

State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 11, 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. 9 and a Letter to Robert H. Acrey in the above-referenced proceeding. Please file stamp and return the copies to SOAH.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Lilo D. Pomerleau".

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	§	BEFORE THE STATE OFFICE
UTILITIES COMPANY TO	§	
RECONCILE ITS FUEL COSTS, FOR	§	OF
PERMISSION TO DELAY	§	
REQUESTING A SURCHARGE, OR IN	§	ADMINISTRATIVE HEARINGS
THE ALTERNATIVE, FOR A	§	
SURCHARGE TO RECOVER UNDER-	§	
RECOVERED FUEL EXPENSE	§	

ORDER NO. 9

MOTION TO DECLASSIFY (CITIES 1-45)

At the February 23, 1996 prehearing conference, GE Nuclear Energy (GE) made a special appearance to discuss a GE report, which GE claims is proprietary and confidential. During discovery and in accordance with the Protective Order, Gulf States Utilities Company (GSU) had provided the Cities with a copy of the report in response to Cities 1-45. The Cities filed a request to declassify portions of this report. At the prehearing conference, GSU, after discussion with GE, stated that it would declassify a redacted version, which was acceptable to the Cities. However, it was discovered that GSU does not have the entire report; that GE, a non-party, claims that this second portion of the report is also privileged, and that GE would consent only to furnish that portion to the Administrative Law Judge (ALJ) for *in camera* inspection. GE stated that the portion it wishes to remain confidential trade secret material contains photographs of flawed fuel rods and descriptions of testing methodology.

The ALJ has reviewed these materials and agrees that they represent photographs of fuel rods, a drawing of a flawed fuel rod, and description of equipment and testing methodologies. Accordingly, GSU shall obtain from GE a redacted version of the entire report, if it has not already done so, and provide this redacted report to the Cities on or before March 20, 1996.

GSU shall also notify GE that it may pick up its confidential material from State Office of Administrative Hearings (SOAH), Utility Division, Ms Texey Caldwell, Room 502 GE will also be provided a copy of this Order through its counsel, Mr Lawrence S Smith

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

STATE OFFICE OF ADMINISTRATIVE HEARINGS


LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

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Recd-

State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 11, 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 9 and a Letter to Robert H Acrey in the above-referenced proceeding. Please file stamp and return the copies to SOAH

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Lilo D Pomerleau".

Lilo D Pomerleau
Administrative Law Judge

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 11, 1996

Mr. Robert H. Acrey
1107 Holly Dr.
Conroe, Texas 77301

Re: **SOAH Docket No. 473-96-0117**
PUC Docket No. 14102

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 Underrecovered Fuel Expense

Dear Mr. Acrey,

Thank you for your letter to the Public Utility Commission of Texas (PUC) expressing your interest in Gulf States Utilities Company's (GSU) fuel case. You mentioned that you do not know whether you wish to intervene or not. Also, you would like the PUC to require GSU to print a notice that non-lawyers can understand. As to the last request, the Commission requires GSU to notify you of every possibility--a possible raise or a delayed raise in fuel rates, or a refund. Failure to give notice of what might happen would mean that the utility could be prohibited from that particular action

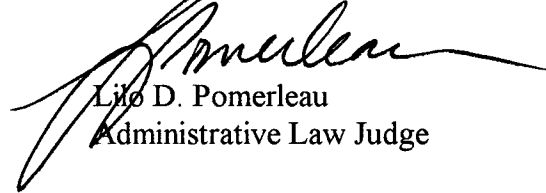
This case is called a "fuel reconciliation" proceeding, which means that the utility is coming to the PUC to recover its reasonable and necessary fuel and purchased power expenses. A public hearing will be held to determine whether GSU's fuel and purchased power expenses (from January 1, 1994 through June 30, 1995) are reasonable. If you wish to formally intervene, as you indicated you may be considering, you need to file a letter with the filing clerk at the PUC, 7800 Shoal Creek Boulevard, Austin, Texas, 78757. The deadline for filing such a letter is April 15, 1996

Intervenors are allowed to participate in the formal hearing held in Austin. The hearing is similar to a trial, could last for a number of weeks, and may involve extremely technical testimony and evidence. In addition to receiving copies of all filings in the case, intervenors can testify under oath, call witnesses, file documentary evidence, and cross-examine other parties' witnesses at the hearing. But intervenors are also required to respond to detailed requests from other parties for information, make themselves and their witnesses available at the hearing to be cross-examined, send

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(512)458-0388. You may also call the Commission's Office of Regulatory Affairs at (512) 458-0282 and ask to speak with the attorney assigned to this docket. At present, I can tell you that so far five parties have intervened in this case. We have held two prehearings to discuss various procedural matters, the deadline for intervention is April 15, 1996, and the hearing on the merits is scheduled for July 22, 1996.

Sincerely,



Lilo D. Pomerleau
Administrative Law Judge

xc: All parties of record

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 14, 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 10 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, reading "Lilo D. Pomerleau".

Lilo D Pomerleau
Administrative Law Judge

/ib

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

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

ORDER NO. 10
RULING ON OPC's MOTION TO COMPEL ITS SECOND AND
THIRD DISCOVERY REQUESTS TO GULF STATES UTILITIES

On March 6, 1996, the Office of Public Utility Counsel (OPC) filed a motion to compel Gulf States Utilities Company (GSU) to respond to certain Requests for Information (RFIs). GSU timely filed a response to the motion. According to those pleadings, the parties have generally agreed to procedures to deal with GSU's responses to the RFIs. This Order addresses certain minor issues that remain in dispute.

I

RFI 2.26. Please provide a copy of the Louisiana Public Service Commission's consultant's testimony filed on June 30, 1995 regarding GSU fuel costs for the period October 1991 through December 1994.

According to the pleadings, GSU has provided to OPC the non-confidential portions of the requested testimony but the confidential portions have not been provided. The confidential portions have previously been provided under a protective agreement in the Louisiana proceeding referenced in the RFI. GSU is concerned that providing that material in this proceeding will be construed by the parties to the Louisiana case as voiding the protection accorded by the Louisiana agreement. OPC counters that GSU is the party being protected by the Louisiana agreement, and GSU will receive comparable protection under the Protective Order in this docket. GSU offered to contact the parties to the Louisiana agreement and attempt to get them to agree that providing the testimony in this docket under the Texas Protective Order will not cause GSU to lose the protection under the

Louisiana agreement. No time frame for obtaining such agreement was suggested by GSU.

The Administrative Law Judge finds that the Protective Order entered in this docket will afford GSU the protection it needs in Texas. Its argument regarding parties' reactions in the Louisiana proceeding seems speculative, at best. GSU points to no attribute in the Texas Protective Order that would cause parties in the Louisiana case to infer that the confidential material would be treated any differently in Texas than it is being treated in Louisiana. Whether the confidential material is relevant for admission into evidence in this docket remains a question to be considered at the time such material might be offered. Therefore, GSU needs not fear any form of disclosure in Texas in this discovery phase that would render the Louisiana protections void. Accordingly, GSU shall provide the requested materials under the Protective Order within three days of issuance of this Order.

II.

