BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Affiliated)	DOCKET NO. 860001-EI-G
Cost-Plus Fuel Supply Relationships)	ORDER NO. 22387
of Florida Power Corporation - Phase II)	ISSUED: 1-9-90
FPC's Cross-Motion for Reconsideration)	
)	

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER DENYING FLORIDA POWER CORPORATION'S CROSS-MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

In February, 1986, we opened Docket No. 860001-EI-G for the purpose of investigating the affiliated cost-plus fuel supply relationships between Florida Power Corporation (FPC) and Tampa Electric Company (TECO) and their respective affiliated fuel supply corporations. Also, in February, 1986, we established Docket No. 860001-EI-F in Order No. 15895 for the purpose of determining why FPC's cost to transport coal by its affiliated waterborne system exceeded its costs to transport coal by non-affiliated rail. In September, 1987, we issued Order No. 18122, which removed TECO from Docket 860001-EI-G, established Docket No. 870001-EI-A for hearing the TECO issues, consolidated the two FPC issues for hearing in Docket No. 860001-EI-G and closed Docket No. 860001-EI-F.

By Order No. 18982, issued on March 11, 1988, we decided to bifurcate the hearings in this docket as follows: (1) the

policy issue of whether a market price standard should be imposed on the recovery of costs for goods and services purchased from affiliated companies and (2) the separate issue of whether any of the monies FPC had recovered through its fuel and purchased power cost recovery clause for goods and services purchased from affiliates from 1984 to date had been imprudently or unreasonably incurred and should, therefore, be refunded to its customers. Hearings on the policy issues in this docket were held on May 11-13, 1988. Hearings on the prudence issues in this docket were held December 14-16, 1988 and April 19, 1989. Order No. 21847, containing our decisions on the prudence issues, was issued September 7, 1989. Occidental Chemical Company (Occidental) and Citizens of the State of Florida Public Counsel (OPC) filed motions for reconsideration on September 22, 1989. These motions were considered at our October 17, 1989 Agenda Conference. Florida Power Corporation filed a cross-motion for reconsideration on October 3, 1989.

DISCUSSION

First, we find that we need not reconsider our decision that Electric Fuels Corporation's (EFC) acquisition of an 80% interest in the Dulcimer coal reserves was not based on sufficient investigation and economic analysis and that, by not doing so, EFC bore the risk that coal from the property could not be economically mined. Florida Power's cross-motion presents no new evidence which was not considered by this Commission. The record indicates that EFC should have conducted additional research on the Dulcimer reserves prior to its purchase. Such additional studies would have better defined the economics of the property and reduced the risks to EFC. EFC chose to purchase the property based on Weirco's preliminary reserve estimate and the fact Weirco thought coal production would be economic. We were correct when we determined that EFC should have conducted additional research on the Dulcimer reserves prior to its purchase and that EFC accepted the risk that coal could not be produced from the property at a competitive price.

We further find that we need not reconsider our decision that EFC did not conduct a formal solicitation of the compliance coal market in 1979 or 1980 and that EFC's constant communication with coal companies did not constitute such a solicitation. Florida Power's cross-motion presents no new

evidence which we did not previously consider. FPC maintains that EFC's constant communication with coal suppliers is the same as conducting a formal solicitation. We find that it is not. FPC's Witness Heller testified that if a bid solicitation is not consummated, the information should not be used as an indicator of the market. He further testified that a coal company's bid only reflects their initial negotiating position. Even if communication with suppliers did constitute a bid solicitation, there were no negotiations with the suppliers to determine actual prices. Thus we will not reconsider our finding that EFC did not conduct a proper solicitation of the compliance coal market in 1979 or 1980.

We also find that we need not reconsider our decision that the compliance coal market changed from a sellers' market in 1978 to an unstable market in the period 1979 through 1981 and that during this unstable period it was unclear whether compliance coal prices would rise, fall or level off. FPC offers no new evidence in its cross-motion. FPC does not disagree with the Commission's resolution of this issue. However, FPC maintains that it would have been reasonable for EFC to believe in 1980 that the compliance coal market was strong and that compliance coal prices would continue to rise. We find that the only prudent way to judge the market conditions of 1980 was to conduct a formal bid solicitation. EFC did not do so. We find, therefore, that our decision on this issue was correct.

