BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement Regarding Upward Modification of Committed Capacity Amount by Cogenerators.	DOCKET NO. 890453-EQ ORDER NO. 21585 ISSUED: 7-19-89

The following Commissioners participated in the disposition of the matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

DECLARATORY STATEMENT

BY THE COMMISSION:

By Petition filed April 5, 1989, Timber Energy Resources, Inc. (Timber Energy), a cogenerator which is a qualifying facility (QF) and small power producer within the contemplation of Rule 25-17.080(2), Florida Administrative Code, and the Public Utility's Regulatory Policy Act, 18 C.F.R., §292.202, et. seq., requested a declaratory statement from this Commission to determine whether or not Timber Energy could change the amount of its committed capacity under the terms of its 1984 "standard offer contract for the purchase of firm energy and capacity from a qualifying facility" with Florida Power Corporation (Florida Power).

We determine that we have jurisdiction over this proceeding pursuant to sections 366.04(3), 366.04(9), and 120.565, Florida Statutes.

Interested parties should take note that Rule 25-22.021 states "... [a] declaratory statement is a means of resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule, or order as it does or may, apply to petitioner in his or her circumstances

only." Our resolution of the question presented in this proceeding will apply only to Timber Energy's particular circumstances. We have relied entirely upon the facts presented in the petition for declaratory statement, and we have made no independent investigation or verification of those facts. Any material changes in the facts presented by petitioner may substantially alter or void this declaratory statement.

Statement of the Facts and Case

On December 31, 1984, Timber Energy and Florida Power entered into a standard offer contract approved by the Commission in which Florida Power agreed to purchase all electric power produced by Timber Energy's 14 megawatt (MW) electric generator in Telogia, Florida. By the terms of section 4.21 of that contract the anticipated committed capacity of the 14 MW unit was 13.446 MW, beginning on or about July 1, 1986. By the terms of section 4.22 of the contract, the actual capacity of the unit committed by Timber Energy in 1987, was 12.765 MW. The amount of committed capacity was agreed to by both parties and is the amount of capacity Timber Energy's Telogia facility is currently selling to Florida Power.

On April 5, 1989, Timber Energy filed a Petition for Declaratory Statement with the Commission, asserting that it wished to retrofit another generator on the same site as the original 14 MW generator in order to sell Florida Power an additional 6 MW of capacity. Timber Energy stated that it was uncertain whether the standard offer contract it executed with Florida Power, and Commission rules and policy, would permit it to increase the amount of capacity it could sell to Florida Power under the contract. Timber Energy requested that the Commission enter a declaratory statement holding that "... Timber Energy may increase the amount of Committed Capacity it provides to Florida Power under the terms of its current contract prior to April 1, 1990, and that such change will not affect the contracted schedule of payments" (page 8 of Petitioner's amended petition for Declaratory Statement).

On May 1, 1989, Florida Power filed a Motion to Intervene in this proceeding, pursuant to Rule 25-22.039, Florida Administrative Code, on the ground that as the other party to the contract its substantial interests would be affected by the Commission's decision in this matter.

Preliminary Matters

We find that in its Petition for Declaratory Statement, Timber Energy has met the threshold requirements of section

120.565, Florida Statutes, and Rule 25-22.021, Florida Administrative Code. It has demonstrated a genuine question or doubt regarding the legitimacy of changing its committed capacity amount under its standard offer contract with Florida Power, and it has shown a need for a declaratory statement. Therefore, we grant the Petition for Declaratory Statement.

We also find that it is not necessary to permit Florida Power to intervene in this Declaratory Statement proceeding. Rule 25-22.022, permissively provides that the Commission "... May hold a hearing to dispose of a petition submitted pursuant to 120.565. If a hearing is held, it shall be conducted pursuant to §120.57 on an expedited basis, or as otherwise agreed upon by the Commission and the parties."

