BEFORE THE PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 040001-EI ORDER NO. PSC-04-1018-PCO-EI ISSUED: October 19, 2004

ORDER DENYING JOINT MOTION TO REMOVE ISSUES RELATED TO PROPOSED UNIT POWER SALES AGREEMENTS, JOINT REQUEST FOR ORAL ARGUMENT, AND PETITION FOR INTERVENTION BY POWER SYSTEMS MANUFACTURING, LLC, AND GRANTING PETITION FOR INTERVENTION BY THOMAS K. CHURBUCK

On September 9, 2004, both Florida Power & Light Company (FPL) and Progress Energy Florida, Inc. (PEF) filed testimony in this proceeding requesting approval for purposes of cost recovery of purchased power contracts with subsidiaries of Southern Company. These purchased power contracts are Unit Power Sales (UPS) agreements between the utilities and Southern Company, wherein FPL and PEF agree to purchase a certain level of capacity and energy from specific units within the Southern Company. FPL requested approval of three UPS agreements executed with subsidiaries of Southern Company representing 955 MW of capacity. The purpose of the proposed UPS agreements is to replace the existing UPS agreement between FPL and subsidiaries of Southern Company, which is set to expire May 31, 2010. PEF filed a letter of intent indicating that both PEF and Southern Company plan to enter into one or more UPS agreements, but that the terms and conditions of these contracts have yet to be determined. PEF envisions the proposed purchased power contract, which would result from the negotiation outlined in the letter of intent, as an extension of the UPS agreement it currently has with Southern Company, which is set to expire May 31, 2010. The proposed purchase by PEF would be for 425 MW of capacity.

I. JOINT MOTION TO REMOVE ISSUES RELATED TO PROPOSED UNIT POWER SALES AGREEMENTS FROM THE FUEL ADJUSTMENT DOCKET

On October 4, 2004, the Citizens of the State of Florida (OPC) and the Florida Industrial Power Users Group (FIPUG) filed a Joint Motion to Remove Issues Related to Proposed Unit Power Sales Agreements from the Fuel Adjustment Docket. In addition, Power Systems Manufacturing, LLC (Power Systems) and Tom Churbuck (Churbuck) filed a Motion to Remove Issues Related to Proposed Unit Power Sales Agreements from the Fuel Adjustment Docket and a Notice of Joinder with the Joint Motion of OPC and FIPUG on October 7, 2004. FPL and PEF filed responses in opposition to the motions on October 11, 2004.

In their joint motion, OPC and FIPUG state that FPL and PEF filed testimony on proposed UPS purchased power agreements with Southern Company for which FPL and PEF are seeking approval in this docket. OPC and FIPUG argue that these UPS agreements are complex and represent a significant commitment of capacity and energy, which require discovery and

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analysis that cannot be done in the shortened time frame of this docket. Further, these agreements do not take effect until 2010, yet the utilities are requesting they be approved at this year's fuel proceeding. According to OPC and FIPUG, the utilities have not demonstrated any need that would require the immediate approval of these agreements. OPC and FIPUG assert that the compressed time frame of this proceeding does not allow them to conduct any meaningful discovery. As such, OPC and FIPUG request that the issues regarding the proposed UPS agreements for which FPL and PEF seek approval in the fuel adjustment docket be removed for consideration in another docket. Power Systems and Churbuck join in OPC and FIPUG's motion as it relates to FPL only.

PEF responds that it does not believe grounds exist to establish a separate docket to consider its proposed UPS agreement as this type of long-term supply contract has traditionally been recovered through the fuel adjustment clause. PEF maintains that many of the ambiguous features of the contract could be resolved through informal discussions among the parties. As a result, PEF requests that the joint motion be denied or held in abeyance pending further discussion among the parties.

