

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of Rule 25-17.0832(4)(e), F.A.C., which requires ten-year minimum contract term, by Florida Power & Light Company, and for approval to offer standard offer contract with five-year minimum term.

DOCKET NO. 011199-EQ
ORDER NO. PSC-01-2488-PAA-EQ
ISSUED: December 20, 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

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING 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. Background

On September 14, 2001, Florida Power & Light Company (FPL) filed a Petition for Waiver of Rule 25-17.0832(4)(e), Florida Administrative Code (Petition for Waiver). FPL seeks a waiver from the 10 year minimum standard offer contract term required by the rule. Instead, FPL requests that it be permitted to substitute a standard offer contract term of five years. Pursuant to Section 120.542(6), Florida Statutes, the petition for rule waiver was noticed in the October 5, 2001, Florida Administrative Weekly. No

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comments were received. The Commission is vested with jurisdiction over this matter by Section 120.542, Florida Statutes.

Also on September 14, 2001, FPL filed its petition for approval of a standard offer contract in Docket No. 011200-EQ. The term of the proposed standard offer contract is five years.

II. Request for Waiver

A. Standard for Approval

Section 120.542, Florida Statutes (2001), 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.

B. FPL's Petition For Waiver

The waiver requested by FPL 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), Florida Administrative Code.

1. Purpose of the Underlying Statute

In its Petition For Waiver, FPL identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPL, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA), are to promote the growth of alternative generating facilities, with the express limitation that electric customers should not pay more for power than they otherwise would.

FPL believes that its requested waiver, if granted, will still meet the purpose of the statute. FPL asserts that the standard offer contract will provide economic incentive for the development of the type of projects contemplated by the statute. FPL further asserts that the waiver requested is more likely to ensure that electric customers do not pay excessive costs for power purchased under the standard offer contract.

2. Substantial Hardship

FPL states that the standard offer contract will not defer or avoid the construction of additional generating capacity. FPL asserts that its customers are prejudiced to the extent they are required to make capacity payments where no generation is avoided or deferred. FPL states that to require capacity payments in such instance for a ten-year period, would incur a substantial risk and hardship.

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 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

who plan generating 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 by Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is the standard offer contract. 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 standard offer contract with FPL, FPL's request for a waiver 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. Purchases made by FPL pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of its proposed avoided unit, the 2003 CT. This is due to the subscription limit being 5 MW of a 165 MW unit. FPL has demonstrated, in this case, that application of the rule would create an economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

3. Other Requests for Waiver/Variance of Rule

We note that there have been other requests for variance or waiver of Rule 25-17.0832(4)(e), Florida Administrative Code:

1. Order No. PSC-99-1713-TRF-EG, issued on September 2, 1999, in Docket No. 990249-EG granted FPL a variance of this rule.
2. Order No. PSC-00-0265-PAA-EG, issued February 8, 2000, in Docket No. 991526-EQ granted Florida Power Corporation a waiver of this rule. This order also directed staff to initiate a rulemaking proceeding to amend Rule 25-17.0832(4)(e)(7), Florida Administrative Code, to amend the contract term provision of the rule.
3. Order No. PSC-00-0504-PAA-EQ, issued on March 7, 2000, in Docket No. 991973-EQ granted Florida Power Corporation a waiver of this rule.

4. Order No. PSC-00-1773-PAA-EQ, issued on September 27, 2000, in Docket No. 000684-EQ, granted Tampa Electric Company a waiver of this rule.
5. Order No. PSC-00-1748-PAA-EQ, issued on September 26, 2000, 2000, in Docket No. 000868-EI, granted FPL a variance of this rule.
6. Order No. PSC-01-1418-TRF-EQ, issued on June 29, 2001, in Docket No. 010334-EQ, granted Tampa Electric Company a waiver of this rule.

The Commission has proposed a modification of the rule in Docket No. 001574-EQ. A hearing is scheduled for May 15, 2002.

III. Conclusion

In sum, FPL's Petition for Waiver from the minimum standard offer contract term is granted because it satisfies the statutory requirements for a rule waiver. FPL has demonstrated that the purpose of the underlying statute will be met if the waiver is granted because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, FPL's Petition for Waiver demonstrates that substantial hardship to its ratepayers would result from application of the rule.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's request for a 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 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

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ORDERED that if no timely protest is filed, this Order shall be closed upon the issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 20th day of December, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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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.

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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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on January 10, 2002.

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.