

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,)
)
 Appellant,)
) CASE NO. 94,665
vs.)
)
 FLORIDA PUBLIC SERVICE COMMISSION,)
)
 Agency/Appellee;)
)
 LAKE COGEN, LTD.)
)
 Intervenor/Appellee.)
_____)

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CITATIONS	ii
SYMBOLS AND DESIGNATIONS OF THE PARTIES	iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	11
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX	19

TABLE OF CITATIONS

PAGE NO.

CASES

<u>Citizens v. Public Service Commission,</u> 435 So. 2d 784 (Fla. 1983)	7,9
<u>City of Tallahassee v. Mann,</u> 411 So. 2d 162 (Fla. 1981)	7
<u>Crossroads v. Orange & Rockland Utilities, Inc.,</u> 159 F. 3rd 129 (3rd Cir. 1998)	6,7,9
<u>Crossroads Cogeneration Corporation v. Orange and Rockland Utilities, Inc.,</u> 969 F. Supp. 907 (D.C.N.J. 1997); 1997 U.S. Dist. LEXIS 9390	6,13
<u>Miller v. Booth,</u> 702 So. 2d 290 (Fla. 3rd DCA 1997)	11
<u>Orange & Rockland Util., Inc.-Petition for a Declara- tory Ruling That the Company and its Ratepayers are not Required to pay for Electricity Generated by a Gas Turbine-Owned by Crossroads Cogeneration Corp.,</u> 1996 N. Y. PUC LEXIS 15674 (New York PSC, Case No. 96-E-0728, Nov. 29, 1996)	5
<u>Pan American World Airways, Inc. v. Florida Public Service Commission,</u> 427 So. 2d 716 (Fla. 1983)	7
<u>Sheldon v. Powell,</u> 128 So. 2d 258 (Fla. 1930)	9,15
<u>Suntide Condominium Ass'n v. Division of Florida Land Sales, Condominiums and Mobile Homes, Dept. of Business Regulations,</u> 504 So. 2d 1434 (Fla. App. 1 Dist. 1987)	9,12

FLORIDA PUBLIC SERVICE COMMISSION ORDERS

Order 24734	5,14
Order No. PSC-95-0210-FOF-EQ	2,3,5,
.	PASSIM

Order No. PSC-97-1437-FOF-EQ	3,4,8, PASSIM
Order No. PSC-98-0450-FOF-EQ	4,8,11
Order No. PSC-98-1621-FOF-EQ	17

FLORIDA STATUTES

Section 120.565, Florida Statutes	9,15
Section 120.68.(12), Florida Statutes	7

FLORIDA ADMINISTRATIVE CODE

Rule 25-17.0832(2), Florida Administrative Code	1,2
Rule 25-17.0832(4), Florida Administrative Code	2
Rule 25-17.0832(5), Florida Administrative Code	2

ACRONYMS

PURPA - Public Utility Regulatory Policies Act of 1978, 16 U.S.C., §§823a, et seq.	2,9,12
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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission is referred to as the Commission, the Florida Commission or PSC. Appellant, Florida Power Corporation is referred to as FPC. Intervenor/Appellee, Lake Cogen, Ltd. is referred to as Lake.

Citations to the record are indicated by R____. Citations to the appendix to this brief are indicated by A____.

STATEMENT OF THE CASE AND FACTS

With the exception of the third sentence thereof, the Commission adopts appellant Florida Power Corporation's (FPC) Statement of the Case appearing at Initial Brief, p. 2. The Commission would substitute as the third sentence the following:

Pursuant to Rule 25-17.0832(2), the Commission approved the negotiated contract between FPC and Lake Cogen because, upon review of the terms of the contract, they could "reasonably be expected" at the time of approval to not exceed FPC's avoided costs, i.e., those costs the utility avoided by not building additional plant.

