

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

MEMORANDUM

JANUARY 26, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN/JOHNSON) ^{MCB}
DIVISION OF ELECTRIC AND GAS (SHINE) ^{RES DV RT RJ}

RE: DOCKET NO. ~~940797-EQ~~ - PETITION FOR APPROVAL, TO THE
EXTENT REQUIRED, OF CERTAIN ACTIONS RELATING TO APPROVED
COGENERATION CONTRACTS BY FLORIDA POWER CORPORATION

AGENDA: 02/07/95 - REGULAR AGENDA
DECISION ON MOTION TO DISMISS - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\940797.RCM

PARTIES HAVE ALREADY PARTICIPATED IN ORAL ARGUMENT IN
THIS MOTION. PARTICIPATION AT THIS AGENDA SHOULD BE
LIMITED TO ANSWERING QUESTIONS.

CASE BACKGROUND

On July 29, 1994, FPC filed a petition asking the Commission to approve certain actions relating to cogeneration contracts that were taken after the contracts were approved by the Commission for cost-recovery. FPC states that its petition was prompted by considerable regulatory uncertainty as a result of a staff recommendation in another proceeding involving the Joint Petition for Declaratory Statement filed by Auburndale Power Partners, L.P. and Florida Power in Docket Number 940819-EQ (hereinafter "Auburndale"). That staff recommendation suggested that certain actions undertaken pursuant to cogeneration contracts after Commission approval of the contracts might require further approval by the Commission, and FPC filed this petition to determine what actions would require further review by the Commission to ensure that it could continue to obtain cost recovery of payments made to cogenerators under those contracts. The specific post-contract actions at issue involve the following: (1) assignments; (2) extensions in construction or operation of qualifying facilities

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due to delays in obtaining regulatory approvals, force majeure events and interconnection delays; (3) changes in location of facilities; (4) changes in committed capacity; (5) curtailment agreements, and; (6) routine administrative actions such as correcting typographical errors.

Several parties have intervened in this docket. In addition, Metro-Dade County/Montenay-Dade (Montenay-Dade) filed a motion to dismiss, stating that the Commission did not have jurisdiction to approve actions taken under a contract after it had been approved for cost recovery. On January 5, 1995, the Commission heard oral argument on the motion to dismiss filed in this docket and on motions filed in other dockets involving cogeneration contracts. The positions of the parties are as follows:

Montenay-Dade

- A. The Commission does not have jurisdiction over cogenerators.
- B. Federal law delegates limited authority to the states to encourage cogeneration and to approve such contracts for cost recovery.
- C. The Commission's orders approving the cogeneration contracts for cost recovery do not confer jurisdiction for the Commission to approve actions taken under the contracts after they have been approved.
- D. The Commission does not have express or statutorily implied jurisdiction to approve actions taken under the contracts after they have been approved.

FPC:

- A. The Commission has the jurisdiction to determine if it must approve certain actions that might constitute modifications to a Commission-approved contract.
- B. The Commission has broad regulatory power over the relationship between utilities and cogenerators.
- C. Having been approved by the PSC, a cogeneration contract becomes an order of the PSC, subject to its continuing jurisdiction.
- D. The petition does not require the Commission to change the contract; instead, it asks the Commission to address and, if necessary, approve actions that may amount to contract modifications.

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- E. The PSC has continuing authority to clarify the meaning of its order, even after the order has been entered.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Montenay/Dade's Motion to Dismiss Florida Power Corporation's petition?

RECOMMENDATION: No. The motion should be denied.

STAFF ANALYSIS: In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), to develop ways to lessen the country's dependence on foreign oil and natural gas. Under PURPA and FERC's implementing regulations states and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of cogeneration contracts for cost recovery from the utilities' ratepayers. In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities must purchase electricity offered for sale by QFs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy.

The Commission's implementation of section 366.051 is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832. A utility is permitted to recover payments made to cogenerators under the contracts if the Commission has approved them. In the case of standard offer contracts, the Commission approves the tariff that includes the standard offer, and if a cogenerator signs the contract and complies with certain requirements, cost recovery is allowed. In the case of negotiated contracts, the Commission reviews each contract under the criteria established in Rule 25-17.0832(2) to determine that the contract is prudent for cost recovery purposes. The Commission has made it clear that it will not revisit its cost recovery determination absent a showing of fraud, misrepresentation or mistake. See Docket No. 910603-EQ, In Re: Implementation of Rules 25-17.080 through 25-17.091, Florida Administrative Code, Order No. 25668, issued February 3, 1992.

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The Commission has, however, reviewed cogeneration contracts for cost recovery purposes when the parties to the contracts have made modifications to the terms and conditions of the contract that may affect cost-effectiveness to the utility's ratepayers. See In Re: Petition for Approval of Amendment and Assignment of Standard Offer Contract with KES Dade, L.P. to Osceola Power Limited Partnership, by Florida Power and Light Company, Docket No. 940569-EQ, Order No. PSC-94-1267-FOF-EQ, issued October 13, 1994; In Re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership, Docket No. 940819-EQ, Order No. PSC-94-1306-FOF-EQ, issued October 24, 1994; and, In Re: Joint Petition for Expedited Approval of Contract Modifications to a 1989 Standard Offer Contract by Tampa Electric Company, Orange Cogeneration Limited Partnership, and Polk Power Partners, L.P., Docket No. 941155-EQ, Order No. PSC-95-0038-FOF-EQ, issued January 9, 1995. The rationale is that if the contract has been modified, it is not the same contract that the Commission approved, and the Commission must review the changes to ensure that the ratepayers are receiving the benefits that were envisioned when the contract was approved. If the Commission could not review modifications to cogeneration contracts, and the parties were then free to change the contracts at will, the Commission could not ensure the continuing cost-effectiveness of the contracts. Under Section 366.051, Florida Statutes, the Commission has the authority to set cost-effective rates for cogenerated power that the utilities may recover from their ratepayers. Staff recommends that the authority to review modifications to cogeneration contracts to ensure continued cost-effectiveness is clearly implied from the statute.

It appears to staff that Montenay/Dade agrees with this position and is only concerned that FPC, because of the way the petition is worded, is somehow asking the Commission to assert broader authority over cogeneration contracts. We think this is a problem of semantics, not substance. FPC has asked the Commission to approve "actions taken under the contract". All of the actions FPC identifies in its petition constitute changes, corrections and modifications to the original contracts, and FPC is asking the Commission to approve those changes. The Commission has the authority to do that, for cost recovery purposes, and if it appears as the case proceeds that FPC is asking for something other than approval of the modifications for cost recovery under the provisions of the Commission's cogeneration rules, Montenay/Dade will have the opportunity to renew its objection to the scope of the petition.

To prevail on its motion to dismiss, Montenay-Dade must demonstrate that the facts alleged in FPC's petition, when viewed in the light most favorable to FPC, fail to set forth any claim

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that the Commission can resolve. Staff recommends that FPC has adequately pleaded a claim that the Commission has the authority to resolve, and the motion to dismiss should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. The docket should remain open pending resolution of the issues presented by the petition.