

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

November 20, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MCB RVE RT*
DIVISION OF ELECTRIC AND GAS (*MAH* HAFF BALLINGER) *TS*

RE: DOCKET NO. 950110-EI- IN RE: STANDARD OFFER CONTRACT FOR
THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM
A QUALIFYING FACILITY BETWEEN PANDA-KATHLEEN
L.P. AND FLORIDA POWER CORPORATION

AGENDA: DECEMBER 5, 1995 - REGULAR AGENDA
DECISION PRIOR TO HEARING - MOTION TO DISMISS AND MOTION
TO STAY OR ABATE PROCEEDINGS

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950110.RCM

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

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition with the Commission for a declaratory statement regarding certain aspects of its Standard Offer cogeneration contract with Panda-Kathleen, L.P./Panda Energy Company (Panda). Panda intervened in the proceeding and filed its own declaratory statement petition on the issues FPC had raised. Panda also raised an additional issue regarding postponement of the significant milestone dates of the standard offer pending the Commission's resolution of the declaratory statement proceedings. FPC moved to strike Panda's petition, which the Commission denied on the common issues both parties had raised in their petitions, but granted on the milestone date issue. See Order PSC-95-0692-FOF-EI, issued June 12, 1995.

On June 29, 1995, after a status conference with Commission staff, at which Panda expressed its concern that material factual issues were in dispute in the case, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing on the issues raised by the declaratory statement petitions. Panda

DOCUMENT NUMBER-DATE

11630 NOV 20 95

FPSC-RECORDS/REPORTING

1200

contended that disputed issues of material fact affected all issues, and should properly be resolved before the full Commission in a formal administrative proceeding. Panda asserted that the standard offer is established by tariff and approved by the Commission, and to the extent permitted by applicable law the Commission has jurisdiction to make determinations respecting the contract and to grant the appropriate relief requested. The Commission granted Panda's Petition in Order No. PSC-95-0998-FOF-EI, issued August 16, 1995.

Three days before Panda filed its petition for an evidentiary proceeding, Panda had filed a complaint in Federal antitrust court against FPC for violations of the antitrust laws. Panda requested a temporary and permanent injunction against FPC, prohibiting it from conducting this proceeding before the Commission. Panda alleged that the proceeding was a sham, because FPC knew that the Commission did not have jurisdiction to consider the issues regarding the standard offer contract. The Commission has filed a Petition to Intervene in the federal case to inform the court of the nature and extent of its jurisdiction over standard offer contracts between public utilities and cogenerators. To protect the integrity of its regulatory process, and to protect its ability to fulfill its responsibility to implement and enforce PURPA in the State of Florida, the Commission has also contested the allegation that its proceeding is a sham. The Petition to Intervene is pending at this time.

On September 12, 1995, Panda filed a Motion to Dismiss and a Motion to Stay or Abate Proceedings in this case. Panda alleged that the Commission cannot consider the issues FPC has raised, because the Commission lacks jurisdiction over Panda, and it lacks jurisdiction over the subject matter of the case, the approved standard offer contract between Panda and FPC. As it did in its antitrust complaint, Panda alleged that this proceeding is a sham. FPC filed a Response in Opposition to Panda's motions on September 19, 1995. The Commission heard oral argument on the motions September 25, 1995. This is staff's recommendation that the Motion to Dismiss and the Motion to Stay or Abate proceedings be denied.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny Panda's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should deny Panda's Motion to Dismiss. The Commission has jurisdiction to consider the issues raised regarding the approved Standard Offer contract and to grant the relief requested.

STAFF ANALYSIS: The subject matter of this case is a "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 MW or a Solid Waste Facility". The form of the standard offer, incorporated in FPC's filed tariff, was approved by the Commission in Order 24989, issued August 29, 1991. The specific standard offer at issue here was executed by Panda and FPC on November 25, 1991. It was specifically approved by the Commission in Order No. PSC-92-1202-FOF-EQ, issued October 22, 1992.

The standard offer states that the agreement is made "consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date". The agreement provides that Panda will provide 74.9 MW (megawatts) of committed firm energy and capacity at rates based on FPC's avoided unit, a combustion turbine with a 1997 in-service date and a 20 year useful life. The term provision of the standard offer shows a term of thirty years, beginning in 1995 and ending in 2025. Firm capacity payments to be made to Panda, however, only last for 20 years, a period that corresponds to the life of the 1997 avoided unit.

FPC's Petition in this case alleges that in the summer of 1994, Panda informed FPC that it intended to build a cogeneration facility capable of producing 115 MWs of capacity to fulfil its 74.9 MW standard offer. Panda also raised questions about the 30-year term of the standard offer and the 20-year period of firm energy and capacity payments incorporated in Appendix C. FPC requests that the Commission determine whether the proposed size of the plant complies with Commission Rule 25-17.0832(3)(a), Florida Administrative Code.¹ FPC also requests that the Commission

¹ Rule 25-17.0832(3)(a) states;

(3) Standard Offer Contracts

(a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard

determine whether Rule 25-17.083(3)(e)(6) requires FPC to make firm energy and capacity payments to Panda under the standard offer for 20 years or 30 years.² In addition, Panda requested that the Commission extend the milestone dates of the standard offer to reflect the regulatory delays caused by this proceeding.