A. 5.

The Commission rejects FPC's Statement of the Facts, Initial Brief, p. 3-9, parts of which are inaccurate and, because premised on a void order, irrelevant. Instead, the Commission would substitute the following Statement of the Facts:

A. Background

On March 19, 1991, FPC presented to the Commission eight negotiated QF ["qualifying facility", i.e. cogeneration] contracts, including the Lake Cogen contract, to be approved for cost recovery of the stream of energy payments to be made thereunder. (R. 3) In the approval process, the Commission was required to determine that, pursuant to Rule 25-17.0832(2), it could "reasonably be expected" at the time of approval that the payment terms would not require FPC to pay Lake Cogen more than FPC would have expended in

construction and operation costs to generate the energy itself. On July 1, 1991, the Commission approved the contracts as meeting the requirements of Rule 25-17.0832(2). A. 5, p. 8. Section 9.1.2 of the Contract, dealing with energy payments, is one of several subjects of controversy concerning pricing in this negotiated contract which are currently being litigated by FPC and Lake in Circuit Court. A. 3, p. 3.

B. Contract Implementation

On July 18, 1994, approximately one year after commencement of payments for energy and capacity to Lake, FPC announced an interpretation of Section 9.1.2 of the Contract which would result, beginning in August 1994, in its paying less to Lake than Lake interpreted the contract to require. R. 6, 10.

C. The 1994 Pricing Docket (Order No. 0210 Denying the 1994 Petition)

On July 21, 1994, FPC filed a Petition for Declaratory Statement asking the Commission to declare that FPC's interpretation of Section 9.1.2 of the contract was consistent with the Commission's interpretation of Rule 25-17.0832(4).¹ The Commission, however, construed the request as seeking, not the Commission's interpretation of its rule, but an adjudication of FPC's contract dispute with Lake:

We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not ['really'] asking us to interpret the rule. It is asking

¹ Renumbered as Rule 25-17.0832(5).

us to decide that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. [e.s.]

A. 2, p. 8.

Citing a list of cases in which state utility regulatory commissions seeking to adjudicate post-approval disputes concerning negotiated cogeneration contracts had been preempted, the Commission dismissed the Petition. A. 2, p. 7, 9. The Commission also noted that it had declined to require standardized contract clauses in negotiated cogeneration contracts. A. 2, p. 8, 9. No appeal was taken of Order 0210.

D. The Lawsuit

Subsequent to the filing of FPC's 1994 Petition, Lake filed suit against FPC in Circuit Court alleging breach of contract based on the pricing controversy earlier described. In January 1996, the Fifth Judicial Circuit Court entered a Partial Summary Judgment for Lake Cogen, prompting settlement discussions between FPC and Lake Cogen. (R. 4) By December 1996, the parties reached a settlement and submitted the proposed agreement to the Commission for approval. (R. 4)

E. 1996 Petition for Approval of the Settlement Agreement

On November 14, 1997 the Commission issued proposed agency action (PAA) Order No. PSC-97-1437-FOF-EQ, declining to approve the settlement. There were two dissents. A. 3.

Though FPC submitted the settlement to the Commission for approval, FPC did not protest the proposed order in which the Commission declined the settlement. Instead, FPC elected to base a new petition for declaratory statement and this appeal of the Commission's denial of that petition on, in large part, the reasoning in that proposed order. R. 11-14. However, Lake did protest Order No. 1437 and, in Order No. PSC-98-0450-FOF-EQ, the Commission declared that Order No. 1437 was a nullity. A. 4.

When FPC's 1998 declaratory statement petition was argued before the Commission panel at the October 6, 1998 Agenda Conference, two commissioners that had dissented from the now void proposed Order 1437 and two commissioners that had voted for the reasoning in the nullified order were still on the panel. The "swing" vote was a new commissioner, Commissioner Jacobs. Therefore, the reasoning in void Order 1437 had never been adopted by a Commission majority in a final order when FPC argued in support of its 1998 petition, and that reasoning, at the October 6, 1998 agenda conference.

