BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for approval of third amendment to agreement for purchase of firm capacity and energy between Indiantown Cogeneration, L.P. and Florida Power & Light Company	)))))	Docket No. 010821-EQ Filed: August 29, 2001

ICLP'S REQUEST FOR AMENDATORY ORDER AND PETITION ON PROPOSED AGENCY ACTION REGARDING PROPOSED ORDER APPROVING THIRD AMENDMENT TO POWER PURCHASE AGREEMENT

Request for Amendatory Order

To remove an internal inconsistency and thereby avoid the possibility of future misinterpretations, Indiantown Cogeneration, L.P. ("ICLP") hereby requests the Commission to amend Order No. PSC-01-1614-PAA-EQ, *Notice of Proposed Agency Action, Order Approving Third Amendment to Power Purchase Agreement*, issued in the above-captioned docket on August 8, 2001 ("August 8 Order").

Background

On June 6, 2001, ICLP and Florida Power and Light Company ("FPL") filed with the Commission a Joint Petition for Approval of Third Amendment to Agreement for Purchase of Firm Capacity and Energy between Indiantown Cogeneration, L.P. and Florida Power & Light Company ("Joint Petition"). The Joint Petition asked the Commission to approve the Third Amendment to the Agreement for the Purchase of Firm Capacity and Energy Between Indiantown Cogeneration, L.P. and Florida Power & Light Company, dated May 17, 2001 ("Third Amendment"). The Third Amendment resolves an issue arising under the Agreement for the Purchase of Firm Capacity and Energy Between Indiantown Cogeneration, L.P. and Florida Power & Light Company, dated May 21, 1990 ("PPA"), as amended. The issue, which led to litigation filed by ICLP in

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1999, pertains to ICLP's right to reclose its electric generating facility ("Facility") with FPL's transmission system after the Facility has tripped, or separated, from the system.

The Joint Petition

In the Joint Petition, the Parties described the essential elements of the Third Amendment. Specifically, the Joint Petition states:

> (a) If the ICL Facility separates from the FPL electrical system for any reason, ICL is permitted to reclose the ICL Facility into FPL's electrical system unless FPL has safety or reliability reasons to prevent ICL from doing so.
>
> (b) Following such reclosure, ICL may deliver up to 100 MW of electric energy to FPL and from the ICL Facility during a period in which FPL has advised ICL that it "does not wish the Facility to reclose into FPL's system." This period is referred to in the Third Amendment as a "Reclose Period." A Reclose Period begins when the ICL Facility recloses into FPL's system and continues until the earlier of the time when (i) the ICL Facility separates from the FPL system, (ii) FPL Dispatches the ICL Facility to generate power above 100 MW, or (iii) FPL ends the Reclose Period and FPL is not exercising its Dispatch Rights under the Power Purchase Agreement.
>
> (c) FPL will pay for energy delivered during a Reclose Period at FPL's "As Available Energy Costs" . . . unless and until ICL has operated under Reclose Period conditions for more than a specified number of hours in a calendar year (the "Accumulated Reclose Hours Account," which is more fully described below), after which time FPL will pay for energy delivered during a Reclose Period at the Unit Energy Payment Cost specified in the Power Purchase Agreement.
>
> (d) At the beginning of each calendar year, FPL receives for that year a base allocation in the Accumulated Reclose Hours Account of 360 hours. In addition, any unused hours in the prior year's Accumulated Reclose Hours Account are carried over and added to the base allocation, provided that in no year may the Accumulated Reclose Hours Account exceed 1440 hours.

In describing the effect of the Third Amendment, the Joint Petition stated that the Third Amendment "provides that ICL may reclose the ICL Facility into the FPL electric system and sell FPL up to 100 MW of energy when FPL does not wish to purchase that energy." (Joint Petition, at Para. 14). The Joint Petition went on to say that FPL will pay its As-Available Energy Cost for the energy purchased from ICL when the Facility is reclosed during periods when FPL does not wish to purchase that energy, except if the total number of "Reclose Period Hours" for which payments are made in a calendar year

exceeds the hours in the Accumulated Reclose Hours Account. The Third Amendment provides a minimum of 360 Reclose Period Hours each year. FPL may carry over and accumulate unused hours until the account reaches a maximum of 1440 hours. In the event FPL has exhausted the hours in the Accumulated Reclose Hours Account, FPL would pay ICL for energy at the Unit Energy Payment Cost during additional Reclose Period Hours. (Joint Petition, at Para 15).

As the foregoing language from the Joint Petition makes clear, the 360 hours designated as Reclose Period Hours were not intended by the Parties to serve, and do not in any way serve, as a limit on the number of hours in a year in which ICLP is entitled to reclose the Facility and deliver up to 100 MW to FPL. As the Third Amendment and the Joint Petition both make clear, ICLP's right to reclose with FPL's system is unlimited, except that FPL may delay reclosure for up to four hours for any reason, or where safety or reliability reasons preclude reclosure.

