease, Applicant will serve at cost as Lessor's construction project manager for the construction of the Scrubbers. The Lessor in turn has agreed to lease the Scrubbers to Applicant after the construction is completed and the Scrubbers become operational. The Lessor will be a passive owner of the Scrubbers.

(7) Applicant also states that the Commission approval of the terms of the Lease will enable the Lessor to avail itself of the exemption from regulation as an electric [\*3] utility company provided for by Section 250.7(d) ("Rule 7(d)"), adopted by the Securities and Exchange Commission, pursuant to the Public Utility Holding Company Act of 1935, as described in the Application and Exhibits.

(8) The Lease has a non-cancelable initial term of 15 years, with an option to renew/extend the lease term for an additional 19 years.

(9) Under the terms of the Lease, the rental payments will commence only after the construction is completed and the Scrubbers become operational. The quarterly rental payments will be based on, among other factors, the amortization of the final cost of the Scrubbers and the cost of the Lessor's debt and equity. Applicant's rental obligation will be pledged by Lessor as security for debt portion of its financing.

(10) Applicant states that the precise costs of its rental obligation under the Lease cannot be fixed at this time because Lessor's debt financing has not yet been completed. In no event will Applicant's recovery in rates of such rental obligations exceed the terms of the Stipulation and Recommendation, dated August 13, 1992 as approved by the Commission Order dated November 25, 1992 in Case No. 92-01-EL-EFC.

(11) The [\*4] Lease provides for a purchase option and a termination option, which may be exercised by Applicant by giving advance notice to the Lessor as described in the Application and Exhibits.

(12) The Staff reviewed the terms of the Lease transaction. To the extent Applicant is seeking Commission approval of the terms of the Lease, based on certain parameters at this time, the Staff recommends that Applicant should be required to report to the Commission, before the commencement of the first quarterly rental payment, the full particulars including, but not limited to, the total actual cost of the Scrubbers and the effective interest rates used to calculate the quarterly rental payments. The Staff also recommends that Applicant should be required to obtain the Commission approval, at the appropriate time, prior to exercising the option to purchase the Scrubbers and/or terminate the Lease. In light of the proposed transaction, the Commission is of the opinion that the Staff recommendations are appropriate and should be adopted.

(13) On May 20, 1993, the Industrial Energy Consumers ("IEC") filed a motion to intervene in this case. IEC states that the approval sought by Applicant in the [\*5] proposed transaction defines the obligation of Applicant, including the responsibility for payment of rent which may become a test year operating expense in the future. IEC also states that it is concerned that Applicant may utilize the Commission's Order in this case as approval for rate making purposes.

(14) On June 21, 1993, John Jacob Esquire, a private citizen and a representative of Sierra Club ("Sierra Club"), also filed a motion to intervene

in this case. Sierra Club states that the proposed transaction is a potential threat to the environment depending upon the energy options recommended. Sierra Club also states that the purpose of this intervention is to demonstrate how least cost planning can be achieved while at the same time assuring the minimum possible environmental impact. Sierra Club further states that it is concerned about the clean air and that the approval of the Lease will have rate making, environmental, and socioeconomic impacts which may adversely affect the Sierra Club.

15) On June 4 and July 2, 1993, Applicant filed Memoranda Contra the Motions to Intervene, requesting the Commission to deny IEC's and Sierra Club's motions to intervene, respectively. [\*6] Applicant states that although the Lease will have ratemaking consequences, contrary to IEC's assumptions, this proceeding will not consider such consequences. Applicant states that IEC does not have a direct, real or substantial interest in this proceeding. Therefore, Applicant requests that IEC's motion should be denied.

Applicant states that it is the Scrubber decision itself that has environmental and socioeconomic consequences, and not the Lease as Sierra Club has claimed. Applicant also states that to the extent Sierra Club had ample opportunity to litigate the Scrubber decision in Case No. 92-01-EL-EFC, it should not be allowed to relitigate those issues in this proceeding. Therefore, Applicant requests that Sierra Club's motion should also be denied.

(16) With respect to IEC's motion, the Commission is of the opinion that the approval of the terms of the Lease will not be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation of the Applicant. Additionally, the lease rental payment will commence only after the construction is completed and the Scrubbers become operational, [\*7] and will not become part of Applicant's rate base at this time. Therefore, the Commission is of the opinion that IEC's motion to intervene should be denied.

