IN THE SUPREME COURT OF FLORIDA
Appeal Case No. 94,665

In re: Petition by Florida Power Corporation for Declaratory Statement, etc.

FLORIDA POWER CORPORATION,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Agency/Appellee,

LAKE COGEN, LTD.

Intervenors/Appellees.

_____/

980509-EP

FLORIDA POWER CORPORATION'S INITIAL BRIEF

On appeal from a decision of the Florida Public Service Commission

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See

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Constitutional Provisions

PREFACE

This is an appeal of a decision of the Florida Public Service Commission (the "Commission") denying Florida Power Corporation's ("Florida Power") Petition for Declaratory Statement. The Appellee/intervenor, cogeneration facility, Lake Cogen, Ltd. will be referred to as "Lake Cogen." Citations to the record will be designated (R-__). An appendix containing the various Commission orders referred to in the Initial Brief is included for the Court's convenience, the orders will be designated by the Commission Order number and the appendix tab number (Order No. ____; A-___).

To resolve a continuing payment dispute between Florida Power and Lake Cogen, Florida Power sought the Commission's guidance as to the scope of the Commission's order approving the cogeneration contract between them. The Commission ruled that it could not issue the requested declaratory relief, finding the question barred by the doctrine administrative finality. The sole issue before this Court is whether the Commission erred in denying Florida Power's petition.

STATEMENT OF JURISDICTION

This case involves review of a decision of the Commission relating to rates of a regulated utility; therefore, this Court has jurisdiction over this case pursuant to Article V, § 3(b)(2) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(1)(B)(ii). See also Fla. Stat. §§ 350.128 & 366.10.

STATEMENT OF THE CASE

On December 4, 1998, by a 3-2 vote, the Commission rejected its Staff's unanimous recommendation and denied Florida Power's petition for declaratory statement. (R-445-453). The petition for declaration requested the Commission to interpret its 1991 order approving the 20-year contract (the "Contract") between Florida Power and Lake Cogen. Under the Contract, Florida Power would purchase capacity and energy from Lake Cogen based upon Florida Power's avoided costs as mandated by the Public Utilities Regulatory Policy Act ("PURPA") and Commission regulations.

On April 9, 1998 Florida Power filed a Petition for Declaratory Statement (the "1998 Petition") asking the Commission to interpret and clarify its order approving the Contract. (R-1-84). After an Agenda Conference, (R-282-444), the Commission concluded that the 1998 Petition was barred by the doctrine of administrative finality. On December 4, 1998, the Commission entered its written order. (R-445-453; Order No. 1621; A-1). Florida Power timely filed a Notice of Appeal on January 4, 1999. (R-454-463).

STATEMENT OF THE FACTS

A. Background.

To fill a need for increased energy and capacity capabilities, on March 13, 1991, Florida Power and North Canadian Power[1] entered a Negotiated Contract (the "Contract") for the Purchase of Firm Capacity and Energy from a Qualifying Facility ("QF"). (R-3). On March 19, 1991, Florida Power presented to the Commission eight negotiated QF contracts, including the Lake Cogen Contract, to be approved for cost recovery of the stream of energy payments to be made thereunder. (R-3). In the approval process, the Commission was required to determine that the payment terms would not require Florida Power to pay Lake Cogen more than Florida Power would have expended in construction and operation costs to generate the energy itself. (Order No. 24734; A-2 at p. 8).

On July 1, 1991, the Commission concluded that the negotiated QF contracts would be cost effective because the payments to each of the QFs for firm capacity and energy would be no greater than the present worth of Florida Power's avoided costs. (The "1991 Approval Order") (Order No. 24734; A-2 at p. 9).

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[1] Florida Power contracted with North Canadian Power, a subsidiary of North Canadian Oils, which operated the cogeneration facility as Lake Cogen, Ltd. and later sold its interests to Energy Initiatives, a subsidiary of GPU International.

Essentially, the Contract requires Florida Power to make two types of payments to Lake Cogen, one for providing electric capacity and one for electric energy delivered to Florida Power. (Order No. 24734; A-2 at p. 6). The express terms of the energy payment provision in Section 9.1.2 of the Contract uses four proxy characteristics to determine when Lake Cogen receives firm energy payments, and also specifies the methodology for calculating the firm energy payments.

B. Contract Implementation.

On July 1, 1993, Lake Cogen began providing electric energy and capacity to Florida Power. (Order No. 1437; A-4 at p. 1). During the summer of 1994, Florida Power determined that its current payment practices might result in an overpayment for the energy -- a payment exceeding its avoided costs. (Order No. 1437; A-4 at p.2). On July 18, 1994, Florida Power notified Lake Cogen (and the other QFs) that effective August 1, it would implement the payment methodology of § 9.1.2. (R-6). Beginning in August 1994, Florida Power paid Lake Cogen according to the methodology set forth in § 9.1.2. Id.

