

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for) DOCKET NO. 940771-EQ
determination that) ORDER NO. PSC-95-0210-FOF-EQ
implementation of contractual) ISSUED: February 15, 1995
pricing mechanism for energy)
payments to qualifying)
facilities complies with Rule)
25-17.0832, F.A.C., by Florida)
Power Corporation.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING MOTIONS TO DISMISS

BACKGROUND

In 1991 and 1992, Florida Power Corporation (FPC) entered into eleven negotiated cogeneration contracts with various cogenerators. Those contracts provide approximately 735 megawatts (MW) out of approximately 1,045 MWs of cogenerated capacity that FPC will have on its system by the end of 1995. The negotiated contracts in question are between FPC and the following cogenerators: Seminole Fertilizer, Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, Ridge Generating Station, Dade County, Polk Power Partners-Mulberry, Polk Power Partners-Royster, EcoPeat Avon Park, and CFR Biogen.

The contracts all contain the following provision, section 9.1.2:

Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided

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Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

This provision establishes the method to determine when cogenerators are entitled to receive firm energy payments or as-available energy payments under the contract. The Commission reviewed the 11 negotiated contracts and found them to be cost-effective for FPC's ratepayers under the criteria established in Rules 25-17.082 and 25-17.0832(2), Florida Administrative Code.¹ The information the Commission received at that time was based on simplified assumptions to arrive at the estimated energy payments.

Recently, FPC states, it reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions. FPC determined that the avoided unit would be scheduled off during certain minimum load hours of the day. On July 18, 1994, FPC notified the parties to the contracts that it would begin implementing section 9.1.2, effective August 1, 1994. Prior to that time FPC had paid cogenerators firm energy prices at all hours.

Three days later, on July 21, 1994, FPC filed a petition seeking our declaratory statement that section 9.1.2 of its negotiated cogeneration contracts is consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. Rules 25-17.0832(4)(a) and (b) provide:

(4) Avoided energy payments.

(a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825(2)(a).

¹ See Order No. 24099, issued February 12, 1991 in Docket No. 900917-EQ; Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ; Order No. 24923, issued August 19, 1991 in Docket No. 910549-EQ; and Order No. PSC-92-0129-FOF-EQ, issued March 31, 1992 in Docket No. 900383-EQ.

(b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825 (2)(a).

Several cogenerators petitioned for leave to intervene and questioned whether the declaratory statement was the appropriate procedure to resolve the issue. In addition, in September 1994, OCL, Pasco, Lake, Metro-Dade County, and Auburndale filed motions to dismiss on the grounds that we do not have jurisdiction to consider FPC's petition. Also, subsequent to the filing of FPC's petition, Pasco Cogen and Lake Cogen initiated lawsuits in the state courts for breach of contract and declaratory judgment.

On November 1, 1994, FPC amended its petition and asked the Commission to determine whether its implementation of section 9.1.2 is lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. FPC also requested a formal evidentiary proceeding. Thereafter the cogenerators filed additional motions to dismiss the amended petition.

On January 5, 1995, we heard oral argument on the motions to dismiss filed in this docket and the motions to dismiss filed in two other dockets involving cogeneration contracts. We have fully considered the merits of the motions to dismiss, and we find that they should be granted. Our reasons for this decision are set out below.

DECISION

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. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. In developing PURPA, Congress identified three major obstacles that hindered the development of a strong cogeneration market. First, monopoly electric utilities resisted purchasing power from other generation suppliers instead of building their own generating units. Second, monopoly electric utilities could refuse to sell needed backup

power to cogenerators. Third, cogenerators and small power producers could be subject to extensive, expensive federal and state regulation as electric utilities.

PURPA contains several provisions designed to overcome these obstacles. 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 most state and federal utility regulation, and section 210(f) directs state regulatory authorities to implement 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). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s. 292.301.

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 statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs.

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 two types of contracts are treated very differently in our rules. The rules require utilities to

publish a standard offer contract in their tariffs which we 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, and insurance. 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.

