BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power and Light Company for approval of cogeneration agreement with AES Cedar Bay, Inc.	DOCKET NO. 881570-EQ ORDER NO. 21468 ISSUED: 6-28-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER APPROVING COGENERATION AGREEMENT AND DENYING PROTEST OF ORDER NO. 20994

BY THE COMMISSION:

On December 13, 1988, Florida Power and Light Company (FPL) filed a petition seeking approval of a negotiated agreement for the purchase of cogenerated power from AES's proposed Cedar Bay facility in Jacksonville, Florida. The proposed facility is a qualifying facility (QF) pursuant to the applicable federal and state regulatory rules.

Simultaneous with the filing of the petition and the agreement, FPL requested that certain portions of the agreement be classified as specified confidential business information pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Subsequent to oral argument on its motion, the prehearing officer denied confidentiality in Order No. 20672, issued on January 30, 1989. FPL then amended its request for confidentiality on February 13, 1989. This amended request was also denied in Order No. 20994, issued on April 7, 1989. On April 21, 1989, FPL filed a protest of that ruling for review by the full Commission. At the hearing in this docket, all parties argued their respective positions but the Commission deferred ruling on the protest. This matter was voted on by the full Commission at the June 6, 1989 agenda conference.

Rule 25-17.083(2), Florida Administrative Code, requires that three criteria be met in order for payments made pursuant to negotiated agreements for the purchase of electricity from cogenerators to be recoverable through a utility's fuel adjustment clause. First, it must be demonstrated that the purchase of such firm energy and capacity from the QF 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. Second, the cumulative present worth of firm energy and capacity payments made to the QF over the term of the contract are to be no greater than the cumulative present worth of the value of the year-by-year deferral of the statewide avoided unit over the term of the contract. Third, to the extent that the annual firm energy and capacity payments made to the QF in any year exceed that year's annual value of deferring the statewide avoided unit, the contract must contain

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adequate provisions to protect the utility's ratepayers in the event the QF fails to perform pursuant to the terms and conditions of the contract.

In Order No. 17480, issued on April 30, 1987, we implemented our cogeneration rules, Rules 25-17.080-.087, Florida Administrative Code, and established a 500 MW 1995 coal unit as the state's next avoided unit. This coal unit forms the basis for the development of the cost parameters which are used in each investor-owned utility's standard offer contract and are also set forth in Order No. 17480. The negotiated contract between FPL and AES Cedar Bay, Inc. (AES) falls within the 500 MW subscription limit associated with the 1995 statewide avoided coal unit. Thus, the first criterion has been met. Further, as shown by Exhibits 301 and 302, the present worth revenue requirements of the negotiated agreement with AES are less than that of the standard offer contract over the term of the agreement and are also less than the present worth revenue requirements of FPL's own avoided unit, 335 MW of combined cycle units with an in-service date of 1994, using comparable capacity factors. That being the case, the second criterion is also met.

Finally, FPL has negotiated terms in its contract with AES which provide it with remuneration if the project is cancelled; provides for penalty payments if the project is delayed; names it loss payee for property and liability insurance; grants it a subordinated lien on a cash reserve designed to assure payment of bank debt and O&M costs; and requires AES to provide a letter of credit from its parent corporation. In addition, FPL must approve all phases of the project, from design and construction to ongoing maintenance, including a facility performance test.

Further, if the project is cancelled prior to January 1, 1991, FPL will receive a cancellation fee. The early notification date should allow FPL sufficient time to seek short-term replacement power and adjust its long-range generation expansion plan to make up for the capacity shortfall, while the fee will offset the cost of replacement power to the ratepayer. Should the project be either delayed or cancelled, FPL should be able to obtain replacement power in the 1993-95 time period easily by exercising the early purchase options in its existing UPS contracts with the Southern Company.

FPL has also negotiated terms which allow it to "step into the shoes" of AES should AES default. It is FPL's intention under those circumstances to keep the contract intact, thus preserving the ratepayer's entitlement to purchase the capacity and energy at the negotiated price. Additionally, should FPL realize any profit from the operation or disposal of the cogeneration facility, FPL testified that the ratepayer will likewise benefit. For these reasons, we find that adequate security provisions are contained in the agreement to protect FPL's ratepayers in the case of default by AES.

Finally, we address the question of whether FPL should be required to resell the electricity produced by the AES facility to another Florida utility at FPL's own cost when FPL does not need the energy or capacity to satisfy the

requirements of its own system. FPL has several problems with being required to resell the electricity which it purchases from AES pursuant to this agreement. First, FPL does not want to be forced to resell this power if the cost of the power is less than that of electricity which it can produce itself or less than the cost of electricity which it would be able to purchase from another source. The logic of this is irrefutable: FPL wishes to serve its territorial load with the least expensive power at its disposal. The application of Rule 25-17.083(5) will not thwart this effort since a purchasing utility is only required to resell its cogenerated power when that power is not needed by the purchasing utility or the cost of that power is higher than the purchasing utility's own avoided cost.

