

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into affili-) DOCKET NO. 860001-EI-G
 ated cost-plus fuel supply relation-) ORDER NO. 21816
 ships of Florida Power Corporation.) ISSUED: 9-5-89
)

ORDER GRANTING IN PART AND DENYING IN PART
THE MOTION TO STRIKE AND GRANTING REQUEST TO FILE
REPLY BRIEFS

On August 15, 1989, the Office of Public Counsel (OPC), Occidental Chemical Corporation (OCC), and Florida Industrial Power Users Group (FIPUG) (Parties) filed a motion to either strike the June 23, 1989 Market Pricing Proposal of FPC and the July 7, 1989 letter to Staff filed by FPC, or to allow the Parties leave to file a reply brief in response to FPC's filing. On August 24, 1989, FPC filed a response to the motion of the Parties urging the Commission to deny both requests of the parties. Essentially, the basis for the Parties' motion is that FPC improperly relied on evidence introduced in Phase II of this proceeding to support their Phase I position. I have reviewed the pleadings of both parties, prior orders of the Commission in this proceeding and the relevant portions of record in this proceeding and have concluded that it is appropriate to grant the Parties' request to strike the July 7, 1989 letter to staff, deny their request to strike the June 23, 1989 Market Pricing Proposal of FPC, and grant all the parties an opportunity to file supplements to their post-hearing briefs.

In 1986, this Commission opened this docket as a fuel adjustment spin-off for the purpose of investigating the affiliated cost-plus fuel supply relationships between FPC and TECO and their affiliated fuel supply corporations. The Commission also opened an investigation regarding why FPC's costs to transport coal by its affiliate waterborne system exceeded its costs to transport coal by non-affiliate rail. Subsequently, the two FPC issues were consolidated for hearing in Docket No. 860001-EI-G and the TECO issues were removed and placed in Docket No. 870001-EI-A.

In February, 1988, FPC filed a Motion for Case Management and Scheduling Conference or for Stay for the purposes of "clarifying" the scope of the proceeding and resolving potentially serious inadequacies in the current schedule, and to stay all pending discovery in the interim. After a hearing

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on the Motion, Order No. 18982 was issued. In Order No. 18982, the Prehearing Officer established a bifurcated proceeding, during which the Commission would consider the policy issues in Phase I and the prudence issues in Phase II.

The Parties argue that FPC inappropriately relied on the Phase II record to support their Phase I position on market pricing contrary to clear intent of the Commission. According to the Parties, the Commission voted to adopt market pricing and issued the Phase I Order instructing the Parties to meet in workshops to try and develop a market price methodology. It is the position of the Parties that if the Commission had not ordered workshops then no Phase II evidence would have been available to support the Phase I determination.

The Parties also request that a July 7, 1989 letter addressed to Staff be stricken from the record since it is an impermissible response to OCC's brief which was not contemplated by the prehearing order establishing the schedule in this proceeding. In addition, they argue that FPC does not cite any rule or order of the Commission permitting the filing of such a brief or response in this proceeding. The Parties' also maintain that FPC improperly relied on testimony which was stricken from the record to bolster its position on waterborne transportation alternatives. Specifically, they refer to the use of rebuttal testimony offered by FPC's witness Flowers which was stricken by the Commission for being unresponsive to witness Sansom's testimony.

Finally, the Parties request that if their motion to strike is not granted, due process requires that they be given an opportunity to response since they were not and could not be held to be on notice that the Phase II record would be relied on to decide Phase I.

FPC maintains that the Parties' motion to strike should be denied because it is contrary to the clear implication of the Commission's prior rulings, because it seeks to preclude the Commission from considering relevant facts which are in the record and because it is not supported by law. According to FPC, Phase I and Phase II are all part of one docket, and there

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is no precedent for the position that evidence in one phase of a docket cannot be considered in another.

FPC acknowledges the July 7, 1989 letter to Staff and states that it was intended to correct a false statement by Occidental in its Market Price Standard Brief regarding whether there was record evidence dealing with transportation adjustments relating to Powell Mountain coal. According to FPC, this letter was not intended to be a reply brief and was not directed to the attention of the Commission. FPC also acknowledges that they did include reference in its proposal to a portion of Mr. Flowers' testimony which was, in fact, stricken from the record. According to FPC, this reference was simply an error in citation and the substance of the position of Mr. Flowers is supported elsewhere in the record.

Finally, FPC concludes that if the Parties should have an opportunity to file a reply brief or responses to their June 23, 1989, market pricing proposal, FPC submits as a matter of due process that they should be allowed to file a reply brief as well.

After review of the motion by the Parties and FPC's response, I believe it is appropriate to strike from FPC's Market Pricing Proposal that portion which relies on testimony which was stricken from the record by the Commission. FPC does not deny that portions of the Flowers' testimony was stricken from the record and states that the reference to the stricken testimony was simply an error by its counsel. Notwithstanding, FPC's assertion by that the proposition supported by the stricken testimony is contained elsewhere in the record, the Parties are correct in suggesting that this testimony should be stricken and their motion to strike that portion of FPC's Market Pricing Proposal should be granted.

