

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA INDUSTRIAL POWER)
USERS GROUP,)
)
 Appellant,)
)
v.)
)
LILA A. JABER, et al.,)
)
 Appellees.)
_____)

CASE NO. SC02-187

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS

Appellant, Florida Industrial Power Users Group, will be referred to in this brief as “FIPUG”. Appellee, the Florida Public Service Commission, will be referred to as “the Commission”. Appellee, Tampa Electric Company, will be referred to as “TECO”. TECO’s affiliate company Hardee Power Partners (HPP) and its predecessor in interest, TECO Power Services (TPS), will be referred to as “Hardee Power”. The Federal Energy Regulatory Commission is referred to as “FERC”.

References to the record on appeal are designated (R. __/__) listing the volume and page number. References to the hearing transcript are designated (Tr. __) References to hearing exhibits are designated (Ex. __). Appellant’s initial brief is cited as (I.B. at __). References to the appendix of Appellant’s initial brief are designated (I.B. App. ____).

Order No. PSC-01-2516-FOF-EI, issued December 26, 2001, the order on review, will be referred to as the “Final Order.”

STATEMENT OF THE CASE AND FACTS

FIPUG's Statement of the Case and Facts is argumentative and contains unsupported assertions and inaccurate characterizations of the evidence and the Commission's decision.

For example, FIPUG's statements on pages 5, 6 and 7, insinuate that there was no detailed evidence of TECO's affiliate transactions or other wholesale transactions. That is wrong. Detailed evidence, including hourly data about TECO's wholesale transactions with its affiliate Hardee Power Partners (HPP) and with non-affiliates, is in the record. (Ex. 4, pages 183 - 355; Ex. 5)¹ The information was furnished to FIPUG, once FIPUG signed the required agreement not to disclose to certain of its members information that TECO asserted was confidential. (Tr. 31, 278; See, e.g., R. 296) In addition, voluminous discovery was provided, including hourly data and data covering several years. (Tr. 277)

To avoid burdening the Court with duplicative statements, the Commission adopts the Statement of the Case and Facts presented in TECO's Answer Brief.

¹Exhibit 4 is the redacted version of the answers to interrogatories. The confidential portions of the documents that were redacted from Exhibit 4 are contained in Exhibit 5 of the record. (Tr. 126)

SUMMARY OF THE ARGUMENT

This is an appeal of a Commission order approving fuel adjustment and capacity cost recovery factors for TECO and other investor-owned electric utilities to be applied for the period of January through December, 2001, and subject to final true-up in the continuing fuel cost recovery proceedings. FIPUG appeals the part of the Final Order denying its request for the Commission to conduct a separate, further investigation of TECO's affiliate transactions and its purchase of power for its wholesale customers.

The Commission's decision was based on competent and substantial evidence of record and FIPUG does not assert as a point in this appeal that the decision is unsupported by such evidence.

The Commission properly placed the burden of proof on TECO to establish that its decisions concerning wholesale energy purchases and sales were reasonable. The Commission did not shift the burden of proof to FIPUG. FIPUG simply failed to provide any support for its speculation that TECO was taking advantage of its affiliate relationships to the detriment of its retail customers, and that further investigation was warranted prior to approving the cost recovery factors.

The Commission concluded that the weight of the evidence established that TECO's decisions concerning its wholesale purchases from and sales to Hardee Power were reasonable. The Commission's decision not to conduct a further

investigation separate from the continuing docket was entirely within its discretion and was not error or an abuse of its discretion.

FIPUG's claim that the Commission's denial of its request for a separate investigation was based on mistakes of law is entirely without merit. The Commission did not base its decision on the fact that the agreements between TECO and an affiliate were FERC-approved, nor did it rely on the fact that one of the contracts will soon expire. FIPUG has simply seized upon statements of background information in the Commission's order to force an argument where there is none.

FIPUG never raised the issue that TECO might not be in compliance with the terms of its contract governing the sale of capacity and energy from its Big Bend Unit 4 (BB-4) plant until this appeal. FIPUG's claim is pure speculation, unsupported by anything in the record. FIPUG waived the issue below and should be foreclosed from raising it now.

If FIPUG believed the Commission had overlooked a point of law or fact in making its decision, FIPUG should have filed a motion for reconsideration pursuant to the Commission's rule authorizing such a motion. All of the issues FIPUG raises in this appeal could have been easily resolved if FIPUG had asked the Commission to reconsider its decision.

