ORIGINAL

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. 961184-EQ
Filed: December 1, 1997

BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.056(3)(b), Florida Administrative Code, the Order Establishing Procedure, Order No. PSC-97-0434-P.O.-EQ, issued April 17, 1997, and the Order Modifying Procedural Schedule, Order No. PSC-97-1009-PCO-EQ, issued August 25, 1997, submit this Brief:

ISSUE 1: Are the economic risks associated with projected ratepayer savings resulting from the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., reasonable?

OPC: No. Risks that regulation will not be available to flow back savings, that savings are too far in the future, that customers will leave before seeing savings, that the discount rate is inappropriate, that projections are inaccurate, that costs will not be offset by savings, and others, are all unreasonable.

DISCUSSION

FPC'S PROPOSAL IS NOT CONSISTENT WITH THE REVERSE AUCTION BID SOLICITATION PROPOSAL.

As originally outlined by FPC when it suggested the reverse auction bid solicitation, there weren't going to be any risks for customers. Before refunding excess revenues from revenue decoupling, the company would test the waters to see if the prospect of immediate refunds could be replaced with something even better. If (and only if) FPC could find benefits from buying out one or more cogeneration contracts which exceeded refunds from decoupling would FPC accept a buyout offer from a cogenerator. The RFP provided that bids which provided benefits sooner

rather than later would be given preference. [T.52] There was no expectation that customer rates might increase above current levels.

FPC's suggestion for an RFP reflected a belief that the company's desire to be better positioned for competition could be wedded to the customers' interest in lower rates while traditional regulation continued. In negotiations with respondents to its reverse auction solicitation, however, FPC apparently learned that, because of financial constraints imposed by lenders, cogenerators were only amenable to buying out the latter contract years, after loans were retired. [T.61] Such a transaction remained attractive to FPC, but it drove a wedge between the company's and its customers' interests. The buyout was too expensive to be paid for from funds earmarked for decoupling refunds. Moreover, savings would only be available in years expected to be dominated by competition.

FPC'S ASSUMPTION OF CONTINUED REGULATION IS INCONSISTENT WITH ITS EXPECTATION OF RETAIL COMPETITION.

FPC's resolution of the dilemma gave rise to the inconsistencies which are so glaringly apparent in this docket. First, FPC evidently decided that, even though it would be much better off rid of the expensive purchased power agreement with OCL, it did not want to pay for the buyout with company funds as it had done in the Tiger Bay docket. Mr. Schuster testified that "the OCL transaction is in many respects similar to Tiger Bay. [T.127] But to argue for ratepayer funding, FPC had to identify customer savings which would exceed the buyout costs. Savings,

however, could be expected to materialize only in the bought-out years when retail competition was expected (by the company and everyone else) to be in full swing.[1]

FPC's solution was to construct an analysis which presumes the continuation of traditional regulation as a means to force customers to purchase an enhanced competitive position for FPC. [T.74, 88, 232] If this Commission accepts the premise underlying FPC's proposal, however, then it must conclude that retail competition will foreclose any opportunity on the Commission's part to order savings from the OCL buyout to be flowed back to FPC's customers. If, on the other hand, the Commission believes retail regulation will continue in its present form for the next quarter century and more, then there is no reason to charge today's customers higher rates based on speculative projections of savings for tomorrow's customers. Although capacity charges under the PPA will be higher in later years, they will be effectively reduced by inflation and spread over a larger customer base in the years at issue in this proceeding. [T.134]

Even if the premise of FPC's case is accepted, the company's analysis fails to demonstrate a realistic expectation of benefits for any identifiable customers. Current customers who leave FPC's system over the next 22 years cannot recoup anything. [T.134] FPC is not guaranteeing any benefits even for persons (if there are any) who are customers today and will remain on FPC's system through 2023. The likelihood of any benefits being received by anyone other than FPC, itself, under the company's proposal is extremely remote and entirely speculative.

