

If a continuance or extension of a deadline is sought, the motion shall propose a new date or dates and shall indicate whether the parties contacted agree on the new date or dates. Because the ALJ and/or hearing room may not be available on a given day, a proposed range of dates would be preferable. The ALJ will not contact parties to ascertain their positions or to negotiate dates. In the absence of a ruling by the ALJ, a contested motion for continuance, cancellation, or extension is **NOT GRANTED** and the existing schedule remains in place.

F. Responses to Motions and Other Pleadings

Unless otherwise specified, responses to any motion or other pleading shall be filed within five working days from receipt of the pleading to which the response is made. Such responsive pleadings **SHALL** state the date of receipt of the pleading to which a response is made. P.U.C. PROC. R. 22.78(a). Failure to file a timely response will be considered as acquiescence to the relief requested. Rulings will be based on the written pleadings unless the ALJ determines that a prehearing conference is necessary.

III. Discovery

The requirements of Subchapter H of the Commission procedural rules apply to this proceeding.

A. Discovery Methods and Sanctions

Parties may obtain discovery by requests for information (RFIs), which include requests for inspection or production of documents or things, requests for admissions, and depositions by oral examination. P.U.C. PROC. R. 22.141(b).

Discovery abuses may subject a party to

B. Requests For Information

RFIs may be sent immediately. Answers to RFIs shall be filed in accordance with P.U.C. PROC. R. 22.144(c)(2). The time deadlines of (e), and (f) shall apply. (See Page 5 above regarding

One copy of answers to RFIs shall be provided to the party requesting them. A party may make a blanket request for all such copies, but shall not request more than one copy. The parties are free to work out arrangements for the production of responses to RFIs. **Parties shall not provide**

C. Discovery Deadlines

According to the agreed procedure:

Discovery on GSU's direct case ends on

Discovery on intervenor and General Co

Discovery on GSU rebuttal begins Monday, 10/1/15. Motions for summary judgment and objections filed within five calendar days of the date of the filing of those motions due three working days after the date of the filing of those motions.

D. Objections to RFIs/Motions

Except for the time deadlines indicated at the end of this section, objections shall be conducted in accordance with P.U.C. PROC. R. 22.144(d). The objections shall be conducted diligently and in good faith and shall

Parties shall negotiate diligently and in good faith concerning any RFI dispute. During negotiations the parties may agree to extend the deadlines to file motions to compel or responses to motions to compel. The parties must promptly file with the Commission a letter explaining that the parties agree to extend a particular deadline.

If negotiation fails, the motion to compel must state the date of receipt of the objections. Absence of a motion to compel will be construed as an indication that the parties have resolved their dispute.

Responses, if any, shall include any legal argument the respondent wants to present regarding the motion. P.U.C. PROC. R. 22.144(f). The response must state the date of receipt of the motion to compel.

Any affidavits supporting an objection, motion to compel, or response shall be attached to the relevant pleading.

E. In Camera Review

In camera inspection is governed by P.U.C. PROC. R. 22.144(g). Documents submitted for *in camera* review **SHALL NOT BE FILED WITH THE COMMISSION FILING CLERK**; they should be hand-delivered to the SOAH ALJ. If they are filed with the Commission filing clerk, even inadvertently, the documents may not be physically removed from the Commission. Further, any claim to privilege or exemption could be found to have been waived by such filing with the Commission filing clerk.

At the time the documents are submitted for *in camera* review, the objecting party shall file sworn affidavits setting out the facts necessary to support the explanation and the privilege or exemption that is claimed. The affidavits will be public documents and as such shall be filed with the

Commission filing clerk and served upon the propounding party.

RFI answers submitted for *in camera* review shall be grouped and separated from other answers by envelope, folder, box, etc.; materials which constitute a response to more than one RFI shall be clearly cross-referenced. RFI answers submitted for *in camera* review will not be accessible to the other parties unless subsequently ordered so by the ALJ.

Should the ALJ determine, following an *in camera* review, that a document is not privileged or exempt, the ALJ will stay the order for three full working days to allow the party claiming the privilege or exemption to appeal that order.

Discovery disputes will be resolved based on the written pleadings, any sworn affidavits attached thereto, and materials, if any, provided for *in camera* inspection, unless a prehearing conference is deemed to be necessary.

Material which is the subject of a successful motion to compel shall be supplied within three working days of receipt of the order granting the motion to compel.

F. Voluminous Material

Production of voluminous material is governed by P.U.C. PROC. R. 22.144(h). Please note that a party will be released from its obligation to provide the requested voluminous data in Austin only if the data exceeds eight linear feet of documents. A request for such release shall indicate the location in which it is proposed that the data be made available, and shall be filed within seven working days after the receipt of the RFI.

A party's failure to deliver voluminous information to the Austin location when due may cause the party's relevant testimony to be stricken.

G. Depositions

Depositions may be taken pursuant to P.U.C. PROC. R. 22.143. Depositions shall be taken at a time and place agreed upon by the parties. Depositions taken pursuant to agreement of the parties will be admissible at hearing as if a commission had been issued.

Introduction of depositions at the hearing, other than during cross-examination or redirect examination, shall be governed by the deadlines for prefilng of evidence set out below.

H. Workpapers

Copies of a witness' workpapers (except workpapers claimed to be privileged) shall *be available* to a party upon request one day after the date of prefilng such witness's testimony. These workpapers should not be filed.

IV. Prefiling Dates for Evidence and Related Pleadings

A. Prefiled Direct Testimony and Exhibits

The following deadlines shall govern the filing of evidence to be offered at the hearing, and the dates for filing objections and responses to objections.

Filing of Testimony:

Party	Direct	Objections	Responses
Intervenor	April 23, 1996	April 30, 1996	May 7, 1996
General Counsel	April 30, 1996	May 7, 1996	May 14, 1996
GSU Rebuttal	May 14, 1996	May 21, 1996	orally at hearing

Workpapers are to be provided by 3:00 p.m. the day following the filing of testimony.

Rebuttal testimony is limited to the scope of other parties' direct testimony. If any testimony is offered at hearing before the deadline for filing objections and/or responses, argument shall be taken live.

B. Objections to Prefiled Evidence

All objections shall specifically identify the testimony being objected to (by page, line number, etc.) and the specific objections raised regarding each portion of such testimony. Requests to take a witness on *voir dire* shall identify the exact portion(s) of the testimony and exhibits giving rise to the request and the objections associated with the request. Failure to comply with the above deadlines will result in waiver of objections and requests for *voir dire* examination.

C. Statements of Position and Issues

At the time intervenor testimony is due, each intervenor wishing to participate in this docket, but not planning to present a direct case, shall file a written statement of position. The statement of position is necessary for the ALJ to determine possible grouping and order of cross-examination. An intervenor who fails to comply with this requirement may be deemed to have waived its right to participate at the hearing. *See* P.U.C. PROC. R. 22.124.

D. Sequence of Witnesses

GSU shall file its sequence of direct witnesses on April 23, 1996. All other parties shall include their sequence of witnesses with their prefiled testimony and GSU's rebuttal witnesses with its rebuttal. The parties shall promptly notify the ALJ and other parties of any proposed changes in this sequence and of any scheduling conflicts which subsequently arise.

V. Second Prehearing Conference, Settlement Discussions, and Hearing on the Merits

On February 22, 1996, the Commission will discuss the issues to be addressed in this proceeding at the scheduled Open Meeting. On February 23, 1996 at **2:00 p.m.**, at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas, the ALJ will convene a prehearing conference to discuss any possible changes to the procedural schedule, pending motions, and any other items that will assist the ALJ and the Commission with a fair and efficient disposition of this case.

On May 6 and May 7, 1996, the parties will meet for settlement discussions. The ALJ has a reserved a room for the parties. Please check with the Commission's Legal Administration Division for the specific room number.

The ALJ will convene a hearing on the merits at **9:00 a.m., May 21, 1996** at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas, and will be continued from day to day until adjourned. Protest or support statements will be taken at the beginning of the hearing. Opening statements, if any, will be made before the taking of direct testimony.

VI. Evidence and Exhibits

A. Rules of Evidence

The Texas Rules of Evidence will be followed at the hearing, with only infrequent recourse being taken to § 2001.091 of the Administrative Procedure Act (APA). The burden is on the proponent of the evidence to show its admissibility.

