State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JULY 11, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (MOORE) CM
DIVISION OF ECONOMIC REGULATION (COLSON) RJ JDJ

RE: DOCKET NO. 020397-EQ - PETITION FOR DECLARATORY STATEMENT BY FLORIDA POWER & LIGHT COMPANY THAT FPL MAY PAY A QUALIFIED FACILITY (QF) FOR PURCHASE OF RENEWABLE ENERGY AN AMOUNT REPRESENTING FPL'S FULL AVOIDED COST PLUS A PREMIUM BORNE BY CUSTOMERS VOLUNTARILY PARTICIPATING IN FPL'S GREEN ENERGY PROJECT.

AGENDA: JULY 23, 2002 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: 8/1/02 - BY STATUTE, ORDER MUST BE ISSUED BY THIS DATE

SPECIAL INSTRUCTIONS: SHOULD NOT BE DEFERRED

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020397.RCM

CASE BACKGROUND

By petition filed May 3, 2002, Florida Power & Light Company ("FPL") requested a declaratory statement pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code. FPL asks the Commission to declare that its proposal to pay in excess of its avoided costs to a QF for renewable energy for a Green Energy Program in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost does not violate PURPA, section 366.051, Florida Statutes, and state and federal regulations implementing PURPA. Notice of the petition was published in the Florida Administrative Weekly on May 24, 2002. New Hope Power Partnership

and Palm Beach Power Corp. filed a petition to intervene on June 12, 2002. FPL filed a response opposing the petition to intervene on June 24, 2002.

ISSUE 1: Should the Commission grant the petition to intervene filed by New Hope Power Partnership and Palm Beach Power Corp.?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Pursuant to Rule 25-22.039, Florida Administrative Code, persons seeking to become parties in a proceeding must demonstrate that they are entitled to participate as a matter of constitutional or statutory right or pursuant to Commission rule, or that their substantial interests are subject to determination or will be affected through the proceeding.

New Hope Power Partnership and Palm Beach Power Corp. ("NHPP and PBPC") state in their petition that they own two renewable energy (biomass) cogeneration plants that are QFs. NHPP and PBPC are interested in providing renewable energy to FPL for its Green Energy Project and have responded to FPL's request for proposals for the sale of renewable energy for the project. (Petition p. 3) NHPP and PBPC assert that the promotion of renewable energy, as well as their interests, will be harmed by any order rendered in this docket where such order unduly narrows the scope of the Commission's authority or limits its options in effectuating public policy on the use of renewable resources and the increased use of such renewables. (Petition p. 6) Because FPL states that the answer to its petition could provide an impetus to develop renewable energy, NHPP and PBPC assert that this proceeding "coincides" with their interests.

NHPP and PBPC specifically seek "to prevent entry of an order that would limit renewable energy programs to the narrow instance where all the costs of the renewable energy would be borne solely by customers voluntarily participating in the program." (Petition p. 7) They believe that a Florida utility's acquisition of renewable energy is not exclusively governed by PURPA and that its purchase can be approved under state statutory authority. NHPP and PBPC cite and discuss several provisions of Florida law to support their assertion that the Commission has such authority. That issue, however, is not the question presented by FPL's petition for declaratory statement and should not be addressed.

FPL opposes intervention and asserts that NHPP and PBPC have not demonstrated that intervention is appropriate for this declaratory statement proceeding; that even if it were appropriate,

they have not shown that they have standing to intervene; and that the petition to intervene presents allegations that are irrelevant and extend far beyond the scope of FPL's narrow request. FPL asserts that it has not asked the Commission for an order narrowing the scope of its authority or limiting its options to effectuate public policy; rather, it has simply asked for the Commission's answer to a question about the applicability of a statutory provision, or of any rule or order of the agency as required by section 120.565, Florida Statutes, authorizing petitions for declaratory statements.

FPL is correct that its petition does not present the issue of whether the Commission has authority to approve rates or other "funding mechanisms" for its Green Energy Project. FPL's petition is limited solely to the issue of whether its proposal is inconsistent with PURPA and its implementing rules, or section 366.051 and its implementing rules. Whether or not the Commission grants intervention, the question of whether circumstances might exist where a request for costs in excess of avoided cost to be borne by the general body of ratepayers would be justified, or the question of the amount FPL or its green electricity customers may pay, is not presented by this petition and should not be addressed in the declaratory statement issued in this docket.

