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August 5, 1994

VIA HAND DELIVERY

ORIGINAL
FILE COPY

Ms. Blanca S. Bayo, Director
Public Service Commission
Division of Records & Reporting
101 E. Gaines St.
Tallahassee, FL 32301

940819-EQ

Re: In re: Amendment of Standard Offer Contracts of
FLORIDA POWER CORPORATION and AUBURNDALE POWER
PARTNERS, LIMITED PARTNERSHIP

Dear Ms. Bayo:

Enclosed for filing in the proceeding referenced above are the original and fifteen copies of a Joint Petition for Expedited Approval of Contract Modifications. Also enclosed is a copy for our records to be date stamped by you and returned to our office.

Thank you for your consideration in this matter.

Sincerely,

HOLLAND & KNIGHT



D. Bruce May

Enclosure
DBM/sms

cc: J. Bradford Hines
Bob Ciotti
Allen Honey
Robert F. Riley
Jerry Glazer

TAL-1016

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EPSC BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

08017 AUG-5

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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IN RE: Amendment Of Standard
Offer Contracts of FLORIDA POWER
CORPORATION and AUBURNDALE POWER
PARTNERS, LIMITED PARTNERSHIP

Docket No. : _____
Filed: August 5, 1994

**JOINT PETITION FOR EXPEDITED
APPROVAL OF CONTRACT MODIFICATIONS**

Florida Power Corporation ("FPC") and Auburndale Power Partners, Limited Partnership ("APP"), by and through undersigned counsel, pursuant to Rule 25-22.036(4), Florida Administrative Code, hereby petition the Florida Public Service Commission ("Commission") to approve for purposes of cost recovery, to the extent that any approval is required, the LFC No. 47 Corp. ("LFC") standard offer contracts with FPC (the "Standard Offer Contracts") as assigned to APP pursuant to the Consent and Agreement, as amended (referred to collectively herein as the "Assignment"). The Assignment provides that in performing the Standard Offer Contracts, APP will supply energy and capacity under the contracts from its Auburndale Facility rather than from the existing facilities in Jefferson and Madison Counties. In addition, APP has waived its rights to require FPC to purchase energy during specified periods in which FPC's load is reduced, and FPC has agreed that APP can utilize an alternative interconnection agreement. FPC and APP request confirmation from the Commission that the Standard Offer Contracts as modified continue to qualify for cost recovery.

DOCUMENT NUMBER-DATE 11
08017 AUG-5 1994
FPSC-RECORDS/REPORTING

REQUEST FOR EXPEDITED CONSIDERATION

FPC and APP respectfully request that the Commission expedite consideration of this petition. Prompt disposition is needed in order for FPC to effectively coordinate its power supply with actual load requirements. Based on the anticipated approval of this Assignment, FPC's Energy Control Center is planning to exercise rights to curtail power beginning October, 1994. Prompt disposition is also crucial to the continued development of the project.

On April 19, 1994, APP and FPC filed with the Commission a Joint Petition for Declaratory Statement requesting confirmation, on or before July 31, 1994, that the Assignment would not jeopardize prior cost recovery approval under the Standard Offer Contracts. Commission staff has advised recently that a declaratory statement proceeding may not be the most effective procedure in which to present the issues to the Commission and has suggested the filing of a petition for approval of contract modifications. Contemporaneous with this filing, the parties have withdrawn the joint petition for declaratory statement but continue to assert that Commission approval of the Assignment is not required, given the minor modifications contemplated therein and the fact that the Standard Offer Contracts specifically provide for assignment. FPC and APP respectfully reserve the right to forward that position at some later time. This petition was filed in this form in order to avoid unnecessary dispute with staff so that the issues relative to the Assignment can be addressed and, if

necessary, approved by the Commission at the earliest practicable time. This change in procedure has placed the parties beyond the original July 31, 1994 deadline and the parties have negotiated an extension of the deadline until August 31, 1994. Should Commission confirmation not be obtained on or before August 31, 1994, it is the parties' understanding that LFC will be required to begin to retrofit its facilities in Jefferson and Madison Counties and move forward under the original contracts. This result could deprive FPC and its ratepayers of the benefits of the curtailment, location change and assignment which will flow from the Assignment.

