

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of
new standard offer contract for
qualifying cogeneration and
small power production
facilities by Tampa Electric
Company.

DOCKET NO. 010334-EQ
ORDER NO. PSC-01-1418-TRF-EQ
ISSUED: June 29, 2001

The following Commissioners participated in the disposition of
this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING PETITION FOR WAIVER AND APPROVING STANDARD OFFER
CONTRACT

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 March 19, 2001, Tampa Electric Company (TECO) filed a
Petition for Approval of a Standard Offer Contract for qualifying
cogeneration and small power production facilities. The proposed
contract is based on a 5 megawatt (MW) subscription limit of a 180
MW combustion turbine generating unit with an in-service date of
May 1, 2004.

Along with its March 19, 2001, Petition, TECO filed a Petition
for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative

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Code. TECO seeks a waiver from the 10 year minimum contract term required by the rule, and proposes a 5 year contract term. On May 2, 2001, TECO filed amended copies of Fifth Revised Tariff Sheet No. 8.295.

II. PETITION FOR WAIVER

TECO's request for a waiver is granted because TECO demonstrated that the purpose of the underlying statute will be met, and that TECO and its ratepayers will suffer substantial hardship if a waiver is not granted.

A. Standard Of Review

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.

The waiver requested by TECO is for a standard offer contract term limited to five years instead of the ten year minimum contract term required by Rule 25-17.0832(4)(e)(7), Florida Administrative Code.

B. TECO's Petition For Waiver

1. Purpose of the Underlying Statute

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

TECO states that its Petition For Waiver will meet the underlying purpose of the statute. TECO submits that new technologies and other factors may lower TECO's costs in the future. TECO contends that limiting the term of the standard offer contract to five years will give the company an opportunity to reassess its avoided costs and take advantage of lower costs for the benefit of ratepayers prior to the passage of ten years. TECO also states that PURPA and Section 366.051, Florida Statutes do not establish a minimum term for standard offer contracts.

2. Substantial Hardship

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

C. Analysis

1. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, to encourage cogeneration and small power production, is express. "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. 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;

The rule provides a range for the contract period tied to the plant life of the utilities' 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 this 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 issue of a ten year minimum contract term was addressed as follows:

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 statute underlying Rule 25-27.0832(4)(e) 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 non-utility generators. Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is standard offer contracts. Insofar as 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 minimum standard offer contract with TECO, TECO's request for a variance appears to satisfy the underlying purpose of the statute.

2. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological or legal hardship. The hardship demonstrated by TECO is economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred. Specifically, the unit to be avoided is Bayside Unit 2, a 5 MW portion of a 180 MW combustion turbine scheduled to be placed in service in May 2004 as part of the Gannon Station repowering project.

In sum, TECO's Petition For Waiver from the minimum standard offer contract term shall be granted because it satisfies the mandatory, statutory requirements of Section 120.542, Florida Statutes. TECO demonstrated that the purpose of the underlying statute, Section 366.051, Florida Statutes, will be met if the waiver is granted.

III. PETITION FOR APPROVAL OF A NEW 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." Section 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." Section 377.709, Florida Statutes.

These federal and state requirements were implemented through our 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 us. 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, TECO proposed a new Standard Offer Contract based on a combustion turbine (CT) unit with an in-service date of May 1, 2004. Specifically, the Contract is based on a 5 MW portion of a 180 MW CT. CT units typically require about 18 months to construct. Therefore, TECO will need to commence construction by November 1, 2002.

TECO's proposed COG-2 (firm capacity and energy) tariff includes a three-week open season period for receiving standard offer contracts. If TECO does not receive a full subscription of 5 MW within the initial three-week open season period, an additional three-week open season period will be held in 60 days. This open season period is similar to the open season period in TECO's previous Standard Offer Contract. TECO's previous Standard Offer Contract tariffs have stated that subsequent to the open season period, TECO will file a petition with the Commission to close the Standard Offer Contract. TECO's Fifth Revised Tariff Sheet No. 8.295, filed on May 2, 2001, now states that TECO will advise our staff in writing and indicate that the Standard Offer Contract should be closed, "once the Company's Standard Offer Contract is fully and acceptably subscribed or has expired." The revised language also states that TECO's written notification will include: 1) the results of the open season period; 2) an estimated time when a new Standard Offer Contract will be filed; and, 3) the revised tariff sheets reflecting the closure of the Standard Offer Contract. We believe that it will increase efficiency for both the Company and this Commission to administratively approve the closure of TECO's proposed Standard Offer Contract. TECO's written notification will provide the necessary information for our staff

to track the results of the Standard Offer Contract. Our staff will advise us if any substantive issues are raised by TECO's written notification.

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

It is unlikely that purchases made by TECO pursuant to the proposed Standard Offer Contract will result in the deferral or avoidance of TECO's 2004 CT unit, because: 1) the eligibility pool for Standard Offer Contracts is limited; 2) the subscription limit of TECO's avoided unit is only a portion of the CT's total capacity; and, 3) TECO has not received any takers for its last two Standard Offer Contracts. The interest in TECO's last two Standard Offer Contracts may have been reduced because the contracts were based on TECO's next avoided units, which were all CT's. The capacity payments for CT's are typically low relative to those for contracts based on other avoided generation technologies, such as combined cycle, coal, or nuclear facilities.

If TECO enters into Standard Offer Contracts under the proposed contract, but the need for the 2004 CT unit is not deferred or avoided, TECO will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of the state regulations discussed above may result in a subsidy to the qualifying facilities. We note, however, that the potential subsidy could be mitigated, as TECO 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. This unequal footing is minimized 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, our rules balance market imperfections with the existing policy of promoting qualifying facilities.

In summary, we find that TECO's proposed Standard Offer Contract will probably not result in the avoidance of the 2004 CT unit. Nonetheless, TECO's proposed contract and tariffs comply with our cogeneration rules. For this reason, we approve TECO's Petition for Approval of a Standard Offer Contract and associated tariffs.

To process both the waiver request and the tariff filing simultaneously, the proposed agency action process shall be utilized instead of the tariff process. 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 waiver portion of the Commission's order were protested, the tariff shall be processed as proposed agency action.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code, is approved. It is further

ORDERED that Tampa Electric Company's Petition for Approval of a Standard Offer Contract is hereby approved. It is further

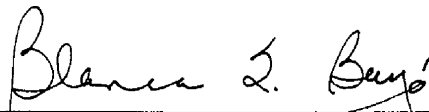
ORDERED that the standard offer contract shall become effective upon the issuance of a consummating order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the 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 the Commission Clerk and Administrative Services, 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.

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By ORDER of the Florida Public Service Commission this 29th
Day of June, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 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.

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 Commission's decision on this tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the proposed action files 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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on July 20, 2001.

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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.