As to the issue of standing, both FPL and NHPP and PBPC assert that the two-pronged test in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981) to determine substantial interest is applicable to determining NHPP and PBPC's standing. To demonstrate standing under Agrico, the petitioner must demonstrate that 1) it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing, and 2) that the substantial injury is of a type or nature that the proceeding is designed to protect against.

FPL asserts that the harm alleged by NHPP and PBPC is purely speculative because FPL does not seek the order that NHPP and PBPC fear (an order limiting renewable energy programs to the narrow instance where all the costs of the renewable energy would be borne solely by customers voluntarily participating in the program). FPL further asserts that NHPP and PBPC's interests are competitive economic interests as potential providers of renewable energy in Florida. FPL argues that the statutes are not intended to protect or address these interests but are designed solely to protect customers.

FPL is incorrect in its assertion that the law at issue here is designed solely to protect customers. Section 210 of PURPA was designed to encourage the development of cogeneration and small power production facilities. American Paper Institute, Inc. v. American Electric Power, 461 U.S. 402 (1983). Section 366.051, Florida Statutes, and the Commission's rules also encourage cogeneration and small power production. NHPP and PBPC own cogeneration plants and have an interest in promoting the development of renewable energy. Thus, their interests appear to fall within the zone of interest protected by PURPA and its implementing rules, and section 366.051 and its implementing rules. In addition, NHPP and PBPC have responded to FPL's request for proposals for FPL's Green Energy Project. The Florida Supreme Court has recognized that declaratory statements may, in a practical sense, affect the rights of other parties and that any substantially affected party can intervene. Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999). Clearly, the cogenerators' interest in encouraging the development of renewable energy resources is substantial and therefore, staff recommends granting intervention to NHPP and PBPC for the purpose of considering the comments presented in their petition to intervene.

ISSUE 2: Should the Commission grant FPL's petition for a declaratory statement?

RECOMMENDATION: Yes, the Commission should grant FPL's petition and declare that FPL's proposal to pay in excess of its avoided costs to a QF for renewable energy for a Green Energy Program in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost does not violate PURPA and its implementing rules, or section 366.051 and its implementing rules.

STAFF ANALYSIS: Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

FPL's petition meets the threshold requirements for a declaratory statement.

The particular set of circumstances FPL alleges are that pursuant to its Demand Side Management Plan (approved by the Commission in Order No. PSC-00-0915-PAA-EG), FPL has assessed the potential supply and demand for a Green Energy Project and has concluded that customer demand exists for it. The project would allow customers to choose to purchase power at prices exceeding standard customer rates based upon the customers' desire to purchase power generated from technologies that afford enhanced protection to the environment. FPL has received proposals from renewable energy suppliers, including the potential purchase by FPL of power from Qualifying Facilities (QFs) at prices in excess of FPL's avoided costs. (Petition p. 5)

FPL is prepared to begin negotiations with suppliers proposing to provide energy from renewable sources for its potential green

energy customers. FPL, however, does not believe that pursuant to PURPA, the federal regulations implementing PURPA, Florida Statutes and rules implementing PURPA, and prior Commission decisions, that it may pay a QF in excess of avoided cost unless the excess costs are borne by the customers participating in the Green Energy Project and not by the general body of ratepayers. (Petition p. 5)

FPL's petition presents the question whether a purchase of renewable energy from a QF at a price above the utility's avoided cost is consistent with PURPA, Florida law, and state and federal regulations implementing PURPA, if the excess costs are borne by the customers voluntarily participating in the Green Energy Project. The statutory provisions and agency rules that are at issue in this petition for declaratory statement are section 210 of the Public Utilities Regulatory Policy Act of 1978 (PURPA), codified at 16 U.S.C. § 824a-3; the Federal Energy Regulatory Commission's (FERC) rules implementing PURPA, 18 C.F.R. sections 292.301 and 292.304(a)(2); section 366.051, Florida Statutes, entitled "Cogeneration; small power production; commission jurisdiction"; and Rule 25-17.0832, Florida Administrative Code.

Congress enacted PURPA in 1978 to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities. 16 U.S.C. § 824a-3(a). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, and not discriminatory against QF's. 16 U.S.C. § 824a-3(b). In addition,

> No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

16 U.S.C. § 824a-3(b). Section 210(f) directs state regulatory authorities to implement FERC's rules. 16 U.S.C. § 824a-3(f).