(17) With respect to Sierra Club's motion, the Commission is of the opinion that by executing the Lease, Applicant will be able to comply with the acid rain requirements by reducing the sulfur dioxide emissions. Furthermore, the reasonableness of the lease rental payments can be litigated in a subsequent rate case or other proceeding. Thus, absent a compelling public interest to the contrary, protracted proceedings on a financing application are in nobody's interest. Therefore, the Commission is of the opinion that Sierra Club's motion to intervene should be denied.

(18) The Lease transaction does not appear to be unjust or unreasonable, and the other terms thereof and the probable cost to Applicant, which are to be no less favorable than as set forth in the Application and Exhibits, do not appear unjust or unreasonable.

(19) The effect on Applicant's revenue requirements resulting from the terms of the Lease can be determined only in rate proceedings in which all factors affecting rates are taken into account according [\*8] to law.

(20) Based on information contained in the Application, the Exhibits thereto, and other documentary information to which the Commission has access, the purpose to which the terms of the Lease transaction is to be consummated is reasonably required by the Applicant to meet its present and prospective lawful

obligations to provide utility service and the Commission is satisfied that the approval of the terms of the Lease should be granted.

It is, therefore,

ORDERED, That the terms of the Lease Agreement between Applicant and JMG Funding, Limited Partnership, is hereby approved, subject to the terms of this Order, pursuant to which JMG Funding, Limited Partnership, will construct the Flue Gas Desulfurization System at Applicant's Gavin Power Plant Facility and lease it to Applicant, all pursuant to the terms and conditions as set forth in the Application and Exhibits. It is, further,

ORDERED, That the motions to intervene in this proceeding by IEC and Sierra Club are denied. It is, further,

ORDERED, That Applicant shall report to the Commission full particulars including, but not limited to, the actual total cost of the Scrubbers and effective interest rates used to calculate [\*9] quarterly rental payments, before the commencement of the first quarterly rental payment. It is, further,

ORDERED, That Applicant shall obtain Commission approval, at the appropriate time (1) prior to submitting this Lease for approval to any regulatory entity other than for limited purpose of obtaining the Lessor's exemption from the regulation by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, and (2) prior to exercising the option to purchase the Scrubbers and/or terminate the Lease. It is, further,

ORDERED, That nothing in this Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation of the Applicant. It is, further,

ORDERED, That nothing in this Order shall be construed to imply any guaranty or obligation as to the Lease, or the quarterly rental payments on the part of the State of Ohio. It is, further,

ORDERED, That nothing in this Order shall be construed to imply any guaranty or obligation by the Commission to assure completion of any specific construction project of the Applicant. It is, further,

ORDERED, That [\*10] a copy of this Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

4901:1-16 [O> -13 <O] 4901:1-16-14 Payment of forfeitures or compromise forfeitures and payments made pursuant to stipulation.

[Editor's Note: Text within these symbols [O> <O] is overstruck in the source.]

(A) All forfeitures, compromise forfeitures, and other payments made pursuant to stipulation, shall be paid by certified check or money order made payable to "Treasurer, State of Ohio," and shall be mailed or delivered to:

"Attorney General of Ohio, Public Utilities Section

180 East Broad Street

THE BORDEN BUILDING, SEVENTH FLOOR

[O> Seventh Floor <O]

Columbus, Ohio 43266-0573"

(B) The attorney general of Ohio OR HIS/HER DESIGNEE shall deposit such payments in the state treasury to the credit of the general revenue fund.

(C) No operator may recover any forfeiture, compromise forfeiture or other payment made pursuant to stipulation, in any pending or subsequent proceeding before the commission.

Case No. 93-1813-GA-ORD

Eff.

Date

Promulgated under R. C. Sec. 111.15

Authorized by R.C. Sec. 4905.91

Rule amplifies R.C. Sec. 4905.95

Prior effective date: 2/1/91

In the Matter of the Petition of GTE NORTHWEST INCORPORATED  
For Depreciation Accounting Changes

DOCKET NO. UT-961632

Washington Utilities and Transportation Commission

1997 Wash. UTC LEXIS 25

March 28, 1997

[\*1] SHARON L. NELSON, Chairman; RICHARD HEMSTAD, Commissioner; WILLIAM R. GILLIS, Commissioner

OPINION: THIRD SUPPLEMENTAL ORDER ACCEPTING REVIEW OF INTERLOCUTORY ORDER; DENYING REQUEST TO REVERSE INTERLOCUTORY RULING; DENYING PETITIONS TO INTERVENE

**PARTIES AND PETITIONERS TO INTERVENE:** The parties are represented as follows: Timothy Williamson, attorney, represents GTE NORTHWEST INCORPORATED (GTE or Company). Sally G. Johnston, Assistant Attorney General, represents Staff of the Washington Utilities and Transportation Commission (Commission Staff). Simon ffitich, Assistant Attorney General, Office of the Attorney General, Public Counsel Section, appears as Public Counsel. Arthur A. Butler, attorney, represents Telecommunications Ratepayers for Cost-based and Equitable Rates (TRACER).

