

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and George R. Hall.

Gulf States Utilities)
Company) Docket No. ER76-816

ORDER APPROVING SETTLEMENT SUBJECT TO
CONDITION

(Issued October 20, 1978)

On March 13, 1978, Gulf States Utilities Company (Gulf States) filed with the Federal Energy Regulatory Commission 1/ a Motion to Certify Settlement Agreement and Record to the Commission in the above designated docket. On March 16, 1978, the Presiding Administrative Law Judge certified the Settlement Agreement and the Record to the Commission for its consideration and determination.

Notice of the proposed settlement was issued on March 24, 1978, with comments due by April 14, 1978. On April 14, 1978, Staff filed comments in support of the settlement. However, Staff noted that certain language in the Availability/Applicability sections should be excluded from the rate schedules since these provisions may be unduly restrictive, anticompetitive and contrary to the public interest. The Commission approves the Agreement subject to condition for the reasons set forth below.

On July 29, 1976, Gulf States tendered for filing Rate Schedule WSM "Other Electric Corporation for Resale", proposing an increase in rates for certain municipal

1/ This proceeding was commenced before the FPC. By the joint regulation of October 1, 1977 (10 CFR 1000.1), it was transferred to the FERC. The term "Commission", when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

customers 2/, and rate Schedule WSC "Wholesale Power to Rural Electric Distribution Cooperatives" proposing an increase in rates for certain cooperative customers. 3/ In addition the tendered rate schedules were proposed to become applicable to the then existing individual contracts between Gulf States and the members of the Sam Rayburn Dam Electric Cooperative Inc. (Sam Dam), although no service was being rendered under these contracts. 4/

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- 2/ Rate Schedule WSM-Municipal Customers: Towns of Erath, Rayne, Gueydan, Kaplan, Abbeville, St. Martinsville, Welsh, New Roads, Louisiana; Cities of Caldwell, and Newton, Texas; and Kirbyville Light and Power Company.
- 3/ Rate Schedule WSC-Cooperative Customers; Mid-South Electric Cooperative Association; Houston County Electric Co-op, Inc., and Cajun Electric Power Cooperative, Inc.
- 4/ The members of the Sam Rayburn Dam Electric Cooperative, Inc. are as follows:

The Town of Vinton, Louisiana, the Cities of Livingston, Jasper, and Liberty, Texas; Sam Houston, and Jasper-Newton Electric Cooperatives. By order issued July 26, 1977 in Docket Nos. ER76-816 and ER77-375 Notices of Cancellation of the individual contracts with the Sam Dam members were accepted and effective on the dates shown in the attachment to said order. Since the effective dates of termination have passed, the aforementioned Sam Dam members are, at present, served by Sam Dam through its contract with Gulf States. The Sam Dam-Gulf States contract was approved by the Commission by order issued May 5, 1977, Docket E-8121 and by its terms extends the Sam Dam-Gulf States power supply arrangement until 1980. See Gulf States Utilities Company FPC No. 98.

Gulf States further proposed that Rate Schedule WSC superseded the existing contract between Gulf States and Cajun Electric Power Cooperative (CEPCO). Although CEPCO was not receiving power under their existing contract with Gulf States, it was estimated that the CEPCO points of delivery served by Gulf States would require power in excess of CEPCO's own generation in 1978.

By Order issued August 31, 1976, the Commission rejected application of the proposed Rate Schedule WSC to the existing contracts between Gulf States and Sam Houston Electric Cooperative, and between Gulf States and Jasper-Newton Electric Cooperative, as these contracts did not permit unilateral rate changes. The Commission accepted for filing the proposed Rate Schedule WSM to become effective subject to refund as to certain municipals on December 1, 1976, and accepted for filing the proposed Rate Schedule WSC for certain cooperative customers to become effective on September 2, 1976, subject to refund. The proposed rates were set for hearing.

Staff served Top Sheets on March 15, 1977, and settlement conferences were held. Testimony and exhibits were served by all parties and the hearing was set for November 8, 1977. Further negotiations on the morning of the hearing produced the settlement.

