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September 25, 1990

Mr. Steve C. Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 900004-EU

Dear Mr. Tribble:

Enclosed for filing on behalf of Indiantown Cogeneration, L.P. are the original and fifteen copies of ICL's Brief on Subscription Limit Policy and Resolution of Queuing Issue.

By copy of this letter, this brief has been furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

RDM/cla
Enclosure
cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Planning Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Pricing for Peninsula Florida's Electric Utilities	)	Docket No. 900004-EU
	)	Filed: Sept. 25, 1990

INDIANTOWN COGENERATION, L.P.'s BRIEF ON SUBSCRIPTION LIMIT POLICY AND RESOLUTION OF QUEUING ISSUE

Indiantown Cogeneration, L.P. ("ICL") hereby files this Brief on Subscription Limit Policy and Resolution of Queuing Issue in response to the Commission's instructions at its September 11, 1990 Agenda Conference.

FACTS

1. ICL is a limited partnership formed to develop a 300 MW coal-fired cogeneration facility located near Indiantown, Florida (the "Indiantown Project"). This project will be a qualifying facility (QF) under PURPA.

2. ICL's general partners are subsidiaries of Pacific Gas & Electric Company and Bechtel Group, Inc.

3. On May 21, 1990, ICL executed a negotiated contract with Florida Power & Light Company (FPL) under which firm capacity and energy from the Indiantown Project will be sold to FPL. The anticipated commercial operation date for the project is December 1, 1995, although the contract permits commercial operation as early as September 1, 1995.

4. On May 25, 1990, the PSC took two separate actions in the annual planning hearing (APH) docket:

(a) The Commission redesignated the statewide avoided unit used for standard offer pricing purposes from a 1993 combined cycle unit (385 MW) to a 1996 pulverized coal unit (500 MW).

(b) The Commission voted on procedures to implement a 500 MW subscription limit; voted not to allocate that subscription limit among the Peninsular Florida utilities; and voted to use the date of contract execution to prioritize cogeneration contracts when applying the subscription limit.

5. Subsequent to May 25, 1990, a number of potential cogenerators signed standard offer contracts based on the 1996 pulverized coal unit. These include CMI (475 MW), who signed on June 6, 1990 and Nassau Power (435 MW), who signed on June 13, 1990. Several other potential cogenerators signed standard offer contracts later.

6. On August 21, 1990, ICL and FPL filed a Joint Petition to Determine Need for the Indiantown Project pursuant to the Florida Electrical Power Plant Siting Act and Section 403.519, F.S. This case has been assigned Docket Number 900709-EQ and is scheduled for hearing on December 5-7, 1990.

7. As shown in the need petition, the Indiantown Project contributes to meeting FPL's capacity need for 1996. That need would otherwise be met by FPL's construction of an integrated gasification combined cycle (IGCC) unit. This is FPL's "avoided unit." It is not the same unit as Martin Unit No. 5 or No. 6. It is an additional IGCC that would have been included in FPL's expansion plan for 1996 if FPL had not forecasted an additional 580 MW of firm QF capacity beyond what was under contract as of November, 1989.

8. A number of parties filed motions for clarification of the order on subscription limits. Most of these motions asked for clarification of whether "negotiated contracts" count toward the subscription limit. Some motions framed this solely as a general policy question (i.e., does a negotiated contract ever count toward the subscription limit?); others asked how the general policy would be applied to the specific facts surrounding ICL's negotiated contract. Because ICL's negotiated contract is the only one that will be governed by Order No. 23235, these questions are interchangeable.

9. On September 11, 1990, the PSC decided to treat these motions as "protests" of Order No. 23235 and directed interested parties to brief two major areas:

A. What should be the PSC's policy on subscription limits?

B. How should the various cogeneration contracts (e.g. ICL, CMI, Nassau Power, etc.) be prioritized for subscription limit purposes (queuing)?