Petitioners to intervene are represented as follows: Clyde H. MacIver, attorney, represents MCI Telecommunications Corporation (MCI) and MCIMetro Access Transmission Services Inc. (MCIMetro). Kraig L. Baker, attorney, represents AT&T Communications of the Pacific Northwest Inc. (AT&T).

**MEMORANDUM**

By petition filed December 23, 1997, GTE Northwest Incorporated (GTE) seeks an order pursuant to RCW 80.04.350 [\*2] authorizing changes and revisions to its depreciation rates for certain accounts.

A prehearing conference was held in this matter on February 27, 1997, before Administrative Law Judge Terrence Stapleton, at Olympia, Washington, upon due and proper notice. An Order on Prehearing Conference was entered on March 5, 1997, which, among other decisions, denied the written petition to intervene of AT&T Communications of the Pacific Northwest Inc. (AT&T) and the oral motions to intervene of MCI Telecommunications Corporation (MCI) and MCIMetro Access Transmission Services Inc. (MCIMetro).

On March 14, 1997, MCI, MCIMetro, and AT&T jointly filed a petition for review and reversal of the Order on Prehearing Conference insofar as it denies the petition and motions to intervene of those parties. Commission Staff, Public Counsel, and intervenor Telecommunications Ratepayers for Cost-based and Equitable Rates (TRACER) filed responses in support of the petition for review and reversal. GTE filed an answer to the petition for review, in support of the decision to deny intervention.

The ALJ's Decision and Positions of Petitioners to Intervene and Parties

The ALJ's Decision

The Order on Prehearing [\*3] Conference explains the decision to deny the petitions to intervene of MCI, MCIMetro, and AT&T as follows, at pages 3-4:

Intervention is governed by RCW 34.05.443 and WAC 480-09-430. Under the statute, the presiding officer may grant a petition to intervene only upon a determination that petitioner qualifies as an intervenor and that intervention is "in the interests of justice" and will not impair the orderly and prompt conduct of the proceedings. Under the rule, a person petitioning to intervene must show that it has a substantial interest in the subject matter of the hearing or that its participation is in the public interest.

MCI and AT&T note they are competitors of GTE for both interexchange toll services and intraexchange switched local service. Both are customers of GTE in the services they must purchase from GTE to provide the services they offer their customers.

I cannot find that their participation is in the interests of justice or that it will not impair the orderly and prompt conduct of the proceedings. Their status as competitors does not entitle them to participate; their participation raises a significant probability of impediment to the proceeding; and, their [\*4] interests as customers of the Company's services will be adequately represented by the participation of TRACER.

The Commission previously has determined that unregulated potential competitors of a regulated company do not have a substantial interest in the outcome of its proceedings. *Cole v. WUTC*, 79 Wn.2d 302 (1971). While that case arose before the era of regulated competition in which we now operate, it is sufficiently analogous to provide sound guidance. To the extent both are competitors of GTE, their interest in keeping prices as low as possible for the services they take from GTE does not constitute a "substantial interest" in the determination of depreciation rates to be made by the Commission under RCW 80.04.350. MCI and AT&T determine their own rates and charges under pertinent law. They do not have the right to participate freely in the determination of their competitors' rates. Their interest as members of the public and as competitors in assuring the proceedings are lawfully conducted and effectively prosecuted is represented by Commission Staff and Public Counsel.

Neither MCI nor AT&T maintains its books and accounts pursuant to the uniform system of accounts prescribed [\*5] by the Federal Communications Commission, as does GTE. Neither accounts for its revenue on a state specific basis, as does GTE. Their participation in this proceeding has the significant likelihood of a disproportionate increase in the length and complexity of the hearing and the volume of evidence that must be considered. It is likely to impair the orderly and prompt conduct of the proceedings.

MCI and AT&T both assert their interest as customers of the Company in the prices they pay for services, which could change as the result of the proceeding. That is a real and practical interest. That interest however can be adequately represented by the participation of TRACER, and it does not outweigh the negative aspects of their intervention identified above. The oral motion of MCI and the petition of AT&T to intervene in the proceeding is denied.

TRACER represents the interests of large customers not otherwise represented by Public Counsel, or any other party. It is suited uniquely to represent the perspectives and interests of all large customers, including MCI and AT&T.

