



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: April 30, 1997

TO: William D. Talbott, Executive Director

FROM: Robert V. Elias, Chief of Electric & Gas, Division of Legal Services *RVE by JA*
Vicki D. Johnson, Senior Attorney, Division of Legal Services *VDJ*

RE: Staff Recommendation that the Commission Request the Circuit Court in Lake County to Refer to the Commission, Questions Relating to FPC's Operation of the Pulverized Coal Avoided Unit on FPC's System - Case No. 94-2354-CA01. (The issues regarding the operation of the avoided unit are germane to pending Docket No. 961477-EQ before this Commission.)

CRITICAL

INFORMATION: Please place this on the May 5, 1997, Internal Affairs. Action is needed.

By this memorandum, staff requests that the Commission authorize it to file the appropriate pleading in the Circuit Court requesting that the court refer to the Commission issues relating to FPC's Operation of it's System of the Pulverized Coal Avoided Unit - Case No. 94-2354-CA01.

On December 12, 1996, Florida Power Corporation (FPC) filed a petition for approval of a settlement agreement between FPC and Lake Cogen, Ltd. According to FPC, the settlement agreement clarifies how the parties will perform under the Negotiated Contract for the Purchase of Firm Capacity and Energy for a Qualifying Facility and thereby terminates litigation now pending between the parties in state court.

The state court litigation refers to a lawsuit filed by NCP Lake Power, Inc. as General Partner of Lake Cogen Ltd. against FPC in the circuit court in Lake County, Florida (Case No. 94-2354-CA01, Judge Don F. Briggs presiding). The parties disagree as to the appropriate methodology for determining the energy price to be paid pursuant to section 9.1.2 of the negotiated contract. Section 9.1.2 provides, among other things, that Lake Cogen will receive payments based on the firm energy cost for each hour that FPC would have had a unit with the characteristics of the avoided unit operating; and during all other hours, the energy cost shall be equal to the as-available energy cost.

When the Lake County lawsuit was initiated, the issue concerning the Commission's authority to interpret negotiated contracts was pending in Docket No. 940771-EQ. Therefore, to protect its jurisdiction, the Commission filed a motion to intervene in the Lake County case. In granting intervention on January 31, 1995, Judge Briggs stated that the Commission had certain expertise, therefore he was inviting the Commission to assist the court in resolving the dispute.

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 FPC - INTERNAL AFFAIRS

In view of the Commission's decision that it would defer to the courts to interpret the pricing provision in FPC's negotiated contracts (Order No. PSC-95-0210-FOF-EQ, issued February 15, 1995) and the Judge's invitation, the Commission filed a Motion to Withdraw as Party and To Appear as Amicus Curiae. The court has not ruled on that motion; however, neither party objected.

On February 23, 1996, Judge Briggs issued an order granting Lake Cogen's motion for partial summary judgment. The order states that section 9.1.2 requires that FPC make electric energy payments to plaintiff with reference to the modeling and operation of a real, operable 1991 Pulverized Coal Unit. Therefore, partial summary judgment was entered for Lake Cogen and against FPC on the issue of liability for FPC's failure to pay Lake Cogen at the firm energy rate when the avoided unit with operational characteristics of an operable 1991 Pulverized Coal unit contemplated in the agreement would have been operating. Following the court's ruling as to liability, the lawsuit has lingered pending the parties' settlement negotiations.

On April 22, 1997, Judge Briggs held a status conference hearing to consider FPC's motion to ratify and enforce the settlement. Because Lake Interest Holdings, Inc. (LIHI), the majority partner in the Lake Cogen project, has not approved the settlement agreement, the court stated that it could not ratify the settlement. The court has given the parties until June 2, 1997 to secure the requisite approvals from LIHI. Absent LIHI's approval, the court will set the matter for hearing as to damages.

Resolution of the damages issue (i.e. when FPC should have paid firm or as-available energy costs) is contingent upon a determination of the hours when FPC would operate the coal unit on its system. Such a determination requires the consideration of technical matters which are uniquely within the Commission's expertise. These matters include, but are not limited to, fuel availability, fuel price forecasts, unit heat rates, and maintenance requirements. In addition, the Commission's approval of the negotiated contract in 1991 provides for recovery of the costs incurred pursuant to the contract through the fuel adjustment proceedings. If the court awards damages, the Commission will be faced with determining whether FPC should be allowed to recover these amounts pursuant to Section 366.051, Florida Statutes.

For these reasons, staff recommends that the Commission should request that the Lake County court refer to the Commission questions relating to FPC's operation of the pulverized coal unit on its system. The Commission could then conduct an evidentiary hearing and submit its specific findings to the court for consideration.

In 1988, the circuit court of Pinellas County referred technical matters to the Commission concerning a lawsuit by Home Shopping Network, Inc.'s (HSN) against GTE Corporation, General Telephone Company of Florida and GTE Communications Corporation (Docket No. 880815-TL). One count of HSN's complaint alleged that the defendants had failed to meet their obligations to provide reasonable and sufficient telephone facilities and equipment as required by Section 364.03, Florida Statutes. After a hearing, the Commission issued Order No. 21280, on May 25, 1989, finding that GTE's service to HSN met the statutory and regulatory requirements.

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Whether the circumstances of a particular case are such as to indicate that the circuit court should refer the matter to the PSC for findings is within the court's discretion. Southern Bell Tel. and Tel. Co. v. Mobile America Corp., 291 So.2d 199 (Fla. 1974). In that case, Mobile America Corp. sought damages in circuit court based on Southern Bell's alleged failure to meet its statutory obligation to provide efficient telephone service. The circuit court dismissed the complaint on the grounds that the PSC had exclusive jurisdiction and the district court of appeal reversed and remanded. Mobile America Corp. v. Southern Bell Tel. and Tel. Co., 282 So.2d 181 (Fla. 1st DCA 1973). In its appeal to the Supreme Court, Southern Bell conceded that the circuit court had jurisdiction over the claim, but asserted that the court was required to obtain the benefit of the PSC's findings.

Staff believes that Judge Briggs recognized that the court could benefit by the Commission's findings when he granted intervention; therefore, the Commission should accept Judge Briggs' invitation to help by requesting that the court refer the question as to when the avoided unit would operate on FPC's system to the Commission. The Commission's participation in this manner will promote judicial economy and will ensure that the ratepayers' interests are protected.

RVE/js

cc: Dr. Mary Bane
Joe Jenkins
Bob Trapp
Rob Vandiver
Noreen Davis