

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Gulf Power Company for waiver of Rule 25-17.0832(4), F.A.C., which sets forth requirements for filing of a standard offer contract.

DOCKET NO. 990172-EI  
ORDER NO. PSC-99-1091-PAA-EI  
ISSUED: May 28, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JULIA L. JOHNSON  
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION  
ORDER DENYING PETITION FOR RULE WAIVER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. CASE BACKGROUND

On February 12, 1999, Gulf Power Company (Gulf) filed a petition for waiver of the requirements of Rule 25-17.0832(4), Florida Administrative Code, concerning the establishment of standard offer contracts for the purchase of firm capacity and energy from certain small qualifying facilities. Pursuant to Section 120.542(6), Florida Statutes, notice of Gulf's petition was submitted to the Secretary of State for publication in the March 5, 1999, Florida Administrative Weekly. On March 17, 1999, the Florida Industrial Cogeneration Association (FICA) filed preliminary comments in opposition to Gulf's petition. No other comments concerning the petition were filed within the 14-day comment period provided by Rule 28-104.003, Florida Administrative Code.

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## II. STANDARD FOR GRANTING RULE WAIVER

Section 120.542(2), Florida Statutes (1997), sets forth the criteria which must be satisfied by any regulated person seeking a variance or waiver from agency rules, as follows:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes 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.

## III. DISCUSSION

In April 1998, Gulf filed its Ten-Year Site Plan (TYSP), which identified Gulf's next planned generating unit as a 100 MW combustion turbine (CT) unit with an in-service date of May 2003. Gulf amended its TYSP in June 1998 to reflect updated planning information. The amended site plan identified Gulf's next planned generating units as an approximately 532 MW combined cycle (CC) unit with an in-service date of June 2002 (2002 CC unit) and a 30 MW portion of a Southern Company CT unit with an in-service date of June 2006 (2006 CT unit).

Gulf argues that the type and timing of these two units make both unsuitable for designation as an avoided unit for purposes of a standard offer contract. Gulf contends that the 2002 CC unit is unsuitable for designation as Gulf's avoided unit because the activities necessary to construct this unit have already begun. Gulf notes that Rule 25-17.0832(4)(e)(5), Florida Administrative Code, requires utilities to end the open solicitation period for standard offer contracts prior to the issuance of timely notice of a Request for Proposals (RFP). Gulf states that at the time this unit became a part of Gulf's generation resource plan, it was already too late to submit a standard offer contract for this unit. By that time, according to Gulf, it had to pursue the activities

necessary to construct the unit, such as issuing a Request for Proposals (RFP), in order to meet the planned in-service date. Gulf contends that the 2006 CT unit is unsuitable for designation as Gulf's avoided unit because it is too far out on Gulf's planning horizon.

We agree that the 2006 CT unit is not suitable for this purpose because it is not Gulf's next planned generating unit and is too far out on Gulf's planning horizon. However, we find that Gulf should file for our approval a standard offer contract based on the 2002 CC unit. We believe that at the time Gulf filed its amended TYSP, a brief open solicitation period for standard offer contracts based on the 2002 CC unit was still feasible. Gulf did not, however, seek approval of a standard offer contract based on the 2002 CC unit or request a rule waiver at that time. Approximately nine months later, Gulf has requested waiver of our standard offer contract rule. Based on the criteria set forth in Section 120.542(2), Florida Statutes, we find that Gulf's rule waiver petition should be denied, as discussed below.

#### Purpose of the Underlying Statute Criterion

Rule 25-17.0832(4), Florida Administrative Code, was promulgated to implement Section 366.051, Florida Statutes. The clear purpose of this statute is to promote the use of electricity from cogeneration and small power production:

Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer.

Section 366.051, Florida Statutes (1997).

The statute directs this Commission to establish guidelines and rates for the purchase of firm capacity and energy by public utilities from cogenerators and small power producers. Further, it directs us, in fixing rates paid to cogenerators or small power producers for firm capacity and energy, to "authorize a rate equal to the purchasing utility's full avoided costs." The statute defines full avoided costs as "the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source."