SETTLEMENT

The proposed settlement in Docket No. ER76-816 provides for a revenue level consistent with the cost of service in Staff's revised Top Sheet and provides for an increase in resale revenues of \$319,925 under Rate Schedule WSC to the rural electric cooperative customers, and \$435,000 under Rate Schedule WSM to the municipal customers based on a test period for the twelve months ending December 31, 1975. The agreement provides for refunds to municipal customers for amounts collected over and above settlement rates, and allows the proposed rate increase as filed to the cooperative customers. The settlement rates would not result in an earned rate of return exceeding Staff's recommended rate of 8.92% overall including 13.00% on common equity based on a common equity ratio of 33.17%.

The agreement further provides for a moratorium on increases in rates prior to April 1, 1979. Gulf States agrees that it will not use the Tax Adjustment Clause in Rate Schedules WSM and WSC as a basis for a change in rates absent a filing pursuant to Section 35.13 of the Commission's Rules and Regulations. As noted in Staff's Comments filed April 17, 1978, the proposed Settlement Agreement includes language which restricts the customers' ability to resell power and energy furnished by Gulf States. Staff believes the language contained in the Availability/Applicability clauses may be unduly restrictive, anticompetitive and contrary to the public interest.

DISCUSSION

We find that the settlement agreement between Gulf States and the named parties, in its totality, is neither unduly preferential nor unduly advantageous, and it establishes a just and reasonable rate level. Accordingly, the settlement should be accepted.

The only point of contention concerns the resale restrictions the settlement places upon the customers of Gulf States. The provisions in question read as follows:

Schedule WSC
WHOLESALE POWER TO
RURAL ELECTRIC DISTRIBUTION COOPERATIVES

Availability

Availability in the territory in which Gulf States operates to Rural Electric Distribution Cooperatives for resale solely to ultimate consumers. Service under this schedule is subject to the terms and conditions specified in the Agreement for Electric Service to Rural Cooperatives to which this schedule is attached and made a part thereof. The charges specified in this schedule shall apply separately to service supplied at each point of delivery.

Schedule WSM
OTHER ELECTRIC CORPORATIONS FOR RESALE

Applicability

This rate is applicable under the regular terms and conditions of the Company to other electric corporations who contract for electric service to be used for resale to ultimate consumers.

This Commission's predecessor traditionally looked with disfavor upon resale restrictions in wholesale contracts and rate schedule tariffs. Cincinnati Gas and Electric Company, Docket Nos. E-8885 and E-8546, Order issued September 5, 1975; Wisconsin Power & Light Company, 49 FPC 645 (1973); Mississippi Power Company, 45 FPC 269 (1971), Georgia Power Company, 35 FPC 436 (1966).

This Commission, like its predecessor, has the responsibility to consider antitrust policy in exercising its regulatory authority, including its examination of rates, terms and conditions for wholesale electric service. Gulf States Utilities Company v. F.P.C., 411 U.S. 747, 760-762 (1973). Gulf States' Applicability/Availability clause on its face prevents further wholesaling of power and energy purchased under the respective rate schedules. This gives Gulf States the power to eliminate or inhibit its bulk power customers as potential competitors of Gulf States for further wholesale sales. The Commission will not give its imprimatur to the proposed acquisition of market power. 5/

We do not find in the regulatory scheme under the Federal Power Act any public policy basis for allowing public utilities to employ tariff provisions to foreclose wholesale competition

5/ The anticompetitive effect is similar to that of a market division or allocation of customers between competitors -- conduct which the Supreme Court has held to violate the antitrust laws. United States v. Topco Associates, Inc., 405 U.S. 596, 606-612 (1972). The situation here differs substantially from that in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), where the Court held that the imposition of resale restrictions by manufacturers on distributors of their products could be reasonable and procompetitive in some circumstances. In that case, Sylvania argued that restraining competition among its retail franchisees in sales of Sylvania television sets promoted more significant competition between Sylvania and other television brands. No such redeeming procompetitive virtues warrant the imposition of explicit resale prohibitions by electric wholesalers; there are no brand names to be promoted or brand reputations to be protected here.

between a supplier like Gulf States and its bulk power purchasers. To the contrary, competition where feasible complements the regulatory scheme. According to the Supreme Court in Otter Tail Power Co. v. United States, "the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. 366, at 374 (1973). It is axiomatic that competition creates pressure on electric utilities to reduce their costs and increase their efficiency in power supply production and marketing. This downward pressure on costs supports our direct regulation of rates to the ultimate benefit of consumers of electricity.