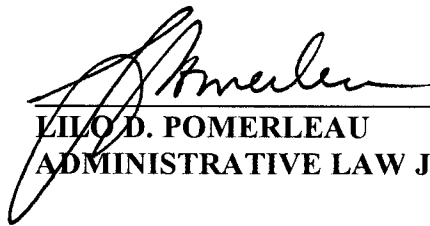
Next, OPC requests that GSU be required to file, on a date certain, an index of privileged documents responsive to OPC's second and third data requests. In its response to the motion to compel, GSU indicated it had found, to date, only one document responsive to the data requests but that it was searching for more. GSU explained further that, because of certain protracted and complicated litigation with Cajun Electric Power Cooperative, Inc., the review of its files has taken time to complete, and GSU requested that it be permitted to file its index of privileged documents by March 20. That request is granted, and GSU shall file such index no later than 3:00 p.m. on March 20, 1996.

III.

In response to a related request by OPC, with regard to future claims of privilege, GSU shall provide to OPC, and any other party to this proceeding requesting privileged material, a specific date by which GSU will provide a list of documents for which it claims a privilege, subject to the duty to supplement under P.U.C. PROC. R. 22.144(j).

SIGNED AT AUSTIN, TEXAS the 14th day of March 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 20, 1996

9 MAR 27 1996
PUBLIC UTILITY COMMISSION
FILED CLERK

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. 11 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

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Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
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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

9. APR 22 1996
PUC UTILITY COM. 15
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ORDER NO. 11
RULING ON GSU'S MOTION TO COMPEL
ITS FIRST REQUEST TO CITIES

On March 8, 1996, Gulf States Utilities Company (GSU) filed a motion to compel the Cities to respond to certain Requests for Information (RFI). Cities timely filed a response. GSU seeks information related to the Cities' expert witnesses. The Cities object to these RFIs on the grounds that discovery on the Cities' case does not begin until July 8, 1996, thus, the questions are premature. GSU argues that Order No. 5, which states that RFIs may be sent immediately, allows GSU to propound non-substantive discovery.

GSU is incorrect in its interpretation. Order No. 8 states that discovery concerning intervenor testimony begins July 8, 1996. Accordingly, GSU's motion to compel the Cities to respond to its first RFI is **DENIED**.

SIGNED AT AUSTIN, TEXAS the 20th day of March 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS


LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

March 29, 1996

APR - 1 11 2 33
PUBLIC UTILITY COMMISSION
FILING CLERK

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. 12 in the above-referenced proceeding. Please file stamp and return the copy to SOAH for our records.

Thank you for your assistance.

Sincerely,

Lilo D. Pomerleau

Lilo D. Pomerleau
Administrative Law Judge

/ib

One Capitol Square
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(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

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FILING 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 §

BEFORE THE STATE OFFICE OF
OF
ADMINISTRATIVE HEARINGS

ORDER NO. 12
RULING ON OPC's MOTION TO COMPEL
ITS FOURTH DISCOVERY REQUEST

On March 11, 1996, the Office of Public Utility Counsel (OPC) filed a motion to compel Gulf States Utilities Company (GSU) to respond to its Request for Information (RFI) No. 4-34. GSU timely filed a response to the motion.

The RFI states:

No. 4-34: For each of Entergy's non-GSU coal-fired units, please provide estimated annual capacity factor for 1994 and 1995 required to burn the minimum annual purchase requirements of any applicable coal supply contracts or to burn the minimum amount of coal which must be transported under any applicable coal transportation contracts.

GSU objects for the following reasons:

1. The requested data is not relevant because this docket concerns the reconcilable fuel costs of GSU's coal units and not those of Entergy Corporation (Entergy);
2. The contracts requested contain confidential or highly sensitive information to which GSU is not in privity and thus cannot freely disclose;
3. The data requested is not in GSU's possession, and it would be required to manipulate data and to undertake certain analyses not yet conducted.

OPC's Arguments in Motion to Compel:

OPC responds that it does not seek information on Entergy's non-GSU coal-fired generating units for the purpose of reviewing Entergy's prudence or decisions concerning the operation and

dispatch of those other units. It seeks the information in order to analyze whether Entergy's other operating companies' coal-fired units were dispatched in a manner that (1) adversely impacts GSU, (2) is inconsistent with the manner in which GSU's coal-fired units were operated and dispatched, or (3) otherwise adversely impacts GSU's Texas retail customers, in order to determine whether these facts are relevant to this docket. This information, according to OPC, flows from and is relevant to issue number two (Issue 2) raised by the Commission in its Preliminary Order in this docket

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 system-wide merger-related fuel savings?

Dispatch on the Entergy system is performed by Entergy. Because all of GSU's dispatch decisions are made by Entergy, in order to address Issue 2, it is necessary to require GSU to obtain this information from Entergy. Citing Rule 166b(2)(b) of the Texas Rules of Civil Procedure¹, adopted by reference at P.U.C. PROC. R. 22.141(a), OPC argues it is counter to the rules favoring full discovery to permit a litigant to compartmentalize its operations to resist disclosure. OPC argues that while the information requested may not be in GSU's actual possession, it is certainly in its constructive possession, or that of its parent company, Entergy. OPC agreed to accept the underlying data in lieu of a complete response to the question in order to avoid any danger of unnecessary speculation on GSU's part. Furthermore, because OPC agreed to receive the information under the protective order in this docket, GSU withdrew, for the time being, its second objection regarding confidentiality.

GSU's Response:

GSU counters that RFI 4-34 seeks hypothetical operating information. To provide a response, GSU must generate hypothetical capacity factors for each of the Entergy Operating

¹Rule 166b(2)(b): A person is not required to produce a document or tangible thing unless it is within the person's possession, custody or control. Possession, custody, or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority or representative), the person has possession, custody or control.

Companies.² GSU indicates that the capacity factors do not exist and would have to be created based on the assumptions contained in the RFI. It did not indicate or argue whether creating such documents would be burdensome.

Furthermore, OPC's first and third issues, GSU claims, relate to questions about the prudence of the operation and dispatch of the other operating companies, which is not within the Texas Commission's jurisdiction to adjudicate. Only two coal-fired plants exist on the Entergy system other than those owned by GSU. These are located in Arkansas and are owned by AP&L and MP&L. GSU believes that each state regulatory body is responsible for reviewing the prudence of unit operation and fuel procurement for the units owned by the Entergy Operating Company operating within its jurisdiction.

All generating units on the Entergy system are economically dispatched by a central system dispatch center run by the Entergy system operator.³ Dispatch of GSU's coal-fired generation is controlled by Entergy. The operating relationship among the Entergy companies is governed by the System Agreement approved by the Federal Energy Regulatory Commission (FERC) and subject to FERC jurisdiction. Therefore, GSU asserts that any complaint that a state regulator or customer has about this operation or dispatch of a unit owned by an Entergy Operating Company operating in another state must be taken to the FERC. A state regulator lacks authority to determine whether the System has been dispatched in a prudent manner or to disallow its Entergy company fuel and purchased power costs based on that regulator's finding that some other Entergy company acted imprudently under the terms of the System Agreement. Consequently, the hypothetical annual capacity factors OPC seeks are irrelevant to any issue in this case because GSU states that the Commission lacks authority to review the prudence of how other Entergy companies operated their units or should have procured fuel for their units. And this Commission lacks the authority to review

²These include Arkansas Power and Light Company (AP&L), Louisiana Power and Light, Mississippi Power and Light (MP&L), New Orleans Public Service Inc.