To avoid further delay and to preserve the benefits of the Assignment for FPC and its ratepayers, FPC and APP request that the Commission use its proposed agency action procedures to address this Petition on or before August 31, 1994 and publish Notice of Proposed Agency Action in the Florida Administrative Weekly as provided by Rule 25-22.029(3), Florida Administrative Code. Should the Commission's schedule not be able to accommodate the August 31 date, the parties respectfully request that the Commission address the petition as soon thereafter as practicable.

INTRODUCTION

1. Any pleadings, motions, notices, orders or other documents required to be served in this docket should be addressed to:

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2. FPC is a public utility subject to the jurisdiction of the Florida Public Service Commission pursuant to Chapter 366, Florida Statutes. FPC's general offices are located at 3201 - 34th Street, South, St. Petersburg, FL 33733. APP is a limited partnership formed under the laws of the State of Delaware and authorized to do business in Florida. APP's general offices are located at 1501 Derby Avenue, Auburndale, Florida 33823.

BACKGROUND

3. On April 5, 1989, Sun Bank of Tampa Bay ("Sun Bank") entered into two Standard Offer Contracts with FPC for the sale of cogenerated power from Sun Bank's Jefferson County and Madison County facilities. Both Standard Offer Contracts executed were the FPC standard offer contract incorporating FPC's COG-2 tariff which had been approved by the Commission on January 26, 1988.¹

¹In re: Annual hearings on load forecasts, generation expansion plans and cogeneration prices for Peninsular Florida's electric utilities, 88 F.P.S.C. 1:435, Docket No. 880004-EQ, Order No. 18735 (January 26, 1988).

4. On April 12, 1989, FPC filed two separate petitions for Commission approval of the Standard Offer Contracts.

5. Sun Bank assigned both Standard Offer Contracts to LFC on April 14, 1989. On June 14, 1989, FPC consented to the assignment as required by Section 9.6 of the Standard Offer Contracts.

6. On September 27, 1989, the Commission approved the recovery of energy and capacity payments by FPC under the Jefferson County contract in Order No. 21497 and under the Madison County contract in Order No. 21498.²

7. In September, 1989, LFC's Madison facility began electric generation and sales of as-available energy to FPC.

8. In August, 1990, LFC's Jefferson facility began electric generation and sales of as-available energy to FPC.

9. On December 18, 1992, LFC exercised its option under Section 4.2.2 of the Madison Standard Offer to change the date for commencement of capacity payments from June 1, 1989, to January 1, 1995.

10. On December 18, 1992, LFC exercised its option under Section 4.2.1 of the Madison Standard Offer to increase its committed capacity under the contract from 7.969 MW to 8.5 MW.

11. On April 8, 1994, LFC signed the Consent and Agreement with APP and FPC and thereby exercised its right under the Standard

²In re: Petition for approval of cogeneration contract between Florida Power Corporation and Sun Bank of Tampa Bay, Jefferson County Facility., 89 F.P.S.C. 9:559, Docket No. 890511-EQ, Order No. 21947 (September 27, 1989); In re: Petition for approval of cogeneration contract between Florida Power Corporation and Sun Bank of Tampa Bay, Madison County facility., 89 F.P.S.C. 9:560, Docket No. 890512-EQ, Order No. 21948 (September 27, 1989).

Offer Contracts to assign the contracts to APP. Such assignment is contingent upon approval of this petition.