B. Exhibits

P.U.C. PROC. R. 22.226 governs the use of exhibits to be offered into evidence. Counsel should work with their witnesses to eliminate argumentative, cumulative, or otherwise objectionable passages in testimony they intend to prefile. The exhibits should not encumber the Commission records or pose difficulties in duplication. Voluminous or complicated data will not be admitted in bulk. Counsel shall be prepared to state that he or she has read the proffered exhibit in full and to show the admissibility of all portions offered. Exhibits should be summarized or excerpted when possible. The underlying data from which exhibits are taken shall be made available to the parties for inspection.

Parties shall have exhibits they intend to offer marked in advance and have the correct number of copies for distribution. At the time a party offers prefiled testimony and exhibits into evidence during its direct case, it shall provide a copy to the court reporter and two copies to the presiding judge; with respect to all other exhibits proffered, the party shall provide a copy to the court reporter and three copies to the presiding judge. The extra copies provided to the judge will be used for purposes of preparing the administrative record in the event the Commission's final order in this case is appealed for judicial review. There will be no breaks taken to allow a party time to make the appropriate number of copies, nor will the ALJ permit a party to take hearing time to have exhibits marked. A party failing to comply with this requirement may lose the opportunity to offer the

particular exhibit in question.

Demonstrative exhibits which are used at the hearing and which are otherwise admissible into evidence will not be placed in the record if their admission would unduly burden the record. Parties instead may submit photographs, which fairly and accurately represent such exhibits, for admission into evidence. Copies of such photographs shall be provided by the sponsoring party to all other parties participating in the hearing.

C. Matters Read Into the Record

Any time that an attorney or a witness reads a document into the record, which document is not offered into evidence, the party questioning the witness or eliciting the answer shall supply to the court reporter a copy of the page or pages which have been read into the record.

D. Official Notice

If a party requests official notice of judicially cognizable facts pursuant to P U C. PROC R. 22.222, the party shall provide a record copy and a copy to the ALJ and all other parties no later than the time the request for official notice is made. The ALJ encourages the parties to reach an agreement relating to taking official notice of these documents before the request is made.

E. Scope of Questions

The scope of redirect examination will be limited to the scope of cross-examination. The scope of recross-examination will be limited to the scope of redirect. After the ALJ's clarifying questions, if any, all parties will be allowed to ask additional questions limited to the scope of the clarifying questions. Also, the scope of cross-examination concerning rebuttal testimony is limited to the scope of rebuttal testimony even if the witness has previously testified at the hearing.

F. Objections

Parties wishing to object to questions or answers during live examination should state concisely the grounds of the objection and identify by number the applicable rule of evidence. Untimely objections will be overruled. Oral argument concerning discussion of an objection shall be limited to the party or parties making the objection and the party or parties against whom the objection is directed, unless the ALJ extends a broader invitation for argument.

To clarify the record or assist in understanding the evidence and issues, the ALJ may ask questions of witnesses at the hearing. On occasion, counsel might be concerned that the phrasing of such a question might cause problems (such as ambiguity or inquiry into privileged information) of which the ALJ is unaware. Counsel should voice such concerns just as they would object to questions by other counsel.

G. Offers of Proof

Written material excluded from evidence will not be included in the record as offers of proof unless the party offering such evidence so requests at the time of the exclusion. Parties wishing to make an offer of proof shall be allowed to do so before the close of the hearing. Offers of proof may be made pursuant to P.U.C. PROC. R. 22.227. Cross examination concerning matters other than admissibility of the testimony or documentary evidence comprising the offer of proof shall be deferred until such time, if any, that the testimony is admitted into evidence.

VII. Other Procedural Guidelines

A. Citation to Legal Authority

Parties citing legal authorities in written or oral argument should provide a full and correct citation to that authority. If the authority is not contained in the Commission's library, a copy of the authority should be provided to the ALJ when the argument is submitted

B. Ex Parte Communications

Ex parte communications with the ALJ are prohibited. Parties should undertake to communicate with the ALJ outside the hearing room only through written documents filed with the Commission and served on all parties.

C. References to Protected Material


The attorneys are expected to make every effort to present argument, ask questions, and prepare their witnesses to answer questions in a way which will neither violate the protective order nor require closing of the hearing to the public.

D. Correction to Transcripts

The correction of transcripts shall be performed in accordance with P.U.C. PROC. R. 22.204(c). Parties are encouraged to review the transcripts as soon as they receive them and to propose corrections, including corrections of typographical errors, if it appears to them that the transcript does not accurately reproduce what took place at the hearing.

SIGNED AT AUSTIN, TEXAS the 29th day of January 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

check

State Office of Administrative Hearings



96 JAN 18 AM 11:17
PUBLIC UTILITY COMMISSION
FILING CLERK

Steven L. Martin
Chief Administrative Law Judge

January 12, 1996

Ms. Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

RE: SOAH Docket No. 473-96-0117
PUC Docket No. 15102

APPLICATION OF GULF STATES UTILITIES COMPANY TO RECONCILE ITS FUEL COSTS, FOR PERMISSION TO DELAY REQUESTING A SURCHARGE, OR IN THE ALTERNATIVE, FOR A SURCHARGE TO RECOVER UNDER-RECOVERED FUEL EXPENSE

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 5 in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,

Lilo D. Pomerleau
Administrative Law Judge

/ib

One Capitol Square
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

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SOAH DOCKET NO. 473-96-0117

PUC DOCKET NO. 15102

US JAN 12 AM 11:17
FILED CLERK
COMMISSION

**APPLICATION OF GULF STATES
UTILITIES COMPANY TO
RECONCILE ITS FUEL COSTS, FOR
PERMISSION TO DELAY
REQUESTING A SURCHARGE, OR IN
THE ALTERNATIVE, FOR A
SURCHARGE TO RECOVER UNDER-
RECOVERED FUEL EXPENSE**

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

ORDER NO. 1

**NOTICE OF PREHEARING CONFERENCE;
ORDER GRANTING MOTIONS TO INTERVENE
AND ESTABLISHING FILING REQUIREMENTS**

APPLICATION

On December 7, 1995, Gulf States Utilities Company (GSU) filed an application requesting: (1) approval of its fuel and purchased power costs; (2) authorization to request in a future proceeding the collection of under-recovered fuel expense through a surcharge to be approved in that future proceeding; or (3) strictly in the alternative, if its request to postpone recovery of its undercollected expenses in fuel is not granted, collection of its under-recovered fuel expenses through a surcharge approved in this proceeding.

GSU's most recent reconciliation of fuel cost covered the period from October 1, 1991 through December 31, 1993, in *Application of Gulf States Utilities Company to Reconcile Fuel Costs*, Docket No. 13170. In September 1994, GSU also filed an application for a surcharge of a fuel under-recovery based on an increase in natural gas prices, *Application of Gulf States Utilities Company to Surcharge a Cumulative Under-Collection of Fuel and Purchased Power Costs*, Docket No. 13409. GSU is submitting this application in compliance with the Final Order in Docket No. 13409 although it seeks authorization not to request a surcharge in this case. GSU also requests a waiver to P.U.C. SUBST. R. 23.23(b)(2)(A)(iii)(II), which requires a utility to "petition for a surcharge at the next date allowed for setting a fuel factor by the schedule set out in subparagraph (E) of this paragraph when it has materially undercollected its fuel costs and projects that it will continue to be in a state of material undercollection."

This case was assigned to the State Office Of Administrative Hearings (SOAH) on January 10, 1996.

JURISDICTION

GSU is a public utility as defined in the Public Utility Regulatory Act of 1995¹ § 2.0011(1). The Public Utility Commission of Texas (Commission) has jurisdiction and authority in this proceeding under PURA 95 §§ 1.101, 2.001, 2.101(e), 2.201, and 2.212(g). SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law under TEX. GOV'T. CODE ANN. ch. 2003.047(e) (Vernon Pamphlet 1996) and PURA 95 §1.101(e).

PREHEARING CONFERENCE

The Administrative Law Judge (ALJ) will convene a prehearing conference at 9:00 a.m., Monday, January 22, 1996 at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas. The matters to be discussed are listed in P.U.C. PROC. R. 22.121, including pending motions filed on or before 3:00 p.m., January 18, 1996.

MOTIONS TO INTERVENE AND OTHER MOTIONS

Motions to intervene were filed by the State of Texas on December 13, 1995; Texas Industrial Energy Consumers (TIEC) on December 15, 1995; and the City of Groves, Texas, on January 2, 1996. There were no objections filed. In accordance with P.U.C. PROC. R. 22.103(b), these motions are **GRANTED**. Motions to intervene by the Office of Public Utility Counsel (OPC) and by the Cities of Port Neches, Nome, and Vidor will be ruled upon after the deadline for objections has passed. A copy of the service list is attached to this Order for the parties' convenience.

