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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need of Hines Unit 2 Power Plant.	)	DOCKET NO. 001064-EI
	)	
	)	Submitted for Filing: October 24, 2000

FPC'S MOTION FOR RECONSIDERATION OF THE PREHEARING OFFICER'S ORDER GRANTING PANDA'S PETITION TO INTERVENE

Florida Power Corporation ("FPC"), pursuant to Rule 25-22.376, F.A.C., hereby moves for reconsideration by the full panel of Order No. 001064-EI granting Panda Energy International Inc.'s ("Panda") Petition to Intervene and in support thereof states as follows:

Introduction

On October 23, 2000, the prehearing officer granted Panda's petition to intervene in this proceeding based on Panda' assertion that as a "rejected bidder" it has the right to contest the outcome of FPC's RFP selection process. As a matter of law, the prehearing officer should have denied Panda's Petition to Intervene out of hand. This is true because Panda's so-called "bid" violated Florida law and could not have been accepted by FPC. In sum, Panda offered to supply FPC with only 250 to 500 MW of capacity and energy, for a two-to-five year term, from one or both of Panda's two proposed 1000 MW merchant power plants. Since Florida law does not permit this Commission to issue a favorable determination of need for an IPP's power plant unless a retail utility has a specific, committed need for all of the electric power to be generated by the proposed plant, Panda's bid was not legally viable, and FPC could not have appropriately accepted it. Accordingly, Panda could not and thus did not show that its substantial interests would be affected by the outcome of this proceeding – the test applicable to all intervention requests.

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But the Order issued by the prehearing officer here does not even address this threshold legal issue or the application of the Florida Supreme Court's controlling decision. It states only that "the issue and impact of TECO[1] on the Bidding Rule and the need determination process has not yet been addressed by this Commission." This is not an appropriate reason to decline to rule on the legal objection we have raised. With all due respect, the Supreme Court in the TECO case has already ruled on the issue we have raised, and the Court made quite clear how the Commission's enabling statutes apply to the need determination process. It is now incumbent upon the Commission to follow the law, and the Commission does not meet this obligation by simply declining to acknowledge that law and to apply it when it is directly placed in issue, as it is here.

Reconsideration

FPC seeks reconsideration of the prehearing officer's order granting Panda's intervention request by the full panel assigned to the proceeding. As explained briefly below, the panel should review the legal question addressed by FPC's motion "de novo" in accord with the standard for reviewing issues of law on appeal.

FPC makes this motion under Rule 25-22.0376, F.A.C. – one of the Commission's two "reconsideration" rules. This Rule essentially permits an appeal from a non-final order issued solely by the prehearing officer to the full panel assigned to the proceeding. This is significant because the first decisionmaker (i.e., the prehearing officer) is different from the second decisionmaker (i.e., the full panel), converting the motion for "reconsideration" into a motion for "consideration" by the full panel. And, as such, the panel is entitled to "de novo" review of legal

[1] Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. Apr. 20, 2000), revised, ___ Fla. L. Weekly ___ (Fla. Sept. 28, 2000) ("Garcia")

issues. See Bennie Demps v. State, corrected slip opinion of the Florida Supreme Court (June 5, 2000) ("[a] trial court's ruling on a pure question of law is subject to de novo review.")

On the other hand, the Commission's second "reconsideration" rule – Rule 25-22.060 F.A.C. – contemplates a true motion for "reconsideration" of a Final Order where the same panel that issued the Final Order will be asked to "reconsider" its own decision. The standard applied here has been recited by this Commission as follows:

> [t]he proper standard of review for a Motion for Reconsideration would be whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. (citations omitted).

See In re Aloha Utilities, Inc., Order No., PSC-00-1628-FOF-WS, (September 12, 2000).

This important distinction between the Commission's two qualitatively different "reconsideration" rules is very important in that the involvement of a second decisionmaker necessarily alters the standard of review governing the order. FPC recognizes, however, that to date this important distinction has been overlooked by the Commission. See, e.g. In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., et al, 96 FPSC 3:398 (applying the reconsideration standard applicable under Rule 25-22.060 to the review of a prehearing officer's decision by the full panel under Rule 25-22.0376).

Undoubtedly, the Commission's misapplication of the "reconsideration" standard in the context of Rule 25-22.0376 is driven by nomenclature. The Rule is titled "Reconsideration of Non-Final Orders." However, the text of the Rule makes clear that a movant under its terms is really seeking new "consideration" of the prehearing officer's independent decision by the proceeding's full panel. As a practical matter, de novo review in this context only makes sense. The panel should not be constrained by an error made by the prehearing officer in misapplying

(or here not applying) the law. To the contrary, the Commission panel should be free to disagree respectfully with the prehearing officer and salvage a proceeding that may come before them for final hearing with an erroneous prehearing ruling. As such, FPC requests that the panel review the question of Panda's intervention de novo.

Having said this, FPC also notes that, regardless of the standard of review applied by the panel here, since the prehearing officer simply failed to apply the Garcia decision at all, the Order is subject to review under either standard.