12. The Consent and Agreement embodies several understandings between APP and FPC relating to the performance of the contracts. It provides that after the assignment, Seller will generate the firm capacity and energy sold under the Standard Offer Contracts to FPC from the cogeneration facility APP has constructed near the city of Auburndale in Polk County, Florida (the "Auburndale Facility") rather than from facility locations in Madison and Jefferson Counties. (See Section 4(c)1. of the Consent and Agreement). APP will also sell firm capacity and energy from its Auburndale Facility to FPC pursuant to a negotiated contract between APP and FPC, which has been approved by the Commission.³ Further, as set forth in Section 5 of the Standard Offer Contracts, the Consent and Agreement embodies FPC and APP's agreement that planned outages and reductions in capacity will occur during certain "Coordinated Curtailment Periods" (See Section 4(f) of the Consent and Agreement), certain "Off-Peak Curtailment Periods," which will be the hours between 12:00 a.m. and 6:00 a.m., beginning on October 1, 1994 through the year 1999 and associated limited Ramp Periods as defined in the Consent and Agreement, during specified designated periods (See Sections 1 and 4(d) of the Consent and Agreement). In addition, the parties have agreed to limited planned outages and reductions in capacity under the

³In re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 F.P.S.C. 7:60, 66, Docket No. 910401-EQ, Order No. 24734 (July 1, 1991).

negotiated contract and to utilize the July 13, 1992, Tampa Electric Company ("TECO") Transmission Service and Interconnect Agreement.

13. On July 19, 1994, APP, FPC and LFC amended the April 8, 1991 Consent and Agreement to (i) clarify that the Assignment, if exercised, will not extinguish or otherwise discharge LFC's original obligations to FPC under the Standard Offer Contracts; and (ii) to extend the termination date from July 31, 1994 to August 31, 1994.

**CONTEMPLATED MODIFICATIONS IN COMMISSION
APPROVED STANDARD OFFER CONTRACTS**

14. The Standard Offer Contracts are not static with respect to assignment, project location and coordinated curtailment. Section 9.6 of the Standard Offer Contracts authorizes the QF to assign its obligations, benefits, and duties provided that the QF obtains FPC's written approval. Section 1 of the Standard Offer Contracts grants the parties discretion to select the cogeneration project location. Sections 5(a) and 5(c) of the Standard Offer Contracts authorize the parties to coordinate scheduled facility outages and curtailment.

15. The changes contemplated by the parties are not of the magnitude or type that should cause the Commission to revoke its original confirmation that cost recovery is appropriate. Based on the long lead time between the submission of a standard offer contract and the commercial operation of the QF, it is inevitable that the plans for the projects will evolve and that the parties

will consider mutually beneficial proposals that either were not included in the original Standard Offer Contract or that contain minor modifications to certain terms therein. Although it would be inconsistent to assert that the parties are free to change the fundamental terms of a standard offer contract without the need for examination of cost recovery, the legislative goal of furthering cogeneration in Florida will be frustrated if QFs and utilities are not afforded reasonable flexibility to develop projects within the parameters of the standard offer concept.⁴

Ratepayer Benefits From Assignment

16. In its review of the original Standard Offer Contracts, the Commission evaluated whether, and ultimately confirmed that, entering into the contracts is prudent and that cost recovery will be permitted. Changes to a standard offer contract that would negatively affect the Commission's conclusions with respect to those criteria may remove the contract from cost recovery protection. However, minor modifications concerning the operations of the QF pursuant to a standard offer contract which do not affect the evaluation pursuant to these criteria and are beneficial to FPC

⁴ The Commission's stated policy is not to revisit or reopen prior approvals of cost recovery under standard offer contracts. FPL v. Beard, 626 So.2d 660 (Fla. 1993) (affirming FPSC Order 24989 in Docket No. 910004-EU); In re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities. In addition, Section 366.051, Fla. Stat., provides, in pertinent part, that "[e]lectricity 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 grid of the state."

and its ratepayers, are distinguishable and should not affect prior cost recovery protections afforded by the Commission.⁵

17. In the case of proposed minor modifications to a standard offer contract, the Commission should apply the same prudence and public interest standard that it applied to the original contract. Application of such prudence standard requires an inquiry as to whether it is prudent for FPC to agree to the proposed Assignment, including curtailment and location change, as an alternative to the "base case," in which these changes would not be made, and the Madison and Jefferson County projects would be operated pursuant to the existing Standard Offer Contracts.⁶

