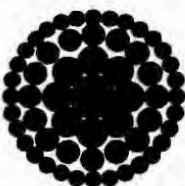


ORIGINAL
FILE COPY



**Florida
Power**
CORPORATION

JAMES A. MCGEE
SENIOR COUNSEL

March 8, 1997

**Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850**

Re: Docket No. 97104-BQ

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of the Response of Florida Power Corporation in Opposition to Public Counsel's Motion to Dismiss.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

- ACK _____
- AFA 2
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAB Harlow
- LEG 1
- LIN 5
- OPD _____
- RCR _____
- S _____
- W-S _____
- BT4 _____

**JAM/kp
Enclosure
cc: Parties of record**

DOCUMENT NUMBER-DATE

GENERAL OFFICE

02504 MAR 10 5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the enclosed Response of Florida Power Corporation in Opposition to Public Counsel's Motion to Dismiss has been furnished to the following individuals by U.S. Mail this 10th day of March, 1997:

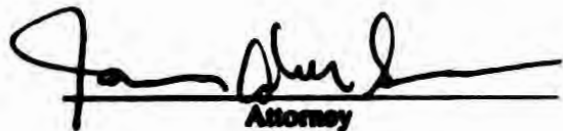
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2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850


Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of an early termination amendment to a negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

Docket No. 861184-EQ

**Submitted for filing:
March 10, 1997**

**RESPONSE OF FLORIDA POWER CORPORATION
IN OPPOSITION TO PUBLIC COUNSEL'S
MOTION TO DISMISS**

Florida Power Corporation (Florida Power) hereby responds in opposition to the motion to dismiss Florida Power's petition on proposed agency action filed by the Office of Public Counsel (Public Counsel) on February 26, 1997, and states as follows:

1. Public Counsel asserts in his motion that Florida Power's petition on proposed agency action (the PAA Petition) should be dismissed on two grounds: First, that the PAA Petition is actually an improper request for reconsideration of the Commission's Proposed Agency Action Order No. PSC-97-0086-POF-EQ (the Order); and second, that Florida Power lacks standing to challenge the Order because its substantial interests were not affected by the denial of Florida Power's petition for approval of an early termination amendment to its purchase power agreement with Orlando Cogen Limited, Ltd. (OCL), a qualifying facility. Neither of these novel grounds asserted by Public Counsel has any merit and, accordingly, his motion to dismiss should be denied.

DOCUMENT NUMBER-DATE

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**Public Counsel's claim that the PAA Petition
is an improper motion for reconsideration**

2. With respect to Public Counsel's first ground for dismissal, his contention that the PAA Petition is in reality a motion for reconsideration is based on nothing more than the fact that the Petition's listing of "disputed issues of fact and policy" indicates Florida Power's disagreement with the Order's findings. Motion, ¶¶6 and 7. Obviously, a protest of a proposed agency action order could hardly be based on anything else. Nor does the fact that "FPC is unhappy with the order" (Motion, ¶8) somehow convert the PAA Petition's request for section 120.57 hearing into a request for reconsideration. Reconsideration is based on oversight, mistake or inadvertence, grounds that Florida Power has not alleged in its PAA Petition.

3. Moreover, it was necessary for the PAA Petition to recite the issues in the Order which are in dispute. Section 120.80(13)(b) provides as follows:

Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated. (Emphasis supplied.)

Absent a detailed listing of the issues disputed by Florida Power, those issues may have been deemed to be stipulated. Public Counsel's contention that by providing such a listing the PAA Petition was transformed into a request for reconsideration is preposterous and should be rejected out of hand.

**Public Council's claim that Florida Power's
substantial interests are not affected**

4. The implications of Public Council's second ground for dismissal are profound. In asserting that Florida Power's substantial interests are not affected by the Order, Public Council is essentially saying that Florida Power's duty to act in the best interests of its customers does not rise to a level sufficient to confer standing before the Commission. This is a strange and potentially dangerous position to be advocating to the Commission, particularly so when the advocate is the Public Council.

5. The PAA Petition asserts that "Florida Power has a substantial interest in the amendment to the OCL contract in that the amendment will provide net savings of over \$400 million to Florida Power and its customers" PAA Petition, ¶10. To this Public Council responds in a surprisingly cavalier manner that Florida Power has no interest in the loss of these savings because "FPC will pass all costs on to its customers. The company will see neither savings nor increased costs either way." Motion, ¶12. The effect of this astonishing view of the interests of a utility with respect to its customers' rates, if accepted, is that the utility would have no standing to present and prosecute cost saving proposals in the Commission's various cost recovery proceedings (e.g. fuel, capacity, conservation and environmental cost recovery clauses) because the utility "will pass all costs on to its customers."¹

¹ Indeed, under Public Council's notion of standing, Florida Power's original petition initiating this proceeding would have been subject to a motion to dismiss at the outset on the
(continued...)

6. Clearly, Public Counsel has overlooked Florida Power's duty pursuant to Section 366.03, F.S. to charge its customers fair and reasonable rates. Public Counsel's contention that Florida Power lacks standing to pursue the opportunity to save its customers over \$400 million they would otherwise pay through rates is in stark contrast to Florida Power's statutory duty. Simply put, Florida Power cannot have a duty to provide reasonable rates and yet lack the standing necessary to fulfill that duty. While Public Counsel may disagree with Florida Power's cost savings proposal on the merits, that is a matter to be determined through the hearing process. The question now before the Commission is whether Florida Power has standing under Chapters 120 and 366, F.S., to avail itself of that hearing process to seek approval of a proposal it believes to be in the best interests of its customers. That question must be answered affirmatively by denying Public Counsel's motion to dismiss.

7. In addition to Florida Power's standing to fulfill its duty under Section 366.03, F.S., Florida Power also has standing before the Commission to seek approval of an amendment to a contract to which it is a party. In this case, the contract subject to amendment was entered into with a qualifying facility pursuant to Commission Rule 25-17.0832, F.A.C., and approved by the Commission in Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ. Subsequently, in Order No. PSC-95-0540-FOF-EQ, issued May 2, 1995 in Docket No. 940797-


¹(...continued)

grounds that Florida Power had no substantial interest in the outcome, despite the fact that it had been directed to file the petition by the Commission in Order No. PSC-96-0352-FOF-EG.

EQ, the Commission ruled that any material modification of contract between a utility and a qualifying facility ~~must~~ be approved by the Commission. Florida Power's original petition, consistent with the Commission's directive, seeks approval of the contract amendment and its FAA Petition affirmatively asserts that denial of its petition for approval of the amendment will adversely affect its substantial interests. On this basis alone, Florida Power has standing before the Commission, thus requiring the denial of Public Counsel's motion to dismiss.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By 

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