The anticompetitive effect of resale prohibitions is of course not conclusive under the Federal Power Act. It remains for us to consider whether such prohibitions serve some significant regulatory purpose which cannot be achieved by a less anticompetitive method and which would render them in the public interest notwithstanding that desirable competition is impaired.

In this connection, we recognize that electric utilities must plan and construct sufficient generation and transmission to meet their future power supply requirements in an orderly fashion. Proper system planning requires utilities like Gulf States to commit to building necessary facilities well in advance of the time such facilities are needed actually to serve loads, and the utilities have an important interest in projecting their load growth and requirements as accurately as possible. Resale restrictions of the sort Gulf States has prescribed do serve this interest; they insure that the loads of wholesale customers will not vary by virtue of those customers adding or losing wholesale customers of their own. These restrictions are, however, an unnecessarily blunt device for this purpose, given their apparent anticompetitive effect and the availability of other, well-established ways for utilities to regulate their loads without impairing competition. 6/

6/ For example, utilities commonly include contractual provisions for obtaining timely notice of customers' increased and decreased requirements. A related concern -- that a member of a wholesale class might gain a resale customer whose usage would make it inappropriate for the wholesale customer to continue to be served at the class rates -- can similarly be accommodated by permitting Gulf States and other such wholesalers to include in their rate schedules appropriate language describing the class on the basis of such criteria as kW load, load factors, etc.

We hold, therefore, that direct resale restrictions, such as the ones here, imposed by power suppliers on their wholesale customers are unreasonable and unjust. Moreover, we conclude that any such restrictions are so devoid of redeeming value in light of the availability of other well-established means of accomplishing the legitimate purposes of regulated utilities that they should be declared per se unlawful in this and all other cases in which the issue may be presented. The public interest does not require and should not tolerate any further record inquiry of this issue. By our action today we announce to all persons interested in our proceedings that we intend to consistently apply the precedent established in this case to strike down any similar resale restrictions presented for our approval.

Accordingly, we will direct Gulf States to remove the offending resale restrictions. ^{7/} However, recognizing Gulf States' legitimate need for orderly power supply planning, we will declare these restrictive provisions null and void and of no legal effect ninety (90) days from the date of issuance of this order. This time period will permit Gulf States to refile substitute tariff provisions appropriate for system planning purposes.

The Commission finds:

The settlement agreement filed in this docket on March 13, 1978, by Gulf States Utilities Company, as conditioned herein, is just and reasonable and should be approved and made effective as hereinafter ordered.

^{7/} We note that the contract between Gulf States and the Intervenor Sam Dam (Gulf States Utilities Company Rate Schedule FPC No. 98, SR-2) contains equally restrictive resale provisions as Rate Schedules WSM and WSC. Our announcement of the per se rule today renders such provisions unenforceable. (On September 1, 1976, Sam Dam petitioned to intervene in the instant docket on behalf of its members whose individual contracts with Gulf States were affected by Gulf States' initial rate application in ER76-816. Sam Dam was granted intervention by Order issued November 8, 1976.)

The Commission orders:

(A) The settlement agreement filed with the Commission in this proceeding on March 13, 1978, as conditioned herein, is incorporated by reference, approved and made effective as of September 2, 1976, for Rate Schedule WSC, and as of December 1, 1976, for Rate Schedule WSM.

(B) Within 90 days of the date of issuance of this order, Gulf States Utilities Company shall file revised rate schedules excluding the restrictive language from the "Availability" section of Rate Schedule WSC, and from the "Applicability" section of Rate Schedule WSM. This order is without prejudice to Gulf States to file within that ninety day period appropriate tariff provisions in accordance with the discussion in the body of the order. Such refiling shall be subject to Commission review and approval.

(C) Within 30 days of the filing of the revised Rate Schedules WSC and WSM, Gulf States Utilities Company shall refund all excess amounts collected over and above the rates stated in the settlement agreement with interest at 9% per annum.

(D) Within 15 days after refunds are made, Gulf States Utilities Company shall file a compliance report with the Commission showing monthly billing determinants and revenues under prior, present, and settlement rates. The compliance report shall show the monthly settlement rate increase, the monthly revenue refund, and the monthly computation, together with a summary of such information for the total refund period. A copy of the report shall also be furnished each State Commission within whose jurisdiction the wholesale customers distribute and sell electric energy at retail as well as to each affected customers.

