

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by CFR-Biogen)
 Corporation against Florida Power))
 Corporation for alleged violation))
 of standard offer contract, and))
 request for determination of))
 substantial interests.))

DOCKET NO. 900383-EQ
 ORDER NO. 24729
 ISSUED: 7-1-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 J. TERRY DEASON
 BETTY EASLEY
 GERALD L. GUNTER
 MICHAEL MCK. WILSON

BY THE COMMISSION:

ORDER GRANTING MOTION TO FILE AMENDED COMPLAINT
AND SETTING CASE FOR HEARING

CFR-Biogen (CFR) has filed a Motion for leave to Amend its original Complaint that was filed in this case on May 1, 1990. CFR's motion is the latest episode in its continuing conflict with Florida Power Corporation (FPC) regarding two cogeneration contracts executed by the parties in 1987 and 1988.

The contracts at issue here called for CFR to install and operate a small biogas burning facility in Drifton, Jefferson County, Florida. Both contracts contained provisions against CFR's assignment of its rights and obligations under the contracts without prior approval of the utility.

In its amended complaint CFR alleges that Florida Power approved an assignment of the two contracts to an entity known as the Venture Group in 1989. When the relationship between the Venture Group and CFR terminated, CFR entered into a project development agreement with Enserch Development Corporation (EDC) which provided that the electric power facility would be relocated to Hinson, Gadsden County, Florida, and assigned CFR's interests in developing, constructing, and operating the facility to EDC.

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On March 29, 1990, CFR advised FPC of its intention to relocate the project, and sought FPC's approval of the assignment to EDC. FPC informed CFR that it would approve the assignment and the change in location only if CFR would bear the expense of wheeling the power it generated to South and Central Florida.

CFR refused to agree to FPC's conditions, and filed its original complaint with the Commission in this docket on May 1, 1990. In its original complaint CFR requested that the Commission order FPC to approve the relocation of the project and the assignment of the contracts.

Our staff recommended that we should not require FPC to accept CFR's unilateral modifications to its contracts with CFR, because we would thus be rewriting the contracts for the parties, contrary to established principles of contract law. We deferred action on the staff's recommendation on July 17, 1990 and again on August 28, 1990 to allow the parties the opportunity to negotiate a resolution of their disagreement.

The parties began extended negotiations over their differences, and during those negotiations CFR filed a petition for a declaratory statement regarding the method of calculating capacity payments under the contracts and the appropriate risk factor to be used in those calculations. (Docket No. 900877-EI). We answered that petition on April 9, 1991.

Thereafter CFR attempted to resume negotiations with FPC, but on March 21, 1991, FPC withdrew all offers of settlement of the contract disagreements, terminated all negotiations, and informed CFR that it would require CFR's performance under the original terms of the cogeneration contracts.

Since CFR filed its original complaint in this docket, we have revised our rules governing cogeneration and the relationship between utilities and cogenerators. Included in the revision is new Rule 25-17.0834, Florida Administrative Code, Settlement of Disputes in Contract Negotiations, which was effective October 25, 1990. That rule provides as follows:

- (1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the

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Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in 366.051, Florida Statutes, should the Commission find that the utility failed to negotiate in good faith.

(2) To the extent possible, the Commission will dispose of an application for relief within 90 days of the filing of a petition by either a utility or a qualifying facility.

(3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.

CFR requests that it be permitted to amend its original complaint to inform the Commission of the intervening facts and circumstances relevant to the parties' dispute, and to allege additional grounds for relief arising out of the parties' dealings since the original complaint was filed. Specifically, CFR now alleges that FPC has failed to negotiate with CFR in good faith or has explicitly dealt with CFR in bad faith, and CFR requests relief under the provisions of Rule 25-17.0834, Florida Administrative Code.

FPC has filed an answer to CFR's motion to amend its complaint which states that the motion should be denied because there is no new matter necessitating an amended complaint and CFR has only reiterated its demand that we alter the approved binding contracts of the parties.

We grant CFR's Motion for Leave to Amend Original Complaint. Contrary to Florida Power's assertion, the amended complaint does allege additional grounds for relief and additional facts and circumstances which are relevant to the Commission's consideration of the issues in this case. CFR has not abused its privilege to amend its pleading, and at this point in the proceeding FPC will not be prejudiced by the amendment. FPC may file an answer to the amended complaint within 20 days of the issuance of this order.

At this point the parties have not been able to settle their differences in this case. The parties have conducted extensive negotiations on the issues. The case is already over a year old,

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and it still does not appear that a resolution can be reached except by means of an evidentiary hearing on CFR's claims. We will therefore set this case for hearing, to effectively resolve this conflict once and for all.

It is therefore

ORDERED by the Florida Public Service Commission that CFR Biogen's Motion to file Amended Complaint is granted. It is further

ORDERED that Florida Power Corporation shall have twenty days from the date of issuance of this order to file an Answer to the Amended Complaint. It is further

ORDERED that this case be set for a formal evidentiary hearing under the provisions of Section 120.57, Florida Statutes and Rule 25-22.036, Florida Administrative Code.

By ORDER of the Florida Public Service Commission, this ____
1st day of July, 1991.


STEVE TRIBBLE, Director
Division of Records and Reporting

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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.

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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 sewer 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.