

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Approval of) DOCKET NO. 940569-EQ
Amendment and Assignment of) ORDER NO. PSC-94-1267-FOF-EQ
Standard Offer Contract with KES) ISSUED: October 13, 1994
Dade, L.P. to Osceola Power)
Limited Partnership, by Florida)
Power and Light Company)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING CONTRACT FOR COST RECOVERY

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 September 20, 1991, KES Dade, L.P. (KES) submitted a standard offer contract to Florida Power and Light Company (FPL) in which KES committed to sell 16.4 MW of firm capacity and energy from its proposed facility in Dade County, Florida. On that same date, Osceola Farms Co. submitted a standard offer contract to FPL for 42.0 MW of firm capacity and energy from its proposed facility in Palm Beach County, Florida. Osceola Farms Co. subsequently assigned its interests in the standard offer contract to Osceola Power, L.P. (Osceola). On March 11, 1992, by Order No. PSC-92-0050-FOF-EQ issued in Docket No. 911140-EQ, the Commission closed FPL's standard offer contract. The KES and Osceola standard offer contracts were included, in full, as two of the contracts to fill the subscription limit.

On April 22, 1994, FPL filed a Petition seeking Commission approval of the amendment and assignment of FPL's standard offer contract with KES. FPL seeks approval to:

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- o reduce the committed capacity of the existing KES standard offer contract from 16.4 MW to 10.0 MW;
- o assign the contractual duties and obligations to perform the amended KES standard offer contract to Osceola; and
- o merge this assigned standard offer contract into the Osceola contract. This requires that Osceola's existing standard offer contract be amended to increase the committed capacity from 42.0 MW to 52.0 MW.

FPL also asks that the Commission confirm that the amended 52 MW standard offer contract with Osceola continues to qualify for cost recovery pursuant to Rule 25-17.0832(8)(b), Florida Administrative Code.

In its recommendation, staff raised the issue of whether or not the existing standard offer contract between Florida Power and Light Company and KES Dade, L.P., as amended and assigned to Osceola Power, L.P., constitutes a new agreement. Staff suggested that if the question was answered in the affirmative, compliance with Rule 17.0832(2), Florida Administrative Code would be required. Several interested persons suggested that a decision on that issue is broader in impact than just this docket and that a resolution is not necessary to rule on FPL's petition. We do not believe it is necessary to decide that issue to adequately address the petition filed by FPL. Accordingly, we take no action on the question of whether or not this contract is a new, negotiated agreement.

Cost-effectiveness of the Amended and Assigned Agreement

As part of its review of the proposed transaction, FPL sought to confirm that KES could have performed its standard offer contract had the contract not been amended and assigned to Osceola. FPL pursued this action to ensure that it was not making an otherwise non-viable contract viable.

KES sought an opinion from a consultant, Environmental Risk Limited (ERL), regarding the viability of the project and the ability of KES to obtain the appropriate environmental permits to construct and operate the proposed Dade County facility. ERL concluded that KES would be able to permit and construct the facility by the January 1, 1997, in-service date.

FPL provided other documents which address KES's commitment to the Dade County Facility. FPL represents that it is reasonably

sure that KES could have performed its standard offer contract had it not been assigned to Osceola.

We note that Sections 7 and 8 of KES's standard offer contract require that KES provide completion and performance security to FPL in the total amount of \$410,000.00. KES has met these requirements.

Given the analysis showing that KES could obtain the required permits and construct the facility to meet its required in-service date, and the significant financial penalty if KES does not perform, we believe that if the petition is not approved, it is likely that the KES facility would still be built.

The original contract provides that KES would start selling firm capacity to FPL in 1997. FPL's most recent expansion plan studies show that there is currently no need for capacity in 1997.

Rule 25-17.083(2), Florida Administrative Code, provides in part that a purchased power contract:

will be considered prudent for cost recovery purposes if it is demonstrated that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs...

