

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: August 16, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Holley) *JAH S.M.C.*
Division of Economic Regulation (Ballinger, Baxter, Brown, Maurey) *10/8*

RE: Docket No. 070232-EQ – Petition for approval of new standard offer for purchase of firm capacity and energy from renewable energy facilities or small qualifying facilities and approval of tariff schedule REF-1, by Gulf Power Company.

Docket No. 070234-EQ – Petition for approval of renewable energy tariff standard offer contract, by Florida Power & Light Company.

Docket No. 070235-EQ – Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc.

Docket No. 070236-EQ – Petition for approval of standard offer contract for small qualifying facilities and producers of renewable energy, by Tampa Electric Company.

AGENDA: 08/28/07 – Regular Agenda – Motion for More Definite Statement, or in the Alternative, Motion to Dismiss – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\070232.RCM.DOC

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Case Background

In its 2005 session, the Florida Legislature enacted Section 366.91, Florida Statutes, regarding renewable energy which states:

The Legislature finds that it is in the public interest to promote the development of renewable energy resources in this State. Renewable energy resources have the potential to help diversify fuel types to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the State, improve environmental conditions, and make Florida a leader in new and innovative technologies.

Section 366.91(3), Florida Statutes, enumerates requirements to promote the development of renewable energy resources. In summary:

- a) By January 1, 2006, each investor-owned electric utility (IOU) and municipal utility subject to the Florida Energy Efficiency and Conservation Act (FEECA) of 1980 must continuously offer to purchase capacity and energy from specific types of renewable resources;
- b) the contract shall be based on the utility's full avoided costs, as defined in Section 366.051, Florida Statutes;
- c) each contract must provide a term of at least ten years; and
- d) the Commission shall establish requirements relating to the purchase of capacity and energy by public utilities from renewable energy producers and may adopt rules to administer this section.

The Commission adopted amendments to Rules 25-17.0832 and 25-17.200 – 17.310, Florida Administrative Code, effective March 8, 2007, to implement these statutory requirements. The rules require each electric investor-owned utility (IOU) to continuously make available standard offer contracts based on a portfolio approach of utility fossil-fueled units; establish a methodology to calculate capacity payments using value of deferral methodology based on the utility's full avoided costs and need for power; require IOUs to expand the capacity and energy payment options to facilitate the financing of renewable generation facilities; allow for reopening of the contract in the event of future carbon taxes; clarify ownership of transferable renewable energy credits; provide for an expedited dispute resolution process; and require annual reporting from all utilities.

On April 2, 2007, Gulf Power Company (Gulf), Florida Power & Light Company (FPL), Progress Energy Florida, Inc. (PEF), and Tampa Electric Company (TECO) filed Petitions for approval of new standard offer contracts with accompanying tariff sheets. Docket Nos. 070232-EI (Gulf), 070234-EQ (FPL), 070235-EQ (PEF), and 070236-EQ (TECO) were opened to address each Petition. On June 11, 2007, the Commission issued Order Nos. PSC-07-0491-TRF-EQ, PSC-07-0492-TRF-EQ, PSC-07-0493-TRF-EQ and PSC-07-0494-TRF-EQ approving each IOU's proposed standard offer contract and associated tariffs. On July 2, 2007, the Florida Industrial Cogeneration Association (FICA) filed a Petition for Formal Hearing and for Leave to Intervene in each of the dockets. On July 23, 2007, Gulf, FPL, PEF, and TECO (collectively the IOUs) together filed a Motion for More Definite Statement or, in the Alternative, Motion to

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Dismiss FICA's Petition for Formal Hearing and for Leave to Intervene (Motion). On July 30, 2007, FICA filed its Response to the IOUs' Motion.

This matter is now before the Commission solely for the purpose of resolving the IOUs' Motion. The Commission has jurisdiction over this matter pursuant to Sections 366.04 through 366.06 and 366.91, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant the IOUs' Motion for More Definite Statement, or in the Alternative, Motion to Dismiss FICA's Petition for Formal Hearing and for Leave to Intervene?

