BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Affiliated Cost-Plus Fuel Supply Relationships of Florida Power Corporation - Phase II)	DOCKET NO.	860001-EI-G
	ORDER NO.	22403
	ISSUED:	1-10-90

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 OCCIDENTAL'S MOTION FOR RECONSIDERATION

BY THE COMMISSION:

CASE 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. On September 22, 1989, Occidental Chemical Corporation (Occidental) filed a motion for reconsideration of that order.

DISCUSSION

Occidental maintains that FPC did not require a three ocean barge fleet until 1986. Occidental states that Electric Fuels Corporation (EFC) could have transported all coal to Crystal River with the original two ocean barges and rail deliveries. The capacity of two ocean barges is 1.2 million tons of coal per year. We determined that FPC had the capacity to receive at least 3.6 million tons of coal, and possibly as much as 4.0 million tons of coal by rail per year. Assuming Dixie operated a two barge fleet, FPC would have received 2.9 million tons by rail in 1984, 3.7 million tons by rail in 1985 and 4.2 million tons by rail in 1986. We determined that it was appropriate for EFC to transport 1.0 million tons of Massey coal by water in 1982. The record indicates that EFC could have planned to ship some Powell Mountain coal by water in 1982 and 1983. The record also indicates that the higher sulfur Amax and Consol midwestern coals would be phased out between 1982 and 1983, but does not indicate what volumes would be shipped in those years. We find that it would be reasonable for EFC to expect water deliveries to be in excess of 1.2 million tons in 1982 and 1983.

Occidental asserts that FPC should have known when the Amax and Consol contracts were signed that environmental restrictions would not allow the high sulfur coals to be burned once Crystal River Units 4 and 5 came on-line. We find that Occidental is correct. Occidental also maintains that EFC should have executed low sulfur contracts which would probably be more economical to deliver by rail. FPC points out that these two contracts were renegotiated and that the record

indicates that the new Amax low sulfur contact is delivered by rail but that the new Consol low sulfur contract can only be delivered by water. Both contracts are for 500,000 tons of coal per year. The combined tonnage of the Massey and Consol contracts is 1.5 million tons per year. Given an ocean barge capacity of 600,000 tons per year, this equates to a need for 2.5 barges. We find that it was reasonable for EFC to maintain a fleet of three ocean barges in 1984, 1985 and 1986. This is consistent with the Commission's decision in Docket No. 850001-EI-A. We find that we correctly determined that it was prudent for EFC to maintain a three barge fleet in order to reduce operational constraints, to enhance reliability and to increase EFC's negotiating leverage with the railroads.

We further find that we need not reconsider our decision that EFC's coal purchases from Kentucky May during the initial 18 months of the contract (January 1986-July 1987) were reasonable. Occidental maintains that the Kentucky May contact coal price was excessive during the first 18 months of the contract and that it was entered into without the benefit of a competitive solicitation. Occidental states that Virginia Power conducted a solicitation and signed three coal contracts effective January 1, 1986 and that the Kentucky May F.O.B. mine price exceeded the F.O.B. mine price of each of the Virginia Power contracts. Finally, Occidental maintains that the report prepared by Witness Sansom's consulting firm stating that the Kentucky May prices were indicative of the market was referring to the 1988 price. It did not address the reasonableness of the Kentucky May price prior to a 1987 renegotiation.

Witness Jaron testified that the Kentucky May F.O.B. mine price was reasonable. Witness Carter testified that Kentucky May had the lowest F.O.B. mine price for all contact coal for Crystal River until January 1987. Witness Carter also testified that the initial Kentucky May price was indicative of the market.

One of the Virginia Power contracts referred to by Witness Sansom had an F.O.B. mine price which was 113.5 ¢/mmBtu, or three percent less than the Kentucky May F.O.B. mine price. A second Virginia Power contract had an F.O.B. mine price which was six percent below the Kentucky May F.O.B. mine price. The third contract had a sulfur content specification higher than the Kentucky May sulfur specification and is not comparable. We find, therefore, that the record indicates that the Kentucky

May coal price was reasonable during the initial 18 months of the contract.

We further find that we need not reconsider our decision that costs charged to the ratepayers for coal purchased from A.T. Massey were reasonable. Occidental maintains that the renegotiated contract with Massey includes costs associated with Massey's agreement to release FPC affiliate, COMCO, from a long-term take-or-pay coal contract and that FPC ratepayers should not pay any costs associated with Massey's release of COMCO. Occidental asserts that FPC was obligated to show that FPC ratepayers paid nothing for Massey's concession to release COMCO and that FPC did not provide this proof. Witness Sansom testified that the renegotiated Massey price was $1.80 per ton above market. Occidental admits that Massey's agreement to reopen the contract early was a concession to FPC by Massey.