FPL responds in opposition to the joint motion for three reasons. First, granting the joint motion could amount to a denial of the UPS agreements and result in the loss of benefits to its ratepayers. FPL states that Southern Company was reluctant to agree to an open-ended condition precedent such as Commission approval without a time limitation. As a result, FPL could terminate the contracts if the Commission does not approve them within six months after the contracts were executed, or if FPL has not been able to secure the necessary transmission rights to deliver the Southern Company power to the FPL system. The right to terminate the contracts extends until the later of the two dates. FPL states that if the transmission rollover rights are granted prior to the expiration of the six-month period, a result which FPL expects, FPL would only have until early February 2005 to obtain Commission approval or it could be constrained to reject the agreements. Therefore, FPL argues that granting the joint motion could be tantamount to denial of the UPS agreements.

Second, the issues presented by the UPS agreements are not complex and need not be removed for consideration in a separate docket in order to come to a reasoned decision. According to FPL, the UPS agreements in question are replacing existing UPS agreements that are expiring. FPL maintains that several of the important benefits of these agreements are not susceptible of quantification, and that no amount of discovery or extension of the schedule of this proceeding will better enable an intervenor to arrive at a decision of what is essentially a question of judgment rather than measurement. Third, the fuel clause is the appropriate proceeding through which to review these agreements. FPL argues that the purpose of the fuel and purchased power clause is to allow utilities to recover costs associated with power purchase agreements.

Upon review of the pleadings and consideration of the arguments, I find that the issues related to the UPS purchased power agreements submitted for approval for cost recovery purposes by both FPL and PEF shall not be removed from this proceeding. FPL maintains that if it does not obtain Commission approval for its proposed UPS agreements by early 2005 that could be tantamount to a denial of the contracts. I find this fact to be persuasive. As for PEF, it does not actually have a signed UPS agreement with Southern Company, only a letter of intent. As a result, at this point in time there is no compelling reason to remove the issues related to PEF's proposed UPS agreement because the issues have not crystallized enough to warrant analysis in a separate proceeding. Therefore, the joint motion to remove issues related to the proposed UPS agreements filed by OPC and FIPUG, and joined by Power Systems and Churbuck, is hereby denied.

II. JOINT REQUEST FOR ORAL ARGUMENT ON JOINT MOTION

OPC and FIPUG filed a Joint Request for Oral Argument on their Joint Motion on October 4, 2004. OPC and FIPUG argue that oral argument on the motion will aid the Commission in understanding the important legal and policy issues involved in this dispute.

Because the pleadings summarized in Part I were sufficiently clear, I find that oral argument is not necessary in this instance. Therefore, the joint request by OPC and FIPUG for oral argument is denied.

III. PETITIONS FOR INTERVENTION

A Petition to Intervene was filed on September 17, 2004, by Power Systems Mfg., LLC, and on September 21, 2004, by Thomas K. Churbuck. On September 27, 2004, FPL responded in opposition to both petitions to intervene.

Power Systems states that it is a consumer of electricity provided by FPL because it has an agreement with its landlord whereby it pays, in addition to its rent, for the electricity it uses. Power Systems argues that the costs of electricity and any increase thereto directly affects the amount paid by Power Systems. As a result, Power Systems asserts that its substantial interests are subject to determination in and will be affected by the Commission's decision in this proceeding. Power Systems alleges that its substantial interests are of sufficient immediacy to entitle it to participate in this proceeding, and are the type of interests this proceeding is designed to protect. To the extent that FPL's rates may be set at levels that are unfair, unjust, and unreasonable in this proceeding, Power Systems maintains that its interests will be immediately and adversely affected. Further, Power Systems asserts that this proceeding is designed to protect persons who use and pay for electricity provided by FPL, such as Power Systems, against practices and charges that are unfair, unjust, and unreasonable. The petition to intervene filed by Thomas Churbuck is essentially the same as that filed by Power Systems; however, Churbuck is a residential ratepayer of FPL who asserts that he pays for the cost of the electricity he uses, and

that any increases in the cost of that electricity directly affects the amount he pays to FPL on a monthly basis.

