

MEMORANDUM

JUNE 30, 1997

RECEIVED

JUN 30 1997
205
FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (KEATING) *RVE WCK*

RE: DOCKET NO. 961184-EQ - PETITION FOR APPROVAL OF EARLY TERMINATION AMENDMENT TO NEGOTIATED QUALIFYING FACILITY CONTRACT WITH ORLANDO COGEN LIMITED, LTD. BY FLORIDA POWER CORPORATION.

PSG 0179

Attached is an ORDER DENYING MOTION TO DISMISS to be issued in the above referenced docket. (Number of pages in Order - 5)

WCK/js

Attachment

cc: Division of Electric and Gas (Ballinger, Harlow, Colson, Draper, Dudley, Tew, Wheeler)
Division of Auditing and Financial Analysis (Stallcup, Noriega)

I:\961184or.wck

38

*boxed - 4/2
marked 1/2*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

DOCKET NO. 961184-EQ
ORDER NO. PSC-97-0779-FOF-EQ
ISSUED: July 1, 1997

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

On October 1, 1996, Florida Power Corporation (FPC) filed a petition for approval of an early termination agreement to a Negotiated Contract (OCL contract) with Orlando Cogen Limited, Ltd. (OCL), a qualifying facility. By Order No. PSC-97-0086-FOF-EQ, issued January 27, 1997, as proposed agency action (PAA Order), we denied FPC's petition. On February 17, 1997, FPC filed its Petition on Proposed Agency Action (Petition) and Motion for Informal Prehearing Schedule. On February 26, 1997, the Office of Public Counsel (OPC) filed its Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action (Motion to Dismiss). On March 10, 1997, FPC filed its Response in Opposition to Public Counsel's Motion to Dismiss (Response). This Order addresses OPC's Motion to Dismiss.

OPC bases its Motion to Dismiss on two grounds: (1) FPC has not established standing to protest this Commission's PAA Order because its substantial interests were not affected by the PAA Order, and (2) FPC's Petition is an improper motion for reconsideration of our PAA Order. In considering OPC's Motion to Dismiss, we must view the facts set forth in FPC's Petition in the light most favorable to FPC in order to determine if FPC's request is cognizable under the provisions of Rule 25-22.029, Florida Administrative Code, and Chapter 120, Florida Statutes. See Varnes

DOCUMENT NUMBER DATE

06616 JUL-16

FPC-REGISTRATION

v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). We find that neither of OPC's arguments provides adequate grounds to dismiss FPC's Petition.

Substantial Interests of FPC

Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial interests may or will be affected by the Commission's proposed agency action may file a petition for a \$120.57 hearing" In its Motion to Dismiss, OPC asserts that FPC's substantial interests were not affected by our PAA Order.

In its Petition, FPC asserts that it has a substantial interest in the amendment to the OCL contract, because the amendment will provide net savings of over \$400 million to FPC and its customers. OPC, in its Motion to Dismiss, argues that under either the original OCL contract or the proposed amendment, FPC would be reimbursed by its customers for all costs and would suffer no harm. Thus, OPC concludes that FPC's substantial interests are not affected. OPC's argument appears to equate "affecting one's substantial interests" solely with "causing one economic harm." OPC cites no authority for this limiting interpretation, and we are unaware of any such authority.

We find that the PAA Order affected FPC's substantial interests by denying FPC the authority to obtain early termination of its contract. Application of OPC's reasoning would have subjected FPC's original petition in this proceeding to a motion to dismiss at the outset on the grounds that FPC had no substantial interest in the outcome. FPC clearly has a substantial interest in obtaining Commission approval to pursue a course of action that it believes will provide savings to itself and its customers. OPC's Motion to Dismiss may be denied based on this finding alone.

FPC asserts in its Petition that it has a substantial interest in the amendment to the OCL contract, because the amendment will mitigate the exposure of FPC and its customers to potentially strandable costs in the future. OPC, citing Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), argues that potential stranded investment is not the type of immediate injury-in-fact necessary to confer standing. Because we have already determined that FPC's substantial interests were affected by our PAA Order, we see no need to consider this argument.

Nevertheless, we note that the petitioners in Agrico were third-party intervenors, not parties in the agency's original proposed agency action proceeding. Although Agrico may arguably be interpreted to govern all petitioners for an administrative hearing, we believe it would be a dangerous precedent to find that a party wishing to protest the denial of its own petition lacked the standing to do so. In fact, Rule 28-106.205 of the recently adopted Uniform Rules of Procedure, authorized under Florida's 1996 Administrative Procedure Act, specifically exempts original parties from the requirement of demonstrating a substantial interest in the matter. We are unaware of any case extending Agrico to original petitioners.

Improper Motion for Reconsideration

In its Motion to Dismiss, OPC argues that FPC's protest is an improper motion for reconsideration of the PAA Order. OPC asserts that FPC is not asking for a hearing to prove the allegations in its Petition, but instead seeks to show this Commission where we erred in our decision. OPC states that the disputed issues of fact and policy presented in FPC's Petition are direct challenges to our PAA Order, amounting to a motion for reconsideration. OPC notes that Rule 25-22.060, Florida Administrative Code, prohibits us from reconsidering a proposed agency action.

FPC argues in its Response that it is required under Section 120.80(13)(b), Florida Statutes, to recite in its Petition the issues from our PAA Order which are in dispute. FPC states that doing so does not transform its Petition into a motion for reconsideration. Section 120.80(13)(b), Florida Statutes, provides:

Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

We do not find OPC's arguments compelling. We believe that Section 120.80(13)(b), Florida Statutes, can be interpreted to effectively preclude a party from addressing at hearing any disputed issues in the PAA order that are not raised in that party's petition on proposed agency action. We also note that Rule 25-22.036(2) and (7)(a)3., Florida Administrative Code, requires

ORDER NO. PSC-97-0779-POF-BQ
DOCKET NO. 961184-BQ
PAGE 4

that initial pleadings, including petitions on proposed agency action, contain a statement of all known disputed issues of material fact. Therefore, OPC's contention that the statement of disputed issues of fact provided in FPC's Petition somehow transforms FPC's Petition into a motion for reconsideration should be rejected. In addition, we believe that it is clear from reading both FPC's Petition and Motion for Informal Prehearing Schedule that FPC seeks a hearing, if necessary, in this matter. Accordingly, we deny OPC's Motion to Dismiss on this ground.

Conclusion

We find that it would be inappropriate to dismiss FPC's Petition when the facts alleged therein, viewed in the light most favorable to FPC, adequately state a cause of action that is cognizable by this Commission under the provisions of Rule 25-22.029, Florida Administrative Code, and Chapter 120, Florida Statutes. Therefore, we deny OPC's Motion to Dismiss.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action is denied. It is further

ORDERED that this docket shall remain open pending resolution of Florida Power Corporation's Petition on Proposed Agency Action.

By ORDER of the Florida Public Service Commission, this 1st day of July, 1997.



BLANCA S. BAYO, Director
Division of Records and Reporting

(S E A L)

WCK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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.