Neither need we reconsider our decision that EFC's cost-plus contract with Powell Mountain Joint Venture (PMJV) was not reasonable in light of the unstable coal market and unanswered questions concerning the economic viability of the Dulcimer reserves when purchased. Florida Power has offered no new evidence in its cross-motion for reconsideration. FPC maintains that it was reasonable in 1980 for EFC to assume that compliance coal prices would rise. Because of this, it was prudent for EFC not to include a market reopener in the PMJV contract. The record indicates that the compliance coal market was in decline and that the prudent way to determine this was to conduct a formal bid solicitation. EFC did not conduct a formal bid solicitation. We find that EFC should have had serious concerns about the $17/ton difference between production cost estimates prepared by Weirco, an independent consulting firm, and Amvest, EFC's partner in the Powell Mountain Joint Venture. We were correct, therefore, when we

determined that EFC was not prudent when it entered a long-term cost-plus contract with PMJV without a market reopener.

We further find that we need not reconsider our adoption of the OPC's Findings of Fact and Conclusions of Law. Essentially, FPC requests that we reconsider our adoption of OPC's proposed findings of fact and conclusions of law because they were not submitted in strict compliance of Rule 25-22.056, Florida Administrative Code. FPC also maintains that the proposed findings and conclusions of law raise issues outside the prehearing order and are in substantial part unsupported by the record as a whole. FPC correctly points out that OPC's proposed findings and conclusions of law are not presented in a document separate from all other post-hearing memoranda nor are they consecutively numbered (1-200).

Rule 25-22.056, Florida Administrative Code, authorizes the presiding officer to rule upon proposed findings only "when filed in conformance with this rule." We find that OPC's filings are in substantial "conformance" with the requirements of the rule. We agree with the OPC's assertion that the title to its brief clearly indicated the presence of their "proposed findings" thus mitigating any harm or prejudice to the parties of this proceeding. We also note that Section 120.57 (1)(b)(4), Florida Statutes, provides that a party shall have an "opportunity....to submit proposed findings of fact...." In addition, it is clear that we are required to answer proposed findings by both statute and case law.

FPC also suggests that under Rule 25-22.056, Florida Administrative Code, the prehearing officer never invited or provided for proposed findings of fact or conclusions of law from the parties. We do not agree with FPC's suggestion that the prehearing officer must invite the submission of proposed findings of fact or conclusions of law. On the contrary, we find that under Chapter 120, Florida Statutes, a party to a 120.57 proceeding has a right to submit proposed findings of fact or conclusions of law.

Finally, FPC argues that many of OPC's proposed findings of fact and conclusions of law are not supported by the record or are modified or contradicted by other testimony. In support of its position, FPC discusses several specific instances and then in Appendix A of their Cross-Motion includes a list of findings of fact and conclusions of law which they maintain are modified

and contradicted by the evidence or lack thereof in the record. We have reviewed each of the items raised by FPC and can find no reason to reconsider our prior rulings on OPC's proposed findings of fact and conclusions of law.

We find that we properly considered the testimony and evidence presented during the course of this proceeding and reached decisions on the issues raised which are embodied in Order No. 21847. If a party disagrees with our decisions on certain issues then that party may likely disagree with the underlying facts or conclusions of law which support the decision. However, our decisions embodied in Order No. 21847 are supported by the record in this proceeding and the findings of fact and conclusions of law which we adopted are also supported by the testimony and documentary evidence in the record of this proceeding.

In consideration of the foregoing, it is

ORDERED that Florida Power Corporation's Cross-Motion for Reconsideration filed on October 3, 1989 is hereby denied as discussed in the body of this Order.

ORDERED that this docket be closed after the time has run in which to file a petition for reconsideration or notice of appeal if such action is not taken.

By ORDER of the Florida Public Service Commission, this 9th day of JANUARY, 1990.

STEVE TRIBBLE
Division of Records and Reporting

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NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.