The ALJ will promptly issue a ruling on the Cities' motion for an order on confidentiality, filed December 22, 1995, after a review of the pleadings pertaining to that motion.

¹ TEX. REV. CIV. STAT. ANN. ART. 1446-0 (Vernon Supp. 1996)(hereinafter PURA 95).

FILING REQUIREMENTS

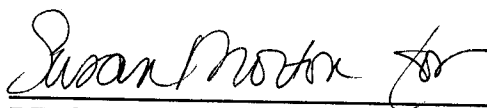
This proceeding has been assigned SOAH Docket No. 473-96-0117. All pleadings filed **SHALL** state both the PUC and SOAH docket numbers. The parties shall comply with P.U.C. PROC. R. 22.71 in form and shall file the number of copies required by the Commission in that recently amended Commission rule. Additionally, on January 3, 1996, the ALJs with the Utility Division of SOAH physically moved from the Commission building at 7800 Shoal Creek Boulevard to:

State Office of Administrative Hearings
300 West 15th, Suite 502
Austin, Texas 78701
Post Office Box 13025
Austin, Texas 78711-3025
PH: (512) 475-4993
FAX: (512) 475-4994

Therefore, any time-sensitive pleadings a party wishes to hand-deliver to the SOAH ALJ should be file-stamped before delivery; directed to Ms. Bravenec; and delivered to the SOAH Docketing Division, Room 504, at the above address. After the move, Utility Division ALJs will usually be unable to return to their offices during breaks in prehearing conferences or hearings to review documents that may have been delivered there, by either the Commission or a party, shortly before or while the hearing is in progress. *Therefore, time-sensitive documents should be filed and hand-delivered to the ALJ as early as possible*, and if a time-sensitive document *must* be filed just before or during a prehearing conference or hearing, hand-delivering the document to the ALJ at that proceeding will be preferable to hand-delivering it to SOAH.

SIGNED AT AUSTIN, TEXAS the 12th day of January 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

SOAH DOCKET NO. 473-96-0117
PUC DOCKET NO. 15102

SERVICE LIST

January 12, 1996

PARTIES	REPRESENTATIVE/ADDRESS
PUBLIC UTILITY COMMISSION OF TX	Legal Division Public Utility Commission of Texas 7800 Shoal Creek Boulevard Austin, Texas 78757 (512) 458-0282
GULF STATES UTILITIES COMPANY	CAROLYN SHELLMAN BICKERSTAFF, HEATH & SMILEY 98 SAN JACINTO, SUITE 1800 AUSTIN TX 78701-4039 512/472-8021
FAX 512/320-5639	
	PAULA CYR GULF STATES UTILITIES CO. PO BOX 2951 BEAUMONT TX 77704 409/838-7871
FAX 409/839-3016	
TEXAS INDUSTRIAL ENERGY CONSUMERS (TIEC)	CARL S. RICHIE MAYOR, DAY, CALDWELL & KEETON 100 CONGRESS AVE., SUITE 1500 AUSTIN TX 78701 512/320-9200
FAX 512/320-9292	
OFFICE OF PUBLIC UTILITY COUNSEL	MARION TAYLOR DREW OFFICE OF PUBLIC UTILITY COUNSEL 7800 SHOAL CREEK BLVD., #290-EAST AUSTIN TX 78757 512/475-3700
FAX 512/475-3707	
CITIES (Groves, Nome, Vidor, Port Neches)	BARBARA DAY BUTLER, PORTER, GAY & DAY 525 BARTON OAKS PLAZA TWO 901 SOUTH MOPAC EXPRESSWAY AUSTIN TX 78746 512/327-2812
FAX 512/327-2246	
STATE OF TEXAS	RICHARD A. MUSCAT ASSISTANT ATTORNEY GENERAL PUBLIC AGENCY REP SECION PO BOX 12548, CAPITOL STATION AUSTIN TX 78711-2548 512/463-2185
FAX 512/322-9114	

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

FILED
PUBLIC UTILITY COM. MI.
FILING OFFICE

February 5, 1996

Ms. Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

RE: SOAH Docket No. 473-96-0117
PUC Docket No. 15102

APPLICATION OF GULF STATES UTILITIES COMPANY TO RECONCILE ITS FUEL COSTS, FOR PERMISSION TO DELAY REQUESTING A SURCHARGE, OR IN THE ALTERNATIVE, FOR A SURCHARGE TO RECOVER UNDER-RECOVERED FUEL EXPENSE

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 6 in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,
Lilo D. Pomerleau
Lilo D. Pomerleau
Administrative Law Judge

/ls

One Capitol Square
Post Office Box 13025 ◆ 300 West 15th Street, Suite 502 ◆ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

13A

APPLICATION OF GULF STATES
UTILITIES COMPANY TO
RECONCILE ITS FUEL COSTS, FOR
PERMISSION TO DELAY
REQUESTING A SURCHARGE, OR IN
THE ALTERNATIVE, FOR A
SURCHARGE TO RECOVER UNDER-
RECOVERED FUEL EXPENSE

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

ORDER NO. 6

**MODIFYING PROTECTIVE ORDER;
ESTABLISHING INTERVENTION DEADLINE; AND
GRANTING CITY OF NEDERLAND MOTION TO INTERVENE**

Modifying Protective Order

On January 29, 1996, Gulf States Utilities Company (GSU) filed a letter noting that the Administrative Law Judge (ALJ) did not include GSU's proposed definition of protected materials in the January 22 Protective Order, as indicated in Order No. 3. Attached to this Order are the first and second amended pages of the Protected Order, which contain the definition. The original pages are **SUPERSEDED** by these amended pages.

Deadline for Motions to Intervene

Order No. 5 did not include the deadline for intervention that was established at the January 22 prehearing conference. Motions to intervene shall be filed by April 15, 1996. Motions to intervene shall show the movant's standing in accordance with P.U.C. PROC. R. 22.103. Motions to intervene shall be served on all parties and shall include a certificate of service. Movants for intervention shall immediately enjoy all the rights and bear all the obligations of party status unless and until their motions to intervene are denied. P.U.C. PROC. R. 22.104(c).

Motion to Intervene

On January 23, 1996, the City of Nederland filed a motion to intervene, stating that the municipality is a customer of GSU. No objections were filed. The City of Nederland's motion is **GRANTED** in accordance with P.U.C. PROC. R. 22.103(b) and it is consolidated with the other municipalities in this proceeding.

SIGNED AT AUSTIN, TEXAS the 5th day of February 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

SOAH DOCKET NO. 473-96-0117
PUC DOCKET NO. 15102

<p>APPLICATION OF GULF STATES UTILITIES COMPANY TO RECONCILE ITS FUEL COSTS, FOR PERMISSION TO DELAY REQUESTING A SURCHARGE, OR IN THE ALTERNATIVE, FOR A SURCHARGE TO RECOVER UNDER- RECOVERED FUEL EXPENSE</p>	<p>§ § § § § § §</p>	<p>BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</p>
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PROTECTIVE ORDER

This Protective Order shall govern the use of all information deemed confidential by a party responding to discovery requests, unless the Administrative Law Judge (ALJ) or the Public Utility Commission of Texas (Commission) finds that such information is not confidential.

1. (a) A party asserting confidentiality, or "highly sensitive" confidentiality shall at the time the confidentiality is claimed identify the basis for such assertion.

(b) Any party producing or filing a document, including, but not limited to, records stored or encoded on a computer disk or other similar electronic storage medium, in this proceeding may designate that document, or any portion of it, as confidential pursuant to this Protective Order by typing or stamping on its face "PROTECTED MATERIALS PURSUANT TO PROTECTIVE ORDER ISSUED IN SOAH DOCKET NO. 473-96-0117 AND PUC DOCKET NO. 15102" or "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER ISSUED IN SOAH DOCKET NO. 473-96-0117 AND PUC DOCKET NO. 15102" or words to this effect (hereinafter referred to as Protected Materials).

(c) Protected materials include any information considered to be confidential by law, either statutory, constitutional, or common law. Protected Materials shall not include any information or document contained in the public files of the Commission, the Federal Energy Regulatory Commission ("FERC") or any other federal or state agency, court or local governmental

authority subject to the Public Information Act. "Protected Materials" also shall not include documents or information which at the time of or before disclosure in these proceedings is or was public knowledge or which becomes public knowledge other than through disclosure in violation of this Protective Order.

2. For the purposes of this Protective Order, a "Reviewing Party" is a party to Public Utility Commission of Texas Docket No. 15102 and SOAH Docket No. 473-96-0117, including the General Counsel and the Commission Staff.