PRINCIPLES FOR DECISION

10. The Commission should apply three principles in analyzing and deciding the subscription limit and queuing issues:

(1) Advance Policy Goals. To the extent possible under existing rules, the Commission's decisions should be consistent with its overall cogeneration policy goals, including the policies adopted on a prospective basis in the new cogeneration rules.

(2) Avoid Unintended Consequences. The Commission should consider the implications of its decisions for future proceedings -- such as need determination or contract approval dockets -- and avoid any action which may have unintended consequences in such proceedings.

(3) Avoid Unfair Retroactive Application. The Commission should avoid applying any decision retroactively in a way that interferes with preexisting contracts. Specifically, the Commission should avoid giving contracts signed after its May 25th vote any advantage over contracts signed prior to that date, for either queuing or need determination purposes.

ADVANCE POLICY GOALS

11. The Commission has repeatedly expressed a preference for negotiated cogeneration contracts. Any decision on subscription limit policy and queuing should either promote negotiated contracts or, at a minimum, should not discriminate against such contracts.

12. The Commission historically adopted subscription limits in order to address the potential mismatch between statewide planning and individual utility planning, and to prevent utilities from being required to accept standard offer contracts in excess of their need for capacity. Any decision on implementation of subscription limits should continue to advance this fundamental policy.

AVOID UNINTENDED CONSEQUENCES

13. There are two possible unintended consequences of any decision on subscription limits and queuing that the Commission should be careful to avoid:

(a) Avoid Linkage Between Subscription Limit and Economic Evaluation of Contracts. It is possible to unintentionally "link" the basis for economic evaluation of a cogeneration contract to the question of whether or not the contract counts toward the subscription limit. Order No. 23235 suggests that a negotiated contract which "counts against" the subscription limit must be compared to the

economics of the statewide avoided unit for contract approval and need determination purposes, while a negotiated contract which does not "count against" the subscription limit should be compared to the economics of the purchasing utility's avoided unit. These two questions should not be linked. The same standard of economic comparison -- the purchasing utility's avoided unit -- should apply in need determination and contract approval dockets regardless of whether the contract "counts against" the subscription limit or not.

(b) Avoid Prejudging Need For Project. It is possible to unintentionally grant a presumption of need to cogeneration projects that count against the subscription limit, effectively prejudging the need for the projects. The Commission should make it clear that no presumption of need is created by a project's place in the subscription limit queue. Need is an independent hurdle that every 75 MW or greater project must clear based on the record developed in its need determination proceeding.

AVOID UNFAIR RETROACTIVITY

14. At the May 25th Agenda Conference, Commissioner Easley expressed concern that the Commission's decision to reconsider and change the designation of the statewide avoided unit should not be applied retroactively to

adversely impact any contracts which had been entered into while the prior avoided unit designation was in effect. (Tr. 42) This is an important concern which should be carried forward as the Commission reconsiders or clarifies its May 25th decisions.

15. This principle is easy to state, but may be difficult to apply. Any claim that a particular action would be "retroactive" must be examined carefully to determine whether the decision would improperly frustrate preexisting contracts, or whether the decision is necessary to avoid frustrating such contracts.

SUGGESTED RESOLUTION OF SUBSCRIPTION LIMIT IMPLEMENTATION ISSUES

16. Order No. 23235 identified and discussed five issues relating to the implementation of subscription limits. The following is ICL's suggested resolution of those issues, and one additional issue that should be considered at the same time. ICL believes that its suggestions are consistent with the principles discussed above, and would avoid any unintended consequences or unfair retroactive effects.

17. Issue 1: How should standard offer contracts and negotiated contracts for the purchase of firm capacity and energy be prioritized to determine the current subscription level?

Suggested Resolution: There is no reason to modify the decision reflected in Order No. 23235. As stated therein, all contracts (negotiated or standard offer) should be prioritized according to the execution date of the contract. There are, however, two sentences in the discussion of Issue 1 that deserve clarification. They state:

> Negotiated contracts will "lock in" their execution date upon approval of the Commission. Negotiated contracts will not officially count toward the subscription limit until approved by the Commission but will be considered as "executed" contracts when determining the priority of all contracts.