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided costs. 18 C.F.R. § 292.304. "Avoided costs" are defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6). In implementing its regulations, FERC weighed Congress's desire to promote cogeneration while not burdening ratepayers, and concluded that requiring utilities to pay full avoided costs properly balanced these interests. Independent Energy Producers Association, Inc. v. California Public Utilities Commission, 36 F.3d 848, 858 (9th Cir. 1994).

The Florida Statute implementing section 210 of PURPA is section 366.051, which, in pertinent part, provides:

> The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source.

The Commission's implementation of section 366.051 is codified in Rules 25-17.080 through 25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers." Rule 25-17.0832(2) provides in part:

> Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a

> cost to the utility's ratepayers which does not exceed full avoided costs, . .

FERC addressed the authority of states to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA in Connecticut Light and Power Company, 70 FERC 61,012 (January 11, 1995), reconsideration denied, 71 FERC 61,035. The Connecticut statute at issue required electric utilities to purchase electric energy generated by municipally-owned resource recovery facilities at the same rate that the utility charged the municipality, i.e., a retail rate that was higher than avoided cost. FERC concluded that the Connecticut statute, insofar as the statute required rates that would exceed avoided cost, was preempted by section 210 of PURPA. In its order granting the utility's petition for declaratory order, FERC explained:

> By stating that states cannot impose rates in excess of avoided cost, section 210 of PURPA and the Commission's [FERC's] regulations balance the competing Congressional concerns of promoting congeneration and small power production and yet not burdening ratepayers; imposing a rate in excess of avoided cost would subsidize QFs and burden ratepayers.

70 FERC at 61,029.

In Midwest Power Systems, Inc., a utility sought to have FERC enjoin the Iowa Utilities Board from ordering the utility to purchase wind-generated power at a price far in excess of its avoided cost. FERC found that the Iowa Board's orders were preempted by PURPA to the extent they obligated electric utilities to purchase power generated by QFs at rates in excess of the utilities' avoided cost. Midwest Power Systems, Inc., 78 FERC 61,067 (January 29, 1997).

This Commission stated the purpose of its rules as they pertain to avoided costs at the time they were adopted. In its 1990 order adopting Rule 25-17.0832 and revising other rules in Part III of Rule Chapter 25-17, the Commission stated:

> These rules reflect the Commission's policy to encourage cogeneration and small power production to the extent that it does not result in higher cost electric service to the ratepayers and citizens of the State of Florida.

In re: Proposed revisions to Rules 25-17.082 et al., Cogeneration Rules, Order No. 23623 issued October 16, 1990 in Docket 891049-EU, 90 F.P.S.C. 405, 406 (1990). See also, In re: Petition for expedited approval of settlement agreement with Lake Cogen, Ltd., by Florida Power Corp., Order No. PSC-97-1437-FOF-EQ issued November 14, 1997 in Docket No. 961477-EQ, 97 F.P.S.C. 11: 202, 212 ("To ensure that benefits remained with a utility's ratepayers, PURPA and the Florida Statutes established that rates for the purchase of power from QFs shall not exceed a utility's avoided cost. Such assurance was necessary to avoid situations that would require a utility to purchase electricity from a QF when in fact it could produce or purchase alternative power at a lower cost.")

It seems clear that the prohibition against exceeding the avoided cost under PURPA and the rules implementing PURPA applies to circumstances where the rate paid to QFs in excess of avoided cost is imposed upon the utility and its ratepayers. FPL's plan as stated in its petition is voluntary and is not, therefore, inconsistent with PURPA, or FERC's regulations, section 366.051, Florida Statutes, or this Commission's rules implementing PURPA. The Commission should grant FPL's petition. Although FPL has worded the statement it requests in several different ways throughout its petition, the Commission should declare that FPL's proposal to pay in excess of its avoided costs to a QF for renewable energy for a Green Energy Program in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost does not violate PURPA and its implementing rules, or section 366.051 and its implementing rules.

In addition, the Commission should make clear in its Declaratory Statement that it is based on the circumstances presented by FPL, and that any change in those circumstances could change the statement. The Commission should also make clear that how FPL implements the Green Energy Program is not addressed by this statement and it does not serve as approval of the particular program requirements or charges, for which a tariff filing is required. See, In re: Petition by Tampa Electric Company for approval of a pilot Green Energy Rate Rider and Program, Order No. PSC-00-1741-TRF-EI issued September 25, 2000, in Docket No. 000697-EI.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

STAFF ANALYSIS: A declaratory statement is issued as a final order and the docket may be closed.

CTM/