

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION
CLERK

DATE: September 20, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of Industry Development and Market Analysis (Clemence)
Division of Engineering (Graves) *RT*
Office of the General Counsel (Robinson) *PER AT*

RE: Docket No. 120228-EQ – Petition for approval of modifications to standard interconnection agreements contained in the approved tariff by Progress Energy Florida, Inc.

AGENDA: 10/02/12 – Regular Agenda –Tariff Filing – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 10/27/12 (60-Day Suspension Date)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\IDM\WP\120228.RCM.100212.DOC

Case Background

On August 28, 2012, Progress Energy Florida, Inc. (PEF) petitioned the Commission for approval of modifications to its Standard Interconnection Agreement Tariff for customer-owned renewable generation, which were originally approved in 2008.¹ Rule 25-6.065(5), Florida Administrative Code (F.A.C.), provides the provisions that must be contained in the agreement. Rule 25-6.065(5)(d), F.A.C., states, in relevant part: "A provision that the customer shall hold

¹ See Order No. PSC-08-0624-TRF-EI, issued September 24, 2008, in Docket No. 080257-EI, In re: Petition for approval of net metering tariff, new interconnection agreements, and modification of various related tariff sheets, by Progress Energy Florida, Inc.

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harmless and indemnify the investor-owned utility for all loss to third parties resulting from the operation of the customer-owned renewable generation, except when the loss occurs due to the negligent actions of the investor-owned utility."

Rule 25-6.065(5)(e), F.A.C., states that, "A requirement for general liability insurance for personal and property damage, or sufficient guarantee and proof of self-insurance, in the amount of no more than \$1 million for Tier 2, and no more than \$2 million for Tier 3. The investor-owned utility shall not require liability insurance for Tier 1." PEF's Standard Interconnection Agreements go beyond the requirement of Rule 25-6.065(5)(e), F.A.C., by requiring customers owning Tier 2 and Tier 3 renewable facilities to maintain general liability insurance for personal injury and property damage in the amount of not less than \$1 million and \$2 million, respectively. The agreement also recommends customers owning Tier 1 renewable facilities to maintain general liability insurance for personal injury and property damage in the amount of not less than \$100,000.²

Section 768.28, Florida Statutes (F.S.), provides for a limited waiver of state sovereign immunity for state agencies. State or government entities, who are PEF customers, assert that they are not legally permitted to agree to the indemnity provision contained in PEF's Standard Interconnection Agreements. Further, these state and government entities assert that they are self-insured and are limited by law to a lesser amount of the Tier 2 and Tier 3 insurance provisions, not the full \$1 million or \$2 million required by PEF's Standard Interconnection Agreement. PEF requests approval for modification of its Tier 1, Tier 2, and Tier 3 Standard Interconnection Agreements to adhere to the limitations in law, which would allow government entities and PEF to execute the Standard Interconnection Agreements.

The Commission has jurisdiction pursuant to Section 366.91, F.S., and Rule 25-6.065, F.A.C.

² Tier 1 - 10 kW or less; Tier 2 – greater than 10 kW and less than or equal to 100 kW; Tier 3 – greater than 100 kW and less than or equal to 2 MW.

Discussion of Issues

Issue 1: Should PEF's proposed changes to its Standard Interconnection Agreement Tariffs for Customer-Owned Renewable Generation be approved?

Recommendation: Yes. Staff recommends that the Commission approve the modifications to PEF's Standard Interconnection Agreement Tariff for Customer-Owned Renewable Generation. (Clemence)

Staff Analysis: Rule 25-6.065, F.A.C., (The Rule), in part establishes the indemnification and liability insurance provisions required in investor-owned utility standard interconnection agreements for customer-owned renewable generation facilities. Government entities are precluded by law from indemnifying other parties and are limited by law as to liability. In its petition, PEF seeks to make changes to its Standard Interconnection Agreement Tariff to recognize existing law allowing PEF to interconnect with customers who are governmental agencies without needing to request rule waivers for each installation. PEF has asserted that governmental entities are unable to sign an agreement that would be in violation of state or federal laws that limit the agencies ability to waive their sovereign immunity, liability or insure for more than their maximum liability. Further, PEF requests to update a website reference to link to the current documents.

Sovereign Immunity/ Indemnity

Section 768.28, F.S., is entitled "Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs." Section 768.28(5), F.S., provides, "Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising of the same incident or occurrence, exceeds the sum of \$300,000."