Recommendation: The Commission should grant the IOUs' Alternative Motion to Dismiss. FICA's Petition is not in substantial compliance with Rule 28-106.201, Florida Administrative Code, and should therefore be dismissed without prejudice. If FICA files an Amended Petition, it should be filed within ten days of the Commission's Order. If the Commission grants the Alternative Motion to Dismiss, the IOUs' Motion for More Definite Statement will be rendered moot. (Holley, Ballinger)

Staff Analysis:

I. FLORIDA STATUTES AND RULES

Pursuant to Section 120.569, Florida Statutes, any person whose substantial interests are to be determined by an agency action may institute proceedings by filing a petition or request for hearing with the agency responsible for making the determination. Section 120.569(2)(c), Florida Statutes, provides:

Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Rule 28-106.201, Florida Administrative Code, sets forth the items required of petitions that initiate proceedings determining substantial interests, and provides in pertinent part:

- (2) All petitions filed under these rules shall contain:
 - (a) the name and address of each agency affected;
 - (b) the name, address, and telephone number of the petitioner and petitioner's representative, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
 - (c) a statement of when and how the petitioner received notice of the agency decision;
 - (d) a statement of all disputed issues of material fact;

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(e) a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) a statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

In addition, Section 120.80(13)(b), Florida Statutes, provides that "[i]ssues in the proposed action which are not in dispute are deemed stipulated."

II. ARGUMENTS

A. IOUs' Motion

The IOUs' Motion alleges that FICA's Petition does not comply with Rule 28-106.201, Florida Administrative Code, because it fails to state the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action. According to the IOUs, the purported "ultimate facts" contained in FICA's Petition simply express FICA's general dissatisfaction with the standard offer contracts, and do nothing to put the IOUs on notice as to what portions of each of the four standard offer contracts FICA finds objectionable. The IOUs request that FICA be directed to provide a more definite statement as to the objections raised, or in the alternative, that FICA's Petition be dismissed without prejudice, with an opportunity for FICA to file an amended Petition.

In support of its Motion, the IOUs cite to Blackwood v. Agency for Health Care Administration, 869 So. 2d 656 (Fla. 4th DCA 2004) (upholding denial of petition for failure to comply with pleading requirements in Rule 28-106.201(2)(e)); and Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Admin., 870 So. 2d 834, 840 (Fla. 3d DCA 2003).

B. FICA's Response

On July 30, 2007, FICA filed its Response to the IOUs' Motion, arguing that Florida law does not require a bevy of specific facts to be set forth in the initial pleading. FICA cites to Rule 1.110(b), Florida Rules of Civil Procedure, which provides that a pleading contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief," and also cites to Ranger Construction Industries, Inc. v. Martin Companies of Daytona, Inc., 881 So. 2d 677, 680 (Fla. 5th DCA 2004), for the proposition that ". . . brevity and clarity in the statement of the essential facts upon which the claim for relief rests are the hallmarks of good pleading."

FICA maintains that it is not required to set forth the "fine details" in its initial pleading because ample opportunity will be provided so that such details can be fleshed out during discovery, pretrial stipulations, and the issue identification process. FICA cites to the

Commission's procedures and "procedural orders" which, according to FICA, set forth discovery provisions, provide for an issue identification process and seek the positions each party plans to take at hearing, and also include prehearing orders, prehearing statements and the prehearing conference. FICA argues that if every offending contractual provision had to be identified in FICA's Petition, the initial pleading would likely be "extensive, intricate and complex." Finally, FICA states that the IOUs have been properly put on notice that FICA alleges that the contracts in question do not promote the development of renewable energy in Florida, and accordingly, the IOUs can "satisfy their desire for detail by using the discovery process and asking FICA to identify each provision of each contract that FICA contends does not promote renewable energy development in Florida." FICA maintains that its Petition states with brevity and clarity that FICA contends, and will present facts to support the notion that the contracts, payments, calculations, and contract terms and conditions do not support the development of renewable energy in Florida.

