

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power
Corporation for Approval of
Standard Offer Contract and
Accompanying Rate Schedule COG-2

DOCKET NO. 991526-EQ
ORDER NO. PSC-00-0265-PAA-EG
ISSUED: February 8, 2000

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING STANDARD OFFER CONTRACT AND ACCOMPANYING RATE
SCHEDULE COG-2

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.

On October 8, 1999, Florida Power Corporation (FPC) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities. The proposed contract is based on a 20 megawatt (MW) subscription limit of a 90 MW combustion turbine generating unit with an in-service date of January 1, 2001.

Along with its October 8, 1999, Petition, FPC filed a Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code (Petition for Waiver). FPC sought a waiver of the 10 year minimum contract term required by the rule. FPC proposed that its contract

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be limited to a term of five years. The petition for rule waiver was noticed in the October 29, 1999, Florida Administrative Weekly. The comment period expired on November 12, 1999.

On November 15, 1999, the Florida Industrial Cogeneration Association (FICA) filed comments in opposition to FPC's petition. In its comments, FICA requests that the Commission enter an order: denying FPC's petition and waiver request; directing FPC to file a standard offer contract based on an appropriate avoided unit in full compliance with Commission rules; and, directing FPC to open a solicitation period on its standard offer contract ending October 1, 2000.

By letter dated November 24, 1999, FPC waived its right under Section 366.04, Florida Statutes, to a consent or suspension decision on its proposed tariff within 60 days of filing its petition. In the same letter, FPC also waived its right under Section 120.542, Florida Statutes, to a decision on its rule waiver request within 90 days of its petition.

I. Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code

A. Standards for Approval

Section 120.542, Florida Statutes (1997), mandates threshold proofs and notice provisions 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, under the statute, 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.

FPC requests a waiver of the ten year contract term for standard offer contracts mandated by Rule 25-17.0832(4)(e)(7), Florida Administrative Code. FPC seeks to have the term limited to five years instead of the ten years required by Rule 25-17.0832(4)(e)(7), Florida Administrative Code.

B. FPC's Petition For Waiver

1. Purpose of the Underlying Statute

In its Petition For Waiver, FPC identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPC, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA) are to encourage cogeneration while at the same time protecting ratepayers from paying costs in excess of avoided costs. FPC contends that these purposes will be achieved by utilizing a five-year contract term.

FPC states that its Petition For Waiver will meet the underlying purpose of the statute. FPC submits that new technologies and other factors may lower FPC's costs in the future. FPC contends that limiting the term of the standard offer contract to five years will give the company the flexibility to reassess its avoided costs and to take advantage of lower costs for the benefit of its ratepayers prior well in advance of the ten years required by the rule. FPC also states that PURPA and Section 366.051,

Florida Statutes do not establish a minimum term for standard offer contracts.

2. Substantial Hardship

FPC argues that obligating it to a ten year contract term in the face of declining costs would subject the it to substantial hardship by adversely affecting its cost structure. FPC also states that ratepayers would be subjected to substantial hardship because the ten year term would increase the price that they would otherwise have to pay for electricity, in the face of declining costs.

C. FICA's Comments

Florida Industrial Cogeneration Association members own and/or operate small qualifying facilities which generate and sell electricity in conjunction with their industrial operations. FICA advances three arguments against the five-year contract term requested by FPC.

1. Value Of Deferral

FICA's first argument was that the objective of the value of deferral pricing mechanism for capacity payments, a component of the standard offer rules, will not be met if standard offer contract terms are limited to five years. According to FICA, the proposed five year contract term will not meet this objective because value of deferral pricing assumes that a small qualifying facility will sell capacity to the utility over the projected useful life of the utility's avoided unit. The value of deferral methodology inverts the capacity revenue stream in comparison to what the utility would receive if it constructed the avoided unit and added it to rate base. Value of deferral payments begin low and increase over time. Traditional revenue requirements begin high and decrease over time.

