

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power Corporation for Approval of Standard Offer Contract Based on a 2003 Combined Cycle Avoided Unit and Accompanying Rate Schedule COG-2 Pursuant to Section 366.051, F.S., and Rules 25-22.036(4) and 25-17.0832(4), F.A.C.

DOCKET NO. 991973-EQ  
ORDER NO. PSC-00-0504-PAA-EQ  
ISSUED: March 7, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION  
ORDER GRANTING RULE WAIVER AND AUTHORIZING ADMINISTRATIVE  
APPROVAL OF STANDARD OFFER CONTRACT

BY THE COMMISSION:

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.

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

03002 MAR-78

FPC-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 proposed 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.

- I. FPC's Petition for a Waiver from the Timing Requirements of Rule 25-17.0832(4)(e)(5), Florida Administrative Code

- A. Standards for Approval

Section 120.542, Florida Statutes, 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 has requested 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 identified 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 contended 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 maintained 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 argued 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 asserted 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 contended 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 forecasted 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 to its ratepayers, we look 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.

We believe 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.

We agree 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, neither FPC nor its ratepayers will be at a disadvantage if FPC issues a RFP for Hines Unit 2 while the standard offer contract 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. We believe 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 customers' energy needs in the future by bringing Hines Unit 2 on line in a timely manner.

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

II. 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

A. Standards for Approval

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

As discussed previously, 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 identified 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 stated that its Petition For Waiver will meet the underlying purpose of the statute. FPC submitted that new technologies and other factors may lower FPC's costs in the future. FPC contended 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 stated that PURPA and Section 366.051, Florida Statutes do not establish a minimum term for standard offer contracts.

2. Substantial Hardship

FPC argued 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 stated 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.

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. On page 19 of that Order, we 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.

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

We note 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. In Order NO. PSC-00-0265-PAA-EG, issued February 8, 2000, in Docket No. 991526-EG, granted FPC a waiver of this rule. Likewise in that Order, we 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.

III. Administrative Approval of Standard Offer Contract

Section 366.06(3), Florida Statutes, requires us to either approve, deny, or suspend a proposed tariff within 60 days of filing. FPC has agreed to waive this requirement. Other than the requested waivers of Rules 25-17.0832(4)(e)(5), and 25-17.0832(4)(e)(7), Florida Administrative Code, FPC's proposed standard offer contract appears to comport with all applicable requirements. Accordingly, we find that FPC's standard offer contract, and associated tariff sheets should be approved if no timely protest to the requested rule waivers is filed. Therefore, we direct staff to administratively approve the tariff when the time for protest of this order granting FPC's petition for waivers of Rule 25-17.0832(4)(e)(5), and 25-17.0832(4)(e)(7), Florida Administrative Code, has run.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Petition of Florida Power Corporation for waiver of Rule 25-17.0832(4)(e)(5), Florida Administrative Code, is hereby granted. It is further

ORDERED that the Petition for Waiver of Rule 25-17.0832(4)(e)(7), Florida Administrative Code is hereby granted. It is further

ORDERED that the proposed COG-2 tariff shall be administratively approved after the expiration of the protest




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period for the two rule waivers granted by this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

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

By ORDER of the Florida Public Service Commission this 7th day of March, 2000.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

GAJ

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

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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.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 28, 2000.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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.