

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a) DOCKET NO. 930490-EQ
declaratory statement concerning) ORDER NO. PSC-93-1130-PCO-EQ
sale of cogenerated power by) ISSUED: August 3, 1993
South Florida Cogeneration)
Associates to METROPOLITAN DADE)
COUNTY.)
_____)

ORDER ESTABLISHING PROCEDURE

On May 18th, 1993, Metropolitan Dade County filed a petition for a declaratory statement concerning the sale of cogenerated power by South Florida Cogeneration Associates (SFCA) to Dade County. Thereafter, SFCA petitioned to intervene and requested a hearing. Intervention was granted and this matter has been set for a prehearing on September 24, 1993, and for hearing on October 11, 12 and 13, 1993.

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and the rules of this Commission.

Discovery

a. When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

b. The hearing in this docket is set for October 11 - 13, 1993. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by October 4, 1993. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 30, and requests for production of documents, including all subparts, shall be limited to 30.

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FLORIDA PUBLIC SERVICE COMMISSION

c. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 366.093, Florida Statutes.

Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

Prefiled Testimony and Exhibits

Pursuant to Rule 25-22.048, Florida Administrative Code, each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 1/2 inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting by the close of business, which is 4:45 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or

hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Prehearing Statement

Pursuant to Rule 25-22.038(3), Florida Administrative Code, a prehearing statement shall be required of all parties in this docket. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 4:45 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

- (a) the name of all known witnesses that may be called by the party, and the subject matter of their testimony;
- (b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;
- (c) a statement of basic position in the proceeding;
- (d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (e) a statement of each question of law the party considers at issue and the party's position on each such issue;
- (f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(g) a statement of issues that have been stipulated to by the parties;

(h) a statement of all pending motions or other matters the party seeks action upon; and

(i) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Prehearing Conference

A prehearing conference will be held in this docket at the Fletcher Building, 101 East Gaines Street, Tallahassee, Florida. The conditions of Rule 25-22.038(5)(b), Florida Administrative Code, shall be observed. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure: Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior

to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

Document Identification

To facilitate the management of documents in this docket, exhibits will be numbered at the Prehearing Conference. Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-EQ
J. Doe Exhibit No. [REDACTED]
Cost Studies for Minutes of Use by Time of Day

Tentative Issues

Attached to this order as Appendix "A" is a tentative list of the issues which have been identified in this proceeding. Prefiled testimony and prehearing statements shall address the issues set forth in Appendix "A".

Controlling Dates

The following dates have been established to govern the key activities of this case.

- 1) Oral argument on SFCA's
Motion to Dismiss August 16, 1993
- 2) Direct testimony
and exhibits of both parties August 27, 1993
- 3) Staff's direct testimony
and exhibits, if any September 8, 1993

- | | | |
|----|--|---------------------------------|
| 4) | Rebuttal testimony
and exhibits of both parties | September 17, 1993 |
| 5) | Prehearing Statements | September 17, 1993 |
| 6) | Prehearing Conference | September 24, 1993 |
| 7) | Hearing | October 11 - 13, 1993 |
| 8) | Briefs | (2 weeks after tran-
script) |

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of

any party to comply with the seven day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information,

all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

Post-hearing procedures


Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

Based upon the foregoing, it is

ORDERED by Commissioner Julia Johnson, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner Julia Johnson, as Prehearing Officer, this 3rd day of August, 1993.



JULIA JOHNSON, Commissioner
and Prehearing Officer

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ORDER NO. PSC-93-1130-PCO-EQ
DOCKET NO. 930490-EQ
PAGE 8

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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ATTACHMENT "A"
TENTATIVE ISSUE LIST

Factual Issues:

1. What are the elements of the arrangement between SFCA and Dade County that are pertinent to the issue of whether the transaction is within the purview of the jurisdiction of the Commission? (SFCA)
2. Was the transaction involving SFCA and Dade County structured primarily to achieve financial and/or tax advantages? (SFCA)
3. Do Dade County and SFCA share a unity of interests in the cogeneration facility? (SFCA)
4. What is Dade County's ownership interest in the assets that comprise the cogeneration project? (SFCA)
5. Is Dade County's involvement in and relationship with the cogeneration facility such that the "generator" and "consumer" should be considered one and the same for jurisdictional purposes? (SFCA)
6. Did Dade County represent to SFCA that the structure of the transaction between SFCA and Dade County did not constitute a "retail sale"? (SFCA)
7. Did Dade County contend before the Commission that the structure of the transaction between SFCA and Dade County did not constitute a "retail sale"? (SFCA)

Legal Issues:

8. Does the doctrine of equitable estoppel preclude Dade County from taking a position in this case which is inconsistent with the positions it has taken in the past, including proceedings before the Commission? (SFCA)
9. Does the doctrine of judicial and/or collateral estoppel preclude Dade County from taking a position in this case which

is inconsistent with the position it has taken in the past in Commission proceedings? (SFCA)

10. Based on all of the pertinent facts, does the transaction between Dade County and SFCA constitute a "retail sale", so as to render SFCA a public utility subject to the jurisdiction of the Commission? (SFCA)
11. Does the sale of cogenerated power by SFCA to Dade County pursuant to the Contract for Purchase and Sale of Electrical and Thermal Energy executed on November 15, 1983 constitute a sale "to or for the public within this state" under Section 366.02(1), Florida Statutes? (Dade County)
12. Does the sale cause SFCA to be a "public utility" as that term is defined in Section 366.02(1), Florida Statutes, and under Florida law? (Dade County)
13. Does the sale cause SFCA to be subject to regulation by the Commission under Chapter 366, Florida Statutes? (Dade County)

Policy Issues: (These issues are moot if the Commission determines that there is no "retail sale".)

14. If the Commission determines that the transaction falls within its jurisdiction, is there a legal and equitable basis for withholding certain regulatory requirements? (SFCA)
15. If the Commission deems the transaction involving SFCA and Dade County to be a "retail sale", and if it determines to assert jurisdiction, how should it regulate the arrangement? (SFCA)