BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of cogeneration agreement between FLORIDA POWER AND LIGHT COMPANY and INDIANTOWN COGENERATION, L.P.	)	Docket No. 900731-EQ
	)	Filed: Dec. 21, 1990

INDIANTOWN COGENERATION, L.P.'s PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this docket before the Florida Public Service Commission (Commission) by its duly designated Hearing Officer, CHAIRMAN MICHAEL McK. WILSON, on December 5, 1990, in Tallahassee, Florida.

APPEARANCES

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On behalf of Florida Power & Light Company

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On behalf of Indiantown Cogeneration, L.P.

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On behalf of Nassau Power Corporation

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On behalf of the Commission Staff

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STATEMENT OF THE ISSUE

The ultimate issue is whether the petition of Florida Power & Light Company (FPL) for approval of its Agreement for the Purchase of Firm Capacity and Energy Between Indiantown Cogeneration, L.P. and FPL (the "Agreement" or "Power Sales Agreement") should be granted. In its petition, FPL requested the following specific findings: (1) the Agreement is reasonable, prudent and in the best interests of FPL's ratepayers; (2) the Agreement contains adequate security based on ICL's (Indiantown Cogeneration, L.P.'s) financial stability; (3) no costs in excess of FPL's full avoided costs are likely to be incurred by FPL over the initial term of the Agreement; (4) all payments for energy and capacity made by FPL pursuant to the Agreement may be recovered from FPL's customers; and (5) FPL shall not be required to resell the energy and capacity purchased pursuant to the agreement to another electric utility so long as their retention is in the best interest of FPL's

ratepayers. By terms of the Agreement, an affirmative finding by the Commission on each of these items is a condition precedent to FPL's obligations under the Agreement.

At the Prehearing Conference held on November 27, 1990 the parties identified seven factual issues and one legal issue for resolution in this proceeding. Those issues are specifically stated in the Prehearing Order in this proceeding, Order No. 23831, issued December 4, 1990.

PRELIMINARY STATEMENT

On August 9, 1990, FPL and ICL (Petitioners) filed a joint petition for a determination of need for a proposed electrical power plant and related facilities to be located in Martin County, Florida, pursuant to Section 403.519, Florida Statutes. The proposed facility, known as the Indiantown Project, will be located near Indiantown, Florida and will be owned and operated by ICL. The net electrical power from the facility will be sold to FPL pursuant to the Power Sales Agreement dated May 21, 1990 and amended December 5, 1990. The proposed unit has a projected in-service date of December 1, 1995. On August 27, 1990, FPL filed a petition pursuant to Rules 25-17.080 through 25-17.091, Florida Administrative Code, seeking approval of the Power Sales Agreement. By Order, the two dockets were consolidated for purposes of hearing.

At the prehearing conference held pursuant to notice on November 27, 1990, ICL was granted intervention in this docket. At the same time, Nassau Power Corporation (Nassau), a company which had tendered an executed standard offer power sales contract to FPL on June 13, 1990, was also granted intervention in this docket. At the outset of the final hearing, Nassau withdrew its intervention.

At the final hearing, ICL presented the testimony of Joseph P. Kearney, President and Chief Executive Officer of ICL and of PG&E-Bechtel Generating Company; Stephen A. Sorrentino, Project Development Manager for PG&E-Bechtel Generating Company with overall responsibility for managing the development of the Indiantown Project; and John R. Cooper, Vice President -- Finance of PG&E-Bechtel Generating Company. FPL presented the testimony of G.R. Cepero, FPL's Director of Bulk Power Markets, and Samuel S. Waters, FPL's Manager of Power Supply Planning. No other party presented any testimony. Petitioners offered Exhibits 2 through 18, Exhibits 20 through 25, and Exhibits 27 through 30, which were received into evidence. The Commission Staff offered Exhibits 1 and 31, which were received into evidence. The Hearing Officer requested Late-Filed Exhibits 19 and 26, which were filed subsequent to the hearing and received into evidence without objection.