³Information regarding system dispatch is contained in the affidavit of William C. Phillips, Entergy employee managing dispatch of generation facilities, attached to GSU response to the motion to compel filed by GSU on March 19.

Given that lack of authority, the hypothetical capacity factors are inadmissible under Tex. R. Civ. Evid. §§401 and 402, because they are not probative in this docket. Furthermore, hypothetical capacity factors, based on the question of how the system actually was dispatched, say nothing about what actually occurred at GSU's units, and therefore, according to GSU, are not relevant to the discovery of admissible evidence as required under Tex. R. Civ. Evid. §402.

Ruling:

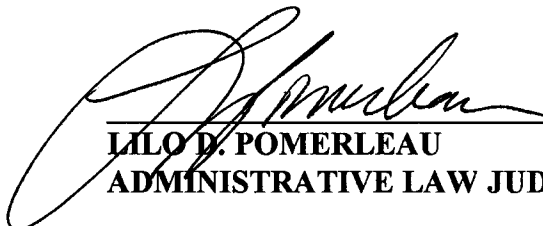
The ALJ finds that the parties have not shown that the info lead to the discovery of admissible evidence; she further finds that the central dispatch or non-GSU coal supply or coal transportation co

jurisdiction of the FERC or other regulatory commissions. Certainly OPC has not tied the information requested to the fuel savings allocation issue; and even though GSU, as the party resisting discovery, is accorded the burden to prove absence of relevance, it failed to address how the information is not relevant to the Commission's Issue 2. Also, because the information does not exist in the "hypothetical" form the RFI seems to require, Commission practice rarely requires entities to create a document for opposing parties. In those instances where the Commission has required such effort, the information requested was clearly discoverable.⁴ In this case, relevance of the information is not nearly as clear. The ALJ is reluctant to order a party to create a document without a convincing showing that the information requested is relevant or reasonably calculated to lead to the discovery of relevant and admissible evidence.

For these reasons the motion to compel is denied. However, instead of calling a prehearing conference in this discovery dispute, OPC is permitted to re-urge its motion to compel if it is able to show, through affidavit or otherwise, a nexus between the information requested and the Issue 2 fuel allocation/sharing review and to explain why the jurisdictional impediment raised by GSU does not apply. GSU will thereafter be permitted to respond, including in its response arguments relating to Issue 2.

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

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

⁴See, *Application of Texas Utilities Electric Company for Authority to Change Rates*, Docket No. 9300, Order No. 15, 15 P.U.C. BULL. 2224 (April 26, 1990); *Application of El Paso Electric Co. For Authority to Change Rates*, Docket No. 12700, 20 P.U.C. BULL. 79, 83 (April 15, 1994).

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State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

April 17, 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. 15 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".

Lilo D. Pomerleau
Administrative Law Judge

/tlc

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March 15, 1996, however, the Commission did not vote to hear it. Pursuant to P.U.C. PROC. R. 22.123(g), the appeal of that order was deemed denied on March 26, 1996.

Deadline for Response to Cities 7-43 and 7-45

Based on the affidavit of Mr. Bradley E. Tate, which indicated personnel could respond to the requests by mid to late April, GSU shall file a response to the Cities' RFI Nos. 7-43 and 7-45 on or before April 29, 1996.

Objections to Cities' 19th RFI

Regarding the Cities' motion to compel 19-4, 19-6, 19-8, 19-10, and 19-18(a) through (p), GSU states that (1) the information is not available in a form maintained by GSU; (2) the date for responses to RFI Nos. 7-43 and 7-45 have not been set, therefore, the Cities' request is inconsistent with the intent of Order No. 8; (3) GSU cannot perform the analysis within the ordinary time period because of the magnitude of the work involved and the limited number of qualified personnel needed to perform the analysis; and (4) the near-critical path analysis sought is irrelevant to a determination of the outage activities.

The questions involve refueling outage No. 5 (RF-5), which took place on April 15, 1994 and lasted until July 6, 1994 (82 days). The planned time for the outage was 53 days. The questions seek detailed explanations for the work scope, root cause, and duration of the critical path for emergent work associated with suppression pool clean-up, and critical path or near-critical path for emergent work associated with the RHR heat exchange inspection, HPSC5 battery replacement, power line conditioner capacitor replacement, and for 16 specified major equipment improvements.

Cities responds that the information requested focuses more narrowly on specific activities. More importantly, GSU has asserted no recognizable objection under the Texas Rules of Civil

Procedure (TRCP) or under the Commission's rules.

In its reply, GSU first states that the information requested seeks 20 different near-critical path analyses. Apparently, according to GSU, these responses are tied to responses to Cities 7-43 and 7-45, for which the ALJ set a deadline to respond in the above section of this Order. Second, GSU claims that the request is wasteful and unreasonable because the Cities have not determined which particular outage activities were imprudent. GSU adds that the duration of near-critical path activity does not have any bearing whatsoever on the issue of whether a particular activity was prudent or any quantification of a disallowance. Finally, GSU argues that considerable work is required to determine near-critical path activity during an 82-day outage. It requests that it not be required to provide the information until the appeal of Order No. 8 is resolved.

The ALJ finds that the Cities' requests (19-4, 19-6, 19-8, 19-10, and 19-18(a) through (p)) are relevant or reasonably calculated to lead to the discovery of admissible evidence as required by TRCP 166b(2)(a). Taking GSU's reply arguments in order, first, the ALJ is persuaded that these responses are tied to Cities 7-43 because both concern near-critical path activity for RF-5. Therefore, GSU's objection and request for a delayed response is proper. Second, GSU's argument that the claim is wasteful and unreasonable is unsupported by legal argument. Third, the ALJ notes that GSU does not specify how long it would take for GSU to provide a response and, with the Commission's denial of GSU's appeal, the ALJ finds it reasonable to set the same deadline for a response to the Cities' 19th RFI that was set for Cities 7-43.

Accordingly, the Cities' motion to compel GSU to respond to RFI Nos. 19-4, 19-6, 19-8, 19-10, and 19-18(a) through (p) is **GRANTED**. GSU **SHALL** provide these responses on or before April 29, 1996.

Objections to Cities 18-1

GSU argues that the request is overly burdensome because it seeks information on every near-critical path activity during each outage. GSU claims that, in order to identify float figures¹ associated with near-critical path activities, it must first identify those activities. (The ALJ presumes GSU means that it must identify the near-critical path activities for every outage before it can identify days of float.) According to GSU, it cannot respond to this request until it responds to Cities 7-43, 7-45, 7-47, and 7-49.²

The RFI states:

18-1 Regarding Mr. Sellman's testimony at page 10, line 3, concerning "near-critical path activity," provide a detailed explanation that sets forth the number of days of float associated with near-critical path activities.

The Cities contend that the question could be answered in several sentences, that GSU is misinterpreting its request "to define the term he uses in testimony at page 10, line 3" and to state what days of float are in terms of near-critical path.

