



Public Service Commission

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RECORDS AND REPORTING

DATE: FEBRUARY 3, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF ELECTRIC AND GAS (HAFF, GING) *MAN CR 173*
DIVISION OF LEGAL SERVICES (JAYE) *RUE JA* *JDJ 23*

RE: DOCKET NO. 991973-EQ - PETITION OF FLORIDA POWER CORPORATION FOR APPROVAL OF STANDARD OFFER CONTRACT AND ACCOMPANYING RATE SCHEDULE COG-2.

AGENDA: 02/15/00 - PROPOSED AGENCY ACTION - RULE WAIVER AND TARIFF SUSPENSION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 60-DAY DEADLINE ON TARIFF SUSPENSION: 2/18/00
90-DAY DEADLINE ON RULE WAIVER REQUEST: 3/17/00

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\EAG\WP\991973.RCM

CASE BACKGROUND

On December 20, 1999, Florida Power Corporation (FPC) filed a Petition for Approval of a Standard Offer Contract for qualifying cogeneration and small power production facilities. The proposed contract is based on the proposed Hines Unit 2, a 531 MW combined cycle generating unit with an in-service date of November 1, 2003. The subscription limit for the proposed contract is 20 MW.

As part of its filing in this docket, FPC filed two additional, separate petitions for rule waiver. These are addressed below:

DOCUMENT NUMBER-DATE

01515 FEB-38

FPSC-RECORDS/REPORTING

1. Petition for Waiver of Rule 25-17.0832(4)(e)(5), Florida Administrative Code.

This rule requires that the open solicitation period for a standard offer contract must terminate prior to the utility's issuance of a Request for Proposals (RFP). According to FPC, unless the proposed standard offer contract is available at the same time that FPC conducts its RFP process for Hines Unit 2, there will be insufficient time for both.

2. Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code.

This rule requires that standard offer contracts have a minimum term of ten years. FPC proposes a five-year term for its standard offer contract. According to FPC, limiting the contract term to five years still encourages cogeneration while protecting FPC's ratepayers from the uncertainties of long-term contracts.

The two petitions for rule waiver were jointly noticed in the January 14, 2000 Florida Administrative Weekly. The comment period expired on January 28, 2000. No comments were received.

This recommendation addresses both the requested rule waivers and the suspension of the standard offer contract tariff.

DISCUSSION OF ISSUES

ISSUE 1: Should FPC's petition for a waiver from the timing requirements of Rule 25-17.0832(4)(e)(5), Florida Administrative Code, be granted?

RECOMMENDATION: Yes. FPC has demonstrated that the purpose of the underlying statute will be met, and that FPC and its ratepayers will suffer substantial hardship if the variance is not granted.
(JAYE, HAFF)

STAFF ANALYSIS:

A. Standards for Approval

Section 120.542, Florida Statutes (1997), mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances 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, under the statute, 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.

FPC seeks a waiver of the rule in order to allow it to conduct its RFP analysis at the same time that the proposed standard offer contract is available.

B. FPC's Petition For Waiver

1. Purpose of the Underlying Statute

In its Petition For Waiver, FPC identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPC, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA), to encourage cogeneration while at the same time protecting ratepayers from paying costs in excess of avoided costs, will be achieved and even enhanced. FPC contends that the waiver will allow the standard offer to remain in effect and be available to cogenerators after the issuance of the RFP and related notice. FPC maintains that its requested waiver fairly accommodates the interests of cogenerators, its need to add new generation capacity to satisfy the new 20% reserve margin requirement, and, its need to bring Hines Unit 2 online in time to meet its 2003/2004 winter peak.

2. Substantial Hardship

FPC argues that obligating it to delay the issuance of the RFP for Hines Unit 2 until completion of the standard offer's open solicitation period would create a substantial hardship on FPC and its ratepayers. FPC asserts that it must issue the RFP at the earliest possible date so that FPC can achieve the accelerated in-service date of November, 2003 for Hines Unit 2. FPC contends that delaying the issuance of the RFP until after the standard offer has been approved and the open solicitation period has expired would frustrate FPC's attempt to satisfy the new 20% reserve margin requirement, as well as jeopardize FPC's ability to add new capacity in time to meet its 2003/2004 winter peak.