The transcript of the hearing (2 volumes) was filed on December 7, 1990. The parties filed Proposed Recommended Orders and Post-Hearing Statements on December 21, 1990. A ruling on each proposed finding has been made in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are made:

I. THE PARTIES

1. FPL is a public utility regulated by the Commission. FPL's service area spans 35 Florida counties and contains approximately 27,650 square miles with a population of approximately 5.9 million. (Ex. 2, p. 14)

2. (a) ICL is a limited partnership formed as the vehicle for PG&E-Bechtel Generating Company to construct, own and operate the Indiantown Project. (Kearney, Tr. 24) ICL's general partners are Toyan Enterprises, a wholly-owned subsidiary of PG&E Generating Company, and Palm Power Corporation, a wholly-owned subsidiary of Bechtel Generating Company. (Kearney, Tr. 24; Ex. 4) PG&E Generating Company is also a limited partner of ICL. Id. Additional limited partners may be admitted at a later date. (Ex. 2, p. 12)

(b) PG&E-Bechtel Generating Company is a general partnership between PG&E Generating Company and Bechtel

Generating Company. (Kearney, Tr. 21, 27; Ex. 4) PG&E Generating Company is a subsidiary of PG&E Enterprises, which in turn is a subsidiary of Pacific Gas & Electric Company, the largest combined electric and gas utility in the country. (Kearney, Tr. 21-22, 28) Bechtel Generating Company is a subsidiary of Bechtel Enterprises, which in turn is a wholly-owned subsidiary of Bechtel Group, Inc., one of the largest engineering, construction and development companies in the world. (Kearney, Tr. 21-22, 28)

II. THE INDIANTOWN PROJECT

3. The Indiantown Project is a 270-330 MW, coal-fired cogeneration facility to be located in southwestern Martin County, Florida, about three miles northwest of Indiantown, nine miles east of Lake Okeechobee, and approximately three miles southeast of FPL's Martin Plant. (Sorrentino, Tr. 50, 69-70; Cepero, Tr. 170; Ex. 2, p. 18; Ex. 9) The projected commercial operation date for the plant is December 1, 1995. (Kearney, Tr. 25; Cepero, Tr. 170)

4. The Indiantown Project is at a relatively advanced stage of development. ICL has a power sales agreement signed after 18 months of negotiation (Ex. 20); an agreement in principle with its steam customer, Caulkins Citrus (Ex. 13); exclusive three year options to purchase the plant site (Sorrentino, Tr. 50-51, 69-70); a letter of intent from

CSX Transportation for coal transportation (Ex. 15); a letter of intent from Indiantown Gas Company for gas supply for start-up operations and supplemental firing (Ex. 16); and expressions of interest from a number of potential coal suppliers (Sorrentino, Tr. 62-63, 89-90). ICL plans to file its Site Certification Application with DER during December, 1990. (Sorrentino, Tr. 64-65; Ex. 12)

5. PG&E-Bechtel Generating Company will have overall responsibility for managing the development, construction and operation of the project. (Kearney, Tr. 25-26; Sorrentino, Tr. 65) PG&E-Bechtel Generating Company was organized in 1989 to be the exclusive vehicle for Pacific Gas & Electric Company (PG&E) and Bechtel Group, Inc. (Bechtel) to participate in the non-utility power production business. (Kearney, Tr. 21, 27) PG&E-Bechtel Generating Company has eleven projects, totaling approximately 1970 MW, in advanced stages of development, and eight additional projects, totaling approximately 1305 MW, in earlier stages of development. (Kearney, Tr. 23, 28; Ex. 6) These projects are in addition to 15 cogeneration projects in which Bechtel has had a development or construction role. (Kearney, Tr. 22, 28; Ex. 5)

6. ICL's access to the skill, experience and resources provided by PG&E and Bechtel, each of which has substantial long-term experience in the electrical power business,

provide confidence that the project will be viable, reliable, and economic. (Kearney, Tr. 22, 23, 30; Cepero, Tr. 172, 177, 197)

III. THE POWER SALES AGREEMENT

7. The sale of capacity and energy from the Indiantown Project is governed by the terms of the Power Sales Agreement between ICL and FPL, executed on May 21, 1990. (Ex. 20) The termination fee provisions of the Power Sales Agreement were modified by a contract amendment executed on December 5, 1990. (Cepero, Tr. 162-163; Ex. 22)