While we agree that FPC ratepayers should not pay any costs associated with Massey's release of COMCO, we find that the record does not indicate that any costs associated with COMCO's release were borne by the ratepayer. Occidental Chemical Corporation maintains that EFC renegotiated its compliance coal contract with Massey in 1986 to a level $1.80 per ton above market levels. Witness Sansom testified that EFC did this in order to have Massey release COMCO, an EFC affiliate, from contractual obligations. Witness Carter testified that the negotiations between Massey and COMCO were separate from the negotiations to reduce the price of coal in the contract between Massey and EFC. The contract between Massey and EFC contained a market reopener and supplied coal to Crystal River Units 4 and 5. EFC renegotiated the price downward to $31.00 per ton 10 months prior to the date specified in the market reopener clause. This represented a price reduction of $6.94 per ton. A savings of $5,205,000 occurred during this 10 month period due to the early renegotiation. If this savings was spread over the period specified by the contract reopener clause, the effective price of the coal would be $29.49 per ton. This is one percent greater than Witness Sansom's market price estimate of $29.20 per ton. We find that EFC was prudent when it renegotiated its price with Massey and can find no evidence to support Occidental's claim that EFC traded an above market price in exchange for Massey's release of a claim against COMCO.

We further find that we made an appropriate decision to

use the market price methodology developed in Phase I of this proceeding to evaluate the reasonableness of the Powell Mountain coal price to determine whether the ratepayer has been harmed by EPC's contract with Powell Mountain Joint Venture. A market price methodology should be selected on its appropriateness and not on whether it mandates a disallowance. We also find that we need not reconsider our decision that FPC agreed to above-market prices when it entered into its 1977 contract with Dixie. Occidental Chemical Corporation Witness Sansom does not question EFC's decision to purchase Dixie tows 1 and 2. He does, however, question the price paid by EFC for the services provided by the two barges. Witness Sansom testified that under the Dixie contract, fixed costs (including depreciation, profit and interest) escalate with changes in the CPI, labor and fuel costs.

In Phase I of this proceeding, Witness Bass testified that in 1977 EFC executed an affreightment contract with Dixie which was based on a daily charter rate per tow. This daily charter rate was escalated by various indices. In 1981 the affreightment contract was amended to establish a daily freight rate based on actual cost plus a profit component. In 1985, the affreightment contract was changed to establish an affreightment per ton rate which spreads fixed costs, variable costs and a profit component over a 2.4 million ton contract minimum relating to four Dixie barges. Witness Bass also testified that the fixed cost, variable cost and profit components are escalated by changes in the wholesale price indices, the price of diesel fuel and labor costs. A maintenance and repair component is escalated according to actual costs. An interest component varies according to a separate index contained in the amended agreement.

Witness Sansom testified that the 1977 contract with Dixie was imprudent because it allowed 94% of the base rate to escalate according to indices. He testified that market conditions would only support an escalation of, at most, 62% of the base price. This was the escalation procedure of a contract between First Mississippi and Dixie for the period August 1978 to December 1983. However, Witness Sansom admits that the 94% escalation rate was never applied because the contract was converted to a cost-plus contract. Witness Sansom also testified that barge operators were willing to contract at rates to provide a 15% after-tax return on equity. He also testified that the interest rate for debt should be calculated

at a rate offered by the Maritime Administration (MarAd) to others building vessels in the 1970's.

Witness Upmeyer testified that the contract between Dixie and FirstMiss was a backhaul contract to utilize an empty barge on the return trip to New Orleans and was not comparable to the contract between EFC and Dixie. He stated that a backhaul contract is a good deal if it recovers variable costs. Witness Upmeyer also testified that MarAd financing was considered in 1977 but found that it was not available on a timely basis. Witness Upmeyer also testified that EFC solicited bids for the construction of Dixie tows 1 and 2 to obtain the lowest available price. We find, therefore, that the original Dixie contract was reasonable.

We further find that we did not err in Order No. 21847 when we determined that the refund plus interest as calculated using Rule 25-6.109(4), Florida Administrative Code, should be refunded by FPC through the fuel adjustment clause for the April 1, 1990 through September 30, 1990 fuel adjustment. We did not, however, rule on Occidental's proposed findings of fact and conclusions of law. To that extent, we find that we should reconsider Order No. 21847 and amend that Order to reflect our ruling on each of the proposed findings of fact and conclusions of law as required by Chapter 120, Florida Statutes. In Appendix B of its post-hearing brief, Occidental proposes several findings of fact and conclusions of law relating to the methodology for returning overcharges to ratepayers. These proposed findings were not brought to our attention in the July 21, 1989 Staff recommendation. Occidental requests that we reconsider our decision in Order No. 21847 to correct this obvious problem.