GSU responds by reiterating what it understands 18-1 to mean: that it seeks to know the number of days of float associated with each near-critical path activity. GSU again states that the identity of all near-critical path activities must be established before it can identify float figures. GSU contends that the Cities' request for float information is unreasonable and actually more burdensome than the Cities' earlier request for all near-critical path activities. It also argues that the amount of

¹GSU defines "float" as "the amount of time a selected activity is from becoming the critical path." The ALJ does not find the definition helpful; however, GSU offers an example. If an activity has six hours of float (with all else being equal), if that activity were to be extended more than six hours, or if the critical path activity were to finish more than six hours early, then the activity would become critical path. GSU Response at 10.

²As ordered above, GSU is required to respond to 7-43 and 7-45 by April 29, 1996. It is the ALJ's understanding that GSU is responding or has responded to Cities 7-47 and 7-49 per the agreement of the parties.

float of any given near-critical path activity does not indicate what the true outage extension is for that critical path activity.

From the Cities' motion and GSU's response, it appears that the parties have been unable to resolve whether the Cities is asking for a definition of the number of days of float or for the actual number of days of float. GSU presumes the latter although it argues that this request is burdensome. Yet GSU fails to give the ALJ any factual data showing how burdensome a response will be, other than the response is also tied to the work that will be undertaken on Cities 7-43 and 7-45. For instance, GSU does not state how many critical path activities are involved or how difficult and time consuming it will be to calculate the days of float. For either interpretation, the ALJ finds that the Cities 18-1 is relevant or reasonably calculated to lead to the discovery of admissible evidence. The ALJ finds that information about near-critical path activity may lead to evidence relevant to quantification of any harm resulting from an imprudent outage.

Therefore, Cities' motion to compel GSU to respond to 18-1 is **GRANTED**. On or before April 19, 1996, GSU is instructed to provide a response to the Cities defining what "days of float" means in terms of near-critical path. If the Cities seeks a determination of the actual number of days of float, it shall immediately notify GSU and GSU shall provide such a response to the Cities on or before May 3, 1996.

SIGNED AT AUSTIN, TEXAS the 17th day of April 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LILLO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE

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Shelia Bailey Taylor
Chief Administrative Law Judge

May 21, 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. 16, NOTICE OF RESCHEDULED HEARING AND ESTABLISHING DEADLINES AND PROCEDURES FOR SUBMISSION OF EVIDENCE UNDER SEAL, in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,

Lilo Pomerleau/ib

Lilo Pomerleau
Administrative Law Judge

/ib

William P. Clements Building
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	§	BEFORE THE STATE OFFICE
UTILITIES COMPANY TO RECONCILE	§	
ITS FUEL COSTS, FOR PERMISSION	§	OF
TO DELAY REQUESTING A	§	
SURCHARGE, OR IN THE	§	ADMINISTRATIVE HEARINGS
ALTERNATIVE, FOR A SURCHARGE	§	
TO RECOVER UNDER-RECOVERED	§	
FUEL EXPENSE	§	

ORDER NO. 16

NOTICE OF RESCHEDULED HEARING AND
ESTABLISHING DEADLINES AND PROCEDURES
FOR SUBMISSION OF EVIDENCE UNDER SEAL

Hearing Date

The Administrative Law Judge (ALJ) finds it necessary to reschedule the hearing on the merits in this case based on conflicts with her current caseload. Accordingly, the hearing set for 9:00 a.m., July 22, 1996 is **RESCHEDULED** to 9:00 a.m., July 31, 1996 at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas. The ALJ is confident that the parties will have adequate time to present evidence and write briefs to meet the December 8, 1996 deadline. Moreover, the ALJ will work with the parties if scheduling conflicts arise with the witnesses. To further assist the parties with scheduling, the ALJ gives notice that the hearing will not be held on August 7 through August 9, 1996.

At this time, the ALJ has reserved a hearing room for negotiations on July 8 through July 19, 1996. If the parties wish to change those dates for the weeks before hearing (July 17 through July 30 or for July 15 through July 26), Gulf States Utilities Company (GSU) shall notify the ALJ as soon as possible to preserve a hearing room.

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PUC UTILITY COMPANY
FILING OFFICE

Procedures and Deadlines for Submitting Evidence U

On March 15, 1996, GSU filed comments regard under seal. GSU also proposed certain dates to carry out and the ALJ assumes that all parties concur with GSU's pr given the rescheduled date of hearing, the ALJ modifies

June 24, 1996	Party proposing declassifi
July 8, 1996	GSU shall file a response
July 15, 1996	Reply to GSU response
July 22, 1996	Hearing on disputed items
July 15, 1996	Intervenors and General Co by the July 24 deadline
July 22, 1996	GSU response
July 26, 1996	Reply to response
July 31, 1996	First day of hearing; heari

The parties **SHALL** continue to use the declassifi order. Any party filing a motion to reclassify or declassify testimony **SHALL** affirm that it intends to use those doc

SIGNED AT AUSTIN, TEXAS the 21st da

STATE OFFICE



LILLO D. POMEROY
ADMINISTRATIVE

Back

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 23, 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. 17, **Order Ruling on Cities' Motion to Compel Gulf States Utilities Co. to Respond to RFI Nos. 26-3 and 28-6-18-7**, in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,

Clay Harris
Clay Harris
Administrative Law Judge

/ib

William P. Clements Building
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 § BEFORE THE STATE OFFICE OF
UTILITIES COMPANY TO RECONCILE §
ITS FUEL COSTS, FOR PERMISSION §
TO DELAY REQUESTING § OF
A SURCHARGE, OR ALTERNATIVELY, §
FOR A SURCHARGE TO RECOVER §
UNDER-RECOVERED FUEL EXPENSE § ADMINISTRATIVE HEARINGS

ORDER NO. 17

**ORDER RULING ON CITIES' MOTION TO COMPEL
GULF STATES UTILITIES COMPANY TO RESPOND TO
REQUESTS FOR INFORMATION NOS. 26-3 AND 28-6-28-7**

I. Introduction

On May 10, 1996, Cities filed a motion to compel Entergy-Gulf States Utilities Company (GSU)¹ to respond to Cities' Request for Information (RFI) Nos. 26-3, 26-9, 26-10, 28-6, and 28-7. GSU filed separate responses to the motion to compel on May 17, 1996. In its responses to the motion to compel answers to Cities' 26th RFI, GSU agreed without waiving any of its objections to respond to Cities' RFI Nos. 26-9 and 26-10. Therefore, the motion to compel responses to these RFIs is now moot and the Administrative Law Judge (ALJ) finds that no ruling on them is necessary.

However, in this Order, the ALJ will address Cities' motion to compel responses to Cities' RFI Nos. 26-3, 28-6, and 28-7. Further, the rulings in this Order apply only to the information sought to be compelled, and should not be interpreted as a waiver or ruling concerning any issue of disclosure or declassification of any discovery information that may be produced under the terms of the Protective Order in effect in this docket or regarding any disputed issues surrounding that Order.

1. Gulf States Utilities Company or GSU as used herein refers to Entergy Gulf States, Inc., which is a subsidiary of Entergy Corporation (Entergy). In addition to Entergy Gulf States, Inc., Entergy has four other electric utility company subsidiaries: Entergy Arkansas, Entergy Louisiana, Entergy Mississippi, and Entergy New Orleans. Collectively, these five companies make up what is called the "Entergy Operating Companies," for purposes of this Order. Affidavit of Charles W. Freeman, Attached to GSU Response to Motion to Compel at 1.

