State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 20, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (ELIAS) RVE RS
DIVISION OF SAFETY & ELECTRIC RELIABILITY (HAFF, BOHRMANN) TB MMH

RE: DOCKET NO. 010821-EQ - 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.

AGENDA: 10/02/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\010821.RCM

CASE BACKGROUND

Indiantown Cogeneration, L.P. (ICL or ICLP) and Florida Power & Light Company (FPL) (collectively, Parties) have an existing negotiated cogeneration contract under which FPL purchases firm capacity and energy generated by ICL's 330 MW coal-fired facility located in Indiantown, Florida. The original agreement was signed on May 21, 1990, and was first amended on December 5, 1990. The original and amended agreement were approved by the Commission in Order No. 24269-A, issued on April 5, 1991, in Docket No. 900731-EQ. A second contract amendment was approved by the Commission in Order No. PSC-92-1345-FOF-EQ, issued on November 23, 1992, in Docket No. 920825-EI. The Power Purchase Agreement discussed herein comprises the original agreement and the two subsequent amendments.

Disputes have occasionally arisen between the Parties concerning each party's respective rights under the Power Purchase Agreement. One such dispute led to litigation filed by ICL on March 19, 1999 (*Indiantown Cogeneration, L.P. v. Florida Power & Light Co.*, Case No. 99-317-CIV-ORL-28C in the United States District Court for the Middle District of Florida). On December 19, 2000, during court-ordered mediation prior to trial, the Parties executed a settlement agreement which resolved and compromised the dispute. The settlement agreement called for the Parties to negotiate a Third Amendment to the Power Purchase Agreement to implement their compromise, petition for Commission approval of the Third Amendment, and dismiss the litigation with prejudice if and when the Third Amendment receives Commission approval. The Third Amendment was filed with the Commission on June 6, 2001, and approved by Order No. PSC-01-1614-PAA-EQ, issued August 8, 2001. On August 29, 2001, ICL filed a pleading styled as a Request for Amendatory Order and Petition on Proposed Agency Action regarding Proposed Order Approving Third Amendment to Power Purchase Agreement. ICL asks that the Commission amend its PAA Order to avoid a possible misinterpretation of the agreement and filed a protest to preserve its rights, as required by the Florida Administrative Procedures Act. This recommendation addresses ICL's August 29, 2001, filing.

The Commission has jurisdiction over the subject matter pursuant to Sections 366.04(1) and 366.051, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission clarify Order No. PSC-01-1614-PAA-EQ, to include the language requested by Indiantown Cogeneration, L.P.?

RECOMMENDATION: Yes. The requested change is consistent with the Commission's approval of the Third Amendment to the Power Purchase Agreement and could avoid a potentially incorrect interpretation of the Commission's order. The approval of this request renders ICL's protest moot.

STAFF ANALYSIS: The change ICL seeks concerns the Commission's discussion related to ICL's right to "reclose" after the facility

is separated from FPL's system and the rate at which ICL will be compensated during such a period. ICL states at pages 3 and 4 of its August 29, 2001, pleading:

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

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.

At page 5 of its pleading, ICL requests that the following language be substituted for the above-quoted language from Order No. PSC-01-1614-PAA-EQ:

> 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.

By letter dated August 31, 2001, FPL, the only other party to the docket, confirmed that it did not object to substituting this language. ICL styled its pleading as a "Request for Amendatory Order." Amendatory Orders to correct scrivener's and other minor errors in Commission Orders are processed administratively, without the need for a Commission vote. In discussions with staff counsel, counsel for ICL asked that the Commission, rather than staff, consider ICL's request and vote to make the change. Staff believes the request is most accurately characterized as a clarification, rather than an amendment to correct a scrivener's error. Staff

believes the requested change is consistent with the Commission's intent in approving the Third Amendment to the Power Purchase Agreement and could avoid a potentially incorrect interpretation of the Commission's order. Accordingly, staff recommends that the Commission clarify Order No. PSC-01-1614-PAA-EQ, by including the language requested by Indiantown Cogeneration, L.P. With the approval of the requested change, ICL's Petition on Proposed Agency Action is moot.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Persons whose substantial interests could be affected by the Commission's action in approving the Third Amendment to the Power Purchase Agreement were afforded a point of entry by Order No. PSC-01-1614-PAA-EQ. With the approval of the requested change, ICL's protest is rendered moot. No other protest was filed. Accordingly, Order No. PSC-01-1614-PAA-EQ should be made final and effective, as clarified herein, and the docket should be closed.