One significant aspect of FPC's analysis is that it cannot be limited to an evaluation of customer costs versus customer savings. By its very nature, the net-present-value analyses offered

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[1]FPC recently reorganized into strategic business units to prepare for competition.[T.129-30, 133] Mr. Schuster conceded FPC was motivated to buy out it PPA's to put itself in a more competitive position for the future. [T. 73, 81, 232]

by the company stand for the proposition that anyone who funds the buyout and is reimbursed from projected savings will be made whole -- if the company's projections of capacity and energy costs and the assumption of continued regulation prove true. The obvious question is who should bear the risk of inaccurate projections and an absence of traditional regulation in the future? The obvious answer is: FPC.

THE RISKS IMPOSED ON CUSTOMERS ARE EXCESSIVE.

Approval of the company's proposal would require today's captive ratepayers to pay $49.4 million in higher rates over five years to put the company in a better competitive position tomorrow. In addition, customers are expected to bear many unreasonable risks. These risks include, but are not limited to: (1) the risk that competition will supplant regulation, eliminating the cost recovery mechanism FPC claims will be in place to flow savings back to customers; (2) the risk that the discount rate used by FPC is inappropriate for customers because their discount rate is higher than the company's and, while customers will theoretically "earn" 8.67% under the company's proposal, they will be paying much higher interests rates on consumer debt at the same time, thereby losing money overall; (3) the risks that the company's projections are inaccurate and there will be no savings; (4) the risk that current customers may leave FPC's system sometime over the next 22 years, thereby losing money even if FPC's speculative projections prove accurate; (5) the risk that natural gas prices may escalate significantly in relation to coal costs (which is currently being borne by OCL) will be placed on FPC's customers through adoption of the company's proposal; (6) the risk that customers will be burdened with stranded costs but that stranded benefits will be retained by FPC for its own benefit; and (7) the risk that FPC will be

successful in imposing all these risks on customers even though the company could fund the buyout and recover all its costs, including its cost of capital, without burdening its customers.

If FPC's net-present-value analysis is meaningful at all, it shows that the company should be indifferent to funding the buyout as long as FPC is permitted to recover an equal amount, in net-present-value terms, in the future based on its own projections. It is certainly more likely that FPC will still be selling electricity in Florida 26 years from now than it is that a significant number of current customers will still be buying their electricity from the company. Although, the OCL contract amendment is contingent upon Commission approval of the amendment, it is not contingent upon Commission acceptance of FPC's proposed method of cost recovery.

If FPC's payments to OCL are deductible as incurred for federal income tax purposes, then the cost to FPC to fund the buyout is significantly less than the cost to its customers. FPC could fund the buyout at a lower cost and recover its costs through the cost recovery mechanisms in the years 2014-2023, thereby satisfying the terms of the contract amendment (which does not specify cost recovery over the five years 1997-2001).

If, on the other hand, the payments to OCL are not currently deductible for tax purposes, then payments received from customers will be taxable as income.[2] In this latter case, FPC will spend $9,881,000 per year but only be reimbursed a net-of-tax amount of approximately $6 million. Under its own proposal, FPC will, therefore, be funding approximately 38.58% of the

[2]Mr. Schuster testified that it is essential to make conservative assumptions and assume that the buyout cost will not be tax deductible on a current basis. [T.127-28]

buyout without recovering any of its after-tax cost of capital.[3] Under these circumstances, Mr. Larkin's proposal to have FPC fund the buyout but recover its costs, including its cost of capital, in the years 2014-2018 is very generous, and it is the same arrangement FPC stipulated to for Tiger Bay in Docket No. 970096-EQ, Order No. PSC-97-0652-S-EQ, June 9, 1997.[4] [T.125-26]

THE CUSTOMERS' DISCOUNT RATE IS HIGHER THAN FPC'S.

FPC has not, on the record of this proceeding, established any logical relationship between the company's discount rate and that of the consumers. The company used its own discount rate of 8.67% as a surrogate, but Mr. Schuster conceded the customers' true cost of capital or discount rate is unknown. [T.112] This assumption leads to absurd results. For example, FPC increased its discount rate recently because of changes in the company's cost of capital brought about by changes in its capital structure and/or its cost of debt and equity. [T.112] This increased the customers' discount rate under FPC's methodology even though Mr. Schuster conceded: "How this actual customer cost of capital or customer opportunity cost or customer discount rate moves, I don't know." [T.113]

