

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: JUNE 6, 2002

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

FROM: DIVISION OF ECONOMIC REGULATION (COLSON, SPRINGER)
OFFICE OF THE GENERAL COUNSEL (HOLLEY) *RC mas JAH MTH JDS*

RE: DOCKET NO. 020295-EQ - PETITION FOR APPROVAL OF STANDARD
OFFER CONTRACT BASED ON 2005 COMBINED CYCLE AVOIDED UNIT
AND ACCOMPANYING RATE SCHEDULE COG-2, BY FLORIDA POWER
CORPORATION.

AGENDA: 06/18/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 8-MONTH EFFECTIVE DATE: DECEMBER 2, 2002
90-DAY DEADLINE ON RULE WAIVER REQUEST: JULY 1,
2002

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020295.RCM

CASE BACKGROUND

On April 2, 2002, Florida Power Corporation (FPC) filed its petition with the Florida Public Service Commission for approval of a Standard Offer Contract and associated tariffs. The standard offer contract subject to this petition is based on a 20 Megawatt (MW) portion of FPC's next planned capacity addition, Hines 3, a 530 MW combined cycle unit with a scheduled in-service date of December 1, 2005. Concurrent with the filing of this petition, FPC filed a petition for a waiver of the requirement in Rule 25-17.0832(4)(e)7, Florida Administrative Code, that standard offer contracts have a minimum term of ten years. The term of FPC's proposed Standard Offer Contract is five years. Also concurrent with the filing of this petition, FPC filed a second rule waiver petition with respect to the requirement in Rule 25-17.0832(4)(e)5,

DOCUMENT NUMBER DATE

05913 JUN-6 8

FPSC-COMMISSION CLERK

Florida Administrative Code, that requires that a standard offer contract's open solicitation period must end prior to the issuance of a request for proposal (RFP) pursuant to Rule 25-22.082, Florida Administrative Code, often referred to as the Commission's "bidding rule." If the Commission approves FPC's second petition, this will allow the standard offer's open solicitation period and the RFP process for Hines 3 pursuant to the bidding rule to take place concurrently.

Pursuant to Section 120.542(6), Florida Statutes, notice of FPC's Petitions was submitted to the Secretary of State for publication in the April 19, 2002, Florida Administrative Weekly. No comments concerning these petitions for waiver were filed. The 14-day comment period provided by Rule 28-104.003, Florida Administrative Code, expired on May 3, 2002.

This recommendation addresses both the petition for approval of the proposed standard offer contract and the requested rule waivers. The Commission is vested with jurisdiction over this matter through Section 120.542, Florida Statutes, as well as several provisions of Chapter 366.06, Florida Statutes, including Sections 366.04, 366.05, 366.051, 366.06, and 366.80-.82, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant FPC's Petition for a Waiver of the ten year minimum contract term required by rule 25-17.0832(4)(e)7, Florida Administrative Code, to allow FPC to provide a five year term?

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

STAFF ANALYSIS:

A. Standard of Approval

Section 120.542, Florida Statutes (1999), mandates threshold proofs and notice provision 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. FPC's Petition For Waiver

The waiver requested by FPC 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, FPC identifies 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), 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.

FPC states that its Petition For Waiver will meet the purpose of the statute. FPC asserts that the standard offer contract will provide economic incentive for the development of the type of projects contemplated by the statute. FPC further asserts that new technologies and other factors may lower FPC's costs over the coming years. Limiting the term of the Standard Offer to five years gives FPC the opportunity to revisit the issue of its avoided cost and take advantage of lower cost for the benefit of its ratepayers prior to passage of a full ten years.

2. Substantial Hardship

FPC states that strict adherence to the ten-year term provided for in the Commission's rules would create a substantial hardship on FPC and its ratepayers by raising the price that would otherwise be paid for electricity.

C. Analysis

1. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, which is to encourage cogeneration and small power production, is expressed in the Statute as follows: "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 non-utility

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 waiver request, and a cogenerator retains the ability to enter into a five year standard offer contract with FPC, FPC'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 FPC pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of its proposed avoided unit, the 2005 CC. This is due to the subscription limit being 20 MW of a 500 MW unit. FPC 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 Florida Power and Light Company 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 (Hearing currently planned for October, 2002).
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-00-1748-PAA-EI, issued on September 26, 2000, in Docket No. 000868 granted Florida Power & Light Company a waiver of this rule.
5. Order No. PSC-00-1773-PAA-EQ, issued on September 27, 2000, in Docket No. 000684 granted Tampa Electric company a waiver of this rule.

The requests granted to date were granted on substantially the same grounds asserted by FPC in this docket. In sum, FPC's Petition for waiver from the minimum standard offer contract term should be granted because it satisfies the statutory requirements for a rule waiver. FPC has demonstrated that the purpose of the underlying statute will be met if the waiver is granted. This is so because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, FPC's Petition for waiver demonstrates that substantial hardship to its ratepayers would result from application of the rule.

ISSUE 2: Should the Commission grant FPC's Petition for a Waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's standard offer contract must terminate prior to its issuance of a notice of Request for Proposal (RFP) based on the standard offer contract's avoided unit?

RECOMMENDATION: Yes. FPC has demonstrated that the purpose of the underlying statute will be met, and that strict adherence to the closure provision of the standard offer contract would create a substantial hardship on FPC and its customers. (HOLLEY, COLSON)

STAFF ANALYSIS:

A. Standard of Approval

The Standard is the same as expressed on page 3 of the Recommendation, which addresses Issue 1.

B. FPC's Petition For Waiver

The waiver of the requirement in Rule 25-17.0832(4)(e)5, Florida Administrative Code, that the open solicitation period for a utility's standard offer contract must terminate prior to its issuance of a notice of Request for Proposal based on the standard offer contract's avoided unit.

