State of Florida

Public Service Commission

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

DATE: JULY 12, 2001

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

FROM: DIVISION OF SAFETY & ELECTRIC RELIABILITY (HAFF, BOHRMANN)
DIVISION OF LEGAL SERVICES (HART)

RE: DOCKET NO. 010821-EQ - JOINT PETITION FOR APPROVAL OF THIRD AMENDMENT TO AGREEMENT FOR PURCHASE OF FIRM CAPACITY AND ENERGY BETWEEN INDIANTOWN COGENERATION, L.P. AND FLORIDA POWER & LIGHT COMPANY.

AGENDA: 07/24/2001 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\010821.RCM

CASE BACKGROUND

Indiantown Cogeneration, L.P. (ICL) and Florida Power & Light Company (FPL) (collectively, Parties) have an existing negotiated cogeneration contract under which FPL purchases firm capacity and energy generated by ICL's 330 MW coal-fired facility located in Indiantown, Florida. The original agreement was signed on May 21, 1990, and was first amended on December 5, 1990. The original and amended agreement were approved by the Commission in Order No. 24269-A, issued on April 5, 1991, in Docket No. 900731-EQ. A second contract amendment was approved by the Commission in Order No. PSC-92-1345-FOF-EQ, issued on November 23, 1992, in Docket No. 920825-EI. The Power Purchase Agreement discussed herein comprises the original agreement and the two subsequent amendments.

Disputes have occasionally arisen between the Parties concerning each party's respective rights under the Power Purchase

Agreement. One such dispute led to litigation filed by ICL on March 19, 1999 (*Indiantown Cogeneration, L.P. v. Florida Power & Light Co.*, Case No. 99-317-CIV-ORL-28C in the United States District Court for the Middle District of Florida). On December 19, 2000, during court-ordered mediation prior to trial, the Parties executed a settlement agreement which resolved and compromised the dispute. The settlement agreement called for the Parties to negotiate a Third Amendment to the Power Purchase Agreement to implement their compromise, petition for Commission approval of the Third Amendment, and dismiss the litigation with prejudice if and when the Third Amendment receives Commission approval. The joint petition for approval was filed with the Commission on June 6, 2001.

The Commission has jurisdiction over the subject matter pursuant to Sections 366.04(1) and 366.051, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission approve the joint Florida Power & Light Company (FPL) / Indiantown Cogeneration, L.P. (ICL) petition for approval of the Third Amendment to their Power Purchase Agreement?

RECOMMENDATION: Yes. The Third Amendment is cost-effective to FPL's ratepayers and resolves pending litigation between the Parties regarding their respective rights under the Power Purchase Agreement.

STAFF ANALYSIS: The Power Purchase Agreement gives FPL the authority to start (commit), shut down (decommit) and control the output of (dispatch) the ICL facility. FPL may dispatch and decommit the ICL facility simultaneously, to control the output at zero if FPL does not need the energy. Pursuant to the Power Purchase Agreement, the output of the facility can go only to FPL. During times that FPL would decommit the ICL facility, ICL may continue to operate at levels up to 100 MW unless safety or reliability concerns dictate otherwise. During these occasions, FPL buys the resulting energy at what is defined as "Unit Energy Payment Cost", which is based on FPL's avoided unit at the time, a

coal unit. Capacity payments are not affected when FPL decommits the ICL facility.

In the past, the Parties have disagreed on one particular aspect of the Power Purchase Agreement. When the ICL facility "trips" off line, or separates from FPL's system, ICL believes that it may reclose the facility into FPL's system and continue operating up to 100 MW, absent safety or FPL system security reasons. However, FPL believes that it may dispatch the ICL facility but refuse to commit it if more economical electricity is available at that time.

The litigation in *Indiantown Cogeneration, L.P. v. Florida Power & Light Co.* arose from just such a dispute. On March 10, 1999, the ICL facility "tripped" off line. After correcting the problems which caused the "trip", ICL asked to reclose its facility into FPL's system. In response, FPL decided to dispatch the ICL facility but refused to commit the unit, therefore refusing to allow ICL to reclose.

During court-ordered mediation prior to trial in *Indiantown Cogeneration, L.P. v. Florida Power & Light Co.*, the Parties executed a settlement agreement which led to the negotiated Third Amendment to the Power Purchase Agreement. The Third Amendment settles the case and dismisses the litigation with prejudice if and when approved by the Commission. The essential elements of the Third Amendment are as follows:

- If the ICL facility separates from FPL's system for any reason, FPL may delay reclosure for up to four hours for any reason (longer if safety or reliability reasons warrant).

- Following a separation of the ICL facility, FPL may not want ICL to reclose for economic reasons. On these occasions, ICL may still reclose and deliver up to 100 MW to FPL under a "reclose period". The reclose period cannot exceed 360 hours in a year, and any unused hours may be accumulated for future use not to exceed 1440 hours total.

- During a reclose period, FPL will pay for ICL's delivered energy at "As-Available Energy Costs" -- the tariff rate for as-available energy. In the unlikely event that ICL operates under a reclose period exceeding 360 hours in a year, FPL will buy the ICL facility's energy at the Unit Energy Payment Cost.

Staff believes that the proposed Third Amendment to the Power Purchase Agreement is reasonable. First, the Third Amendment is cost-effective to FPL's ratepayers because FPL will pay As-Available Energy Costs during times it does not want or need ICL's energy deliveries. Pursuant to Rule 25-17.0825(1), Florida Administrative Code, as-available energy costs do not exceed a utility's avoided energy cost. Second, the Third Amendment resolves pending litigation between the Parties. By agreeing to compromise and resolve its dispute with ICL, FPL avoids potentially costly litigation. While each of the Parties believe that their position is correct, neither FPL nor ICL can predict the outcome of litigation. If ICL were to prevail in the litigation, FPL may have to purchase up to 100 MW from the ICL facility at Unit Energy Payment Cost when more cost-effective electricity is available from other sources. Under the Third Amendment, most, if not all, such energy will be priced at the As-Available Energy Cost. For these reasons, staff recommends that the Commission grant the Parties' joint petition to approve the Third Amendment to the Power Purchase Agreement.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.

STAFF ANALYSIS: At the conclusion of the protest period, if no protest is filed, this docket should be closed upon the issuance of a consummating order.