BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement by Florida Power & Light Company that FPL may pay a Qualified Facility (QF) for purchase of renewable energy an amount representing FPL's full avoided cost plus a premium borne by customers voluntarily participating in FPL's Green Energy Project.	DOCKET NO. 020397-EQ ORDER NO. PSC-02-1059-DS-EQ ISSUED: August 6, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

By petition filed May 3, 2002, Florida Power & Light Company ("FPL") requested a declaratory statement pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code. FPL asks us to declare that its proposal to pay in excess of its avoided costs to a qualifying facility ("QF") for renewable energy for a Green Energy Program, in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost, does not violate PURPA, section 366.051, Florida Statutes, and state and federal regulations implementing PURPA. Notice of the petition was published in the Florida Administrative Weekly on May 24, 2002.

New Hope Power Partnership and Palm Beach Power Corporation ("NHPP and PBPC") filed a petition to intervene on June 12, 2002. NHPP and PBPC own two renewable energy cogeneration plants that are QFs. NHPP and PBPC are interested in providing renewable energy to FPL for its Green Energy Project and have responded to FPL's request for proposals for the sale of renewable energy for the project. FPL filed a response opposing the petition to intervene

on June 24, 2002, however, its counsel later informed staff that it no longer opposed such intervention. We granted intervention for the purpose of considering the comments presented in the petition to intervene.

The particular set of circumstances FPL alleges are that pursuant to its Demand Side Management Plan (approved in Order No. PSC-00-0915-PAA-EG), FPL has assessed the potential supply and demand for a Green Energy Project and has concluded that customer demand exists for it. The project would allow customers to choose to purchase power at prices exceeding standard customer rates based upon the customers' desire to purchase power generated from technologies that afford enhanced protection to the environment. FPL has received proposals from renewable energy suppliers, including the potential purchase by FPL of power from QFs at prices in excess of FPL's avoided costs.

FPL is prepared to begin negotiations with suppliers proposing to provide energy from renewable sources for its potential green energy customers. FPL, however, does not believe that pursuant to PURPA, the federal regulations implementing PURPA, Florida Statutes and rules implementing PURPA, and prior Commission decisions, that it may pay a QF in excess of avoided cost unless the excess costs are borne by the customers participating in the Green Energy Project and not by the general body of ratepayers.

FPL's petition presents the question whether a purchase of renewable energy from a QF at a price above the utility's avoided cost is consistent with PURPA, Florida law, and state and federal regulations implementing PURPA, if the excess costs are borne by the customers voluntarily participating in the Green Energy Project. The statutory provisions and agency rules that are at issue in this petition for declaratory statement are section 210 of the Public Utilities Regulatory Policy Act of 1978 (PURPA), codified at 16 U.S.C. § 824a-3; the Federal Energy Regulatory Commission's rules implementing PURPA, 18 C.F.R. sections 292.301 and 292.304(a)(2); section 366.051, Florida Statutes, entitled "Cogeneration; small power production; commission jurisdiction"; and Rule 25-17.0832, Florida Administrative Code.

Congress enacted PURPA in 1978 to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA

encourages the development of alternative power sources in the form of cogeneration and small power production facilities. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities. 16 U.S.C. § 824a-3(a). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, and not discriminatory against QF's. 16 U.S.C. § 824a-3(b). In addition,

> No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

16 U.S.C. § 824a-3(b). Section 210(f) directs state regulatory authorities to implement FERC's rules. 16 U.S.C. § 824a-3(f).

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided costs. 18 C.F.R. § 292.304. "Avoided costs" are defined as:

> the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

18 C.F.R. § 292.101(b)(6). In implementing its regulations, FERC weighed Congress's desire to promote cogeneration while not burdening ratepayers, and concluded that requiring utilities to pay full avoided costs properly balanced these interests. Independent Energy Producers Association, Inc. v. California Public Utilities Commission, 36 F.3d 848, 858 (9th Cir. 1994).

The Florida Statute implementing section 210 of PURPA is section 366.051, which, in pertinent part, provides:

> The commission shall establish guidelines relating to the purchase of power or energy by public utilities from

> cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source.