3. (a) (1) Except as otherwise provided in this Protective Order, a Reviewing Party shall be permitted access to "Protected Materials" only through its "Reviewing Representatives." Reviewing Representatives of a Reviewing Party include its counsel of record in this proceeding and associated attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by the Reviewing Party and directly engaged in these proceedings. At the request of the PUCT Commissioners or their staff, copies of Protected Materials may be produced by the General Counsel's Office to the Commissioners. The Commissioners and their staff shall be informed of the existence and coverage of this Protective Order, with the intention that those persons observe the restrictions of the Protective Order during their consideration and deliberation on Docket No. 15102.

(2) The term "Highly Sensitive Protective Materials" is a subset of "Protected Materials" and refers to documents or information which a responding party claims is of such a highly sensitive nature that making copies of such documents or information or providing access to such documents or information to employees of the Reviewing Party would expose the responding party to an unreasonable risk of harm. Documents or information so classified by a producing party shall bear the designation "HIGHLY SENSITIVE PROTECTED MATERIALS" or words to this effect. The provisions of this Protective Order pertaining to Highly Sensitive Protected Materials supersede any and all contrary provisions pertaining to Protected Materials.

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

April 11, 1996

Ms. Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

FILED
APR 12 AM 9 30

RE: SOAH DOCKET NO. 473-96-0626; PUC DOCKET NO. [REDACTED]
SOAH DOCKET NO. 473-96-0117; PUC DOCKET NO. [REDACTED]

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 5 and Order No. 14 in the above-referenced proceedings. Please file stamp and return the copy to SOAH for our records.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Lilo D. Pomerleau".
Lilo D. Pomerleau
Administrative Law Judge

/ib

One Capitol Square
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

324

SOAH DOCKET NO. 473-96-0626
PUC DOCKET NO. 15489

APPLICATION OF GULF STATES
UTILITIES COMPANY TO REVISE ITS
FIXED FUEL FACTORS

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BEFORE
THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

ORDER NO. 5

SOAH DOCKET NO. 473-96-0117
PUC DOCKET NO. 15102

APPLICATION OF GULF STATES
UTILITIES COMPANY TO
RECONCILE ITS FUEL COSTS, FOR
PERMISSION TO DELAY
REQUESTING A SURCHARGE, OR IN
THE ALTERNATIVE, FOR A
SURCHARGE TO RECOVER UNDER-
RECOVERED FUEL EXPENSE

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BEFORE
THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

03 APR 12 AM
PUBLIC UTILITY
FILM OFFICE

ORDER NO. 14

DENYING OPC'S MOTION FOR
RECONSIDERATION OF ORDER NO. 3

On April 5, 1996, the Office of Public Utility Counsel (OPC) filed a motion for reconsideration of Order No. 3 denying OPC's motion to consolidate the above-styled and numbered dockets (hereinafter Docket No. 15489 and Docket No. 15102). Administrative Law Judge (ALJ) Andries did not receive a copy of OPC's motion until the afternoon of April 10, 1996. This does not appear to be the result of any error on the part of OPC. On April 9, 1996, Gulf States Utilities Company (GSU) filed its opposition to OPC's motion for reconsideration and, on April 10, 1996, OPC filed a motion to strike GSU's opposition as "an improper attempt to reply to OPC's reply."

I. OPC's Motion for Reconsideration

In its motion for reconsideration, OPC argues several reasons why consolidation of the above two dockets is necessary and Order No. 3 should be reversed. First, OPC argues that, while the Commission rejected proposed language in the new fuel rule [P.U.C. SUBST. R. 23.23(b)] that would allow a utility to change its fuel factor in a fuel reconciliation proceeding, the Commission did not say

that consolidation was improper.¹ Furthermore, OPC states, that the Commission “found that it was unnecessary to amend the rule, as written, because the revision could be filed during the course of the fuel reconciliation and the two proceedings could then be consolidated ” OPC provides no citation for this statement. OPC further argues that P.U.C. SUBST R 23 23(b)(2)(F), in requiring the expedited fuel factor schedule only for “a separate proceeding,” implicitly permits consolidation with other proceedings, such as fuel reconciliation proceedings.

Second, OPC takes issue with the statement in Order No 3 that fuel factor proceedings are based on prospective rate-setting analysis and fuel reconciliation proceedings deal with historical data. OPC points out that P.U.C. SUBST. R.23.23(b)(2)(C) requires the review of historical data in fuel factor revisions as well, arguing that historical data provides the basis upon which the utility’s projected modifications must be made.

Third, OPC disagrees with GSU’s contention that consolidation would harm future customers because it would impose on them surcharges for current underrecoveries. OPC counters that the converse is also true: if current customers pay a higher fuel factor than is justified by historical data, (data that will be more completely examined within the fuel reconciliation proceeding), any refund due as a result will not compensate those currently paying the higher fuel factor. For this reason, OPC argues, it is important to use “litigation-tested” historical data. OPC contends that the harm caused by requiring GSU to wait a few months to recover its underrecovered balance is more than outweighed by the danger of permitting GSU to improperly overrecover the expenses included in its fixed fuel factor, continuously, over a period of years until its next fuel reconciliation proceeding.

Finally, OPC notes that, in addition to itself, General Counsel, Texas Industrial Energy Consumers, and the Cities all support consolidation.

¹OPC refers to the discussion of the drafting of the new fuel rule contained on page 6 of GSU’s opposition to OPC’s motion to consolidate, specifically, footnote 5.

II. GSU's Opposition to OPC's Motion for Reconsideration and OPC's Motion to Strike

OPC's motion to strike portions of GSU's opposition as an improper "reply to a reply" is **DENIED**. Pursuant to Order No. 3, OPC's motion for reconsideration is properly a motion, rather than a reply and, as such, GSU is entitled to respond with its opposition.

In its opposition, GSU states that the fuel rule establishes two distinct types of proceedings having different scopes and involving different evidence and findings and, consequently, should be litigated separately. GSU also responds to OPC's criticism that GSU on the one hand, does not file fixed fuel factor petitions often enough and then, on the other hand, criticizes GSU for filing this petition too quickly. Finally, GSU states that waiting nine months instead of 90 days is a significant delay.

III. Ruling

The ALJs have considered the pleadings and uphold Order No. 3 for the reasons stated therein. Specifically, the ALJs find that P.U.C. SUBST. R. 23.23(b) treats the two proceedings differently and the timing difference in the processing of the two cases may unfairly prejudice GSU. Accordingly, OPC's motion for reconsideration is **DENIED**.

SIGNED AT AUSTIN, TEXAS the 11th day of April, 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



EVA KING ANDRIES
ADMINISTRATIVE LAW JUDGE



LILLO D. POMERLEAU

ADMINISTRATIVE LAW JUDGE

Back

State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

February 13, 1996

FILED
PUBLIC UTILITY COM
FILING OFFICE

Ms. Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

RE: SOAH Docket No. 473-96-0117
PUC Docket No. 15102

APPLICATION OF GULF STATES UTILITIES COMPANY TO RECONCILE ITS FUEL COSTS, FOR PERMISSION TO DELAY REQUESTING A SURCHARGE, OR IN THE ALTERNATIVE, FOR A SURCHARGE TO RECOVER UNDER-RECOVERED FUEL EXPENSE

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 7, in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,
Lilo Pomerleau /ib

Lilo D. Pomerleau
Administrative Law Judge

/ib

One Capitol Square
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

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SOAH DOCKET NO. 473-96-0117
PUC DOCKET NO. 15102

APPLICATION OF GULF STATES
UTILITIES COMPANY TO
RECONCILE ITS FUEL COSTS, FOR
PERMISSION TO DELAY
REQUESTING A SURCHARGE, OR IN
THE ALTERNATIVE, FOR A
SURCHARGE TO RECOVER UNDER-
RECOVERED FUEL EXPENSE

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

ORDER NO. 7

ORDER RULING ON REQUEST FOR CHANGE IN DESIGNATION

On January 22, 1996, the Cities filed a notice of request for change in designation of certain documents that Gulf States Utilities Company (GSU) provided when responding to discovery requests. GSU classified these RFI responses as confidential, a designation that the Cities contests and seeks to change as provided by the terms of the Protective Order. GSU filed an objection on January 29, 1996 and submitted the documents for *in camera* review on February 5, 1996. GSU requests that the ALJ convene a prehearing conference if necessary, after reviewing the documents. A prehearing conference is scheduled for February 23, 1996 and any items not ruled upon in this Order will be taken up at that time. The rulings are based on the written pleadings, cited authorities, and *in camera* review of the documents.