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[3]Mr. Schuster testified that "Florida Power has not requested a contingency provision to protect Florida Power from that consequence [of no current tax deduction], we are accepting that risk." [T.535-36]

[4]In the order, at page 3, the Commission notes that the Tiger Bay regulatory asset is expected to be fully amortized by January 2008. Notably, the stipulation, at paragraph 2g, provides for appropriate treatment of the unamortized balance if retail competition prevents full recovery under regulation. Benefits from the OCL buyout will not start until 6 years later, in 2014, and net savings will not materialize before 2019, 11 years later. In the 1992 order granting FPC's last determination of need, Order No. 25805, issued February 25, 1992, at page 39, the Commission approved only two of the four units requested because "[t]oo much uncertainty remains with respect to Florida Power's resources in the 1999-2000 time frame."

Mr. Larkin noted that FPC's cost of capital affects none of the components, either capacity or energy, of the costs FPC proposes to pass on to its customers. [T.235] It is not related either to the buyout transaction itself (unless, of course funded by FPC) or to the customers' discount rate. An analysis assuming customers are investors in the buyout is only meaningful if the customers' discount rate is used. Mr. Larkin inquired of banks and concluded that 13%, the interest rate on unsecured debt, is a reasonable approximation of customer return requirements. His analysis shows that, assuming the company's projections are otherwise accurate, the cumulative net present value of the company's proposal is a negative $4,690,550. [T.233]

CONTRACT CAPACITY COSTS ARE NOT PROJECTED PROPERLY.

FPC has assumed future capacity payments are etched in stone. [T.98] The reality is that the capacity payments to OCL are based on a formula. [T.245-46] Moreover, the contract explicitly provides an option for OCL to reduce its capacity. Article VII of the PPA, section 7.3, provides that "[a]fter the one (1) year period specified in section 7.2, and except as provided in section 7.4 [addressing force majeure], the QF may decrease its Committed Capacity over the Term of this Agreement by amounts not to exceed in the aggregate more than twenty percent (20%) of the Initial Committed Capacity specified in section 7.1 hereof as of the Execution Date." Appendix to Petition, Negotiated Contract, at page 14. FPC, however, has not addressed either the possibility or the likelihood that OCL would reduce its capacity commitments and capacity costs under the contract in future years.

REPLACEMENT CAPACITY COSTS ARE NOT PROJECTED PROPERLY.

FPC will not replace lost generation from the buyout with an equal amount of capacity from another source. Mr. Schuster testified that a combined cycle unit built to replace the PPA

capacity would be of a larger size. [T.94] Replacement case capacity costs should, therefore, reflect the actual size of the replacement unit and all associated capacity costs since that is what customers are going to be asked to support in rates under the company's proposal.

THE BUYOUT PROPOSAL IS NOT ANALOGOUS TO A COMPARISON OF GENERATION ALTERNATIVES.

FPC and OCL attempted to portray the net-present-value analysis done by FPC for the buyout as being reasonable because it was similar to analyses accepted by the Commission in need determination proceedings. [T.18, 22-23, 83] Evaluation of generation alternatives, however, is driven by factors outside the utility's control. Load growth or the retirement of existing units leaves the utility with no choice but to add capacity either by purchasing or building.

Once the decision is made to construct, the net-present-value analysis focuses on which generation alternative has the lowest life-cycle costs. Everyone knows that projections of future costs are going to be wrong to some extent, but the need to act requires that a decision be made based on the best information available. Reliance must be placed on projections of capacity and energy costs going out many years into the future. In a need determination order, the Commission implicitly responds to customers' concerns which may be expressed as follows: "We understand that something must be done and costs will increase, but we ask that you, the Commission, require the company to construct the lowest cost alternative consistent with appropriate reliability and fuel supply criteria."

The utility's cost of capital is appropriate for evaluation of alternatives because the assets will actually be owned by the company. [T.110-11] Customers are not treated as investors in a

need determination proceeding. And, if they leave the system, they will not forego future savings which were tied to excessive current rates.