8. The Power Sales Agreement has an initial term of 30 years. (Cepero, Tr. 170; Ex. 20, §3.3) The plant has a nominal net electrical output of 300 MW. (Cepero, Tr. 170) The actual committed capacity from the plant will be designated by ICL based on pre-operational tests, and must be in the 270 MW to 330 MW range, unless FPL agrees otherwise. (Cepero, Tr. 170-171; Ex. 20, §5.13)

9. The anticipated commercial operation date for the facility is December 1, 1995, although the Power Sales Agreement permits a commercial operation date as early as September 1, 1995. (Cepero, Tr. 170; Ex. 20 §1.14) Capacity payments begin on the commercial operation date. (Sorrentino, Tr. 115-116) Any energy available from the facility prior to the commercial operation date will be

purchased by FPL under the terms of the Agreement. (Cepero, Tr. 184; Sorrentino, Tr. 116; Ex. 20, §6.1)

10. The Power Sales Agreement contains a number of provisions designed to provide reasonable assurance that the facility will be completed on-time. (Cepero, Tr. 174; Sorrentino, Tr. 74-75)

(a) First, the agreement provides a series of milestones designed to maintain progress toward completion of the facility. These include: (i) contractual deadlines for filing the need determination application and the site certification application for the facility (§3.5.1, 4.2.2); (ii) construction loan closing within 36 months from the date of execution of the agreement (§3.4); and (iii) start of construction within 39 months from the date of execution of the agreement (§3.4). (Cepero, Tr. 174-175)

(b) Second, the contract requires that $9 million of completion security be furnished on the following schedule: (i) $1 million within 15 days following Commission approval of the Power Sales Agreement, (ii) $2 million within 15 days following certification of the facility under the Power Plant Siting Act, and (iii) $6 million within 15 days after closing of the construction loan for the facility. (Cepero, Tr. 177; Ex. 20, §4.1) This completion security is forfeited at the rate of $750,000 for every month (and on a pro rata basis for partial months) that the

commercial operation date is delayed beyond December 1, 1995. (Sorrentino, Tr. 58; Ex. 20, §4.2.1) FPL additionally has the right to terminate the contract in the event that the commercial operation date is not achieved by December 1, 1996. (Sorrentino, Tr. 114; Ex. 20, §3.4) Both the December 1, 1995 and December 1, 1996 dates are subject to delay for up to, but no longer than, five additional months as a result of force majeure. (Sorrentino, Tr. 112, 114-115) The Power Sales Agreement's definition of force majeure is very narrow, and excludes, for example, equipment breakdown caused by its design, construction, operation or maintenance, or otherwise caused by an event originating in the facility. (Ex. 20, §1.28)

(c) Third, ICL must submit an integrated engineering, procurement and construction schedule, and a start-up and test schedule, for FPL's review, and must submit monthly progress reports to FPL until the commercial operation date (§5.5). (Cepero, Tr. 176)

11. The Power Sales Agreement also contains a number of provisions intended to assure that the facility will be designed as a utility grade plant capable of reliable, high capacity factor operation. These include: (a) FPL has the right to approve the selection of the architect/engineer for the facility, who must be instructed to design and construct the facility to be capable of operating reliably with a

capacity billing factor of at least 87% during the initial term of the Power Sales Agreement (§5.1); (b) ICL is required to obtain a minimum $60 million liquidated damages provision from its prime contractor to guarantee performance levels and completion date (§5.3); and (c) ICL must arrange to have its lenders designate an independent engineering firm to review and evaluate the design of the facility, and must make any changes determined to be necessary by that firm unless FPL concurs with ICL that such changes are unnecessary (§5.4). (Cepero, Tr. 175-177; Sorrentino, Tr. 58)

12. The Power Sales Agreement also contains a number of provisions designed to assure that the facility will operate reliably throughout the term of the agreement. (Cepero, Tr. 128; Sorrentino, Tr. 75) These include: (a) the previously mentioned provisions to assure that the basic facility design is sound (see ¶11); (b) ICL must arrange for review of the facility's operation and maintenance plan by an independent engineer (subject to FPL's approval) to determine that the plan is effective and that it will allow the facility to operate with a capacity billing factor of at least 87% (§5.8, 5.9); (c) an independent review of the facility's operation and maintenance plan must be performed on a periodic, on-going basis (§13.14); (d) the parties must mutually develop written operating procedures to integrate

the facility into FPL's electric system (§5.7); (e) ICL must enter into long-term fuel supply agreements, with market price reopener provisions, for at least 50% of the facility's fuel requirements (§§3.5.2, 3.5.8); and (f) ICL has agreed that the facility will be managed by PG&E-Bechtel Generating Company, or one of ICL's general partners (§21.10). (Cepero, Tr. 178-180; Sorrentino, Tr. 58-60)