In its response in opposition, FPL states that Power Systems is a subsidiary of Calpine Corporation (Calpine) and that Churbuck is the president of Power Systems. FPL argues that the petitions by Power Systems and Churbuck are intended to allow Calpine to gain access to this proceeding by proxy so that it can obtain information about FPL's plans to purchase power from Southern Company and to disrupt those plans. Calpine's motives, according to FPL, have to do with Calpine's competitive position in the wholesale market, and this proceeding is not designed to address competition in the wholesale power market. FPL argues that Calpine is aware of this and so it has found a proxy to bring about the intervention it seeks. Calpine should not be permitted to do indirectly through proxy interventions what it has no standing to do directly.

As for the petition by Power Systems, FPL states that Power Systems is not a retail customer of FPL, rendering its petition deficient on its face. The petition by Churbuck does allege that he is a retail customer of FPL, but FPL maintains that the interests of all FPL customers are ably represented in this proceeding by OPC. FPL asserts that Churbuck cannot claim that his own personal interest in this proceeding is substantial enough to warrant intervention. Finally, FPL maintains that if the Commission does allow either party to intervene, then that intervention should be limited to minimize the potential for mischief by Calpine.

Rule 28-106.205, Florida Administrative Code, requires that a petition to intervene contain allegations sufficient to demonstrate that the person seeking intervention is entitled to participate in the proceeding because the person's substantial interests are subject to determination or will be affected by the proceeding. In order to demonstrate standing under the "substantial interest" test, an intervenor must show that it will suffer an injury in fact that is of sufficient immediacy to entitle it to a hearing, and that the injury suffered is of a type that the proceeding is designed to protect. Agrico Chemical Co. v. Dep't of Environmental Regulation 406 So.2d 478 (Fla. 2d DCA 1981) reh'g denied 415 So.2d 1359 (Fla. 1982).

Upon review of the pleadings and consideration of the arguments, it appears that the substantial interests of Churbuck, but not those of Power Systems, may be affected by this proceeding. As a retail customer of FPL, Churbuck has a direct interest in the rates and charges of FPL, which will be determined in this proceeding. Churbuck has demonstrated that his interests are substantial enough to warrant intervention in this docket, and are the type of interests that this proceeding is designed to protect. Because Power Systems is not a direct customer of FPL, its interests are too remote to warrant intervention in this proceeding. In addition, its interests as a potential provider of wholesale power are not the type of interests that this proceeding is designed to protect. Therefore, the petition to intervene filed by Churbuck is hereby granted, and the petition to intervene filed by Power Systems is hereby denied. Pursuant to Rule 25-22.039, Florida Administrative Code, Churbuck takes the case as he finds it.

Based on the foregoing, it is,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that the Office of Public Counsel and Florida Industrial Power Users Group's Joint Motion to Remove Issues Related to Proposed Unit Power Sales Agreements from the Fuel Adjustment Docket is hereby denied. It is further

ORDERED that the Motion to Remove Issues Related to Proposed Unit Power Sales Agreements from the Fuel Adjustment Docket filed by Power Systems Mfg., LLC, and Thomas K. Churbuck is hereby denied. It is further

ORDERED that the Office of Public Counsel and Florida Industrial Power Users Group's Joint Request for Oral Argument is hereby denied. It is further

ORDERED that the Petition to Intervene filed by Power Systems Mfg., LLC, is hereby denied. It is further

ORDERED that the Petition to Intervene filed by Thomas K. Churbuck is hereby granted. Pursuant to Rule 25-22.039, Florida Administrative Code, Thomas K. Churbuck takes the case as he finds it. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings, and other documents which may hereinafter be filed in this proceeding, to:

Jon C. Moyle, Jr.
Bill Hollimon
Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
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Thomas K. Churbuck
911 Tamarind Way
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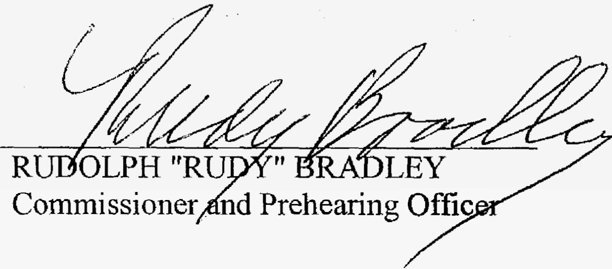
By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 19th day of October, 2004



RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

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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 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.