

ORIGINAL



JACK BERNHE
PUBLIC COUNSEL

**STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL**

c/o The Florida Legislature
111 West Madison Street
Room 822
Tallahassee, Florida 32301-1400
904-488-0200

October 1, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. ~~00000000~~EQ

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of the Prehearing Statement of the Office of Public Counsel for filing in the above referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Prehearing Statement of the Office of Public Counsel, in WordPerfect for Windows 6.1 format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,


Roger Howe
Deputy Public Counsel

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DOCUMENT NUMBER-DATE

10079 OCT-15

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for approval of an early termination amendment to a negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

Docket No. 961184-EQ
Filed: October 1, 1997

PREHEARING STATEMENT OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Order Establishing Procedure in this docket, Order No. PSC-97-0434-PCO-EQ, issued April 17, 1997, and the Order Modifying Procedural Schedule, Order No. PSC-97-1009-PCO-EQ, issued August 25, 1997, submit this Prehearing Statement.

APPEARANCES:

JOHN ROGER HOWE, ESQUIRE
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida

A. WITNESSES:

Hugh Larkin, Jr.
Larkin & Associates
15728 Farmington Road
Livonia, MI 48154

The Office of Public Counsel reserves the right to subpoena an appropriate representative for Florida Power & Light Company to support the statement reported in a September 16, 1997, Palm Beach Post article on the Okaloosa and Osceola cogeneration plants that "FPL has nothing to gain or lose from the outcome since 100 percent of the cost of electricity produced by the plants is passed through directly to FPL's customers." Such testimony would be offered to support Public Counsel's position that electric utilities are not harmed by denial of buyout petitions where all costs are borne by consumers.

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B. EXHIBITS:

1. **Appendix I to Mr. Larkin's testimony: Qualifications of Hugh Larkin, Jr.**
2. **Exhibit (HL-1): Net Present Value Summary**

C. STATEMENT OF BASIC POSITION

The petition in this docket is an attempt by FPC to have its customers pay higher rates under traditional regulation so that the company will be in a better competitive position in the unregulated future. FPC believes its cost of electricity from purchased power agreements will be above market prices in a competitive environment. Buying out the OCL contract (as well as others) will improve FPC's ability to compete. If FPC were to fund the buyout, FPC would receive the future benefit of enhanced competitiveness in a market where retail customers have choices.

FPC, however, would rather use its customers' money to reach this end. This leads to the paradoxical argument offered by FPC. Focusing on one source of high-cost electricity allows FPC to ignore other resources which would be below market price under competition. Even under this unrealistically narrow scenario, the company can only show customer "benefits" (using FPC's definition of the term) in the form of questionable future savings which will purportedly flow to customers 17 to 26 years from now. But if customers can choose their electric company in the future, they will pay the market price (to FPC or some other provider) regardless of any amounts paid, or not paid, to FPC under regulation. Thus, if retail rates are expected to be deregulated, customers cannot receive any benefits from funding the buyout. If retail rates are to remain regulated, there is no reason for a buyout in the first place. Since the OCL costs are borne solely by FPC's customers, FPC cannot be harmed from denial of its petition, but the customers will suffer immediate harm if forced to pay higher rates today to put FPC in a better competitive position tomorrow.

Even if the premise of FPC's case is accepted, the company's analysis fails to demonstrate a realistic expectation of benefits for any identifiable customers. Current customers who leave FPC's system over the next 22 years cannot recoup anything. FPC is not guaranteeing any benefits even for persons (if there are any) who are customers today and will remain on FPC's system through 2023. The likelihood of any benefits being received by anyone other than FPC, itself, under the company's proposal is extremely remote and entirely speculative.

If FPC's net-present-value analysis is meaningful at all, it shows that the company should be indifferent to funding the buyout (a much lower, net-of-tax cost for the company) as long as FPC is permitted to recover an equal amount, in net-present-value terms, in the future based on its own projections. It is certainly more likely that FPC will still be selling electricity in Florida 26 years from now than it is that a significant number of current customers will still be buying their electricity from the company. Although, the OCL contract amendment is contingent upon Commission approval of the amendment, it is not contingent upon Commission acceptance of FPC's proposed method of cost recovery.

D. STATEMENT OF FACTUAL ISSUES AND POSITIONS

ISSUE 1: Are the economic risks associated with projected ratepayer savings resulting from the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., reasonable?

QPC: No. [A preliminary question should be whether FPC has demonstrated ratepayer benefits.]

ISSUE 2: Are the intergenerational inequities among Florida Power Corporation's ratepayers, if any, associated with the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., reasonable?

QPC: There are intergenerational inequities, and they are not reasonable.

ISSUE 3: Does the Commission have a defined standard for intergenerational fairness, and if so, what is that standard?