II. Background Information

This is a fuel reconciliation case. GSU filed its application for a reconciliation of fuel costs and to delay or implement a surcharge on December 7, 1995. Cities² intervened. Texas Industrial Energy Consumers (TIEC), the State of Texas (State), North Star Steel of Texas, Inc., General Counsel of the Public Utility Commission of Texas (Commission), and the Office of Public Utility Counsel (OPC) are also parties to the proceeding, but these parties did not file any responsive pleadings regarding the motion to compel.

This discovery dispute between GSU and Cities turns on the discoverability of information found in the Federal Energy Regulatory Commission (FERC)-administered Intra-System Billing (ISB) documents and schedules for Entergy Operating Companies other than Entergy Gulf States, Inc. (synonymous with GSU for purposes of this Order), relating to the invoicing and accounting treatment of non-firm capacity power purchases and sales and also transmission equalization charges.

The Entergy Operating Companies (hereinafter referred to as "Companies") coordinate their generation and transmission activities through an Entergy System Agreement (ESA). The ESA governs the economic dispatch power and is also the mechanism by which the Companies jointly plan and operate their electric systems. The ESA controls the scheduling and dispatch of power from all resources on the Entergy System and the allocation of the expenses and the revenues produced. The ESA was approved by the FERC in 1985.

Each month, the Entergy System generates an ISB, which allocates expenses and revenues to the Companies in accordance with ESA schedules. During discovery in this proceeding, GSU has provided to the Cities portions of the ISB relevant to GSU in response to Cities' RFIs, specifically

2. The Cities include the Cities of Port Neches, Groves, Nome, Vidor, Beaumont, China, Conroe, and Nederland.

RFI No. 11-11. ISB Attachment 3, already provided to Cities in response to RFI No. 11-11, contains the distribution of all joint account sales to the Companies for each month of the reconciliation period. According to schedule MSS-5 of the ESA, any costs associated with off-system sales of power is first deducted from the gross revenue received for such sales and the remaining net balance is distributed among the Companies according to the FERC's ratio. GSU's Response to Motion to Compel Response to RFI No. 26-1, Affidavit of Charles Freeman at 2.

Because the Cities have discovered what they believe to be "discrepancies" in the off-system sales revenue information already provided to them by GSU, Cities now would like a detailed, monthly breakdown of such information by company for all Entergy Operating Companies other than GSU, for each month of the reconciliation period. Further, Cities request that GSU be compelled to produce such a breakdown for transmission equalization charges and payments as well.

III. Order Ruling on Motion to Compel

A. The Standards for Discoverability of Requested Information

The standards for the scope of discovery in contested administrative proceedings such as this are set forth in P.U.C. PROC. R. 22.141. That rule specifically provides that the "[p]arties may obtain discovery regarding any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, that is relevant to the subject matter in the proceeding." P.U.C. PROC. R. 22.141(a); *and see* Tex. Gov't. Code Ann. § 2001.091 (Vernon Supp. 1996). It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. Proc. 166b(2)(a). The Commission's *Rules of Practice and Procedure* provide an additional directive that parties shall negotiate diligently and in good faith concerning any discovery dispute prior to filing an objection. P.U.C. PROC. R. 22.144(d).

Applying the foregoing standards, the question presented in this discovery dispute is whether non-firm capacity sales revenues and transmission equalization charges of all of the Entergy Operating Companies *other than GSU*, are relevant to the subject matter of the case or reasonably calculated to lead to the discovery of admissible evidence. In attempting to answer this question, it is instructive to observe that the Commission has held that a utility's profits from off-system sales should be included in the utility's reconcilable fuel under/over recovery calculation. *Application of Houston Lighting & Power Company for Authority to Change Rates and Application of Houston Lighting & Power Company for a Final Reconciliation of Fuel Costs Through September 30, 1988*, Docket Nos. 8425 and 8431, 16 P.U.C. BULL. 2199, 2325 (June 20, 1990) (case involving HL&P only; not other operating companies). Although that case did not deal specifically with affiliates or affiliate transactions involving non-firm capacity sales between utility operating companies, the Commission has stated the standards for determining what constitutes an affiliate transaction in at least one previous GSU fuel proceeding. *Application of Gulf States Utilities Company for a Final Reconciliation of Fuel Costs*, Docket No. 10894, 19 P.U.C. BULL. 1401 (July 6, 1993) (affiliate transactions).

In this case, the Cities do not argue that the information requested may be relevant to an "affiliate transaction" or reasonably calculated to lead to discovery of admissible evidence. Instead, the motion argues that the alleged "discrepancies" and the whole picture **require** GSU to respond with all of the information. Even though the ESA and the application of the ISB and related schedules is apparently within the exclusive jurisdiction of the FERC, Cities contend that the information is relevant to the Commission's 'duty' to see that the revenue allocation and charges "is being done pursuant to the system agreement." It is undisputed that the FERC has approved the ESA and allocates the revenues and charges under the agreement and in the ISB and related schedules. GSU Response to Motion to Compel, Affidavit of Charles Freeman at 2.

The information relevant to GSU has already been provided. Cities must show something more than a desire to ensure that "the sum of the parts equals the whole," amounting to little more than a general desire to embark on a "fishing expedition," in order to demonstrate that the requested

information is reasonably calculated to lead to the discovery of admissible evidence for such a blanket request. *See Petition of Southwestern Electric Power Company for a Declaratory Order and for Revision of Avoided Cost Rates*, Docket No. 9655, Examiner's Order No. 17, 18 P.U.C. BULL. 625, 627-28 (June 3, 1992) (portion of a blanket request failed to adequately demonstrate the necessity of seeking the production of all of the information). And despite the broad interpretation generally given the scope of discovery, Texas courts recognize that the broad grant of discovery under the Texas Rules of Civil Procedure is limited by certain legitimate interests, including the interest to avoid over broad requests. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984, orig. proceeding); *Alexson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990)

B. RFI No. 26-3: Non-Firm Capacity Sales Revenues for Entergy Operating Companies other than GSU

1. Cities' Argument.

Cities' argument is that because there is some "discrepancy" between the non-firm capacity power sales revenues and the information provided to them by GSU in the ISB, they are entitled to discovery of a listing of such revenues and transactions for every Entergy Operating Company other than GSU by company for every month of the reconciliation period. This "discrepancy," it is argued, justifies the requirement to produce information additional to that already produced in response to Cities' RFI 11-11. Cities argue that it is the Commission's duty in the context of a fuel reconciliation proceeding to make sure that the revenues are being allocated properly under the ESA and ISB and related schedules.

2. GSU's Response.

GSU responds that non-firm capacity sales revenue and transaction information requested in RFI No. 26-3 for each Entergy Operating Company other than GSU is not relevant and therefore,

not discoverable. GSU responds that it will provide the information requested in Cities' RFI Nos 26-9 and 26-10. Therefore, only the information requested in Cities' RFI No. 26-3, (e g , revenues for non-firm capacity sales for the other operating companies, other than GSU) is at issue.

