BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Parsons & Whittemore, Inc., and Resources Recovery (Dade County), Inc.	)	DOCKET NO. 810249-EU(MC) ORDER NO. 10481 ISSUED: 12/30/81

The following Commissioners participated in the disposition of this matter:

JOSEPH P. CRESSE, Chairman
GERALD L. GUNTER
JOHN R. MARKS, III
KATIE NICHOLS
SUSAN W. LEISNER

Pursuant to notice, the Florida Public Service Commission held a public hearing on the above matter on September 17, 1981 and December 4, 1981, in Tallahassee, Florida. Having considered the entire record herein, the Commission now enters its order.

APPEARANCES: Alan Braverman, Esq., Washington, D.C.; David J. Bardin, Esq., George Kucik, Esq., 1815 H. Street N.W., Washington, D.C., 20006; Parker Davidson Thompson, Esq., 1300 Southeast First National Bank Bldg., Miami, FL 33131; and Daniel Dearing, Esq., P. O. Box 1118, Tallahassee, FL 32302, for the Petitioners.

J. Christian Hauck, Esq., Jonathan Alper, Esq., P. O. Box 529100, Miami, FL 33152, Darrey A. Davis, Esq., and Matthew M. Childs, Esq., 1400 S.E. 1st National Bank Bldg., Miami, FL 33131, for the Respondent.

Melvin N. Greenberg, Esq., and Ronald Ravikoff, Esq., 1401 Brickell Ave., Miami, FL 33131, for Intervenor Metropolitan Dade County.

Paul Sexton, Esq., 101 E. Gaines St., Tallahassee, FL 32301, for the Commission Staff.

Virginia Daire, Esq., and Prentice P. Pruitt, Esq., 101 E. Gaines St., Tallahassee, FL 32301, as Counsel to the Commissioners.

ORDER REQUIRING INTERCONNECTION

BY THE COMMISSION:

By petition dated June 24, 1981, Parsons & Whittemore, Inc. (P&W) and Resources Recovery (Dade County), Inc. (RRD), sought an order of this Commission requiring Florida Power & Light Company to interconnect with their small power production facility located in Dade County, Florida.

Background

The petition, filed pursuant to the provisions of Florida Administrative Code Rule 25-17.87, alleged that the small power production facility located in Dade County was a qualifying facility under the Commission's rules governing cogenerators and small power producers (25-17.80 through 25-17.89, F.A.C.), and that P&W and RRD were entitled to interconnection under Rule 25-17.87.

In response, Florida Power & Light Company (FP&L) filed an answer, asserting that RRD lacked standing to seek interconnection, that the facility was not a qualifying facility, that PURPA regulations did not apply to the subject matter, and that interconnection would impose an unfair burden on FP&L customers.

P&W and RRD filed a response to FP&L's answer.

We thereafter issued a notice of hearing pursuant to the requirements of Section 120.57(1)(b)(2), Florida Statutes (1980).

FP&L then filed an answer to the response of P&W and RRD and requested a continuance of the hearing asserting that the question should be answered by the Federal Regulatory Energy Commission (FERC) and not the Public Service Commission; that the Public Service Commission should defer ruling until the FERC had acted; and that the matter should be continued because of pending litigation.

P&W and RRD filed a response to the request for continuance asserting that we were authorized to rule upon the matter.

Metropolitan Dade County (the County) then filed an answer to the original petition asserting that the FERC had exclusive jurisdiction to determine if the facility was a qualifying facility; that the facility was not a qualifying facility until the FERC so ruled; and that the Public Service Commission was preempted from acting on the petition.

Argument on the motion for continuance was heard at the September 17, 1981 public hearing. We denied the motion, finding that we did have jurisdiction to address the petition.[1] P&W, RRD and FP&L were represented at the hearing. The County did not appear. Evidence was thereafter received on the issues raised on the petition and answers thereto.

The hearing was continued until a later date and notice was thereafter issued pursuant to Section120.57(1)(b)(2), Florida Statutes, setting the continued public hearing for December 4, 1981.

