

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for approval, ) DOCKET NO. 940797-EQ  
to the extent required, of ) ORDER NO. PSC-95-0218-FOF-EQ  
certain actions relating to ) ISSUED: February 16, 1995  
approved cogeneration contracts )  
by Florida Power Corporation )  
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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 DENYING MOTION TO DISMISS

CASE BACKGROUND

On July 29, 1994, Florida Power Corporation (FPC) filed a petition asking the Commission to approve certain actions relating to cogeneration contracts that were taken after the contracts were approved by the Commission for cost-recovery. FPC states that its petition was prompted by uncertainty over the question of whether certain actions undertaken pursuant to cogeneration contracts after Commission approval of the contracts might require further approval by the Commission. FPC filed this petition to determine what actions would require further review by the Commission to ensure that it could continue to obtain cost recovery of payments made to cogenerators under those contracts. The specific post-contract actions at issue involve the following: (1) assignments; (2) extensions in construction or operation of qualifying facilities due to delays in obtaining regulatory approvals, force majeure events and interconnection delays; (3) changes in location of facilities; (4) changes in committed capacity; (5) curtailment agreements, and; (6) routine administrative actions such as correcting typographical errors.

Several parties have intervened in this docket. In addition, Metro-Dade County/Montenay-Dade (Montenay-Dade) filed a motion to dismiss, stating that the Commission did not have jurisdiction to approve actions taken under a contract after it had been approved for cost recovery. On January 5, 1995, we heard oral argument on Montenay-Dade's motion to dismiss and on motions to dismiss filed

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in two other dockets involving cogeneration contracts. We have fully considered the merits of Montenay-Dade's motion and we find that it should be denied. 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. Under PURPA and FERC's implementing regulations 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 cogeneration contracts for cost recovery from the utilities' ratepayers. 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.

Our 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, Florida Administrative Code. A utility is permitted to recover payments made to cogenerators under the contracts if the Commission has approved them. In the case of standard offer contracts, the Commission approves the tariff that includes the standard offer, and if a cogenerator signs the contract and complies with certain requirements, cost recovery is allowed. In the case of negotiated contracts, the Commission reviews each contract under the criteria established in Rule 25-17.0832(2) to determine that the contract is prudent for cost recovery purposes. We have made it clear that the Commission will not revisit its cost recovery determination absent a showing of fraud, misrepresentation or mistake. 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.

We have, however, reviewed cogeneration contracts for cost recovery purposes when the parties to the contracts have made modifications to the terms and conditions of the contract that may affect cost-effectiveness to the utility's ratepayers.<sup>1</sup> The rationale is that if the contract has been modified, it is not the same contract that we approved, and we must review the changes to ensure that the contract costs remain appropriate for cost recovery. If we could not review modifications to cogeneration contracts, and the parties were then free to change the contracts at will, we could not ensure the continuing cost-effectiveness of the contracts. Under Section 366.051, Florida Statutes, we have the authority to set cost-effective rates for cogenerated power that utilities may recover from their ratepayers. It is clear to us that the authority to review modifications to cogeneration contracts to ensure continued cost-effectiveness is clearly implied from the statute.

We believe that Montenay-Dade agrees with this position and is only concerned that FPC, because of the way the petition is worded, is asking the Commission to assert broader authority over cogeneration contracts. We do not perceive this concern as a barrier to our exercise of jurisdiction in this case. FPC has asked us to approve certain "actions taken under the contract". The actions identified in its petition constitute changes, corrections and modifications to the original contracts, and FPC is asking us to approve those changes. We believe we clearly have the authority to do that, for cost recovery purposes. If it appears as the case proceeds that FPC is asking for something other than approval of the modifications for cost recovery under the provisions of the Commission's cogeneration rules, Montenay/Dade will have the opportunity to renew its objection to the scope of the petition.

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<sup>1</sup> See In Re: Petition for Approval of Amendment and Assignment of Standard Offer Contract with KES Dade, L.P. to Osceola Power Limited Partnership, by Florida Power and Light Company, Docket No. 940569-EQ, Order No. PSC-94-1267-FOF-EQ, issued October 13, 1994; In Re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership, Docket No. 940819-EQ, Order No. PSC-94-1306-FOF-EQ, issued October 24, 1994; and, In Re: Joint Petition for Expedited Approval of Contract Modifications to a 1989 Standard Offer Contract by Tampa Electric Company, Orange Cogeneration Limited Partnership, and Polk Power Partners, L.P., Docket No. 941155-EQ, Order No. PSC-95-0038-FOF-EQ, issued January 9, 1995.

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To prevail on its motion to dismiss, Montenay-Dade must demonstrate that the facts alleged in FPC's petition, when viewed in the light most favorable to FPC, fail to set forth any claim that the Commission can resolve. We find that FPC has adequately pleaded a claim that the Commission has the authority to resolve, and the motion to dismiss is therefore denied.

It is therefore

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by Metro-Dade County/Montenay-Dade is denied. It is further

ORDERED that this docket shall remain open pending resolution of the substantive issues of the case.

By ORDER of the Florida Public Service Commission, this 16th day of February, 1995.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay Flynn  
Chief, Bureau of Records

( 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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), 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.