The OCL buyout is a different matter altogether. Lights will not go out if FPC's buyout proposal is rejected. FPC has not been forced to consider alternatives to replace a status quo which has become untenable. Indeed, the status quo may turn out to be just fine if natural gas prices escalate significantly in relation to coal prices such that the OCL contract is a bargain in the last ten years when compared to a company-owned natural gas-fired alternative. This is a risk currently being borne by OCL that FPC would foist upon its customers. [T.93]

Customers who will leave FPC's system over the next 22 years are definitely better off with the status quo. Even those customers who will still be on the system for the next 27 years won't see any benefits that would not be available in a competitive environment regardless of the action taken in this docket.

FPC is in the business of making investments in return for the opportunity to earn a fair return. As a corporation (an artificial legal entity), it is not unreasonable to presume that FPC has an indefinite benefit horizon. And, while it is reasonable to require customers to reimburse FPC for its prudent investments as assets are consumed, it is unreasonable to require customers with shorter benefit horizons and much higher discount rates to step into the company's shoes and make the initial investment on the company's behalf. The interests of FPC and its customers are not aligned in this proceeding. It is difficult to imagine customers asking: "We understand that you, the Commissioners, don't have to do anything, but please raise our rates over the next five years by $49.4 million so we can see if FPC's speculative projections for the next 27 years and the

assumed continuation of a fuel and capacity adjustment clause in the years 2014 through 2023 prove true."

Once a generation alternative is selected, there is no opportunity to second guess the decision. Projections may prove inaccurate, but there will be no opportunity to replace the selected alternative with one that was rejected. Similarly, once the capacity of the avoided unit is fully subscribed, there is no opportunity to decide that customers would have been better off if the avoided unit had actually been built instead of entering into purchased power agreements with cogenerators. FPC's contention that customers are better off with the buyout than they would have been had the avoided unit been built is, therefore, meaningless. [T.62-63] The avoided unit could only have existed if the PPA's had never been entered into. The buyout is an issue, however, only because the PPA's precluded construction of the avoided unit. The buyout can only be compared to continuation of the PPA; it cannot be meaningfully compared to an alternative that could not have occurred.

Moreover, this case is premised on the fact that FPC found out later that the PPA's were not economical alternatives because of unforeseen improvements in combined cycle technology. [T.81, 84] Had the avoided unit been built, FPC would be stuck with a generating resource which cannot compete with combined cycles. The PPA, which is based on the costs of the coal unit, places FPC in the same position: FPC will be worse off because of the OCL contract in a competitive environment. FPC's customers, however, may not be because they will only have to pay the market price in the future under competition. It is FPC that has benefitted from the fact that it did not construct the avoided coal unit. The PPA buyout allows FPC to become more

competitive, an option which would not have been available if the avoided coal unit had been built.

The onset of competition may not hold any threat for FPC. Article XX, the "reg out" provision of the PPA, provides as follows:

> 20.1 The Parties agree that the Company's [FPC's] payment obligations under this Agreement are expressly conditioned upon the mutual commitments set forth in this Agreement and upon the Company's being fully reimbursed for all payments to the QF through the Fuel and Purchased Power Costs Recovery Clause or other authorized rates and charges. Notwithstanding any other provision of this Agreement, should the Company at any time during the Term of this Agreement be denied the FPSC's or the FERC's authorization, or the authorization of any other regulatory bodies which in the future may have jurisdiction over the Company's rates and charges, to recover from its customers all payments required to be made to the QF under the terms of this Agreement, payments to the QF from the Company shall be reduced accordingly.
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> Appendix to FPC's petition, Negotiated Contract, page 33.

Although the Commission may be precluded from disallowing recovery in the future, FPC would apparently be released from any payment obligations under the PPA if the Commission lost jurisdiction altogether because of retail competition.

The proposal offered by FPC in this case is not the only one which would satisfy the terms of the contract amendment. True, the amendment is contingent upon the Commission allowing for recovery of the buyout costs through the cost recovery mechanisms, but it is not specifically contingent upon recovery being allowed in the years 1997-2001. If FPC were to fund the buyout and recover the costs (including the after-tax cost of capital) through the cost recovery mechanisms in the years 2014-2023, the terms of the contract amendment would be satisfied.

ISSUE 2: Are the intergenerational inequities among Florida Power Corporation's ratepayers, if any, associated with the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., reasonable?