FIPUG's arguments lack both substance and record support. The court should affirm the Commission's decision.

ARGUMENT

I. STANDARD OF REVIEW

Orders of the Commission come to the court “clothed with a presumption of validity.” BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). The burden of overcoming the presumption is on the party challenging the Commission’s order, and it must show that there has been a departure from the essential requirements of the law. Id. at 597. The Court will not reweigh or reevaluate the evidence presented, but will examine the record only to determine whether competent, substantial evidence supports the Commission’s findings and whether the decision comports with the essential requirements of law. Bricker v. Deason, 655 So. 2d 1110 (Fla. 1995).

FIPUG appeals the Commission’s denial of its request for the Commission to conduct a further investigation of TECO’s fuel transactions, separate from the continuing fuel cost recovery proceedings. On appeal, FIPUG asks the Court to remand this case to the Commission and instruct it to investigate TECO’s affiliate wholesale power purchase and sales transactions. (I.B. 43) The Commission’s decision not to conduct a further investigation was an exercise completely within its discretion, similar to denying a continuance of a hearing. The Court should not substitute its judgment for that of the Commission on an issue of discretion. Absent a clear showing by the appellant that the Commission has abused its discretion, the

Court must affirm the decision. Panda Energy International v. Jacobs, 27 Fla. L. Weekly S154 (Fla. Feb. 21, 2002); Mercer V. Raine, 443 So. 2d 944 (Fla. 1983).

II. THE COMMISSION PROPERLY CARRIED OUT ITS RESPONSIBILITIES UNDER CHAPTER 366, FLORIDA STATUTES, AND DID NOT ERR IN DENYING FIPUG’S REQUEST FOR A FURTHER INVESTIGATION SEPARATE FROM THE FUEL COST RECOVERY PROCEEDING.

A. The Commission agrees that its statutory responsibility is to set fair, just and reasonable rates and to ensure that a utility’s ratepayers do not subsidize nonutility activities.

FIPUG’s first point is a recitation of the various provisions of law describing the Commission’s authority and responsibility. FIPUG includes a quotation from one of the Commission’s own orders in an investigation of fuel oil overcharges, which serves to demonstrate that FIPUG and the Commission have no disagreement about the nature of the Commission’s duty in the fuel cost recovery proceedings. In the case below, the Commission properly carried out its responsibility. FIPUG fails to show otherwise.

B. The Commission agrees that only reasonable and prudent expenses related to retail service may be recovered from retail customers.

The Commission agrees the law is well-established that a utility may only recover from its ratepayers expenses that are reasonable, prudent and necessary in

providing service. As FIPUG relates, the Commission has a long history of reviewing utilities' expenses that are to be recovered from its ratepayers, and, as it must, disallowing those that it finds are not prudent and reasonable. See, e.g., Gulf Power Company v. Florida Public Service Comm'n., 487 So. 2d 1036 (Fla. 1986) (Company required to pay \$2 million refund to its ratepayers after Commission found that company's managerial imprudence caused it to pay excessive fuel costs); Florida Power Corp. v. Cresse, 413 So. 2d 1187 (Fla. 1982)(Company's excess fuel costs disallowed on basis of mismanagement). The Commission did not fail to do so in this case.

C. The Commission correctly determined that a further investigation was not necessary to appropriately allocate the costs between TECO's wholesale and retail jurisdictions.

1. The Commission did not conclude that FERC's approval of the TECO/Hardee Power contract barred it from taking any action.

FIPUG's argument on this point rests upon the premise that the Commission reached a certain legal conclusion when in fact, it did not. The Commission did not conclude that because FERC had approved a contract between TECO and Hardee Power it was precluded from evaluating the reasonableness of costs passed through to retail customers as a result of transactions under the contract. The statement by Commission staff in its recommendation and by the Commission in its Final Order that

the contract “is FERC-approved and cost-based” was a point of background information. The significance of the fact that the contract is cost-based was explained by FERC in its order approving the agreements:

[W]here cost-based (as opposed to market-based) rates are presented and there is no evidence of undue preference and no complaint of preference, we traditionally have not pursued the matter further. That is the case here. Applicants have provided adequate cost data to justify both the affiliate upstream and the downstream transactions. Because all of the transactions are cost-justified, it would be difficult for TECO Energy to divert profits from Tampa Electric’s customers to its shareholders, thereby eliminating the principal reason to sell BB4 power at too low a price. This regulatory control of profits ensures that ratepayers are treated fairly and that the regions generation resources are allocated as efficiently as if the affiliate, Power Services, were removed from the transactions.

