

State of Florida



Public Service Commission  
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DATE: OCTOBER 24, 2002

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

FROM: DIVISION OF ECONOMIC REGULATION (HAFF, MUNROE, SPRINGER)  
OFFICE OF THE GENERAL COUNSEL (JAEGER)

*ms DS JRM RJ*  
*mod on K*  
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RE: DOCKET NO. 020725-EQ - PETITION OF TAMPA ELECTRIC COMPANY FOR APPROVAL OF NEW STANDARD OFFER CONTRACT FOR QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES, AND FOR WAIVER REQUIREMENT IN RULE 25-17.0832 (4) (E)7, F.A.C., THAT STANDARD OFFER CONTRACTS HAVE A TEN-YEAR TERM.

AGENDA: 11/05/2002 - PROPOSED AGENCY ACTION - RULE WAIVER AND TARIFF - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 8-MONTH EFFECTIVE DATE: 3/17/2003  
DEADLINE ON RULE WAIVER REQUEST: 11/05/2002

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020725-B.RCM

CASE BACKGROUND

On July 15, 2002, Tampa Electric Company (TECO) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities. The proposed contract and associated tariffs are based on a 5 MW subscription limit of a 180 MW combustion turbine generating unit, Polk Unit 4, with an anticipated in-service date of May 1, 2005.

Along with its July 15, 2002, Petition, TECO filed a Petition for Waiver of Rule 25-17.0832(4) (e)7., Florida Administrative Code (Petition for Waiver). TECO seeks a waiver from the 10-year minimum contract term required by the rule, and proposes a 5-year contract term.

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At the September 3, 2002 Agenda Conference, the Commission suspended the tariff revisions filed as part of TECO's Petition. The tariff suspension allowed staff sufficient time to review TECO's Petition.

This recommendation addresses both the Petition for Approval of the proposed Standard Offer Contract and the requested Petition for Waiver. The Commission is vested with jurisdiction over this matter through Sections 120.542, 366.04, 366.05, 366.051, 366.06, and 366.80 through 366.82, Florida Statutes.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should Tampa Electric Company's (TECO) Petition for a Waiver from the ten-year minimum contract term required by Rule 25-17.0832(4)(e)7., Florida Administrative Code, be granted?

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

#### **STAFF ANALYSIS:**

##### **I. Standard Of Review For Rule Waiver Requests**

Section 120.542, Florida Statutes, mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states in pertinent part:

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. . . .

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Thus, under the statute, a person requesting a variance or waiver must affirmatively demonstrate that the purpose of the underlying statute has been or will be 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.

As stated in the case background, TECO filed its Petition For a Waiver of Rule 25-17.0832(4)(e)7 Requiring Minimum Ten-Year Contract Term (Petition for Waiver), on July 15, 2002, in conjunction with its Petition For Approval Of A Standard Offer Contract. The waiver requested by TECO is for a fixed standard offer contract term of five years instead of the ten-year minimum contract term required by Rule 25-17.0832(4)(e)7., Florida Administrative Code. Notice of the waiver request was published in the Florida Administrative Weekly on August 30, 2002. The comment period expired on September 14, 2002. No comments in opposition to the Petition For Waiver were received. This section of the recommendation addresses TECO's Petition for Waiver.

## II. TECO's Petition for Waiver

### A. Purpose of the Underlying Statute

In its Petition for Waiver, TECO correctly identifies Section 366.051, Florida Statutes, as the underlying statute implemented by the rule from which a variance is requested. According to TECO, the purpose of that statute (and the Public Utility Regulatory Policies Act of 1978 - PURPA) with respect to cogeneration and small power production is to "encourage cogeneration while at the same time protect ratepayers from paying costs in excess of avoided costs."

TECO states that the above-noted purpose "will be achieved by utilizing a five-year contract term." TECO further notes neither PURPA nor Section 366.051, Florida Statutes, mandate a minimum term, and that the continued availability of standard offer contracts would provide "more than enough incentive to encourage the development of cogeneration in accordance with the statutes."

Finally, in paragraph 8 of its Petition for Waiver, TECO notes as follows:

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In considering the Standard Offer filed by Florida Power & Light Company in Docket No. 990249-EG, the Commission granted a variance from the rule's minimum ten-year requirement and approved a five-year term (Order No. 99-1713-TRF-EG, issued September 2, 1999, pages 10-16). The policy reasons relied on by the Commission in approving the five-year term - ratepayer protection and adequate QF incentive - are equally applicable to this petition. The Commission, likewise, recently granted a rule waiver allowing Florida Power Corporation to use a five-year term in its Standard Offer. See Order No. 00-0504-PAA-EQ, issued on March 7, 2000 in Docket No. 991973-EQ. The Commission granted the same rule waiver request for Tampa Electric in the company's last Standard Offer Contract approved in Order No. PSC-01-1418-PAA-EQ issued June 29, 2001 in Docket No. 010334-EQ.