III. ANALYSIS

For the reasons set forth below, staff believes that FICA's Petition fails to meet the requirements of Rule 28-106.201, Florida Administrative Code. Accordingly, staff recommends that FICA's Petition be dismissed without prejudice, with the opportunity for FICA to amend its Petition within ten days of the Commission's vote.

Chapters 28-101 through 28-110, Florida Administrative Code (the Uniform Rules), are the rules of procedure for every agency and govern agency proceedings unless the agency has been granted an exception by the Administration Commission. Section 120.54(5)(a), Florida Statutes. Thus, staff disagrees with FICA's argument that Rule 1.110(b), Florida Rules of Civil Procedure, governs these proceedings rather than Rule 28-106.201, Florida Administrative Code. Further, Ranger Construction Industries at 881 So. 2d 677, the case relied upon by FICA, is not controlling in this instance because it dealt with a circuit court proceeding in which the petitioner sought a final summary judgment.

Further, staff rejects the notion advanced by FICA that merely filing its Petition for Formal Hearing in response to the Commission's proposed agency action puts the onus on the IOUs to "flesh out" FICA's case through the discovery process. FICA has protested the Commission's Orders finding that Gulf, FPL, PEF, and TECO's Standard Offer Contracts and associated tariffs are in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code. Accordingly, it is FICA's burden, not the IOUs' burden, to state all disputed issues of material fact, as well as provide a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification, pursuant to Rule 28-106.201, Florida Administrative Code. As stated by the court in Brookwood Extended Care Center of Homestead at 870 So. 2d at 840:

The amended statute and rules are crystal clear. In a proceeding governed by Rule 28-106.201, the burden is now on the person or entity petitioning for an administrative hearing to state the ultimate facts, to identify the facts that are in dispute, and to allege the facts that warrant, in the petitioner's opinion, reversal.

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The “disputed issues of fact and law” and “statement of ultimate facts” set forth in FICA’s Petition contain only vague and general statements that do not meet the specific pleading requirements of Rule 28-106.201, Florida Administrative Code.¹ FICA also makes the statement in its Petition that it “does not waive or relinquish the right to allege additional disputed issues of fact [disputed issues of law, and additional ultimate facts] at a later date.” FICA’s Petition at pages 3-4. These statements illustrate further FICA’s mistaken belief that it may continue to raise additional disputed issues of fact, law, and ultimate facts beyond those contained in its initial Petition as the parties move forward through the formal hearing process. Rule 25-22.029(3), Florida Administrative Code, clearly states that “[i]ssues in the proposed action that are not identified in the petition or a cross-petition shall be deemed stipulated.” (emphasis supplied)² Thus, unless FICA through its initial Petition, or the IOUs through a cross-petition, clearly identify an issue contained in the Commission’s Orders that is in dispute, it shall be deemed stipulated, and therefore, cannot be at issue in the hearing going forward.

Staff also disagrees with FICA’s characterization of these proceedings. Several of the “disputed issues of fact,” “disputed issues of law,” and “statement of ultimate facts” contained in FICA’s Petition seem to generally take issue with the Commission’s policy on renewable standard offer contracts as reflected in Commission Rules 25-17.200 through 25-17.310, Florida Administrative Code, rather than identify disputed issues contained in the Commission’s PAA Orders.³ Further, included under the “Statement of Substantial Interest” portion of its Petition,

¹ For example, FICA’s Disputed Issues of Fact and Disputed Issues of Law, on page 3 of its Petition, include:

- (1) The payments, calculations, terms and conditions established by said renewable energy contracts (and/or tariffs) raise additional disputed issues of material fact that can only be resolved by a formal administrative hearing;
- (2) The payments, calculation, terms and conditions established by said renewable energy contracts (and/or tariffs) raise additional disputed issues of law.

