

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Authority ) DOCKET NO. 911142-EQ  
for Florida Power Corporation to ) ORDER NO. PSC-92-1202-FOF-EQ  
Refuse all Standard Offer ) ISSUED: 10/22/92  
Contracts Except that submitted )  
by Panda Kathleen, L.P. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
SUSAN F. CLARK  
J. TERRY DEASON  
BETTY EASLEY  
LUIS J. LAUREDO

ORDER GRANTING PETITION FOR AUTHORITY FOR FLORIDA POWER CORPORATION TO REFUSE ALL STANDARD OFFER CONTRACTS EXCEPT THAT SUBMITTED BY PANDA KATHLEEN, L.P.

BY THE COMMISSION:

CASE BACKGROUND

In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for its standard offer contract was a 1997 combustion turbine. The standard offer subscription limit was set at 80 MW, with an effective date of September 20, 1991.

FPC conducted a two week "open season" from September 20, 1991, to October 4, 1991, during which potential providers were to submit standard offer contracts for evaluation. FPC received nine contracts during its "open season" and one contract after the "open season" concluded. On November 19, 1991, FPC petitioned the Commission for authority to reject the first standard offer contract it had received on September 20, 1991, from Noah IV GP, Incorporated (Noah IV). Subsequently, on November 26, 1991, FPC filed a petition with the Commission for authority to refuse all standard offer contracts except the one submitted by Panda Kathleen L.P. This petition also included rejection of Noah IV's contract. The two petitions have been combined into this single docket, Docket No. 911142-EQ.

On December 13, 1991, Noah IV and Ark Energy, Incorporated (Ark), jointly filed an Answer and Cross-Petition to FPC's petition. In the petition, Noah IV and Ark requested the Commission to reject FPC's petition and either (1) order FPC to execute the standard offer contract submitted by Noah IV to FPC or (2) set the matter for hearing. Subsequently, counsel for Noah IV and Ark agreed to permit the petition by FPC to be treated as a Proposed Agency Action. At the February 18, 1992, agenda

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conference, the Commission voted unanimously to approve the staff recommendation to approve FPC's petition, but to keep the standard offer open until the remaining 5.1 MW are subscribed.

Noah IV and Ark timely filed a protest to the Notice of Proposed Agency Action. A hearing was held on the matter on June 29, 1992. All parties submitted post hearing filings. In addition to its forty two page brief, ARK/NOAH IV submitted forty proposed Findings of Fact. Recommendations for rulings on each specific Finding of Fact are included in this Order as Attachment I. ARK/NOAH IV also submitted 11 proposed Conclusions of Law. We believe these conclusions are redundant in the context of a case heard by the agency head with an explicitly defined Issue List, Post Hearing briefs and a Final Order to be prepared after considering staff recommendations on the enumerated legal, policy and factual issues. This agency is under no legal duty to address each proposed conclusion in this setting. Therefore, we make no rulings on the 11 proposed Conclusions of Law submitted by ARK/NOAH IV.

We find that Commission rules do not require a "first-in-time, first-in-line" prioritization of standard offer contracts submitted to a utility. Rule 25-17.0832(d)3 does allow other methods of prioritizing contracts.

The pertinent portion of rule reads:

"Within sixty days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions **may** be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer." (emphasis added)

We believe that had the commission intended these two criteria to be exclusive, the words "**may only**" or "**shall only**" would appear in the place of the word "**may**". In reviewing the legislative history of the rule, we are unpersuaded that the Commission intended that these two explicit criteria were intended to be

exclusive. The record is devoid of evidence suggesting the commission considered the possibility of an immediate over-subscription of a standard offer contract or of simultaneous delivery to the utility or of a "first day queue" as experienced by Florida Power and Light Company and referenced in testimony in this proceeding. Moreover, the deletion of one proposed explicit basis for petitioning the Commission (a change in the utilities generation expansion plan) from the proposed rule should not be construed to eliminate every possible reasonable method of evaluating standard offer contracts. In the instant case, Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available. We find that this action is consistent with the language of Rule 25-17.0832(3)(d), F.A.C.

We find that Florida Power Corporation did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the standard offer contract delivered to FPC by Panda Kathleen on October 4, 1991.