OPC: No. FPC did not represent the 1991 OCL contract as containing intergenerational inequities, nor was it approved with that understanding by the Commission. The buyout cannot, therefore, mitigate nonexistent inequities. The buyout, however, will impose costs on today's customers so that either future customers or FPC will reap the benefits.

DISCUSSION

FPC and OCL should be foreclosed from addressing this issue. In its order denying FPC's petition, the Commission's decision with regards to intergenerational inequity was tied to the length of time customers would have to wait for net savings:

> The Amendment contradicts the objectives of the reverse auction bid solicitation and has negative effects on intergenerational equity due to the lengthy payback period. FPC's petition requests approval to recover $49.4 million from its current ratepayers over the next five years to receive a net benefit of $32.9 million. However, FPC's ratepayers will not see this benefit until the year 2019, or 22 years from today.
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> Order No. PSC-97-0086-FOF-EQ, at page 3.

FPC could not reach the issue whether the Commission had adequate standards for defining intergenerational inequity or whether the Commission appropriately applied its existing standard in this case without also contesting the Commission's conclusion that 22 years is too long to wait.[5] FPC originally announced an intent to contest this conclusion, stating at paragraph

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[5]How undefined could the concept of intergenerational inequity be if FPC "knows" it was created in the original PPA and that it would be mitigated by approval of the buy out? FPC, however, was not motivated to buy out the OCL contract because of perceived intergenerational inequities. Rather, changes in fuel prices and improvements in combined cycle technology made the PPA's high cost relative to current alternatives. [T.81, 84,94] FPC's PPA's cost about $50 per megawatt-hour, whereas current combined cycles are in the $30-$35 per megawatt-hour range. [T.82]

5c of its protest that "the contract will provide net benefits sooner than 22 years into the future." However, FPC abandoned the disputed issue by ignoring it in Mr. Schuster's prefiled testimony. Moreover, Mr. Schuster agreed on the record that net savings would not, in fact, materialize under the company's proposal before 2019. [T.106, 109] Since the matter is not in dispute, under the provisions of Section 120.80(13)(b), Florida Statutes (Supp. 1996), it is deemed stipulated.

Everyone, including FPC, expects retail competition to be on the scene well before 2014. If "intergenerational inequity" is defined as the disparate treatment afforded customer rates over time by overt action of the Commission, then the issue is probably irrelevant because no action taken by the Commission in this docket is likely to have any effect at all on customer rates in 2014 and later years. The issue becomes one of whether costs sought to be recovered are prudent costs. Should customers be required to pay $49.4 million over the next five years when such payments are unrelated to current costs of service and cannot have an effect, beneficial or otherwise, on future rates for themselves or another generation of customers, whether served by FPC or some other provider? If, however, "intergenerational inequity" includes the requirement to pay today to get nothing from FPC tomorrow, then clearly the reality of FPC's proposal is grounded on an inherent inequity because only FPC will receive something different as a result of the buyout, i.e., an enhanced ability to compete.

The issue of intergenerational fairness under traditional regulation is subsumed within statutory requirements. For example, the issue of prudence of costs implicitly considers the question: Prudent to whom, and when? Section 366.041(1) requires the Commission to consider "the cost of providing such service and the value of such service to the public." This also implicates issues of whether the value of service might be different to similar groups of customers

at different times. Section 366.06(1) requires the Commission to "consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers, and public acceptance of rate structures." Inquiry into public acceptance of rates necessarily implicates considerations of intergenerational inequities. Any reasonable reading of the statutory language indicates that, if traditional regulation is assumed to continue, current customers would have to pay solely to benefit future customers. The parameters of intergenerational inequity do not have to be defined with precision for the Commission to recognize that when net savings will not be realized for 22 years, the result is intergenerational inequity.

FPC's position that the buyout simply mitigates intergenerational inequities created by the PPA is without merit. In 1991, when FPC signed the PPA with OCL, the utility thought it was appropriate to do so and that the capacity and energy costs were fair and reasonable. [T.81] FPC was forthright, disclosing to the Commission how capacity and energy costs would be recovered from ratepayers, with capacity costs being lower in early years and higher in later years. [T.523] FPC apparently did not represent to the Commission that the company was asking to create intergenerational inequities. Nothing in the Commission order approving the PPA suggests the Commission approved the PPA based on any knowledge or assumption that the contract would create intergenerational inequities. [T.524] Customers would be paying the costs of the PPA at the time it was being used to serve them. [T.525-26] Surely, FPC is not suggesting that the mere fact that prudent costs are higher in one period than in another gives rise to intergenerational inequities.