C. Analysis

In determining whether a rule waiver should be granted to a utility which bases its assertion of substantial hardship upon hardship to its ratepayers, staff directs the Commission's attention to Order No. PSC-98-1211-FOF-EI, issued September 14, 1998, in Docket No. 980740-EI. In that Order, which determined a rule waiver request by Florida Power & Light Company (FPL), the Commission noted that the Legislature intended the provisions of Section 120.542, Florida Statutes:

to remedy situations where "strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results . . ." Section 120.542(1), Florida Statutes. We believe that this language should be read together with subsection (2) of the statute in order to determine whether FPL has demonstrated a substantial hardship in this case.

In terms of the rule's impact on FPL alone, it is arguable whether the rule creates a substantial hardship. However, FPL's ratepayers may achieve substantial benefits if FPL's request for a rule waiver is granted. Conversely, if the rule waiver is not granted, FPL's ratepayers must forego those benefits. We believe that this is the type of "unreasonable, unfair, and unintended result" that Section 120.542, Florida Statutes, was intended to remedy. Therefore, given the interests of FPL's ratepayers and our responsibility to those ratepayers, we find that FPL has demonstrated that application of Rule 25-17.015(1) Florida Administrative Code, creates a substantial hardship.

Staff, therefore, believes that Commission precedent holds that a demonstration by an Investor Owned Electric Utility (IOU) that the application of a rule will cause a substantial hardship to its ratepayers is sufficient to grant the IOU the requested rule waiver.

Staff agrees with FPC that allowing the issuance of the RFP at the same time as the open solicitation period will satisfy the

underlying purposes of the statute by encouraging small qualifying facilities (QF). FPC has stated that recent revisions to the cogeneration rules focus the rules more closely upon QFs less than 0.1 MW. Therefore, FPC and its ratepayers will be at no disadvantage by issuing its RFP for Hines Unit 2 while the standard offer is outstanding. If the waiver were not granted, FPC's efforts to meet the new 20% reserve margin would be frustrated. A delay in the RFP process would "seriously jeopardize" FPC's ability to bring Hines 2 on line by the November 2003 in-service date. Staff believes that these two concerns constitute "substantial hardship" within the meaning of Section 120.542, Florida Statutes. The requested waiver would allow FPC to meet its 20% reserve margin obligations as well as to ensure that it can meet its customer's energy needs into the future by bringing Hines 2 on line in a timely manner.

For these reasons, staff recommends that the Commission approve FPC's petition for a waiver of Rule 25-17.0832(4)(e)(5), Florida Administrative Code.

ISSUE 2: Should FPC's petition for a waiver from the ten-year minimum contract term requirement of Rule 25-17.0832(4)(e)(7), Florida Administrative Code, be granted?

RECOMMENDATION: Yes. FPC has demonstrated that the purpose of the underlying statute will be met, and that FPC and its ratepayers will suffer substantial hardship if the variance is not granted.
(JAYE, HAFF)

STAFF ANALYSIS:

A. Standards for Approval

FPC also requests a waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code. FPC seeks to substitute a standard offer contract term of five years.

As discussed in Issue 1, FPC must demonstrate that the purposes of the underlying statute will be met, and that application of the rule either creates a substantial hardship or violates principles of fairness.

B. FPC's Petition For Waiver

1. Purpose of the Underlying Statute

In its Petition For Waiver, FPC identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPC, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA), to encourage cogeneration while at the same time protecting ratepayers from paying costs in excess of avoided costs, will be achieved by utilizing a five-year contract term.

