BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Tampa Electric Company for Declaratory Statement Regarding Proposed Sale of Electricity By Empire Systems, Inc. to MacDill Air Force Base.	)	DOCKET NO. 881267-EI
	)	ORDER NO. 21277
	)	ISSUED: 5-23-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER DISMISSING AND DENYING PETITIONS FOR DECLARATORY STATEMENTS

BY THE COMMISSION:

CASE BACKGROUND

On September 30, 1988, Tampa Electric Company (TECO) filed a Petition for Declaratory Statement with this Commission. The petition alleged that Empire Energy Management Systems, Inc. (Empire) proposed to make an unregulated retail sale of electricity to MacDill Air Force Base (MacDill), and requested declaratory relief. Specifically, TECO sought an order declaring that a proposed unregulated retail sale of cogenerated electricity by Empire to MacDill would be inconsistent with the substantive law of Florida and with Commission rulings, and that neither Empire nor MacDill would qualify under TECO's tariffs to receive standby or supplemental service.

Upon request by Staff, TECO furnished Empire and MacDill with a copy of its petition. Empire, the United States Air Force (USAF), and MacDill subsequently intervened in this docket, and Empire filed a Motion to Dismiss TECO's petition. Empire later amended its pleadings to incorporate a request for a declaratory order (1) that furnishing electricity to the United States Air Force entirely within the confines of MacDill Air Force Base, a federal enclave, does not constitute furnishing electricity to or for the public within the State of Florida within the meaning of Chapter 366.02, Florida Statutes, and (2) that the proposed sale of electricity by Empire to MacDill would therefore not subject Empire or MacDill to the Commission's regulation as a public utility.

Thereafter, Staff met with all parties, at which time the parties agreed upon certain factual issues in order to facilitate the Commission's decision in this docket. After review of the parties' pleadings and briefs, we hereby grant Empire's Motion to Dismiss TECO's Petition for Declaratory Statement. We further deny Empire's Petition for Declaratory Statement.

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TECO'S PETITION

TECO petitioned this Commission to issue a declaratory statement that a "proposed unregulated retail sale of cogenerated electricity, by Empire Systems, Inc., ... would be inconsistent with the substantive law of Florida and recent rulings of this Commission applying Section 366.02(1) Florida Statutes ...." In its petition, TECO failed to allege facts constituting a controversy which applies to TECO in its particular circumstance only. The utility alleged, as an impact upon its interests, that MacDill will purchase less electricity from it. However, impact upon the petitioner does not fulfill the requirements of Rule 25-22.021, Florida Administrative Code. TECO asks the Commission to examine the relationship between third parties and to issue a declaratory statement regarding the nature of that relationship. Therefore, TECO fails to meet the requirements of Rule 25-22.021, Florida Administrative Code, which states that a declaratory statement is "a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule, or order as it does, or may, apply to petitioner in his or her particular circumstances only" (emphasis added). TECO does not ask the Commission to apply a statute, rule, or order to its own situation, but instead wishes the Commission to issue a declaration invalidating the relationship of two other parties.

Further, this Commission has no jurisdiction over the relationship in question. In the Agreed Limited Statement of Facts, the parties agreed that the cogeneration facilities in question will be built by Empire and will be located wholly within the confines of MacDill Air Force Base, on land owned by the Air Force and leased to Empire. Further, Empire and MacDill asserted that all useful thermal and electrical output will be purchased by the Air Force and used by MacDill, and will be delivered through existing lines owned by MacDill. MacDill Air Force Base is located on a federal enclave, and therefore, the State of Florida has no jurisdiction over activities which take place thereon. U.S. Const. art I, Sec. 8, cl. 17; Paul v. U.S., 371 U.S. 245, 263 (1963); Pacific Coast Dairy, Inc. v. Dept. of Agriculture, 318 U.S. 285,295 (1943). Thus, TECO seeks a declaratory statement regarding the activities of third parties, which activities cannot be regulated by this Commission. This portion of TECO's petition does not comply with Rule 25-22.020 and 25-22.021, Florida Administrative Code.

TECO points to certain federal statutes and argues that they support the propriety of issuing the requested declaratory statement. Specifically, TECO cites Section 8093 of Public Law 100-202, 101 Statutes 1329-79 (December 27, 1987), which describes limitations on federal agencies in the purchase of electricity:

> None of the funds appropriated or made available by this or any other Act may be used...to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including State utility Commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation or State-approved

> territorial agreements: Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287 1/; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 2/ or from purchasing electricity from any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

The appropriations act cited by TECO applies to spending practices of the federal government. TECO argued that federal law defers to state law in that the cited act does not allow purchase of electricity "in a manner inconsistent with State law...." However, TECO incorrectly argued that this act adopts as federal substantive law the applicable State law governing electric service.