3. ALJ's Ruling on RFI No. 26-3.

The ALJ finds that the revenues for each month of the reconciliation period from non-firm capacity sales which are reflected on invoices for each Entergy Operating Company other than GSU are not relevant to the subject matter of this dispute and that Cities failed to show that such a broad request for information is reasonably calculated to lead to the discovery of relevant information. Although these other entities are regulated entities, they are not regulated by the Commission nor is there any assertion that they are affiliates or involve affiliate transactions with GSU. Although a utility's off-system sales and affiliate transactions may be relevant in a fuel reconciliation proceeding, every unrelated operating company's off-system sales revenues should not have to be produced in every fuel proceeding. Essentially, Cities have failed to show any basis for possible relevance other than a general need to ensure compliance with an FERC governed transaction.

The ALJ does not agree that the possible existence of a "discrepancy" is an appropriate discovery standard. The FERC has exclusive jurisdiction over the off-system sales revenue allocation among the operating companies and exercises such control through the ESA. The information relevant to GSU has already been produced and GSU has offered to interpret and to provide the formulae, check the figures for correctness, and otherwise assist Cities in interpreting the information relevant to GSU. Therefore, the ALJ finds that Cities failed to show that the requested information is discoverable. Accordingly, the motion to compel a response to Cities' RFI No. 26-3 should be, and is hereby, **DENIED**.

C. RFI Nos. 28-6 and 28-7: Transmission Equalization Charges for Entergy Operating Companies other than GSU

1. Cities' Argument.

Cities also argue that because the "sum of the parts does not seem to equal the whole," that it should be able to have GSU respond to a request for corresponding transmission equalization charges for January 1994 and for each month of the reconciliation period for each of the other Entergy Operating Companies, other than GSU. The Cities argue that they have looked at these charges to GSU and want to see the charges to all of the other Entergy Operating Companies in order to determine whether the sum of the parts equals the whole.

2. GSU's Response.

GSU's position is that, while the Cities may have a legitimate inquiry in determining whether Transmission Equalization Payments made by GSU have been correctly calculated, what the other Entergy Operating Companies have received or paid under schedule MSS-2 is wholly irrelevant to the matters at issue in this proceeding or matters over which this Commission has jurisdiction. GSU argues that the ESA is a FERC-approved agreement governing the operating relationship among the Entergy Operating Companies and the economic dispatch of each operating company's generating units on a system wide basis. Transmission Equalization Charges are payments listed on schedule MSS-2 to the ESA. GSU argues that the Commission does not have jurisdiction to determine how the revenues and fuel expenses are allocated under the ESA or to alter FERC-ordered allocations.

3. ALJ's Ruling Regarding RFI Nos. 28-6 and 28-7.

The ALJ tends to agree with GSU that transmission equalization charges and payments reflected in FERC-approved schedule MSS-2 for Entergy Operating Companies other than GSU are

not relevant to the subject matter of this proceeding. This case involves an application for a reconciliation of fuel costs for GSU, not every entity in the Entergy Operating System. If Cities are interested in determining whether the calculations are accurate, then they may accept GSU's offer to assist in interpreting the relevant information already provided for GSU, the utility before the Commission. GSU has, in the ALJ's view, shown the utmost good faith in conducting cooperative discovery and trying to resolve these requests.

The fact that such information was not provided in the exact format or for every operating company whether shown to be affiliated with GSU or not, does not show that such information is reasonably calculated to lead to the discovery of relevant information. The ALJ believes that, without something more of Cities such as a showing of how the requested information could lead to relevant information, Cities' motion amounts to little more than a thinly disguised fishing expedition. The ALJ finds that the information requested in Cities' RFI Nos. 28-6 and 28-7 is therefore not subject to discovery. Accordingly, Cities' motion to compel responses to Cities' RFI Nos. 28-6 and 28-7 is hereby **DENIED**.

IV. Conclusion

In conclusion, the ALJ's impression from reviewing the Cities' motion to compel and the other responsive pleading is that Cities did not exhaustively pursue negotiations to try to resolve this discovery dispute in accordance with the spirit of the Commission's *Rules of Practice & Procedure* before filing its motion to compel. For example, Cities filed its motion to compel responses to Cities' RFI Nos. 28-6 and 28-7 one day after GSU filed its objections. GSU's response indicated it was willing to work with Cities to "confirm the correctness of Entergy Gulf States' share of equalizable transmission investment according to the MSS-2 formula for each month of the reconciliation period, e.g., the source document showing the origin of the formula and the schedule containing the data concerning total system transmission investment, Entergy Gulf States transmission investment, the Entergy Gulf States responsibility ratio, etc." GSU response at 3. The ALJ wonders if such a

response had been conveyed in response to a simple telephone call from Cities, whether the need for a motion to compel could have been obviated. The ALJ would hope that these kinds of disputes could be resolved by agreement without the necessity of protracted discovery proceedings. However, the ALJ can only rule upon the dispute that is before him and the motion to compel simply does not present sufficient basis for compelling the responses requested. Therefore, the ALJ is of the opinion that the motion to compel is without merit and is properly denied.

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

STATE OFFICE OF ADMINISTRATIVE HEARINGS

William Clay Harris
WILLIAM CLAY HARRIS
ADMINISTRATIVE LAW JUDGE

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Shelia Bailey Taylor
Chief Administrative Law Judge

June 24, 1996

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

Dear Ms. Mueller:

Enclosed for filing is the original and one copy of Order No. 18, ORDER DENYING MOTION TO COMPEL RESPONSES TO CITIES' THIRTY-SECOND RFI, in the above-referenced proceeding. Please file stamp and return the copy to SOAH.

Thank you for your assistance.

Sincerely,

Clay Harris /ib

William Clay Harris
Administrative Law Judge

/ib

William P. Clements Building
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 ENTERGY-GULF § BEFORE THE STATE OFFICE
STATES UTILITIES COMPANY TO §
RECONCILE ITS FUEL COSTS, §
FOR PERMISSION TO DELAY § OF
REQUESTING A SURCHARGE, OR §
IN THE ALTERNATIVE, FOR A §
SURCHARGE TO RECOVER § ADMINISTRATIVE HEARINGS
UNDERRECOVERED FUEL EXPENSE §

ORDER NO. 18
DENYING MOTION TO COMPEL RESPONSES
TO CITIES' THIRTY-SECOND RFI

I. Introduction

This order addresses yet another discovery battle in the ongoing fuel reconciliation war between Entergy-Gulf States Utilities Company (Entergy) and the Cities. On May 24, 1996, Entergy filed its objections to Cities' RFI Nos. 32-42 and 32-43.¹ On May 31, 1996, Cities filed its motion to compel the answers to the RFIs. On June 7, 1996, Entergy filed its response to the motion to compel, arguing that the information requested is not discoverable even under the terms of the protective order. This order will serve to resolve the dispute surrounding the discoverability of the information and the calculation sought to be compelled in response to Cities' RFI Nos. 32-42 and 32-43.