13. The Power Sales Agreement also contains a number of provisions to assure the reliable operation of the facility during times of highest electrical demand. (Cepero, Tr. 180; Sorrentino, Tr. 75) These include: (a) ICL may only schedule outages during periods approved by FPL (§13.11); (b) ICL cannot schedule a maintenance shutdown of the facility during on-peak hours in December, January, February, June, July, August, or September 1 to September 15 of any year (§5.10, 13.11); (c) the facility is subject to dispatch by FPL (§13.6); and (d) as discussed below, the contract contains pay-for-performance provisions which give a financial incentive for high capacity factor performance during on-peak hours. (Cepero, Tr. 180-182; Sorrentino, Tr. 57-58)

14. The Power Sales Agreement allows FPL to economically dispatch the facility, to commit and decommit the facility, and to control both the real and reactive power from the facility. (Cepero, Tr. 182-183; Sorrentino,

Tr. 56; see Waters, Tr. 268) This provision allows the facility to be treated as if it were an FPL unit, thus creating the opportunity for FPL to reduce its system costs. Id.

15. The facility's location near FPL's load center enhances FPL's system reliability by maximizing the reliability benefit of the capacity provided by the project. (Waters, Tr. 251, 264-270, 272, 282-283; Ex. 25) That location also helps FPL minimize its production costs by reducing the need for additional transmission facilities and by reducing FPL's losses when compared to other sources of generation. (Id.; Cepero, Tr. 182) In addition, the project's location is helpful to FPL's ability to use the facility for voltage support. Id.

16. Under the Power Sales Agreement, capacity payments are on a pay-for-performance basis. The base capacity payment, assuming the plant operates in the 87% to 92% capacity billing factor range, is $23,000 per MW/month ($23 per kW/month) for the first twenty years of the contract. (Cepero, Tr. 185-186; Sorrentino, Tr. 57; Ex. 20, Appendix A) This base payment declines by 50% in the twenty-first year, and declines annually thereafter. Id.

17. If the plant operates above the 92% capacity billing factor level, then there is a 2 percentage point bonus for every 1 percentage point increase in capacity

billing factor up to 97%, where the capacity payments are capped. (Cepero, Tr. 187; Sorrentino, Tr. 57; Ex. 20, §§8.6, 8.7, Appendix A; Ex. 21) If the plant operates below the 87% capacity billing factor level, then there is a 2 percentage point penalty for every 1 percentage point decrease in capacity billing factor down to 55%. Id. No capacity payment is made in any month in which the capacity billing factor is less than 55%. Id.

18. The calculation of the capacity billing factor gives extra weight to performance during on-peak hours, which are noon to 9:00 p.m. from April 1 through October 31, and 6:00 a.m. to 10:00 a.m. and 6:00 p.m. to 10:00 p.m. from November 1 to March 31. (Ex. 20, §§ 1.12, 1.46) The target level for performance during these hours is a 93% capacity factor, and on-peak performance above or below this level is given greater weight in calculation of the capacity billing factor. (Sorrentino, Tr. 57; Ex. 20 §1.12) These provisions provide ICL with a significant financial incentive to produce energy during the on-peak periods when the capacity and energy are of greatest value of FPL and its customers. (Cepero, Tr. 187; Sorrentino, Tr. 57)

19. Taken together, FPL's right to dispatch the facility, the maintenance scheduling restrictions in the Power Sales Agreement, and the financial incentives in that agreement for high capacity factor on-peak performance

provide reasonable assurance that the energy and capacity from the Indiantown Project will be available when most needed by FPL's customers.

