State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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DATE: DECEMBER 7, 2000

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

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW, BOHRMANN) WBM
DIVISION OF LEGAL SERVICES (C. KEATING) WCK

RE: DOCKET NO. 991779-EI - REVIEW OF THE APPROPRIATE APPLICATION OF INCENTIVES TO WHOLESALE POWER SALES BY INVESTOR-OWNED ELECTRIC UTILITIES.

AGENDA: 12/19/00 - REGULAR AGENDA : ISSUE 1 - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF; ISSUE 2 - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\991779_2.RCM

CASE BACKGROUND

By Order No. 12923, issued January 24, 1984, in Docket No. 830001-EU-B, the Commission established a shareholder incentive mechanism to encourage investor-owned electric utilities ("IOUs") to use their excess capacity to make economy energy sales. At the Commission's November 22-23, 1999, hearing in Docket No. 990001-EI, the assigned panel heard arguments about whether this incentive mechanism was still necessary or appropriate. By Order No. PSC-99-2512-FOF-EI, issued December 22, 1999, the Commission ordered that this matter be the subject of a separate proceeding. Accordingly, this docket was established, and an evidentiary hearing was held on May 10, 2000.

By Order No. PSC-00-1744-PAA-EI, issued September 26, 2000, in this docket, ("Order 00-1744") the Commission determined that a

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properly structured incentive mechanism may achieve greater benefits for ratepayers. (Order 00-1744, p.7) Toward that end, the Commission approved the following shareholder incentive structure:

1. The incentive shall apply to the gains from all non-separated wholesale power sales, firm and non-firm, excluding emergency sales, made under current or future FERC-approved schedules.

2. A three year moving average of gains on all non-separated wholesale power sales, firm and non-firm, excluding emergency sales, shall be established each year as the threshold for application of the incentive. All gains below this threshold shall be credited to the ratepayers. All gains above this threshold shall be split 80%/20% between ratepayers and shareholders, respectively.

(Order 00-1744, p.13)

On October 11, 2000, the Florida Industrial Power Users Group ("FIPUG") filed a motion for clarification of parts I and II of Order 00-1744, which were issued as final action by the Commission. Parts I and II of the Order established the shareholder incentive structure discussed above. FIPUG's pleading also included a protest to part III of Order 00-1744, which was issued as proposed agency action. Part III of the Order approved a method for calculating gains on non-separated wholesale power sales and the appropriate regulatory treatment of the revenues and expenses associated with those sales.

On October 17, 2000, Gulf Power Company ("Gulf") filed a request for clarification/modification of part III of Order 00-1744 or, in the alternative, petition for a formal proceeding on part III of the Order. No person filed a response to this pleading.

On October 23, 2000, Tampa Electric Company ("TECO") filed a response to FIPUG's motion for clarification and protest. In its response, TECO suggested that FIPUG's protest should be stricken by the Commission on its own motion. On October 24, 2000, the Office of Public Counsel ("OPC") filed a response to FIPUG's motion for clarification and protest.

Issue 1 of this recommendation addresses FIPUG's motion for clarification of parts I and II of Order 00-1744. Issue 2 addresses FIPUG and Gulf's protests of part III of the Order.

The Commission is vested with jurisdiction over this matter through the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Florida Industrial Power Users Group's motion for clarification of parts I and II of Order No. PSC-00-1744-PAA-EI?

RECOMMENDATION: No. The Florida Industrial Power Users Group's motion for clarification does not seek to clarify any part of Order No. PSC-00-1744-PAA-EI. Instead, it is a request to have the Commission graft into this order new substantive restrictions on IOUs' wholesale sales, a matter that was never put at issue in this proceeding.

STAFF ANALYSIS:

I. Standard of Review

The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision-maker in rendering its order. Diamond Cab Co. V. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the order is not a valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958). Although FIPUG's pleading is styled as a motion for clarification rather than a motion for reconsideration, FIPUG asserts in its motion that the standard of review set forth in Diamond Cab applies in this case.

II. Arguments of the Parties

In its motion, FIPUG asserts that "the Commission has overlooked serious unintended ramifications which may flow from its decision." FIPUG asserts that when the Commission expanded the shareholder incentive to include firm sales, "it may have inadvertently sent the wrong signal to utilities, indicating to them that it is permissible to interrupt retail customers in order to pursue such wholesale sales or that utilities may replace their wholesale sales with more costly third party purchases to serve retail load." FIPUG states its belief that the Commission did not intend to encourage such policies.

