

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to Resolve) DOCKET NO. 940546-EU
Territorial Dispute with South) ORDER NO. PSC-94-1350-FOF-EU
Florida Cogeneration Associates) ISSUED: November 3, 1994
by Florida Power and Light)
Company)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

On May 13, 1994, Florida Power and Light Company (FPL) filed a petition to resolve a territorial dispute with South Florida Cogeneration Associates (South Florida). The petition alleges that by selling electricity from its cogeneration facility to Dade County at Dade County's Downtown Government Center (DGC), South Florida is providing retail electric service as a public utility under the provisions of Chapter 366, Florida Statutes. The petition claims that the Dade County Downtown Government Center is in FPL's service territory, and it invokes the Commission's jurisdiction to resolve a territorial dispute under Section 366.04(2), Florida Statutes and Rule 25-6.0441(1), Florida Administrative Code.

The petition also alleges that a settlement agreement between Dade County and South Florida, which will be placed on the ballot for voter approval in November, contains three "initiatives" that could potentially expand the scope of what the petition calls South Florida's "impermissible retail electric sales to Dade County".

South Florida filed a Motion to Dismiss the petition and a Request for oral argument on July 13, 1994. We considered the motion to dismiss at our October 18, 1994, Agenda conference. We did not hear oral argument, because South Florida, with FPL's concurrence, withdrew its request.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

South Florida has moved to dismiss FPL's petition on three basic grounds: 1) The petition does not show that any real territorial dispute exists between FPL and South Florida or that FPL is substantially affected by the arrangements between South Florida and Dade County at the Downtown Government Center; 2) FPL is estopped from claiming a territorial dispute because it has acknowledged and acquiesced in South Florida's relationship with Dade County for many years; and, 3) FPL's complaints about South Florida's and Dade County's "Settlement Initiatives" are not ripe for Commission disposition, and when they become ripe they may not fall within the Commission's jurisdiction.

In its Response in Opposition to the Motion to Dismiss, FPL states that its petition shows that South Florida presently sells electricity to Dade County at the DGC; that the sale makes South Florida a "public utility" subject to the Commission's jurisdiction, as that term is defined in section 366.02(1), Florida Statutes; that a present dispute exists with South Florida because South Florida is providing retail electric service to a customer in FPL's service territory, and; that the dispute is within the Commission's jurisdiction to resolve under the Grid Bill and its own territorial dispute rules. FPL also states that the doctrine of equitable estoppel is an affirmative defense to the petition, and it is not an appropriate ground to dismiss a petition for failure to state a cause of action. FPL contends that if any of the "Settlement Initiatives" are adopted they will exacerbate the existing territorial dispute between the parties.

To prevail on its motion to dismiss South Florida must demonstrate that the facts alleged in FPL's petition, when viewed in the light most favorable to FPL, fail to set forth any claim that the Commission can resolve. We find that the motion has not met this test, and we decline to dismiss the case. We agree that the facts FPL alleges concerning the proposed "Settlement Initiatives" do not give rise to any issues that are ripe for our consideration at this time, since none of the initiatives have been undertaken by Dade County or South Florida. If they were the only facts alleged in the petition, we would agree that the petition should be dismissed. FPL's petition, however, does allege facts sufficient to show that South Florida provides retail electric service to a customer in the territory that FPL has the right and obligation to serve. Therefore a territorial dispute presently exists between FPL and South Florida that we have the jurisdiction to resolve. Estoppel may be an issue the Commission will need to address when it considers the evidence in the case, but it is not sufficient grounds to grant a motion to dismiss.

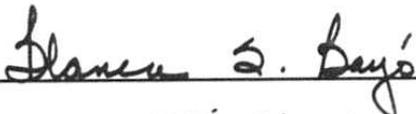
ORDER NO. PSC-94-1350-FOF-EU
DOCKET NO. 940546-EU
PAGE 3

The facts alleged in the petition, viewed in the light most favorable to the Petitioner, set forth a claim that is cognizable by the Commission under the provisions of Section 366.04(2), Florida Statutes and Rule 25-6.0441, Florida Administrative Code. It is therefore

ORDERED by the Florida Public Service Commission that South Florida Cogeneration Associates' Motion to Dismiss is denied. It is further

ORDERED that this docket shall remain open pending full resolution of the substantive issues of the case.

By ORDER of the Florida Public Service Commission, this 3rd day of November, 1994.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MCB

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 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.