Second, FPL does not want to be burdened with the responsibility of deciding who needs any "excess" cogenerated power which it has purchased. As written, our cogeneration rules envision the designation of the utility who needs the capacity associated with the statewide avoided unit selected in the Planning Hearing. The Commission has never "designated" any utility as the utility needing the capacity associated with the statewide avoided unit. This "designation" issue, as well as the concept of "allocating" the statewide avoided unit to specific investor-owned utilities has been raised in the current Planning Hearing. In practical terms, the identification of utilities needing power at any time is not too difficult since all of the investor-owned, as well as cooperative and municipal electric utilities, are connected to a statewide broker system. And, Mr. Corn, FPL's witness, admitted that even if the Commission were to designate a utility with the statewide avoided need or to allocate the statewide avoided unit, FPL would still object to the requirement to resell cogenerated power. [T. 75]

The real rub is the price at which FPL is required to sell the power pursuant to Rule 25-17.083: "the original purchasing utility's cost." FPL simply wants to be able to keep the fruits of its bargain with the cogenerator. Or stated another way, FPL does not want some other utility to benefit from its negotiating ability. Although we are sympathetic with this sentiment, FPL should be required to resell this cogenerated power, and it should be required to sell this power at its own cost. Our cogeneration rules are based on a statewide avoided unit implemented through a statewide market. Individual utilities are not supposed to be profiting from the purchase of cogenerated power, nor are they supposed to be penalized for being required by federal and state law to purchase such power. The goal is for each transaction to be revenue-neutral. Thus FPL should not be in any different position vis-a-vis this contract than it would be in had it entered into a standard offer contract to which the rule applied. In order for the statewide need and statewide pricing concept to work, resale to the utility actually needing the power must be accomplished. To do otherwise is to undermine the theory which supports our current cogeneration pricing rules. Thus, we find that FPL should be required to resell the cogenerated power purchased pursuant to this agreement at its original cost when that energy and capacity is not needed by FPL to meet its own territorial needs.

Having fulfilled all of the requirements of Rule 25-17.083(2), Florida Administrative Code, we approve this agreement and find that payments made pursuant to this agreement are properly recovered from FPL's ratepayers through the fuel adjustment clause. We note, however, that Subsection 3 of Paragraph A on page 21 of the agreement states that if the Commission finds that FPL is required to resell the electricity purchased pursuant to the agreement, the agreement is null and void.

Finally, we deny FPL's protest of Order No. 20994 and affirm the prehearing officer's decision that certain portions of this agreement are not confidential business information pursuant to Section 366.093, Florida Statutes. However, we would clarify the order to this extent: we do not hold that policy considerations are relevant to a determination of confidentiality under Section 366.093. Although those policy considerations do exist in this case, we base our decision on the fact that we are unpersuaded that FPL's ability to negotiate cogeneration contracts will be significantly impaired by the publication of this agreement due to the highly individualized nature of cogeneration facilities.

We are supported in this opinion by the testimony of Mr. Baake, the President and Chief Operating Officer of AES, who stated that none of AES' ten previously negotiated cogeneration purchase contracts had been classified as confidential since they "are so significantly different" that "AES doesn't really mind they're public." [T. 126-7] Mr. Baake went on to state that he approved of negotiated contracts because they represented the recognition on the part of Florida regulators that each project was "unique and different" and that "we often need different kinds of contract[s] with different kinds of formats." [T. 127-8] Mr. Baake's own words belie FPL's assertion that it would be damaged in negotiations with other cogenerators by the release of the contract terms in this agreement since all cogenerators would require the same terms and conditions. We too hold the opinion that each project is so unique that the terms and conditions must be tailor-made for each to meet the cogenerator's as well as FPL's needs. And thus we do not find that FPL, or any other utility in this state, will be disadvantaged by the publication of the terms and conditions in this agreement.

Based on the above, it is

ORDERED By the Florida Public Service Commission that the petition of Florida Power and Light Company for the approval of a negotiated agreement for the purchase of cogenerated power from AES Cedar Bay, Inc. is hereby approved as discussed in the body of this order. It is further

ORDERED that the protest filed by Florida Power and Light Company of Order No. 20994 is hereby denied and Order No. 20994 is clarified as discussed in the body of this order.

By ORDER of the Florida Public Service Commission this 28th day of JUNE, 1989.

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.