1. Purpose of the Underlying Statute

In its Petition For Waiver, FPC identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes, the purpose of which is to encourage cogeneration while at the same time protecting ratepayers from potential adverse effects. According to FPC, the purpose will not only be achieved but enhanced by the requested waiver of the rule's standard offer closure provision.

2. Substantial Hardship

FPC states that strict adherence to the closure provision (Rule 25-17.0832(4)(e)5) would create a substantial hardship on FPC and its ratepayers. FPC's waiver request is intended to protect FPC and its ratepayers from potential adverse effects of the rule.

C. Analysis

1. Purpose Of The Underlying Statute

Rule 25-17.0832(4)(e)5, Florida Administrative Code, implements Section 366.051, Florida Statutes, the purpose of which is to encourage cogeneration and small power production. Pursuant to the Rule, each standard offer contract shall, at minimum, specify:

A reasonable open solicitation period during which time the utility will accept proposals for standard offer contracts. Prior to the issuance of timely notice of a Request for Proposals (RFP) pursuant to Rule 25-22.082(3), the utility shall end the open solicitation period.

FPC believes that the purpose of the underlying statute will be enhanced by the requested waiver because it will eliminate a limitation on the availability of a standard offer contract to cogenerators. The waiver will enable the standard offer to remain in effect and available to cogenerators while the RFP process is underway, a situation that would be impermissible under the rule sought to be waived.

Staff agrees 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, staff believes that neither FPC nor its ratepayers will be at a disadvantage if FPC issues a RFP for Hines Unit 3 while the standard offer contract is outstanding.

2. Substantial Hardship

FPC believes that the timely completion of the RFP process is a key milestone in the schedule to place this 500 MW capacity addition in service by December, 2005, and be available to meet the ensuing 2005/2006 winter peak demand period. Also, FPC believes that delaying the completion of the RFP process until after the standard offer has been approved and open solicitation period has expired would significantly impair FPC's ability to satisfy its 20% reserve margin responsibilities within this important reliability

time frame. FPC states that such an impairment to the reliability of FPC's generation resources would create a real and substantial hardship on FPC and its customers.

Staff believes that if the waiver is not granted, FPC's efforts to meet the new 20% reserve margin would be frustrated. On November 30, 1999, the Commission approved an agreement between FPC, FPL, and TECO adopting a 20% reserve margin planning criterion starting in the summer of 2004. A delay in the RFP process could seriously jeopardize FPC's ability to bring Hines 3 on line by the December, 2005, in-service date. Staff believes that these two concerns constitute "substantial hardship" within the meaning of Section 120.542, Florida Statutes.

3. Other Requests for Waiver/Variance of Rule

Staff notes that the Commission has granted the requested waiver of the rule's standard offer closure requirement and approved the contract's open solicitation period that ran concurrent with the RFP process conducted for Hines 2 self-build option. Order No. PSC-00-0504-PAA-EQ, issued March 7, 2000, in Docket No. 991973-EQ.

The requests granted to date were granted on substantially the same grounds asserted by FPC in this docket. In sum, FPC has demonstrated that the purpose of the underlying statute will be met if the waiver is granted. This is so because the requested waiver will eliminate a limitation on the availability of a standard offer contract to cogenerators. In addition, FPC's Petition for waiver will remove the impairment to the reliability of FPC's generation resources, thus eliminating a substantial hardship to its ratepayers that would have result from application of the rule.

ISSUE 3: Should FPC's petition for approval of a new Standard Offer Contract, based upon a combined cycle (CC) unit with an in-service date of December 1, 2005, and associated tariffs be approved?

RECOMMENDATION: Yes. FPC's Standard Offer Contract complies with Rule 25-17.0832, Florida Administrative Code. Thus, the Standard Offer Contract and associated tariffs should be approved. (COLSON, 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 CAR 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 (PURPA) 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, FPC proposed a Standard Offer Contract based on a Combine Cycle (CC) unit with an in-service date of December 1, 2005, as its avoided unit. Specifically, the Contract is based on a 20 MW portion of a 530 MW CC unit. FPC 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 (20 MW) is fully subscribed, or two week after approval of this standard offer by the Florida Public Service Commission.

Staff believes that FPC's evaluation criteria will be readily understandable to any developer who signs FPC's Standard Offer Contract. The avoided unit cost parameters appear to be reasonable for a CC 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 FPC's avoided unit is only a portion of its total capacity, purchases made by FPC pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of the 2005 CC unit. If FPC enters into Standard Offer Contracts, but the need for the 2005 CC unit is not deferred or avoided, FPC 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 FPC 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 fossil fueled 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 FPC's proposed Standard Offer Contract will result in the avoidance of its proposed avoided unit, a 2005 CC. Nonetheless, FPC's proposed contract and tariff comply with the Commission's cogeneration rules. For this reason, staff recommends that FPC's petition to establish its new Standard Offer Contract and associated tariffs be approved.

DOCKET NO. 020295-EQ
DATE: June 06, 2002

ISSUE 4: On what date should FPC's proposed Standard Offer Contract become effective?

RECOMMENDATION: FPC's proposed standard offer contract should become effective upon the issuance of the consummating orders for the waivers if there is no timely protest filed to either the waivers or the standard offer contract portion of the order. (HOLLEY, COLSON, SPRINGER)

STAFF ANALYSIS: Since it would not be reasonable to have this tariff go into effect if the waiver portions 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 waivers it should become effective upon the issuance of a consummating order for the waiver portions of the order.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes, 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. (HOLLEY)

STAFF ANALYSIS: In order to process both the variance request and the tariff filing simultaneously, staff recommends 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 portions 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 waivers 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.