Rule 25-17.0832 is incorporated by reference in FPC's standard offer tariff. The subject of "evaluation criteria" is not explicitly spoken to in the tariff. Any violation of the tariff is predicated on a violation of Rule 25-17.0832, F.A.C. Since we have determined that FPC's actions were consistent with the requirements of Rule 25-17.0832, F.A.C., no violation of FPC's tariff occurred.

Additionally, as recognized by Ark witness James Freeman, standard offer contracts are a unique type of tariff. Rather than selling products or services for an established price/rate, the standard offer tariff defines the terms of a utility purchase of products or services. We believe that standard offer contracts are published as tariffs as a matter of administrative convenience and are not subject to the same type scrutiny as a utility's offers to provide service. Therefore, we find that FPC did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the standard offer contract delivered to FPC by Panda Kathleen on October 4, 1991.

We find that ARK/NOAH IV did not waive its right to object to Florida Power's evaluation process by failing to notify Staff, other respondents to the standard offer or Florida Power of Ark/Noah's position that a first-in-time acceptance was required. Prior to the Petition to Reject Standard Offer Contracts filed by FPC, ARK/NOAH IV had no clear point of entry to a Section 120.57, Florida Statutes proceeding to exercise its rights. ARK/NOAH IV were under no duty to protest FPC's chosen procedure until they

were afforded a point of entry by the Commission to do so.

Rule 25-17.0832, F.A.C., does not purport to give individual parties the right to object to the evaluation method utilized by a utility in evaluating standard offer contracts. Thus, ARK/NOAH could not waive a right that it never had in the first place. ARK/NOAH were under no duty to protest FPC's chosen procedure until they were afforded a point of entry to a proceeding pursuant to Section 120.57, Florida Statutes. In protesting the Notice of Proposed Agency Action entered in this docket ARK did what the law required.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration Project was technically viable with respect to fuel transportation capability.

On June 20, 1991, a \$10,000 reservation deposit was made to reserve pipeline capacity for the Ark/Noah project and other Ark projects on Florida Gas Transmission's Phase III expansion. Evidently, this fact was not communicated to FPC when Ark/Noah filed its standard offer acceptance or when asked for additional information by FPC. In addition, another pipeline is projected to be constructed in Florida that could provide gas transportation for the project. Since the Ark/Noah project will have dual fuel capability, it could use another fuel as a "bridge" measure between its in-service date and the availability of additional pipeline capacity. Therefore, we find that the Ark/Noah project appears to be technically viable with respect to fuel transportation capability.

We find that sufficient information was not provided to FPC to determine the technical viability of the proposed thermal host for ARK/NOAH IV's Lake County Cogeneration Project.

Ark/Noah's witness Malenius argues, in part, that viability with respect to the thermal host is assured based on the following: (1) there is sufficient lead time for a competent QF developer to construct such a project; (2) Ark Energy's financial strength and established experience; and (3) Ark is presently developing a similar facility (the Mulberry Facility). However, these facts, which are very general in nature, do not establish the viability of the thermal host for the specific project proposed by Ark/Noah in this proceeding.

On October 11, 1991, FPC sent a questionnaire to seven entities who had submitted standard offer contracts during the open season. This questionnaire, among other things, asked the proposer to describe the level of commitment from the steam user, including whether it is an existing, ongoing enterprise and whether the steam user has an ownership interest in the project. The questionnaire

also asked for copies of commitments by the steam user on behalf of the project. In response to this specific request, Ark referred to Attachment "H" of its September 21 [sic], 1991, standard offer submittal to FPC. Attachment "H" of Ark's standard offer submittal has not been offered into evidence in this proceeding, but FPC assigned a score of minus 1 (Poor) to the category entitled "Host" in its comparative evaluation of the project.

In a letter to Thomas Wetherington of FPC, dated November 5, 1991, William Siderewicz of Ark Energy briefly discusses the possibility of marketing its CO2 product to a wholesaler, who, in turn, will distribute the CO2 product to end users. Item 3 of that letter states, in part, "A copy of Carbonic Industries, 1990 annual report and recent communication regarding our working relationship is attached." We make the following three observations with regard to this information:

(1) the 1990 annual report of Carbonic Industries does not provide specific technical information to assess the viability of any specific thermal host;

(2) the one-page brief letter from David Fike of Carbonic Industries to William Siderewicz of Ark Energy provides almost no information on the purported "working relationship" between the two entities;

(3) the information provided does not constitute any kind of commitment to purchase the CO2 output.

