

State of Florida



Public Service Commission

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RECORDS AND REPORTING
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DATE: AUGUST 24, 2000

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

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (FUTRELL) *MF MB*
DIVISION OF ECONOMIC REGULATION (SPRINGER) *PM*
DIVISION OF LEGAL SERVICES (C. KEATING, STERN) *WCK MKS 192 JBJ*

RE: DOCKET NO. 000868-EI - PETITION BY FLORIDA POWER & LIGHT COMPANY FOR APPROVAL OF STANDARD OFFER CONTRACT.

AGENDA: 09/05/00 - PROPOSED AGENCY ACTION - RULE WAIVER/VARIANCE AND TARIFF - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: TARIFF - 60-DAY SUSPENSION DATE: 09/15/00
RULE WAIVER/VARIANCE - DEEMED APPROVED IF NO COMMISSION DECISION PRIOR TO 10/15/00

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000868.RCM

CASE BACKGROUND

On July 17, 2000, Florida Power and Light Company (FPL) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities (QF). The proposed contract is based on a 5 megawatt (MW) subscription limit of a 165 MW combustion turbine generating unit with an in-service date of January 1, 2002.

FPL also filed a Petition for a Variance from Rule 25-17.0832(4)(e), Florida Administrative Code (Petition for Variance). FPL seeks a variance from the 10 year minimum contract term required by the rule, and instead proposes the contract be limited to a term of five years. Pursuant to Section 120.542(6), Florida Statutes, notice of FPL's petition was submitted to the Secretary of State for publication in the August 11, 2000, Florida Administrative Weekly. As of the date of this recommendation, no

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comments concerning the Petition for Variance have been filed. The 14-day comment period provided by Rule 28-104.003, Florida Administrative Code, expires on August 25, 2000, the day after the filing of this recommendation. If comments are received, staff will address them at the Agenda Conference. In accordance with Section 120.542(8), Florida Statutes, the Petition for Variance is deemed approved if the Commission does not grant or deny it by September 15, 2000.

This recommendation addresses both the petition for approval of the proposed standard offer contract and the requested rule variance. The Commission is vested with jurisdiction over this matter through several provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, 366.051, 366.06, and 366.80-.82, Florida Statutes. The Commission is vested with jurisdiction to address FPL's Petition for Variance through Section 120.542, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should FPL's petition for a variance of the ten year minimum contract term required by Rule 25-17.0832(4)(e), Florida Administrative Code, to a five year term, be granted?

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

STAFF ANALYSIS:

A. Standard for Approval

Section 120.542, Florida Statutes (1999), 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.

B. FPL's Petition For Variance

The variance requested by FPL is for a standard offer contract term limited to five years instead of the ten year minimum contract

term required by Rule 25-17.0832(4)(e), Florida Administrative Code.

1. Purpose of the Underlying Statute

In its Petition For Variance, FPL identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPL, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA), are to promote the growth of alternative generating facilities, with the express limitation that electric customers should not pay more for power than they otherwise would.

FPL states that its Petition For Variance will meet the purpose of the statute. FPL asserts that the standard offer contract will provide economic incentive for the development of the type of projects contemplated by the statute. FPL further asserts that the variance requested is more likely to ensure that electric customers do not pay excessive costs for power purchased under the standard offer contract.

2. Substantial Hardship

FPL states that the standard offer contract will not defer or avoid the construction of additional generating capacity. FPL asserts that its customers are prejudiced to the extent they are required to make capacity payments where no generation is avoided or deferred. FPL states that to require capacity payments in such instance for a ten-year period, would incur a substantial risk and hardship.

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

The ten year minimum contract term, while not a requirement of PURPA, was mandated by the Commission in order to assist utilities and cogenerators 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 statute underlying Rule 25-17.0832(4)(e) is to encourage cogeneration. Investor-owned utilities' with planned generation 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 nonutility generators. Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is standard offer contracts. Insofar as cogenerators' ability to enter into negotiated contracts is unaffected by the variance request, and a cogenerator retains the ability to enter into a five year standard offer contract with FPL, FPL'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. Purchases made by FPL pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of its proposed avoided unit, the 2002 CT. This is due to the subscription limit being 5 MW of a 165 MW unit. FPL has demonstrated in this case that application of the rule would create an economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

3. Other Requests for Waiver/Variance of Rule

Staff notes that there have been other requests for variance or waiver of the ten year minimum contract requirements of Rule 25-17.0832(4)(e), Florida Administrative Code, to a five year term:

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. Order No. PSC-00-0265-PAA-EG, issued February 8, 2000, in Docket No. 991526-EQ granted Florida Power Corporation a waiver of this rule. This order also directed staff to initiate a rulemaking proceeding to amend Rule 25-17.0832(4)(e)(7), Florida Administrative Code, to amend the contract term provision of the rule.
3. Order No. PSC-00-0504-PAA-EQ, issued on March 7, 2000, in Docket No. 991973-EQ granted Florida Power Corporation a waiver of this rule.
4. On June 2, 2000, Tampa Electric Company petitioned for a waiver of the ten year minimum contract period in Docket No. 000684-EQ. A recommendation on the waiver request has been filed on the same date as this recommendation.

The requests granted to date were granted on substantially the same grounds asserted by FPL in this docket.