Order No. 10426 issued November 25, 1981, required the parties to file a statement of contentions prior to the December 4, 1981 hearing. Statements of contentions were filed by P&W and RRD, FPL and the County.

P&W and RRD contended: (1) that the stipulations and testimony presented at the September 17, 1981 hearing, established the facility as a qualifying facility; (2) that FP&L was required to interconnect with the facility; and (3) that FP&L was required to pay for purchased energy at its avoided cost rate. In addition, P&W and RRD challenged the County's standing to intervene in the case.

FP&L contended: (1) that an order to interconnect would abrogate its contract rights to own and operate the electrical operators; (2) that the facility was not a qualifying facility because P&W and RRD did not own it or have a valid right to operate the facility; (3) P&W and RRD had only a security interest in the facility and could not qualify under 18 CFR s.292.203 et. seq.; and (4) that an order requiring interconnection would constitute an impairment of contract by retroactive legislation.

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[1]A majority of the Commission voted to deny the motion for continuance. Commissioners Gunter and Nichols voted to reserve ruling until the close of the evidence.

The County contended: (1) that P&W and RRD lacked standing to seeking interconnection because (a) they lacked legal title to the facility, (b) that the wrong parties sought interconnection; (c) that equitable ownership in the County and FP&L barred the petition; and (d) that P&W and RRD had no right to be on the property and that P&W and RRD have standing only if they own the land upon which the facility stands; (2) that FERC had exclusive jurisdiction to determine if the facility was a qualifying facility, that the facility was not a qualifying facility until FERC so ruled and that the Public Service Commission was preempted from acting on the petition; and (3) that an order on interconnection would interfere with the contractual relations of the parties.

At the December 1981 hearing, evidence was presented by all parties. The parties were then allowed ten days within which to file proposed findings of fact and post-hearing memoranda.

Findings of Fact

The facility in question processes household garbage and reduces it to boiler fuel. This fuel fires boilers which are then used to produce steam which is passed through two electric generators. The Electric generators were designed to be interconnected with FP&L's distribution system to provide energy to its customers. At this time the facility is not interconnected and is providing no power to FP&L's distribution system.[2]

The facility operates as a unit. Steam is used only for electrical generation and no electricity is generated unless steam is produced. The electric generators are integrated in and are contiguous with the steam producing part of the facility.

On September 28, 1976, RRD, a wholly-owned subsidiary of P&W, entered into a contract with the County for the construction and operation of a waste processing facility to be located in Dade County, Florida. The original contract contained specifications for the waste-processing and steam-producing portions of the facility (and an electrical generating building) and stated that the entire contract was conditioned upon obtaining a contract with FP&L for the completion of an electrical generating facility.

On October 18, 1977, the County and FP&L entered into a contract whereby the County would construct an electrical generating facility for FP&L at the Dade County site, and further established terms and conditions for the sale of steam to FP&L by the County.

On March 22, 1978, and again on May 5, 1978, the original contract was amended to reflect this contract and RRD agreed to assume the County's obligations to construct the electrical generators.

On January 15, 1978, RRD assigned its rights and obligations under the contract to Resources Recovery (Dade County) Construction Corporation (RRDC), a wholly-owned subsidiary of RRD.

On January 9, 1981, RRDC notified the County that the entire facility was substantially completed as provided in the escrow agreement between RRD and the County. The County disputed RRDC's

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[2]For purposes of this Order, "facility" shall refer to the garbage processing, steam producing, and electric generating portions of the plant as a unit, unless otherwise designated.

compliance with the escrow agreement and refused to allow the escrow agent to release the funds. RRDC then requested arbitration, which continues at this time.

The facility is fully operational at this time. P&W and RRD currently have control over the entire facility and are operating it. RRD requested that FP&L interconnect with the facility but FP&L refused to do so. The electrical generators cannot produce more electricity than the facility itself may consume and the facility is operating at minimum capacity. Garbage dumped by the County at the landfill created for the facility is continuing to accumulate.