C. The 1994 Pricing Docket (Order No. 0210 the "1994 Petition").

On July 21, 1994, Florida Power initiated the Pricing Docket seeking a declaratory statement from the Commission clarifying and interpreting the Contract and particularly, the pricing mechanism in § 9.1.2. (R-3). Lake Cogen

moved to dismiss the 1994 Petition, contending that the Commission lacked jurisdiction to interpret the Contract. (R-3). On February 15, 1995, the Commission dismissed the 1994 Petition, reasoning that consistent with its understanding of PURPA, it did not have the jurisdiction to adjudicate what it characterized as a contract dispute involving a negotiated contract. (R-3; Order No. 0210; A-3). Determining that the 1994 Petition was asking it to resolve a contract dispute, the Commission deferred to the courts to resolve the question. (Id). Notably, the order "recognized the Commission's continued responsibility for cost recovery review." (Order No. 1437; A-4 at p. 3).

D. The Lawsuit.

While the 1994 Petition was pending, Lake Cogen sued Florida Power for breach of contract, contending that it was not being paid in accordance with the Contract. (Order No. 1437; A-4 at p. 3). Florida Power defended asserting that Lake Cogen's approach would result in instances where Florida Power would be required to pay for energy at prices above its avoided cost, a violation of PURPA.[2] (R-9).

[2] In 1998, Lake Cogen amended its complaint claiming Florida Power breached the Contract by changing the manner by which coal was delivered to CR 1&2. Conversely, Florida Power argued that it was not bound to the coal delivery practices in effect at the inception of the Contract and that it acted in accordance with the Contract and PURPA when it took advantage of lower prices for coal transported by rail.

In January 1996, the Fifth Judicial Circuit Court entered a Partial Summary Judgment for Lake Cogen, prompting settlement discussions between Florida Power and Lake Cogen. (R-4). By December 1996, the parties reached a settlement and because the settlement terms required specific payment rates derived in a manner not approved by the Commission, the parties submitted the proposed agreement to the Commission for approval. (R-4).

E. 1996 Petition for Approval of the Settlement Agreement.

On December 12, 1996, Florida Power filed a petition with the Commission seeking approval on an expedited basis of the Settlement Agreement. (R-4). On November 14, 1997, the Commission declined approval of the Settlement Agreement (R-4-5; Order No. 1437; A-4) finding that the proposed settlement would have exceeded Florida Power's avoided costs. Significantly, in the order rejecting the settlement, (the "1997 Order"),[3] the Commission repeatedly referred to the 1991 Approval Order and made several significant statements regarding its interpretation and analysis of the 1991 Approval Order. (Order No. 1437; A-4).

In reviewing the proposed settlement, the Commission evaluated the settlement by interpreting the 1991 Approval Order. The Commission stated that

[3] The 1997 order eventually became a nullity because the settlement expired by its own terms before the order became final. (Order No. PSC-98-0450-FOF-EQ, in Docket No. 961477-EQ).

in 1994, it may have construed its own jurisdiction to review negotiated contracts too narrowly. (Order No. 1437; A-4 at p. 8). More importantly, the Commission stated that it had the jurisdiction to interpret its own orders, including the 1991 Approval Order, citing the New York Public Service Commission ("NYPSC") Declaratory Ruling in Orange & Rockland Util., Inc. - Petition for a Declaratory Ruling that the Company and its Ratepayers are not Required to Pay for Electricity Generated by a Gas Turbine Owned by Crossroads Cogeneration Corp. ("Crossroads"), 1996 N.Y. PUC. LEXIS 674 (New York PSC, Case No. 96-E-0728, Nov. 29, 1996) (NYPSC granted a declaratory statement finding that the NYPSC had the jurisdiction to explain and interpret its original order approving the contract at issue). (Order No. 1437). The Commission stated that the question whether Florida Power was properly calculating the payments under the terms of the Contract, "is inextricably linked to what the Commission approved when they approved the contract." (Id. at 10) (emphasis added).

Evaluating the settlement proposal, the Commission determined that its previous Approval Order considered § 9.1.2. to operate as a pricing proxy and it had not envisioned that Lake Cogen would be paid based on a method other than the one set forth. The Commission also stated that its "approval of the original contract recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed," and that FPC's modeling

of the avoided unit is consistent with this Commission's 1991 Approval Order and more closely approximate the avoided cost. (Id. at pp. 4-5). Thus, the Commission exercised jurisdiction to interpret the meaning of the 1991 Approval Order, and on that basis, denied the proposed settlement.