20. Under the Power Sales Agreement, monthly energy payments are based on a target energy cost of $23.20 per MWH, as adjusted quarterly from the first quarter of 1990 to track changes in the cost of coal, coal transportation, and lime and ash disposal. (Cepero, Tr. 184-185; Sorrentino, Tr. 56; Ex. 20, §8.1, 8.3, App. I) This base energy rate is premised on the cost of fuel for the St. Johns River Power Park (SJRPP) units, adjusted for a transportation differential to Indiantown and for ICL's expected consumption of lime and costs for ash disposal. (Cepero, Tr. 184; 213-214) The monthly payments are further adjusted to reflect the hourly effect of changes in the efficiency of the facility caused by FPL dispatch. (Cepero, Tr. 185; Sorrentino, Tr. 56)

21. Once a year, the actual energy cost for the facility is calculated (subject to audit by FPL), and ICL and FPL share in any difference between the actual energy cost and the target energy cost. (Cepero, Tr. 187-188; Ex. 20, §8.4, 10.1 to 10.3) Energy costs related to the production of steam are ICL's sole responsibility, and are excluded from the calculation. (Ex. 20, App. I, ¶D.1, D.3) If the actual energy cost is less than the target, ICL

and FPL share 50/50 in the energy cost savings. (Cepero, Tr. 188; Sorrentino, Tr. 156-160) If the actual energy cost is greater than the target, ICL and FPL share the first 10% of additional energy cost on a 60/40 basis, and ICL bears all the additional energy cost above 110% of the target. Id. This provision caps FPL's responsibility for energy costs at 104% of the target rate. Id.

22. These energy payment provisions give ICL a substantial incentive to minimize the energy costs for the facility, and enable FPL's customers to share in any savings achieved while limiting their exposure to increased costs. (Cepero, Tr. 188, 217-218; Waters. Tr. 285; Sorrentino, Tr. 56, 156-160; Ex. 20, §8.4) In the absence of such a split of savings provision, ICL would be entitled to all energy cost savings and no savings would be available to be credited to FPL's customers. (Cepero, Tr. 226) FPL's economic analysis shows that the Indiantown Project remains approximately $76 million more cost-effective than FPL's own avoided unit even if FPL's share of the energy cost reaches the 104% cap permitted under the Power Sales Agreement. (Waters, Tr. 296)

23. The Power Sales Agreement also contains a number of provisions designed to protect FPL in the event that the facility fails to perform. (Cepero, Tr. 188-189) These include:

(a) ICL must provide $9 million completion security against which FPL can draw $750,000 per month as liquidated damages in the event the facility does not achieve its December 1, 1995 commercial operation date, except as the date may be extended for up to 5 months by force majeure (§4.1, 4.2). This monthly amount is representative of what it could cost FPL to make obtain replacement power on a short-term basis. (Cepero, Tr. 203-204)

(b) In the event that the agreement is prematurely terminated, ICL is obligated to pay FPL a termination fee equal to the cumulative difference between payments to ICL under the agreement and FPL's avoided cost for an IGCC unit, calculated on a year-by-year value of deferral basis. (Ex. 20, §3.8; Ex. 22) Exhibit 23 shows that the termination fee payable in each year is equal to the difference between the payments to ICL under the agreement, and FPL's own avoided cost for an IGCC unit. This obligation is secured by (i) termination fee security in the form of cash or a letter of credit which starts at $13 million in the first year of operation up to a maximum of $50 million in the fifth year of operation (§21.1); (ii) a first lien on the QF status reserve fund described below (§21.2); (iii) a second lien on the maintenance reserve fund described below (§21.4); and (iv) a second mortgage on the

facility, also described below (§21.5). (Cepero, Tr. 189-193; Sorrentino, Tr. 59-60) Exhibit 23 shows that the total security for payment of the termination fee exceeds the termination fee obligation in each year. Similarly, Exhibit 24 shows that the termination fee payable under the Power Sales Agreement is greater than the termination fee liability which would be calculated if a statewide pulverized coal unit, rather than FPL's own IGCC unit, was used as the basis for calculating the termination fee liability.

