BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding application of Rule 25-17.0836, F.A.C., Modification to Existing Contracts; Explanation of When Approval is Required, to its circumstances, by Indiantown Cogeneration L.P.	DOCKET NO. 040863-EU ORDER NO. PSC-04-0973-DS-EU ISSUED: October 7, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

Background

On August 16, 2004, Indiantown Cogeneration, L.P. (ICL) filed a petition for declaratory statement (petition). Therein, ICL noted that its coal-fired cogeneration facility in Indiantown, Florida sells capacity and energy to Florida Power & Light Company (FPL) pursuant to a Commission-approved power purchase agreement (PPA), which included a "fuel index". While the fuel index incorporated data based on the cost of Appalachian Coal purchased by and delivered to the St. Johns River Power Park (SJRPP), the Second Amendment to the PPA, approved by us in Order No. PSC-92-1345-FOF-EI, provided for the parties to agree to a comparable replacement index in the event of a long-term interruption in or permanent cancellation of delivery of coal to SJRPP.

Since during January 2003, SJRPP ceased purchasing Appalachian Coal, the parties to the PPA have agreed on a Replacement Index based on publicly reported delivered coal cost information for utilities and municipalities in Florida that utilize Appalachian Coal.

Pursuant to Rule 25-17.0836, FPL provided staff a copy of the Letter Agreement containing the Replacement Index, noting that it did not constitute a material change in the PAA since it was explicitly contemplated by the Second Amended PPA approved by us.[1]

ICL notes in its Petition that Paragraph 19-4 of the PPA places on ICL the risk of disallowance of any energy payments calculated, which would involve application of the Replacement Index. Accordingly, ICL must certify to its financing entities that no approval of the Letter Agreement by us is necessary for cost recovery. ICL argues that we should so state based on Rule 25-17.0836(3):

> Commission approval is not required for modifications explicitly contemplated by the terms of the contract....

ICL further notes that such a declaration is necessary in view of Rule 25-17.0836(7), which states:

> On its own motion, the Commission may review a contract modification to determine whether the modification requires approval.

ICL represents that FPL supports issuance of the statement petitioned for by ICL.

Discussion

We agree with the petitioner that the Letter Agreement containing the Replacement Index devised by FPL and ICL is not subject to the requirement of formal approval to assure cost recovery. Pursuant to Section 120.565, Florida Statutes, a substantially affected person may seek an agency's opinion as to the applicability of any rule or order as it applies to the particular set of circumstances of that person. Here, the choice offered by Rule 25-17.0836, F.A.C. between subsections (3) of the rule (Commission approval not required for modifications explicitly contemplated by contract terms) and (7) (Commission may review contract modification to determine whether it requires approval), creates some uncertainty as to whether, in view of the Replacement Index modification, ICL can represent to its financing entities that all approvals for cost recovery have been obtained.

In this instance, we believe it to be non-controversial that the modification should be governed by Rule 25-17.0836(3). Therefore, we grant the petition to issue the requested declaratory statement in order to resolve any potential uncertainty.

In view of the foregoing, it is

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[1] The Letter Agreement provides for the SJRPP based index to again govern if SJRPP begins taking deliveries of Appalalchian Coal exceeding a threshold quantity.

ORDERED by the Florida Public Service Commission that the Petition of Indiantown Cogeneration L.P. for Declaratory Statement is granted. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission this 7th day of October, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: _____
Kay Flynn, Chief
Bureau of Records

(SEAL)

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.