

State of Florida



Public Service Commission

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COMMISSION CLERK

DATE: NOVEMBER 19, 2001

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

FROM: DIVISION OF LEGAL SERVICES (ECHTERNACHT) *RUE KNE*  
DIVISION OF SAFETY & ELECTRIC RELIABILITY (FUTRELL) *MJ J/S*  
DIVISION OF ECONOMIC REGULATION (SPRINGER) *SPW JDT*

RE: DOCKET NO. 011199-EQ - PETITION FOR WAIVER OF RULE 25-17.0832(4)(E), F.A.C., WHICH REQUIRES TEN-YEAR MINIMUM CONTRACT TERM, BY FLORIDA POWER & LIGHT COMPANY, AND FOR APPROVAL TO OFFER STANDARD OFFER CONTRACT WITH FIVE-YEAR MINIMUM TERM.

AGENDA: 12/04/01 - REGULAR AGENDA - PROPOSED AGENCY ACTION - RULE WAIVER - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: RULE WAIVER - DEEMED APPROVED IF NO COMMISSION DECISION PRIOR TO 12/13/01 PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

SPECIAL INSTRUCTIONS: SHOULD BE CONSIDERED WITH DOCKET NO. 011200-EQ

FILE NAME AND LOCATION: S:\PSC\SER\WP\011199.RCM

CASE BACKGROUND

On September 14, 2001, Florida Power and Light Company (FPL) filed a Petition for Waiver of Rule 25-17.0832(4)(e), Florida Administrative Code (Petition for Waiver). FPL seeks a waiver from the 10 year minimum standard offer contract term required by the rule, and instead proposes the standard offer 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 October 5, 2001, Florida Administrative Weekly. No comments concerning the Petition for Waiver were filed during the comment period. In accordance with

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FPSC-COMMISSION CLERK

Section 120.542(8), Florida Statutes, the Petition for Waiver is deemed approved if the Commission does not grant or deny it by December 13, 2001.

Also on September 14, 2001, FPL filed its petition for approval of a standard offer contract in Docket No. 011200-EQ. The term of the proposed standard offer contract is five years. The recommendation in that docket will be filed along with the recommendation in the instant docket.

This recommendation addresses the requested rule waiver. The Commission is vested with jurisdiction over this matter by Section 120.542, Florida Statutes.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should FPL's petition for waiver of the ten year minimum standard offer 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 waiver is not granted.  
(ECHTERNACHT, 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 Waiver

The waiver 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 Waiver, 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 Waiver 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 waiver 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' 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 by Rule 25-17.0837(1), Florida Administrative Code. The alternative is to make available standard offer contracts. 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 standard offer contract with FPL, FPL's request for a waiver 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 2003 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:

DOCKET NO. 011199-EQ  
November 19, 2001

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. Order No. PSC-00-1773-PAA-EQ, issued on September 27, 2000, in Docket No. 000684-EQ, granted Tampa Electric Company a waiver of this rule.
5. Order No. PSC-00-1748-PAA-EQ, issued on September 26, 2000, 2000, in Docket No. 000868-EI, granted FPL a variance of this rule.
6. Order No. PSC-01-1418-TRF-EQ, issued on June 29, 2001, in Docket No. 010334-EQ, granted Tampa Electric Company a waiver of this rule.

The Commission has proposed a modification of the rule in Docket No. 001574-EQ. A full Commission hearing is scheduled for May 15, 2002.

In sum, FPL's Petition for Waiver from the minimum standard offer contract term should be granted because it satisfies the statutory requirements for a rule waiver. FPL has demonstrated that the purpose of the underlying statute will be met if the waiver is granted, because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, FPL's Petition for Waiver demonstrates that substantial hardship to its ratepayers would result from application of the rule.

DOCKET NO. 011199-EQ  
November 19, 2001

**ISSUE 2:** Should this docket be closed?

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