In addition, FIPUG asserts that questioning at the May 10, 2000, hearing in this docket indicates that the IOUs may interrupt native retail customers to serve wholesale load. FIPUG states that while it does not believe the IOUs purposely disadvantaged retail customers, it has frequently happened in the last two years. FIPUG asserts that "the Commission may have overlooked the fact that unforeseen events have caused retail customers to pay more" and that "[i]ncentives to increase these [wholesale] sales while capacity is short from generators in the last cycle of their life span may have disastrous results for non-firm customers."

FIPUG requests that the Commission clarify Order 00-1744 to:

1. Prohibit the IOUs from making non-separated wholesale sales any time it will be necessary to interrupt retail customers.

2. Prohibit the IOUs from making non-separated wholesale sales any time it will be necessary to purchase wholesale power to serve the retail customer unless the price for replacement wholesale power is less than the price of the wholesale power sold.

In its response, TECO asserts that FIPUG's motion is not a motion for reconsideration but an effort by FIPUG to have the Commission impose new substantive restrictions on utility wholesale sales, restrictions that the Commission chose not to include in Order No. 00-1744. TECO further states that while FIPUG's motion purports to seek protection for "retail customers," the prohibitions that FIPUG seeks are "designed solely to give interruptible customers a better deal that they bargained for when they signed up for interruptible service."

TECO also argues that FIPUG's motion should be denied under the standard set forth in <u>Diamond Cab</u> because FIPUG is rearguing its position from this proceeding. TECO also asserts that FIPUG is rearguing positions it has taken in prior proceedings. TECO notes that FIPUG, in its Motion for Mid-Course Protection filed in June 2000 in Docket No. 000001-EI, asked that TECO be required to curtail any wholesale sale if the sale would occur during the same hour in which TECO planned to interrupt interruptible customers. TECO asserts that this is "the same type of subsidy which FIPUG's currently proposed prohibition No. 1 would effect." TECO also notes that FIPUG, in its Motion for Mid-Course Protection, requested that the Commission require TECO to reduce the buy-through power rate by the amount included in base rates for generating capacity. TECO argues that this is "a similar effort to achieve the type of buy-through power price subsidy FIPUG now seeks in its second proposed prohibition." TECO notes that the

Commission denied those requests for relief from FIPUG's Motion for Mid-Course Protection.

In its response, OPC states that it agrees that FIPUG has raised valid issues which should be clarified by the Commission. OPC states its belief that "no Florida IOU should receive any incentive reward for making a non-separated wholesale sale which disadvantages its retail customers."

III. Staff Analysis

As stated above, the Commission, at its November 22-23, 1999, hearing in Docket No. 990001-EI, heard arguments about whether the shareholder incentive mechanism approved in 1984 by Order No. 12923 was still necessary or appropriate. By Order No. PSC-99-2512-FOF-EI, issued December 22, 1999, the assigned panel of Commissioners found that the full Commission should address this matter as the subject of a separate proceeding. Accordingly, this docket was established and the following issues were ultimately identified for hearing in the Prehearing Order for this docket:

ISSUE 1: Should the Commission eliminate the 20 percent shareholder incentive set forth in Order No. 12923, issued January 24, 1984, in Docket No. 830001-EU-B?

ISSUE 2: If the Commission decides to maintain the 20 percent shareholder incentive in Issue 1 or approves a new incentive, what types of non-separated, non-firm, wholesale sales should be eligible to receive the shareholder incentive?

ISSUE 3: If the Commission decides to maintain the 20 percent shareholder incentive in Issue 1 or approves a new incentive, how should the incentive be structured?

(Order No. PSC-00-0888-PHO-EI, issued May 5, 2000.) By Order 00-1744, the Commission ordered approval of a new shareholder incentive structure, as set forth above.

By its motion, FIPUG requests that the Commission clarify Order 00-1744 to prohibit IOUs from making non-separated wholesale sales in certain circumstances. However, the Commission's proceeding in this docket did not concern, nor was it intended to concern, a prohibition on making certain non-separated wholesale sales. None of the issues identified for hearing by any party addressed the question of whether any types of non-separated wholesale sales should be prohibited; rather, the issues simply addressed the question of what type of shareholder incentive program, if any, was appropriate for non-separated wholesale sales. Thus, FIPUG's requested prohibitions go beyond the scope of this docket. FIPUG's motion for clarification does not seek to clarify any part of Order 00-1744. Instead, it is a request to have the Commission graft into Order 00-1744 new substantive restrictions on IOUs' wholesale sales, a matter that was never put at issue in this docket.