F. Present Controversy and the 1998 Petition

As noted above, after the Commission issued proposed Order 1437 declining to approve the settlement, and that order, when protested, had become a nullity, FPC elected to file a new Petition for Declaratory Statement on April 9, 1998. Like FPC's 1994 Petition, the subject matter was focused on ultimately determining how to calculate what was owed Lake by FPC for FPC's purchases of

Lake's energy. To the arguments forwarded in 1994 (and then rejected) that some interpretation other than the jurisdictionally forbidden one of post-approval interpretation of negotiated cogeneration contract terms was being requested, FPC now added additional points based on some more recent, albeit non-binding, authority.

However, the Commission majority, itself citing other recent authority, rejected -- just as it had in 1995 -- the claim that it could accede to FPC's request without interfering in the contract dispute between Lake and FPC in the Circuit Court. Moreover, the Commission majority pointed out that it was continuing its policy of Order 0210, pursuant to which settlements involving other parties in this same series of cogeneration contracts had been approved, suggesting thereby that the prior proposed disapproval of the Lake/FPC settlement was not only a legal nullity, but a transient policy anomaly as well. R. 403, l. 5-16; R. 434, l. 6-10.

G. Agenda Conference

The debate at the October 6, 1998 agenda conference centered around whether "explaining what the Commission approved" in Order 24734 approving the series of cogeneration contracts with FPC, of which the Lake contract was one, would -- or would not -- be tantamount to adjudicating the contract dispute concerning pricing which all parties agreed was within the jurisdiction of the courts.

FPC and the Commission staff, citing the NYPSC's Crossroads declaratory statement,² argued that the Commission would not be interfering in the contract dispute if it explained what it approved with respect to those same disputed pricing issues. However, Commissioner Clark cited the Federal District Court Crossroads opinion which concluded that

. . . plaintiff [Crossroads Cogeneration Corp.] is collaterally estopped from relitigating the contract issues raised in the [declaratory statement] proceedings before the NYPSC. Plaintiff had a full and fair opportunity to litigate these issues, which issues were actually litigated and their outcome decisively determined by the NYPSC. Accordingly, the Court determines that Plaintiff's [contract based] Causes of Action must be dismissed for the reason that under the closely-related doctrines of res judicata and collateral estoppel, plaintiff is barred from bringing these claims anew.

Crossroads Cogeneration Corporation v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907, 920 (D.C.N.Y. 1997); 1997 U.S. Dist. LEXIS 9390. Since the Federal District Court concluded that when the NYPSC "explained what it approved" it had adjudicated the contract dispute issues as well, the Florida Commission majority understandably viewed skeptically the claim that explaining what was approved would not insert the Commission into Lake and FPC's pending contract dispute before the Court.

² Orange & Rockland Util., Inc.-Petition for a Declaratory Ruling That the Company and its Ratepayers are not Required to pay for Electricity Generated by a Gas Turbine-Owned by Crossroads Cogeneration Corp., 1996 N. Y. PUC LEXIS 15674 (New York PSC, Case No. 96-E-0728, Nov. 29, 1996).

Although Crossroads' contract claims were later reinstated by the 3rd Circuit in Crossroads v. Orange & Rockland Utilities, Inc., 159 F. 3d 129 (3rd Cir. 1998), that opinion was filed November 27, 1998, more than a month and a half after the Commission's October 6, 1998 vote. While the Commission's order did not issue until December 4, 1998, no notice of supplemental authority or motion for reconsideration was filed before or after that date based on the 3rd Circuit's partial reversal.³

STANDARD OF REVIEW

Under Section 120.68(12), Florida Statutes, the Court may not now substitute its judgment for the Commission's own action taken within the statutory range of discretion. Citizens v. Public Service Commission, 435 So. 2d 784 (Fla. 1983).

A Public Service Commission order is clothed with the presumption of validity, and the burden is on the challenging party to overcome that presumption by showing a departure from the essential requirements of law. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983).