Therefore, we find that sufficient information was not provided to FPC to establish technical viability of the proposed thermal host.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration project did not have the highest likelihood of success relative to the other proposals received by Florida Power Corporation.

Although ARK/NOAH's witnesses testified that FPC's comparative evaluation system was unfair, no alternate weighting and ranking system was introduced into the record showing that the NOAH IV project would have the highest likelihood of success. The fairness and/or reasonableness of FPC's comparative evaluation procedure is not one of the issues that have been raised in this proceeding. However, we believe that the criteria used to evaluate the various proposals were valid, reasonable and fairly applied. Exhibit 1 contains the ranking criteria, ranking methodology, and the results of FPC's evaluation.

Based on our decisions in the above issues, the remainder of the issues raised in this proceeding are rendered moot.

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In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Petition for authority to reject all standard offer contracts except that submitted by Panda Kathleen, L.P. is GRANTED. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 22nd day of October, 1992.

  
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STEVE TRIBBLE, Director  
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Records and Reporting 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 or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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.

ATTACHMENT I  
SPECIFIC RULINGS ON ARK/NOAH'S PROPOSED FINDINGS OF FACT

1. Nothing in the Commission's standard offer rule addresses the comparative evaluation/open season procedure followed by Florida Power Corporation ("Florida Power") in this proceeding. [Rule 25-17.-832, F.A.C. (1991)]

**RULING:** Rejected as a Conclusion of Law and not a Finding of Fact.

2. Nothing in the pre-adoption history of the standard offer rule supports the use of a comparative evaluation/open season procedure for executing standard offer contracts. [ARK/NOAH Exhibit 3; Tr. 313 line 25- Tr. 317 line 3, esp. p. 316, lines 15-16]

**RULING:** Rejected as a Conclusion of Law and not a Finding of Fact.

3. At hearing, Florida Power introduced no evidence that the pre-adoption history of the standard offer rule supports use of a comparative evaluation/open season approach. [Tr. 12, line 11 - Tr. 142, line 2; Tr. 554, line 13 - Tr. 593, line 11].

**RULING:** Rejected as unnecessary to decide the factual matters at issue in this case.

4. At the September 18, 1990 agenda conference, the Commission voted to adopt Rule 25-17.0832. At that conference, prior to their vote, Commission members were advised by staff that the rule was structured so that standard offer contracts would be handled on a "first in line" basis. [ARK/NOAH Exhibit 3, Doc. 9, at 49-50]

**RULING:** Accepted and incorporated with the clarification that the exchange was between Chairman Wilson and Ms. Harvey; and was not sworn testimony in any proceeding.

5. Prior to adoption of the rule, members of the Commission considered establishing three criteria for rejecting a standard offer contract, then reduced the criteria to the two now contained in Rule 25-17.0832(3). [ARK/NOAH Exhibit 3, Doc. 5, pp. 93-103].

**RULING:** Accepted and incorporated with the clarification that the criteria are not exclusive.



6. The conversation with Jennifer Harvey described by Florida Power at hearing was informal, not noticed, and entirely off the record. [Tr. 66, line 17 - Tr. 67, line 8].

**RULING:** Rejected as unnecessary to decide the matters at issue in the proceeding.

7. ARK/NOAH were the first to accept Florida Power's standard offer to purchase firm capacity and energy from a QF. [Tr. 21, lines 18-19; FPC Exhibit 1, pp. 19,30]

**RULING:** Accepted and incorporated.

8. ARK/NOAH were the only QF to accept Florida Power's standard offer tariff on September 20, 1991, and no other QF accepted until September 26, 1991. [Tr. 21, lines 18-19; FPC Exhibit 1, pp. 19,30]

**RULING:** Accepted and incorporated, with the clarification that ARK/NOAH were the first to file documents responsive to the tariff.

9. At hearing Florida Power introduced no evidence to demonstrate that the ARK/NOAH project was not viable. [Tr. 12, line 11 - Tr. 142, line 2; Tr. 554, line 13 - Tr. 593, line 11].

