

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of standard offer contract based on 2007 combined cycle avoided unit and accompanying Rate Schedule COG-2, and for waiver of Rule 25-17.0832(4)(e)5, F.A.C., by Progress Energy Florida, Inc.

DOCKET NO. 030866-EQ
ORDER NO. PSC-03-1329-PAA-EQ
ISSUED: November 21, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITIONS FOR RULE WAIVER AND
APPROVAL OF 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.

CASE BACKGROUND

On August 27, 2003, Progress Energy Florida (Progress or Company) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities. The proposed contract and associated tariffs are based on a 20 MW subscription limit of a 540 MW combined cycle unit, Hines Unit 4, scheduled to go into service in December 2007.

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On the same day, Progress also filed a Petition for Waiver of Rule 25-17.0823(4)(e)5, Florida Administrative Code, which requires that the open solicitation period of the standard offer contract must end prior to issuance of a Request for Proposals (RFP), pursuant to Rule 25-22.082, Florida Administrative Code (Bid Rule), for the standard offer's avoided unit. Waiver of the rule allows the open solicitation period of the standard offer and the RFP process to take place concurrently.

Pursuant to Section 120.542(6), Florida Statutes, notice of the Company's petition for rule waiver was submitted to the Secretary of State for publication in the September 19, 2003, Florida Administrative Weekly. The 14-day comment period, provided for in Rule 28-104.003, Florida Administrative Code, expired on October 3, 2003. No comments concerning this petition were filed.

At the October 7, 2003 Agenda Conference, we suspended the tariff revisions filed as part of the Company's Petition. The tariff suspension allowed Commission staff sufficient time to review the Petition filed by Progress.

This Order addresses both the Petition for Approval of the Standard Offer Contract and the related Petition for Waiver. We are vested with jurisdiction over this matter pursuant to Sections 120.542, 366.04, 366.05, 366.051, 366.06, and 366.80 through 366.82, Florida Statutes.

RULE WAIVER

Progress has petitioned for waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's Standard Offer Contract must terminate prior to its issuance of a notice of Request for Proposal based on the standard offer contract's avoided unit. The utility is requesting the waiver to allow the proposed Standard Offer Contract to continue concurrently with Progress's RFP process based on Hines 4, the avoided unit.

Section 120.542, Florida Statutes, mandates threshold requirements for variances and waivers from agency rules. Subsection (2) of the statute states:

Variations 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, 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.

In its Petition For Waiver, Progress identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes, the purpose of which is to encourage cogeneration and small power production, while at the same time protecting ratepayers from potential adverse effects. Rule 25-17.0832(4)(e)5, Florida Administrative Code, implements Section 366.051, Florida Statutes. Pursuant to the Rule, each standard offer contract shall, at a minimum, specify:

A reasonable open solicitation period during which time the utility will accept proposals for standard offer contracts. Prior to the issuance of timely notice of a Request for Proposals (RFP) pursuant to Rule 25-22.082(3), the utility shall end the open solicitation period.

Progress believes that the purpose of the underlying statute will not only be achieved but enhanced by the requested waiver because it will eliminate a limitation on the availability of a

standard offer contract to cogenerators. The waiver will enable the standard offer to remain in effect and available to cogenerators while the RFP process is underway, a situation that would be impermissible if the rule were not waived.

We agree with Progress that allowing the issuance of the RFP at the same time as the open solicitation period will satisfy the underlying purpose of the statute by encouraging small qualifying facilities. In addition, we believe that neither Progress nor its ratepayers would be at a disadvantage if the Company issues an RFP for Hines Unit 4 while the standard offer contract is outstanding.

Next, Progress states that strict adherence to the closure provision contained within Rule 25-17.0832(4)(e)5, Florida Administrative Code, would create a substantial hardship for Progress and its ratepayers. The Company believes that the timely completion of the RFP process is a key milestone in the schedule to place this 540 MW capacity addition in service by December 2007, so that it will be available to meet the 2007/2008 winter peak demand period. Also, delaying the completion of the RFP process until after the standard offer has been approved, and the open solicitation period has expired, would significantly impair the Company's ability to satisfy its 20% reserve margin responsibilities within this important reliability time frame. Such an impairment to the reliability of the Company's generation resources would create a real and substantial hardship on Progress and its customers.