2. Purpose of Underlying Statute

FICA's second argument was that the purpose of the underlying statute will not be met if the requested five year waiver were granted. The underlying statute is designed to encourage cogeneration and small power production. FICA argued that FPC's proposed five year fixed term guarantees less than full avoided cost payments to the cogenerator and will discourage, rather than encourage, cogeneration and small power production. "Granting the waiver sought by FPC would deny SQF's [small qualifying facilities] the opportunity to provide electric generating capacity to FPC. Such a result would be contrary to both Florida and Federal law which favors QFs as an alternative to the construction of generating capacity by electric utilities." (Comments, pg. 9)

3. Inadequate Basis

FICA's third argument was that FPC has not adequately pled a basis for a variance. Citing the uniqueness requirement of Section 120.542, Florida Statutes, FICA stated that FPC's request is based on "vague allegations and unsubstantiated opinions". (Comments, pg. 8) FICA maintained that, if FPC's request were granted, it would defeat the underlying statutory objective and render the standard offer rules meaningless. FICA stated that FPC's petition was more in the nature of rulemaking because it operates to undermine the purpose of the rule. In sum, FICA argued that FPC's Petition For Variance should be denied because the request defeats the purpose of the statute and does not satisfy the burden of proof required to obtain a waiver.

D. Analysis

1. Purpose Of The Underlying Statute

Section 366.051, Florida Statutes, expressly encourages 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 . . ." Rule 25-17.0832(4), Florida Administrative Code, implements Section 366.051, Florida Statutes.

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Pursuant to the Rule, standard offer contracts must contain certain minimum specifications relating to, among other things, the term of the contract and the calculation of firm capacity payments. With respect to the term of standard offer contracts, Subsection 25-17.0832(4)(e)7, requires:

Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in service date of the avoided unit;

Rule 25-17.0832(4)(e)7, Florida Administrative Code.

The rule provides a range for the contract period tied to the plant life of the utility's avoided unit by establishing a minimum and a maximum term for standard offer contracts.

The ten year minimum contract term, while not a requirement of PURPA, was mandated by the Commission in order to assist utilities and cogenerators with planning. In Order No. 12634, issued October 27, 1983, Docket No. 820406-EU, Amendment of Rules 25-17.80 through 25-17.89 relation to cogeneration, the Commission addressed the issue of a ten year minimum contract term. The Commission stated:

The requirement that a QF be willing to sign a contract for the delivery of firm capacity for at least ten years after the originally anticipated in service date of the avoided unit is important from a planning perspective. While a ten-year contract will not offset the expected thirty year life of a base load generating unit, we believe it is of sufficient length to confer substantial capacity related benefits on the ratepayers.

Order No. 12634, pg. 19.

The purpose of the underlying statute is to encourage cogeneration. To promote cogeneration, investor-owned utilities' planned generation units not subject to Rule 25-22.082, Florida Administrative Code, are encouraged to negotiate contracts for the purchase of firm capacity and energy with utility and nonutility generators. Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is the standard offer contract. FPC's request for a waiver appears to satisfy the underlying purpose of the statute because a cogenerators' ability to enter into negotiated contracts is unaffected by the waiver request, and a cogenerator retains the ability to enter into a five year standard offer contract with FPC.

2. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological or legal hardship.

In determining whether a rule waiver should be granted to a utility which bases its assertion of substantial hardship upon hardship to its ratepayers, we refer to Order No. PSC-98-1211-FOF-EI, issued September 14, 1998, in Docket No. 980740-EI. In that Order, which determined a rule waiver request by Florida Power & Light Company (FPL), we noted that the Legislature intended the provisions of Section 120.542, Florida Statutes:

to remedy situations where "strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results . . ." Section 120.542(1), Florida Statutes. We believe that this language should be read together with subsection (2) of the statute in order to determine whether FPL has demonstrated a substantial hardship in this case.

In terms of the rule's impact on FPL alone, it is arguable whether the rule creates a substantial hardship. However, FPL's ratepayers may achieve substantial benefits if FPL's request for a rule waiver is granted. Conversely, if the rule waiver is not granted, FPL's

ratepayers must forego those benefits. We believe that this is the type of "unreasonable, unfair, and unintended result" that Section 120.542, Florida Statutes, was intended to remedy. Therefore, given the interests of FPL's ratepayers and our responsibility to those ratepayers, we find that FPL has demonstrated that application of Rule 25-17.015(1) Florida Administrative Code, creates a substantial hardship.

We, therefore, believe that our precedent holds that a demonstration by an Investor Owned Electric Utility (IOU) that the application of a rule will cause a substantial hardship to its ratepayers is sufficient to grant the IOU the requested rule waiver.

The hardship demonstrated by FPC is economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred. We disagree with FICA's argument that the value of deferral payment methodology compels a minimum ten year contract term. First, value of deferral is but one of four payment methodologies provided for in Rule 25-17.0832(4)(g), Florida Administrative Code. Second, the value of deferral payments compensate the cogenerator for the service provided. For example, if a cogenerator signed a 12 year contract, it would be paid the value of deferring construction of an avoided unit for 12 years. The cogenerator would not be paid the entire cost of the unit because of the finite term of the contract.