TECO Power Services Corp. and Tampa Electric Co., 53 F.E.R.C. P.61,202, 61,811

(I.B. App. 61) In the Final Order on appeal, the Commission went on to state that the original contract was appropriately compared to other available capacity and energy options and that the contract amendment compared favorably to other available options in the wholesale market. (R. 428)

The contract at issue provides for Hardee Power to sell capacity and energy to TECO at cost-based rates during TECO’s peak use periods. 53 F.E.R.C. P61202 (Nov. 1990). (I.B. App. 61) The contract was dated July 27, 1989, and was amended in 1999. The contract was reviewed and approved by the Commission as one of

several contracts approved in the 1989 Seminole Cooperative power plant need determination for the Hardee Power Station. In re: Petition of Seminole Electric Cooperative, 89 F.P.S.C. 12:262 (1989). (I.B. App. 72) Another of the contracts provided for the sale of capacity and energy by TECO from its Big Bend Unit 4 plant. The Commission's approval in 1989 was based on the economics of the contracts as a package. Id. (I.B. App. 75-76) The Commission found in that proceeding that the agreements would result in savings to TECO's ratepayers of \$90 million over the lives of the contracts and savings of \$57 million to Seminole Electric Cooperative's ratepayers. Id. (I.B. App. 76)

The Commission made its approval of the need determination for Hardee Power Station contingent on FERC's approval of the particular terms and conditions of the power purchase and sales agreements, and specifically provided in its order that any changes to the terms by FERC or otherwise would have to be brought back for the Commission's consideration. Id. (I.B. App. 75-76) The amendment to the 1989 contract was approved for cost recovery purposes in the Commission's 1999 fuel adjustment proceeding. In addition, in its order approving the contract amendment for cost recovery, the Commission provided that any subsequent discovery of information suggesting that costs were not prudently incurred would be considered at a future fuel adjustment hearing. In re: Fuel and purchased Power Cost Recovery Clause, 99 F.P.S.C. 12:438 (1999).

FIPUG's suggestion that the Commission should, in essence, reevaluate its approval of the terms of that contract for cost recovery purposes overlooks the law governing a determination of prudence. The prudence of a decision to enter a contract must be determined in light of the facts and circumstances existing at the time a contract is entered, just as the prudence of TECO's wholesale transactions today must be determined in light of the market conditions and other factors that exist at the time they are made. Gulf Power v. Florida Public Service Comm'n., 487 So. 2d 1036 (Fla. 1986); Florida Power Corp. v. Cresce, 413 So. 2d 1187 (Fla. 1982). TECO's ongoing purchases and sales transactions under the contracts are properly reviewed in the continuing fuel and purchased power cost recovery proceeding and through audits. The Commission did not neglect to do that here.

Nowhere does the Commission conclude that it cannot investigate TECO's affiliate transactions under the contract and ensure that costs are properly allocated between TECO's wholesale and retail jurisdictions. Nor does the Commission conclude that it cannot evaluate the reasonableness of costs passed through to retail customers, for the reason of FERC approval or any other reason. FIPUG itself acknowledges that the Commission has exercised such authority. (I.B. 27, 29) The Commission fully recognizes its duty and has even adopted a rule on the subject. Fla. Admin. Code R. 25-6.1351, "Cost Allocation and Affiliate Transactions."

The issue presented with regard to FIPUG's request in the case below, however, was not whether the Commission could investigate the allocation of costs; it was whether, having investigated, a further, separate investigation was warranted. The Commission acted entirely within its discretion to decide that it was not.

2. The Commission properly considered TECO's allocation of Big Bend Unit 4 power between retail and wholesale customers.

Although lengthy and replete with a one-sided presentation of historical information, FIPUG's only complaint in this point appears to be that TECO did not prove below that it has not been breaching its contract. FIPUG asserts that under the 1989 agreements for TECO to sell capacity and energy to Hardee Power, TECO is limited in the amount of power it may sell to Hardee from its Big Bend Unit 4 plant, and it speculates that TECO might not be observing the limit.

FIPUG never raised the issue of whether TECO's retail customers had access to at least 60 percent of the Big Bend Unit 4 capacity until it filed its brief in this appeal. A review of the record evidence does not show any testimony by FIPUG's witnesses that can fairly be said to address this issue, nor are there any questions by FIPUG's counsel to TECO's witnesses on the subject. FIPUG should be foreclosed from raising it now. This is a basic principle of fairness that encourages judicial

economy and prevents abuse of the appellate process. Castor v. State, 365 So. 2d 701 (Fla. 1978).