Since this Commission has no authority to regulate Empire and MacDill's proposed relationship, a declaratory statement

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1/ 42 U.S.C. 8287 provides as follows: "The head of a Federal agency may enter into contracts under this title [42 USCS §§8287 et seq.] solely for the purpose of achieving energy savings and benefits ancilliary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract."

Again, this provision relates to federal appropriations for energy, and the Commission is required neither to apply nor to interpret it.

2/ "§2394. Contracts for energy or fuel for military installations

(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years--

(1) Under section 2689 of this title [10 USCS §2689]; and

(2) For the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities."

While this provision would appear to authorize spending for the Empire-MacDill project, application of this section by the Commission is not required.

would be of no value to TECO in determining its rights under Florida law. If, for some reason, TECO wishes to advise a federal court of Florida law, the utility need only point to the recent Florida Supreme Court decision in P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). In that case, the court affirmed this Commission's ruling in Docket No. 870446-EU that a sale of electricity to any member of the public renders the provider a "public utility" under Section 366.02(1), Florida Statutes. For the reasons discussed above, we hereby dismiss this portion of TECO's Petition.

STANDBY AND SUPPLEMENTARY SERVICE

TECO also requested that we issue a declaratory statement that under the circumstances described by TECO, MacDill would not qualify for TECO's firm standby or supplemental service, and that Empire would not be entitled to standby service. We decline to do so.

TECO's Schedule SBF (firm standby and supplemental service) is applicable "...where customer generating capacity exceeds 20% of on-site load requirements....". This service is also available to "self-generating customers". The tariff sheet specifies that resale is not permitted. TECO argued that in the future, MacDill will not qualify to take firm standby or supplemental service because it will have no "customer generating capacity" and that Empire will not be entitled to standby service because the tariff does not permit resale. In the parties' Agreed Limited Statement of Facts, Empire stated that it anticipates that, upon completion of the cogeneration facilities in question, they will be certified as Qualifying Facilities (QFs) under Federal Energy Regulatory Commission regulations. It argued that the federal Public Utility Regulatory Policies Act of 1978 (PURPA) and Federal Energy Regulatory Commission and Florida Public Service Commission regulations therefore require provision of supplementary, back-up, maintenance, and, interruptible power to both Empire and MacDill

At present, TECO's arguments are speculative. The facilities are not in existence and no demand has been made by either Empire or MacDill for standby, backup, or supplemental power from TECO. When built, the facilities may or may not be certified as QFs, and thus may or may not be entitled to supplementary and backup power from TECO. It is therefore premature to issue a declaratory statement which would define the rights of TECO, Empire or MacDill under future circumstances, and we hereby dismiss this final portion of TECO's petition. Of course, dismissal of TECO's petition for a declaratory statement would not prevent this utility from raising the issue at the proper time.

EMPIRE'S PETITION

Empire requested that the Commission issue a declaratory statement that furnishing electricity to the USAF entirely within the confines of MacDill, a federal enclave, does not constitute furnishing electricity to or for the public within the State of Florida within the meaning of Section 366.02, Florida Statutes, and that the proposed sale of electricity by

Empire to MacDill would not, therefore, subject Empire or MacDill to this Commission's regulation as a public utility. We hereby deny Empire's petition.

On its face, the Empire-MacDill transaction would clearly constitute a retail sale under this Commission's Order No. 18302, which was affirmed by the Florida Supreme Court in the previously discussed P.W.Ventures decision. Empire would therefore be a public utility under Sec. 366.02, Fla. Stat. However, because the the land comprising MacDill Air Force Base is a federal enclave, over which the federal government has exclusive jurisdiction, this Commission lacks jurisdiction to regulate the transaction. We decline to issue a declaratory statement where we have no jurisdiction to regulate the transaction in question. Further, for the same reason, we wish to avoid "blessing" the arrangement, as requested by Empire.

In consideration of the above, it is

ORDERED that Empire's Motion to Dismiss Tampa Electric Company's Petition for Declaratory Statement is hereby granted. It is further

ORDERED that Tampa Electric Company's Petition for Declaratory Statement, filed herein on September 30, 1988, is hereby dismissed. It is further

ORDERED that Empire Energy Management Systems, Inc.'s Petition for Declaratory Statement is hereby denied.

By ORDER of the Florida Public Service Commission, this 23rd day of MAY, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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by: Kay Flynn
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.