The August 8 Order

Upon consideration of the Joint Petition, the Commission determined that the Third Amendment is cost-effective for FPL's ratepayers. Its decision to grant the Joint Petition and approve the Third Amendment was memorialized in the August 8 Order. The purpose of this request is to bring to the Commission's attention a scrivener's error in the August 8 Order that could potentially lead to an incorrect interpretation in the future. The August 8 Order states, in pertinent part (at p. 3) as follows:

> Following a separation of the ICL facility, FPL may not want ICL to reclose for economic reasons. On these occasions, ICL may still reclose and deliver up to 100 MW to FPL under a "reclose period." The reclose period cannot exceed 360 hours in a year, and any unused hours may be accumulated for future use not to exceed 1440 hours total.

> During a reclose period, FPL will pay for ICLP's delivered energy at "As-Available Energy Costs" -- the tariff rate for as-available energy.

Request for Amendatory Language

ICLP respectfully suggests that, while the intent of this portion of the August 8 Order undoubtedly is to track accurately the description of the limitation on the applicability of the as-available rate during a reclose period that is contained in the Joint Petition that the Commission granted (see above quotation), due to a scrivener's error the August 8 Order possibly could be misinterpreted to mean that ICLP may only reclose with FPL's system 360 hours in a year, when in fact, as provided in the Third Amendment, and as stated in the Joint Petition, ICLP is entitled to reclose during *any and all* hours of the year, unless FPL delays reclosure for four hours for any reason, and except for safety and reliability reasons. ICLP also believes that the above-quoted language could be misinterpreted as limiting ICLP to As-Available Energy Costs for all reclose period hours in a year. As discussed above, however, ICLP is entitled to be paid for Energy at the Unit Energy Payment Cost if FPL has exhausted the hours in the Accumulated Reclose Hours Account.

The Staff Recommendation that the Commission voted to approve through its August 8 Order recognized both the fact that a reclose period may exceed 360 hours and the concept that ICLP is to be paid the Unit Energy Payment Cost of the contract for reclose hours that exceed a specified number of hours. At page 3, Staff stated:

> During a reclose period, FPL will pay for ICL's delivered energy at "As-Available Energy Costs" – the tariff rate for as-available energy. <u>In the unlikely event that ICL operates under a reclose period exceeding 360 hours a year, FPL will buy the ICL facility's energy at the Unit Energy Payment Cost.</u>

However, the underscored language was not included in the August 8 Order.

That the ambiguity in the above-quoted language is unintentional is also made clear on page 4 of the August 8 Order. Commenting on the effect of the Third Amendment, the Commission noted that "most, of not all", of the energy delivered to FPL during a reclose period would receive the as-available price. In other words, elsewhere in the August 8 Order the Commission correctly recognized the (unlikely) possibility that circumstances could arise under which the As-Available Energy Cost would not apply to some portion of ICLP's generation during reclose hours. The language of the August 8 Order that is the subject of this request should be amended to be consistent with this express recognition.

Accordingly, ICLP requests that the Commission amend the August 8 Order to ensure that ICLP's right to reclose with FPL's system could not be misinterpreted in the future. To achieve consistency, ICLP recommends that the above-quoted language in the August 8 Order be deleted, and that the following language be substituted in lieu thereof:

> Following a separation of the ICL facility, FPL may not want ICL to reclose for economic reasons. On these occasions, ICL may still reclose and deliver up to 100 MW (and more when ICL performs a capacity test) to FPL during a "reclose period."
>
> For any hour during a reclose period which is designated a "Reclose Period Hour" that does not exceed the number of hours in the "Accumulated Reclose Hours Account" under the Third Amendment, energy delivered up to 100 MW shall be compensated at "As-Available Energy Costs" in accordance with Section 8.1.2 of the Third Amendment. In general, energy delivered during hours that are Reclose Period Hours but which exceed the number of hours in the "Accumulated Reclose Hours Account" shall be compensated at the Unit Energy Payment Cost specified in the Power Purchase Agreement, subject to certain exceptions specified in Section 8.1 of the Third Amendment. The total number of Reclose Period Hours available in the "Accumulated Reclose Hours Account" during a year will be a minimum of 360 hours and a maximum of 1440 hours.