TRACER maintains that the Company's largest customers have a direct interest in the outcome of this proceeding given [\*6] the role depreciation rates play in determining the Company's cost of service. TRACER's representation of large customers mirrors Public Counsel's representation of small business and residential customers, and on that basis has a substantial interest in this proceeding. TRACER states that its participation will not broaden the issues in this proceeding. The oral motion to intervene of TRACER is granted.

#### Position of Petitioners to Intervene

MCI, MCIMetro, and AT&T contend, at page 2 of their petition for review of the Order on Prehearing Conference:

The Administrative Law Judge incorrectly concluded that the participation of MCI, MCIMetro, and AT&T (1) is not in the interests of justice and (2) will impair the orderly and prompt conduct of the hearings (Order, p. 3). The Administrative Law Judge also concluded that the status of MCI, MCIMetro, and AT&T as competitors does not entitle them to participate and their participation would raise a significant probability of impediment to the proceeding (Order p. 3). The Administrative Law Judge further found that the interests of MCI and MCIMetro as customers of GTE will be adequately represented by the participation of TRACER (Order, [\*7] p. 3). It is respectfully submitted that these findings are inconsistent with the facts and the law, and would cause substantial and irreparable harm to MCI, MCIMetro, and AT&T.

MCI, MCIMetro, and AT&T argue that they have substantial interests in the methodology to be adopted in establishing depreciation rates and the project life of equipment and capital expenditures contained in certain plant and equipment accounts reflected on the books of GTE, as competitors of GTE who are dependent upon GTE for various services. MCI and AT&T currently compete with GTE in the provision of toll and other interexchange services. AT&T and MCIMetro are or soon will compete with GTE in the local exchange market. MCIMetro and AT&T are negotiating and arbitrating contracts with GTE to establish the rates, terms and conditions for interconnection of their networks for the termination of one another's local traffic, for unbundled network elements, for transport and termination, and for resale of network elements pursuant to the Telecommunications Act of 1996. GTE's depreciation rates affect GTE's cost of service and therefore have a substantial impact on the rates it charges its competitors for services, [\*8] including interconnection and related services provided to MCI, MCIMetro, and AT&T. They argue that reasonable rates, including proper depreciation lives, are critically important to MCI's, MCIMetro's, and AT&T's ability to provide high quality services to Washington consumers at competitive prices. They note that they are or have been participants in several Commission dockets in which GTE's and/or U S WEST's rates for interconnection and related services are or were at issue, and were parties in U S WEST's prior depreciation proceeding. They note that they are participants in the Commission's current investigation of the cost methodology for interconnection and related services in consolidated Dockets UT-960369, et al., and argue that the depreciation rates established in the present docket will provide significant input in whatever methodology the Commission adopts in UT-960369. They argue that they therefore have a direct interest in the depreciation rates at issue in this docket, and that this proceeding presents the only opportunity for them to have input on these important depreciation issues affecting GTE's costs.

MCI, MCIMetro, and AT&T argue that the Administrative law judge [\*9] incorrectly concluded that their interests as customers of GTE can be adequately represented by the participation of TRACER. They argue:

MCI, MCIMetro, and AT&T are not simply customers of GTE as are TRACER members. MCI, MCIMetro, and AT&T are also dependent competitors of GTE. Not only is TRACER not prepared to represent the interests of dependent competitors of GTE, it could be caught in a conflict of interest if it attempted to represent the interests of its members as well as the interests of dependent competitors of GTE such as MCI, MCIMetro, and AT&T which hope to compete for the business of TRACER members.

MCI, MCIMetro, and AT&T argue that neither Commission Staff nor Public Counsel is in a position to or in fact intends to represent the specific interests of MCI, MCIMetro, and AT&T as customers and dependent competitors of GTE. They contend that there is no other party in this proceeding who will represent their interests.

MCI, MCIMetro, and AT&T contend that they do not desire to and will not broaden the issues in this proceeding, and that their intervention will not unreasonably delay or extend the proceeding.

Positions of Commission Staff, Public Counsel, and [\*10] Intervenor TRACER

Commission Staff filed a response to the petition for review, supporting the petition. Commission Staff argues that petitioners should be permitted to participate in this proceeding for the reason that as customers of GTE, they have a substantial interest in this proceeding. Staff argues that this is a proceeding about rates, in that the ultimate outcome of this proceeding will be the implementation of the depreciation rates that are determined in this proceeding, in rates charged to GTE's customers. Staff argues that the Commission historically has allowed petitioners such as these to participate in proceedings in which rates will be set, and should not take an inconsistent position on these petitions to intervene. Staff argues that it makes little sense to exclude the petitioners from participating in proceedings in which various components of GTE's total revenue requirement are set, yet allow them to participate in proceedings in which rates are set to produce that revenue requirement.

