

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

MEMORANDUM

AUGUST 25, 1994

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JOHNSON, CHRIST) *MP az*
DIVISION OF ELECTRIC AND GAS (FUTRELL) *JJF*

RE: DOCKET NO. 940357-EQ - PETITION FOR RESOLUTION OF A
COGENERATION CONTRACT DISPUTE WITH ORLANDO COGEN LIMITED,
L.P., BY FLORIDA POWER CORPORATION *JOJ*

AGENDA: 09-06-94 - REGULAR AGENDA
POST ORAL ARGUMENT DECISION - PARTIES MAY PARTICIPATE BUT
MAY NOT REARGUE POSITIONS PREVIOUSLY ARGUED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\940357.RCM

CASE BACKGROUND

On March 13, 1991, Orlando Cogen Limited, L.P. (OCL) and Florida Power Corporation (FPC) executed a Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility (Contract). Pursuant to section 20.1 of the contract, FPC's payment obligations under the contract were conditioned upon the Commission's approval of the contract. By Order No. 24734, dated July 1, 1991, the Commission approved the contract.

Section 3.3 of the contract states that the facility's ability to deliver its committed capacity "shall not be encumbered by interruptions in the its fuel supply." FPC, in a complaint filed on April 7, 1994 alleges that section 3.3 requires that OCL maintain a back-up fuel supply and OCL has not complied with that section. OCL denies that backup fuel is required. Prior to the filing of FPC's complaint, OCL filed a lawsuit against FPC in the United States District Court for the Middle District of Florida alleging violations of the anti-trust laws and breach of contract. On April 27, 1994, OCL filed a motion to dismiss FPC's complaint.

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Oral argument on the motion was held on August 15, 1994. The positions of the parties are as follows:

OCL:

- A. The Commission does not have jurisdiction over OCL.
- B. The Commission does not have jurisdiction over the claims asserted by FPC.
- C. FPC's allegations of fraud constitute an improper attempt to invoke the exception to the Administrative Finality Rule.
- D. The doctrine of comity requires that the Commission defer to the federal court.

FPC:

- A. The PSC has broad statutory authority to regulate the terms and conditions of QP contracts and it exercised that authority in this area.
- B. Having been approved by the PSC, the contract became an order of the PSC, subject to its continuing jurisdiction.
- C. The PSC has continuing authority to clarify the meaning of its order, even after the order has been entered.
- D. The doctrine of comity does not require the Commission to defer to the federal court.

DISCUSSION OF ISSUES

ISSUE 1: Does the Commission have jurisdiction to interpret section 3.3 of the contract between FPC and OCL?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Pursuant to Section 366.051, Florida Statutes, this Commission has jurisdiction over power purchases and properly exercised that authority by approving the contract which is the basis of this dispute. In approving the contract and the provision for cost-recovery, the Commission did not simply review the capacity payments that FPC was to make, but it also considered whether the contract was "prudent" and how the contract would affect the electric grid. The Commission has exclusive jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout the State to assure an adequate and reliable source of energy pursuant to Section 366.04(5), Florida Statutes. Whether OCL is required to maintain a secondary fuel supply could affect FPC's ability to provide reliable service to its customers and could also have an effect on the reliability of the electric grid, therefore, based upon Section 366.04(5), Florida Statutes, this matter is within the purview of the Commission's jurisdiction.

OCL argues that prior decisions holding that an agreement becomes part of the Commission order should not be extended to this type of agreement. OCL indicates that previous rulings deal only with territorial agreements and tariff disputes. It is unnecessary, however, to even address the question of whether the contract becomes part of the Commission order. As set forth below, the Commission has jurisdiction to interpret contracts when dealing with an area over which the Commission has jurisdiction. The subject case involves such an area. Under Section 366.051, Florida Statutes, utilities such as FPC are required to purchase all electricity offered for sale by a cogenerator or small power producer. The Statute further states that the Commission shall authorize the rate at which the utility must purchase power which is equal to the purchasing utility's full avoided costs. Also, the Commission has the regulatory authority and responsibility to oversee and protect the integrity and reliability of Florida's energy grid. This cogeneration contract is a creature of regulation in a field that is uniquely within the Commission's regulatory expertise and authority.