The generic question of the "need" for this power was established in the 1991 Annual Planning Hearing, satisfying the requirement of Rule 25-17.0832(2)(a), Florida Administrative Code.

We believe that the substitution of an obligation to purchase 10 megawatts of electricity for an obligation to purchase 16.4 megawatts of electricity is in the best interests of the general body of ratepayers, given that the utility does not need the incremental capacity. The payments to be made under the new agreement are proportionally less than those under the prior agreement. FPL is using this contract to avoid the payments under the prior contract. Thus, the requirement of Rule 25-17.0832(2)(b)2 is satisfied.

Provisions of the KES standard offer contract, which we believe are incorporated in this agreement, satisfy the

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requirements with respect to the security for, and, the viability of, this agreement, in accord with sections (c) and (d) of Rule 25-17.0832, Florida Administrative Code.

Therefore, we find that FPL's petition for approval of the amendment and assignment of KES's standard offer contract to Osceola shall be and is hereby approved. Cost recovery under the agreement shall be allowed pursuant to Rule 25-17.0832(8)(a), Florida Administrative Code.

It is, therefore,

ORDERED that we take no action on the question of whether or not this contract is a new, negotiated agreement. It is further

ORDERED that FPL's petition for approval of the amendment and assignment of KES's standard offer contract to Osceola shall be and is hereby approved. Cost recovery under the agreement shall be allowed pursuant to Rule 25-17.0832(8)(a), Florida Administrative Code. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket should be closed.

By ORDER of the Florida Public Service Commission, this 13th day of October, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Hejira
Chief, Bureau of Records

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DISSENT

Commissioner Garcia dissents from the majority's decision concerning whether or not the assignment and amendment of the KES Dade, L.P. standard offer contract constitutes a new agreement.

It is appropriate and necessary to address the issue of whether or not the assignment and amendment of the KES Dade, L.P. standard offer contract constitutes a new agreement. The concept of the standard offer contract was developed and approved by this Commission as a way to facilitate market entry for small cogenerators which typically do not possess the resources to effectively engage the utilities in the negotiation of contracts. As such, the standard offer contract should be viewed as an end in and of itself, and not as prelude to further negotiations of its terms from without the shadow of this Commission's jurisdiction.

This is not to say that the terms of a standard offer contract could not or should not be altered through negotiation, if that should be the desire of the parties. However, a change in any material term of a standard offer contract must necessarily divest that contract of its perfunctory approval.

This Commission is vested with responsibility for the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure a reliable source of energy..." Section 366.05(5), Florida Statutes. By this statutory mandate, and by its prior approval of standard offer contracts, the Commission insinuates its party status upon the standard offer contract. While it is true that the defining terms of such a contract are initially left open and to the discretion of the parties, once executed, those terms form part of the basis of subsequent planning decisions by this Commission. It would be contrary to public policy to allow the standard offer contract, a creation of the Commission, to operate to preclude the agency from carrying out its assigned duties.

I concur in the decision concerning the cost-effectiveness of the new contract.

Commissioner Kiesling dissents from the majority's decision not to address the question of whether or not the standard offer contract between Florida Power and Light Company and KES Dade, L.P., as amended and assigned to Osceola Power, L.P., constitutes

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a new agreement. Standard offer contracts were approved by this Commission as a mechanism to encourage market entry for small cogenerators which traditionally lack competitive advantage in negotiating contracts. I concur with staff's analysis and conclusion that the subject contract constitutes a novation under the standards set forth in Sans Souci v. Division of Florida Land Sales and Condominiums, 448 So.2d 1116 (Fla. 1st DCA 1984). When a material change is made to a standard offer contract, it becomes either a novation or a negotiated contract and should no longer be afforded the same treatment as a standard offer contract. Therefore, the Commission should have first addressed the question of whether the subject agreement constitutes a new agreement. I concur in the majority's decision concerning the cost-effectiveness of the agreement.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on November 3, 1994.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

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.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.