**RULING:** Rejected as unsupported by the evidence, FPC expressed concerns about the viability of the steam host which could affect the viability of the project. However, the evidence neither proves nor disproves the viability of the project.

10. At hearing Florida Power's witness conceded that had the ARK/NOAH project been the only project under consideration, he did not know whether he would have petitioned to reject. [Tr. 26, line 10 - Tr. 27, line 2]

**RULING:** Rejected. At one point in his testimony he did not know. On redirect he indicated that FPC would have petitioned to reject the contract.

11. At hearing, Florida Power's witness admitted that Florida Power "would have had a difficult time" in proving that ARK/NOAH could not bring their project on line in five years. [Tr. 31, lines 15-24]

**RULING:** Accepted and incorporated.

12. Florida Power's witness admitted that it is possible to build a facility such as ARK/NOAH's Lake County cogeneration facility. [Tr. 30, lines 17-18].

**RULING:** Accepted and incorporated.

13. Under Florida Power's comparative evaluation analysis, ARK/NOAH were rated "very good" as a developer [Tr. 137, lines 24-25].

**RULING:** Accepted and incorporated.

14. The ARK/NOAH project was rated as "good" or "very good" on 7 of 8 viability-related criteria. [Tr. 138, line 6 - Tr. 139, line 12; FPC Exhibit 1, p. 19]

**RULING:** Accepted and incorporated.

15. The ARK/NOAH project was ranked fourth overall under Florida Power's comparative evaluation. [Tr. 26, lines 7-8; FPC Exhibit 1, p. 19].

**RULING:** Accepted and incorporated.

16. As of November 19, 1991, the ARK/NOAH Lake County Cogeneration project was a viable project. [Tr. 540, line 1 - Tr. 541, line 10; Tr. 184, line 11 - Tr. 186, line 9].

**RULING:** Rejected as unsupported by the greater weight of the evidence. FPC had concerns about the security of the steam host. [Tr. 556-557; page 22, FPC Exhibit 1]. The viability of the steam host could affect the viability of the project.

17. ARK Energy, through Polk Power Partners, L.P., is also developing the Mulberry Cogeneration Facility, a cogeneration facility in Polk County, Florida, that is nearly identical to the Lake County Cogeneration Facility being developed by ARK/NOAH. [Tr. 535, lines 3-14].

**RULING:** Rejected as irrelevant.

18. The Mulberry Cogeneration Facility is approximately on schedule. [Tr. 535, lines 15-16; Tr. 538, line 18 - Tr. 539, line 4].

**RULING:** Rejected as irrelevant.

19. Florida Power's standard offer tariff, Sheets Nos. 9.500 through 9.900, was required to be filed on September 6, 1991. [PSC Order No. 24989, p. 70, 73].

**RULING:** Accepted and incorporated.

20. Florida Power's standard offer tariff did not mention a comparative evaluation/open season process. [Tr. 34, line 5 - Tr. 35, line 3]

**RULING:** Accepted with the modification that FPC's standard offer tariff does not mention any evaluation method.

21. Florida Power's standard offer tariff was approved on September 12, 1991, and became effective on September 20, 1991. [Tr. 33, lines 4-6; FPC Exhibit 1, Section X, Memo from R.D. Dolan to File: See Tr. 72, lines 9-12]

**RULING:** Accepted and incorporated.

22. Florida Power's comparative evaluation/open season process was never reviewed or approved by the Commission. [Tr. 34, line 5 - Tr. 35, line 3]

**RULING:** Accepted with the clarification that prior approval of the comparative evaluation/open season was not required under the rule and by our decision in this matter is explicitly approved.

23. ARK/NOAH accepted the standard offer tariff at 7:35 a.m. on September 20, 1991 by hand-delivery of a completed standard offer contract to Florida Power in St. Petersburg, Florida. [Tr. 464, lines 10-13].

**RULING:** Accepted and incorporated.

24. Once ARK/NOAH accepted Florida Power's standard offer contract on September 20, only 10 MW remained to be subscribed, under the Commission's rule and the terms of Florida Power's tariff. [FPC Exhibit 1, Standard Offer Contract Tariff, Original Reissue Sheets Nos. 9.511 and 9.710]

**RULING:** Rejected as a Conclusion of Law, however we accepted as

fact that NOAH/ARK offered to provide 70 MW of the 80 MW subscription limit.