³ The 3rd Circuit differentiated NYPSC's explanation of what it had approved from adjudicating the contract dispute as expressing NYPSC's intent as opposed to the intent of the parties to the contract. However, the 3rd Circuit acknowledged that NYPSC's declaration "...can be, and in most circumstances would properly be, viewed as a declaration on the same issue presented to the district court by Crossroads' contract claims." [e.s.] 159 F. 3d at p. 140.

SUMMARY OF ARGUMENT

Appellant claims that "a substantial change of circumstances relating to the subject matter with which the ruling was concerned" precludes application of principles of administrative finality in the Commission's disposition of FPC's petition. However, the "changed circumstances" relied on by FPC are conclusions contained in Proposed Agency Action (PAA) Order No. PSC-1437-FOF-EQ (Lake Order). The Lake Order was protested and declared a nullity by the Commission in Order No. PSC-98-0450-FOF-EQ. The reasoning in the Lake Order was never adopted in a final order. Therefore, as a matter of law, the Commission has not determined that its prior determination of jurisdiction in this matter in Order 0210 "was probably too restrictive". Nor, as a matter of law, has the Commission itself recognized that "the law governing the Commission's jurisdiction has been clarified since the Commission denied Florida Power's 1994 Petition on the basis that it lacked jurisdiction".

The Commission viewed authority presented by FPC to be ambiguous, rather than persuasive, on the issue of whether the Commission's explanation of what it approved would be equivalent to adjudicating the contract dispute between FPC and Lake now before the Circuit Court. While FPC cited the NYPS Crossroads declaratory statement to the effect that an explanation by the Commission as to what it had approved would be a different issue

than adjudicating the contract dispute, the Commission majority cited the Federal District Court Crossroads opinion holding that the two issues were the same. That was the status of the federal court Crossroads case on October 6, 1998 when the Commission voted to dismiss FPC's Petition.

Besides adhering to the requirements of PURPA and the cases cited in Order 0210, the Commission's refusal to become involved in adjudicating FPC's post-approval contract dispute with Lake is in accord with the holding in Suntide Condominium Ass'n v. DBR. Therein, the First District Court of Appeal stated that an agency should decline to issue a declaratory statement when litigation is pending involving the same issue that is the subject matter of the petition.

Under the applicable standard of review, the court may not now substitute its judgment for the Commission's own action taken within the statutory range of discretion. Citizens v. Public Service Commission. Pursuant to Section 120.565, the Commission exercises the following discretion: "the agency shall issue a declaratory statement or deny the petition...." [e.s.] See also, Sheldon v. Powell (Discretion of tribunal should at all times be open to render, or to decline to render, declaratory decree).

FPC's internally inconsistent and absurd position is that the Commission enjoys more than sufficient flexibility to depart from its prior policy but insufficient flexibility to adhere to that policy. What is relevant to the standard of review is not whether

the Commission could have done what FPC seeks, but whether the Commission either erred or abused its discretion in declining to do so. FPC's arguments do not even address that issue, let alone demonstrate any error or abuse of discretion in the Commission's Order.

In applying the appellate standard of review that "the Court will not now substitute its judgment for the Commission's own action taken within the statutory range of discretion", the Court may recognize the Commission's attempt to exercise a similar self-discipline with respect to the Circuit Court's acknowledged jurisdiction over the contract dispute between FPC and Lake.

It was well within the Commission's statutory discretion to rely on its own precedent rather than depart from it in light of the non-binding authorities forwarded by FPC. Moreover, FPC's attempt here to force that change of policy on the Commission must fail when supported by nothing stronger than a tentative proposal which vanished when protested and was declared a nullity.

ARGUMENT

FPC, citing a per curiam affirmance of a zoning board decision, Miller v. Booth, 702 So. 2d 290, 291 (Fla. 3rd DCA 1997), states that "a substantial change of circumstances relating to the subject matter with which the ruling was concerned" precludes the application of principles of administrative finality. However, no such change was found in Miller and appellant fails to identify any here.

