

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: October 22, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (SICKEL, BAXTER, HAFF)
OFFICE OF THE GENERAL COUNSEL (VINING)

RE: DOCKET NO. 030866-EQ - PETITION FOR APPROVAL OF STANDARD
OFFER CONTRACT BASED ON 2007 COMBINED CYCLE AVOIDED UNIT
AND ACCOMPANYING RATE SCHEDULE COG-2, AND FOR WAIVER OF
RULE 25-17.0832(4)(E)5, F.A.C., BY PROGRESS ENERGY
FLORIDA, INC.

AGENDA: 11/03/03 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 8-MONTH EFFECTIVE DATE: 4/27/04
90-DAY DEADLINE ON RULE WAIVER REQUEST: 11/25/03

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030866.RCM

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CASE BACKGROUND

On August 27, 2003, Progress Energy Florida (Progress or Company) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities. The proposed contract and associated tariffs are based on a 20 MW subscription limit of a 540 MW combined cycle unit, Hines Unit 4, scheduled to go into service in December 2007.

On the same day, Progress also filed a Petition for Waiver of Rule 25-17.0823(4)(e)5, Florida Administrative Code, which requires that the open solicitation period of the standard offer contract must end prior to issuance of a Request for Proposals (RFP), pursuant to Rule 25-22.082, Florida Administrative Code, (Bid Rule) for the standard offer's avoided unit. If the Commission approves

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this rule waiver, the open solicitation period of the standard offer and the RFP process will take place concurrently.

Pursuant to Section 120.542(6), Florida Statutes, notice of the Company's petition for rule waiver was submitted to the Secretary of State for publication in the September 19, 2003, Florida Administrative Weekly. The 14-day comment period, provided for in Rule 28-104.003, Florida Administrative Code, expired on October 3, 2003. No comments concerning this petition were filed.

At the October 7, 2003 Agenda Conference, the Commission suspended the tariff revisions filed as part of the Company's Petition. The tariff suspension allowed staff sufficient time to review the Petition filed by Progress.

This recommendation addresses both the Petition for Approval of the Standard Offer Contract and the related Petition for Waiver. The Commission is vested with jurisdiction over this matter pursuant to Sections 120.542, 366.04, 366.05, 366.051, 366.06, and 366.80 through 366.82, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Progress Energy Florida's Petition for a Waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's standard offer contract must terminate prior to its issuance of a notice of Request for Proposal (RFP) based on the standard offer contract's avoided unit?

RECOMMENDATION: Yes. Progress has demonstrated that the purpose of the underlying statute will be met, and that strict adherence to the closure provision of the standard offer contract would create a substantial hardship for Progress and its customers. (Vining)

STAFF ANALYSIS: Progress has petitioned for waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's Standard Offer Contract must terminate prior to its issuance of a notice of Request for Proposal based on the standard offer contract's avoided unit. The utility is requesting the waiver to allow the proposed

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Standard Offer Contract to continue concurrently with Progress's RFP process based on Hines 4, the avoided unit.

Section 120.542, Florida Statutes, mandates threshold requirements for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Thus, a person requesting a variance or waiver must affirmatively demonstrate that the purpose of the underlying statute has been met. In addition, the petitioner must demonstrate that it will either suffer "substantial hardship" or that "principles of fairness" will be violated. If the allegations relate to fairness, an additional proof of uniqueness to the petitioner is required by the statute.

In its Petition For Waiver, Progress identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes, the purpose of which is to encourage cogeneration and small power production, while at the same time protecting ratepayers from potential adverse effects. Rule 25-17.0832(4)(e)5, Florida Administrative Code, implements Section 366.051, Florida Statutes. Pursuant to the Rule, each standard offer contract shall, at a minimum, specify:

A reasonable open solicitation period during which time the utility will accept proposals for standard offer contracts. Prior to the issuance of timely notice of a Request for Proposals (RFP) pursuant to Rule 25-

22.082(3), the utility shall end the open solicitation period.

Progress believes that the purpose of the underlying statute will not only be achieved but enhanced by the requested waiver because it will eliminate a limitation on the availability of a standard offer contract to cogenerators. The waiver will enable the standard offer to remain in effect and available to cogenerators while the RFP process is underway, a situation that would be impermissible if the rule were not waived.