B. Substantial Hardship

TECO asserts that strict adherence to the ten-year term would create a substantial hardship on both it and its ratepayers. Specifically, TECO argues that "new technologies and other factors may lower" costs over the coming years and that "limiting the term of the Standard Offer to five years" would give TECO "the opportunity to revisit the issue of its avoided cost and take advantage of lower costs for the benefit of ratepayers prior to the passage of a full ten years." TECO further argues that it "would subject the company to substantial hardship by adversely affecting its cost structure, and would subject its ratepayers to substantial hardship by raising the price that they would otherwise have to pay for electricity," if TECO were required "to adhere to a ten-year term in the face of declining costs."

III. Analysis

A. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, to encourage cogeneration and small power production, is expressly stated in the statute: "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, Subparagraph 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 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, page 19.

However, as noted by TECO, in three successive orders involving Florida Power and Light Company, Florida Power Corporation, and TECO, respectively, the Commission has found that the purpose of the underlying statute to encourage cogeneration has been met by allowing this waiver to a five-year period. To promote cogeneration, investor-owned utility's 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 a cogenerator's ability to enter into negotiated contracts is unaffected by the variance request, and a cogenerator retains the ability to enter into a five-year minimum standard offer contract with TECO, TECO's request for a variance appears to satisfy the underlying purpose of the statute.

B. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological or legal hardship. The hardship demonstrated by TECO is economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

IV. Conclusion

In sum, TECO's Petition for Waiver from the minimum standard offer contract term should be granted because it satisfies the mandatory, statutory requirements. TECO 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, staff believes that TECO's Petition for Waiver demonstrates substantial hardship to its ratepayers. Therefore, staff recommends that TECO's Petition for Waiver be granted.

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**ISSUE 2:** Should TECO's petition for approval of a new Standard Offer Contract, based upon a combustion turbine unit with an in-service date of May 1, 2005, be approved?

**RECOMMENDATION:** Yes. TECO's new Standard Offer Contract complies with Rule 25-17.0832, Florida Administrative Code. (Haff, Munroe, 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 CFR 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 a tariff and a Standard Offer Contract with the Commission. These provisions implement the requirements of the Public Utilities Regulatory Policies Act 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, TECO proposes a new Standard Offer Contract based on a 5 MW portion of TECO's next identified generating unit, Polk Unit 4, a 180 MW combustion turbine (CT) unit with an anticipated in-service date of May 1, 2005. CT units typically require about 18 months to construct. Therefore, TECO will need to commence construction by November 1, 2003.

TECO's proposed COG-2 (firm capacity and energy) tariff includes a three-week open season period for receiving standard offer contracts. If TECO does not fully subscribe the 5 MW available for Standard Offer Contracts during the initial three-

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week open season period, an additional three-week open season period will be held within 60 days. This open season period is similar to that contained in previous TECO Standard Offer Contracts which have been approved by the Commission.

The evaluation criteria contained in TECO's proposed Standard Offer Contract should be readily understandable to any developer who signs the contract. The avoided unit cost parameters appear to be reasonable for a CT unit, and the resulting capacity payments are appropriate.

It is unlikely that purchases made by TECO pursuant to the proposed Standard Offer Contract will result in the deferral or avoidance of TECO's 2005 CT unit, because: 1) the eligibility pool for Standard Offer Contracts is limited; 2) the subscription limit of TECO's avoided unit is only a portion of the CT unit's total capacity; and, 3) TECO has not received any takers for its last three Standard Offer Contracts. The interest in TECO's last three Standard Offer Contracts may have been reduced because the contracts were all based on CT units. Capacity payments for CT units are typically low relative to capacity payments based on other generation technologies such as combined cycle or coal.

If TECO signs Standard Offer Contracts under the proposed contract, but the need for the 2005 CT unit is not deferred or avoided, TECO will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of the state regulations discussed above may result in a subsidy to the qualifying facilities. Staff notes, however, that the potential subsidy could be mitigated, as TECO may have opportunities to sell any surplus capacity on 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 to be given some preferential treatment. The Commission has minimized this unequal footing by requiring Standard Offer Contracts only for small 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.



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In summary, staff does not expect that TECO's proposed Standard Offer Contract will result in the avoidance of the 2005 CT unit. Nonetheless, TECO's proposed contract and tariffs comply with the Commission's cogeneration rules. For this reason, staff recommends that TECO's petition to establish its new Standard Offer Contract and associated tariffs be approved.

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**ISSUE 3:** On what date should TECO's proposed Standard Offer Contract become effective?

**RECOMMENDATION:** TECO's proposed standard offer contract should become effective upon the issuance of a consummating order if there is no timely protest filed. (Haff)

**STAFF ANALYSIS:** Since it would not be reasonable to have this tariff go into effect if the waiver portion of the Commission's order were protested, the tariff should be processed as a proposed agency action. TECO's proposed standard offer contract should become effective upon the issuance of a consummating order.

**ISSUE 4:** 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. (Jaeger)

**STAFF ANALYSIS:** In order to process both the waiver request and the tariff filing simultaneously, staff recommends 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 waiver 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.