The March 16, 2001, Order Establishing Procedure explicitly provides that “[a]ny issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown.” (R. 61) Even if the matter could be said to fall generally within the ambit of one of the stated issues for hearing, it would be unreasonable for TECO to have to prove that it was not out of compliance with a contract when there had been no claim of a breach throughout the proceeding below.

Under this point of its argument, FIPUG refers to an exhibit of TECO witness Jordan regarding purchased capacity, and speculates that a \$35.3 million charge is for Hardee Power contract purchases. (I.B. 37) It is unclear what relevance FIPUG’s statement about TECO’s purchases has to do with FIPUG’s claim regarding TECO’s sale to Hardee Power of Big Bend Unit 4 capacity and energy, other than to make it appear that TECO’s charges greatly exceed what FERC approved in 1990, and that TECO provided no justification for its charges. Nevertheless, FIPUG misstates the record. The dollar amount in the exhibit FIPUG points to include more purchases than just the power purchases under the Hardee Power agreement, it is for projected charges, and those charges are subject to a later “true-up”. Further, TECO did provide justification for the charges. Ms. Jordan, who is TECO’s Director of Rates

and Planning, and TECO Witness Mr. Brown, TECO's Director of Wholesale Marketing and Sales, testified about the bases for these projected power purchase costs. (Tr. 54-55, 58 - 61, 97)

The only evidence in the record below is that TECO is in compliance with its contract for the sale of Big Bend Unit 4 capacity and energy. (Tr. 268) There is nothing in the record showing that FIPUG questioned TECO's compliance with the contract provisions or asked the Commission to further investigate it, much less that the Commission "refused" to look into the matter. Having failed to raise the issue below, FIPUG should not be heard to raise it on appeal. Moreover, if the issue is truly of concern to FIPUG, it has every opportunity to raise that issue in the Commission's ongoing fuel cost recovery proceeding.

3. The Commission did not shift the burden of proof to FIPUG. FIPUG simply failed to present evidence to overcome the competent and substantial evidence that TECO's charges were just and reasonable.

There is no dispute that the burden of proof in the Commission's fuel cost recovery proceedings is always on the utilities seeking to demonstrate the reasonableness of their fuel costs. Conversely, it is the Commission's regulatory duty to evaluate the evidence presented by a utility in support of its fuel costs, and to allow it to pass on to retail ratepayers those costs that are reasonably and prudently incurred.

Florida Power Corp. v. Cresse, 413 So. 2d 1187 (Fla. 1982).

Contrary to FIPUG's assertion, the Commission did not "presume" that TECO's costs were reasonable in its 2001 fuel adjustment proceeding; the burden was clearly on TECO to demonstrate their reasonableness. Competent and substantial evidence in the record supports the reasonableness of the costs.

TECO presented exhibits and testimony to support its request. (Tr. 8 - 16, 33 - 125, 235 - 311; Ex. 1-3, 11) In addition, there was extensive discovery concerning TECO's request by Commission staff and FIPUG. (Tr. 277 - 278, 297) Staff's Composite Exhibits 4 and 5 include responses submitted four months before the hearing to interrogatories that ask whether interruptible customers' (such as FIPUG's members) service was interrupted in order for TECO to make wholesale sales. The exhibits also show the time periods when FIPUG members were interrupted or "buy-through" purchases were made by TECO at their request. (TECO's interruptible customers may authorize TECO to "buy-through" power for them instead of having their service interrupted.) Interrogatory No. 6 explores "buy-through" activity during interruptions and compares purchases and sales during that period. It further identifies whether TECO's affiliate Hardee Power was involved in the transaction. (Ex. 4, pages 192-204)

Also in the exhibit are sales and purchase data for all transactions during July, 2000, a month in which TECO's load is high, capacity is tight, and thus interruptions to customers such as FIPUG's members who buy interruptible service are most likely.

(Ex. 4, pages 206 - 355) These data include the details of TECO's dealings with its affiliate and other sellers of power, the identity of the party it is purchasing from, whether the prices it pays to its affiliate are higher than those it pays to non-affiliate suppliers, and whether the prices at which it sells to its affiliates are lower than the price paid by non-affiliate buyers. The data also show whether these transactions are short-term or long-term and whether the transactions were firm or non-firm.