Panda asserts in its Motion to Dismiss that the Commission does not have jurisdiction to hear this case because The Commission has no jurisdiction over Panda itself, and because the Commission is preempted by Federal law from "'revisiting' the previously-approved contract". Motion to Dismiss, p.3. Panda claims that the Commission cannot resolve any contract dispute between utilities and cogenerators. Referring to the Commission's recent orders deferring to the courts to interpret negotiated cogeneration contract provisions and resolve negotiated cogeneration contract disputes, Panda claims that there is no valid difference between the Commission's authority over negotiated contracts and its authority over standard offer tariff contracts. Panda states that the Commission's rule limiting the availability of standard offer contracts to small cogenerators under 75 MW has no basis in federal law. Panda claims that this proceeding will subject it to "utility-type regulation" from which it is exempt under PURPA (Public Utility Regulatory Policy Act) and FERC's (Federal Energy Regulatory Commission) regulations implementing PURPA.

offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

² Rule 25-17.0832(3)(e) provides, in pertinent part that;

(e) Minimum Specifications. Each standard offer contract shall, at a minimum, specify . . .

6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit. . . .

FPC responds that whether or not the Commission entertains jurisdiction over a cogenerator, the Commission clearly has jurisdiction over a public utility itself and the standard offer cogeneration contracts that the Commission requires the utility to execute. FPC also states that Panda has voluntarily submitted to the Commission's jurisdiction and affirmatively requested relief from the Commission on the same issues FPC has raised. FPC contends that Panda's arguments and supporting case law are not relevant to the issues FPC has raised and the relief FPC has requested. FPC asserts that the Commission clearly has jurisdiction to interpret its own standard offer rules as they apply to this agreement. FPC points out that Panda does not mention the numerous cases in which the Commission has exercised its jurisdiction to interpret standard offers and the rules that govern them.³ FPC argues that neither PURPA, nor FERC's rules implementing PURPA, preempt the Commission's authority to answer the questions raised in this case. According to FPC, PURPA and FERC's guidelines establish a cooperative regulatory scheme in which the federal government has prescribed broad guidelines to encourage the development of cogeneration and the states retain continuing responsibility to implement and enforce those guidelines. As long as the state regulatory agency acts in ways that are compatible with the FERC guidelines, it is carrying out its intended role under PURPA.

Jurisdiction over Panda

Panda's argument that the Commission should dismiss this case because it does not have jurisdiction over Panda is groundless for two reasons. First, the Commission does have regulatory authority

³ See, for example, In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991, Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

over FPC, the public utility required to purchase cogenerated power under the state-created and state-controlled standard offer contract. Second, Panda has voluntarily submitted itself to the jurisdiction of the Commission by taking substantive action in the case and requesting affirmative relief from the Commission. A claim of lack of jurisdiction over the subject matter of a case (in rem jurisdiction) may be raised at any time, even for the first time on appeal; but a claim of lack of jurisdiction over the person (in personam jurisdiction) must be affirmatively asserted before the party takes any substantive action in the case or the claim will be deemed waived. Miller v. Marriner, 403 So.2d 472 (Fla. 5th DCA 1981); Alsup v. Your Graphics are Showing, Inc., 551 So. 2d 222 (Fla. 2d DCA 1988); Hubbard v. Cazares, 413 So.2d 1192 (Fla. 2d DCA 1981). Panda's own Petition for Declaratory Statement and its Petition for Formal Evidentiary Proceeding preclude it from arguing lack of jurisdiction over Panda now.

Jurisdiction over the Subject Matter

Panda's motion to dismiss generally raises a broad array of state and federal issues concerning the relationship between public electric utilities and cogenerators and the shared jurisdiction of state and federal regulators over that relationship. It does not appear to staff, however, that Panda's arguments really address the issues in this case, the facts in this case, or the specific relief that FPC has requested.

Federal Issues

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 and to encourage the use of waste energy. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QF's, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting QFs from state and federal regulation of electric utility rates and financial organization, except those regulations established to implement and enforce PURPA's mandate. Section

210(e)(3) specifically states that qualifying facilities will not be exempt from regulations implementing PURPA. Section 210(f) directs state regulatory authorities to implement PURPA and FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, "the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. s. 292.101(b)(6). In subpart C of its regulations FERC directs the states and their utility commissions to implement, on a continuing basis, FERC's regulations. Subpart F reflects PURPA's intent to exempt qualifying facilities from traditional state utility regulation, with the exception of state regulation implementing PURPA. 18 C.F.R. s. 292(c) states;

(c) Exemption from certain State law and regulation.