No hearing will be necessary for the disposition of this petition. There are no disputed issues of material fact. The only issue before the Commission is a question of law as to whether Timber Energy may change the amount of its committed capacity under the terms of the standard offer contract and Commission rules and policy governing those terms. As no 120.57 hearing will be necessary, we deny Florida Power's motion to intervene. State of Florida, Department of Administration, Division of Retirement v. University of Florida, 531 So.2d 377 (1st DCA 1988).

Question Presented

Do Commission rules and policies governing utilities' commitments to cogenerators permit an interpretation of Timber Energy's standard offer contract with Florida Power which would sanction a change in the design of the original facility and a consequent increase in the committed capacity amount to be sold at the original contract price?

Discussion

Petitioner states that the standard offer contract is ambiguous with regard to upward modification of committed capacity because section 3 states "The company agrees to purchase all of the electric power generated at the facility and transmitted to the company by QF," while section 4.2 of the contract "delineates an exact amount." Petitioner proposes that the April 1, 1990, deadline for committing capacity under the contract allows Timber Energy to change the amounts of capacity already committed up to that date and still receive the original contract price. In arguing its construction of the purported ambiguity, Petitioner reminds the Commission that the effect given ambiguous language should comport with the purpose of the agreement. (Bruce

Construction Corp. v. Federal Realty Corp., 139 So. 209 (Fla. 1932). Petitioner says that one must look to the Commission rules and policies, particularly those encouraging cogeneration, to determine the purpose of the agreement. Since the Commission encourages cogeneration, Timber Energy argues that the contract should be construed to favor Timber Energy's capacity increase thereby favoring development of cogeneration.

Unilateral Modification of Committed Capacity

It has been, and remains, the Commission's position that a qualifying facility may not increase its capacity commitment to the utility without executing a new contract for the increased amount at the current avoided unit price. The standard offer contract provisions here in question were prescribed by Commission Rule 25-17.083, Florida Administrative Code, to support that policy. Allowing Timber Energy to increase (or decrease) its capacity at will up to a particular final date after it had already made a specific capacity commitment would effectively allow it to unilaterally determine the amount of capacity Florida Power would receive. Section 4 of Florida Power's standard offer contract does address the need for a moderate amount of flexibility between what capacity a particular generating facility is predicted to produce (anticipated committed capacity) and what capacity that particular generating facility actually does produce after a reasonable test period (actual committed capacity). The flexibility, however, is purposely limited to small discrepancies between anticipated and actual committed capacity of the original generating facility. Section 4 does not in any way contemplate a significant change or addition to the design of the original generating facility, and it does not sanction a capacity increase of roughly 50%, as Timber Energy proposes.

In Order No. 13247, Docket No. 830337-EU, "In Re: Proceedings to Implement Cogeneration Rules, the Commission dealt at length with the exact question presented here by petitioner.

> Changes to a Qualifying Facility's Capacity Commitment
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> During these proceedings, Dade County suggested that a QF be able to unilaterally modify its standard offer capacity commitment, within certain limits. Presumably such a provision would afford more flexibility to the QF should minor differences between the design characteristics and actual performance of a proposed QF occur.
>
> We reject this proposal as being potentially detrimental to a utility's planning process and not in the best interest of its ratepayers.

Because of the long lead times associated with the construction of conventional power plants, utilities must plan and make construction commitments far in advance of when additional capacity is actually needed. Should circumstances mitigating the need for planned capacity occur after construction commitments have been made, the result can often be increased costs to ratepayers, particularly if such changes occur after significant amounts of construction dollars have been spent. Conversely, if circumstances occur which increase the need for capacity beyond that which has been planned by the utility, the utility may not have time to respond and service reliability suffers.

Firm capacity purchases from QFs represent an alternative to the construction of conventional power plants. As such, when a utility enters into a contract for the purchase of firm capacity from a QF, the utility is entitled to rely on the level of capacity committed to defer the construction of otherwise needed power capacity.

Allowing a QF to modify its capacity commitment, up or down, during the life of a standard offer contract only introduces uncertainty into the utility's planning process. This uncertainty results in the risk that a utility may construct too much or too little generating capacity to meet the needs of its customers. Neither situation is in the best interests of the ratepayers.