ICL understands the language about "officially" counting toward the subscription limit to mean that a negotiated contract's place in line does not become final and unalterable until the contract is approved by the Commission. The negotiated contract nevertheless does hold its place in line based on execution date, subject only to final Commission action to confirm that place in line (by approving the contract) or to toss the contract out of line (by rejecting the contract). The Commission should confirm this interpretation and state that the language does not mean that a negotiated contract is subject to being pushed out of line at any time prior to final contract approval merely by the subsequent execution of a standard offer contract.

18. **Issue 2: How should the utilities who are subject to the Commission designated subscription amounts notify the Commission on the status of capacity signed up against the designated statewide avoided unit?**

Suggested Resolution: There is no reason to modify procedures set out in Order No. 23235 for notifying the Commission of contract execution.

19. **Issue 3: What happens when a utility reaches its own subscription limit?**

Suggested Resolution: There is no reason to modify the procedures set out in Order No. 23235 for closing the standard offer.

20. **Issue 4: Does the subscription limit prohibit any utility from negotiating, and the Commission from subsequently approving, a [negotiated] contract for the purchase of firm capacity and energy from a qualifying facility?**

Suggested Resolution: This question should be answered simply "No."

Discussion. Given the Commission's policy to promote cogeneration generally, and negotiated contracts in particular, there is no reason that a utility should be prohibited or discouraged from negotiating with QFs for the purchase of firm capacity and energy to meet the utility's needs. This is the bottom line conclusion that the Commission reached on May 25th, and this bottom line conclusion should be confirmed.

The discussion of this issue in Order No. 23235 goes further than necessary to support this conclusion. The additional discussion (i) introduces some ambiguity into the decision, (ii) appears to unintentionally prejudge the standards to be applied in Commission review of various classes of negotiated contracts, and (iii) appears to establish a standard for review of some contracts that is inconsistent with current Commission rules and policy.

The discussion creates ambiguity by talking in terms of contracts "negotiated against" the current statewide avoided unit. This class of contracts is never defined. Does it mean:

- contracts that meet the same need as the statewide avoided unit?
- contracts with the same in-service date as the statewide avoided unit?
- contracts with the same or earlier in-service date as the statewide avoided unit?
- contracts with a price structure similar to that of the standard offer contract?
- contracts executed during the period time that a particular standard offer tariff was in effect?
- or something else?

The discussion then suggests that the economic standard to be used to evaluate this particular class of contracts is different from the standard for review of contracts that were not "negotiated against" the statewide

avoided unit. This in effect prejudges the standard to be applied in subsequent contract approval dockets.

ICL believes that the Commission's policy as articulated in Order No. 22341 (the final APH order) makes it clear that any cogeneration contract, negotiated or standard offer, must be evaluated in the need determination process against the purchasing utility's own avoided costs. (Order No. 22341, p. 26) There is no logical basis, and no requirement under the Commission's rules, to apply one standard to evaluation of a negotiated cogeneration project for need determination purposes and a totally different standard to evaluation of the same project for contract approval purposes. The existing discussion of this issue in Order No. 23235 should be deleted, since it appears to prejudge the standards question in a way that is inconsistent with Commission policy.

If the Commission concludes that the standard for evaluating negotiated contracts is not clear, or should be considered further, then the question should be addressed in individual need determination or contract approval dockets, where a full record can be developed. In any event, the current order should not prejudge this issue.

21. Issue 5: Should a negotiated contract whose project has an in-service date which does not match the in-service date of the avoided unit be counted towards that utility's subscription limit?

Suggested Resolution. The Commission should modify or clarify Order No. 23235, as discussed in the Staff's August 30, 1990 recommendation, to state that a negotiated contract counts against the subscription limit if the project has an in-service date the same as, or prior to, the in-service date of the statewide avoided unit.

