

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Clarification) DOCKET NO. 920041-EI
and Guidance on Appropriate) ORDER NO. PSC-92-0304-FOF-EI
Market Based Pricing Methodology) ISSUED: 05/06/92
for Coal Purchased from Gatliff)
Coal Company by Tampa Electric)
Company.)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, CHAIRMAN
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER DENYING MOTION TO DISMISS

On January 10, 1992, Tampa Electric Company (TECO) petitioned the Commission for clarification and guidance on the appropriate market based pricing methodology for recovery of the cost of coal that it purchases from its affiliate, Gatliff Coal Company.

TECO's Petition for Clarification and Guidance seeks Commission review of the appropriate market based pricing methodology for recovery of the cost of coal that it purchases from its affiliate, Gatliff Coal Company. The petition alleges that TECO retained the services of Resource Data International, Inc. (RDI) to examine the means of implementing the market-based pricing and benchmark methodology that the Commission approved in 1988 in TECO's "cost plus" docket (Order No. 20298, Docket No. 870001-EI-A). In that docket the Commission approved a stipulation between TECO and the office of Public Counsel that established an initial market price for coal purchased from the Gatliff Coal Company. The stipulation then provided that for purposes of regulatory review in the fuel docket, a benchmark would be calculated by escalating or de-escalating the initial market price by the annual percentage change in Bureau of Mines District 8 Data for Coal Shipments, as reported on FERC Form 423 for the weighted average price per million BTU of contract transactions that meet TECO's Gannon Station coal specifications. All spot transactions included in the FERC data were intended to be excluded from the benchmark calculation. For purposes of recovery through the fuel adjustment clause, TECO was required to justify the costs for Gatliff Coal that exceeded the market-based benchmark calculation.

RDI provided TECO with a detailed analysis of the benchmark

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procedure and the database (Bureau of Mines District 8 contracts) used to calculate the benchmark. RDI recommended that certain categories of contract transactions presently included in the BOM data should be excluded for purposes of calculating the benchmark, because they were not representative of the same type of coal contract as TECO's Gatliff contract.

TECO's petition alleges that RDI's analysis shows that "certain transactions reflected in the FERC Form 423 data base have been erroneously included in earlier implementations of the benchmark procedure". (Petition pps. 4-5). TECO seeks "Commission confirmation" that the new method of applying the benchmark procedure proposed by RDI is consistent with the procedure contemplated by Order No. 20298 and will more accurately implement the intent of Order No. 20298 "to use a substitute market proxy price which was as close to comparable market as the availability of data would permit". (Petition p. 4). TECO states that the RDI method does not constitute a modification of the benchmark, the benchmark calculation method, or the stipulation approved by the Commission. But the petition goes on to request that if the Commission does determine that the RDI method does effect a modification of the benchmark stipulation, the Commission should determine that the modification is reasonable.

On January 30, 1992, Public Counsel filed a motion to dismiss TECO's petition. Public Counsel moved to dismiss TECO's petition for the following reasons: 1) The petition does not comply with Commission Rule 25-22.036(7)(a), Florida Administrative Code; 2) The petition is "in the nature of an improper petition for declaratory statement"; and, 3) The petition is an improper attempt to set aside the stipulation approved by the Commission in Order No. 20298. Public Counsel argues that principles of res judicata, administrative finality, and legal policies favoring and protecting settlements preclude the Commission from hearing the petition, because TECO has not alleged changed circumstances that would permit the Commission to revisit the issues resolved by the stipulation in 1988.

TECO responded in opposition to the motion on February 12, 1992. The response states that: 1) Its petition complies with the requirements of Rule 25-22.036; 2) Public Counsel's declaratory statement arguments are meritless; and, 3) The stipulation, and Order No. 20298 approving it, merely state the standard for the benchmark calculation and do not specify which contracts should be included or excluded from the database under the exclusionary provisions of that standard. TECO argues that the petition does not attempt to set aside the stipulation. Rather, it seeks Commission approval that data on contracts that are not similar to

the Gatliff contract have been erroneously included in the calculation of the benchmark and should be removed.

Rule 25-22.036(7)(a)

Rule 25-22.036(7)(a), Florida Administrative Code states;

(7) Form and Content.

