BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co.	DOCKET NO. 000982-EI ORDER NO. PSC-00-2341-FOF-EI ISSUED: December 6, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

ORDER GRANTING MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

On August 29, 1991, this Commission issued Order No. 24989, in Docket No. 910004-EU, which required Florida Power & Light Company ("FPL") to issue a standard offer contract for up to 125 megawatts ("MW") of capacity. The capacity and energy payments for the standard offer contract were based on FPL's next avoided unit, the 1997 stage of an Integrated Coal Gasifier Combined Cycle unit.

On September 20, 1991, Okeelanta Corporation ("Okeelanta") and Osceola Farms, Co. ("Osceola") (collectively, "QFs") submitted signed standard offer contracts with FPL. The Okeelanta contract was to provide FPL with 70 MW of firm energy and capacity starting on January 1, 1997, and continuing through 2026. The Osceola contract was to provide 42 MW of firm energy and capacity (subsequently upgraded to 55.9 MW under a provision of the contract) to FPL from January 1, 1997, through 2026. By Order No. PSC-92-0050-FOF-EQ, issued March 11, 1992, in Docket No. 911140-EQ, this Commission approved both standard offer contracts for cost recovery.

A dispute arose between FPL and the QFs concerning whether the

QFs accomplished commercial operation by January 1, 1997, as set forth in Section 2 of the standard offer contract, and the effect, if any, of a failure to do so on the parties' respective rights and obligations under the various provisions of the standard offer contract. FPL initiated an action for a declaratory statement from state circuit court to determine its rights and obligations under the standard offer contract. The QFs subsequently filed a countersuit seeking approximately $490 million in damages for breach of contract.

On July 28, 2000, FPL filed a petition for our approval of a Conditional Settlement Agreement ("Settlement Agreement") to buy-out the QF standard offer contracts. The Settlement Agreement calls for the following:

(1) termination of the QF standard offer contracts;

(2) settlement of all claims by and/or against FPL; and,

(3) settlement of the pending judicial proceedings relating to the QF contracts.

In return, FPL would make a one-time payment of $222.5 million to the QFs. In its petition, FPL requested approval for recovery of the $222.5 million settlement payment through the capacity cost recovery clause ("capacity clause") and/or fuel and purchased power cost recovery clause ("fuel clause").

By proposed agency action Order No. PSC-00-1913-PAA-EI, issued October 19, 2000 ("PAA Order"), we approved the Settlement Agreement and recovery of the settlement payment over a five-year period beginning January 1, 2002, with 79% of the payment to be recovered through the capacity clause and the remaining 21% to be recovered through the fuel clause. We found that termination of the QF contracts pursuant to the Settlement Agreement would provide FPL's ratepayers with approximately $412 million in net present value (NPV) savings over the entire life of the contracts or approximately $300 million in NPV savings from 2001 through the contracts' remaining terms. We also approved FPL's proposal to treat the settlement payment as a base rate regulatory asset from January 1, 2001, through December 31, 2001.

On November 9, 2000, Mr. Michael T. Caldwell ("petitioner"), an FPL customer, filed a protest of Order No. PSC-00-1913-PAA-EI, requesting an evidentiary hearing under Section 120.57, Florida Statutes ("protest petition"). On November 15, 2000, FPL filed a motion for a summary final order dismissing or denying Mr. Caldwell's protest and request for hearing, and affirming our PAA Order. In its motion, FPL requested expedited disposition of the motion. On December 4, 2000, the petitioner filed a response to FPL's motion. Although the petitioner's response was not timely filed, we have considered the content of the response in rendering our decision on this matter. As set forth below, we grant FPL's motion for summary final order.

Standard of Review

Rule 28-106.204(4), Florida Administrative Code, provides that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact." Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.

Under Florida law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgement is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "[a] summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

FPL's Motion

In its motion, FPL contends that the protest petition fails to raise a genuine issue as to any material fact, and, therefore, the petitioner is not entitled to a formal administrative hearing under Section 120.57(1), Florida Statutes. FPL asserts that the protest petition consists entirely of "misstatements of fact, undisputed yet irrelevant statements of fact, and inaccurate characterizations of the Commission's decision," rather than disputing the material

facts germane to our approval of the Settlement Agreement. Further, FPL asserts that the protest petition does not allege that our decision reflects a mistake of law. Thus, FPL asserts, it is appropriate for this Commission to grant its motion.

In its motion, FPL addresses the matters alleged as disputed issues of material fact in paragraph 5 of the protest petition. First, in paragraph 5(a) of the protest petition, the petitioner alleges the following:

> The Commission approved both standard offer contracts for cost recovery by Order No. PSC-92-0050-FOF-EQ on March 11, 1992 in Docket No. 911140-EQ. Florida Power and Light Company never petitioned the Commission for approval to buy-out of those standard offer contracts on the basis that those contracts were no longer cost-effective. Instead, Florida Power and Light Company voluntarily chose to terminate those standard offer contracts.