Review of appellant's argument reveals that the supposed "change of circumstances" is limited to the reasoning in a proposed order which was protested and then declared a nullity. A. 3. To be precise, the reasoning in proposed Order No. PSC-97-1437-FOF-EQ was never adopted in a final order. See, Order No. PSC-98-0450-FOF-EQ. A. 4. Therefore, as a matter of law, the Commission has not determined that its prior determination of jurisdiction in this matter in Order 0210 "was probably too restrictive". Nor, as a matter of law, has the Commission itself recognized that "the law governing the Commission's jurisdiction has been clarified since the Commission denied Florida Power's 1994 Petition on the basis that it lacked jurisdiction".

A review of the transcript of the agenda conference in which FPC's Petition was considered, R. 282-443, demonstrates that the Commission was presented with a number of options, each of which had some merit and some supportive legal rationale. Therefore, the

choice was more difficult than would have been the case if one side of the debate had been conclusively meritorious and the other side wholly lacking in merit.

Though the Commission panel has been carefully non-committal as to the merits of the contract dispute between Lake and FPC, the record demonstrates that the Commission staff preferred FPC's interpretation. R. 353-6. Therefore, staff supported FPC's argument that the Commission should exercise "Crossroads" jurisdiction to explain what it approved and to do so consistent with FPC's contract interpretation. As the transcript indicates, the Commission majority rejected that suggestion, not because those arguments were perceived as totally without merit, but because the Commission deemed their merits to be insufficient to overcome their defects. Those defects included policy inconsistency with what the Commission had announced to the cogeneration industry in its 1995 disposition of FPC's prior petition and arguable inconsistency with the Commission's successful policy of non-involvement with post-approval negotiated cogeneration contract disputes. R. 350-352; 426. Indeed, that non-involvement policy was deemed to be required by PURPA. A. 2, p. 8. Moreover, the Commission's policy of not issuing advisory opinions to the Court was perceived to be at risk. R. 439. See, Suntide Condominium Ass'n v. Division of Florida Land Sales, Condominiums and Mobile Homes, Dept. of Business Regulations, 504 So. 2d 1434 (Fla. App. 1 Dist. 1987).

The Commission not only saw the list of major detriments⁴ in what was proposed by FPC to be much greater than the claimed benefits, but evaluated the authority cited in support of what was proposed to be both non-binding and ambiguous, rather than persuasive. Specifically, while FPC and the staff could cite the NYPSC's declaratory statement in Crossroads as demonstrating that explaining what was approved was "a different issue" from adjudicating a contract dispute about the pricing term in the Lake/FPC contract, the Commission majority, as of the October 6, 1998 decision date, could -- and did -- cite the Federal District Court's decision in Crossroads holding that the contract issues the cogenerator sought to litigate in federal court were the same issues which the NYPSC had decided in the Crossroads declaratory statement.⁵ The majority had, therefore, a reasonable basis to view skeptically the claim that exercising Crossroads jurisdiction would not amount to contract adjudication.

While FPC complains of being "forever caught in between" the Commission's proposed rejection of the FPC/Lake settlement and the Commission's posture of non-involvement in the contract dispute itself, FPC's statement is a gross exaggeration. In this case, "forever" does not accurately describe the brief period of time

⁴ The full extent of those detriments is set out in more detail in the Commission's Answer Brief in the companion appeal, Case No. 94,664, which is incorporated herein by reference.

⁵ Crossroads Cogeneration Corporation v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907, 920 (D.C.N.Y. 1997)

between the appearance of the Commission's proposed agency action order (and its nullification) and the publication of its Order in this case. That December 4, 1998 Order clearly establishes the continuity of Commission policy with Order 0210. R. 447-449. Since pursuant to that policy, numerous settlements were approved involving the line of cogeneration contracts approved in Order 24734 (of which the Lake/FPC contract is one), the signal has been given of receptivity to the settlement of this litigation as well. R. 403; 434.