II. Background Information

In Opinion No. 385, the Federal Energy Regulatory Commission (FERC) approved the merger and reorganization of Entergy Corporation and Gulf States Utilities Company. *Entergy Servs., Inc., & Gulf States Utils. Co.*, 65 F.E.R.C. (CCH) § 61,332 (1993), *modified on reh'g and*

1. Entergy objected to several other of Cities' RFIs, but only Cities RFI Nos. 32-42 and 32-43 are the subject of the motion to compel filed by Cities. Therefore, this order will be limited to a discussion of Cities RFI Nos. 32-42 and 32-43.

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denied in part, 67 F.E.R.C. (CCH) § 61,192 (1994). In that decision, the FERC adopted voluntary agreements between Entergy and Gulf States, including Service Schedule MSS-7, the Merger Fuel Protection Procedure known as the "fuel tracker." March 24, 1995, Letter to Ms. Lois D. Cashell, Secretary, FERC, at 2. The purpose of the MSS-7 was to protect any electing participating operating company from adverse impacts of the merger on fuel costs.² MSS-7 provides a mechanism for compensating companies experiencing increased fuel costs as a result of the merger. The compensation from the other participating companies and Gulf States, which must participate, would be paid if the other participating companies experience decreased fuel costs.

Entergy filed its compliance tariffs with the FERC, including proposed tariff sheets and proposed Service Schedule MSS-7. In its compliance filings, Entergy requested that all merger-related amendments to the System Agreement become effective on the same date, January 1, 1994, the effective date of the merger. Entergy anticipated that it would implement Service Schedule MSS-7 for the first time in early 1995, after the individual Entergy Operating Companies made their elections.

According to Entergy, Service Schedule MSS-7 is not currently in effect because compliance filings do not become effective by operation of law, but only upon acceptance by the FERC. Because the compliance tariff filings are still pending before the FERC, according to Entergy the other Entergy Operating Companies have not received official notification from each of their respective retail regulatory authorities to either opt in or out of Service Schedule MSS-7. Therefore, Entergy represents that it will not complete the first MSS-7 fuel cost calculation for 1994 until the FERC has accepted Entergy's compliance tariff sheets containing MSS-7 and the other Entergy Operating Companies' retail regulators each have indicated whether the company within its jurisdiction may participate in the merger fuel protection procedure.

2. The state regulatory authorities with jurisdiction over each of the Entergy Operating Companies may either opt in or opt out of Service Schedule MSS-7 before it is implemented, and to date, only the Louisiana Public Service Commission has formally indicated that Louisiana Power & Light Company will participate in MSS-7.

Thus, the first calculation under the MSS-7 has not been performed. This is exactly what Cities' RFI Nos. 42-42 and 32-43 would have Entergy do: a hypothetical, pre-election calculation utilizing a fuel tracker that has yet to be finally approved by the FERC for its intended purpose. Entergy Gulf States argues that providing the information requested by Cities would allow parties to analyze fuel cost changes and, in effect, perform the first calculation under the fuel tracker prior to the election deadline. The performance of a hypothetical calculation would also violate the term of a written filing made by Entergy at the FERC. In that filing, Entergy represented that implementation of the MSS-7 would not occur until it had received final FERC approval. Entergy further argues that the requested information is irrelevant to the fuel costs that are at issue in this proceeding because the MSS-7 has never been implemented and therefore no dollars have ever been paid to any company under the tracker during the reconciliation period.

III. Standard for Discoverability and the Nature of the Information Requested

A. Standard for Discoverability

The standard for the scope of discovery in a contested administrative proceeding is set forth in P.U.C. PROC. R. 22.141. That rule specifically provides that the "[p]arties may obtain discovery regarding any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, that is relevant to the subject matter in the proceeding." P.U.C. PROC. R. 22.141(a); *and see* Tex. Gov't Code Ann. § 2001.091 (Vernon Supp. 1996). It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. Proc. 166b(2)(a). The Commission's *Rules of Practice and Procedure* provide an additional directive that parties shall negotiate diligently and in good faith concerning any discovery dispute prior to filing an objection. P.U.C. PROC. R. 22.144(d).

On the general issue of relevance, it should be noted that the scope of discovery is much broader than the scope of admissibility. It is true that under the standard for discoverability, it is not

necessary that information be admissible in order for it to be discoverable; the information sought need only be reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. Proc. 166(b)(2)(a). However, P.U.C. PROC. R. 22.141(a) still requires that the information sought be "relevant to the subject matter of the proceeding." To determine whether requested discovery is relevant, the judge must balance the probative value of the information sought and the burden on the movant, if discovery is denied, weighed against the burden placed upon the opponent, if discovery is ordered. *Gordon v. Blackmon*, 675 S.W.2d 790 (Tex. App.--Corpus Christi 1984, *no writ*).

B. Nature of the Information Requested in RFI Nos. 32-42 and 32-43

The nature of the information is a hypothetical calculation and associated workpapers for an FERC fuel tracker formula that has never been implemented before. The fuel tracker's relevance to a fuel reconciliation proceeding is highly questionable because not a single dollar of fuel revenue or expense has ever flowed through it. Service Schedule MSS-7 was not in effect during the reconciliation period and still is not in effect. The question presented in this dispute then is whether this information is discoverable if it is not relevant to the subject matter of this proceeding or reasonably calculated to lead to the discovery of admissible evidence because it has never been implemented during or after the reconciliation period in this case.

Another consideration apart from the discoverability of the information is the effect such a "premature calculation" could have on Entergy and its ratepayers if it is made and later disclosed. If the information, even though provided under the protective order, were obtained by the other operating companies' retail regulators who are not bound by the protective order and who have not yet made an election, and the calculation proved unfavorable to the other operating companies, Entergy and its ratepayers could suffer harm by the other operating companies opting out of Service Schedule MSS-7 before it is ever implemented. This would leave Entergy with a greater proportionate share of fuel expense attributable to the merger and render the MSS-7 ineffective, increasing the cost burden to Entergy ratepayers.

IV. Order Denying Motion to Compel

The Administrative Law Judge (ALJ) disagrees with Cities' representation in the motion to compel that Entergy never argued that RFI Nos. 32-42 and 32-43 were not discoverable on any basis set forth in the *Texas Rules of Civil Procedure*. The ALJ tends to agree with Entergy's argument at page 6 of its response that the requested information is irrelevant to the fuel costs that are being reconciled in this proceeding. The tracker has never been implemented, which means that no dollar has ever passed to or from Entergy under the MSS-7 during the reconciliation period

The Cities' need to have Entergy now conduct a hypothetical calculation using a formula that is not yet approved by the FERC which does not have all of the parties involved and under which no fuel revenue or expense could have passed for the reconciliation period does not establish that such a calculation would have any probative value, nor does it show that the calculation would be reasonably calculated to lead to the discovery of admissible evidence. The ALJ believes that the probative value, if any, of such a hypothetical calculation and the burden on the Cities if discovery is not ordered are outweighed by the burden on Entergy if the discovery is ordered to be produced. Moreover, the ALJ believes that the potential harm to Entergy and its Texas ratepayers would be great from the calculation and use of a premature formula, even with a protective order in place.

