BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a Declaratory Statement Concerning the Mission Energy, Inc., Standard Offer Contract by FP&L	DOCKET NO. 921179-EQ ORDER NO. PSC-93-0527-DS-EQ ISSUED: 04/07/93

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

ORDER GRANTING IN PART AND DENYING IN PART FLORIDA POWER AND LIGHT COMPANY'S PETITION FOR DECLARATORY STATEMENT

BACKGROUND

On November 13, 1992, Florida Power and Light Company (FPL) filed a Petition For Declaratory Statement, pursuant to Rule 25-22.020, F.A.C., concerning a standard offer contract executed by Cypress Energy Company (Cypress), a wholly-owned subsidiary of Mission Energy. The standard offer contract at issue is dated June 18, 1990.

A Petition To Intervene was filed December 4, 1992 by Cypress, which subsequently filed a Supplemental Response on January 11, 1993. On December 11, 1992, FPL responded to Cypress' Petition To Intervene indicating essentially no objection thereto.

As stated at pg. 9 of its Petition, FPL asked two questions:

1) Was it the intention of the Commission that FPL purchase power from Cypress absent a need or cost effectiveness determination and, if so, does the Commission affirm that the Cypress contract qualifies for cost recovery.

2) Under the standard offer agreement, can a party unilaterally change the location of the project?

For its part, Cypress argued that the first question should be answered in the affirmative, Supplemental Response, p. 1, and that the second question was improperly presented in that Cypress contemplated no change of location from that agreed to in the standard offer contract. Id., p. 15-16.

Both FPL and Cypress offered extensive briefing of their respective positions on question 1. While FPL did not explicitly argue that Cypress' standard offer contract was not binding, the citations offered by FPL, if applicable, would tend to demonstrate that further review was contemplated before the contract would be qualified for cost recovery. Cypress, for its part, disputed that conclusion.

The relevant factual background is related most clearly in Order No. 23792, wherein the Commission allocated 500 MW of statewide avoided capacity to two cogeneration projects, Nassau Power Corporation's 435 MW project and Cypress' 180 MW project.

Since Nassau submitted its standard offer first, it was awarded the first 435 MW of the 500 MW subscription limit. The remaining 65 MW were awarded to Cypress, which had submitted its standard offer second. Nassau Power Corporation v. Beard, 601 So. 2d 1175, 1178, n. 8 (Fla. 1992); Order No. 23792, p. 4-5.

DISCUSSION

First, we grant Cypress' petition to intervene in this docket. As stated in Rule 25-22.020, F.A.C., a declaratory statement concerns the applicability of a rule, statute or order of the Commission to a petitioner in his or her circumstances only. Therefore, as to most such petitions, intervention may be denied because only the petitioner for the declaratory statement is directly concerned. However, exceptions have occurred where the petitioner for intervention is directly affected by the proceeding. See, e.g., Petition For Intervention Of St. Johns County Board of Commissioners in Docket No. 910078.

Second, we grant the Petition For Declaratory Statement stating that Cypress' contract qualified for cost recovery pursuant to Rule 25-17.0832(8)(b), formerly Rule 25-17.083(8), F.A.C., to the extent of 65 MW.

Though the permutations of law and policy offered by the parties' competing analyses were extremely complex, the recently

decided Nassau Power Corp., supra, opinion provides a helpful basis for clarification of these issues.

As stated therein, 601 So. 2d at 1177, the Commission indicated in Order No. 22341, issued December 26, 1989, that "it would no longer use the findings under the cogeneration regulations as a surrogate for the factual findings required by the Siting Act."[1]

Indeed, the process of implementation of that policy in the form of a subscription limit was considered at an agenda conference on May 25, 1990, which resulted initially in Order No. 23235 (July 23, 1990) and ultimately in Order No. 23792 (November 21, 1990).

Thus, as of the June 18, 1990 date of execution of the Cypress standard offer, both parties had notice that the cogeneration regulations would not be dispositive as to facilities covered by the Siting Act, including the 180 MW facility contemplated in Cypress' standard offer. Moreover, both parties had notice, as of May 25, 1990, that the specific subscription limit method of implementing Order No. 22341 was actively in process. That process was, in fact, completed by Order No. 23792.

When, in Order No. 23792, 115 MW of Cypress' project was disallowed as exceeding the subscription limit, the new policy had been fully applied to Cypress, thus creating the possibility of the 65 MW project at issue as to which no factual findings under the Siting Act were required.[2] See, §403.503(12), Fla. Stat., excluding from the definition of "electrical power plant" for Siting Act purposes "any steam or solar electrical generating facilities of less than 75 megawatts in capacity ... " In effect, as to Cypress' 65 MW project, and as of November 21, 1990 (the issuance date of Order No. 23792), the "cogeneration regulations," including Rule 25-17.0832(8)(b) did apply because the new policy only prohibited their use as a surrogate for Siting Act factfinding, i.e., factfinding concerning solar or steam power plants 75 MW or larger. In contrast, as to Cypress' 65 MW project,

---

[1] Florida Electrical Power Plant Siting Act, §403.501, et. seq., Fla. Stat.

[2] Another possibility was also created; a 180 MW facility with 65 MW of standard offer and 115 MW of negotiated power which would be subject to further Siting Act factfinding.

the cogeneration regulations were applicable without more. Rule 25-17.0832(8)(b) provides that

> Upon acceptance of the contract by both parties, firm energy and capacity payments made to a qualifying facility pursuant to a standard offer contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs.

Here, it is undisputed that both parties accepted the standard offer contract on June 18, 1990. Accordingly, payments made thereunder were then established as recoverable, subject only to the modification of the size of the standard offer down to 65 MW, as required by the Commission's implementation of its changed cogeneration policy on November 21, 1990.[3]

Third, we deny the Petition For Declaratory Statement as to the question of whether Cypress can unilaterally change the location of its project from that contemplated in the standard offer contract. This question was improperly raised without more definite facts.

FPL stated only that Cypress may pursue a 65 MW project at another location in Dade County than Medley, Dade County. FPL Petition, p. 9, ¶15. Since no particular alternate location has been specified, the circumstances are insufficiently described to apply rules, orders or statutes to it. Depending on whether the change, for electrical planning purposes, were substantial, negligible or something between the two, the analysis would differ and each would have to be related to a specific location.

In view of the above, it is

---

[3] Rule 25-17.0832(8)(b) became effective 10/25/90, i.e., about a month prior to issuance of Order No. 23792. The former version of the rule would not change the analysis. Rule 25-17.083(8) stated that "Firm energy and capacity payments made to qualifying facilities pursuant to a utility's standard offer shall be recoverable by a utility though the Fuel and Purchased Power Cost Recovery Clause."

ORDERED by the Florida Public Service Commission that Cypress Energy Company's Petition to Intervene in this docket is granted. It is further

ORDERED that Florida Power and Light Company's Petition For Declaratory Statement stating that the Cypress contract qualified for cost recovery pursuant to Rule 25-17.0832 (8)(b), formerly Rule 25-17.083(8), F.A.C., is granted to the extent of 65 MW. It is further

ORDERED that Florida Power and Light Company's Petition For Declaratory Statement on the issue of a possible change of location for Cypress' project is denied. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission this 7th day of April, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.