Public Counsel filed a response to the petition for review. It supports the intervention of MCI and MCIMetro (which it refers to collectively as "MCI"), and the intervention of [\*11] AT&T in this proceeding as being in the interests of justice. It argues:

This depreciation proceeding is unlike past depreciation cases in at least two significant respects. First, the Commission will be asked to consider, in an unprecedented way, the impact of technology and of new competition on the useful lives of plant and equipment used by GTE to provide service. Such an inquiry poses a major challenge for the Commission and the parties. The Commission's task will be greatly assisted by an adequate record, particularly on the competition issues. AT&T and MCI are in a position to be of particular help to the Commission in developing such a record.

Second, this depreciation case will not only affect the rates which GTE end-user customers will pay for GTE services, it will play an important role in the introduction of local competition in Washington. The depreciation rates set here will affect the price of interconnection for competitors. As AT&T and MCI have noted, this depreciation case will have a direct impact on their ability to

"provide high quality services to Washington consumers at competitive prices." Petition at 3. Their participation in this case is therefore appropriate.

[\*12]

TRACER filed a response to the petition for review. It supports the intervention of MCI, MCIMetro, and AT&T. It states two reasons for its support. Its first argument is that as dependent competitors of GTE, the petitioners have a direct and substantial interest in the outcome of this proceeding, and that interest is not adequately represented by any party. TRACER argues that the ALJ incorrectly concluded that the petitioners' interests as customers of GTE can be adequately represented by TRACER. It argues that although TRACER is a representative of large end-user customers, it does not represent dependent competitors of GTE, and that the interests of the latter are not necessarily the same as the interests of end-user consumers.

TRACER's second argument in support of the intervention MCI, MCIMetro, and AT&T is that as competitors entering the local market on a national basis, the petitioners "are in a position to provide particularly valuable insight and information on the central issue of this proceeding, namely, the impact of technology and competition on the economically useful lives of the various categories of plant and equipment used by GTE in providing service," and therefore [\*13] their participation would assist the Commission in making an informed and careful decision.

#### Position of GTE

GTE filed an answer to the joint petition for review, opposing the petition. GTE argues:

This docket is an accounting docket regarding the setting of depreciation lives for GTE Northwest, a regulated local exchange carrier. In its Petition, GTE Northwest stated that the primary function is the setting of appropriate depreciation lives for its equipment and facilities, and the decision in this case would not change the prices that it charges its customers. Specifically, GTE Northwest is not requesting any changes in the rates charged for its Washington intrastate services.

GTE contends that the administrative law judge properly denied AT&T, MCI, and MCIMetro intervention in this proceeding under appropriate administrative law requirements, based on findings that as competitors of a regulated company (GTE), they do not have a substantial interest in the outcome of this proceeding, and that their participation is likely to impair the orderly and prompt conduct of the proceedings.

Finally, GTE points out that the petitioners are parties to the major proceeding regarding [\*14] GTE's pricing for competitors entitled "In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale," joint Docket Nos. UT-960369, UT-960370, and UT-960371. GTE argues that the status of the petitioners as either customers, competitors, or dependent competitors and the role of depreciation in the rates charged them will be adequately addressed.

Commission Discussion and Decision on Review

A decision by an administrative law judge regarding a petition to intervene is subject to Commission review pursuant to WAC 480-09-760. WAC 480-09-430(3).

Interlocutory review is appropriate when, as here, an interlocutory order by an administrative law judge would terminate the participation of a person in the proceeding, or interlocutory review might save the Commission and the parties substantial effort and expense. WAC 480-09-760. The Commission accepts review of the Order on Prehearing Conference entered on March 5, 1997.

The Commission has reviewed the decision of the administrative law judge, and has considered the petition for review and the responses and answer thereto. We agree with the analysis and the decision of the administrative [\*15] law judge. There is no "right" to intervention, this is not a type of proceeding which calls for extensive participation, and any benefit that might accrue from the participation of the petitioners is outweighed by the likelihood that their participation would impair the orderly and prompt conduct of the proceedings.