(E) Insofar as this order accepts the settlement agreement filed with the Commission in this proceeding, it is without prejudice to any finding or order which has been made or which may hereafter be made by the Commission, and is without prejudice to any claims or contentions which may be made by the Commission, its Staff or any party or person affected by this order in any proceeding now pending or hereafter instituted by or against Gulf States Utilities Company or any other person or party.

(F) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

* In the Matter of)	
)	
* FLORIDA POWER & LIGHT COMPANY)	Docket No. 50-389A
)	
(St. Lucie Nuclear Power Plant,)	August 7, 1981
Unit No. 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was served upon the following persons by hand delivery (*) or by deposit in the U. S. Mail, first class, postage prepaid this 7th day of August, 1981.

*Peter B. Bloch, Esq.
Administrative Judge
Atomic Safety and Licensing Board
Nuclear Regulatory Commission
Washington, D. C. 20555

Michael A. Duggan, Esq.
Administrative Judge
College of Business
Administration
University of Texas
Austin, Texas 78712

*Robert M. Lazo, Esq.
Administrative Judge
Atomic Safety and Licensing Board
Nuclear Regulatory Commission
Washington, D. C. 20555

*Ivan W. Smith, Esquire
Alternate Member
Atomic Safety and Licensing Board
Nuclear Regulatory Commission
Washington, D. C. 20555

*Jerome E. Sharfman, Chairman
Atomic Safety and Licensing Appeal
Board
Nuclear Regulatory Commission
Washington, D. C. 20555

* Michael C. Farrar, Esq.
Atomic Safety and Licensing
Appeal Board
Nuclear Regulatory Commission
Washington, D. C. 20555

Donald A. Kaplan, Esq.
Robert Fabrikant, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

J. A. Bouknight, Jr., Esq.
Lowenstein, Newman, Reis &
Axelrad
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036

John E. Mathews, Jr., Esq.
Mathews, Osborne, Ehrlich,
McNatt, Gobelman & Cobb
1500 American Heritage Life
Building
Jacksonville, Florida 32202

Reubin O. D. Askew
Greenberg, Traurig, Askew,
Hoffman, Lipoff, Quentel
& Wolff, P.A.
1401 Brickell Avenue
Miami, Florida 33131

William C. Wise, Esq.
1200 18th Street, N. W.
Suite 500
Washington, D. C. 20036

William H. Chandler, Esq.
Chandler, O'Neal, Avera, Gray,
Lang & Stripling
P. O. Drawer 0
Gainesville, Florida 32602

Daniel H. Gribbons, Esq.
Herbert Dym, Esq.
Covington & Burling
888 16th Street, N. W.
Washington, D. C. 20036

Florida Power & Light Company
ATTN: Dr. Robert E. Uhrig
Vice President
Vice President
Advanced Systems & Technology
P. O. Box 529100
Miami, Florida 33152

Benjamin H. Vogler, Esq.
Ann P. Hodgdon, Esq.
Counsel for NRC Staff
Nuclear Regulatory Commission
Washington, D. C. 20555

Robert R. Nordhaus
Van Ness, Feldman, Sutcliffe,
Curtis & Levenberg
1050 Thomas Jefferson St., N.W.
7th Floor
Washington, D. C. 20007

Janet Urban, Esquire
Department of Justice
P. O. Box 14141
Washington, D. C. 20044

* Chase Stephens, Chief
Docketing & Service Section
Nuclear Regulatory Commission
Washington, D. C. 20555

Robert A. Jablon

Robert A. Jablon
Alan J. Roth
Joseph Van Eaton
Attorneys for The Lake Worth Utilities
Authority, the Utilities Commission of New
Smyrna Beach, the Sebring Utilities
Commission, and the Cities of Alachua,
Bartow, Fort Meade, Key West, Mount Dora,
Newberry, St. Cloud and Tallahassee, Florida,
and the Florida Municipal Utilities Agency

August 7, 1981

Law offices of:
Spiegel & McDiarmid
2600 Virginia Avenue N.W.
Washington, D.C. 20037