Our implementation of section 366.051 is codified in Rules 25-17.080 through 25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers." Rule 25-17.0832(2) provides in part:

> Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, ...

FERC addressed the authority of states to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA in Connecticut Light and Power Company, 70 FERC 61,012 (January 11, 1995), reconsideration denied, 71 FERC 61,035. The Connecticut statute at issue required electric utilities to purchase electric energy generated by municipally-owned resource recovery facilities at the same rate that the utility charged the municipality, i.e., a retail rate that was higher than avoided cost. FERC concluded that the Connecticut statute, insofar as the statute required rates that would exceed avoided cost, was preempted by section 210 of PURPA. In its order granting the utility's petition for declaratory order, FERC explained:

> By stating that states cannot impose rates in excess of avoided cost, section 210 of PURPA and the Commission's [FERC's] regulations balance the competing Congressional concerns of promoting cogeneration and small power production and yet not burdening ratepayers; imposing a rate in excess of avoided cost would subsidize QFs and burden ratepayers.

70 FERC at 61,029.

In Midwest Power Systems, Inc., a utility sought to have FERC enjoin the Iowa Utilities Board from ordering the utility to purchase wind-generated power at a price far in excess of its avoided cost. FERC found that the Iowa Board's orders were preempted by PURPA to the extent they obligated electric utilities to purchase power generated by QFs at rates in excess of the utilities' avoided cost. Midwest Power Systems, Inc., 78 FERC 61,067 (January 29, 1997).

We stated the purpose of our rules as they pertain to avoided costs at the time we adopted them. In our 1990 order adopting Rule 25-17.0832 and revising other rules in Part III of Rule Chapter 25-17, we stated:

> These rules reflect the Commission's policy to encourage cogeneration and small power production to the extent that it does not result in higher cost electric service to the ratepayers and citizens of the State of Florida.

In re: Proposed revisions to Rules 25-17.082 et al., Cogeneration Rules, Order No. 23623 issued October 16, 1990 in Docket 891049-EU, 90 F.P.S.C. 405, 406 (1990). See also, In re: Petition for expedited approval of settlement agreement with Lake Cogen, Ltd., by Florida Power Corp., Order No. PSC-97-1437-FOF-EQ issued November 14, 1997 in Docket No. 961477-EQ, 97 F.P.S.C. 11: 202, 212 ("To ensure that benefits remained with a utility's ratepayers, PURPA and the Florida Statutes established that rates for the purchase of power from QFs shall not exceed a utility's avoided cost. Such assurance was necessary to avoid situations that would require a utility to purchase electricity from a QF when in fact it could produce or purchase alternative power at a lower cost.")

It seems clear to us that the prohibition under PURPA and the rules implementing PURPA against exceeding the avoided cost applies to circumstances where the rate paid to QFs in excess of avoided cost is imposed upon the utility and its ratepayers. FPL's plan as stated in its petition is voluntary and is not, therefore, inconsistent with PURPA, or FERC's regulations, section 366.051, Florida Statutes, or our rules implementing PURPA. Accordingly, we grant FPL's petition and declare that its proposal to pay in excess of its avoided costs to a QF for renewable energy for a Green Energy Program in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost does not violate PURPA and its implementing rules, or section 366.051 and its implementing rules.

The question of whether circumstances might exist where a request for costs in excess of avoided cost to be borne by the general body of ratepayers would be justified, or the question of the amount FPL or its green electricity customers may pay, is not presented by FPL's petition and is not addressed in this declaratory statement. In addition, how FPL implements its Green Energy Program is not addressed by this statement, and this order does not serve as approval of the particular program requirements or charges, for which a tariff filing is required. See, In re: Petition by Tampa Electric Company for approval of a pilot Green Energy Rate Rider and Program, Order No. PSC-00-1741-TRF-EI issued September 25, 2000, in Docket No. 000697-EI.

It is therefore

ORDERED that the petition to intervene filed by New Hope Power Partnership and Palm Beach Power Corporation is granted. It is further

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's request for a declaratory statement is granted as stated above. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of August, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

CTM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule

25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.