(1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2) of this section from State law or regulation respecting:

(i) The rates of electric utilities; and
(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State laws and regulation implementing Subpart C.

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.

The rules require utilities to publish a standard offer contract in their tariffs which the Commission must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, insurance, the term of the contract, and the length of the capacity payment stream. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d), Florida Administrative Code.

The same is not true for negotiated contracts, and the distinction is significant. Rule 25-17.082(2), Florida Administrative Code, encourages utilities and QFs to negotiate contracts, and provides the criteria the Commission will consider when it determines whether the contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. Utilities are not required to execute a negotiated contract, and they are not required to include the vast array of specific provisions that the standard offer rules contain. As the Commission observed in Order No. PSC-95-0210-FOF-EQ, issued February 15, 1995, negotiated contracts are not subject to such extensive direction and control under the rules.

While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions, but we have not interpreted the provisions of negotiated contracts.

Order at p.7

There is a valid regulatory purpose behind the different treatment of negotiated contracts and standard offers in the Commission's cogeneration rules, and it is entirely consistent with federal regulation. State-controlled standard offers that a utility is required to execute encourage the development of cogeneration by relieving smaller qualifying facilities from the

DOCKET NO. 950110-EI
November 20, 1995

burden of negotiating with utilities with greater resources and superior bargaining power. Conversely, because a utility is not free to negotiate the terms and conditions of a standard offer, it is entitled to rely upon the stability and certainty of the standardized terms established and enforced by the Commission's rules, just as the cogenerator is.

In this case FPC has asked the Commission to apply and enforce the cogeneration rules it developed to implement PURPA. As the Commission stated in Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Docket No. 840438-EI, Order No. 14207, issued March 31, 1985; "[T]he Commission certainly has jurisdiction to construe its own Rules at the request of a regulated utility to which those rules apply. If the Commission did not have that authority there would be no reason to have implemented the rules. Contrary to Panda's claims it does not appear to staff that FPC is asking the Commission to "revisit" and modify or terminate Panda's standard offer. Rather FPC is asking the Commission to apply its rules, in effect at the time the standard offer was executed and approved, to the terms of the contract also in effect at the time the agreement was executed and approved. In fact it appears to staff that Panda is the party suggesting that the standard offer be modified. The relief FPC has requested here does not conflict with federal regulations or subject Panda to "utility-type" state rate regulation. It seeks an answer to two questions: 1) Under the provisions of Rule 25-17.0832(3)(a), Florida Administrative Code, as applied to the standard offer at issue, is Panda permitted to build a cogeneration facility larger than 75 MW; 2) Under the provisions of Rule 25-17.0832(3)(e)(6), Florida Administrative Code, as applied to the standard offer at issue, is Florida Power obligated to make firm capacity and energy payments to Panda for more than 20 years. Certainly the Commission has the authority to answer those questions.

To prevail on its motion to dismiss Panda 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 that the Commission can resolve. We find that the motion has not met this test, and we decline to dismiss the case.

DOCKET NO. 950110-EI
November 20, 1995

ISSUE 2: Should the Commission deny Panda's Motion to Stay or Abate Proceedings?

RECOMMENDATION: Yes. The Commission should deny Panda's Motion to Stay or Abate Proceedings at this time.

STAFF ANALYSIS: Panda's Motion to Stay or Abate Proceedings, in its entirety, consists of the following paragraph;

When the jurisdiction of a court or agency is put at issue - which can be done by the parties or the court or agency at any time - then the court or agency should not take any further actions until reply briefs are filed and a proper determination of jurisdiction is made. All decisions and actions of a court or agency without jurisdiction are void and may be ignored. See Stel-Den of America, Inc. v. Roof Structures, Inc., 438 So.2d 882 (Fla. App. 1983)

Staff recommends that Panda's motion should be denied. The authority cited above supports the position that a claim of lack of subject matter jurisdiction can be raised for the first time on appeal or at any other time. It clearly does not stand for the proposition that a court or agency must refrain from taking any action every time a litigant raises a subject matter jurisdiction argument. Staff suggests that the wheels of justice would grind to a screeching halt if parties could so easily delay a proceeding by that tactic. Nor does the Stel-Den case state that decisions of a court or agency without jurisdiction may be summarily ignored.

Rule 25-22.061(2), Florida Administrative Code, provides that a decision to grant a stay rests within the sound discretion of the Commission. Usually a stay is requested under this rule after judicial review of the Commission's final or nonfinal order has been requested. Without commenting on the merits of such a motion, Staff believes that Panda's motion here is premature and would be better filed after Panda seeks judicial review of a decision to deny the motion to dismiss, if the Commission approves staff's recommendation in Issue 1. Therefore, staff recommends that the motion to stay be denied without prejudice to file another motion to stay, pending judicial review of the Commission's decision.

DOCKET NO. 950110-EI
November 20, 1995

ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes. This docket should remain open.

STAFF ANALYSIS: The docket should remain open until the substantive issues of the case are resolved.