

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a ) DOCKET NO. 930490-EQ  
declaratory statement concerning ) ORDER NO. PSC-93-1395-FOF-EQ  
sale of cogenerated power by ) ISSUED: 9/23/93  
South Florida Cogeneration )  
Associates to Metropolitan Dade )  
County. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman  
SUSAN F. CLARK  
JULIA L. JOHNSON

ORDER DENYING SOUTH FLORIDA COGENERATION ASSOCIATION'S  
MOTION TO DISMISS  
AND DENYING METROPOLITAN DADE COUNTY'S  
REQUESTS FOR RECONSIDERATION AND ORAL ARGUMENT

Background

On May 18, 1993, Metropolitan Dade County (Dade County) filed a petition for declaratory statement in which it asked the Commission to determine that the sale of cogenerated power from South Florida Cogeneration Associates (SFCA) to the County constitutes a prohibited retail sale that causes SFCA to be deemed a public utility subject to the Commission's regulation. SFCA requested intervention and an evidentiary hearing. The prehearing officer granted both requests, and a hearing was set for October 11 - 13, 1993. The County moved for reconsideration of the decision to grant intervention and set an evidentiary hearing, and filed a motion for continuance of the hearing on the grounds that its chief witness was unavailable during the hearing dates. The prehearing officer granted the motion. In a related matter, the Commission intervened in a civil suit between Dade County and SFCA in order to assert its jurisdiction to determine whether or not the sale of electricity constituted a prohibited retail sale that would subject SFCA to the Commission's regulatory jurisdiction.

On August 16, 1993, the Commission heard oral argument on SFCA's motion to dismiss the proceeding.

DOCUMENT NUMBER-DATE

10292 SEP 23 93

FILED IN RE: PETITION FOR DECLARATORY STATEMENT

Dade County's request for oral argument

Dade County requested oral argument on its Motions for Reconsideration of Orders PSC-93-1067-PCO-EQ and PSC-93-1124-PCO-EQ. Oral argument is denied. The purpose of oral argument is to aid the Commission in comprehending and evaluating relevant issues. Rule 25-22.058, F.A.C. Oral argument on motions for reconsideration may be granted at the Commission's discretion. Rule 25-22.060(f), F.A.C. We do not believe that oral argument would be necessary or helpful in our review of the County's motions. The motions are self-explanatory and are not so unusual or complex as to require oral argument.

Dade County's Motions for Reconsideration

Rule 25-22.038(2) allows any party adversely affected by a prehearing officer's order either to seek reconsideration by the prehearing officer or to seek review by the Commission panel assigned to the proceeding. Dade County has requested that the Commission review Orders No. PSC-93-1067-PCO-EQ and No. PSC-93-1124-PCO-EQ.

**Order No. PSC-93-1067-PCO-EQ (granting intervention):**

Dade County argues that the expressed basis for allowing SFCA to intervene is that the cogenerator's status will be determined if the Commission rules upon the declaratory statement. The county believes that this rationale ignores the applicable statute and rule, which indicate that SFCA can't be bound by the ruling unless it is a party to the proceeding. Thus, the county argues that it is the Commission's own action in granting intervention that gives SFCA the substantial interest that justifies the intervention.

In response, SFCA argues that the Commission cannot issue the requested statement without affecting SFCA. Further, SFCA believes that the county has no valid grounds for reconsideration, in that it has shown no matter of fact or law that was overlooked by the prehearing officer.

We agree with SFCA. The county correctly believes that the Commission could declare SFCA to be a regulated utility, subject to this agency's jurisdiction, but the statement would not be binding upon SFCA so long as it was not a party. However, we believe such a course of action would be a misuse of agency

resources that would not settle the issue. SFCA would be free to seek the Commission's declaration it was not a regulated utility. We find that the best way to settle this issue is to grant intervention to SFCA and hold a hearing.