(c) ICL is required to maintain a QF status reserve fund which starts at $500,000 during the first year of commercial operation and increases to a maximum of $5 million by the tenth year of operation (§21.2). This fund is available to ICL to take whatever action is necessary to maintain its qualifying facility status, including building or securing a new steam host. (Sorrentino, Tr. 103, 107) FPL has a first lien on this fund as additional security for payment of any termination fee liability. (Cepero, Tr. 190, 194-195; Sorrentino, Tr. 59, 86, 107)

(d) ICL is required to maintain a maintenance reserve fund which starts at $3 million in the first year of operation and increases to $30 million in the tenth year of operation (§21.4). (Cepero, Tr. 190; Sorrentino, Tr. 59, 103-105) The fund can be used for major maintenance or

overhaul to the plant (§21.4.2), but can never fall below $10 million. Id. This provision can be satisfied by a similar reserve fund required by ICL's lenders, including a debt service reserve fund. Id. FPL has a second lien on such fund to secure all of ICL's obligations, including any termination fee liability, if ICL's lenders require a similar fund. Id. FPL has a first lien on the fund if a similar fund is not required by ICL's lenders, or when ICL's project debt is fully paid. Id.

(e) FPL will hold a second mortgage on the facility to secure all of ICL's obligation to FPL, including any termination fee liability. (Ex. 20, §21.5) The value of this second mortgage is protected by the requirement that ICL have a minimum 10% equity investment in the project (§21.7); by a levelization formula which requires ICL's equity investment to increase over time, either through reduction in the project debt and/or appreciation in the fair market value of the facility (§21.6 and Appendix M); and by limits on distributions to ICL's partners during the period in which ICL may be liable for payment of a termination fee (§21.9). (Cepero, Tr. 190-191; Sorrentino, Tr. 107-111) The estimated value of this second mortgage interest ranges from a minimum of $ 102 million in the first year of operation to over $ 650 million by the nineteenth year of operation, which is projected to be the last year in which any termination fee liability exists. (Ex. 23)

24. Taken together, the experience of the sponsors of the Indiantown Project and the provisions of the Power Sales Agreement discussed above provide reasonable assurance that the Indiantown Project will be a reliable long-term source of power to assist in meeting FPL's capacity needs beginning in 1996. The record also demonstrates that the ICL/FPL contract contains adequate security provisions to protect FPL's customers in the event that ICL's fails to perform in accordance with the requirements of the agreement. [Issue 3]

IV. FPL'S NEED FOR POWER

25. FPL's analysis of its need for power, which has been reviewed by the Commission in the related need determination docket for the Indiantown Project, shows that (a) FPL has a need for an additional 900 MW of capacity in 1996 in order to maintain adequate system reliability, and (b) the most cost-effective utility construction alternative for meeting that need would be the construction of two 768 MW integrated gasification combined cycle (IGCC) units. (Waters, Tr. 248-249) Thus an IGCC unit is FPL's "avoided unit" for 1996. (Ex. 2, p. 64)

26. The Indiantown Project will contribute 300 MW toward the total 900 MW of capacity needed by FPL in 1996 and is an integral part of meeting FPL's necessary

reliability level. (Waters, Tr. 250-251) As shown below, the Indiantown Project is the most cost alternative for meeting the 300 MW increment of need that it is intended to satisfy.

27. Absent ICL's contribution toward meeting FPL's need, or the substitution of some other alternative such as FPL's construction of an IGCC unit, FPL's system reliability would degrade to unacceptable levels in 1996, increasing the likelihood of service interruptions. (Waters, Tr. 250-251; Ex. 28, revised p. 60) The record thus demonstrates that the Indiantown Project will contribute to the deferral or avoidance of capacity construction by FPL. [Issue 1]

28. The Indiantown Project is a more cost-effective alternative for meeting a portion of FPL's 1996 capacity need than the 1996 IGCC unit. (Waters, Tr. 252) The Indiantown Project saves approximately $73 million cumulative net present value (1990 $) over thirty years when compared to an equivalent amount of IGCC capacity on a year-by-year value of deferral basis. (Waters, Tr. 252; Ex. 29) [Issue 2]

29. FPL's need for additional capacity in 1996 is part of a statewide need for approximately 1,060 MW of new capacity in 1996. (Waters, Tr. 256) The ICL unit would represent 28% of this total planned capacity. Id. The 300 MW to be provided by the ICL unit is also less than the

cumulative Peninsular Florida need of 2,058 MW by 1996 which remains unsatisfied after all prior QFs and previously certified capacity additions are taken into account. (Ex. 2, pp. 71-72) Thus, the Indiantown Project will contribute to the deferral or avoidance of capacity construction by Florida utilities from a statewide perspective. [Issue 1]