Cities 1-20 and 1-21

The documents responsive to these RFIs were presented to the board of directors of GSU (Cities 1-20) and Entergy Corporation (Entergy) (Cities 1-21) in 1994 and 1995. The bulk of these documents consists of proposed, detailed capital budgets. Other documents include an executive incentive plan and nuclear goal levels and other financial amounts such as contingency adjustments, evaluation of impaired assets, insurance costs, and estimated pre-tax returns. GSU considers these to be trade secrets and argue that they are extremely valuable to its or Entergy's competitors, claiming that its release would disclose cost patterns that could be useful to its competitors. GSU

also argues that the data's sensitivity is not lessened by the fact that it is historic -- citing again the disclosure of trends and patterns. GSU further affirms that competitive value can be derived simply from the project descriptions, although GSU is objecting only to the release of dollar amounts in most of these documents. GSU is prepared to furnish these documents with costs and some written information redacted.

GSU has the burden of showing that the type of information sought to be protected is indeed a trade secret and that specific harm will result if it is disclosed.¹ At first blush, the ALJ questions how capital expenditures (some of which may become part of GSU's rate base in a future case) is confidential information. However, because these documents contain very detailed lists with columns labeled: prior, 1995, future, and total costs, the ALJ is persuaded that such detail is indeed trade secret material. GSU sets out, in affidavit form, the standard factors to be considered in determining whether the documents are trade secret.² It affirms that disclosure of these documents is very limited within GSU and Entergy; that competitive value can be derived from the information; and that the information was developed by GSU and would be extremely difficult for the information to be acquired or duplicated by others. Moreover, GSU limits disclosure only to persons outside GSU or Entergy who have signed proprietary agreements.

GSU has shown that these redacted documents with detailed capital budget listings contain legitimate trade secret material and are treated by the Company with substantial secrecy. Therefore, the ALJ finds they should remain protected. The ALJ is not so persuaded with regard to the 1995 Capital Budget summary, Bates No. 0016781, and 1995 Capital Budget Resolution, Bates No. 0016782, which include overall cost estimates. And the ALJ also questions the non-disclosure of the 1995 Executive Incentive Plan, Effect of New Accounting Standard, and 1994 Insurance Cost

¹*Inquiry of the Public Utility Commission of Texas Concerning the Fixed Fuel Factor of Gulf States Utilities Company; Application of Gulf States utilities Company for Authority to Change Rates*, Docket Nos. 6477 and 6525, 12 P.U.C. BULL. 924, 934 Order No. 18 (Jan. 22, 1986).

²*See 4 Restatement of Torts* § 757 Comment b (1939)(six factors to consider in determining trade secret privilege)

Breakout (Bates Nos. 0016763, 0016769, and 0016771, respectively). These five items will be discussed in further detail at the February 23, 1996 prehearing conference.

GSU also specifically objects to the declassification of Bates No. 0016765, entitled "Entergy Corporation -- GSU Third Quarter 1994 Preacquisition Contingency Adjustments" claiming that revealing the amount of potential adjustment for financial accounting purposes will adversely affect its ability to negotiate in pending litigation. The Cities argue that GSU has already disclosed Entergy's estimate in a 1994 Federal Energy Regulatory Commission (FERC) form and provided a copy of that estimate as an attachment. Upon a review of the information, the ALJ concurs with the Cities. GSU cannot claim that this information is confidential because it has been disclosed in a public filing.³

The Cities' request to change the designation of 1-20 and 1-21 is **GRANTED** in part and **DENIED** in part. Except for the specific items not ruled upon and for Bates No. 0016765, which shall be disclosed as required in this Order's last paragraph, all documents provided in response to Cities 1-20 and 1-21 shall remain protected, unless redacted as indicated by GSU.⁴

Cities 2-17 and 2-18

According to the Cities, these documents are excerpts from the periodical *NuclearFuel* and the information can be obtained on *Westlaw*. GSU's states that the publication is protected by copyright and therefore the publisher would be "jeopardized were portions of this publication entered into the record."⁵ GSU admits that the fair use doctrine under 17 U.S.C.A. §107 permits the limited

³*Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex.App.--Corpus Christi 1990, no writ)(no trade secret protection when material has been publicly disclosed).

⁴GSU has agreed to declassify the following portion of its response to Cities 1-21: Bates Nos. 16746, 16764, 16766-16768, 16770, 16772-16777. Gulf States Utilities Company's Objection to Cities' Notice of Request for Change in Designation at 12.

⁵Gulf States Utilities Company's Objection to Cities' Notice of Request for Change in Designation at 7.

copying that has occurred in this docket but that public dissemination would "subject the document to unlimited copying and destroy a third party's copyright protection."⁶ GSU's attempts to buttress this argument by noting that this information is normally sold -- therefore, the publisher's property interest is negatively impacted. GSU further dilutes its position by stating that, unless the Cities can demonstrate a compelling reason why this publication should be made public, the data must be protected.

The Cities' request to change the designation of 2-17 and 2-18 is **GRANTED**. GSU's arguments that the declassification of discovery documents will result in rampant violation of copyright laws are speculative and cannot be supported. The act of declassifying these documents is allowed under 17 U.S.C.A. §107. The ALJ cannot imagine that this information will somehow be signaled out from the vast number of RFIs and responses, testimony, briefs, etc. that are or will be filed or entered into evidence and then disseminated to the non-paying public. Moreover, the burden of proof rests on the party asserting confidentiality -- the Cities need not demonstrate why this information must be protected.

Cities 1-45

These documents were the subject of a previous motion to compel, which the ALJ denied, finding that GSU had not waived confidentiality by late-filing an objection. The ALJ did not review the documents *in camera* at that time and thus did not issue a ruling concerning proper designation. The Cities now challenge GSU's classification of this document as a trade secret. After carefully reading the *in camera* material, affidavit, and argument, the ALJ still has questions and will discuss this item at the prehearing conference scheduled for February 23, 1996. Because General Electric Nuclear Energy (GENE) is the entity claiming that this document is proprietary, GSU is instructed

⁶*Id.*

to discuss with GENE and the Cities the possibility of providing a redacted version that would resolve this dispute.

Cities 2-29

This request involves the nuclear fuel costs of other Entergy nuclear plants on a dollar per kWh basis. GSU claims this document is confidential and its release could cause harm in future competitive situations. The Cities states that it has obtained this information from public sources and provided an attachment showing the average fuel costs of other Entergy nuclear plants. Given the Cities' attachment, GSU is unable to show that this document should be afforded the trade secret privilege because the material has been disclosed. The Cities' request to change the designation of Cities 2-29 is **GRANTED**.

Cities 2-21, 2-30, and 2-38

Cities 2-21 requests variances between actual and budgeted nuclear fuel expenses. The information requested by the Cities 2-38 pertains to monthly nuclear fuel balances during the reconciliation period. Cities 2-30 pertains to nuclear fuel inventory values. The Cities contend that there is no possible harm to future competition (and that GSU's generalized statements are inadequate to prove trade secret) because GSU is a monopoly and its power costs from the River Bend plant are so high that there is no market for it. GSU claims that these documents are indeed trade secret materials. The ALJ has questions concerning these documents and will take this issue up at the February 23, 1996 prehearing conference.

Cities 1-67

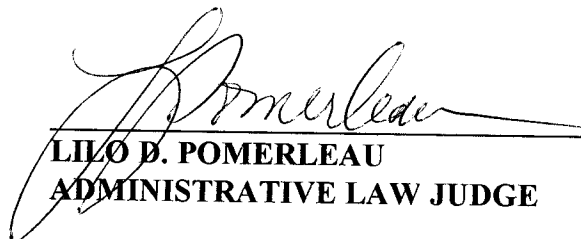
Cities 1-67 seeks the price of uranium used at River Bend. The response is a single page containing the average estimated price at April 1986, December 1987, June 1989, December 1990,

September 1992, and July 1994. The Cities argue that GSU presents no evidence that “average price information from as long ago as ten years” can be trade secret.⁷ GSU includes an affidavit attesting that this document is a trade secret, however, the affidavit is general in nature and does not address how the release of an average price can cause the utility harm. Therefore, GSU fails to meet its burden of showing that this document contains a substantial element of secrecy⁸ and that its disclosure will harm GSU. The Cities’ request to change the designation of 1-67 is **GRANTED**.

As provided by the Protective Order, any ruling granting a change in designation is not effective until three working days following the date of receipt by GSU. If GSU appeals any ruling allowing disclosure, the protected materials shall remain confidential, as provided in Paragraph 11(c) and (d) of the Protective Order.