**Order No. PSC-93-1124-PCO-EQ (setting hearing):**

Dade County argues that the prehearing officer's rationale for setting a hearing is that making the determination requested by Dade County will decide the status of SFCA. The county argues that any evidentiary hearings are discretionary under Section 120.565, Florida Statutes, Rule 25-22.022, Florida Administrative Code, and that hearings are appropriate only when there are disputed issues of material fact which must be determined in order to provide the legal interpretation requested. The county further argues that the order identifies no disputed issues of material fact, and that granting a evidentiary hearing extinguishes the county's right to discuss the case with Commissioners without violating ex parte prohibition; its right to reach merits of legal issues without having to bear expense of litigation; and its right not to bear burden of proof on legal issues raised.

SFCA believes that there are disputed issues of fact, including which elements of the relationship between the parties are pertinent to the dispute, how the transaction evolved (given the Commission's policy of examining the purpose of a business structure), and how the parties are related, among others. SFCA also argued that having a hearing doesn't deprive the County of any procedural rights -- that instead, the County is trying to deprive SFCA of substantive and procedural rights.

We find that there are disputed issues of material fact as argued by SFCA, and therefore we will not reconsider the order setting a hearing in this docket. In the past, the Commission has examined not only the written agreements between parties to a cogeneration agreement, but has also examined the entire business relationship, including the reason for a particular business structure. The Commission should also examine those aspects of the relationship between the county and SFCA. Additionally, the parties disagree about which elements of the business relationship are relevant to this dispute.

More importantly, however, we should not ignore Dade County's allegation of an unregulated retail sale. While a declaratory statement may not be the perfect procedural vehicle for a review of the transaction, the Commission has the discretion to grant intervention to SFCA and hold a hearing on the matter.

SFCA's Motion to Dismiss

As it pointed out in its oral argument on August 16, 1993, SFCA believes that Dade County's petition for declaratory statement presents a contrived, rather than genuine, controversy or doubt and is filed only as a tactic to assist in civil litigation; and that the declaratory statement sought by Dade County is unnecessary because the Commission already reviewed the details of the transaction in Docket No. 860786-EI and expressed no concern over the legality of the arrangements.

Not only does Dade County disagree with SFCA's arguments, as set forth in its response to the motion and in its oral argument, but it also argues that the motion to dismiss does not show a legal basis for dismissal. Dade County argues that a motion to dismiss a case should not be granted unless the petitioner fails to plead a cause of action upon which relief may be granted. That is, the Commission should dismiss the case only if Dade County fails to plead a case that the Commission can address through a declaratory statement, even if the Commission assumed that all facts pled in Dade County's petition for declaratory statement are true.

We agree with SFCA that Dade County's petition does not properly request a declaratory statement. The county asks the Commission to declare that the sale in question constitutes a retail sale under Section 366.02(1), Florida Statutes, that the sale causes SFCA to be deemed a public utility, and that the sale subjects SFCA to the Commission's regulation. Thus, the county asks the Commission to declare the legal and regulatory status of SFCA. Clearly, this is not a proper subject of a declaratory statement. Rule 25-22.021, Florida Administrative Code, states the purpose and use of a declaratory statement:

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 set of circumstances only.

The declaratory statement sought by Dade County does not merely concern the applicability of statutes, rules or orders to the County, but instead, would determine the status of SFCA.

However, we will not dismiss the petition. Dade County has alleged that it is a party to an unregulated retail sale of electricity. As discussed above, a petition for declaratory statement may not be the perfect vehicle for bringing the matter before the Commission, but we should not refuse to review the matter by dismissing the petition.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Request for Oral Argument filed by Metropolitan Dade County is denied. It is further

ORDERED that the Motions for Reconsideration filed by Metropolitan Dade County are denied. It is further

ORDERED that the Motion to Dismiss filed by South Florida Cogeneration Associates is denied.

By ORDER of the Florida Public Service Commission this 23rd day of September, 1993.

STEVE TRIBBLE, Director  
Division of Records and Reporting

by: Kay Flynn  
Chief, Bureau of Records

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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.