The Rules pertaining to standard offer contracts have been carefully designed to provide the planning certainty required to allow a utility to depend on the QF capacity and defer additional power plant construction. Should a QF wish to increase its capacity commitment, it is easy enough to enter into another standard offer contract for the increased capacity. However, should a QF wish to decrease its capacity commitment, a number of problems immediately surface, i.e., the repayment of early capacity payments, and the adverse effects on utility reserve margins, among others.

Another reason for our objection to a QF being allowed to unilaterally modify its capacity

> commitment is the potential for manipulation of the avoided costs paid to the QF. For example, suppose a QF today contracts for the delivery of 10 MW of firm capacity starting in 1986 and elects to fix early capacity payments based on the current estimates of the cost of the statewide avoided unit. Two years later, in 1986, the QF determines that it can increase its capacity commitment to 12 MW. However, by 1986, new estimates for the 1992 statewide avoided unit have been developed which indicate that due to an improved economic outlook, and lower inflation, the cost of this unit is materially lower than originally contemplated in 1984. The QF should not be able to receive the original estimate of avoided costs for the belated 2 MW increase in capacity.
>
> For the above stated reasons, changes to a QF's capacity commitment should only be allowed if mutually acceptable to the QF and the utility, and only if such changes do not adversely affect the cost or quality of service to ratepayers. Therefore, a unilateral provision allowing a QF to modify its capacity commitment will not be included in the statewide standard offer. Rather, changes to the QF's capacity commitment should be negotiated on a case-by-case basis based on the circumstances which prevail at the time.

When the particular contract provisions of the standard offer at issue here are read in light of the Commission's purposes in implementing the rules governing the standard offer, they do not appear ambiguous at all. To the contrary, they seem clearly crafted to support the development of cogeneration while at the same time establishing a stability in the contractual process which contributes to stability in the utility planning process.

In In Re First American Energy Company, 83 PUR 4th 348, 1987, the Pennsylvania Public Utility Commission reached a similar conclusion on a similar issue. Pennsylvania Power and Light was ordered to enter into a long-term agreement with a cogenerator for the purchase of electricity from a proposed 80 MW facility. The facility was originally scheduled to generate 44 MW of capacity and was later expanded to 80 MW. The Commission held that the first 44 MW of QF capacity would be entitled to the rate that existed at the time the QF entered into serious negotiations with the utility for power purchased from the facility as originally planned, and the additional capacity would be entitled to avoided cost rates as of the date of the QF informed the utility it was expanding its generating capacity.

> Clearly, a QF that contracted PP&L in November 1985 concerning a proposed 1 MW project should not be enabled to expand the project to 80 MW in April 1986 and receive the older, higher rates for the entire project. Such a result would enable potential QFs to obtain the advantage of hindsight by waiting to see if avoided cost-based rates drop prior to a decision to increase a project's size or keep it constant. Conversely, if avoided cost-based rates were to rise, the QF would be under no obligation to construct additional capacity, and the project's owners could simply build a separate facility to qualify for higher rates. ... [I]t would not appear to be in the public interest to enable a QF to nearly double its capacity as originally proposed and to qualify for higher rates for the entire project in an era of declining avoided costs. Supra, p. 354.

Conclusion

We hold that Rules 25-17.083, 25-17.087(5), Florida Administrative Code, and FPSC Order No. 13247 prevent Timber Energy from changing the design and capacity commitment of its Telogia generating facility under its present contract with Florida Power. As Order No. 13247 suggests, it is easy enough for Timber Energy to enter into another standard offer contract for the increased capacity at the current avoided unit rate.

Now, therefore, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement filed by Timber Energy Resources, Inc. is granted. It is further

ORDERED that the Motion for Intervention filed by Florida Power Corporation is denied. It is further

ORDERED that the substance of the Declaratory Statement is as set forth in the body of this order. It is further

ORDERED that this docket should be closed.

By ORDER of the Florida Public Service Commission, this 19th day of July, 1989.

STEVE TRIBBLE, Director
Records and Reporting

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by: Kay Flynn
Chief, Bureau of Records