The issue of intergenerational inequity arises under the buyout proposal, however, because FPC would require today's customers to pay higher rates to purchase a lower cost of electricity for tomorrow's customers. As Mr. Larkin noted, intergenerational inequities would be visited on today's customers because "[t]hey are taking the risk and receiving no benefit while in the original contract the customers at the beginning are taking the risk of nonperformance and receiving the benefit of lower cash payments for that risk." [T.236]

ISSUE 3: Will the proposed buy out of the OCL contract provide net benefits sooner than 22 years into the future?

OPC: No. This issue should be deemed stipulated pursuant to Section 120.80(13)(b), Florida Statutes (Supp. 1996), because FPC did not dispute the issue at hearing. Moreover, since the basis of the PAA is not in dispute, the Commission has no basis to retreat from its original denial of FPC's petition.

DISCUSSION

Mr. Schuster testified that the company's proposal, as reflected in Exhibit D to the petition will not show positive net savings before the year 2019. [T.102, 106] Mr. Schuster also testified that FPC's proposal, as modified in Exhibit 7 to Mr. Schuster's prefiled testimony, will not produce positive net savings for customers before 2019. [T.109]

FPC's petition was denied as a proposed agency action in Order No. PSC-97-0086-FOF-EQ, issued January 27, 1997, because the proposal could not produce net savings for customers before the year 2019. The Office of Public Counsel would submit that, although FPC identified this matter as an issue in dispute in its protest of the PAA (alleging in paragraph 5c: "The proposed buyout of the OCL contract will provide net benefits sooner than 22 years into the future"), the issue was not the subject of prefiled testimony nor disputed at the hearing. Indeed,

as noted above, FPC's witness, Mr. Schuster, conceded that the proposal as originally filed and as modified in his Exhibit 7 would not produce net savings before the year 2019. Therefore, under the provisions of Section 120.80(13)(b), Florida Statutes (Supp. 1996), the matter should be deemed stipulated.

ISSUE 4: Should the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd., be approved for cost recovery pursuant to Rule 25-17.0836, Florida Administrative Code?

OPC: No. FPC did not identify Rule 25-17.0836 in its petition according to Rule 25-22.036(7)(a)4, which requires that the petitioning party identify the rules and statutes which entitle the petitioner to relief.

ISSUE 5: If approved, how should Florida Power Corporation recover the expenses associated with the Amendment to the Negotiated Contract between Florida Power Corporation and Orlando Cogen Limited, Ltd.?

OPC: FPC should not be permitted to recover the buyout costs from its customers. FPC should, however, be permitted to recover the buyout costs through the fuel and capacity cost recovery mechanisms in the years 2014-2018 if the company funds the buyout.

ISSUE 6: Should this docket be closed?

OPC: Yes.

PROCEDURAL MATTERS

FPC did not establish its standing on the record of the hearing in this docket, so the Office of Public Counsel renews its motion to dismiss FPC's protest of the PAA. In its protest, FPC alleged its substantial interests were affected because its proposal would "provide net savings of over $400 million to Florida Power and its customers and will mitigate the exposure of Florida

Power and its customers to potentially strandable costs in the future." Florida Power Corporation's Petition on Proposed Agency Action, at 5. Public Counsel's motion to dismiss for lack of standing was denied in Order No. PSC-97-0779-POF-EQ, issued July 1, 1997. The stated reason for denying the motion to dismiss was that Public Counsel's argument was limited to allegations that FPC had not demonstrated economic harm.[6] The Commission concluded that the PAA order affected FPC's substantial interests by denying FPC the authority to obtain early termination of its contract. This basis for standing was not alleged by FPC, nor was it the subject of an evidentiary presentation at the hearing. Apparently, even FPC recognized that nothing in Chapter 120, Florida Statutes, the Administrative Procedure Act, made the agency's denial of a petition an independent basis for conferring standing on a protesting party.