Discussion. ICL has the only negotiated contract that could possibly count against the current subscription limit, unless all pending standard offer contracts are rejected and the subscription queue thereby remains unfilled. Further, the Commission's new cogeneration rules set up a totally different regulatory scheme under which only standard offer contracts below 75 MW will count against any future subscription limit. Thus nothing is gained by considering Issue 5 on a purely theoretical basis, without regard to the specific facts before the Commission.

The relevant facts are simple. ICL's negotiated contract calls for its project to be in-service in December, 1995. As such, ICL's project will contribute toward meeting FPL's 1996 capacity need, which is a part of Peninsular Florida's larger need for capacity in 1996. There is no logic in establishing a policy based on the premise that a cogeneration facility with an in-service date of January 1, 1996 contributes to avoiding a 1996 utility-constructed unit, but that a cogeneration facility with an in-service

date of December 1, 1995 (one month earlier) does not contribute to "avoiding" that unit. Thus the Commission should rule that units with in-service dates prior to the in-service date of the statewide avoided unit (such as ICL's contract) do count against the 500 MW subscription limit.1/

This practical solution is also consistent with Commission policy. The subscription limit is a mechanism created by the Commission to address the potential mismatch between a statewide avoided unit and an individual utility's capacity needs by protecting a utility against an unlimited obligation to purchase cogeneration capacity. The current subscription limit in effect says that the utilities (individually or in the aggregate) will not be required to accept cogeneration contracts that exceed the 500 MW level established by the Commission.

No one disputes that negotiated contracts with the same in-service date as the statewide avoided unit count against the subscription limit, and thereby reduce the utility's obligation to accept standard offer contracts for the same year. Unless this were the rule, a utility would have a strong disincentive to negotiate with QFs. Such negotiations could result in the utility meeting 100% of its

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1/ CMI has argued that counting ICL's contract (which was signed on May 21, 1990) against the subscription limit would give the Commission's May 25th decision "retroactive" effect. That is not the case, as discussed in detail in the next section of this brief under the caption "Queuing."

own needs with negotiated contracts, yet leave it with an obligation to accept up to 500 MW of additional standard offer contracts based on a "statewide" need.

The same rationale supports counting negotiated contracts against the subscription limit if they have in-service dates earlier than the statewide avoided unit. Such contracts still contribute toward meeting the state's capacity need for the later year. If such contracts are not counted against the subscription limit, the utilities would potentially be exposed to a requirement to purchase capacity in excess of their needs.

22. Issue A: Does the fact that a particular cogeneration contract (negotiated or standard offer) counts against the subscription limit create any presumption that the project covered by the contract must be taken as a given for need determination purposes?

Suggested Response: No. The resolution of the subscription limit and queuing issues does not create a presumption for or against any cogeneration project in the need determination process.

Discussion. ICL is concerned that a decision on the subscription limit and queuing issues could have unintended consequences in future need determination dockets. This could happen, for example, if a need applicant were required to take the existence of other cogeneration projects as a "given" based on their place in the subscription limit queue.

Granting such a presumption of need based on place in the subscription limit queue would be inconsistent with existing Commission policy as stated in Order No. 22341 (the final APH order). That order held that the mere execution of a standard offer contract within the subscription limit is no longer sufficient to prove the need for the underlying project.

It is important for the Commission to confirm that its decisions in this docket are not intended to prejudge the need for specific cogeneration projects, nor to modify the policy stated in Order No. 22341. In particular, the Commission should put the parties on notice that its decisions on the "queuing" issues relate only to the extent of the utilities' obligation to accept cogeneration contracts, and do not create a presumption of need in favor of a project that falls within the subscription limit.

QUEUING

23. The queuing issue involves at least three separate points of contention:

(a) Can a negotiated contract with an in-service date prior to the in-service date of the avoided unit ever count against the subscription limit?

As discussed in Issue 5 above, ICL submits that the answer is "yes," particularly when considered in light of the facts of this case.