Certainly, parties should be able to rely on a reasonable consistency in the Commission's pronouncements. Here, however, FPC demands more than the Commission's consistency with policy and law adopted in its final orders. FPC demands the Commission's consistency with policy and law formulations that were merely proposed and then nullified, even if that consistency would itself be inconsistent with the Commission's prior final order pronouncements.

In basing its appeal on the Commission's mixed signal in void Order 1437, FPC has failed to meet the standard of appellate review. No abuse of discretion has been demonstrated in the challenged order in this case nor has the Commission's decision been demonstrated to be clearly erroneous.

The facts presented demonstrate that the administrative process is not perfect and that inconvenience can result in the processing of complex and close legal and policy issues. However,

as the standard of review indicates, the Court may not now substitute its judgment for the Commission's own action taken within the statutory range of discretion.⁶ Accordingly, what was a close debate below, does not translate, in the Commission's view, into a close issue on appeal.

Below, the Commission exercised its discretion to reject a policy change favored by FPC and chose to remain with its prior stated policy. Here, FPC's internally inconsistent and absurd position is that the Commission enjoys more than sufficient flexibility to depart from its prior policy but insufficient flexibility to adhere to that policy. By utilizing the weak reed of a null and void Commission proposed order, FPC seeks to "wag the dog" by having the Court itself exercise the Commission's discretion on FPC's behalf. Appellant has, however, identified no factual or legal basis whatsoever on the basis of which that result should obtain. Indeed, in applying the appellate standard of review that "the Court will not now substitute its judgment for the Commission's own action taken within the statutory range of discretion", the Court may recognize the Commission's attempt to exercise a similar self-discipline with respect to the Circuit

⁶ The Commission exercises the following discretion pursuant to Section 120.565: "the agency shall issue a declaratory statement or deny the petition...." [e.s.] See, Sheldon v. Powell, 128 So. 2d 258 (Fla. 1930) (Discretion of tribunal should at all times be open to render, or to decline to render, declaratory decree).

Court's acknowledged jurisdiction over the contract dispute between FPC and Lake Cogen.

It was well within the Commission's statutory discretion to rely upon its own precedent rather than depart from it in light of the non-binding authorities forwarded by FPC. Moreover, FPC's attempt here to force that change of policy on the Commission must fail when supported by nothing stronger than a tentative proposal which vanished when protested and was declared a nullity.

CONCLUSION

Appellant has identified neither error nor an abuse of discretion in Order No. PSC-98-1621-FOF-EQ. Wherefore, the Florida Public Service Commission respectfully requests that the Court affirm the Commission's Order.

Respectfully submitted,

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Dated: June 7, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 7th day of June 1999, to the following:

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APPENDIX

- APPENDIX 1 - ORDER DENYING FLORIDA POWER CORPORATION'S PETITION FOR DECLARATORY STATEMENT - ORDER NO. PSC-98-1621-FOF-EQ
- APPENDIX 2 - ORDER GRANTING MOTIONS TO DISMISS - ORDER NO. PSC-95-0210-FOF-EQ
- APPENDIX 3 - NOTICE OF PROPOSED AGENCY ACTION ORDER DENYING PETITION TO APPROVE SETTLEMENT AGREEMENT - ORDER NO. PSC-97-1437-FOF-EQ
- APPENDIX 4 - ORDER DISMISSING PROCEEDINGS AND FINDING ORDER NO. PSC-97-1437-FOF-EQ TO BE A NULLITY - PSC-98-0450-FOF-EQ
- APPENDIX 5 - NOTICE OF PROPOSED AGENCY ACTION ORDER APPROVING FIRM CAPACITY AND ENERGY CONTRACTS - ORDER NO. 24734