In addition to the foregoing, the following facts were established in the record:

1. The facility's maximum output will not exceed 80 megawatts.

2. The facility burns only biomass fuel to produce electrical energy.

3. No utility presently owns fifty percent or more of the facility and no such ownership is contemplated under any existing contract.

4. The facility is located in Dade County, Florida, which is within FP&L's service area.

5. RRD has agreed to pay the cost of the interconnection.

6. P&W and RRD will comply with all FP&L safety requirements.

7. Operation of the facility after interconnection will help conserve scarce petroleum fuels, promote the development of small power production and support the use of alternative energy resources.

8. The facility is currently capable of producing electrical energy for distribution into FP&L's system upon interconnection.

9. The facility is currently not interconnected and is providing no electrical energy for distribution into FP&L's system.

10. The contracts between P&W/RRD, the County and FP&L include terms and conditions for the sale of steam to FP&L but do not contain terms and conditions for the sale of electrical energy to any person.

11. RRD and P&W are in possession of and are operating the facility.

12. The County and FP&L are neither in possession of nor in control of the facility.

13. The necessary facilities to complete interconnection are in place, and interconnection may be easily and quickly accomplished.

Conclusions of Law

P&W and RRD filed their petition pursuant to Florida Administrative Code Rule 25-17.87 which provides in part:

> (2)(e) where a utility refuses to interconnect with a qualifying facility, the qualifying facility may petition the Commission for relief. . . .

Where a utility refuses to interconnect because it disputes a claim of being a "qualifying facility", under the rule we must necessarily consider that issue.

Both the County and FP&L argue that the Commission is preempted by FERC authority. The County asserts that we lack authority to entertain the petition until FERC rules that the facility is a small power production facility under its own rules. Rules 25-17.80 through 25-17.89 do not, however, make certification by FERC a condition precedent to the right to seek interconnction. Rule 25-17.80, F.A.C., does adopt FERC's definitions and qualifying criteria; however, adoption of those criteria does not make a FERC ruling a condition precedent to Commission action. In fact, adoption of Rule 25-17.80 would be redundant unless we contemplated applying the definitions and criteria ourselves. Rules 25-17.80 through 25-17.89 contemplate independent action by the Commission and our action is based upon those rules. The question of preemption is a question of the constitutionality of our rules. We are unable to rule upon the issue and must assume the validity of the rules. Myers v. Hawkins, 362 So.2d 926 (Fla. 1978); Adams Packing Association, Inc. v. Florida Department of Citrus, 352 So.2d 569, (Fla. 2nd DCA, 1977).

Resources Recovery (Dade County) Construction Corporation (RRDC), filed a motion to intervene at the time post hearing memoranda were due. Because the time required to allow FP&L and the County to respond would delay our disposition of the merits, and because we find the intervention to have no effect on the validity of the petition, we find that the motion should be denied.

Rule 25-17.87(2)(e) permits a "qualifying facility" to seek relief. Since the facility itself is not a person, the words "qualifying facility" must refer to a person associated with the facility in some manner. The words "qualifying facility" contained in Rule 25-17.87(2)(e) should be limited to a person owning the facility and/or operating the facility in concert with the owner. It does not really appear necessary to distinguish between P&W, RRD or RRDC as the holder of "legal" title for purposes of standing. RRD is a wholly-owned subsidiary of RRD. RRD and RRDC share corporate officers and all three file consolidated tax returns.

The County asserts that the "equitable" title in itself and FP&L defeats the standing of P&W and RRD. It is not readily apparent whether equitable or legal title are superior in this case. The two forms of ownership have their origins outside of our jurisdiction and we cannot adjudicate their relative merits. What is clear, however, is that both the County and FP&L have conceded that P&W and RRD (or RRDC) hold at least "legal" title to the facility. We consider this form of ownership to be sufficient to qualify as an owner under our construction of Rule 25-17.87(2)(e). Even if P&W and RRD do not hold title directly, they are operating the facility in concert with RRDC and may file the petition.

P & W and RRD challenge the standing of the County to intervene in this proceeding. For the same reasons that we believe P & W and RRD have standing to file the petition, we believe the County has standing to intervene the County asserts equitable title to the facility, the validity of which we may not adjudicate, and the County may be substantially affected by our actions.