We believe that if the waiver is not granted, Progress's efforts to meet the 20% reserve margin would be frustrated. In 1999, an agreement was approved between Progress Energy Florida, Florida Power & Light Company, and Tampa Electric Company adopting a 20% reserve margin planning criterion, effective with the summer of 2004. See Order No. PSC-99-2507-S-EU, issued December 22, 1999, Docket No. 981890-EU, In Re: Generic Investigation into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida. A delay in the RFP process could seriously jeopardize Progress's ability to bring Hines 4 on line by the December 2007 in-service date, an action which is necessary to ensure that the Company maintains a 20% reserve margin. As a result, we agree with the Company that this potential impairment to the reliability

of Progress's generation resources constitutes "substantial hardship" within the meaning of Section 120.542, Florida Statutes.

Finally, we would note that we have previously waived the rule's standard offer closure requirement, and approved an open solicitation period for the standard offer contract that ran concurrently with the RFP process conducted for both the Hines 2 and 3 self-build options. Order No. PSC-00-0504-PAA-EQ, issued March 7, 2000, in Docket No. 991973-EQ, In Re: Petition of Florida Power Corporation for Approval of Standard Offer Contract Based on a 2003 Combined Cycle Avoided Unit and Accompanying Rate Schedule COG-2 Pursuant to Section 366.051, F.S., and Rules 25-22.036(4) and 25-22.170832(4), F.A.C.; Order No. PSC-02-0909-PAA-EQ, issued July 8, 2002, in Docket No. 020295-EQ, In Re: Petition for Approval of Standard Offer Contract Based on 2005 Combined Cycle Avoided Unit and Accompanying Rate Schedule COG-2, by Florida Power Corporation. The previous requests were granted on substantially the same grounds asserted by Progress in this docket.

In conclusion, Progress has demonstrated that the purpose of the underlying statute will be met, and that strict adherence to the closure provision of the standard offer contract would create a substantial hardship on Progress and its customers. Therefore, we hereby grant Progress Energy Florida's Petition for a Waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's standard offer contract must terminate prior to its issuance of a notice of RFP based on the standard offer contract's avoided unit, Hines 4.

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 the Commission to "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Section 366.82(2), Florida Statutes. The Commission is 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 by the Commission through its adoption of the Standard Offer Contract process in Rule 25-17.0832(4)(a), Florida Administrative Code. Pursuant to this rule, each investor-owned electric utility must file with the Commission a tariff and a Standard Offer Contract for the purchase of firm capacity and energy from small qualifying facilities. These provisions implement the requirements of the Public Utilities Regulatory Policies Act (PURPA) 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, Progress proposes a new Standard Offer Contract based on a 20 MW portion of the Company's next identified generating unit, a 540 MW combined cycle unit to be located at the Hines Energy Complex. The unit will be known as Hines 4, and is scheduled to enter commercial service no later than December 31, 2007. The Company's proposed Standard Offer Contract meets the minimum requirements set forth in Rule 25-17.0832(4)(e), Florida Administrative Code. The delivery of firm capacity and energy will commence on or before January 1, 2008, and extend for five years.

Progress has proposed an associated tariff, COG-2 (firm capacity and energy). This tariff would expire on the earlier of the date the subscription limit of 20 MW is fully subscribed, or two weeks after approval of this standard offer by the Commission.

The evaluation criteria contained in the Company's proposed Standard Offer Contract are readily understandable to any developer who signs the contract. The avoided unit cost parameters appear to be reasonable for a combined cycle unit, and the resulting capacity payments are appropriate.

It is unlikely that purchases made by Progress pursuant to the proposed Standard Offer Contract will result in the deferral or avoidance of the Hines 4 unit. The subscription limit of 20 MW is only a portion of the proposed Hines 4 unit. If Progress enters into Standard Offer Contracts, but the need for the 2007 combined cycle unit is not deferred or avoided, Progress 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 the potential subsidy could be mitigated, as Progress 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 due to their size or timing. Thus, our rules balance market imperfections with the existing policy of promoting qualifying facilities.

In summary, we do not expect that the Company's proposed Standard Offer Contract will result in the avoidance of the scheduled combined cycle unit addition. Nonetheless, the contract and tariffs proposed by Progress are in compliance with our cogeneration rules. For this reason, we hereby approve Progress's petition to establish its new standard offer contract and associated tariffs.

Since it would not be reasonable to have this tariff go into effect if the rule waiver portion of this Order were protested, the tariff shall not be effective if a protest is filed. The standard offer contract as proposed by Progress shall become effective upon the issuance of a consummating order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida's Petition for Waiver of Rule 25-17.0832(4)(e)5, Florida Administrative Code, is hereby granted. It is further

ORDERED that Progress Energy Florida's Petition for Approval of a Standard Offer Contract is hereby granted. It is further

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ORDERED that the tariff for the standard offer contract shall become effective upon the issuance of a Consummating Order in this docket. 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.

By ORDER of the Florida Public Service Commission this 21st Day of November, 2003.

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.

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 December 12, 2003.

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/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.