FPC states that its Petition For Waiver will meet the underlying purpose of the statute. FPC submits that new technologies and other factors may lower FPC's costs in the future. FPC contends that limiting the term of the standard offer contract to five years will give the company an opportunity to reassess its avoided costs and take advantage of lower costs for the benefit of ratepayers prior to the passage of ten years. FPC also states that

PURPA and Section 366.051, Florida Statutes do not establish a minimum term for standard offer contracts.

2. Substantial Hardship

FPC argues that obligating it to a ten year contract term in the face of declining costs would subject it to substantial hardship by adversely affecting its cost structure. FPC also states that ratepayers would be subjected to substantial hardship by raising the price that they would otherwise have to pay for electricity, in the face of declining costs.

C. Analysis

1. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, to encourage cogeneration and small power production, is express. "Electricity 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 electric grid of the state...." Rule 25-17.0832(4), Florida Administrative Code, implements Section 366.051, Florida Statutes. Pursuant to the Rule, standard offer contracts must contain certain minimum specifications relating to, among other things, the term of the contract and the calculation of firm capacity payments. With respect to the term of standard offer contracts, Subsection 25-17.0832(4)(e)7, requires:

Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in service date of the avoided unit.

Rule 25-17.0832(4)(e)7, Florida Administrative Code.

The rule provides a range for the contract period tied to the plant life of the utility's avoided unit by establishing a minimum and maximum term for standard offer contracts.

The ten-year minimum contract term, while not a requirement of PURPA, was mandated by the Commission to assist utilities with planning. In Order No. 12634, issued October 27, 1983, Docket No. 820406-EU, Amendment of Rules 25-17.80 through 25-17.89 relation to cogeneration, the Commission addressed the issue of a ten-year minimum contract term. The Commission stated:

The requirement that a QF be willing to sign a contract for the delivery of firm capacity for at least ten years after the originally anticipated in service date of the avoided unit is important from a planning perspective. While a ten-year contract will not offset the expected thirty year life of a base load generating unit, we believe it is of sufficient length to confer substantial capacity related benefits on the ratepayers.

Order No. 12634, pg. 19.

The purpose of the underlying statute is to encourage cogeneration. To promote cogeneration, investor-owned utilities who plan generating units not subject to Rule 25-22.082, Florida Administrative Code, are encouraged to negotiate contracts for the purchase of firm capacity and energy with utility and non-utility generators. Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is the standard offer contract. Insofar as cogenerators' ability to enter into negotiated contracts is unaffected by the waiver request, and a cogenerator retains the ability to enter into a five-year minimum term standard offer contract with FPC, FPC's request for a variance appears to satisfy the underlying purpose of the statute.

2. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological or legal hardship. The hardship demonstrated by FPC is economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

3. Other Requests for Waiver of Rule

Staff notes that there have been two other recent requests for variance or waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code:

1. Order No. PSC-99-1713-TRF-EG, issued on September 2, 1999, in Docket No. 990249-EG granted FPL a variance of this rule.
2. At the January 18, 2000, Agenda Conference, the Commission voted unanimously to grant FPC a waiver of this rule in Docket No. 991526-EI. Additionally, in voting on this item, the Commission directed staff to initiate a rulemaking proceeding to amend Rule 25-17.0832(4)(e)(7), Florida Administrative Code, to allow for five-year fixed term standard offer cogeneration contracts. The order is due in this docket on February 7, 2000.

ISSUE 3: Should FPC's proposed COG-2 (firm capacity and energy) tariff be suspended?

RECOMMENDATION: Yes. FPC's proposed new standard offer contract should be suspended pending disposition of FPC's petitions for rule waivers discussed in Issues 1 and 2. (HAFF, GING)

STAFF ANALYSIS: FPC's proposed tariff should be suspended until FPC's petition for waivers of Rule 25-17.0832(4)(e)(5), Florida Administrative Code, and Rule 25-17.0832(4)(e)(7), Florida Administrative Code, are finalized.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to dispose of the proposed tariff after the requested rule waivers are final.

STAFF ANALYSIS: This docket should remain open to dispose of the proposed tariff after the requested rule waivers are final.