(Emphasis supplied by petitioner.) FPL asserts that it agrees with the first two sentences of this paragraph. FPL contends that these are not disputed facts and are not material or relevant to our decision to approve the Settlement Agreement. FPL contends that the third sentence is a misstatement of fact. FPL asserts that it did not voluntarily terminate the two standard offer contracts; rather, it took the position that its legal obligations under the contracts ceased effective January 1, 1997. FPL further asserts that only the court before which the contract action is pending can ultimately determine FPL's rights and obligations under the contracts.

Second, in paragraph 5(b) of the protest petition, the petitioner alleges the following:

> Florida Power and Light Company voluntarily chose not to exercise what it believed to be its option to extend the commercial operation deadline of the QFs under the standard offer contracts; this voluntary choice by the company led to litigation which resulted in damages being incurred by the QFs and caused the QFs to file for bankruptcy in May, 1997; the proposed settlement agreement of $225.5 million is to settle those damages

> incurred as a result of Florida Power and Light Company's voluntary actions.

FPL asserts that it agrees with the first clause of this paragraph. FPL contends that this is not a disputed fact and is not material or relevant to our decision. As to the second clause of this paragraph, FPL asserts that it "agrees that it exercised what it believed to be its right to seek a declaratory judgment in circuit court to confirm that it no longer had any legal obligations under the contracts as of January 1, 1997, and that due to the lack of capacity payments, the QFs chose to file for bankruptcy." FPL contends that these facts are not in dispute and are not material to our decision. FPL contends that the third clause of this paragraph misstates the facts. FPL asserts that the payment called for under the Settlement Agreement is not a "settlement for damages" but instead reflects a compromise made in recognition of the strengths and weaknesses of the parties' positions before the circuit court and the associated risks of litigation. FPL notes that there has been no judgment awarding damages. Thus, according to FPL, there is no factual dispute, only a dispute as to characterization.

Third, in paragraphs 5(c) and (d) of the protest petition, the petitioner alleges the following:

> (c) The Commission erroneously approved this settlement agreement as a "buy out" of the Okeelanta Corporation and Osceola Farms, Co. standard offer contracts. As noted in paragraph 5(a) above, FPL never petitioned the Commission to buy out of these contracts prior to FPL's voluntary termination of those contracts.
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> (d) The $222.5 million settlement is to pay off the bondholders of the two QFs and thus to settle the damages incurred by the QFs as a result of FPL's voluntary actions. These voluntary actions, and the resulting damages, were simply bad business decisions on the part of FPL's management.

Again, FPL contends that the petitioner's allegation that the Settlement Agreement is a "settlement for damages" rather than a "buy out" is a misstatement of fact. FPL points to Section 1.15 of the Settlement Agreement which states that "'PSC Approval' shall mean the unqualified final determination of the PSC ... that the

terms and conditions of this Agreement are an appropriate buy-out of the Standard Offer Contracts ...." FPL again notes that there has been no judgment awarding damages. As to the allegation that the settlement payment was a result of FPL management's bad business decisions, FPL contends that this conclusion is not supported by any alleged facts in the protest petition and reflects only the petitioner's disagreement with our decision.

Fourth, in paragraph 5(f) of the protest petition, the petitioner alleges the following:

> If the outcome of the litigation is that the QFs prevail and the Court orders performance of the contracts, then FPL could petition the Commission for approval of a buy out of the contracts on the basis that the contracts are not cost-effective.

FPL contends that this allegation amounts to speculation. FPL asserts that this "suggestion and speculation ... that FPL's customers would be better off if FPL pursued the litigation (and appeals) and then petitioned for a buy-out if FPL does not prevail ignores the risks and costs associated with this litigation as well as the severely hampered bargaining position of FPL should the QFs prevail."

In paragraph 5(e) of the protest petition, the petitioner alleges the following:

> One of the four possible outcomes of the litigation is that FPL prevails. The potential cost of this outcome is a potential cost to the ratepayers of $7.6 million in attorney's fees and court costs. Obviously this would be a better choice if FPL's customers are to pay for the outcome of the litigation.

FPL does not address this allegation in its motion.

Findings

Section 120.80(13)(b), Florida Statutes, provides that "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." The protest petition challenges only our decision in

part II of the PAA Order to approve the Settlement Agreement for cost recovery. Specifically, the protest petition challenges the prudence of FPL's actions that led to this Settlement Agreement. The protest petition does not challenge our determination of the $300 million to $412 million in net present value savings projected to result from the Settlement Agreement. The protest petition also does not challenge part III of the PAA Order which addresses the timing of recovery of the settlement payment and the allocation of the settlement payment between the fuel clause and capacity clause. Further, the protest petition does not challenge the adjustments to capital structure required for regulatory purposes in the PAA Order. Pursuant to Section 120.80(13)(b), Florida Statutes, these undisputed matters are deemed stipulated. Thus, the only matter addressed by the protest petition is that portion of the PAA Order approving the Settlement Agreement for cost recovery.