⁵ Compare, In re: Petition Not To Accept Standard Offer Contract By Tampa Electric Company, Order No. PSC-94-0488-FOF-EQ, Docket No. 940193-EQ (dated April 25, 1994). In that case, Polsky Energy Corporation attempted to unilaterally alter a TECO standard offer contract by reducing the minimum Monthly Availability Factor ("MAF") and deleted the completion security, performance security and liquidated damages provisions in the contract. In contrast to the mutually-agreed upon changes proposed by the petitioners in the instant case, the changes in Polsky arguably may have affected the outcome of the Commission's prudence and public interest analysis. Reducing the MAF reduces the ability of the project to defer generation and affects the Commission's analysis of performance assurances. Moreover, none of the changes in Polsky concerned the areas in which the standard offer contracts afford the seller flexibility.

None of the changes proposed by the parties herein affects the Commission's previous analysis of prudence and public interest, and all of the changes relate to those areas in the Standard Offer Contracts which contemplate such modifications. It is not appropriate or necessary that the Commission extend its holding in Polsky to the instant facts.

⁶ This test was applied by the Commission in evaluating CFR Bio-Gen's amended standard offer contract with FPC. In Re: CFR BIO-GEN's Petition for a Declaratory Statement regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, 91 F.P.S.C. 4:109, 114, Docket No. 900877-EI, Order No. 24338 (April 9, 1991). CFR Bio-Gen and FPC

18. With respect to the base case, LFC's Madison facility is operational, having started electric generation and sale of available energy to FPC as of September, 1989. LFC's Jefferson facility is also operational, having started electric generation and sales of available energy to FPC as of August, 1990. FPC thus is reasonably assured that LFC is in position to operate and perform under the Standard Offer Contracts, and FPC is not making an otherwise unviable project viable by amending the Standard Offer Contracts. As shown below, the proposed minor modifications are beneficial to FPC's customers, in comparison to the base case, and hence are prudent.

Benefits of Assignment

19. FPC has concluded that the proposed changes will enhance FPC's overall system performance thereby ultimately benefiting its ratepayers. As a result of the Assignment, energy and capacity will be provided to FPC under the two LFC Standard Offer Contracts and the APP negotiated contract from the Auburndale Facility, which will be operated under characteristics that are more responsive to FPC's on-peak requirements. LFC's assignment of the Standard Offer

entered into a stipulation agreeing to resolve disputes that had arisen regarding their two standard offer contracts by negotiating a new contract. The stipulation provided that the negotiated contract, among other things, would change the location of the project and allow FPC to dispatch the planned cogeneration unit. In its recommendation addressing whether the Commission should approve the negotiated contract staff noted that for all practicable purposes the negotiated contract is a "modification of the standard offer contract," and thus concluded: "[t]hat being the case, the only relevant analysis is to compare the two payment streams of the contracts." See, Staff Recommendation dated February 27, 1992, in Docket No. 900383-EQ.

Contracts to APP is specifically contemplated by Section 9.6 of the approved Standard Offer Contracts which authorizes LFC to assign its obligations, benefits, and duties under the Standard Offer Contracts provided that LFC obtains the written approval of FPC. APP's Auburndale Facility is a gas-fired combustion turbine generating facility which became commercially operable on July 1, 1994, and APP is poised and prepared to fully perform under the Standard Offer Contracts. FPC's ratepayers will be afforded a reliable and cost-effective supply of power from the APP Facility.

Curtailment

20. In response to a request by FPC, APP has agreed to coordinate, in advance of the in-service date of the contracts, a schedule of set periods of time when outages and reductions in capacity can occur under the Standard Offer Contracts. APP and FPC's agreement regarding these "Off-Peak Curtailment Periods" including the associated Ramp Periods and "Coordinated Curtailment Periods" provide FPC with advance notice of coordinated outages and reductions in capacity as contemplated by Sections 5(a) and 5(c) of the Standard Offer Contracts.⁷ The agreed on curtailment will benefit FPC's ratepayers. The "Off-Peak Curtailment Periods" and the "Coordinated Curtailment Periods" have been designed to occur when FPC expects its loads will be low. As a result of these mutually agreed upon curtailment periods, FPC will be afforded

⁷ Section 5(a) of the Standard Offer Contracts states that APP will provide FPC with an annual estimate of "any planned outages or reductions in capacity." Section 5(c) of the Standard Offer Contracts states that APP will "coordinate its scheduled facility outages with the Company."

operational flexibility with respect to its generating units during periods when its load is anticipated to be low, and APP will not be penalized as a result of its agreement to curtail.