F. **Present Controversy and the 1998 Petition.**

After the Commission denied Florida Power the opportunity to settle the Lake Cogen litigation, the dispute continued. On April 9, 1998, based on the Commission's statements in the 1997 Order, Florida Power filed the 1998 Petition at issue here asking the Commission to clarify the 1991 Approval Order as it had done in the 1997 Order. (R-1-83). Florida Power asserted that it had a present and actual need to know how the Commission determined its avoided cost in the 1991 Approval Order and how the Commission calculated the payments to be made to Lake Cogen. (R-1-84). Obligated by law to ensure that its ratepayers pay no more than the avoided costs for energy, Rule 25-17.0832, Fla. Admin. Code, Florida Power remained uncertain as to its rights and duties as the Commission approved. (R-1-84). Moreover, the Commission retains ultimate control over Florida Power's ability to recover its costs from ratepayers, therefore, Florida Power had a present need to understand the Commission's Approval Order, and in particular what costs were approved in the Approval Order. Unlike its 1994 Petition seeking

clarification of the Contract, Florida Power's 1998 Petition sought clarification of the Approval Order itself. (Order No. 0210; A-3; R-1-84).

G. **Agenda Conference.**

On October 6, 1998, the Commission heard oral argument on the 1998 Petition and denied the Petition. (R-282-444). The Commission erroneously concluded that because it had previously denied Florida Power's 1994 Petition based on its lack of jurisdiction to interpret the Contract, the 1998 Petition for was barred by principles of administrative finality. (R-445-453). The Commission's written order was entered December 4, 1998, and this appeal timely followed. (Id.; R-454). The only issue before this Court is whether the Commission erred by denying Florida Power's 1998 Petition based on administrative finality.

SUMMARY OF ARGUMENT

The Commission improperly invoked the doctrine of administrative finality to preclude Florida Power from obtaining a declaratory statement. The 1998 Petition presented a question within the Commission's stated understanding of the scope of its jurisdiction – asking the Commission to interpret one of its own orders. The Commission's failure to exercise jurisdiction to interpret its own order left Florida Power with no recourse other than costly litigation, which it was denied permission to settle.

With respect to additional argument, Florida Power adopts and relies upon the arguments raised in its brief served simultaneously with this one in the companion case of In re: Petition by Florida Power Corporation for Declaratory Statement; Florida Power Corporation v. Florida Public Service Commission and Metropolitan Dade County, Appeal No. 94,664.

ARGUMENT

Administrative Finality Does Not Preclude the Commission from Exercising Jurisdiction Here.

Principles of administrative finality do not apply in administrative proceedings like this one, where there has been such a "substantial change of circumstances relating to the subject matter with which the ruling was concerned, sufficient to prompt a different or contrary determination ...." Miller v. Booth, 702 So. 2d 290, 291 (Fla. 3d DCA 1997). As the Commission itself recognized in its 1997 Order denying the settlement, the law governing the Commission's jurisdiction has been clarified since the Commission denied Florida Power's 1994 Petition on the basis that it lacked jurisdiction. In the 1997 Order, the Commission not only stated that it had the jurisdiction to interpret its own orders, but it also acknowledged that in light of recent decisions in Florida of other state public service commissions its 1994 decision was probably too restrictive. (Order No. 1437; A-4 at p.8). Still embroiled in costly litigation that the Commission denied

authority to settle, Florida Power carefully crafted its 1998 Petition to be certain that it asked questions within the Commission's scope of jurisdiction as the Commission itself drew the distinction in its 1997 Order. Florida Power asked questions related to the Commission's 1991 Approval Order, an area where the Commission had acknowledged it possessed jurisdiction. Then, in another about face, the Commission refused to follow the reasoning of its 1997 Order and, erroneously, found the 1998 Petition barred by the doctrine of administrative finality.

As the dissent noted in the order under review, the Commission disregarded the case law, specifically Crossroads and Panda, that supported the Commission's exercise of jurisdiction over its own orders, and remained committed to its earlier decision, which was wholly inapplicable to the jurisdictional question before it. (Order No. 1621; A-4 at pp. 6-7). Rather than acknowledging that "Crossroads provides a path 'between Scylla and Charibdis," the Commission chose not to exercise jurisdiction, thus, forcing Florida Power to be forever caught in between. (Id. at p. 8).

Florida Power relied on the Commission's own order – the 1997 Order – which explained the scope of the Commission's jurisdiction, in filing the 1998 Petition and the Commission again failed to exercise jurisdiction. This Court

should reverse the Commission's erroneous decision and remand for proceedings on the merits of the 1998 Petition.

CONCLUSION

Based on the foregoing, and each of the arguments set forth by Florida Power in the brief filed in the companion case, Florida Power respectfully requests that this Court reverse and remand for an adjudication on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32349-9850; and Robert Scheffel Wright, Esquire, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302 (counsel for Lake Cogen), David E. Smith, Esquire, Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0880 and John R. Marks, III, Esquire, Knowles, Marks & Randolph, P.A. 215 South Monroe Street, Suite 130, Tallahassee, Florida John R. Beranek, Esquire, P.O. Box 391, Tallahassee, Florida 32302; and Gail P. Fels, Assistant County Attorney, Dade County Aviation Department, P.O. Box 592075 AMF, Miami, Florida 33159, this 26th day of March, 1999.

Attorney