(b) If the answer is to the first question is "yes", does the ICL contract count toward the subscription limit even though it was executed four days prior to the May 25th designation of the 500 MW pulverized coal unit?

The answer to this question is also "yes". As discussed below, any other answer would give unfair retroactive effect to the Commission's May 25th decisions.

(c) What is the relative priority for subscription limit purposes of the standard offer contracts signed after May 25th (CMI, Nassau Power, etc.)?

ICL is not affected by the relative priority of these contracts, and takes no position on this question.

24. CMI's Memorandum in Response to Motions for Clarification asked the Commission to declare that "QF contracts negotiated against prior statewide avoided units and executed prior to the Commission's vote on May 25, 1990 are not to be retroactively bound by the new 500 MWs subscription limit." (Motion, pp. 5-6) Since ICL has the only negotiated contract before the Commission, CMI's request has the potential effect of knocking ICL's May 21st contract out of the subscription queue on grounds of "retroactivity". That would be improper. Placing ICL's contract at the head of the queue would have no unfair retroactive effect. To the contrary, eliminating ICL's contract from the queue based solely on execution date would

itself give the May 25th decisions an unfair retroactive application.

25. The purpose of the rule against retroactivity is to protect parties who acted in reliance on a given set of ground rules from having their expectations frustrated by subsequent changes in those ground rules. Commissioner Easley was correct in expressing concern at the May 25th agenda that the Commission's reconsideration of the avoided unit designation should not impair preexisting contracts. As Commissioner Easley pointed out, it would be improper for the Commission's decision to designate a 1996 coal unit to nullify previously executed cogeneration contracts. The Staff provided assurance that the decision would not have such a retroactive effect. (Tr. 42)

26. CMI's memorandum now invokes the term "retroactivity" to suggest a result which would have the precisely the bad effect -- changing the ground rules in a way that frustrates the parties' expectations -- that the Commission was determined to prevent.

27. Under the ground rules in effect when ICL signed its negotiated contract on May 21, 1990, it was fair for ICL to expect that (a) the 1993 standard offer tariff was not relevant to its decision, because the Indiantown Project would not be in service until late 1995; (b) it was first in line to help meet FPL's 1996 capacity need which it had been

negotiating to serve, and (c) its contract would be evaluated against FPL's own avoided unit for 1996. Similarly, when FPL signed the contract on May 17, 1990, it was fair for FPL to expect that (a) the ICL project was first in line to contribute 300 MW toward meeting its 1996 capacity need, (b) the contract would be evaluated against its own avoided unit for 1996, and (c) it would not be required to purchase capacity for 1996 that might exceed its needs.

28. These legitimate expectations of the contracting parties are best protected by placing ICL first in the subscription limit queue. That is where ICL belongs, based on the execution date of its contract. If the Commission confirms that priority, there will be no basis for any other party to argue that it has a superior right to be considered first in line to meet FPL's 1996 need, and no risk that FPL might be required to purchase more capacity than necessary to satisfy its own needs. If, to the contrary, ICL is eliminated from the subscription limit queue, there is a risk that these legitimate expectations of ICL and FPL will be frustrated only to benefit parties who had no legitimate expectation under the May 21st ground rules that they would move into a position of priority for meeting FPL's 1996 capacity needs.

CONCLUSION

WHEREFORE, ICL respectfully requests that the Commission:

(a) determine that ICL's negotiated contract does count against the subscription limit for the 1996 statewide avoided unit and that based on the execution date of its contract, ICL is first in the queue;

(b) state that the standard for evaluation of a negotiated contract for need determination and contract approval purposes does not depend on whether the contract does or does not count against the subscription limit; and

(c) state that the prioritization of contracts for subscription limit purposes does not create a presumption of need in favor of those projects that apply against the subscription limit.

RESPECTFULLY SUBMITTED this 25th day of September, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 25th day of September, 1990, to the following:

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