FIPUG had ample opportunity during the hearing to cross-examine TECO's witnesses. FIPUG simply failed to put forth a credible challenge to the substantial evidence supporting the reasonableness of TECO's transactions.

The Commission stated in its Final Order that the evidence in the record showed that TECO's decisions concerning its wholesale transactions with Hardee Power were reasonable during the period in question. (R. 428) The Commission's further finding that no evidence was presented to indicate TECO is abusing the Hardee Power contract or inappropriately allocating the costs reflects the Commission's weighing of the evidence. It does not indicate a shifting of the burden of proof to FIPUG. FIPUG simply did not present evidence to overcome the weight of the evidence of record demonstrating that TECO's expenses were reasonable.

FIPUG further criticizes the Commission's Final Order for not citing evidence to justify TECO's actions or evidence that contradicts FIPUG's claim. In Occidental Chemical Company v. Mayo, 351 So. 2d 336 (Fla. 1977), receded from on other

grounds in Citizens of the State of Fla. v. Beard, 613 So. 2d 403 (Fla. 1992), this Court articulated the standard by which it will review the adequacy of the Commission's orders. In that case the appellants challenged the sufficiency of the Commission's statement of facts in its order. The Court stated that "the Commission was not required to include in its order a summary of the testimony it heard or a recitation of every evidentiary fact on which it ruled." Id. at 341. The Court found the Commission's order adequate where it contained "a succinct and sufficient statement of the ultimate facts upon which the Commission relied, including commentary expressly directed to Occidental's contentions." Id.

The relevant commentary in the Commission's Final Order in this case is not limited to the discussion under the heading "TECO's Wholesale Transactions with Hardee Power Partners." In addition, the Final Order states:

The record indicates that no buy-through power was purchased by TECO from TECO affiliates. Therefore, there is no reason to believe that TECO has an incentive to purchase unreasonably high priced buy-through power.

Final Order p. 11-12. (R. 427-428). It is difficult to see what more the Commission could say about FIPUG's contentions regarding TECO's transactions with Hardee Power, given that the evidence simply did not support FIPUG's speculation.

The Commission's order is sufficient in form and content. There is no basis put forth by FIPUG in this argument that would justify a remand of the order for further proceedings.

4. The Commission did not rely upon a contract termination date as the basis for approving TECO's request.

In a last effort to force an argument where there is none, FIPUG asserts that the Commission relied on the expiration date of a contract to approve TECO's fuel adjustment charges. Once again, the Commission's statement in its order was merely a point of information and not a basis for its decision. That information addresses the concern that to the extent that conditions have changed and TECO may currently need more of the capacity of Big Bend Unit 4 to serve its own retail load than was estimated at the time the contract was signed, that capacity will be available when the 1989 contract terminates in December, 2002. In addition, it addresses the concern that the contract is for a sale of capacity and energy that is a separated sale, but that is not charged based on system average fuel costs. Commissioner Deason questioned this during the hearing. (Tr. 303-304) FIPUG had also complained that the sale under this contract was made at unit-based cost rather than at system average cost. Charges based on system average fuel costs is what the Commission's policy adopted in 1997

requires of contracts entered into since that time. In re: Fuel and Purchased Power Cost Recovery Clause, 97 F.P.S.C. 3:49 (1997). (R. 426)

The statement in the Final Order about the contract expiration date was not put forth by the Commission as a reason not to evaluate the prudence of TECO's affiliate transactions or conduct a separate investigation. FIPUG's complaint is without merit, and it is not a basis on which to reverse the Commission's order.

If FIPUG truly believed the Commission relied on the contract expiration date for its decision, it should have asked the Commission to reconsider the decision on the grounds that it had overlooked a point of law or fact. Rule 25-22.060, Florida Administrative Code, authorizes such a motion for this purpose. In fact, the errors FIPUG alleges as the bases for its appeal of the Commission's decision are particularly suited to resolution on reconsideration by the agency. The Commission could have cleared up any misperception FIPUG had about its decision and perhaps avoided this meritless appeal.

CONCLUSION

FIPUG has failed to meet the burden required to overcome the presumption of validity attached to the Commission's order. FIPUG has not demonstrated that Order No. PSC-01-2516-FOF-EI is unsupported by competent substantial evidence of record, or that it violates the essential requirements of law. Nor has FIPUG shown that the Commission abused its discretion by deciding not to conduct a separate investigation. The Court should affirm the Commission's order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States mail this 3rd day of May, 2002, to the following:

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