3. Inadequate Basis

FICA's argument that FPC has not demonstrated uniqueness, incorrectly applies the law of waivers and variances. Section 120.542, Florida Statutes states that when "principles of fairness" are alleged to be violated, the petitioner must demonstrate application of the rule affects it differently than similarly situated persons subject to the rule. FPC did not allege that principles of fairness were violated, therefore, the standard does not apply.

We believe that FPC's Petition For Waiver from the minimum standard offer contract term satisfies the mandatory, statutory requirements. We believe that FPC has demonstrated that the purpose of the underlying statute will be met if the variance is granted because the company will continue to enter into negotiated as well as standard offer contracts with cogenerators. We also believe that FPC's Petition For Waiver demonstrated substantial hardship to its ratepayers should we have declined to grant the waiver.

II. Rule 25-17.0832(4)(e)(7) Florida Administrative Code

We believe that the number of requests for variance or waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code, that we have ruled upon in the last year indicates that the rule needs to be amended. In at least two dockets, Docket No. 991973-EI, and the present docket, utilities have requested a variance of this rule. Both of these instances have occurred since we issued Order No. PSC-99-1713-TRF-EG on September 2, 1999, in Docket No. 990249-EG. In that Order we granted Florida Power & Light Company a variance of this rule. We believe that five year terms for standard offer cogeneration contracts are sufficient to fulfill the purposes of the underlying statutes: Section 366.051, Florida Statutes; and, PURPA. We, therefore, direct staff to initiate rulemaking proceedings to amend the contract term provision of Rule 25-17.0832(4)(e)(7), Florida Administrative Code.

III. FPC's Standard Offer Contract

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 us to "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Chapter 366.82(2), Florida Statutes. We are 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." Chapter 377.709, Florida Statutes.

We implemented these federal and state requirements through the adoption of the Standard Offer Contract in Rule 25-17.0832(4)(a), Florida Administrative Code. Pursuant to this rule, each investor-owned electric utility must file a tariff and a Standard Offer Contract with the Commission. These provisions implement the requirements of the Public Utilities Regulatory Policies Act 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, FPC proposed a new Standard Offer Contract based on a 20 MW portion of a 90 MW combustion turbine (CT) unit with an in-service date of January 1, 2001. FPC's proposed COG-2 (firm capacity and energy) tariff shall expire on the earlier of the date the subscription limit (20 MW) is fully subscribed, or July 1, 2000. We believe that the nearly six month open season period will increase the probability that FPC will receive offers under its proposed Standard Offer Contract.

FPC's evaluation criteria should be readily understandable to any developer who signs FPC's Standard Offer Contract. The avoided unit cost parameters appear to be reasonable for a CT unit, and the resulting capacity payments are appropriate. The performance provisions include dispatch and control, and on-peak performance incentives.

Given that the subscription limit of FPC's avoided unit is only a portion of its total capacity, purchases made by FPC pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of the 2001 CT unit. If FPC enters into a Standard Offer Contract, but the need for the 2001 CT unit is not deferred or avoided, FPC 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. We note, however, that

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the potential subsidy could be mitigated, as FPC 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. We have 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 because of either timing or their small size. Thus, our rules balance market imperfections with the existing policy of promoting qualifying facilities.

We do not expect that FPC's proposed Standard Offer Contract will result in the avoidance of the 2001 CT unit. Nonetheless, FPC's proposed contract and tariffs comply with the Commission's cogeneration rules. We, therefore, approve FPC's petition to establish its new Standard Offer Contract and associated tariffs.

Because it would not be reasonable to have this tariff go into effect if the waiver portion of this Order were protested, FPC's COG-2 tariff approved in this Order shall be processed as a proposed agency action. Therefore, FPC's proposed standard offer contract shall become effective upon the issuance of a consummating order.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Petition of Florida Power Corporation for Approval of Standard Offer Contract and Accompanying Rate Schedule COG-2 is hereby approved. It is further

ORDERED that the Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code is hereby granted. It is further

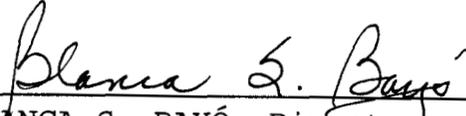
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance

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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 8th day of February, 2000.



BLANCA S. BAYÓ, 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 120.569(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 February 29, 2000.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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.