M E M O R A N D U M

November 5, 1990

TO : STEVE TRIBBLE, DIVISION OF RECORDS OF REPORTING

FROM : CINDY MILLER, ASSOCIATE GENERAL COUNSEL CM

RE : SEMINOLE PETITION FOR DECLARATORY STATEMENT
DOCKET NO. 900699-EQ

23729

Attached is the Order granting Seminole's petition. Please distribute as soon as possible, which I understand will be November 6.

CBM:prl
Attachment
cc: Sandy Simmons
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility.	DOCKET NO.	900699-EQ
	ORDER NO.	23729
	ISSUED:	11-7-90

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
GERALD L. GUNTER
BETTY EASLEY
FRANK S. MESSERSMITH

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

By petition filed on August 16, 1990, Seminole Fertilizer Corporation (Seminole) sought a Declaratory Statement on the jurisdictional status of a proposed expansion of a cogeneration project. Specifically, the Petition requests an order declaring that its planned expanded cogeneration facility as financed and owned

a) will not result in or be deemed to constitute an unlawful sale of electricity;

b) will not cause Seminole or the partnership/lessor that will own the cogeneration facility, or any of its individual partners, to be deemed a public utility as that term is defined under Florida Law; and

c) will not cause Seminole or the partnership/lessor that will own the cogeneration facility, or any of its individual partners to otherwise be subject to regulation by the Commission.

Caveat

This Declaratory Statement is based solely upon information provided by Petitioner. Any alteration or modification of that information or failure to realize arrangements as described in the petition may substantially affect the conclusions reached in this Declaratory Statement as stated herein. Moreover, our conclusion is limited to the facts presented by Petitioner.

Background

Petitioner operates a phosphate fertilizer manufacturing complex and mine in Bartow, Polk County, Florida, within the service area of Tampa Electric Company (TECO). Cogeneration facilities owned and operated by Seminole now furnish approximately 10 to 15% less than Seminole's electric power needs while utilizing about 50% of the waste heat generated by Seminole's fertilizer manufacturing operations. Seminole proposes an expansion to its cogeneration facilities in order to utilize up to 90% of available waste heat while generating about twice as much electricity as Seminole requires. The excess electricity will be sold to one or more utilities.

Seminole proposes to finance the purchase of additional equipment, a nominal 36 MW (37 MW nameplate) steam turbine generator ("Phase 1") and nominal 22 MW (28 MW nameplate) combustion gas turbine ("Phase 2") by creating a limited partnership to own its cogeneration equipment and, in turn, lease it to Seminole, thus allowing for "off balance sheet" accounting treatment for financial purposes.

Seminole anticipates the following general sequence of events:

> First, Seminole will transfer existing cogeneration assets, tangible and intangible, into a wholly owned subsidiary ("Sub"). Second, Sub will organize a limited partnership ("partnership") into which it will transfer cogeneration assets in exchange for general and limited partnership interests. Third, Sub will sell partnership interests to one or more investors, retaining a general partnership interest for itself.

Seminole will enter into a lease arrangement with the partnership and an operating and maintenance (O&M) agreement under which Seminole will be obligated to operate and maintain the cogeneration facilities in order to meet Seminole's energy needs

and to supply power under sales agreements with one or more utilities.

While the specific lease and O&M agreements have not yet been developed, Seminole represents that such documents will reflect the following characteristics of the proposed lease financing:

1) Seminole, as operator, will be the applicant for QF certification.

2) Seminole will be obligated to make fixed lease payments reflecting a return on capital plus a return on investment to the partnership and reflecting the value of the transaction to Seminole and the requirements of capital markets; i.e., estimated at 10-15% of the value of the assets used by Seminole.

3) The lease payments will be fixed, subject to an annual escalator, and will not vary with the electricity produced.

4) Lease payments are due regardless of outages with two exceptions:

   a) failure to complete the expansion.

   b) force majeure.

5) Seminole is responsible for the maintenance, repair, replacement, and operation of the equipment.

6) Seminole provides waste heat; partnership/ lessor supplies fuel for the combustion turbine.

7) The initial lease term is expected to be 10-15 years with a 5-year renewal and an option to extend or purchase.

8) The risks to Seminole are analogous to debt financing; i.e., lease payments are due without regard to electricity production.

9) Seminole will lease an undivided interest in the cogeneration assets for the purpose of generating its electrical power requirements. Seminole will own the electric power thus generated, but only that amount required for its own use. Other than power used by Seminole, all electric power will be sold to the utility and not used by any of the participants.

10) Under the O&M agreement, Seminole will be paid by the partnership to operate the cogeneration assets to generate electrical power in excess of its own requirements, which will be owned by the limited partnership/lessor and sold by it to one or more utilities. In the event less electricity is produced than required by Seminole and the partnership/lessor power sales, the latter will have "priority."

Discussion

Petitioner's suggested analysis asserts the applicability of our Order No. 17009, In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.

Therein, we determined that Monsanto's lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause Monsanto's lessor to be deemed a public utility and did not subject either Monsanto or its lessor to regulation by this Commission.

The instant petition essentially asks whether that result would change under the facts as described in the petition.

This Commission has taken the position that a QF may not engage in a retail sale, without becoming a regulated public utility, pursuant to Chapter 366, Florida Statues. In re: Amendment of Rules 25-17.80 through 25-17.89 relating to cogeneration, Order No. 12634, issued October 27, 1983 at 21; In re: Repeal of Rule 25-17.835 and Adoption of Rules 25-17.88, 25-17.882, and 25-17.0883 - Wheeling of Cogeneration Energy; Retail Sales; Order No. 15053, issued September 27, 1985 at 9-10.