(a) Generally except for orders or notices issued by the Commission, each initial pleading should contain:

1. The name of the Commission and the Commission's docket number, if known;
2. The name and address of the applicant, complainant or petitioners, and an explanation of how his or her substantial interests will be or are affected by the Commission determination;
3. A statement of all known disputed issues of material fact. If there are none, the petition must so indicate;
4. A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;
5. A demand for relief; and
6. Other information which the applicant, complainant or petitioner contends is material.

Public Counsel argues that TECO's petition is so facially deficient that "[n]either the Commission nor affected parties have any idea what authority Tampa Electric is invoking that would empower the Commission to grant relief". We do not find this argument convincing. The petition well meets the accepted standards for the form of petitions filed with the Commission. The petition states that the Commission has regulatory authority over TECO under the provisions of Chapter 366, Florida Statutes. The petition further indicates that the Commission has exercised that regulatory authority with respect to this matter in TECO's "cost-plus" docket and Order No. 20298. The petition sets out the relief requested and alleges the factual and legal grounds on which the request for relief is based. Whether or not TECO's petition specifically labelled particular material facts in dispute, it is certainly clear from review of Public Counsel's motion that disputed issues of material fact do exist. For example, does the database analysis proposed by TECO comply with the standards established by the Commission in Order 20298, does the FERC database contain contracts that have mistakenly been included in calculating the Gatliff

contract benchmark, and does TECO's proposal violate the

stipulation approved by the Commission? These issues of fact are well within the Commission's regulatory authority to resolve.

Declaratory Statements

Section 120.565, Florida Statutes, Declaratory statement by agencies, states in part;

Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements. A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only. . . .

Commission Rules 25-22.020, 25-22.021, and 25-22.022, Florida Administrative Code, also require that a petitioner must allege in a petition for declaratory statement that the opinion requested would relate to the petitioner's particular circumstances only. Where material issues of fact exist, or where another party's substantial interests would be affected by the Commission's decision, a declaratory statement is not the appropriate means to resolve the question. Public Counsel indirectly acknowledges this by characterizing TECO's petition as "in the nature of an inappropriate petition for declaratory statement", and we are certain that if the Commission proposed to handle TECO's petition that way, Public Counsel would object. Public Counsel, as a party to the original stipulation establishing market based pricing for affiliate coal purchases and the benchmark methodology, certainly has a substantial interest in the Commission's decision here. We do not believe that it is proper for us to dismiss a petition on the grounds that is "in the nature of an inappropriate petition for declaratory statement."

The Stipulation

The substantive portion of Public Counsel's motion to dismiss involves Public Counsel's conviction that TECO's petition is a thinly-veiled attempt to have the Commission modify the stipulation between Public Counsel and TECO that it approved in Order No. 20298. Public Counsel argues that as a matter of law the Commission is precluded by the stipulation from reviewing the benchmark methodology and granting the relief TECO requests. Public Counsel states that principles of res judicata, administrative finality, and the clear policy of the law to protect

and support stipulations prevent the Commission from hearing this case. Thus, the argument goes, TECO has failed to state a cause of action on which the Commission can grant relief.

In the hearing we will certainly consider the substantive issue of whether or not TECO's request violates the terms of the original stipulation we approved in Order 20298. All of the issues Public Counsel raises in the motion to dismiss are appropriate to be heard in this case. But TECO has alleged in its petition that its request, and the methodology for analyzing contracts to be used in the benchmark database, do not abrogate the stipulation. TECO has also alleged in its petition that "certain transactions reflected in the FERC Form 423 data base have been erroneously included in earlier implementations of the benchmark procedure". For purposes of our decision here, we must take the allegations in the petition as true, and we must consider them in the light most favorable to the petitioner. With that standard in mind, we consider TECO's petition to be legally sufficient to survive a motion to dismiss at this time. It is therefore,

ORDERED by the Florida Public Service Commission that Public Counsel's Motion to Dismiss the Petition is denied.

By ORDER of the Florida Public Service Commission, this 6th day of May, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
MCB:bmi

by: Kay Flynn

Chief, Bureau of Records

Commissioner Lauredo dissented from this decision.

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

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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 wastewater 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.