See also FICA’s Statement of Ultimate Facts contained on page 4 of its Petition, which include:

- (1) that matters within the scope of this proceeding will affect the cost, availability, reliability and security of electricity supplies;
- (2) that matters within the scope of this proceeding will determine to what extent renewable energy resources will be promoted.

² The underlying authority for Rule 25-22.029(3), Florida Administrative Code, is Section 120.80(13)(b), Florida Statutes, which provides that, “[n]otwithstanding ss.120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.”

³ For example, FICA’s alleged “disputed issues of fact” and “disputed issues of law,” as stated in its Petition, include:

- (i) Whether the renewable energy contracts (and/or tariffs) which are the subject of these proceedings will appropriately promote the development of renewable energy resources in the State as required by Florida law.
- (ii) Whether the payments, contract terms and conditions established by , and the policies reflected in, said renewable energy contracts (and/or tariffs) are specifically designed to promote renewable energy resources in the State as required by Florida law.
- (iii) whether the renewable energy contracts (and/or tariffs) which are the subject of these proceedings are in compliance with the requirements and intent of the Legislature;

FICA alleges that “one of the purposes of these proceedings is to implement legislative directives that require the promotion of renewable energy resources such as waste heat.” FICA Petition at page 2.

The Orders that FICA has protested specifically find that Gulf, FPL, PEF, and TECO’s Standard Offer Contracts and associated tariffs are in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code. These rules, which became effective on May 8, 2007, implement Section 366.91, Florida Statutes, which addresses renewable energy. The Commission adopted these rules after a lengthy rulemaking proceeding which included numerous rule development workshops, several Commission Agenda Conferences, and a rulemaking hearing.⁴ FICA participated in the rule proceeding. The arguments raised by FICA with respect to whether the approved contracts will promote renewable energy as required by Florida law, or whether they meet the intent of the Florida Legislature, are not appropriate for this proceeding which was designed to address the compliance of the contracts with the requirements of the rules.

Finally, in addition to failing to meet the basic pleading requirements of Rule 28-106.201(2), Florida Administrative Code, as illustrated above, FICA’s Petition also fails on two additional requirements of Rule 28-106.201(2), Florida Administrative Code. Specifically, the rule mandates that Petitions shall contain:

- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency’s proposed action.

FICA’s Petition fails to include either of these requirements.

For the reasons set forth above, staff believes that FICA’s Petition fails to meet the pleading requirements contained in Rule 28-106.201, Florida Administrative Code. Staff recommends that the IOUs’ Alternative Motion to Dismiss be granted without prejudice. If the

FICA’s “statement of ultimate facts” include:

- (i) that the renewable energy contracts (and/or tariffs) which are the subject of these proceedings are not specifically designed to promote renewable energy resources and fail to appropriately promote such resources;
- (ii) that the renewable energy contracts (and/or tariffs) which are the subject of these proceedings do not comply with the requirements, intent and polices articulated by the Florida Legislature.

⁴ See Docket No. 06055-EI, In re: Proposed Amendments to Rule 25-17.0832, F.A.C., Firm Capacity and Energy Contracts.

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Commission grants the Motion to Dismiss, the IOUs' Motion for More Definite Statement will be rendered moot. Pursuant to Section 120.569(2)(c), Florida Statutes, FICA is entitled to one opportunity to file an amended petition to cure the defects. Staff recommends that if FICA files an Amended Petition, that it be required to file its Petition within ten days of the Commission's Order.

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Issue 2: Should these dockets be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, Docket Nos. 070232-EQ, 070234-EQ, 070235-EQ, and 070236-EQ should remain open to allow FICA to file its Amended Petition. (Holley)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, Docket Nos. 070232-EQ, 070234-EQ, 070235-EQ, and 070236-EQ should remain open to allow FICA to file its Amended Petition.