25. ARK/NOAH contacted Florida Power prior to the standard offer contract's effective date, and inquired where to file the contract and how early the office would open on September 20. [Tr. 463, line 18 - Tr. 464, line 3; Tr. 502, line 25 - Tr. 503, line 9].

**RULING:** Accepted and incorporated.

26. As of November 19, 1991, ample capacity remained in FGT's Phase III pipeline expansion to serve ARK/NOAH's fuel requirements. [Tr. 437, 541, line 19 - Tr. 542, line 8]

**RULING:** Accepted and incorporated.

27. On June 20, 1991 the appropriate reservation deposit was made on behalf of ARK to reserve Phase III capacity for the ARK/NOAH project and other ARK projects in Florida. [Tr. 441, lines 11-12]

**RULING:** Accepted and incorporated.

28. ARK/NOAH have numerous options available to it for fuel supply in 1997. [Tr. 188, lines 2-11; Tr. 437, line 14 - Tr. 438, line 2; Tr. 542, line 14 - Tr. 543, line 1].

**RULING:** Rejected to the extent that numerous is too indefinite.

29. ARK/NOAH's cogeneration facility will have dual fuel capability, so if necessary, ARK/NOAH will use an alternative fuel as a bridge measure. [Tr. 188, lines 6-11; Tr. 437, line 20 - Tr. 438, line 22; Tr. 542, line 20 - Tr. 543, line 1].

**RULING:** Accepted and incorporated.

30. Florida Power rated ARK/NOAH's Lake County project "good" with respect to fuel transportation. [FPC Exhibit 1, p. 19,25].

**RULING:** Accepted and incorporated.

31. Liquid carbon dioxide plants are widely recognized as viable thermal hosts for qualifying cogeneration facilities. [Tr.

535, line 19 - 536, line 3].

**RULING:** Accepted and incorporated without the word "widely."

32. Florida Power itself has sought and obtained approval of a negotiated contract for a cogeneration facility with a carbon dioxide plant as its thermal host. [Tr. 189, line 21 - Tr. 194, line 2].

**RULING:** Accepted and incorporated.

33. The Florida Power plant referred to in the above Proposed Finding of Fact is scheduled to be built in less than half the time available to ARK/NOAH for the Lake County project. [Tr. 192, line 16 - Tr. 193, line 13; Tr. 543, line 17 - Tr. 544, line 10]

**RULING:** Accepted and incorporated.

34. Florida Power produced no evidence that the plant referred to in Proposed Finding 32 will be unable to come on line because of lack of a CO2 thermal host. [Tr. 97, line 18 - Tr. 98, line 11].

**RULING:** Rejected as irrelevant.

35. The sum total of Florida Power's allegation that ARK/NOAH's project is not viable is Florida Power's subjective rating of the project as "poor" with respect to thermal host, because of the absence of a letter of intent to construct the CO2 plant, and undocumented "doubts" concerning ARK/NOAH's ability to access the CO2 market. [FPC Exhibit 1, p. 22; Tr. 97, lines 7-18].

**RULING:** Rejected as argument rather than a finding of fact.

36. ARK/NOAH have a ready market for the carbon dioxide produced at its Lake County Facility, and has already granted a "right of first refusal" to a CO2 marketer. [Tr. 546, line 14-24]

**RULING:** Rejected as unsupported by the evidence of record.

37. Florida Power never formally advised potential QF's of its comparative evaluation/open season. [Tr. 119, line 6 - Tr. 123, line 14]

**RULING:** Rejected. The term "formally" is not adequately defined.

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38. Florida Power's evaluation and scoring criteria never made a part of the record of Docket No. 910004-EU.

**RULING:** Rejected as irrelevant, based on our determination that the open season was proper under the rule.

39. ARK/NOAH had no communication with Panda Kathleen prior to filing its acceptance of the standard offer contract. [Tr. 152, line 18 - Tr. 153, line 20]

**RULING:** Accepted and incorporated.

40. Panda made its decision when to file based on the representations of Florida Power and allegedly others, but not on any representations or communication by ARK/NOAH. [Tr. 152, line 18 - Tr. 153, line 20]

**RULING:** Accepted and incorporated.