SIGNED AT AUSTIN, TEXAS the 13th day of February 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILLO B. POMERLEAU
ADMINISTRATIVE LAW JUDGE

⁷Cities’ Response to GSU’s Objection to Notice to De-Classify Information at 6

⁸*Rimes v. Club Corp. of America*, 542 S.W 2d 909, 913 (Tex. Civ. App. --Dallas 1976, writ ref’d n.r.c.) (in order to be a trade secret, there must be a substantial element of secrecy).

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 5, 1996

FILED
MAR 6 1996
AUSTIN, TEXAS

Ms. Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

RE: SOAH Docket No. 473-96-0117
PUC Docket No. 15102

APPLICATION OF GULF STATES UTILITIES COMPANY TO RECONCILE ITS FUEL COSTS, FOR PERMISSION TO DELAY REQUESTING A SURCHARGE, OR IN THE ALTERNATIVE, FOR A SURCHARGE TO RECOVER UNDER-RECOVERED FUEL EXPENSE

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 8 in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Lilo D. Pomerleau" followed by a flourish.

Lilo D. Pomerleau
Administrative Law Judge

One Capitol Square
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

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SOAH DOCKET NO. 473-96-0117
PUC DOCKET NO. 15102

APPLICATION OF GULF STATES
UTILITIES COMPANY TO
RECONCILE ITS FUEL COSTS, FOR
PERMISSION TO DELAY
REQUESTING A SURCHARGE, OR IN
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SURCHARGE TO RECOVER UNDER-
RECOVERED FUEL EXPENSE

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

ORDER NO. 8

ORDER MEMORIALIZING SECOND PREHEARING CONFERENCE;
RULING ON MOTION TO DECLASSIFY;
MODIFYING PROCEDURAL SCHEDULE; AND
NOTICE OF RESCHEDULED HEARING ON THE MERITS

On February 23, 1996, the undersigned Administrative Law Judge (ALJ) convened a second prehearing conference in this docket. Appearances were entered by the following:

PARTIES	REPRESENTATIVES
Gulf States Utilities (GSU)	Carolyn Shellman, Kathryn Lichtenberg, and Eric Drummond
Cities of Groves, Port Neches, Nome, Vidor, Beaumont, China, Conroe	Barbara Day
State of Texas	Jason M. Wakefield
Office of Public Utility Counsel	Alex Schnell
Texas Industrial Energy Consumers	Carl S. Richie
North Star Steel Texas, Inc.	Philip Chabot
General Counsel	Michael Etchison
GE Nuclear Energy ¹	Lawrence S. Smith

The following items were discussed at the prehearing conference.

¹Not appearing as a party.

I. Outstanding Discovery Disputes

A. Motions to Compel

1. Cities 7-4 and 7-5

Cities' motion to compel GSU to respond to Cities 7-4 and 7-5 was withdrawn.

2. Cities 7-47, 7-49, 7-43, and 7-45

Cities' motion to compel GSU to provide information in response to Cities 7-47 and 7-49 was **DENIED** because GSU will, according to the Cities' motion, be providing those responses on March 11, 1996.

The Cities' motion to compel GSU to respond to Cities 7-43 and 7-45 was **GRANTED**, however, the ALJ did not set a time certain for GSU to provide that information pending a response from GSU. Cities 7-43 and 7-45 requests GSU to provide a detailed explanation setting forth the actual critical path and near critical path activities for certain River Bend outages. GSU does not have that information available in the form requested by the Cities, although it can create such a document. GSU has argued that the detailed analysis is very time consuming and overly broad. GSU estimates that it will take approximately 40-plus hours to respond to Cities 7-43 and 25-plus hours to respond to Cities 7-45. Moreover, the two managers at the plant who are able to reconstruct the outage schedule are currently working overtime on River Bend's sixth refueling outage.

The Cities argue that near critical path activity, the parallel work that would have become the critical path if the critical path activity had not occurred, is at issue in this case. These activities may be the subject of recommended disallowances. As such, the Cities state that these reports are necessary for the Cities' identification of imprudent action.

Although Texas law does not require a party to create documents in response to discovery requests,² the Commission has required utilities to do so when relevant to the case.³ The ALJ finds that these reports are necessary for determining possible imprudence and that GSU is the only entity with the ability to produce such reports. As stated above, based on the pleadings, oral argument, and Commission precedent, the ALJ granted the Cities' motion to compel GSU to produce an analysis of critical path and near critical path activities.

GSU indicated at the prehearing conference that it would file a statement indicating the earliest date it could furnish the reports. If not already filed, this item is due on March 8, 1996. Responses, if any, are due March 15, 1996. Based on these filings, the ALJ will issue an order requiring GSU to respond to Cities' motion to compel on a date certain.

B. Motion to Declassify

1. Cities 1-20 and 1-21

GSU will provide redacted portions of Bates Nos. 16771, 16781 and 16782, which satisfy the Cities. GSU is declassifying Bates No. 16763.

Concerning Bates No. 16769, the ALJ did not rule whether this document is a trade secret. GSU is releasing updated information (FAS 121 statement) in April of 1996. The Cities may again file a motion to declassify this document after the new information is released.

²Tex. R. Civ. P. 166(b)(2)(e)(4); *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989).

³*Application of Texas Utilities Electric Company for Authority to Change Rates*, Docket No. 9300, Order No. 15, 15 P.U.C. BULL. 2224 (Apr. 26, 1990), *Application of El Paso Electric Company for Authority to Change Rates and of Central and South West Corporation and El Paso Electric for Approval of Acquisition* Docket No. 12700, Order No. 18, 20 P.U.C. BULL. 79 (Apr. 15, 1994)(utility required to create study when such information is relevant and utility has superior ability to produce such studies)

2. Cities 2-21 and 2-30

GSU placed a witness on the stand for direct and cross-examination. According to counsel for GSU, the utility is providing the Cities a redacted version of Cities 2.21. As to the remaining portions of Cities 2-21 and all of 2-30, GSU proved that this information is trade secret material, a compilation of information used by GSU that is also useful to its competitors purchasing uranium. In making this determination, the ALJ applied the Restatement of Torts factors. After finding that the information is so privileged, the ALJ applied a balancing test to determine if the privilege gave way to the public's need for disclosure.⁴ After applying the factors in the *Pennzoil* case, the ALJ finds that full disclosure is not necessary. Based on the *in camera* inspection, pleadings, witness testimony, and legal argument, Cities motion to declassify Cities 2-21 and 2-30 was **DENIED**.

3. Cities 2-38

GSU placed a witness on the stand for direct and cross-examination. Cities 2-38 provides the monthly nuclear fuel balances, representing the draw down of the inventory. The witness testified that a competing nuclear fuel manager could estimate GSU's nuclear fuel purchases. However, the witness stated that this information will not provide the "complete puzzle, but it is a helpful piece of the puzzle and it gives them (competitors) information that helps them." Tr. 118. The ALJ did not rule on this document at that time.

Based on the testimony of the witness, *in camera* inspection, pleadings, and legal argument, Cities motion to declassify Cities 2-38 is **DENIED**. The ALJ finds that GSU met its burden of proving that the release of this information, although it is a single item of information and not the full "puzzle," will give an advantage to competitors.⁵ After finding that the information is so privileged,

⁴*Pennzoil Co. v. FPC*, 534 F.2d 627, 632 (5th Cir. 1976).

⁵*S.W. Bell Tel. Co v. State Corp. Comm'n*, 629 P.2d 1174 (Kan Ct App. 1981)(trade secret may relate to a single item of information, a plan or compilation of information).

the ALJ applied a balancing test to determine if the privilege gave way to the public's need for disclosure, as required in the *Pennzoil* case. The ALJ finds that it did not.

II. Procedures for Submitting Evidence Under Seal

Parties who wish to comment upon the procedures in this case for submitting evidence under seal are directed to look at Docket No. 10894, Order Nos. 19, 31, 35 and 37. Any proposed procedures and/or schedules concerning this issue are due March 15, 1996 and replies are due on March 21, 1996. The ALJ will then establish the procedure and schedule based on the pleadings.

III. Modification to Procedural Schedule

GSU proposed a modification of the procedural schedule in order to address Item No. 2 in the Commission's Preliminary Order, which requests that GSU identify the level of fuel savings that have accrued to Texas ratepayers during the reconciliation period as a result of GSU's merger with Entergy Corporation. The proposed changes to the procedural schedule allow for the Commission to process this case within the one year deadline and were agreed to at the prehearing.