Staff agrees with Progress that allowing the issuance of the RFP at the same time as the open solicitation period will satisfy the underlying purpose of the statute by encouraging small qualifying facilities (QF). In addition, staff believes that neither Progress nor its ratepayers would be at a disadvantage if the Company issues a RFP for Hines Unit 4 while the standard offer contract is outstanding.

Next, Progress states that strict adherence to the closure provision contained within Rule 25-17.0832(4)(e)5, Florida Administrative Code, would create a substantial hardship for Progress and its ratepayers. The Company believes that the timely completion of the RFP process is a key milestone in the schedule to place this 540 MW capacity addition in service by December 2007, so that it will be available to meet the 2007/2008 winter peak demand period. Also, Progress states that delaying the completion of the RFP process until after the standard offer has been approved, and the open solicitation period has expired, would significantly impair the Company's ability to satisfy its 20% reserve margin responsibilities within this important reliability time frame. Such an impairment to the reliability of the Company's generation resources would create a real and substantial hardship on Progress and its customers.

Staff believes that if the waiver is not granted, Progress's efforts to meet the 20% reserve margin would be frustrated. In 1999, the Commission approved an agreement between Progress Energy Florida, Florida Power & Light, and Tampa Electric Company adopting a 20% reserve margin planning criterion, effective with the summer of 2004. See Order No. PSC-99-2507-S-EU, issued December 22, 1999, Docket No. 981890-EU, In Re: Generic Investigation into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida. A delay in the RFP process could seriously jeopardize

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Progress's ability to bring Hines 4 on line by the December 2007 in-service date, thereby ensuring that the Company can maintain a 20% reserve margin. As a result, staff agrees with the Company that this potential impairment to the reliability of Progress's generation resources constitutes "substantial hardship" within the meaning of Section 120.542, Florida Statutes.

Finally, staff notes that the Commission has previously waived the rule's standard offer closure requirement, and approved an open solicitation period for the standard offer contract that ran concurrently with the RFP process conducted for both the Hines 2 and 3 self-build option. Order No. PSC-00-0504-PAA-EQ, issued March 7, 2000, in Docket No. 991973-EQ, In Re: Petition of Florida Power Corporation for Approval of Standard Offer Contract Based on a 2003 Combined Cycle Avoided Unit and Accompanying Rate Schedule COG-2 Pursuant to Section 366.051, F.S., and Rules 25-22.036(4) and 25-22.170832(4), F.A.C.; Order No. PSC-02-0909-PAA-EQ, issued July 8, 2002, in Docket No. 020295-EQ, In Re: Petition for Approval of Standard Offer Contract Based on 2005 Combined Cycle Avoided Unit and Accompanying Rate Schedule COG-2, by Florida Power Corporation. The previous requests were granted on substantially the same grounds asserted by Progress in this docket.

In conclusion, Progress has demonstrated that the purpose of the underlying statute will be met, and that strict adherence to the closure provision of the standard offer contract would create a substantial hardship on Progress and its customers. Therefore, staff recommends that the Commission should grant Progress Energy Florida's Petition for a Waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's standard offer contract must terminate prior to its issuance of a notice of Request for Proposal (RFP) based on the standard offer contract's avoided unit, Hines 4.

ISSUE 2: Should Progress Energy Florida's petition for approval of a new Standard Offer Contract, based upon a combined cycle unit with a scheduled in-service date of December 2007, be approved?

RECOMMENDATION: Yes. The Standard Offer Contract submitted by Progress complies with Rule 25-17.0832, Florida Administrative Code. (Sickel, Haff, Baxter)

STAFF ANALYSIS: Pursuant to federal law, the availability of standard rates is required for fossil-fueled qualifying facilities less than 100 kilowatts (0.1 MW) in size. 16 U.S.C. 2601 *et seq.*, 16 U.S.C. 792 *et seq.*, 18 CFR 292.304. Florida law requires the Commission to "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Section 366.82(2), Florida Statutes. The Commission is further directed to "establish a funding program to encourage the development by local governments of solid waste facilities that use solid waste as a primary source of fuel for the production of electricity." Section 377.709, Florida Statutes.

These federal and state requirements were implemented by the Commission through its adoption of the Standard Offer Contract process in Rule 25-17.0832(4)(a), Florida Administrative Code. Pursuant to this rule, each investor-owned electric utility must file with the Commission a tariff and a Standard Offer Contract for the purchase of firm capacity and energy from small qualifying facilities. These provisions implement the requirements of the Public Utilities Regulatory Policies Act (PURPA) and promote renewables and solid waste-fired facilities by providing a straightforward contract. Larger qualifying facilities and other non-utility generators may participate in a utility's Request For Proposal process, pursuant to Rule 25-22.082, Florida Administrative Code.