The Commission may grant a petition for intervention upon determining that the petitioner qualifies as an intervenor and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. RCW 34.05.443. The applicable rule is WAC 480-09-430. It requires that a petition disclose a substantial interest in the subject matter of the hearing, or that the participation of the petitioner be in the public interest. It is in the Commission's discretion whether to grant or deny a petition to intervene. RCW 34.05.443; WAC 480-09-430(3); *Cole v. Washington Utilities & Transp. Comm'n*, 79 Wn.2d 302, 306-307, 485 P.2d 71 (1971).

It is clear from the petition for review that the interest which the petitioners assert, and which they seek to protect, is their interest as competitors of GTE. That is not an interest which [\*16] we may consider in determining what depreciation parameters are appropriate for GTE.

The issue before us is what are the appropriate useful lives of the various categories of plant and equipment used by GTE in providing service. The impact of technology and competition on those useful lives will be a factor in our determination. We recognize that the complex interplay between competition and useful lives makes our task difficult. Competition may cause useful lives to shorten. Allowing GTE to recognize those shorter lives for accounting and ratemaking purposes may retard that very competition, through increases in the prices GTE charges dependent competitors, and thereby cause plant and equipment to be useful for a longer period than it would be if GTE were not allowed to shorten lives. However, while the relationship between competition and useful lives is an issue in this proceeding, the focus is on what are the appropriate useful lives, not on how resetting lives may affect competition.

We appreciate Public Counsel's concern that the depreciation rates that are set for GTE in this proceeding may play an important role in the introduction of local competition in Washington. However, [\*17] the effect that GTE's depreciation rates may have on the development of competition is not a factor we can consider in this proceeding. Nor do we believe it appropriate under RCW 80.04.350 to require GTE to keep its depreciation rates at an artificially low level in order to foster competition.

As the Order on Prehearing Conference notes, the Commission previously has determined that unregulated potential competitors of a regulated company do not have a substantial interest in the outcome of Commission proceedings concerning the regulated company. *Cole, supra*. To the extent the petitioners are competitors of GTE, their interest in keeping prices as low as possible for the services they take from GTE does not constitute a "substantial interest" in the

determination of depreciation rates to be made by the Commission under RCW 80.04.350. The petitioners determine their own rates and charges under pertinent law. They do not have a right to participate freely in the determination of their regulated competitors' rates. The Commission will not allow the petitioners to intervene for the purpose of protecting and promoting their competitive interests.

The competitive interests of the petitioners [\*18] are not represented by any party in this proceeding, nor should they be. Their only legitimate interest as competitors is in assuring that this proceeding is lawfully conducted and effectively prosecuted. That interest already is represented by Commission Staff and Public Counsel. The petitioners do not allege that Commission Staff and Public Counsel will not adequately protect the public interest in assuring that the proceedings are lawfully conducted and effectively prosecuted.

The Commission could allow the petitioners to intervene to the extent they are customers of GTE for interconnection and related services if we believed that the interests of customers required additional representation. We do not believe that additional customer representation is required.

Historically, depreciation lives and other depreciation parameters for U S WEST and GTE have been set without extensive involvement of customer representatives. They have been determined every three years in three-way meetings involving only the Commission Staff, the FCC staff, and the company, generally referred to as the "triennial rescription process." n1 A triennial rescription process involving U S WEST has recently [\*19] concluded. We are confident that Commission Staff, given its expertise and its recent participation in that proceeding, can provide the Commission with current studies and other information that will enable the Commission to make an informed and careful decision in this proceeding involving GTE.

-----Footnotes-----

n1 See, In re Petition of U S WEST Communications, Inc., for Depreciation Accounting Changes, Docket No. UT-940641, Fifth Supplemental Order, On Remand (April 1996), footnote 19.

-----End Footnotes-----

Moreover, there will be participation by customer representatives in this proceeding. The interests of customers of GTE are represented by TRACER and Public Counsel. While neither party represents the specific interests of the petitioners, they represent the interests of customers generally in having depreciation lives properly set so that any adverse impact that the resetting may have on the rates that GTE charges for its services is minimized. To the extent the petitioners have legitimate interests as customers in this proceeding, those interests [\*20] are adequately represented by the participation of TRACER and Public Counsel.

If the petitioners are aware of recent studies and other information on the issues that are before us in this proceeding, they certainly may make them available to Commission Staff, Public Counsel, and TRACER for possible inclusion in those parties' presentations. While we agree with Public Counsel that this depreciation proceeding is unlike past depreciation cases in that competition has not previously been a significant factor bearing on useful lives, and agree

with Public Counsel that the Commission's task will be greatly assisted by an adequate record, we do not agree that the participation of AT&T and MCI would be of particular help in developing the record.