In contrast, our rules are more limited in their treatment of negotiated contracts. Rule 25-17.082(2), Florida Administrative Code, simply 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. The rule makes no provision for resolution of a dispute once the contract has been executed and approved for cost recovery.

We use certain standard offer contract rules as guidelines in determining the cost-effectiveness of negotiated contracts for cost recovery purposes, but we have not required any standard provisions to be included in negotiated contracts. In Docket No. 910603-EQ, we specifically addressed the issue of standard provisions for negotiated contracts. In that docket the cogenerators urged us to prescribe certain standard provisions in negotiated contracts and prohibit other provisions, like regulatory out clauses. In Order No.25668, issued February 3, 1992, we said:

We will not prescribe standard provisions in negotiated contracts, because negotiated contracts are just that --negotiated contracts. Standardized provisions are not necessary in negotiated contracts, and they can impair the negotiating process.

Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. . . .

Standardized terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction". Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. . . . It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

Order No. 25668, p. 7

This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. 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 negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. As Auburndale's attorney pointed out in oral argument, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.

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,² but we have not

² 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,

interpreted the provisions of negotiated contracts. See Docket No. 840438-EI, In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Order No. 14207, issued March 31, 1985, where we refused to construe a paragraph of the agreement that concerned renegotiation of contract terms. There we said that while we could interpret our cogeneration rules and decide that the new rules did not apply to preexisting contracts, matters of contractual interpretation were properly left to the civil courts. Our Conserv decision, while not controlling here, does lend support to the proposition that we have limited our involvement in negotiated contracts to the contract formation process and cost recovery review.

The weight of authority from other states that have addressed similar issues supports this position. See, eg. Afton Energy, Inc v. Idaho Power Co., 729 P.2d 400 (Id. 1986); Bates Fabrics, Inc. v. PUC, 447 A.2d 1211 (ME. 1992); Barasch v. Pennsylvania Public Utility Commission, 546 A.2d 1296, reargument denied, 550 A.2d 257 (1988); Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the general consensus appears to be that under federal and state regulation of the relationship between utilities and cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In Afton, supra., Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditioned on the Idaho Supreme Court's determination whether the Idaho commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that

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.

the lesser payment option would be in effect. The Commission dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In Erie Associates, supra., the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had cancelled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.

We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such questions do not involve our authority, under PURPA and PSL@66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.

. . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25-17.0832(4), Florida Administrative Code. We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25-17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts. We have clearly said that we would not require any standard provisions, pricing or otherwise, for negotiated

contracts. Therefore, whether FPC's implementation of the pricing provision is consistent with the rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. In this case, we will defer to the courts to resolve that dispute. We note however, that courts have the discretion to refer matters to us for consideration to maintain uniformity and to bring the Commission's specialized expertise to bear upon the issues at hand.

We disagree with FPC's proposition that when the Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret. It is true that the Supreme Court has determined that territorial agreements merge into Commission orders approving them, but territorial agreements are not valid commercial purchased power contracts. They are otherwise unlawful, anticompetitive agreements that have no validity under the law until we approve them. Furthermore, territorial agreements involve the provision of retail electric service over which we have exclusive and preemptive authority. As explained above, we do not enjoy such authority over QFs or their negotiated power purchase contracts.

Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake;³ but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. That power has been clearly recognized by the parties through the "regulatory out" provisions of those contracts. We do not think, however, that the regulatory out provisions of negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract.

For these reasons we find that the motions to dismiss should be granted. FPC's petition fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is dismissed.

³ 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.

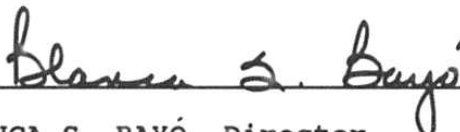
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It is therefore

ORDERED by the Florida Public Service Commission that the Motions to Dismiss filed by Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, and Metro Dade County/Montenay are granted. Florida Power Corporation's Petition is dismissed. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 15th day of February, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.