All but one of the items raised as disputed issues of material fact in paragraph 5 of the protest petition are either undisputed or misstatements of fact. The following undisputed facts were raised in the protest petition:

1. "The Commission approved both standard offer contracts for cost recovery by Order No. PSC-92-0050-FOF-EQ on March 11, 1992 in Docket No. 911140-EQ."

2. "Florida Power and Light Company never petitioned the Commission for approval to buy-out of those standard offer contracts on the basis that those contracts were no longer cost-effective."

3. "Florida Power and Light Company voluntarily chose not to exercise what it believed to be its option to extend the commercial operation deadline of the QFs under the standard offer contracts."

4. "If the outcome of the litigation is that the QFs prevail and the Court orders performance of the contracts, then FPL could petition the Commission for approval of a buy out of the contracts on the basis that the contracts are not cost-effective."

5. "One of the four possible outcomes of the litigation is that FPL prevails. ... Obviously, this would be a better choice if FPL's customers are to pay for the outcome of the litigation."

The following misstatements of fact were raised in the protest petition:

1. "Florida Power and Light Company voluntarily chose to terminate those standard offer contracts."

The undisputed history of the circuit court litigation shows that FPL brought an action for declaratory judgment to determine whether its legal obligations under the contracts had ceased. (It is undisputed, however, that FPL voluntarily chose not to exercise what it believed to be its option to extend the commercial operation deadline of the QFs under the standard offer contracts.)

2. "[T]his voluntary choice by the company led to litigation which resulted in damages being incurred by the QFs and caused the QFs to file for bankruptcy in May, 1997."

The undisputed history of the circuit court litigation shows that the contract action has not yet gone to trial. Damages were alleged by the QFs, but it cannot be disputed that damages have not been found or awarded by the court.

3. "[T]he proposed settlement agreement of $225.5 million is to settle those damages incurred as a result of Florida Power and Light Company's voluntary actions."

"The Commission erroneously approved this settlement agreement as a 'buy out' of the Okeelanta Corporation and Osceola Farms, Co. standard offer contracts."

"The $222.5 million settlement is to pay off the bondholders of the two QFs and thus to settle the damages incurred by the QFs as a result of FPL's voluntary actions."

As stated above, the undisputed history of the circuit court litigation shows that the contract action has not yet gone to trial; it cannot be disputed that damages have not been found or awarded by the court. A settlement, by its nature, is a compromise by both sides to avoid the risks of litigation, which in this case may include a potential damages award against FPL or a potential ruling against the QFs that the contracts should be terminated. Thus, the petitioner's characterization of the Settlement Agreement as a "settlement for damages" is erroneous. Further, the Settlement Agreement, by its own terms, provides for, among other

things, termination of the QF contracts. A condition precedent of the Settlement Agreement is that this Commission approve the Settlement Agreement as an appropriate buy-out of these contracts.

These misstatements of fact, when clarified based on the undisputed history of the circuit court litigation and the terms of the Settlement Agreement, do not raise a genuine issue as to any material fact.

Drawing every possible inference in favor of the petitioner, the protest petition raises one arguable issue of fact - the prudence of FPL's actions in seeking the circuit court's opinion on FPL's obligations under the contract, which in turn led to the litigation that the proposed Settlement Agreement is intended to resolve. The petitioner suggests that FPL should have pursued a buy-out of these QF contracts then sought Commission approval on the basis that the contracts were no longer cost-effective.

The ultimate issue in this case is whether the costs of the Settlement Agreement were prudently incurred. A determination of imprudence would require us to find both a poor management decision based on what was known or should have been known at the time and a negative result based on that decision. As stated above, the petitioner has not challenged our determination of the $300 million to $412 million in net present value savings projected to result from the Settlement Agreement. That portion of the PAA Order is stipulated pursuant to Section 120.80(13)(b), Florida Statutes. Thus, even if the petitioner were to succeed in proving that FPL's management made a poor decision, it is not disputed that the decision made by FPL management will yield $300 million in NPV savings that will be realized by FPL's customers. Accordingly, there is no genuine issue as to whether the costs of the Settlement Agreement were prudently incurred.

In conclusion, we find that there is no genuine issue as to any material fact in this case. In addition, there are no disputed issues of law. Therefore, we grant FPL's motion for summary final order and affirm Order No. PSC-00-1913-PAA-EI as our final order in this docket effective December 5, 2000, the date of our vote.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's motion for summary final order is granted. It is further

ORDERED that Order No. PSC-00-1913-PAA-EI, issued October 19, 2000, is affirmed as our final order in this docket effective December 5, 2000, the date of our vote. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th Day of December, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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DISSENT

COMMISSIONER JABER dissents, as set forth below:

Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists. I note, in this case, that the customer may not have had the benefit of discovery (depositions, answers to interrogatories or admissions on file) that may allow the requisite demonstration of a genuine issue of material fact as contemplated by this statute. For that reason alone, I dissent from the majority's decision.

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.

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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.