Pursuant to the above statute, state and government agencies have advised PEF that they are self-insured for liability pursuant to Section 768.28(16)(a), F.S., and their liability is limited by Section 768.28(5), F.S. Therefore, state and government agencies cannot agree to the indemnity provision contained in PEF's Standard Interconnection Agreements. To address these limitations, PEF is requesting a modification of paragraph 11 of all its Standard Interconnection Agreements for all three tiers.

The proposed tariff modifications would include the following language: (1) that to the extent permitted by law and without waiving or limiting sovereign immunity, and (2) that nothing herein shall be intended to serve as a waiver or limitation of customer's sovereign immunity defenses as allowed by law.

The proposed modifications also include language that all provisions of the tariff will apply to the extent that they are not barred from executing under state or federal law. Governmental entities are subject to state and federal laws which take precedence over the

indemnification and liability provisions of the rule. This provision allows PEF to interconnect with governmental entities without needing to seek rule waivers.

The Commission has addressed the issue of sovereign immunity and indemnity for governmental agencies wishing to sign a Standard Interconnection Agreement.³ The Commission granted a waiver of the rule provisions on indemnification and liability. Since the approval of that rule waiver, PEF has been approached by other governmental entities and requests that the Commission approve tariff modifications that would allow it to quickly execute the Standard Interconnection Agreement.

Insurance

The proposed tariff modifications would add the following language to the liability insurance provision: “to the extent permitted by law,” and a new sentence that allows governmental entities to self-insure. Rule 25-6.065(5)(e), F.A.C., states “A requirement for general liability insurance for personal and property damage, or sufficient guarantee and proof of self-insurance, in the amount of no more than \$1 million for Tier 2, and no more than \$2 million for Tier 3. The investor-owned utility shall not require liability insurance for Tier 1. The investor-owned utility may include in the interconnection agreement a recommendation that Tier 1 customers carry an appropriate level of liability insurance.” PEF’s tariffs request no less than the \$1 million for Tier 2 and no less than \$2 million for Tier 3. This causes an issue for state government entities that have a maximum liability of \$200,000. Thus the issue is not with the rule, but with PEF’s tariffs.

The proposed changes to the insurance provisions of the Standard Interconnection Agreement are consistent with the rule. However, PEF’s modifications make it clear that governmental entities can only insure for the amount of their liability allowed by law.

Website Reference

PEF requests to update a reference to the current location of the tariffs on the PEF website. Staff also recommends that the request to change the address in the tariff be approved. Ensuring that the tariff includes the most up-to-date website location will allow customers to more easily access information about the Interconnection Agreement.

Conclusion

Staff believes the proposed tariff modifications will improve administrative efficiency for PEF to execute the Standard Interconnection Agreement with governmental entities. Governmental entities are subject to state and federal laws which take precedence over the indemnification and liability provisions of the rule. These changes will reduce the regulatory burden on governmental entities and PEF will not need further rule waivers to interconnect with governmental entities. The modifications will not impact other customers.

³ See Order No. PSC-12-0173-PAA-EI, issued April 2, 2012, in Docket No. 120012-EI, In re: Petition for variance and waiver of certain contractual requirements in Rule 25-6.065, F.A.C., by Progress Energy Florida, Inc.

Docket No. 120228-EQ
Date: September 20, 2012

Staff recommends the approval of all the requested changes to the PEF Standard Interconnection Agreement for Customer-Owned Renewable Generation. Approving the changes will allow PEF to interconnect with governmental agencies without needing to have rule and or tariff waivers approved for each interconnection.

Docket No. 120228-EQ
Date: September 20, 2012

Issue 2: Should this docket be closed?

Recommendation: Yes. If Issue 1 is approved, this tariff should become effective on October 2, 2012. If a protest is filed within 21 days of the issuance of the order, this tariff should remain in effect, with any revenues held subject to refund, pending resolution of the protest. If no timely protest is filed, this docket should be closed upon the issuance of a consummating order. (Robinson)

Staff Analysis: If Issue 1 is approved, this tariff should become effective on October 2, 2012. If a protest is filed within 21 days of the issuance of the order, this tariff should remain in effect, with any revenues held subject to refund, pending resolution of the protest. If no timely protest is filed, this docket should be closed upon the issuance of a consummating order.