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Even constitutional claims of contractual interference have been universally rejected by the courts in the face of the Public Service Commission's exercise of its statutory authority to regulate utility services. Specifically, the Commission's regulation of utility services is considered a valid exercise of its police power. Even when an existing contract is voided by the Commission's actions, there is no unconstitutional impairment of contract under the Florida or United States Constitution. H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979); City of Plant City v. Mayo, 337 So.2d 966 (Fla. 1976); City of Plantation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963); Union Dry Good Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309; Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). See also State v. Burr, 84 So.61 (Fla. 1920) and Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2 DCA, 1975). As the Supreme Court of Florida stated in H. Miller & Sons, Inc. v. Hawkins, supra:

The Commission's decision was based upon the well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts. (373 So.2d at 914)

OCL also argues that a previous decision of the Commission refusing to interpret a contract should be controlling. It should be noted that in Order No. 14207, issued March 21, 1985, the Commission declined to interpret the terms of a QF contract between Tampa Electric Company (TECO) and Conserv, Inc. (CONSERV), however that case should not be applied to the case at hand. At the time when the CONSERV contract was approved by the Commission, the Commission's cogeneration rules simply provided that any QF with a 70% equivalent availability factor was entitled to negotiate a capacity payment with a regulated utility. The approval of the CONSERV contract by the Commission predates the enactment of section 366.051 which mandates that utilities purchase power from cogenerators and the adoption of revised Rules 25-17.80 through 25-17.89 which requires a more extensive review of QF contracts.

While the parties to this docket have framed the issues solely in terms of contract interpretation, staff believes that the issues raised in this docket are broader in scope. If the contract approved by the Commission for cost recovery purposes in Order No. 24734, issued July 1, 1991, may not result in a facility able to

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deliver its committed capacity because of possible interruptions in fuel supply¹, the Commission may wish to revisit its cost recovery decision. In Order No. 25668, issued February 3, 1992, in Docket No. 910603-EQ, the Commission stated that it would not revisit decisions allowing cost recovery on cogeneration contracts absent some extraordinary circumstance such as perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of information.

This Commission approved the OCL project for cost recovery, with the view that the project would reliably be able to deliver its committed capacity without possible interruption in fuel supply. If this is not the case, the Commission's approval of cost recovery under the contract may have been the result of mistake or inadvertence, two of the circumstances under which the Commission may revisit its cost recovery decision. It is well settled that the Commission may modify its orders when there is a demonstrated public interest. People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), Florida Power v. Beard, 626 So.2d 660 (Fla 1993), Sunshine Utilities v. Florida Public Service Commission, 577 So.2d 663 (Fla 1st DCA 1991), and Richter v. Florida Power Corp., 366 So.2d 798 DCA 1979).

Therefore, issues related to this Commission's decision to allow cost recovery, as well as contractual issues, are raised in this docket. Staff therefore, recommends that the Motion to Dismiss be denied.

¹ FPC's complaint alleges that OCL has failed to provide an "unencumbered" fuel supply. A motion to dismiss tests the legal sufficiency of the pleading. Augustine v. Southern Bell Telephone and Telegraph Company, 91 So.2d 320 (Fla.1956). It admits all well pleaded allegations of the pleading to which it is directed and asserts that the pleading does not state a cause of action on which relief may be granted. Connolly v. Sabeco, Inc., 89 So.2d 482 (Fla. 1956), Withers v. Flagship Peoples Bank of Tallahassee, 473 So.2d 789 (1. DCA 1985).

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ISSUE 2: Should the Commission exercise its jurisdiction and interpret the contract in light of OCL's comity assertion?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Under Florida law, a state court or administrative agency has discretion to stay the proceedings when there is a previously filed federal court proceeding on the same issue. The existence of certain circumstances may provide adequate grounds for the state court or agency to deny to stay a state court or agency proceeding. Such circumstances exist in this case. The Commission has the staff and expertise to evaluate the technical issues relating to the adequacy of OCL's fuel supply and its impact on the reliability of the electric grid. The Commission in Order No. 20808, Docket No. 881326-EI, Declaratory Statement Regarding Wheeling by Florida Power & Light Company (FPL), entered a declaratory statement regarding FPL's obligation to wheel power produced by a cogenerator despite the pendency of a federal anti-trust suit regarding the same dispute. The Commission found that it was "not being asked to address federal anti-trust issues. We believe it is appropriate ... to proceed with clarifying the rights and obligations of petitioner [FPL] under Florida law." Thus, by exercising jurisdiction in this case, this matter would be resolved in an expedient basis and the reliability of the grid will be protected.

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ISSUE 3: Is this matter moot as alleged by OCL at the oral argument?

RECOMMENDATION: No.

STAFF ANALYSIS: During the oral argument on OCL's motion, OCL stated that the complaint is moot because "we've already begun to purchase the equipment and install the system to put in the backup that they demand." The 11th hour assertion by OCL that the complaint is now moot is not supported by any documentation or data that would allow the Commission to make an informed decision. Given the lateness of OCL's assertion of mootness, FPC did not agree that OCL's plans for backup fuel will meet their demands. At this time it can not be decided whether OCL's plans for backup fuel meet the requirements of the agreement. This question can always be raised and disposed of during the hearing.