We find unpersuasive the argument of petitioners and Commission Staff that the Commission has permitted the petitioners to participate in U S WEST and GTE proceedings in which rates will be set; that although this is not a rate setting docket, the depreciation rates for GTE which are established in this proceeding may flow through to a rate proceeding and adversely impact the petitioners; that this proceeding presents the only meaningful opportunity [\*21] for the petitioners to have input on these depreciation issues; and, that therefore we should allow these petitioners to intervene. We recognize that while this is not a proceeding in which customer rates will be set, it may be the only meaningful opportunity for the petitioners to have input on depreciation issues which may adversely affect the rates that will be established for them in other proceedings. However, as noted above, the systematic review of a regulated company's depreciation lives and parameters does not contemplate nor facilitate customer involvement. In any event, the Commission does not allow intervention by every customer who seeks intervention, even in rate cases. The extent to which we allow intervention depends upon the number, complexity, and newness of the issues before us, upon whether we believe the intervenor will provide relevant facts and argument which are not cumulative and will contribute positively to our understanding and evaluation of the issues, and upon the effect that allowing a particular intervention will have upon the orderly and prompt conduct of the proceedings.

The Commission agrees with the administrative law judge that any benefit to the [\*22] Commission that might result from the intervention of MCI, MCIMetro, and AT&T is outweighed by the substantial risk that their intervention will impair the orderly and prompt conduct of the proceedings. We believe, based on the contentiousness of the interconnection proceeding, the interconnection arbitration proceedings, the generic costing proceeding, and other ongoing proceedings in which GTE and these competitors have squared off against one another, that there is a substantial likelihood that allowing these competitors to intervene in this proceeding would result in broad and contentious discovery requests, efforts to interject issues that are not material to our determination, unnecessarily long and complex hearings, and an unnecessarily large volume of evidence to consider.

Finally, on March 17, 1997, Public Counsel filed with the Commission an objection to and request for modification of the Order on Prehearing Conference. Public Counsel takes issues with the following highlighted language of the Order:

MCI and AT&T determine their own rates and charges under pertinent law. They do not have the right to participate freely in the determination of their competitor's rates. [\*23] **Their interest as members of the public and as competitors in assuring the proceedings are lawfully conducted and adequately focused is represented by Commission Staff and Public Counsel.** [Emphasis supplied.]

Public Counsel worries that a mischaracterization of its role may be read from this statement by implying that Public Counsel may have some role in "representing the interests of MCI and AT&T in their capacity as competitors of GTE." He urges that "Public Counsel does not represent the interests of competitive telecommunications providers in Commission proceedings."

While we recognize Public Counsel's responsibility to be concerned about a mischaracterization of its role in Commission proceedings, the offending language noted by Public Counsel was misapprehended. We believe that the intent of the presiding officer was to respond to the argument by counsel for MCI that the interests of "competitors" would find no representation without the joint participation of MCI and AT&T, even though they shared the same interest "in the ultimate issue" in this proceeding with Commission Staff and Public Counsel. n2 There was no intimation that Public Counsel represents the [\*24] litigation strategy or financial interests of MCI and AT&T. Rather than modify this statement, the Commission reaffirms its confidence in the ability of all assistant attorneys general to adequately and accurately represent and protect the public interest in Commission proceedings. n3

-----Footnotes-----

n2 Tr., vol. 1, p. 8, II. 13-18, Docket No. UT-961632.

n3 Perhaps counsel confuses the distinction between the common interests that the petitioners have as members of the public and as competitors, with the possession of some property interest or absolute right to participate, which is absent. Public Counsel is charged with representing the interests of all citizens as members of the public. Competitors are members of the public. All such persons have an interest in seeing that a lawful proceeding is conducted. Saying that does not say that Public Counsel must follow a litigation strategy that serves any individual member of the public or that treats any individual member of the public as a client. Because MCI and AT&T may share similar interests in "lawfully conducted and adequately focused" proceedings with individual citizens or with cellular telecommunications companies or with other competitors, neither elevates MCI and AT&T to a unique or superior status nor obligates Public Counsel to act as their personal attorney, yet it acknowledges the protections they share with other citizens.

-----End Footnotes-----

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[\*25]

The Commission adopts the decision of the administrative law judge denying the petitions to intervene of MCI, MCIMetro, and AT&T.

**ORDER**

THE COMMISSION ORDERS That the request of MCI, MCIMetro, and AT&T that the Commission reverse the Order on Prehearing Conference to the extent it denies the petitions or motions to intervene of MCI, MCIMetro, and AT&T, and that the Commission grant those petitions or motions, is denied. The Commission denies the petition of AT&T to intervene in this proceeding. The Commission denies the oral motion of MCI and MCIMetro to intervene in this proceeding.

