BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a Declaratory Statement Concerning Financing and Ownership Structure of a Cogeneration Facility in Polk County, by Polk Power Partners, L.P.	DOCKET NO. 931190-EQ ORDER NO. PSC-94-0197-DS-EQ ISSUED: February 16, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING
LUIS J. LAUREDO

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT IN THE NEGATIVE

BY THE COMMISSION:

BACKGROUND

By petition filed December 13, 1993, Polk Power Partners, L.P. ("Polk"), sought a declaratory statement to the effect that certain contemplated financing and ownership structures of the Mulberry Cogeneration Facility as described in the petition a) will not be deemed an unlawful sale of electricity; b) will not cause Polk or its individual partners to be deemed a public utility under Florida law; c) and will not cause Polk or its individual partners to be subject to regulation by the Commission.

The cogeneration facility at issue will have an average generation output of 118.3 megawatts net. It will consist of a natural gas fired cogeneration facility employing combined cycle technology to produce electric power and steam, and a thermal host ethanol plant that will produce ethanol and related co-products.

The Mulberry Cogeneration Facility has a Commission-approved 23 MW standard offer contract (Tampa Electric Company) and Commission-approved negotiated contracts for the sale of 72 MW of

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firm capacity and energy and 28 MW of firm capacity and energy (Florida Power Corporation).[1]

Under financing option 1, Polk would develop, construct and hold legal title to the entire facility, but lease the ethanol plant on a "utilities included" basis to an unrelated operator. The lease payments would not vary based on the amount of utilities (electricity, water and wastewater) used, but would exceed a negotiated minimum monthly amount if the adjusted monthly cash flow (revenues less expenses for the ethanol plant) exceeds that minimum rent. Under financing Option 2, the ethanol plant would be sold to an unrelated purchaser, but be supplied with electricity, water and wastewater services by Polk.

DISCUSSION

Polk first petitions us to issue a declaratory statement to the effect that Polk's financing Option 1 would not be deemed a sale of electricity, cause Polk or any of its partners to be deemed a public utility or cause Polk or any of its partners to be deemed subject to Commission regulation?[2] However, we conclude that the declaratory statement should be issued in the negative.

In support of its petition, Polk cites §366.81 and §366.051, which speak to the policy of encouraging cogeneration and the benefits to the public thereof. Polk also notes that in Order No. 17009, Monsanto, we concluded that

> Monsanto is leasing equipment which produces electricity rather than buying electricity that the equipment generates.

Monsanto, 86 FPSC 12:356

In addition, the Seminole Fertilizer case is cited for the point that

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[1] Polk has explained the slight shortfall in energy output (118.3 MW) as compared to total contract requirements (123MW) by stating that peak output will exceed 118.3 MW and that another facility will eventually share the load.

[2] No jurisdictional issue as to the provision of water and wastewater is raised by this petition because Polk County, where the facility is to be located, rather than the Commission, regulates water and wastewater utilities located therein.

> the lessee QF (Seminole) and partnership/lessor (Seminole Sub L.P.) are so "related" that the arrangement surmounts the jurisdictional boundary identified in Petition of P.W.Ventures, Inc.

In P.W. Ventures, Order No. 18302-A, we held that the supply of electricity to an unrelated entity invoked our jurisdiction. Here, Polk argues that in supplying electricity to an unrelated lessee of its ethanol plant, Polk is, in effect, merely supplying its own facility which is leased out on a "utilities included" basis.

We believe that Polk's arguments confuse a number of issues. First, while cogeneration is to be encouraged, we have never encouraged sales of electricity by cogenerators to the public. In testing whether that would be the case here, we note that in Monsanto, generation equipment was leased and the lessee then produced and consumed the power generated. There was no sale of the power to an unrelated entity. Similarly, in Seminole, transactions between Seminole, a QF/lessee, and Seminole Sub L.P., the partnership/lessor, were found not to be transactions between unrelated entities, such as would have invoked our jurisdiction. In effect, no sale of electricity to the public was present.