ISSUE 2: Should the Commission set for hearing the protests of the Florida Industrial Power Users Group and Gulf Power Company concerning part III of Order No. PSC-00-1744-PAA-EI?

RECOMMENDATION: Yes. The protests of the Florida Industrial Power Users Group and Gulf Power Company concerning part III of Order No. PSC-00-1744-PAA-EI should be set for hearing in Docket No. 000001-EI.

STAFF ANALYSIS: Part III of Order 00-1744 provides for the following regulatory treatment for revenues and expenses associated with each non-separated wholesale power sale:

1. Each IOU shall credit its fuel and purchased power cost recovery clause for an amount equal to the incremental fuel cost of generating the energy for each such sale;

2. Except for FPC, each IOU shall credit its environmental cost recovery clause for an amount equal to the incremental SO_2 emission allowance cost of generating the energy for each such sale. FPC, because it does not have an environmental cost recovery clause, shall credit this cost to its fuel and purchased power cost recovery clause;

3. Each IOU shall credit its operating revenues for an amount equal to the incremental operating and maintenance (O&M) cost of generating the energy for each such sale; and

4. In accordance with Order No. PSC-99-2512-FOF-EI, issued December 22, 1999, in Docket No. 990001-EI, each IOU shall credit its capacity cost recovery clause for an amount equal to any transmission revenues or separately identifiable capacity revenues.

Order 00-1744 provides that if a protest to this part of the Order is timely filed, this matter shall be addressed as part of the Commission's fuel and purchased power cost recovery proceedings.

In its protest of part III of Order 00-1744, FIPUG contends that this regulatory treatment ignores replacement power purchases and that Item 1 should be revised, as follows, to address this situation:

> Each IOU shall credit its fuel and purchased power cost recovery clause for an amount equal to the incremental fuel cost of generating the energy for each such sale <u>or in the event wholesale power is purchased to replace the power sold, when the incremental cost of replacement purchased power is more than the applicable fuel cost factor, the clause or the buy through customer for whom the replacement power is purchased shall be credited with the price difference.</u>

FIPUG also contends that Item 3 should be broadened to cover any operating and maintenance costs that are charged to the fuel and purchased power clause.

In response to FIPUG's protest, TECO argues that FIPUG's motion does not raise a legitimate factual issue regarding the calculation of gains but, instead, "is a repackaged version of FIPUG's recurring argument that its interruptible customers should be guaranteed the equivalent of firm service at significantly lower and non-cost-effective interruptible rates." TECO asserts that FIPUG's protest is governed by the law of the case established in the Commission's July 11, 2000, order on FIPUG's Motion for Mid-Course Protection, and that "[r]es judicata dictates that such loss be avoided by the striking of FIPUG's motion." TECO concludes that the Commission should, on its own motion, strike FIPUG's protest as constituting an abuse of process.

Staff believes that the relief sought in FIPUG's protest is distinct from the relief sought in FIPUG's Motion for Mid-Course Protection. In the Motion for Mid-Course Protection, filed May 18, 2000, in Docket No. 000001-EI, FIPUG requested that the amount paid by non-firm retail customers for buy-through power be reduced by an equal amount to the base rate charges paid by non-firm retail customers that support TECO's generating plants. FIPUG's protest raises a related but distinct issue. Therefore, staff recommends that FIPUG's protest of Items 1 and 3 be set for hearing. Pursuant to Order 00-1744, the hearing should be conducted within the fuel and purchased power cost recovery docket.

In its pleading, Gulf requests that Item 2 in part III of Order 00-1744 be modified to allow an IOU to forego crediting its environmental cost recovery clause for an amount equal to the incremental SO_2 emission allowance cost of generating the energy for each sale when the SO_2 emission allowance cost is so small as to be immaterial. In the alternative, Gulf requests a formal proceeding on this matter. Rule 25-22.060(1)(a), Florida Administrative Code, provides that the Commission will not entertain a motion for reconsideration of a proposed agency action. Thus, Gulf's requested modification to Item 2 of part III of Order 00-1744 should also be addressed at hearing within the fuel and purchased power cost recovery clause.

No person challenged Item 4 of part III of Order 00-1744. Pursuant to Section 120.80(13)(b), Florida Statutes, Item 4 is deemed stipulated.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run.

STAFF ANALYSIS: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run. Because FIPUG and Gulf's protests will be addressed at hearing in the fuel and purchased power cost recovery docket, nothing remains for resolution in this docket.