DATED at Olympia, Washington, and effective this 28th day of March 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

3 of 3 DOCUMENTS

In re: Petition of Monsanto Company for a Declaratory  
Statement Concerning The Lease Financing of a Cogeneration  
Facility

DOCKET NO. 860725-EU; ORDER NO. 16581

Florida Public Service Commission

1986 Fla. PUC LEXIS 351

86 FPSC 211

September 11, 1986

[\*1]

The following Commissioners participated in the disposition of this matter:  
GERALD L. (JERRY) GUNTER, KATIE NICHOLS, MICHAEL MCK. WILSON, JOHN T. (TOM)  
HERNDON

OPINION: ORDER ON INTERVENTION AND REQUEST FOR A HEARING

BY THE COMMISSION:

On June 3, 1986, the Monsanto Company (Monsanto) filed a petition for declaratory statement asking that the Commission find that: (1) Monsanto's planned lease-financing of its cogeneration facility would not result in an unlawful sale of electricity, (2) this arrangement would not cause Monsanto's lessor to be a public utility subject to regulation by this Commission, and (3) Gulf Power Company (Gulf) was required to supply supplemental, back-up and maintenance ("standby") electric power at approved non-discriminatory tariff rates to Monsanto.

On June 26, 1986, Metropolitan Dade County (Dade) filed a petition to intervene in this docket on the grounds that it had "also used lease-financing for its cogeneration plant" and would be substantially affected by the decision in this docket. Likewise, on July 2, 1986, Gulf asked to intervene on the grounds that its substantial interests would be affected by the loss of Monsanto's load and the requirement that [\*2] Gulf provide back-up and supplemental power to Monsanto. Further, Gulf requested a "full evidentiary hearing pursuant to Section 120.57, Florida Statutes," should its intervention be granted.

Monsanto filed objections to Dade's and Gulf's request for intervention on July 7 and July 17, 1986, respectively. Monsanto has also objected to Gulf's request for an evidentiary hearing should its intervention be allowed and asked for oral argument on that point.

At the request of Commissioner Katie Nichols, Prehearing Officer in this docket, the petitions for intervention and hearing were considered at the September 2, 1986 agenda conference by the full panel. All parties were given an opportunity to present oral argument on both issues at that time making a separate oral argument unnecessary.

Having listened to oral argument on these issues and reviewed the petitions of Dade and Gulf, we find that Dade's request for intervention in this docket should be denied. Dade's only interest in this case is the precedent set on issues common to this docket and Docket No. 860786-EI, a pending Section 120.57 proceeding in which Dade is seeking to require Florida Power and Light to wheel power from [\*3] a lease-financed cogeneration facility. Potential adverse legal precedent does not constitute the "substantial interest" needed for intervention under our rule (Rule 25-22.39, Florida Administrative Code) or the case law. *State Department of Health and Rehabilitative Services v. Barr*, 359 So. 2d 503, 505 (Fla. 1st DCA 1978).

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 Co. 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 25-22.39, Florida Administrative Code, deny Gulf's request for intervention.

However, in the interest of more fully educating the Commission on the issues raised in Monsanto's request for a declaratory statement, we will allow Gulf to file a brief addressing these issues. Gulf's brief will be due on Monday, September 22, 1986.

Since Gulf has been denied intervenor [\*4] status in this proceeding, its request for an evidentiary hearing is moot. We note, however, that evidentiary hearings are discretionary under Section 120.565, Florida Statutes, and Rule 25-22.22, Florida Administrative Code, and appropriate only when there is a disputed factual issue which must be determined in order to provide the legal interpretation requested. *Sans Souci v. Division of Florida Land Sales*, 448 So. 2d 1116, 1119-20 (Fla. 1st DCA 1984). Gulf did not allege any disputed factual issues integral to the issuance of Monsanto's requested declaratory statement either in its petition or at oral argument.

It is, therefore,

ORDERED by the Florida Public Service Commission, that Metropolitan Dade County's and Gulf Power Company's petitions for intervention are hereby denied. It is further

ORDERED that Gulf Power Company and the Monsanto Company be allowed to submit briefs on the issues raised in Monsanto Company's request for declaratory statement on or before the close of business on September 22, 1986. It is further

ORDERED that Gulf Power Company's request for an evidentiary hearing is denied.

By ORDER of the Florida Public Service Commission this 11th day [\*5] of September, 1986.