To comply with Rule 25-17.0832(4)(a), Florida Administrative Code, Progress proposes a new Standard Offer Contract based on a 20 MW portion of the Company's next identified generating unit, a 540 MW combined cycle unit to be located at the Hines Energy Complex. The unit will be known as Hines 4, and is scheduled to enter commercial service no later than December 3, 2007. The Company's proposed Standard Offer Contract meets the minimum requirements set forth in Rule 25-17.0832(4)(e). The delivery of firm capacity and energy will commence on or before January 1, 2008 and extend for five years.

Progress has proposed an associated tariff, COG-2 (firm capacity and energy). This tariff would expire on the earlier of the date the subscription limit of 20 MW is fully subscribed, or two weeks after approval of this standard offer by the Commission.

By a concurrently filed petition, the Company seeks to waive the requirement of Rule 25-17.0832(4)(e)5, that the open solicitation period for a utility's standard offer must terminate prior to its issuance of a notice of RFP based on the standard offer contract's avoided unit. Upon the Commission granting the petition for waiver, as recommended in Issue 1 above, the open solicitation period for this standard offer would run concurrently with the RFP for the avoided unit.

The evaluation criteria contained in the Company's proposed Standard Offer Contract should be readily understandable to any developer who signs the contract. The avoided unit cost parameters appear to be reasonable for a combined cycle unit, and the resulting capacity payments are appropriate.

It is unlikely that purchases made by Progress pursuant to the proposed Standard Offer Contract will result in the deferral or avoidance of the Hines 4 unit. The subscription limit of 20 MW is only a portion of the scheduled Hines 4 unit. If Progress enters into Standard Offer Contracts, but the need for the 2007 combined cycle unit is not deferred or avoided, Progress will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of state regulations discussed above may result in a subsidy to the qualifying facilities. Staff notes, however, that the potential subsidy may be mitigated, as Progress may have opportunities to sell any surplus capacity to the wholesale market.

Ideally, qualifying facilities should compete on equal footing with all other producers of electricity. However, until and unless there is a change in federal and state law, qualifying facilities are to be given some preferential treatment. The Commission has minimized this unequal footing by requiring Standard Offer Contracts only for small qualifying facilities, renewables, or municipal solid waste facilities. These types of facilities may not be in a position to negotiate a purchased power agreement due to their size or timing. Thus, the Commission's rules balance market imperfections with the existing policy of promoting qualifying facilities.

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In summary, staff does not expect that the Company's proposed Standard Offer Contract will result in the avoidance of the scheduled combined cycle unit addition. Nonetheless, the contract and tariffs proposed by Progress are in compliance with the Commission's cogeneration rules. For this reason, staff recommends that Progress's petition to establish its new Standard Offer Contract and associated tariffs be approved.

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ISSUE 3: On what date should the Standard Offer Contract proposed by Progress become effective?

RECOMMENDATION: Progress's proposed standard offer contract should become effective upon the issuance of a consummating order if there is no timely protest filed. (Sickel, Haff, Baxter)

STAFF ANALYSIS: Since it would not be reasonable to have this tariff go into effect if the rule waiver portion of the Commission's order were protested, the tariff should be processed as a proposed agency action. The standard offer contract as proposed by Progress should become effective upon the issuance of a consummating order.

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ISSUE 4: 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. (Vining)

STAFF ANALYSIS: In order to process both rule waiver request and the tariff filing simultaneously, staff recommends that the proposed agency action process be utilized instead of the tariff process for the portion of the Order approving the standard offer contract. While both processes provide for a point of entry for protest, under the tariff process, if there is a protest, the tariff would go into effect pending the outcome of the hearing; whereas under the proposed agency action process, if protested, the tariff would not go into effect as the proposed agency action order becomes a nullity. Since it would not be reasonable to have this tariff go into effect if the rule waiver portion of the Commission's Order was protested, the tariff should be processed as proposed agency action. If there is no timely protest to either the rule waiver or standard offer contract portions of the Order by a person whose substantial interests are affected, the docket should be closed upon the issuance of a consummating order.