30. The Indiantown Project is a cost-effective alternative for meeting the Peninsular Florida capacity need when compared to the statewide avoided unit, a 1996 pulverized coal unit. The Indiantown Project saves approximately $67 million cumulative net present value (1990 $) on a value of deferral basis when compared to such a unit. (Waters, Tr. 254; Ex. 30) [Issue 2]

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this docket pursuant to Chapters 120 and 366, Florida Statutes, and Chapters 25-17 and 25-22, Florida Administrative Code.

2. The Commission's cogeneration rules have recently been substantially amended. However, the approval of the Power Sales Agreement in this docket is governed by the rules as they existed when the contract was signed on May 21, 1990. The then-current version of Rule 25-17.083(2), Florida Administrative Code, relating to approval of negotiated cogeneration contracts, provides that:

(2) Generally, such contracts will be considered prudent for cost recovery purposes, if the following criteria are met:

(a) it is demonstrated that the purchase of firm energy and capacity from the qualifying facility pursuant to the terms and conditions of the contract can reasonably be expected to result in the economic deferral or avoidance of additional capacity construction by Florida utilities from a statewide perspective; and

(b) the cumulative present worth of firm capacity and energy payments made to the qualifying facility over the term of the contract are to be no greater than the cumulative present worth of the year-by-year value of deferral of the statewide avoided unit over the term of the contract; and

(c) to the extent that the annual firm energy and capacity payments made to the qualifying facility in any year exceed that year's annual value of deferring the statewide avoided unit, the contract contains adequate provisions to protect the utility's ratepayers in the event that the qualifying facility fails to perform pursuant to the terms and conditions of the contract. . . .

(Emphasis added)

3. A legal issue has been raised in this proceeding as to whether, in determining QF contract prudence and cost recovery pursuant to Rule 25-17.083(2), the Commission may consider a utility specific unit as the basis for comparison, or whether it must use a statewide avoided unit.

4. ICL contends that in addressing this question the Commission must recognize that the ICL contract is designed to meet FPL's need for additional capacity in 1996, a need that would otherwise be met by an FPL-constructed IGCC unit. Under Order No. 22341, the Commission has previously held that the purchasing utility's avoided cost is the appropriate basis for evaluation for need determination purposes. (Order No. 22341, pp. 25-27) ICL contends that it is appropriate to use that same standard of comparison for contract approval purposes particularly where, as here, the need determination and contract approval dockets are being handled concurrently. ICL submits that this consistency in the economic standard is logical and appropriate, and that nothing in Rule 25-17.083 requires a different result. ICL points out that while the rule does make several references to the "statewide avoided unit", it is expressly stated to set forth a "general" standard for contract approval, and does not preclude application of a utility specific standard in a particular case. Finally, ICL contends that application of a utility specific standard is especially appropriate in this case, since the Power Sales Agreement was signed before the 1996 statewide avoided unit was designated so that using the 1996 statewide avoided unit as the sole standard of comparison would give that designation an unfair retroactive effect.

5. The record shows, however, that the Indiantown Project meets the criteria of Rule 25-17.083(2) regardless of whether FPL's own avoided 1996 IGCC unit or the statewide avoided 1996 pulverized coal unit is used as the standard of comparison. The answer to the legal issue would therefore make no difference to the result in this case. Since the version of the rule applicable in this case will not apply in future cases, we find no compelling need to resolve this legal issue, and expressly decline to do so.