FPC contends that Occidental's proposed findings of fact and conclusions of law should not be considered by us because they were not submitted in accordance with the rule. Specifically, FPC argues that Occidental's proposed findings were not in a separate document as required by Rule 25-22.056(2)(a), Florida Administrative Code. In addition, FPC asserts that Occidental's proposed finding contained mixed questions of fact and law which is prohibited by Rule 25-22.056(2)(b), Florida Administrative Code. While we find that Occidental's proposed findings are apparently in conflict with the rule, we point out that Public Counsel's proposed findings which we did address in Order No. 21847 were also in

apparent violation of Rule 25-22.056(2)(a), Florida Administrative Code. We have examined each of Occidental's proposed findings of fact or conclusions of law and find that each finding should be accepted or rejected as required by Chapter 120, F.S. (See Appendix A).

With regard to the appropriate manner to calculate the interest to be applied to the refund, Occidental argues that we should have applied the statutory interest rate of 12% set forth in Section 687.01, Florida Statutes. According to Occidental, we chose to rely on Rule 25-6.109(4), Florida Administrative Code, to calculate the interest solely because it was used in In Re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company - Maxine Mine), Docket No. 820001-EU-A, Order No. 13452 (84 FPSC 295), aff'd, Gulf Power Company Co. v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986). Occidental maintains that Rule 25-6.109, Florida Administrative Code, was enacted to be applicable only to refunds that result from rate changes or overearnings. Our analysis of Maxine Mine indicates that we concluded as a matter of law that Gulf Power had engaged in certain imprudent actions which caused it to incur excessive costs for coal purchased from Maxine Mine in the amount of $2,575,540 and that amount including interest calculated in accordance to Rule 25-6.109(4), Florida Administrative Code, should be refunded to Gulf's ratepayers. Order No. 13452, p. 20. We believe that there are striking similarities between Maxine Mine and this proceeding. We find, therefore, that it is appropriate for us to rely on Maxine Mine to support our decision to apply Rule 25-6.109(4), Florida Administrative Code, when calculating the amount of interest be applied to the refund ordered in this proceeding.

Occidental also takes issue with our decision to require that FPC make the refund to its ratepayers through the fuel adjustment clause rather than by check or credit. We found that it was appropriate to require the refund be made through the fuel adjustment clause to avoid administrative difficulties and because the refund at issue was a reflection of costs determined to have been imprudently collected through the fuel adjustment process. While we share Occidental's apparent concern that FPC should not be allowed to charge or pass through the administrative costs associated with the refund to FPC's ratepayers, we do not believe that that outcome is possible under the methodology we ordered in Order No. 21847.

Finally, we would note that in Maxine Mine, we concluded that it was appropriate to make the refund to Gulf's ratepayers through the fuel adjustment clause.

We find, therefore, that we should reach a specific finding on each of the findings of fact and conclusions of law proposed by Occidental contained in Appendix A. In addition, we should deny Occidental's request for reconsideration of our decision in Order No. 21847 regarding the appropriate manner to calculate the interest to be applied to the refund and the methodology for returning that refund to FPC's ratepayers.

In consideration of the foregoing, it is

ORDERED that the motion for reconsideration filed by Occidental Chemical Corporation on September 22, 1989 is denied in part and granted in part as discussed in the body of this order. It is further

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 10th day of JANUARY, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

5388L/SBr:bmi

by: Kay Flynn
Chief, Bureau of Records

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.

APPENDIX A

FINDINGS OF FACT

We accept the following proposed findings of fact because they are supported by competent, substantial evidence in the record of this proceeding.

1. Refunds to FPC ratepayers should equal the fuel amount of overcharges incurred by EFC after January 1, 1984 plus interest. (Tr. 637)

2. Interest should accrue monthly, as fuel expenses were passed through to customers on a monthly basis. (Exhibit 246)

3. For the purpose of calculating the amount of interest due, the amount of loss each month should be estimated by presuming that overcharges incurred each year were passed through to customers in equal monthly increments that year as recommended by Dr. Kennedy. (Tr. 642, Exh. 246)

5. FPC should not be allowed to retain any portion of the overcharges to ratepayers to offset administrative expenses because that would lower refunds to ratepayers below the overcharges to ratepayers and inequitably require ratepayers to pay FPC's expenses to correct for FPC's imprudent actions. (Tr. 645, 757-58)