The following dates are adopted and supersede those set out in Order No. 5:

A. Testimony

Party	Direct	Objections	Responses
GSU supplemental (all except fuel savings)	March 29, 1996	April 12, 1996	April 19, 1996
GSU supplemental (1995 fuel savings)	April 30, 1996	May 14, 1996	May 21, 1996
Intervenor	June 28, 1996	July 8, 1996	July 15, 1996
General Counsel	July 8, 1996	July 15, 1996	July 22, 1996
GSU rebuttal	July 15, 1996	July 22, 1996	orally at hearing

GSU shall file its sequence of direct witnesses on April 30, 1996.

B. Discovery

Discovery begins on Intervenor and General Counsel testimony: July 8, 1996

Discovery ends on GSU Direct: July 8, 1996

Discovery begins on GSU Rebuttal: July 15, 1996

Discovery ends on Intervenor and General Counsel testimony and on GSU rebuttal:
July 22, 1996

C. Settlement Conference

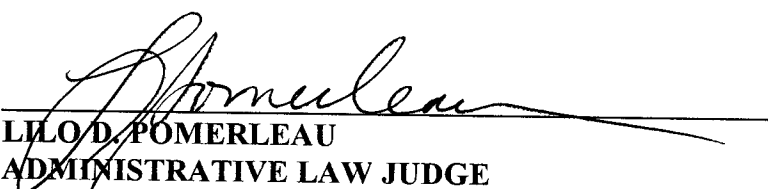
July 8 and July 9, 1996

D. Hearing on the Merits

The hearing on the merits noticed in Order No. 5 is **RESCHEDULED** from 9:00 a.m., May 21, 1996 to **9:00 a.m., July 22, 1996** at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas.

SIGNED AT AUSTIN, TEXAS the 5th day of March 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS


LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

Back

PUC DOCKET NO. 15102
SOAH DOCKET NO. 473-96-0117

20 FEB 23 AM 10:36
PUBLIC UTILITY COMMISSION
CLERK

APPLICATION OF GULF STATES §
UTILITIES COMPANY TO §
RECONCILE ITS FUEL COSTS, FOR §
PERMISSION TO DELAY §
REQUESTING A SURCHARGE, OR IN §
THE ALTERNATIVE, FOR A §
SURCHARGE TO RECOVER UNDER- §
RECOVERED FUEL EXPENSE §

PUBLIC UTILITY COMMISSION
OF TEXAS

PRELIMINARY ORDER

On December 7, 1995, Gulf States Utilities Company (GSU or Gulf States) filed an application requesting reconciliation of its fuel costs for the period beginning January 1, 1994 and ending June 30, 1995 (the "reconciliation period"). At the end of the reconciliation period, GSU's fuel account balance was under-recovered by approximately \$22 million.¹ Rather than implement a surcharge at the conclusion of this docket, GSU has proposed to carry forward the under-recovered balance to a future proceeding. In the alternative, GSU proposes to surcharge the under-recovered fuel balance, less any Commission-authorized fuel cost disallowance, over a 12-month period. During the reconciliation period, Gulf States has collected fuel revenues via two separate fixed fuel factors that were set in Docket Nos. 10894 and 12712.² Additionally, GSU became a wholly owned subsidiary of Entergy Corporation on December 31, 1993. Therefore, this is the first fuel reconciliation that addresses GSU/Entergy's post-merger fuel costs.

¹ Application of Gulf States Utilities Company to Reconcile its Fuel Costs, Docket No. 13170, 20 P.U.C. BULL. 1026 (April 18, 1995) (mem.). GSU's fuel costs were reconciled through December 31, 1993 and the fuel over/under recovery balance was set to zero.

² Application of Gulf States Utilities to Reconcile Fuel Costs, Establish New Fixed Fuel Factors, and Recover Its Under-Recovered Fuel Expense, Docket No. 10894, 19 P.U.C. BULL. 1401 (Aug. 19, 1993); Petition of Gulf States Utilities Company to Lower Its Fixed Fuel Factor and For Good Cause Exception to PUC Subst. R. 23.23(b)(2), Docket No. 12712, 19 P.U.C. BULL. 1761 (April 28, 1994) (mem.). Docket No. 10894 fixed fuel factors were applied during the months of January and February 1994; Docket No. 12712 fixed fuel factors were applied during the months of March 1994 through June 1995.

I. ISSUES TO BE ADDRESSED

Pursuant to Tex. Gov't Code Ann. § 2003.047(e) (Vernon Pamphlet 1995), the Commission must provide to the administrative law judge (ALJ) a list of issues or areas that must be addressed in any proceeding referred to the State Office of Administrative Hearings (SOAH). The Commission identifies the following issues that must be addressed in this docket:

1. Were the prices charged to GSU by its fuel- and power-supplying affiliates during the reconciliation period in accordance with PURA § 2.208(b)?
2. What level of fuel savings have accrued to Texas ratepayers during the reconciliation period as a result of GSU's merger with Entergy Corporation; and, has GSU's Texas retail jurisdiction received a proportionate share of Entergy's systemwide merger-related fuel savings?
3. Are GSU's non-fixed fuel factor sales subsidized to any degree by Texas retail customers paying the fixed fuel factor?
4. To what extent did GSU seek to market any excess capacity at its Spindletop natural gas storage facility to third parties during the reconciliation period in an effort to reduce fuel costs for GSU's ratepayers; and, were GSU's efforts in this respect reasonable?
5. What is the effect on Gulf States and its ratepayers, if any, of GSU's change in coal inventory accounting methodology from last in, first out (LIFO) to average cost in the absence of a corresponding rate base adjustment to fuel inventory in a general rate case?
6. Was the duration of GSU's River Bend refueling outage number five (RF-5) reasonable and was the outage prudently planned and managed?

7. Was the extended forced outage 94-03 at River Bend due, in whole or in part, to imprudent management by GSU/Entergy?
8. Assuming that the extended forced outage 94-03 at River Bend was *not* due to imprudent management and that fuel costs for GSU increased as a result of the outage, should GSU be required to absorb some or all of the increased fuel costs, or should this risk be borne entirely by GSU's ratepayers?
9. Is there good cause to justify an exception to the allocation of 100 percent of the revenues from off-system sales to ratepayers during the reconciliation period subsequent to the final order in Docket No. 12712?

Nothing in this Preliminary Order precludes the parties and the ALJ from raising and addressing any issue relevant to these proceedings which is not specified in this Order. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Tex. Gov't Code Ann. § 2003.047(e).

II. ISSUES NOT TO BE ADDRESSED

Furthermore, the Commission takes the position that the following issue need not be addressed in this proceeding, for the reasons stated:

Whether GSU should be allowed to continue to allocate a portion of the margins from off-system sales to its shareholders subsequent to the end of the reconciliation period? P.U.C. SUBST. R. 23.23(b)(2)(B)(vi)(III) states that, unless otherwise specified by the Commission, eligible fuel expenses shall include "revenues from off-system sales in their entirety." Thus, any sharing mechanism for off-system sales revenues is subject to the full discretion of the Commission.

In *Petition of Southwestern Public Service for Fuel Reconciliation*, Docket No. 14174 (Jan. 5, 1996) (not yet reported), the Commission ordered Southwestern to include 100 percent of

the revenues received from off-system sales as an offset to eligible fuel expense on a prospective basis. Consistent with that policy decision, and regardless of the ultimate determination of the allocation of margins during the reconciliation period as discussed in Section III of this Order, the continuation of a sharing mechanism for off-system sales subsequent to June 30, 1995 is not an issue to be addressed in this case.

III. THRESHOLD LEGAL/POLICY DETERMINATIONS

Parties filed briefs on February 9, 1996 addressing certain legal and policy issues. The following statement of position was reached in consideration of the parties' arguments. Accordingly, pursuant to the Administrative Procedure Act, Tex. Gov't Code Ann. § 2001.058(c) (Vernon Pamphlet 1996), the Commission states its position on the following threshold legal/policy issues:

Does GSU have a vested interest in 25 percent of the margins from off-system sales during the reconciliation period; or, in the alternative, are the margins from off-system sales, in their entirety, subject to a reasonableness review and reconciliation?

Gulf States collected fuel revenues under two separate fixed fuel factors during the reconciliation period. For the months of January and February 1994, GSU collected fuel revenues through the fixed fuel factors set in Docket No. 10894. For the months of March 1994 through June 1995, fuel revenues were collected through the fixed fuel factors set in Docket No. 12712.