The issuance of an amendatory order under the circumstances identified herein is consistent with the Commission's practice. On numerous occasions the Commission has

issued amendatory orders, including amended PAA orders, when necessary to correct errors or to give full effect to the Commission's intent. The occasions in which the Commission has issued amendatory PAA orders range from the correction of simple numerical errors to the addition and/or deletion of multiple sentences and phrases. *See* Order No. 99-2503A-PAA-TL, issued on December 21, 1999, and Order 98-0683A-AS-WU, issued in Docket No. 960444-WU on May 22, 1998. While these particular amendatory orders were issued prior to the expiration of the protest period established within the respective original PAA orders, the Commission also has issued amendatory PAA orders following the expiration of the applicable protest periods. Order 01-1167A-PAA-WS, issued on June 19, 2001 in Docket No. 001513-WS; Order No. 00-2473B-PAA-TI, issued on January 18, 2001 in Docket Nos. 001208-TI, 001212-TI, 001213-TI, 001223-TI, 001225-TI, and 001256-TI. Issuing the amendatory order requested herein will not alter the Commission's decision or the relief afforded to the parties in any way. The only effect will be to articulate more accurately the terms of the Third Amendment, which form the basis for the Commission's action in approving the Joint Petition.

Conclusion

The amendatory language sought herein will accomplish the intent of the August 8 Order to accurately characterize the agreement reached by the Parties in the Third Amendment, and will prevent any misinterpretation with respect to ICLP's right to reclose with FPL's system and the rate for energy purchases during reclose periods. As described in the Joint Petition, the Amendment provides benefits to ratepayers because FPL will pay only the As-Available Energy Cost during Reclose Periods for up to 360 hours per year which is considerably more Reclose Period Hours than historical experience suggests FPL will have occasion to use. Moreover, as also described in the Joint Petition, even if FPL did use up all of the hours in the Accumulated Reclose Hours Account, it would thereafter only pay ICL for energy at the same rate (*i.e.*, the Unit

Energy Payment Cost) that ICL would receive for *all* Reclose Period Hours if ICL were to prevail in the litigation. *See* Joint Petition at p.8.

Petition on Proposed Agency Action

ICLP submits that the ambiguity identified above was unintentional, and fully expects the requested amendment to be non-controversial. In an abundance of caution, to satisfy the technical requirements to which a PAA order gives rise, and to preserve its rights, ICLP submits its Petition On Proposed Agency Action and Request for a Formal Proceeding, pursuant to Rule 28-106.201, Florida Administrative Code. If the Commission issues the amendatory order, ICLP will promptly withdraw its Petition and request for a hearing.

1. (a) **Name and address of Petitioner:**

Indiantown Cogeneration, L.P.
13303 Southwest Silver Fox Lane
Post Office Box 1799
Indiantown, Florida 34956

2. (b) **Name and address of Petitioner's representatives:**

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Vice President
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Statement of how the Petitioner's substantial interests will be affected by the agency determination: The foregoing Request for Amendatory Order is incorporated by reference. If the Commission declines to issue the amendatory order requested above, ICLP will be exposed to the possibility that the terms of the Third Amendment may be misinterpreted in the future.

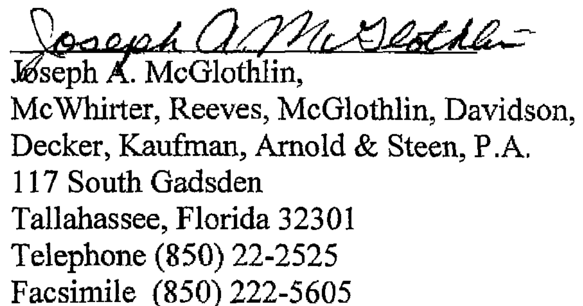
(c) **Statement of when and how the petitioner received notice of the agency decision:** The Commission served copies of the decision on ICLP by mail.

(d) **Statement of all disputed issues of material fact. If there are none, the petition must so indicate:** For the reasons stated above, ICLP believes that there are no issues of material fact. However, if the Commission declines to issue the Amendatory Order, then ICLP raises as a factual dispute the issue of whether the Commission accurately portrayed the terms of the Third Amendment that is the subject of the PAA.

(e) **A concise statement of the ultimate facts alleged:** ICLP adopts and incorporates by reference the above Request for Amendatory Order as its statement.

(f) **A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action:** Not applicable.

(g) **A statement of the relief sought by the petitioner:** ICLP adopts and incorporates by reference its Request for Amendatory Order as its response to this item.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of ICLP'S Request for Amendatory Order and Petition on Proposed Agency Action Regarding Proposed Order Approving Third Amendment to Power Purchase has been furnished U.S. Mail or by hand delivery (*) on this 29th day of August, 2001, to the following:

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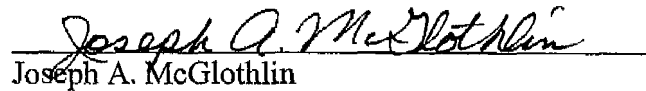

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