In contrast, Polk would be supplying power, under the facts presented, which would then be consumed by an unrelated lessee in its operation of Polk's ethanol plant. Though the rental payments would not vary with the amount of electricity consumed, the separate identities of the power producer (Polk) and power consumer (lessee) differentiate these facts from those in Seminole and Monsanto. Under this analysis, the common ownership of the power generator and the ethanol plant is no more dispositive than the lack of such common ownership was in Monsanto and Seminole. In our view, what is dispositive for jurisdictional purposes is the contemplated generation of electric power by one entity, Polk, for consumption by an unrelated entity, the lessee of Polk's ethanol plant, in return for payment. Such an arrangement is encompassed by §366.02(1), Florida Statutes, read in the light of P.W. Ventures.

However, Polk would distinguish this case from P.W. Ventures on the ground that no pre-existing large industrial customer exists where Polk owns the entire project initially and then leases out the ethanol plant on a "utilities included" basis to an unrelated operator. Polk argues that whereas "creamskimming" of the utility revenues that the customer previously paid to the utility would occur if those revenues were directed to P.W. Ventures at the

expense of the utility's other ratepayers, no creamskimming can occur here because of the "greenfield" nature of Polk's project. In effect, there would be no ethanol plant at all absent the project, so revenues from a pre-existing industrial customer will not be diverted away from a utility.

In our view, this does not change the result. While the creamskimming issue supported our conclusion in P.W. Ventures as a matter of policy, that conclusion interpreted §366.02(1) to include cogenerators as subject to our regulatory jurisdiction when "supplying electricity..., to the public within this state...", which remains the case unaffected by the greenfield nature of the project.

A final complexity in the comparison of Polk's facts with those in P.W. Ventures is that payment for electricity under the lease in P.W. Ventures included a take or pay minimum plus a negotiated rate. Here, Polk contemplates a minimum lease amount which would not vary with the electricity consumed, plus increases based on production. We note, however, that under §366.02(1), Commission regulatory jurisdiction is invoked when persons are "supplying" electricity to the public. Moreover, we are unable to conclude that no sale of electricity takes place under these facts where electricity is supplied for rent payments. See, by analogy, rule 25-6.049(5)(1), F.A.C., which requires individual electric metering for separate occupancy units of new commercial establishments.

In conclusion, we do not agree that §366.051 or §366.81 or the greenfield nature of Polk's project changes the result of the analysis in P.W. Ventures when applied to these facts. Therefore, financing Option 1 would be deemed an unlawful sale of electricity, would cause Polk and its individual partners to be deemed a public utility under Florida law and would cause Polk and its individual partners to be subject to regulation by the Commission.

Polk also petitions us to issue a declaratory statement to the effect that Polk's financing Option 2 would not be deemed a sale of electricity, cause Polk or any of its partners to be deemed a public utility or cause Polk or any of its partners to be deemed subject to Commission regulation. However, we conclude that the declaratory statement should be issued in the negative.

The analysis is the same as in financing Option 1, except that ownership of the ethanol plant, as well as its operation and resulting consumption of the power, is by an entity separate from and unrelated to the supplier of the power. Under authorities cited, the declaratory statement must therefore be issued in the

negative. Accordingly, financing Option 2 would be deemed an unlawful sale of electricity, would cause Polk and its individual partners to be deemed a public utility under Florida law and would cause Polk and its individual partners to be subject to regulation by the Commission.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition of Polk Power Partners L.P. be granted in the negative as to financing Option 1. It is further

ORDERED that the Petition of Polk Power Partners, L.P. be granted in the negative as to financing Option 2. It is further

ORDERED that the docket be closed.

By ORDER of the Florida Public Service Commission this 16th day of February, 1994.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

Commissioners Susan F. Clark and Julia Johnson dissented.

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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.