In Docket No. 10894, the Commission found that "[b]eginning with the effective date of the fixed fuel factor approved in this proceeding, it is reasonable to split the adders between the ratepayers and shareholders 75/25 percent in favor of the ratepayers."³ By way of this finding, the Commission granted GSU an exception to P.U.C. SUBST. R. 23.23(b)(2)(B)(vi)(III) by *explicitly* specifying a treatment of margins from off-system sales other than that which would be

³ Docket No. 10894, Finding of Fact No. 323, 19 P.U.C. BULL 1401, 1671. Off-system sales *adders* are synonymous with off-system sales *margins*.

effective by default, *i.e.*, the classification of 100 percent of the revenues from off-system sales as an offset to eligible fuel expense.

Gulf States next revised its fixed fuel factors in Docket No. 12712, filed on January 19, 1994. In its application, GSU proposed to revise its fixed fuel factors to reflect merger-related savings pursuant to the stipulation in Docket No. 11292.⁴ Interim rates were effectuated in March 1994 and the docket was ultimately stipulated by the parties at the interim rate level. Unlike Docket No. 10894, the Commission's final order in Docket No. 12712 did not specify the allocation of margins from off-system sales.

In addition, Gulf States reconciled its fuel costs from October 1, 1991 through December 31, 1993 in Docket No. 13170. Again, the Commission's final order did not contain language specifying the allocation of margins from off-system sales.

In its brief, GSU claims that "Gulf States has a vested interest in the Commission's prior holdings until those holdings are modified prospectively." With respect to this statement, GSU references *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 615 S.W.2d 947, 956-57 (Tex. Civ. App.--Austin 1981) (*SWB*), which states that, in determining whether vested rights are destroyed or impaired by the application of a statute retroactively, one must consider:

- a) whether the public interest is advanced or retarded;
- b) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons; and
- c) whether the statute surprises persons who have long relied on a contrary state of the law.

GSU argues that it has a vested interest in the 75/25 split because (1) it is not in the public interest to issue a prospective order, and then rescind such order after the fact; (2) it had a

⁴ *Application of Entergy Corporation and Gulf States Utilities Company For Sale, Transfer, or Merger*, Docket No. 11292, 19 P.U.C. BULL. 1889, 2018 (Dec. 29, 1993).

reasonable expectation that the 75/25 split adjudicated in Docket No. 10894 would not be retroactively changed, and (3) it will be “surprised” if a retroactive modification occurs.

Addressing the effect of Docket No. 12712, GSU argues that the sole purpose of that docket was to reflect merger-related savings in a revised fuel factor. Regardless of the statements in the stipulation and final order disavowing any precedential value with regard to the principles and methodology underlying the calculation of the fixed fuel factor, GSU contends that Docket No. 12712 did nothing to change the allocation of margins approved in Docket No. 10894.

In support of its position, GSU also cites the Commission’s treatment of Southwestern Public Service Company’s (SPS) off-system sales margins. GSU notes that, in Docket No. 10602, a stipulation was adopted by the Commission which provided for a 75/25 allocation of off-system sales margins in favor of the ratepayers.⁵ GSU also observes that the propriety of the split for SPS was not expressly litigated in either of the subsequent dockets in which the split was maintained, Docket No. 11011 or Project No. 11520.⁶ Not until Docket No. 14174 was this treatment altered, and only then on a prospective basis from the end of the reconciliation period.

General Counsel agrees with GSU’s position that the 75/25 allocation of margins from off-system sales established in Docket No. 10894 should continue throughout the entire reconciliation period. General Counsel argues that, because the allocation established in Docket No. 10894 was neither litigated nor addressed in Docket Nos. 12712 or 13170, the 75/25 percent allocation methodology was implicitly continued. Thus, the General Counsel contends that the allocation may not be changed for a reconciliation period which has ended.

⁵ *Petition of Southwestern Public Service Company for Permanent Authorization of Periodic Opportunity Sales Margin Credits*, Docket No. 10602, 17 P.U.C. BULL. 2056 (Feb. 5, 1992) (mem.).

⁶ *Petition of Southwestern Public Service Company for Authority for a Fuel Reconciliation*, Docket No. 11011, 18 P.U.C. BULL. 1259 (Jan. 14, 1993) (mem.); *Petition of Southwestern Public Service Company for Authority to Refund Fuel Cost Over-Recoveries*, Project No. 11512, ___ P.U.C. BULL. ___ (Nov. 12, 1992).

The Office of Public Utility Counsel (OPC) and Cities both take the position that the margins from off-system sales are subject to a reasonableness review and reconciliation from March 1994 through the end of the reconciliation period. OPC contends that the Commission did not confer a “vested interest” in future margins from off-system sales upon GSU in Docket No. 10894 or in any docket subsequent to that proceeding. OPC further argues that GSU lost its opportunity to share in off-system sales margins in Docket Nos. 12712 and 13170 because the Commission did not expressly find in the final order issued in those dockets that the 75/25 allocation scheme should continue in either case. Likewise, Cities claim that the fixed fuel factor set in Docket No. 12712 did not incorporate an express exception to the requirements in P.U.C. SUBST. R. 23.23(b)(2)(B)(vi)(III) that eligible fuel expenses include revenues from off-system sales in their entirety; therefore, the Cities assert that the rule is deemed effective, rather than any exception to the rule. The fuel factors in Docket No. 12712 became effective in March 1994, preceding the final order in Docket No. 13170, which was issued on April 18, 1995. Therefore, OPC and Cities maintain that all margins from off-system sales are subject to reconciliation from March 1994 forward.

The Commission takes the position that the margins from off-system sales are, in their entirety, subject to a reasonableness review and reconciliation for the period of April 28, 1994 through the end of the reconciliation period.⁷ The rule addressing the treatment of off-system sales requires that the revenues from such sales, in their entirety, be included in eligible fuel *unless otherwise specified by the Commission*. In Docket No. 10894, the Commission specifically found a split in margins to be reasonable “beginning with the effective date of the fixed fuel factor approved in [that] proceeding.” In contrast, in Docket No. 12712, the Commission did not specify any allocation of margins. Therefore, the Commission’s prior 75/25 split was modified *prospectively*, consistent with the rule, *i.e.*, 100 percent allocation to the ratepayers. This allocation will be followed in the reconciliation of fuel expenses and revenues in this case unless GSU can justify an exception to the rule.

⁷ April 28, 1994 is the date of the final order in Docket No. 12712.

The Commission disagrees with GSU's contention that it has a vested interest in the 75/25 split under the holding in *SWB*. The fixed fuel factors and the associated exceptions that were approved in Docket No. 10894 ceased to exist upon the rendition of the final order in Docket No. 12712, which did not expressly carry forward those exceptions. GSU should not have had any expectation that the split would continue past that point and, therefore, should not be "surprised" by the application of the plain language of the rule. In actuality, it may be GSU's ratepayers and the parties to Docket Nos. 12712 and 13170 who are "surprised" by GSU's proposed continuance of the 75/25 split, when there was no specific exception granted by the Commission in either docket, as required by the rule.

Regarding GSU's argument relating to the treatment of SPS's margins in Docket No. 14174, the Commission finds that docket to differ substantially from the case at hand. In Docket No. 14174, the Commission found that "[i]t is reasonable to interpret the final order in Docket No. 10602 to contemplate only a prospective change in the 75/25 margin-splitting formula in light of the language in the stipulation entered into in that proceeding."⁸ In the case of GSU, there is no language in Docket Nos. 10894⁹, 12712, or 13170 that would dictate a prospective-only adjustment of the allocation of margins similar to that approved in Docket No. 14174.

IV.

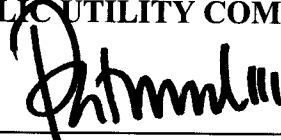
This Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at the hearing. Furthermore, this Order is not subject to motion for rehearing or motion for reconsideration.

⁸ Docket No. 14174, Finding of Fact No. 25(a).

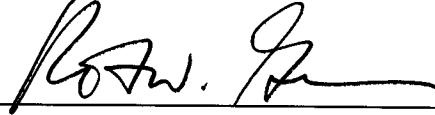
⁹ As discussed previously, however, the Commission finds that GSU had good reason to rely upon the 75/25 split authorized in Docket No. 10894 until the issuance of the final order in Docket No. 12712.

SIGNED AT AUSTIN, TEXAS the 23rd day of February, 1996.

PUBLIC UTILITY COMMISSION OF TEXAS



PAT WOOD III, CHAIRMAN



ROBERT W. GEE, COMMISSIONER



JUDY WALSH, COMMISSIONER

ATTEST:



PAULA MUELLER
SECRETARY OF THE COMMISSION