QPC: The issue of intergenerational fairness is subsumed within statutory requirements. For example, the issue of prudence of costs implicitly considers the question: Prudent to whom, and what? Section 366.041(1) requires the Commission to consider "the cost of providing such service and the value of such service to the public." This also implicates issues of whether the value of service might be different to similar groups of customers at different times. Section 366.06(1) requires the Commission to "consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers, and public acceptance of rate structures." Inquiry into public acceptance of rates necessarily implicates considerations of intergenerational inequities.

ISSUE 4: Should the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., be approved for cost recovery?

QPC: No. [This issue should probably be limited to whether the amendment should be approved, leaving to the next issue the question whether and how FPC should be allowed to recover the buyout costs from its customers.]

ISSUE 5: If approved, how should Florida Power Corporation recover the expenses associated with the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd.?

QPC: FPC should not be permitted to recover the buyout costs from its customers.

ISSUE 6: Should this docket be closed?

OPC: Yes.

E. STATEMENT OF LEGAL ISSUES AND POSITIONS:

ISSUE 7: Did Florida Power Corporation have standing to protest the proposed agency action order denying its petition?

OPC: No. FPC's protest of the PAA alleged two ways in which its substantial interests would be adversely affected by denial of its petition: (1) the contract amendment will provide net savings of over \$400 million to Florida Power and its customers; and (2) the contract amendment "will mitigate the exposure of Florida Power and its customers to potentially straddleable costs in the future." (Petition on Proposed Agency Action, at 5) The company, however, cannot lose savings from the denial of its original petition or experience savings from granting it. All costs under the purchased power agreement are flowed through directly to FPC's customers. The following question and answer from the September 19, 1997, deposition of FPC's witness, Mr. Schuster, establishes this fact:

Q. Would you agree that as your testimony now stands, that you have not pointed out any clear detriment to the company in financial terms that would result from a denial of its petition?

A. With respect to detriment to the company I would agree, but that doesn't speak to the benefits that would be denied to the customers. [T.76]

The claim of potential straddleable costs is too remote and speculative to demonstrate a current injury-in-fact from denial of the company's petition.

ISSUE 8: Is Florida Power Corporation asking the Commission to reconsider its PAA order denying the company's petition? If so, is such a request permissible under the Commission's rules of procedure?

OPC: Mr. Schuster, in his proffered testimony, at page 20, explicitly states that FPC is asking the Commission to reconsider its prior decision. The company's protest is, in all material aspects, a motion for reconsideration. Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of PAA orders.

E. STATEMENT OF POLICY ISSUES AND POSITIONS: None at this time.

G. STIPULATED ISSUES: None.

H. PENDING MOTIONS:

The Office of Public Counsel intends to renew its motion to dismiss at the beginning of the hearing in this docket and to strike Mr. Schuster's testimony. In the motion to dismiss filed February 26, 1997, Public Counsel argued that FPC's protest of the proposed agency action order, Order No. PSC-97-0086-FOF-EQ, was in the nature of a motion for reconsideration which is explicitly prohibited by Rule 25-22.060(1)(a), Florida Administrative Code, and that FPC had failed to demonstrate any injury under the standard first announced in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The Commission's denial of the motion to dismiss is reported in Order No. PSC-97-0779-FOF-EQ, dated July 1, 1997. Now that FPC has filed testimony, it is clear that FPC is, in fact, merely asking the Commission to reconsider the decision reported in the proposed agency action order and is not offering evidence to demonstrate injury sufficient to satisfy the Agrico test.

I. STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE:

The Office of Public Counsel cannot comply with the order establishing procedure to the extent that order may be construed to limit the ability of Public Counsel's expert witness to address any and all matters which are introduced through FPC, OCL or Staff witnesses. The Commission, under the Administrative Procedure Act, must base its final decision on evidence in the record. That evidence may be introduced through prefiled testimony, in response to cross-examination by opposing counsel, or in response to redirect examination by the witness's attorney. Answers to questions asked by Commissioners may also form part of the record supporting final agency action. Exhibits may be introduced as part of prefiled testimony or during cross or redirect examination. Prefiled testimony by Public Counsel's witness, however, is necessarily limited to presentation of this office's direct case and rebuttal of the company's case as it is known at the time. Due process and fundamental fairness, however, dictate that Public Counsel's witness cannot be precluded from addressing matters which are not included in the company's prefiled testimony but arise during the course of the hearing and to which the Commission may refer to support a finding of fact.

Respectfully submitted,

Jack Sharve
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Jack Roger Howe
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**Attorneys for the Citizens
of the State of Florida**

**CERTIFICATE OF SERVICE
DOCKET NO. 961184-EQ**

**I HEREBY CERTIFY that a true and correct copy of the foregoing PREHEARING
STATEMENT OF THE OFFICE OF PUBLIC COUNSEL has been furnished by U.S. Mail or
*Hand-delivery to the following parties on this 1st day of October, 1997.**

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