As the Parties to this proceeding are aware, Commission rules provide for the filing of post-hearing briefs by the Parties after a hearing has been held. Rule 25-22.056, Florida Administrative Code. Currently, there is no rule or provision for the filing of reply briefs. In addition, the presiding officer of this proceeding did not authorize the Parties to submit reply briefs in this proceeding.

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The Parties maintain that FPC's July 7, 1988 letter addressed to Staff is an improper response to OCC's post-hearing brief and should therefore be stricken. I agree. FPC's letter was an improper response and should be stricken from the record. Furthermore, I believe it to be appropriate to strike the Parties' July 11, 1988 to Staff urging that FPC's letter be disregarded. Both the letters in question argue the merits of the respective Parties' position on key issues regarding the appropriate market price methodology. Each letter is improper and therefore should be stricken from the record.

With respect to the Parties' request that FPC's entire Market Pricing Proposal be stricken from the record, the solution is not so clear. Essentially, the Parties contend that FPC's post-hearing brief contains improper citations from the record in Phase II of this proceeding. According to the Parties, FPC's market pricing standards for the future were to be based solely on the record developed in Phase I of this proceeding. As support for their position, the Parties rely primarily on the fact that the decision to conduct this hearing in two phases necessarily meant each was to stand or fall its own. The Parties also rely on a discussion introduced by Commissioner Gunter during Phase II of this proceeding to support their position.

A review of the transcript of Phase II indicates a concern being expressed regarding repetitive cross-examination and a suggestion that unless the intention was to impeach the witness, there was no need to repeat questions from Phase I. (TR 368) Additionally, the record demonstrates that while there was no clear cut pronouncement resolving this issue in either manner, the Commission expressed the desire that Parties not repeat questions that had been exhaustively covered previously. (TR 370) In addition, the Commission expressly stated that their comments were not intended to infringe on the due process rights of any party. (TR 370)

As the Parties and FPC noted in their arguments on this motion, in Order No. 20604 the Commission reserved the right to impose a market pricing methodology based upon the record evidence in this case or as supplemented, if necessary. Order at p. 15.

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The clear implication of this statement, in my view is that the Commission intended to consider evidence in the entire proceeding, at a minimum to reach a decision about a market price methodology. Finally, I would note that the Parties have not provided any legal support for their position that creating two phases in a single proceedings precludes the use of evidence from one in the other. In addition, I would note that if the Commission had chosen to deny FPC's request to bifurcate this proceeding, this question would not have arisen and the Parties could have relied on the entire record.

Based upon the above, I believe that the Parties' motion to strike FPC's Market Pricing Proposal because it contains references to Phase II should be denied. In my opinion neither the record in this proceeding nor past Commission practice support the view espoused by the Parties in support of their motion to strike.

I must acknowledge that it is reasonable based upon a literal reading of the exchange which occurred during Phase II to be confused about regarding the relationship between Phase I and Phase II. I also note that the record does not indicate that any party to this proceeding sought clarification of this issue prior to Parties' letter of July 23, 1989 to Staff. I believe Staff acted appropriately by recommending to the Parties that this issue was best resolved by the Prehearing Officer or the full Commission.

In an effort to ensure that each party to this proceeding has full exercise of his rights, I believe it appropriate to grant all parties an opportunity to supplement their post-hearing briefs to the Commission. As indicated earlier, Commission rules do not contemplate or make provision for reply briefs. Thus, the opportunity to supplement post-hearing briefs is not intended to provide the parties to this proceeding an opportunity for rebuttal of each others respective positions. Rather, this opportunity is intended to allow the parties to supplement their positions as they may feel necessary.

In view of the above, it is

ORDERED that the portions of Florida Power Corporation's Market Pricing Proposal identified in Appendix A be stricken from the record in this proceeding. It is further

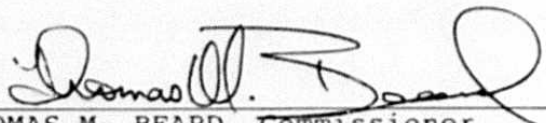
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ORDERED that the July 7, 1989 letter from Florida Power Corporation to Commission Staff and the July 1, 1989 letter from the Parties to Commission Staff be stricken from the record. It is further

ORDERED that the Parties motion to strike Florida Power Corporation's Market Pricing Proposal be denied. It is further

ORDERED that all the Parties to this proceeding may file a supplement to their post-hearing briefs and such responses must be filed within seven days from the date of this Order.

By ORDER of Commissioner Thomas M. Beard, as Prehearing Officer, this 5th day of September, 1989.


THOMAS M. BEARD, Commissioner
and Prehearing Officer

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APPENDIX A

On the other hand, Mr. Flowers, who at that time arranged for transportation of coal from New Orleans to Crystal River and who was available for cross-examination, testified that he talked with every coal hauler in the Gulf, including Nilo Barge line and was unable to secure satisfactory vessels to haul coal from New Orleans to Crystal River. Flowers, Phase II. (TR 1352)