Gulf asserts that the statute's underlying purpose is to require purchases of capacity and energy by electric utilities from cogeneration and small power producers only where such purchases would result in a benefit to the general body of ratepayers. Assuming that this is an accurate statement of the statute's purpose, Gulf has not demonstrated how this purpose is achieved through its requested waiver. Because Gulf did not timely issue a standard offer based on the 2002 CC unit, we cannot know whether purchases from cogenerators or small power producers would have resulted in a benefit to Gulf's ratepayers.

Considering that the statute promotes the use of electricity from cogeneration and small power production, we find that Gulf has not demonstrated that this purpose will be or has been achieved by other means. Instead, it appears that if Gulf's waiver petition is granted, the purpose of Section 366.051, Florida Statutes, will not be effectuated. Clearly, if Gulf does not issue a standard offer based on the 2002 CC unit, the use of electricity from cogeneration and small power production is not promoted.

#### Substantial Hardship / Principles of Fairness Criterion

Gulf asserts that if we require it to establish a standard offer contract based on the 2002 CC unit, a delay in construction of the unit would result and, consequently, its ratepayers' need for capacity and energy would not be met. Gulf argues that this would impose a substantial hardship on Gulf and its ratepayers while providing no tangible benefits. Gulf does not argue that this would violate principles of fairness as defined in Section 120.542, Florida Statutes.

Gulf's argument appears to be based on the notion that if it is required to issue a standard offer contract based on the 2002 CC unit, it will be required to restart the process for approval and construction of this unit set forth in our rules. Gulf has already issued and received responses to a Request for Proposals (RFP) for supply-side alternatives to the 2002 CC unit and is currently seeking a determination of need for the unit from this Commission, as required by our rules. By requiring Gulf to issue a standard offer contract based on the 2002 CC unit, however, we do not intend for Gulf to restart the process set forth in our rules. We intend for Gulf to seek our approval of and issue a standard offer contract concurrent with its ongoing activities for approval and construction of the 2002 CC unit. This course of action will not cause Gulf to delay construction of its next unit.

We also believe that the hardship alleged by Gulf is not created by application of the rule, but by actions entirely within Gulf's control. Gulf is well aware of its own planning processes and should be well aware of this Commission's rules, including the standard offer rule, related to that process. If Gulf had issued a standard offer contract or sought waiver of the rule in a more timely manner, Gulf would have been able to mitigate any potential hardship caused by a delay in construction of its next planned generating unit.

#### IV. CONCLUSION

In conclusion, we find that Gulf's petition for waiver of Rule 25-17.0832(4), Florida Administrative Code, should be denied. Gulf has not demonstrated that the purpose of the statute underlying this rule will be or has been achieved by other means and has not demonstrated that application of the rule will create a substantial hardship for Gulf. Further, we find that Gulf should file for our approval a standard offer contract based on the 2002 CC unit. This standard offer contract shall provide for a two-week open solicitation period to allow potential parties sufficient time to sign the contract.

This approach is consistent with the approach recently taken by Tampa Electric Company (TECO) in Docket No. 981893-EQ. In that case, TECO's planning process indicated that its next planned generating unit would need to be built sooner than expected. While TECO was not required to issue an RFP for the unit, there was no time to issue a standard offer contract that could effectively defer the necessity to construct the unit. In order to comply with the rule, however, TECO petitioned for approval of a standard offer contract based on that unit. The contract called for a brief open solicitation period of two weeks. By Order No. PSC-99-0748-FOF-EQ, we approved TECO's petition.

While we recognize that requiring Gulf to issue a standard offer contract at this time based on the 2002 CC unit most likely will not result in a benefit to Gulf's ratepayers, we believe that Gulf's ratepayers will not be materially burdened with costs from potential signed standard offer contracts due to the low likelihood of response to the standard offer and Gulf's ability to mitigate any potential costs through wholesale transactions. More importantly, as stated above, Gulf has not satisfied the criteria set forth in Section 120.542(2), Florida Statutes, for waiver of our rule requiring issuance of such a contract.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company's petition for waiver of Rule 25-17.0832(4), Florida Administrative Code, is denied. It is further

ORDERED that Gulf Power Company shall submit for this Commission's review a standard offer contract based on its next planned generating unit, a combined cycle unit with an in-service date of June 2002. This standard offer contract shall provide an open solicitation period of two weeks. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon issuance of a consummating order, unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th day of May, 1999.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 18, 1999.

In the absence of such a petition, this order shall become final and effective on the day a consummating order is issued.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.