In sum, FPL's Petition for Variance from the minimum standard offer contract term should be granted because it satisfies the statutory requirements for a rule variance. FPL has demonstrated that the purpose of the underlying statute will be met if the variance is granted. This is so because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, FPL's Petition for Variance demonstrates

that substantial hardship to its ratepayers would result from application of the rule.

ISSUE 2: Should FPL's petition for approval of a new Standard Offer Contract, based upon a combustion turbine unit with an in-service date of 2002, be approved?

RECOMMENDATION: Yes. FPL's new Standard Offer Contract complies with Rule 25-17.0832, Florida Administrative Code. Thus, the Standard Offer Contract and associated tariffs should be approved. (FUTRELL, SPRINGER)

STAFF ANALYSIS: Pursuant to federal law, the availability of standard rates is required for fossil-fueled qualifying facilities less than 100 kilowatts (0.1 MW) in size. 16 U.S.C. 2601 et seq., 16 U.S.C. 792 et seq., 18 CFR 292.304. Florida law requires the Commission to "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Section 366.82(2), Florida Statutes. The Commission is further directed to "establish a funding program to encourage the development by local governments of solid waste facilities that use solid waste as a primary source of fuel for the production of electricity." Section 377.709, Florida Statutes.

These federal and state requirements were implemented by the Commission through its adoption of the Standard Offer Contract in Rule 25-17.0832(4)(a), Florida Administrative Code. Pursuant to this rule, each investor-owned electric utility must file with the Commission a tariff and a Standard Offer Contract for the purchase of firm capacity and energy from small qualifying facilities. These provisions implement the requirements of the Public Utilities Regulatory Policies Act and promote renewables and solid waste-fired facilities by providing a straightforward contract. Larger qualifying facilities and other non-utility generators may participate in a utility's Request For Proposal process pursuant to Rule 25-22.082, Florida Administrative Code.

To comply with Rule 25-17.0832(4)(a), Florida Administrative Code, FPL proposed a new Standard Offer Contract based on a

combustion turbine (CT) unit with an in-service date of January 1, 2002 as its avoided unit. Specifically, the Contract is based on a 5 MW portion of a 165 MW CT. FPL has also proposed an associated tariff, COG-2 (firm capacity and energy). This tariff would expire on the earlier of the date the subscription limit (5 MW) is fully subscribed, or upon the expiration of the two week open solicitation period which would begin ten days after the date of issuance of the Commission's consummating order if staff's recommendation in Issue 3 is approved.

Staff believes that FPL's evaluation criteria will be readily understandable to any developer who signs FPL's Standard Offer Contract. The avoided unit cost parameters appear to be reasonable for a CT unit, and the resulting capacity payments are appropriate. The performance provisions include dispatch and control, and on-peak performance incentives.

Given that the subscription limit of FPL's avoided unit is only a portion of its total capacity, purchases made by FPL pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of the 2002 CT unit. If FPL enters into Standard Offer Contracts, but the need for the 2002 CT unit is not deferred or avoided, FPL will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of state regulations discussed above may result in a subsidy to the qualifying facilities. Staff notes, however, that the potential subsidy could be mitigated, as FPL may have opportunities to sell any surplus capacity to the wholesale market.

Ideally, qualifying facilities should compete on equal footing with all other producers of electricity. However, until and unless there is a change in federal and state law, qualifying facilities are given some preferential treatment. The Commission has minimized this unequal footing by requiring Standard Offer Contracts only for small qualifying facilities, renewables, or municipal solid waste facilities. These types of facilities may not be in a position to negotiate a purchased power agreement due to their size or timing. Thus, the Commission's rules balance market imperfections with the existing policy of promoting qualifying facilities.

In summary, staff does not expect that FPL's proposed Standard Offer Contract will result in the avoidance of its proposed avoided unit, a 2002 CT. Nonetheless, FPL's proposed contract and tariff comply with the Commission's cogeneration rules. For this reason, staff recommends that FPL's petition to establish its new Standard Offer Contract and associated tariffs be approved.

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ISSUE 3: On what date should FPL's proposed Standard Offer Contract become effective?

RECOMMENDATION: FPL's proposed standard offer contract should become effective upon the issuance of the consummating order for the waiver if there is no timely protest filed to either the waiver or the standard offer contract portion of the order. (C. KEATING, FUTRELL, SPRINGER)

STAFF ANALYSIS: Since it would not be reasonable to have this tariff go into effect if the waiver portion of the Commission's order were protested, the tariff should be processed as a proposed agency action. If there is no protest by a substantially affected person to the portion of the order approving the contract or the waiver it should become effective upon the issuance of a consummating order for the waiver portion of the order.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: If no person whose substantial interests are affected by the proposed agency actions files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (C.KEATING, FUTRELL)

STAFF ANALYSIS: In order to process both the variance request and the tariff filing simultaneously, we recommend that the proposed agency action process be utilized instead of the tariff process for the portion of the order approving the standard offer contract. While both processes provide for a point of entry for protest, under the tariff process, if there is a protest, the tariff would go into effect pending the outcome of the hearing; whereas under the proposed agency action process, if protested, the tariff would not go into effect as the proposed agency action order becomes a nullity. Since it would not be reasonable to have this tariff go into effect if the variance portion of the Commission's order were protested, the tariff should be processed as proposed agency action. If there is no timely protest to either the waiver or standard offer contract portion of the order by a person whose substantial interests are affected, the docket should be closed upon the issuance of a consummating order.