The central issue in this case is whether the facility located in Dade County is a qualifying facility under Commission rules. By Rule 25-17.80, we have adopted the definitions in FERC Rules 292.101-292.207, CFR. Section 292.101(b)(1) defines a qualifying facility as one that qualifies under Sections 292.201-292.207. Section 292.203(a) states the small power production qualifications: (a) maximum output of not more than 80 megawatts (ref. s. 292.204(a)); (b) use of fuel of at east 50% biomass, waste, or renewable resource (ref. s. 292.204(b)); (c) not more than 50% ownership in an electric utility. (ref. s. 292.206).

Of the three major criteria stated in Section 292.203(a), only the ownership criterion is truly at issue in this case. The ownership criterion is more fully set forth in Section 292.206, which states in part:

> (a)...A... small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power...
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> (b)...For purposes of this section a . . . small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by a public utility or utilities, or by a public utility holding company, or companies, or any combination thereof. . .

Both FPL and the County assert that the facility is not a qualifying facility because P & W and RRD (or RRDC) do not own it. The question of ownership and entitlement to operate the facility under the contracts may not be ad judicated herein. We have already concluded that P & W and RRD have standing under Rule 24-17.87. The question of ownership of the facility is of further relevance to this proceeding only with regard to the question of whether FPL owns more than 50% of the facility. If FPL or the County wish to contest P & W or RRD's right to possession and/or control of the facility, or desire an ad judication of who has paramount title, they may do so in other forums. We are not construing any persons's rights under the contracts, nor are we adjudicating any persons's rights under the contracts. We are construing only our rules, and the rights and duties arising thereunder.

Reference in Section 292.206(b) to "equity interest" refers to common equity, as opposed to secured debt, or other interests. It has no application to the relative merit of legal verus equitable title.

As reflected in the findings of fact herein, no public utility currently holds more than 50% ownership in the facility, nor is such ownership contemplated in any contract. The purpose of the ownership test in Section 292.206(b) is not to preclude utility interest in a qualifying facility, but to preclude utility control of a qualifying facility. Not only does FPL not hold more than a 50% interest in the facility, but it currently controls none of the facility at this time. P & W and RRD control the facility.

The example cited at Volume 45, No. 56, P. 17963 of the Federal Register is disimilar to the current case. Here we have a facility currently under the possession and control of a non-utility, where a utility has refused to interconnect, and no electrical energy is being porduced for the utility. P&W and RRD would clearly benefit by being considered a qualifying facility.

We conclude that the small power production facility located in Dade Coutny, Florida, is a qualifying facility under Rule 25-17.80, and that P&W and RRD are entitled to an order requiring FP&L to interconnect with the facility.

FP&L contends that a decision to order interconnection would constitute an impermissible impairment of the purchase contract between RRD, the County and FPL in violation of the United States Constitution and the Constitution of the State of Florida. Under Rule 25-17.87, a facility is entitled to an order requiring interconnection if it is a qualifying facility and all safety requirements are met. Under Rule 25-17.80 a small power production facility is a qualifying facility if it meets the criteria of Section 292.203(a), CFR. We have found that the facility has satisfied those criteria. Rules 25-17.80 and 25-17.87, therefore require an order for interconnection. The challenge is to the constitutionality of our rules and, as before, we may not address the question Myers v. Hawkins, supra, Adams Packing Association, Inc., v. Florida Department of Citrus, supra, but must assume the constitutionality of our rules.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition of Parsons and Whittemore, Inc., and Resources Recovery (Dade County), Inc., for an order requiring Florida Power and Light Company to interconnect with their small power production facility located in Dade County, Florida, be and the same is hereby granted. It is further

ORDERED that Florida Power and Light Company interconnect with said facility forthwith, and no later than December 31, 1981. It is further

ORDERED that the Motion to Intervene filed by Resources Recovery (Dade County) Construction Corporation is hereby denied.

By Order of the Florida Public Service Commission, this 30th day of December 1981.

Steve Tribble
COMMISSION CLERK

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