Under the facts presented in the Petition, Seminole will operate and maintain the cogeneration equipment and supply waste heat for its operation. The partnership/lessor will supply fuel for the gas turbine and will have priority as to the electricity produced, which it will own and sell to utilities to the extent of its power sales agreements. The remaining electricity will be owned and consumed by Seminole. The Commission finds it noteworthy that the proposed expansion will result in more efficient use of waste heat.

Neither the lease nor O&M (operating and maintenance) agreement have been drafted. However, since the electricity produced must be divided between its respective owners, these agreements must address amounts of electricity produced, as distinguished from Monsanto, which only involved a lease of equipment. Moreover, at least a portion of the partnership's power will be generated from Seminole's waste heat, again as distinguished from Monsanto, where the user of electricity supplied the fuel:

> Throughout the lease term, Monsanto would be solely responsible for all costs and expenses associated with the maintenance, repair, replacement, and operation of the leased equipment, including the repair and replacement of major capital items, procurement of fuel for the facility, taxes, and insurance. Most importantly, just as in the lease of an automobile, the lease payments would be fixed throughout the term of the leased. These payments, based on a negotiated rate of return on the lessor's investment, would be independent of electric generation, production rates, or any other operational variables of the facility.

Notwithstanding the apparent dissimilarities between the Monsanto lease arrangement and the transaction presented here, our jurisdiction is not automatically triggered. The analysis by the Commission addresses whether the separate entities created primarily for "off-balance sheet accounting" are so strongly related as to be considered one and the same for jurisdictional purposes; and whether the Commission's jurisdiction is triggered by the combination of generation for Seminole's self-consumption and generation for sale to a public utility via the separate, related entity.

While there are some analogies to the Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of

Self Service Transmission, Order No. 17510, issued May 5, 1987, that case is also not dispositive here. In Metro-Dade, the FPSC dismissed an application for self-service wheeling.

> [T]he County has title only to the building . . . that it is no longer in possession of, because it has leased it to another party. The generating equipment that will actually produce the electrical power is owned . . . by either Winthroup Financial Co. or Florida Energy Partners. In turn, neither of these parties has possession of the generating equipment because it has been leased to South Florida Cogeneration Associates. We find that the County does not "generate" the electrical power to be wheeled because it must first purchase the power from South Florida Cogeneration.

However, the issue in Metro-Dade was transmission and dealt specifically with an FPSC self-service transmission rule.

The Commission deems Seminole and the lessor to have a "unity of interests" due to Seminole's wholly owned subsidiary being the general partner of the lessor. The structuring solely for financial and tax reasons does not result in Seminole or the limited partnership being deemed a public utility. Finally, none of the participants would become subject to PSC jurisdiction solely because of such a transaction.

The Commission finds that the lessee/QF (Seminole) and partnership/lessor (Seminole sub L.P.) are so "related" that the arrangement surmounts the jurisdictional boundary identified in PW Ventures, Inc. Petition of PW Ventures, Inc., Order No. 18302; PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). It follows from that finding that the transaction at issue does not create a public utility which is subject to our jurisdiction.

The Commission finds no retail sale in the above presentation of facts. The petition presents a scenario where there is, on the one hand, Seminole's self-service generation; and, on the other hand, there is sale of energy to a utility via the limited partnership. None of the limited partners consume the energy. Neither transaction equals a retail sale. Section 366.02, Florida Statutes. Therefore, the Commission finds that the expanded cogeneration facility as financed and owned: (a) will not result in or be deemed to constitute an unlawful sale of electricity; (b) will not cause Seminole or the partnership to be deemed a public utility as that term is defined under Florida law; and (c) will not

cause Seminole or the limited partnership or its individual partners to otherwise be subject to FPSC regulation.

Conclusion

The Monsanto case is not directly dispositive of the issues presented by the Petitioner. The two-way flow of dollars between the lessee and lessor require different tests than those provided in Monsanto. However, the additional complexities do not, in this case, result in a prohibited retail sale.

Our conclusion is that no retail sale occurs where, as presented here, the general partner of the partnership/lessor is a wholly owned subsidiary of the lessee/QF and the energy is either consumed by Seminole or sold to a public utility. Of the two formal entities involved in this project, one consumes the energy produced and the other sells it to a public utility. The applicability of this declaratory statement is conditioned upon Seminole and the limited partnership applying for certification of the proposed cogeneration facilities as "qualifying facility(ies)" by the Federal Energy Regulatory Commission (FERC) and the granting or issuance of such certification.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement by Seminole Fertilizer Corporation is hereby granted. The Commission declares that the proposed financing and ownership structure as presented by Seminole would not result in or be deemed to constitute an unlawful sale of electricity, would not cause Seminole or the partnership/lessor that will own the cogeneration facility or its individual partners to be deemed a public utility under Florida law, and would not cause Seminole or the partnership/lessor or any of its individual partners to otherwise be subject to regulation by this Commission, so long as the Federal Energy Regulatory Commission grants or issues certification for the qualifying facility(ties) upon application by both Seminole and the limited partnership.

By ORDER of the Florida Public Service Commission this 7th day of NOVEMBER, 1990.

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.

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.