Location Change

21. Following the Assignment, APP will provide energy and capacity under the Standard Offer Contracts and its Negotiated Contract with FPC from its Auburndale Facility. The mutually agreed upon change in location from Jefferson County and Madison County to the Auburndale Facility location is permitted under the Standard Offer Contracts. The form of the Standard Offer Contracts left the facility location unspecified, such provision simply to be filled in by the QF upon contract execution.

22. The mutually agreed upon change in location will benefit both FPC and its ratepayers because the Auburndale Facility is south of FPC's Central Florida Substation and is closer to FPC's load center.⁴ The new location will reduce line loss incurred in the transmission of power to the load center, provide greater reliability as the transmission distance will be significantly shortened, and increase FPC's opportunity for purchase of bargain and emergency power from the non-peninsular Florida System.

⁴The Commission has recognized that from a planning perspective, units south of the central Florida substation "provide lower cost electricity than those in northern Florida." In Re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities., 91 F.P.S.C. 8:561, 579, Docket No. 910004-EQ, Order No. 24989 (August 29, 1991). In fact, FPC's new standard offer contract imposes a location penalty on QFs located north of FPC's Central Florida Substation. Id.

**EFFECT OF THE STANDARD OFFER
CONTRACT ASSIGNMENT**

23. The assignment, curtailment, and change in location are minor modifications contemplated by the Standard Offer Contracts as approved by the Commission. As such, the Standard Offer Contracts now should be evaluated against the Commission's rules in place at the time the Standard Offer Contracts were executed and the Commission should not reopen or revisit its analysis of the cost recovery under the Standard Offer Contracts.⁹ The parties have made it clear that the Assignment will not discharge LFC from its obligations under the Standard Offer Contracts. Additionally, the Assignment will not merge the Standard Offer Contracts with APP's negotiated contract with FPC. All three contracts will remain separate and distinct. Further, the in-service dates under the Standard Offer Contracts will not be extended by the Assignment beyond those dates provided for in the original Standard Offer Contracts. Thus, if there is to be any avoided costs comparison made, such a comparison should be based on the avoided costs projected at the time that the Standard Offer Contracts were executed.

⁹The Commission's stated policy with respect to standard offer contracts is that it will not reopen and revisit cost recovery under standard offer contracts once such contracts are approved. In re: Planning Hearings on Load Forecasts Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 F.P.S.C. 8:560, 629, Docket No. 910004-EQ, Order No. 24989 (August 29, 1991); Florida Power & Light v. Beard, 626 So.2d 660 (Fla. 1993).

75 MW Cap Does Not Apply

24. Following the Assignment, APP will provide energy and capacity under the Standard Offer Contracts from its Auburndale Facility which has project capacity of approximately 150 megawatts (MWs). In October of 1990, the Commission adopted Rule 25-17.0832(3)(a), Florida Administrative Code, which for the first time limited the availability of standard offer contracts to projects with capacity of less than 75 MW.¹⁰ The 75 MW cap in Rule 25-17.0832(3)(a) does not apply to the Standard Offer Contracts at issue because these contracts were executed, approved and became effective in 1989, more than a year before the Commission adopted Rule 25-17.0832(3)(a).¹¹

25. The Commission has stated that the cogeneration rules adopted in 1990 are to only have prospective application and are not to be interpreted such that they affect contractual obligations established prior to their adoption. In Re: CFR BIO-GEN's Petition for a Declaratory Statement regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, 91 F.P.S.C. 4:109, 114, Docket No. 900877-EI, Order No. 24338 (April 9, 1991). In that Order the Commission stated:

¹⁰In Re: Proposed revisions to Rule 25-17.0825, 25-17.083, 25-17.0831, 25-17.088, 25-17.0882, 25-17.091, and creation of Rules 25-17.0832, 25-17.0833, 25-17.0834 and 25-17.089, F.A.C., Cogeneration Rules., 90 F.P.S.C. 10:405, Docket No. 891049-EQ, Order No. 23623 (October 16, 1990).