Now that the hearing has concluded, it is evident that FPC has not demonstrated standing to protest the PAA on the record of this proceeding. FPC apparently retreated from its claims of lost savings and potential strandable costs at the hearing. Mr. Larkin testified that FPC would not be harmed from denial of its petition because it passes all costs through the cost recovery mechanisms. [T.240-41] In his prefiled rebuttal testimony, at page 495, Mr. Schuster is asked the following question:

> What is your reaction to Mr. Larkin's statement that Florida Power will suffer no harm if the Commission were to deny its petition?

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[6]The motion to dismiss was, in fact, addressing the adequacy of FPC's allegations which were limited to claims of economic harm. No obligation rests with the Office of Public Counsel to address elements of standing that FPC did not raise.

If Mr. Schuster could identify any harm FPC might suffer, one would expect to see it identified in response to this prefiled question. But Mr. Schuster does not identify any harm suffered by FPC. Instead, Mr. Schuster acknowledges that FPC will not be harmed:

> . . . It is Florida Power's customers, not the [sic] Florida Power, who will be directly harmed if the Company's petition is rejected and customers are denied the benefits which would result for the OCL contract buy out.

During cross-examination, Mr. Schuster was asked: "Would it be correct to state that in response to that question [quoted above] you do not identify any harm being suffered by Florida Power Corporation?" [T.529] He answered: "Yes." [T.529]

The only harm alleged on the record was that FPC's customers would be harmed if they were deprived of the "benefit" of the company's proposal. Such an allegation is inadequate to confer standing under Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), and there is no rule or statute which would confer standing on FPC to champion its customers' entitlement to purported benefits. On the narrow question of whether FPC has either pled or demonstrated standing to protest the PAA, it is clear that FPC has not.

Implicit in the staff recommendation on Public Counsel's motion to dismiss and the Commission's acceptance of that recommendation in its order, was a belief that an electric utility which had the authority to petition the Commission in the first place certainly had standing to protest a denial of its petition, whether the Commission could identify the source of that standing or not. The APA requires more. Standing is either based on well-founded allegations meeting the Agrico test or it must be based on rule or statute. Clearly, there was no demonstration of standing at the hearing to meet the Agrico standard. The Commission's Rule 25-22.029(4) requires that

FPC demonstrate that its substantial interests may or will be affected by the proposed action. It is not simply a question of whether standing can be conferred on FPC, but whether FPC has demonstrated standing. The record is lacking in this regard.

The only remaining basis for FPC's standing would be that the company is a specifically named party in the proceeding. The Commission's denial of the motion to dismiss must have implicitly adopted the reasoning that since the order was addressed specifically to FPC's petition, FPC must have standing, at least as a specifically named party. But a "party" pursuant to Section 120.52(12)(a) is not just a specifically named person; it is a specifically named person "whose substantial interests are being determined in the proceeding." FPC could not demonstrate in its protest of the PAA or during the hearing that its substantial interests were even being "affected," much less "determined."

FPC has not shown its substantial interests were either determined or affected by the PAA. The Commission's action neither helped nor harmed the company. Either way, under the original contract or the proposed amendment, FPC would be reimbursed by its customers for all its costs. No one was harmed by the PAA order, and the only persons who could be harmed by a contrary decision would be the customers whom FPC is asking to charge almost $10 million more per year in additional rates.

Respectfully submitted,

Jack Shreve
Public Counsel

John Roger Howe
Deputy Public Counsel

Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Tallahassee, FL 32399-1400
(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 961184-EQ

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF THE OFFICE OF PUBLIC COUNSEL has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 1st day of December, 1997.

James A. McGee, Esquire
Jeffery Froeschle, Esquire
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733-4042

Wm. Cochran Keating, IV, Esquire
Jorge Cruz-Bustillo, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building, Room 370
Tallahassee, Florida 32399-0850

Mr. Roger A. Yott
Manager, Power Sales Contracts
Air Products & Chemicals, Inc.
7201 Hamilton Boulevard
Allentown, PA 18195

Matthew M. Childs, Esquire
Jonathan E. Sjostrom, Esquire
Steel Hector & Davis, L.L.P.
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301-1804

John Roger Howe
Deputy Public Counsel