6. The record shows that FPL has a need for 900 MW of additional capacity in 1996 in order to maintain the reliability and integrity of its electric system. That need is part of the larger Peninsular Florida need for capacity in 1996. The Indiantown Project will contribute 300 MW toward meeting that capacity need. The favorable location of the Indiantown Project on the electric grid; the strength and experience of its sponsors; the use of a stable, domestically-sourced fuel and a proven coal fired technology; and the numerous provisions of the Power Sales Agreement which are designed to assure the timely completion and reliable long-term operation of the facility combine to provide assurance that the project will provide a reliable source of capacity and energy to FPL. As such, the Indiantown Project can reasonably be expected to result in the economic deferral or avoidance of additional capacity

construction both by FPL and by Florida utilities from a statewide perspective. The Indiantown Project and contract therefore satisfy the requirements of subsection (a) of Rule 25-17.083(2), F.A.C. [Issue 1]

7. (a) FPL's own avoided unit for 1996 is an IGCC unit. FPL's studies show that such a unit is the most cost-effective utility construction alternative available to FPL to meet its 1996 need. The cumulative present worth of the firm energy and capacity payments to be made to ICL over the term of the contract are approximately $73 million (1990$) less than the cumulative value of a year-by-year deferral of FPL's own avoided unit. The Indiantown Project and contract therefore satisfy the requirements of subsection (b) of Rule 25-17.083(2) if FPL's own avoided unit is used as the standard for economic comparison. [Issue 2]

(b) The statewide avoided unit for 1996 is a pulverized coal unit. The cumulative present worth of the firm energy and capacity payments to be made to ICL over the term of the contract are approximately $67 million (1990$) less than the cumulative value of a year-by-year deferral of the statewide avoided unit. The Indiantown Project and contract therefore satisfy the requirements of subsection (b) of Rule 25-17.083(2) if the statewide avoided unit is used as the standard for economic comparison. [Issue 2]

(c) Based on the foregoing, we make the related finding requested by FPL that no costs in excess of FPL's full avoided costs are likely to be incurred by FPL over the initial term of the Power Sales Agreement.

8. The annual firm capacity and energy payments to be made to ICL in the early years of the contract exceed the annual value of deferring either FPL's own avoided unit or the statewide avoided unit. However, the contract provides a termination fee liability which is equal to the amount of the excess (plus interest) when compared to FPL's own avoided unit, and which is greater in each year than the amount of the excess (plus interest) when compared to the statewide avoided unit. Through a combination of termination fee security, reserve funds on which FPL has a lien to secure payment of any termination fee, and the second mortgage in favor of FPL, the termination fee liability is more than 100% secured in each year of the Power Sales Agreement. The contract therefore contains adequate security provisions to protect FPL's customers in the event ICL fails to perform, and satisfies the requirements of subsection (c) of Rule 25-17.083(2). [Issue 3] We further make the related finding requested by FPL that the Power Sales Agreement contains adequate security based on ICL's financial stability.

9. Taken together, the experience of the sponsors of the Indiantown Project and the provisions of the Power Sales Agreement discussed above provide reasonable assurance that the Indiantown Project will be a reliable long-term source of power to assist in meeting FPL's capacity needs beginning in 1996. As previously stated, the Indiantown Project will provide such power at a lower cost than a utility-constructed unit. We therefore find that the Power Sales Agreement is reasonable, prudent, and in the best interests of FPL's ratepayers. [Issue 4] We further find that FPL may recover from its ratepayers all payments for energy and capacity in connection with the agreement. [Issue 5]

10. Section 3.1.1 of the Power Sales Agreement provides that FPL's obligations under the agreement are not enforceable unless, among other things, the Commission holds that FPL shall not be required to resell to another utility the energy and capacity purchased under the ICL/FPL contract so long as it is in the best interest of FPL's customers to retain the power. There is no statutory or regulatory requirement for FPL to resell congenerated power under such circumstances, and no overriding policy goal would be served by the imposition of such a requirement. We therefore find that FPL shall not be required to resell the energy and capacity purchased under the Power Sales Agreement to another electric utility so long as the retention of such

energy and capacity is in the best interest of FPL's ratepayers. [Issue 6] It should be noted that this finding is also consistent with the recent amendments to our cogeneration rules.

RECOMMENDATION

11. Based upon the record of this proceeding and the findings of fact and conclusions of law recited herein, it is RECOMMENDED that the Florida Public Service Commission adopt a Final Order approving the negotiated cogeneration agreement between FPL and ICL and incorporating each of the findings of fact and conclusions of law set forth above.

Entered this _____ day of January, 1991.

MICHAEL McK. WILSON,
as Hearing Officer

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THE FOREGOING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER ARE RESPECTFULLY SUBMITTED THIS 21st DAY OF DECEMBER, 1990.

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