Argument

Application of the Florida Supreme Court's decision in Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. Apr. 20, 2000), revised, ___ Fla. L. Weekly ___ (Fla. Sept. 28, 2000) ("Garcia") to Panda's bid presents strictly an issue of law because the facts of Panda's bid cannot change. Based on what is within the four corners of Panda's Petition and the nature of the proposal that Panda made at the time, it is abundantly clear that Panda cannot maintain in this proceeding that it presented a legally viable proposal to FPC. As a result, Panda's substantial interests cannot be further affected by this proceeding and FPC respectfully disagrees with the prehearing officer's determination that they could.

Rather than restating here each argument in its opposition to Panda's intervention petition, however, FPC incorporates its opposition by reference as if fully set forth herein. As noted above the panel is entitled to consider these issues de novo and FPC requests that it do so here.

To begin, Panda is not entitled to intervene in this proceeding unless it can meet the usual intervention standard. In this connection, Panda must show (which it cannot) that its substantial interests will be affected in this proceeding, in that (1) it will suffer injury in fact of sufficient

immediacy to warrant a hearing, and (2) that the injury is of the type or nature that the proceeding is designed to protect. E.g., Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1359 (Fla. 1982). Panda cannot make this showing. This is because Panda's bid was grounded in a now decidedly illegal merchant plant giving FPC no choice but to reject Panda's bid under the law.

Panda does not – as it might suggest – have standing to intervene as a "rejected bidder" (whether its proposal was illegal or not) simply to test the integrity of FPC's RFP process. To the contrary, Panda substantial interests can only be affected by this proceeding if it can allege and ultimately show that the power supply proposal that Panda made during the RFP process actually offered FPC the best proposal available. Here, Panda cannot and does not even make this allegation.

Further, regardless of whether or not Panda's bid was the least-cost alternative (and it most assuredly was not), by the time FPC made its selection, favorable action by this Commission on Panda's proposed power plant was legally foreclosed by the Supreme Court's decision in Garcia.

The Supreme Court in the Garcia case took pains to make clear that an IPP could not bootstrap what was largely a merchant plant into the Florida Electrical Power Plant Siting Act and Section 403.519, Fla. Stats., by committing part of the plant to a Florida utility, as some kind of anchor tenant. And to avoid having to determine in case after case "how much is enough?" the Court explicitly and repeatedly stated that "[a] determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electric power to be generated at a proposed plant." (Slip Op., p. 13) (emphasis supplied); id. at 17 (existing law "was not intended to authorize the

determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates").

Without recounting all the specifics of Panda's bid, it is enough to note that Panda planned to commit no more than half the capacity of either its Leesburg or Midway Plants (each the topic of an abated merchant plant need proceeding), under purported "long-term" (2 – 5 years) firm power purchase agreements, indicating it would operate the other half of the plants on a merchant basis. (App. 1 and App. 4 Confidential portions of Need Study). Thus, Panda quite clearly offered to commit considerably less than "all" of its proposed power plant(s) to FPC or any other retail utility in Florida.

Moreover, Panda cannot properly claim that FPC could accept its illegal proposal in the hopes that Panda may be able to commit the other 90% of its plant(s) capacity to other Florida retail utilities in time for FPC to obtain a determination of need and for Panda to build the plant(s) to meet FPC's need by winter 2003. FPC is entitled to conduct an RFP process that has a beginning and an end. Even Panda concedes that rejected bidders or other would-be suppliers are not permitted to "sandbag" the utility with proposals that differ from proposals actually presented during the RFP process. To conclude otherwise would be to dismantle the entire RFP process, which as recognized by this Commission is designed to provide closure to FPC's evaluation of wholesale power purchase options. In re Florida Power Corporation, PSC-99-0232-FOF-EI (PSC Feb. 9, 1999) ("Bid Waiver").

FPC can only conclude from the Order granting intervention that the prehearing officer overlooked or refused to apply controlling precedent in the Garcia case (and in FPC's Bid Waiver case), due to some misimpression that the Commission must first "address" the "impact" of the Garcia case "on the Bidding Rule and need application process." FPC's objection to

Panda's intervention calls upon the Commission to do just that. Further, in addressing this issue, the Commission has only to follow the law because the Supreme Court explicitly and conclusively determined in the Garcia case that projects like Panda's cannot be legally sited in this state. Because the prehearing officer overlooked this obligation and failed to apply the law here, the full panel unquestionably should consider this matter now before this proceeding goes any farther.

In the end, FPC believes that the panel must agree that as a matter of law Panda's bid cannot change and as a result Panda cannot maintain that it submitted a legally viable proposal to FPC. Because the viability of Panda's proposal has already been foreclosed by controlling Supreme Court authority, nothing that happens in this case can further affect Panda's substantial interests.

Conclusion

The panel should reconsider the prehearing officer's Order, apply the law, and deny Panda's Petition to Intervene.

Respectfully submitted this 24th day of October, 2000.

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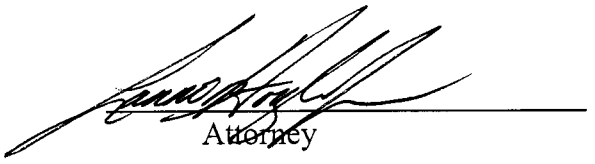
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing have been furnished by facsimile to Deborah Hart, Esq., as counsel for the Florida Public Service Commission and to Suzanne Brownless, as counsel for Panda Energy International, Inc. and has been furnished by U.S. Mail to all other interested parties of record as listed below on this 24th of October, 2000.



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