

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

MAY 29, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF ELECTRIC & GAS (BALLINGER, HARLOW, COLSON, DRAPER, DUDLEY, TEN, WHEELER) ^{JDJ}
DIVISION OF LEGAL SERVICES (WAGNER, KEATING) ^{RVE}
DIVISION OF AUDITING & FINANCIAL ANALYSIS (STALLCUP, MORINGA) ^{MS}

RE: DOCKET NO. 96086-EQ - - PETITION FOR APPROVAL OF EARLY TERMINATION AGREEMENT TO NEGOTIATED QUALIFYING FACILITY CONTRACT WITH ORLANDO COGEN LIMITED, LTD. BY FLORIDA POWER CORPORATION

AGENDA: 06/10/97 - REGULAR AGENDA - MOTION TO DISMISS - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\ERG\WP\961186EQ.RCM

CASE BACKGROUND

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., a qualifying facility. By Order No. PSC-97-0086-FOF-EQ, issued January 27, 1997, as proposed agency action (PAA Order), this Commission 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 recommendation addresses OPC's Motion to Dismiss.

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FPSC-RECORDS/REPORTING

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ISSUE 1: Should the Commission grant the Office of Public Counsel's Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action?

RECOMMENDATION: No. The Office of Public Counsel's Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action should be denied. Florida Power Corporation's Petition adequately states a cause of action upon which the Commission may grant relief.

STAFF ANALYSIS: OPC bases its Motion to Dismiss on two grounds: (1) FPC has not established standing to protest the Commission's PAA Order because its substantial interests were not affected by the PAA Order, and (2) FPC's protest is an improper motion for reconsideration of the PAA Order. In considering OPC's Motion to Dismiss, the facts set forth in FPC's Petition should be viewed 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. Staff believes 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 the Commission's 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 interpretation, and Staff is unaware of any such authority.

Staff believes that the PAA Order affected FPC's substantial interests by denying FPC the authority to obtain early termination of its contract. As FPC states in a footnote to its Response, application of OPC's reasoning would have subjected FPC's original petition in this proceeding to a motion to dismiss at the outset on

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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. Staff believes that 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. 2d DCA 1981), argues that potential stranded investment is not the type of immediate injury-in-fact necessary to confer standing. If the Commission accepts Staff's above recommendation that FPC's substantial interests were affected by the PAA Order, Staff believes that the Commission does not need to consider this argument.

Nevertheless, Staff notes 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, Staff believes it would be a dangerous precedent to state 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. Staff is 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 the Commission where they erred in their decision. OPC states that the disputed issues of fact and policy presented in FPC's Petition are direct challenges to the PAA Order, amounting to a motion for reconsideration. OPC notes that Rule 25-22.060, Florida Administrative Code, prohibits the Commission's reconsideration of 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 the PAA Order which are in dispute and that doing so does not transform the Petition into a motion for reconsideration. Section 120.80(13)(b), Florida Statutes, provides:

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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.

Staff does not find OPC's arguments compelling. Staff believes that Section 120.80(13)(b), Florida Statutes, can be interpreted to effectively preclude a party from addressing at hearing any disputed issues that are not raised in that party's petition on proposed agency action. Staff also notes that Rule 25-22.036(2) and (7)(a)3., Florida Administrative Code, requires 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, 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, OPC's Motion to Dismiss should be denied.

Conclusion

Staff believes 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 the Commission under the provisions of Rule 25-22.029, Florida Administrative Code, and Chapter 120, Florida Statutes. Therefore, Staff recommends that the Commission deny OPC's Motion to Dismiss.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of FPC's Petition on Proposed Agency Action.

STAFF ANALYSIS: This docket should remain open pending resolution of FPC's Petition on Proposed Agency Action.