6. FPC should not be allowed to retain refund amounts that rightfully belong to customers that can not be located or no longer exist as legal entities. (Tr. 645-46)

7. The theoretically correct refund method would refund to each customer the amount of that customer's overpayment. (Tr. 630-31, 753-54)

8. The theoretically correct way of allocating the total amount of refunds among individual ratepayers is to base the class refund on the number of kilowatt hours generated to serve each ratepayer class (as a percentage of total kwh generated) during the period

in which the damages accrued, adjust the class refund for line losses, and than allocate the class refund on the basis of the kilowatt hour consumption of each individual customer (as a percentage of class consumption) during the period in which the damages occurred, as recommended by Dr. Kennedy. (Tr. 641, 642, Exhibit 246)

10. In cases where the administrative cost of calculating the theoretically correct refund is disproportionately high in comparison to the amount of the refunds due, it is acceptable allocate the class refund among individual customers in that class on the basis of their kilowatt hour consumption during a future twelve month period. (Tr. 631-32, 647-48)

11. In cases where refund allocations will be made on the basis of a future 12 month period, it is acceptable to allocate the refund among all customers of record in the month in which each portion of the are fund is made. (Tr. 631-32, 647-48)

12. When refunds for amounts overbilled are issued in accordance with Rule 25-6.106, Florida Administrative Code, customers may choose whether the refund will be in the form of check or billing credit.

13. In cases where refund allocations will be made to individual customers in proportion to that customer's actual kilowatt hour consumption during the period in which the overcharges occurred, FPC must make all reasonable efforts to locate each customer, including customers that have moved off the system, and refund that customer, or its successor or assignee, the amount due. (Tr. 645-46)

16. Refunds should be made as promptly as possible. The longer the refund period, the greater the probability that persons and organizations who were ratepayers between January 1984 and March 1989 will not be located (because they have moved, or dissolved as legal entities), and thus will not receive the refund to which they are entitled.

17. There is no reason to spread refunds over the same number of years as overcharges were incurred.

18. FPC should submit a compliance filing within 30 days of the close of this proceeding detailing the amount of the overcharges, the amount of interest due on those overcharges (projected forward to the time the refund will be paid), and FPC's proposed mechanism for returning overcharges to ratepayers.

We reject the following proposed findings of fact because they are not supported by competent, substantial evidence in the record of this proceeding or for the reasons stated below:

4. Because this case is not a base rate case the refund method established by Rule 25-6.109, Florida Administrative Code, which pertains to base rate cases, is not applicable here.

Section (1) of Rule 25-6.109, Florida Administrative Code, states:

(1) Applicability. With the exception of deposit refunds and refunds associated with adjustment factors, all refunds ordered by the Commission shall be made in accordance within the provisions of the Rule unless otherwise ordered by the Commission.

We find, based on this language, that Rule 25-6.109, Florida Administrative Code, is applicable to situations other than base rate cases as suggested by Occidental.

9. For residential customers and commercial customers with demands below 1000 KW, the administrative cost of calculating refunds based on each customers' kilowatt hour usage during the applicable period is likely to be disproportionately high in comparison to the amount of the refunds due; for other customers, refunds should be made directly by check. (Tr. 631, 646-47, 649-50)

We reject this proposed finding because it appears to combine two unrelated issues and and actually suggests no real finding of fact.

14. Refunds to customers who have left the system must be made by check.

While there is no specific cite associated with this proposed finding, we are of the opinion that it may be found in the record. We believe this proposed finding should be rejected because a refund by check is not the only option available to us under out rules.

15. Where after reasonable effort, FPC is unable to locate a customer, to whom a refund is due, the amount of that customer's refund should be reallocated among the other members of its class. (Tr. 631, 646)

We reject this finding since reallocation of undeliverable refunds within a particular class is only one option available to us under our rules.

19. In the case of damages resulting from overpayments made to Powell Mountain Joint Venture (PMJV), where the amount of damages is based on comparison to BG&E Form 580 which will not be filed until 1990, FPC should be ordered to make refunds with interest within 90 days of the date on which the forms are filed.

There is no evidence in the record to support this finding and it is, therefore, rejected.

PROPOSED CONCLUSIONS OF LAW

We accept the following proposed conclusions of law:

20. As a matter of Florida state law, damages includes prejudgment interest retroactive to the date of loss. Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985).

21. The appropriate rate of prejudgment interest to be applied to utility refunds in the absence of a rule that specifies otherwise is 12% per annum, as provided for by Florida Statute § 687.01, "Rate of interest in absence of contract." See Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988).