How can the hypothetical information requested in Cities' RFI Nos. 32-42 and 32-43 be relevant to Entergy's reconcilable fuel costs or revenues when the MSS-7 formula was not even in effect at the time of the reconciliation period? How could it lead to anything admissible in this proceeding when it is still not approved on a final basis and not even all the parties are identified? Why should Entergy have to shoulder the burden and risk the harm of a hypothetical calculation to satisfy the Cities' curiosity when the City already has access to the important information relevant to this fuel proceeding? The ALJ believes that the answer to these questions are obvious because the information has not been shown to be relevant nor reasonably calculated to lead to the discovery of admissible evidence and the burden on the Cities if the calculation is not ordered is slight,

balanced against the burden on Entergy if the
resulting to Entergy and its Texas ratepayers.

Further, by implementing MSS-7 on a
by the other operating companies, Entergy
misrepresenting to the FERC how the tracker
policy. Providing the information the Cities w
with jurisdiction over the other parties to ana
calculation under the fuel tracker before the e
agreement and the March 24, 1995, letter to the
if parties determined from the calculation that
formula and then decided on the basis of that
The ALJ believes that the potential for harm or a
especially where the relevance of the calculation
The Cities' motion to compel responses to RF

SIGNED AT AUSTIN, TEXAS the .

STATE


WILL
ADMIN

Rich

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 1, 1996

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PUBLIC UTILITIES COMMISSION

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. 20, ORDER GRANTING MOTION TO EXTEND SCHEDULE FOR FILING OF TESTIMONY, 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

William P. Clements Building
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

514

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 §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

ORDER NO. 20

ORDER GRANTING MOTION TO EXTEND SCHEDULE FOR
FILING OF TESTIMONY

On June 27, 1996, Gulf States Utilities Company (GSU) filed a motion requesting a one week extension of the filing deadlines found in Order No 8 Order No 19, issued the next day, granted an extension of the intervenor filing deadline until July 1, 1996, pending further ruling of the undersigned Administrative Law Judge (ALJ).

The ALJ **GRANTS** GSU's request to postpone the filing of testimony and/or statements of position. The following sets out the amended deadlines


Party	Direct	Objections	Responses
Intervenor	July 5, 1996	July 12, 1996	July 19, 1996
General Counsel	July 15, 1996	July 22, 1996	July 29, 1996
GSU rebuttal	July 22, 1996	July 29, 1996	August 5, 1996

As noted in Order No. 5, page 11, statements of position are required at the time intervenor testimony is due if that party is not filing testimony.

The ALJ will not change the hearing date at this time but will do so if settlement negotiations are progressing and additional time is needed. The ALJ requests swift notification from GSU if such an extension is necessary.

SIGNED AT AUSTIN, TEXAS the 1st day of July 1996.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LLOD POMERLEAU
ADMINISTRATIVE LAW JUDGE

File

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 16, 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 21, **Granting State of Texas' Motion to Withdraw; Granting GSU's Motion to File Supplemental Testimony and Extend Schedule; and Notice of Rescheduled Hearing**, 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, appearing to read "Lilo D. Pomerleau".

Lilo D. Pomerleau
Administrative Law Judge

/ib

William P. Clements Building
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	§	BEFORE THE STATE OFFICE
UTILITIES COMPANY TO RECONCILE	§	
ITS FUEL COSTS, FOR PERMISSION	§	OF
TO DELAY REQUESTING A	§	
SURCHARGE, OR IN THE	§	ADMINISTRATIVE HEARINGS
ALTERNATIVE, FOR A SURCHARGE	§	
TO RECOVER UNDER-RECOVERED	§	
FUEL EXPENSE	§	

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PUC COMMISSION
FILED CLERK

ORDER NO. 21

GRANTING STATE OF TEXAS' MOTION TO WITHDRAW;
GRANTING GULF STATES UTILITIES COMPANY'S
MOTION TO FILE SUPPLEMENTAL TESTIMONY AND EXTEND SCHEDULE;
AND NOTICE OF RESCHEDULED HEARING

I. Motion to Withdraw

On July 10, 1996, the State of Texas filed a motion to withdraw from this proceeding. This motion is **GRANTED**.

II. Motion to File Supplemental Testimony and Extend Procedural Schedule

A. GSU's Motion

On July 5, 1996, Gulf States Utilities Company (GSU) filed a motion for leave to file supplemental testimony. As reason for this request, GSU states it did not include information pertaining to transmission-related revenues and expenses as part of this filing and in its recent fuel factor case, *Application of Gulf States Utilities Company to Revise Its Fixed Fuel Factors*, PUC Docket No. 15489 (pending) because it treated the data as items related to base rates rather than reconcilable fuel items. However, on June 5, 1996, the Commission remanded Docket No. 15489 to supplement the evidentiary record to include data on these issues. *See Order of Limited Remand for Further Proceedings*, PUC Docket No. 15489. GSU seeks to supplement its testimony in this filing to include similar data.

AMENDED SCHEDULE

Testimony:

GSU supplemental testimony	July 5, 1996
Objections	July 12, 1996
Responses	July 19, 1996
Intervenor testimony (addressing only this GSU supplemental)	August 2, 1996
Objections	August 12, 1996
Responses	August 19, 1996
General Counsel testimony (addressing all GSU direct)	August 12, 1996
Objections	August 19, 1996
Responses	August 26, 1996
GSU Rebuttal testimony	August 19, 1996
Objections	August 26, 1996
Responses	orally at hearing

Discovery

Discovery ends on GSU Direct	July 8, 1996
Discovery ends on GSU Supplemental Direct	August 12, 1996
Discovery begins on Intervenor Direct	July 5, 1996
Discovery begins on General Counsel Direct	August 12, 1996
Discovery begins on GSU Rebuttal	August 19, 1996
Discovery ends on Intervenor and General Counsel Direct and on GSU Rebuttal	August 26, 1996

Settlement Conference	August 12 & 13
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Hearing	August 26, 1996
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Accompanying its motion, GSU filed proposed testimony that includes information pertaining to (1) transmission revenues received under transmission service contracts approved by the Federal Energy Regulatory Commission (FERC); (2) transmission revenues associated with FERC-regulated Entergy System transmission transactions under its open access tariff; and (3) the transmission equalization expense being charged to FERC Account 565. The testimony also explains GSU's position on the merits of excluding transmission (wheeling) revenues and expenses from reconcilable fuel expense.

Although discovery on associated issues have already been propounded on GSU, the utility argues that its position should come as no surprise, especially in light of the testimony filed in Docket No. 15489. However, to allow additional discovery on this issue and to allow a limited round of intervenor and Staff testimony, GSU proposes a modified procedural schedule and hearing date. GSU waives its right to a final order by December 8, 1996, if necessary.

The Cities, Office of Public Utility Counsel (OPC), and General Counsel oppose GSU's motion to file supplemental testimony and to extend the procedural schedule. North Star Steel Texas, Inc. (North Star) takes no position on the supplemental testimony but supports GSU's proposed schedule.

B. Opposition to Supplemental Testimony

The Cities, OPC, and General Counsel object to a GSU's supplementation to correct a deficiency in its case. They state that GSU has known its filing was deficient and failed to comply with P.U.C. SUBST. R. 23.23(b)(2)(B)(vi)(II). They also argue that GSU can attempt to file its proposed supplemental testimony as rebuttal in response to the Cities' filed testimony, although they do not agree that such testimony is proper rebuttal. The Cities and OPC further contend that the latest motion should have been filed earlier.