¹¹In addition, the original assignments by Sun Bank to LFC occurred more than 18 months prior to the Commission adopting its new cogeneration rules.

Rules, like statutes, are not usually applied retroactively unless they are curative in nature, explicitly note in the title that they will apply retroactively, and do not impair the obligation of contract or vested rights. See 49 Fla Jur. 2d. Statutes, 136. The new cogeneration rules are not curative rules, they do not give clear notice that they are to be applied retroactively, and they do not apply to affect contractual obligations established three years prior to their adoption.

Id. at 114. (Emphasis supplied). This ruling is consistent with the general principle that an administrative rule is presumed to operate prospectively absent express language to the contrary in the rule itself.¹²

26. This petition involves two existing cogeneration contracts that were executed and approved prior to the effective date of Rule 25-17.0832(3)(a), Florida Administrative Code, and at a time when standard offer contracts were not limited to projects of a certain size.¹³ Consequently, the new cogeneration rules, including Rule 25-17.0832(3)(a), and any Commission interpretation of that rule, are inapplicable to the Standard Offer Contracts, and cannot retroactively apply to impair the validity, legality or

¹²See Jordan v. Department of Professional Regulation, 522 So. 2d 450 (Fla. 1st D.C.A. 1988).

¹³Indeed, as evidenced by the Commission's approval of the Nassau project with a capacity of 435 MW, standard offer contracts that were entered into prior to October 25, 1990, could be accepted by developers of projects with a capacity well above 75 MW. See In Re: Planning Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Prices for Peninsular Florida's Electric Utilities, 90 F.P.S.C. 11:286, Docket No. 90004-EQ, Order No. 23792 (November 21, 1990).

enforceability of the Standard Offer Contracts if they are assigned to APP.

27. This analysis should remain unchanged even assuming arguendo that the Assignment would be construed as resulting in two new negotiated contracts. The 75 MW cap would not apply under that construction of the Assignment because the cap does not apply to negotiated contracts by operation of rule. Further, given the reasonable assurances that both LFC projects are operational and viable, the appropriate evaluation of the new contracts for purposes of prudence and public interest is that prescribed by the Commission in the CFR Bio-Gen case. See Footnote 6, In Re: CFR BIO-GEN's Petition for a Declaratory Statement regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, 91 F.P.S.C. 4:109, 114, Docket No. 900877-EI, Order No. 24338 (April 9, 1991). Because the Standard Offer Contracts will be performed by LFC absent the Assignment, the comparison for determining the prudence of the resultant negotiated contract, for cost recovery purposes, is between payments under the original standard offer contract and payments under the negotiated contracts.

CONCLUSION

28. When the benefits under the 1989 Standard Offer Contracts with LFC without the Assignment are compared to the benefits under the Standard Offer Contracts as modified by the Assignment, it is clear that the Standard Offer Contracts as modified will prove more

beneficial to FPC and its ratepayers than the original Standard Offer Contracts. The Assignment will: (i) enhance the supply of reliable capacity and energy during periods when FPC most needs electric power; (ii) afford FPC operational flexibility with respect to its generating units during periods when its load is anticipated to be low; (iii) alleviate transmission capacity constraints by relocating the source of power under the LFC contracts south of the central Florida substation; and (iv) locate the source of capacity closer to FPC's primary load center. Based on the foregoing, the Commission should approve the Assignment and confirm that cost recovery is appropriate under the modified Standard Offer Contracts.

WHEREFORE, FPC and APP respectfully request that the Commission approve the Assignment on an expedited basis and confirm that the modified Standard Offer Contracts continue to qualify for cost recovery.

Respectfully submitted,



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